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March 2, 2017

By overnight delivery

Joseph H. Orlando, Esq.
Clerk of the Appellate Division
25 W. Market Street
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Re: Casino Reinvestment Development Authority, Appellant, v. Charles Birnbaum, Lucinda Birnbaum, et al., Respondents
Appellate Division Docket No. A-19-16
Reply Brief of Cross-Appellants Charles Birnbaum, et al.

Dear Mr. Orlando:

Please accept for filing the enclosed original and four copies of the reply brief of the Defendants/Respondents/Cross-Appellants Charles Birnbaum, et al.

Please receipt the extra copy and return it to us in the enclosed, postage-prepaid envelope.

Thank you.

Respectfully submitted,

POTTER AND DICKSON

By Peter Dickson

CERTIFICATION OF SERVICE

I hereby certify that I have served two copies of the reply brief by Defendants/Respondents/Cross-Appellants Charles

Birnbaum, et al., by overnight delivery March 2, 2017, upon counsel of record for the appellant, at his address of record:

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Dated: March 2, 2017.

Peter D. Dickson

CASINO REINVESTMENT DEVELOPMENT AUTHORITY, a public corporate body of the State of New Jersey, Plaintiff/Appellant/Cross-Respondent, v. CHARLES BIRNBAUM; LUCINDA BIRNBAUM; LOUISE TAYLOR DAVIS; GERALD GITTENS; THE ATLANTIC CITY MUNICIPAL UTILITIES AUTHORITY; THE ATLANTIC CITY SEWERAGE CO.; and THE CITY OF ATLANTIC CITY, Defendants/Respondents/Cross-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000019-16 CIVIL ACTION ON CROSS-APPEAL FROM: SUPERIOR COURT OF NEW JERSEY, ATLANTIC COUNTY, LAW DIVISION, ATL-L-589-14 JUDGMENT ENTERED: DENIAL OF AUTHORITY TO CONDEMN SAT BELOW: HONORABLE JULIO L. MENDEZ, A.J.S.C.

REPLY BRIEF OF DEFENDANTS/RESPONDENTS/CROSS-APPELLANTS CHARLES AND LUCINDA BIRNBAUM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

At the outset, Cross-Appellants Charles and Lucinda Birnbaum note that the parties appear to be fundamentally in agreement about the procedural posture of this case. As Appellant Casino Reinvestment Development Authority (CRDA) correctly states, the court below never reversed any of the legal conclusions that form the basis of the Birnbaums' cross-appeal. Instead, it "merely asked CRDA to prove it was capable of completing the Project and scheduled a hearing for CRDA to present such proof." (CRDA Reply Br. 3.) After that hearing, the court found as a matter of fact that CRDA was **not** capable of completing the Project—and, as explained in the Birnbaums' opening brief (and not contested in CRDA's reply), CRDA has failed to appeal that factual finding. (Birnbaums' Opening Br. 21.)If the Court accepts this conclusion (as it must), it should rule on the appeal and dismiss this cross-appeal as moot.

That said, to the extent the Court reaches the issues raised in this cross-appeal, the Birnbaums have established that this condemnation should also have been dismissed at an earlier stage of the proceedings. As detailed in the Birnbaums' opening brief, CRDA's initial condemnation papers failed entirely to

make a prima facie case for its right to condemn the Birnbaums' longtime family home.[1](Birnbaums' Opening Br. at26-59.)

CRDA's response brief changes none of this. CRDA has failed to articulate a sufficient public use for this condemnation; it has failed to explain how this condemnation meets the requirements of the Blighted Areas Clause; it has failed to explain how the vague intention to create a plan in the future constitutes a sufficiently "specific" plan; it has failed to explain why the Birnbaums' property is necessary to achieve CRDA's aims; and it has failed to explain how this condemnation meets the minimum public-use requirements imposed on all redevelopment takings by both the United States Constitution and the New Jersey Constitution.

In short, the trial court's ruling in this case should be affirmed—either because the ruling below was correct (and based on a factual finding CRDA has not appealed) or for any of the independent reasons raised in the Birnbaums' cross-appeal.

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[1] As detailed in the Birnbaums' initial brief, Charlie Birnbaum's parents lived in this home from 1969 until their respective deaths in 1987 and 1998. (Birnbaums' Opening Br. 5.) Charlie Birnbaum has since converted the first floor into a piano studio and a memorial to his parents (including his mother, who was murdered in the home). (Birnbaums' Opening Br.5-6.) CRDA's snide assertion that Mr. Birnbaum simply "takes advantage of the property as a source of income" (CRDA Reply at 4 n.1) is both a needless insult and a direct contradiction of the factual findings of the trial court, which heard Mr. Birnbaum's testimony and specifically noted that it believed Mr. Birnbaum is resisting this condemnation because of his sincere and deep emotional ties to the longtime family home. (Pa1069a, Pa1075a.)

ARGUMENT

CRDA's reply brief fails entirely to rebut any of the arguments raised in the Birnbaums' cross-appeal. First, CRDA simply misstates the purpose of the taking in this case: This condemnation is not intended to create a "Tourism District" in Atlantic City because Atlantic City already has a Tourism District and will continue to have one regardless of whether this condemnation goes forward. Second, this condemnation, which involves taking private property to be put to a different, assertedly superior private use, must meet (and fails to meet) the requirements of the Blighted Areas Clause. Third, CRDA's plans for the Birnbaums' property amount, at best, to a "plan to make a plan"—a level of vagueness that has been rejected across the country. Fourth, CRDA's brief erroneously asserts that its discretion to include the Birnbaums' property in its proposed project is beyond review by this (or any) Court. Fifth, CRDA's brief entirely misunderstands both the United States Constitution's limits on the use of eminent domain and the New Jersey constitutional limitations explained by the Law Division's decision in Casino Reinvestment Development Authority v. Banin, 320 N.J. Super. 342 (L. Div. 1998) - a decision CRDA has conceded is legally correct. For any or all of these reasons, the ruling below should be affirmed.

I. This Case Is Not About Whether The "Tourism District" Is A "Public Purpose."

CRDA's reply brief is replete with the assertion that it is condemning the Birnbaums' longtime family home in order to achieve the public purpose of creating a "Tourism District" in Atlantic City. (E.g., CRDA Reply Br. 11, 13.) Not so.

Simply put, we know this condemnation is not meant to create a Tourism District in Atlantic City because there is **already** a Tourism District in Atlantic City. The Tourism District was authorized by the Legislature in 2011 in the Tourism District Act (which does not mention eminent domain). The Tourism District existed for years before CRDA filed this condemnation. The Tourism District exists at this very moment. And it will continue to exist after this appeal is resolved.

This case is not about the Tourism District because CRDA does not seek to condemn any property in order to create a Tourism District or in order to fulfill any mandate in the Tourism District Act. Instead, CRDA seeks to condemn the Birnbaums' property in order to further the South Inlet Mixed Use Development Project(the "Project") —a project that covers only**a small part of** the Tourism District and that CRDA approved in 2012. The only question is whether the Project is sufficient to justify condemnation of the Birnbaums' property—and, either because the trial court was correct to dismiss it after trial or

(as discussed further below) because the condemnation should have been dismissed at an earlier stage—it is not.

II. In New Jersey, Government May Use Eminent Domain To Replace One Private Use With Another Only If Property Is Blighted.

As explained in the Birnbaums' opening brief, the South Inlet Mixed Use **Redevelopment** Project is a **redevelopment** project—that is, it seeks to condemn private property in order to devote that property to a different, assertedly more optimal private use. (Birnbaums' Opening Br. 44-46.) As such, the condemnation can only be allowed to proceed if CRDA can show it has met the requirements of the Blighted Areas Clause. (Birnbaums' Opening Br. 37-46.)

CRDA's reply brief simply misses the mark on this point. First, CRDA misunderstands the function of the Blighted Areas Clause, which is the **exclusive** means of conducting redevelopment takings like this under the New Jersey Constitution. Second, CRDA incorrectly asserts that its initial filings in this case (which did not mention, much less establish, the existence of blight) met the requirements of the Blighted Areas Clause. And finally, even if CRDA were correct that it properly alleged the Birnbaums' property is blighted (and it is not), well-established legal authority holds that the Due Process Clause requires that property owners be given an opportunity to contest

whether their property is actually blighted—an opportunity the Birnbaums have been denied.

A. CRDA's brief fundamentally misunderstands the Blighted Areas Clause.

CRDA's brief proceeds from a fundamentally wrong understanding of the Blighted Areas Clause. The Clause is not, as CRDA would have it, simply a "limitation" on the State's eminent-domain power. Instead, the Blighted Areas Clause was adopted as a**limitedexpansion** of the State's eminent-domain power.GallenthinRealty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 359-62, 365 (2007)("The clause operates as both a grant and limit on the State's redevelopment authority."); see also Hon. James R. Zazzali and Jonathan L. Marshfield, Providing Meaningful Judicial Review Of Municipal Redevelopment Designations: Redevelopment In New Jersey Before And After Gallenthin Realty Development, Inc. v. Borough Of Paulsboro, 40 Rutgers L. J. 451, 468-75 (2009). The Clause was adopted because the original understanding of New Jersey's eminent-domain power did not include the power to use eminent domain for redevelopment—that is, to take property that was currently devoted to one private use in order to put that property to a different, purportedly better private use.Gallenthin, 191 N.J. at 361-62. In the absence of this power, New Jersey cities found themselves unable to eliminate economically deteriorated

properties that were having a "domino effect" on their surrounding area. Id.The Blighted Areas Clause creates that power, but, significantly, allows it to be used only to alleviate blight.Id. at 373 (**"Our Constitution restricts government redevelopment to 'blighted areas.'"**).

In other words, the Blighted Areas Clause created the power to use eminent domain for redevelopment, and it is therefore the only source of that power. To the extent a government entity attempts to exercise eminent domain for redevelopment outside the scope of the Blighted Areas Clause (as CRDA does here), it exceeds the scope of its constitutional power.

This much is clear as a matter of constitutional history. But one is left to wonder: On CRDA's view of the matter, what is it that the Blighted Areas Clause **does**? If it is the case (as CRDA argues) that the State may invoke eminent domain for any purpose that it believes will improve the surrounding area, then what power does the Blighted Areas Clause create? If improving the surrounding area is sufficient to justify eminent domain, then why did Gallenthinreject as unconstitutional a condemnation designed to put a property to its "optimal" use? Gallenthin, 191 N.J. at 365. CRDA's brief offers no answers to these questions because it has no answers to these questions. The Blighted Areas Clause serves a clear purpose: It creates the power to use eminent domain for redevelopment. And Gallenthin

held that condemning property just to put it to a more "optimal" use would violate the New Jersey Constitution because such a condemnation would be beyond the scope of the Blighted Areas Clause, which is the **sole** source of power to use eminent domain for redevelopment. That is what the New Jersey Constitution says; that is what the New Jersey Supreme Court says. That is the law.

B. The condemnation in this action did not (and did not purport to) meet the requirements of the Blighted Areas Clause.

In its reply brief, CRDA attempts in the alternative to argue that this condemnation meets the requirements of the Blighted Areas Clause after all. (CRDA Reply Br. 16-21.) This is incorrect: As demonstrated in the Birnbaums' opening brief, neither CRDA nor any other entity has ever designated the Birnbaums' property or the surrounding area blighted. (Birnbaums' Opening Br. 46-51.)

More importantly, CRDA's belated arguments ignore the procedural posture of this cross-appeal. Presented with CRDA's original complaint in condemnation, the trial court was faced with three options: It could allow the condemnation to proceed in summary fashion (as CRDA argued it should), it could convert the condemnation into a plenary proceeding to allow discovery and factfinding, or it could dismiss the complaint. N.J. Court R. 4:67-5. Over the Birnbaums' objection, the lower court held

that the condemnation could simply proceed in summary fashion, as CRDA requested. (Pa772a, Pa773a-799a.) That decision is the subject of the Birnbaums' current cross-appeal.

And, in that context, CRDA's arguments about the state of the area surrounding the Birnbaums' property are unavailing. Nothing in CRDA's initial filings in this case allege that the Birnbaums' property (or any property) is blighted. There are no factual assertions that there ever was a blight finding. Neither are there any factual assertions that could support a blight finding if there was one. Cf.Gallenthin, 191 N.J. at 373 ("Because a redevelopment designation carries serious implications for property owners, the net opinion of an expert is simply too slender a reed on which to rest that determination.").Factual assertions like these matter: One of the reasons the Gallenthin court gave for refusing to allow condemnation of land that was merely "not fully productive" was that this would mean that "most property in the State would be eligible for redevelopment." Id. at 365.So too here. Allowing condemnation of land in the absence of any factual assertions, much less proof, of blight creates exactly the same danger of unbridled discretion to condemn that was rejected in Gallenthin.

Here, CRDA did not allege anything at all in its original Complaint that would justify a blight taking. Therefore, to the extent a blight finding is necessary (which, as demonstrated

above, it is), CRDA's Complaint was insufficient at the outset, and the trial court's contrary conclusion was error. That insufficiency cannot be cured by raising arguments in the alternative in CRDA's appellate brief.

C. Property owners have adue-process right to litigate about whether their property is, in fact, blighted.

Finally, even if CRDA were right that this condemnation was justified by a blight finding (which, as shown above, is incorrect), the trial court's decision was still in error. New Jersey courts have already held that property owners who are subject to condemnation pursuant to a blight declaration have the right to notice and an opportunity to be heard in order to contest (as a factual matter) whether the blight finding is justified. Harrison Redev. Agency v. DeRose, 398 N.J. Super.361, 402-03 (App. Div. 2008). Denying property owners this opportunity violates their due-process rights under the United States and the New Jersey Constitutions. Id.

As the Birnbaums explained in their opening brief, even if CRDA were right that this condemnation was justified by a blight determination, allowing the condemnation to proceed without giving the Birnbaums notice and an opportunity to challenge that blight determination would violate their constitutional rights. (Birnbaums' Opening Br. 49.) CRDA's reply does not address this argument and, therefore, even if the Court accepts literally

every argument advanced in CRDA's brief, the lower court's decision must **still** be reversed under the rule of DeRose.

III. CRDA's "Plan" Amounted To No More Than A Plan To Make APlan.

As explained in the Birnbaums' opening brief, CRDA's initial filings in support of their condemnation were unusual in that they provided no explanation whatsoever of what CRDA planned to do with the properties it sought to condemn. (Birnbaums' Opening Br. 26-37.)The most it could muster was that the Birnbaums' property would be put to some "Tourism District use"—which, since the Birnbaums' property is located in the Tourism District, means no more than saying it will be put to some "Atlantic City use." While the Birnbaums found several cases across the country rejecting takings justified with this level of vagueness, they found none, in New Jersey or elsewhere, allowing such a taking to move forward. Id.

As far as its reply brief reveals, CRDA has not found one either. Instead, CRDA attempts to distinguish this taking from one[2] of the cases cited by the Birnbaums by asserting without

[2] CRDA's brief does not even attempt to address most of the cases cited in the Birnbaums' initial brief, all of which stand for the proposition that courts reject takings where a condemnor has not sufficiently articulated its post-condemnation plans. (See Birnbaums' Opening Br. 31n.11.) CRDA's brief cites none of these cases, nor does it suggest that these cases (or the similar New Jersey authority cited by the Birnbaums, see id. at 31-32) follow a legal rule that has been rejected in this jurisdiction.

citation that the record had ample evidence of its plans for the area because it had "presented its conceptual plan for the Project area" to the court below. (CRDA Reply Br. 12.)

The problem is that this statement is entirely false. CRDA did not "present[] its conceptual plan for the Project area" to the court below or to anyone else.[3] As laid out in the Birnbaums' initial brief, the only evidence before the court below when it ruled in November 2014 was that CRDA **intended** to work with an architect to create a massing plan for the Project area that would suggest what kind of development might occur in the Project area. (Birnbaums' Opening Br. 27.) The problems with allowing a condemnation based on such a promise to plan are obvious: What if, for example, CRDA's architect ultimately decided the Birnbaums' property wasn't needed for whatever development was feasible in the Project area?[4] The most CRDA presented to the lower court, then, was a promise that it had

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[3]CRDA's massing plan for the Project was **not** presented to the lower court or the Birnbaums before the court issued its November 17, 2014 opinion. (See Birnbaums' Opening Br. 10-11, 27 & n.9). In CRDA's initial appendix, CRDA included a declaration that purported to attach the massing plan, but CRDA has subsequently conceded that this declaration was never actually filed and corrected its appendix accordingly. (SeeLetter from Stuart M. Lederman to Marge Hunter (Superior Court of New Jersey, Appellate Division) (January 12, 2017).)

[4] This, of course, is exactly what ultimately happened when the massing plan was finally revealed in 2016, and excluded the Birnbaums' property from the site, marking it instead as "FUTURE DEVELOPMENT."(SeeBirnbaums' Opening Br. 10-11, 27 n.9.)

plans to create a plan, making this exactly the kind of "condemn first, decide what to do with the property later" taking that has been rejected by courts nationwide (and, as far as the briefing in this case reveals, accepted by literally none). City of Stockton v. Marina Towers L.L.C., 88 Cal. Rptr. 3d 909, 913, (Cal. Ct. App. 2009). Allowing CRDA to condemn property based on no more than a plan to plan was error, and the lower court's contrary decision should be reversed.

IV. CRDA Failed To Establish That Taking The Birnbaum Property Is Necessary For The Project, And Now Claims That Its Condemnations Are Unreviewable For Necessity.

In response to the Birnbaums' argument that the condemnation of the Birnbaums' property was arbitrary because it was not necessary for the Project, CRDA adopts the sweeping position that New Jersey courts cannot review the necessity of condemning a particular piece of property as long as a condemnation is made for a statutory purpose. (CRDA Reply Br. 21-23.) CRDA's position, however, is as wrong as it is sweeping: All the New Jersey cases discussing necessity cited in the Birnbaums' opening brief also involved statutory purposes, such as condemnations for public highways and sewer lines, but they all nonetheless said that condemnors were **only allowed to take properties reasonably necessary** to achieve those purposes. See, e.g., Burnett v. Abbott, 14 N.J. 291, 294-95 (1954) (noting that agency had "authority to select the

particular highways within **reasonable limits** on the highway route designated by the statute" (emphasis added)); N.J. Highway Auth. v. Currie, 35 N.J. Super. 525, 531-33 (App. Div. 1955) (noting that takings are "limited to lands **reasonably necessary** for the achievement of the statutory purpose," which was the construction of the Garden State Parkway (emphasis added)); Twp. of Bridgewater v. Yarnell, 64 N.J. 211, 214-15 (1974) (holding that property owners had made out a sufficient prima facie case that the condemnor's proposed sewer-line route was arbitrary).

CRDA bases its argument on a misquotation from Currie, which would transform that court's finding about the validity of the purpose for the condemnation in that particular instance into a broad legal principle that has never been followed. Compare CRDA Reply Br. 22-23 withCurrie, 35 N.J. Super at 533. Notably, in Currie, the landowner did not dispute the taking as arbitrary, but instead argued that "the **uses** to which the land will be put **are unreasonable**." Id. at 532 (emphasis added). That is why the Currie opinion identifies the specific uses for the land and states that "the acquisition of land for purposes authorized by the statute cannot be held to be a palpable abuse of discretion." Id. at 533.Currie acknowledged that an abuse of discretion would invalidate the condemnation. Id. at 532-33.

Likewise, CRDA confuses the court's finding regarding the taking at issue in Essex County v. Hindenlang with a broad legal

holding about whether necessity is "an essential element" of a condemnation case. (CRDA Reply Br. 23 (quoting 35 N.J. Super. 479, 492 (App. Div. 1955)).) The Hindenlang court certainly did not hold or even suggest that necessity was not a required element in condemnation cases. To the contrary, it evaluated whether Essex County had satisfied the necessity requirement and found that it had done so by "demonstrat[ing] the existence of parking conditions in the vicinity of and with relation to the county buildings which required attention in the public interest, and that the measures taken to meet these conditions were properly and reasonably necessary and useful to that end." Id. at 493. Here, in contrast, CRDA has failed to offer any explanation for the necessity of the taking, choosing instead to rely on the argument that its discretion is unreviewable.

The Birnbaums previously identified numerous indicia of the arbitrariness of the condemnation of the Birnbaums' property, (see Birnbaums' Opening Br. 51-52), and CRDA concedes these points by failing to address any of them. CRDA has never offered any explanation or justification for the inclusion of the Birnbaums' property in the condemnation and the exclusion of neighboring properties (including vacant, development-ready parcels that were for sale at the time). The taking was thus

not reasonably necessary for CRDA's purposes, nor for any present purposes.[5]

V. CRDA Failed To Meet The Public-Use Requirements Imposed By Both The United States And New Jersey Constitutions.

In their opening brief, the Birnbaums noted two additional fatal constitutional flaws in CRDA's attempted condemnation here. First, CRDA failed to undertake the kind of careful planning process required by the United States Supreme Court's decision in Kelo v. City of New London, 545 U.S. 469 (2005). Second, CRDA's application to condemn failed to provide sufficient "assurances that the public interest will be protected" when the property is turned over to a private developer, as required by Casino Reinvestment Development Authority v. Banin, 320 N.J. Super. 342 (Law Div. 1998). (Birnbaums' Opening Br. 54-59.)

In response, CRDA offers a non sequitur culminating in a lengthy list of different "public purposes" that have been accepted by different courts around the country. (CRDA Reply

[5] Evidence adduced at the April 2016 evidentiary hearing confirms the lack of necessity. Everything CRDA sought to condemn when it acquired properties for the South Inlet Project was designated as "OUR SITE" on CRDA's May 2014 massing plan — except for the Birnbaums' property, which was designated for "FUTURE DEVELOPMENT." (See Birnbaums' Opening Br. 11.) The Birnbaums' property was the only piece of property designated for "FUTURE DEVELOPMENT" that CRDA sought to condemn — the remaining properties designated for "FUTURE DEVELOPMENT" were left untouched. (Id.) The record contains no explanation for why the Birnbaums were singled out for condemnation in 2014.

Br. 24-32.) This misses the point. However broad a definition of "public use" one adopts, both the United States Constitution and the New Jersey Constitution impose these requirements to ensure the public use is actually being advanced by the taking. And, as demonstrated below, CRDA has failed both tests here.

A. CRDA failed to meet the federal requirements for a careful planning process, as articulated in Kelo.

As the Birnbaums explained in their opening brief, federal law requires condemning agencies to undergo an extensive planning process. (See Birnbaums' Opening Br. 57-58.) The majority in Kelo explicitly conditioned its approval of the condemnations in that case on "the comprehensive character of the plan [and] the thorough deliberation that preceded its adoption." 545 U.S. at 484. Where these elements are missing, as they are in this case, courts reject attempted condemnations. (See Birnbaums' Opening Br. 58.)

CRDA responds by claiming – without any citations to the record – that it had retained planning consultants, employed an internal planning team, and hired a firm to develop massing plans. (CRDA Reply Br. 32.) Notably absent from CRDA's response is the fact that no development plan or massing plan for the project area was ever approved by CRDA, much less presented to the lower court before it issued its November 17, 2014 opinion. (See Birnbaums' Opening Br. 27 & n.9.) At most,

CRDA saw some "conceptual plans" prepared by the Revel Casino (which were themselves never presented to the court below), and authorized condemnations in 2012 based on those concepts.[6] (See Pa224a-25a.) CRDA's complete failure to present any plans for the project prior to condemnation fails to satisfy the federal standard, as laid out in Kelo, and the lower court should have dismissed CRDA's complaint on that ground.

B. CRDA failed to provide adequate assurances of a public use rather than a private use.

As discussed in the Birnbaums' opening brief, Casino Reinvestment Development Authority v. Banin, 320 N.J. Super. 342 (Law Div. 1998), held that where there is a proposal to take property from one private owner and transfer it to another private owner, there must be "adequate assurances" of future public use – specifically, a legally binding agreement that commits the new private owner to put the property to an agreed public use. Id. at 353.

CRDA completely fails to respond to this argument, addressing Banin only briefly in the context of specificity of the public use. (See CRDA Reply Br. 9-10.)[7] But Banin is not a case about the specificity of the public use. It is a case

[6] Evidence adduced at the April 2016 evidentiary hearing bears out these concerns: Even as late as May 2014, CRDA's entire plan for the Birnbaums' property was to use it for unspecified "FUTURE DEVELOPMENT." (See Birnbaums' Opening Br. 10-11.)

[7] Once again, CRDA does not dispute that Banin is good law and in fact cites Banin with approval.

about whether there are "adequate assurances" of future public use - that is, whether condemned land being transferred to a private developer is accompanied by a sufficiently specific binding agreement that limits that developer's discretion to use the land for its own private ends. CRDA's failure to address this problem underscores its inability to offer adequate assurances of a public use for the Birnbaums' property.

CRDA's statement that it is "assembling a development-ready parcel that a private developer will be able to transform into a non-gaming tourism focused use" only serves to further showcase the absence of adequate assurance of future public use. (CRDA Reply Br. 5.) Not only is CRDA unable to identify this "tourism focused use," but it is unable to identify a developer, and thus certainly cannot identify anything about any agreement with an as-yet-unidentified developer that would provide assurances of a future public use. If an actual agreement with an actual developer was insufficient to satisfy the reasonable-assurances-of-future-public-use requirement in Banin, a nonexistent agreement with an unidentified developer surely cannot satisfy that requirement here.

CONCLUSION

For all the foregoing reasons, the lower court erred in initially allowing this condemnation to move forward. To the extent this Court rejects the ultimate ruling below, it should

affirm on any or all of the alternate grounds raised in the Birnbaums' cross-appeal.

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