

**FILED**

NOV 17 2014

**ATLANTIC COUNTY  
LAW DIVISION**

**PREPARED BY THE COURT**

CASINO REINVESTMENT DEVELOPMENT  
AUTHORITY, a public corporate body of the  
State of New Jersey,

Plaintiff,

v.

CHARLES BIRNBAUM; LUCINDA  
BIRNBAUM; LOUIS TAYLOR DAVIS;  
GERALD GITTENS; THE ATLANTIC CITY  
MUNICIPAL UTILITIES AUTHORITY; THE  
ATLANTIC CITY SEWARAGE CO.; and THE  
CITY OF ATLANTIC CITY.

Defendants.

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
ATLANTIC COUNTY**

DOCKET NO. ATL-L-589-14

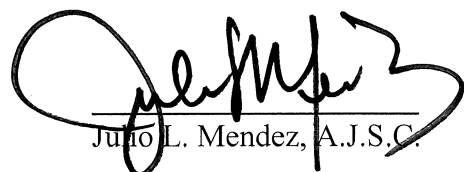
Dated: November 17, 2014

ORDER

The Court having read the papers filed in this matter, having considered the arguments of Stuart M. Lederman, Esq. on behalf of Plaintiff, Casino Reinvestment Authority and Peter D. Dickson, Esq., R. William Potter, Esq., and Robert J. McNamara, Esq on behalf of Defendants, Charles and Lucinda Birnbaum, et al., sets forth its findings of facts and conclusions of law herein, and upon other good cause shown;

**IT IS** on this 17<sup>th</sup> day, **November 2014, ORDERED** as follows:

1. The Casino Reinvestment Development Authority's application to exercise its power of eminent domain with respect to the property located at 311 Oriental Avenue, Atlantic City, New Jersey is hereby GRANTED.
2. The Defendants' application to dismiss the Complaint is hereby DENIED.
3. The Court will not sign the declaration of taking for forty-five (45) days.

  
Julio L. Mendez, A.J.S.C.

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CHARLES BIRNBAUM, et al.,

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**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
ATLANTIC COUNTY**

DOCKET NO. ATL-L-589-14

Dated: November 17, 2014

OPINION OF THE COURT

Stuart M. Lederman, Esq., representing Plaintiff, Casino Reinvestment Development Authority, a public corporate body of the State of New Jersey; Peter D. Dickson, Esq., R. William Potter, Esq., and Robert J. McNamara, Esq. representing defendant, Charles Birnbaum, et al.

MENDEZ, A.J.S.C.

Plaintiff, CASINO REINVESTMENT DEVELOPMENT AUTHORITY, a public corporate body of the State of New Jersey (hereinafter "CRDA"), has filed this Complaint, Declaration of Taking, and Order to Show Cause to acquire by eminent domain, the property of Defendants, CHARLES BIRNBAUM and LUCINDA BIRNBAUM et al., pursuant to N.J.S.A. 5:12-153 et seq. and N.J.S.A. 20:3-1, et seq. The Birnbaums have filed an opposition to the taking and are seeking dismissal of the complaint. For all of the reasons stated in this opinion, the Court finds that there is a valid public purpose for the taking of the Birnbaum property and the CRDA is duly authorized to exercise eminent domain for the taking of the property at 311 Oriental Avenue, Atlantic City, NJ.

### **Facts and Procedural Background**

The property at issue in this case is located at 311 Oriental Avenue<sup>1</sup> in Atlantic City, New Jersey and it is owned by Defendants, Charles and Lucinda Birnbaum (hereinafter “Birnbaums”). The property is located within the statutorily designated Atlantic City Tourism District. In 1969, Charles Birnbaum’s parents purchased the Birnbaum property, made up of three apartments. From the time of purchase until 1987, Charles’s mother and father lived in the second-floor apartment and from 1987 until 1998 Charles’s mother lived in the first-floor apartment with her live-in caretaker companion. In November 1998, an intruder murdered Charles’s mother and his mother’s live-in caretaker in the first floor apartment. Charles converted the apartments’ parlor into a piano studio as a memorial to his parents and their love of music. The first-floor apartment is currently used for Charles’s piano tuning business. The second and third floor apartments are rented to two long-time tenants. The Birnbaums do not live in this property.

The CRDA is a State agency with broad powers, including the power of eminent domain. N.J.S.A. 5:12-182. On January 10, 2011 the Atlantic City Tourism District Act (hereinafter “Tourism District Act”) N.J.S.A. 5:12-218, et seq. was enacted. In accordance with the Tourism District Act, the CRDA board adopted a Tourism District Master Plan by Resolution 12-14 and readopted by Resolution 12-23. Thereafter at a public meeting, on June 19, 2012, the CRDA board adopted the South Inlet Mixed Use Development Project by Resolution 12-82. This project was adopted in accordance with the Tourism District Master Plan. The resolution provided the CRDA executive director with the authority to acquire properties within the project area and if necessary, to use the power of eminent domain. The Birnbaums received notice and attended these meetings.

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<sup>1</sup> The property is identified as Block 72, Lot 3 on the Atlantic City Tax Map.

After the adoption of Resolution 12-82, the South Inlet Mixed Use Development Project, the CRDA attempted to acquire the Birnbaum property through negotiations with the owners, Charles and Lucinda Birnbaum. The CRDA obtained an appraisal of the Birnbaum property and an offer of \$238,500 was made to the Birnbaums. The Birnbaums did not accept the offer.

On February 11, 2014, the CRDA filed a verified complaint in condemnation, a declaration of taking, and Order to Show Cause in the Superior Court of New Jersey, Law Division, of Atlantic County for a judgment determining the Casino Reinvestment Development Authority is authorized to, and duly exercised its power of eminent domain and for the Court to appoint condemnation commissioners to make a just and equitable appraisal of the value of the property at issue, 311 Oriental Avenue in Atlantic City, New Jersey. The Birnbaums filed a brief in opposition to the taking as well as a brief to convert the case to a plenary hearing and permit discovery.

This matter first came before the Court on the return date of the Order to Show Cause, on May 20, 2014. At that time, there were two companion condemnation cases, CRDA v. Sencit Vermont Associates, ATL-L-868-14 and CRDA v. Sencit Metropolitan Associates, ATL-L-869-14. In both of the Sencit cases, tenants residing in those properties opposed the taking by the CRDA. The CRDA and the tenants in the Sencit cases have reached a resolution.

At the May 20, 2014 hearing, the Court denied the motion to convert this case to a plenary hearing and for additional discovery. The Court was satisfied that there were no material factual disputes based on the statement of facts, exhibits attached, and certifications submitted by the parties. The Court ordered supplemental briefing on several issues and the final hearing took place on October 21, 2014.

### Legal Analysis

**This Court holds that:**

- **The Atlantic City Tourism District Act is the legislative declaration of a legitimate public purpose.**
- **The fundamental public purpose of the Atlantic City Tourism District Act is to promote tourism, to create and protect jobs in Atlantic City, and to assist the ailing gaming industry.**
- **The Atlantic City Tourism District Act establishes an abundantly appropriate public purpose that passes both Federal and State constitutional muster.**
- **The CRDA is duly authorized to exercise the power of eminent domain for the taking of the Birnbaum property.**

The State possesses the authority to take private property but this power is not without limitation. There are three constitutional limitations to the State's eminent domain power: (1) the State must pay "just compensation" for the property, (2) the property owner must be given due process of law, and (3) private property may be taken only for a "public use." N.J. Const. art. I, ¶ 20; Twp. of W. Orange v. 769 Assocs. 172 N.J. 564, 572, 800 A.2d 86 (2002). The "just compensation" and due process constitutional limitations are not an issue in this case. The arguments presented in this case involve the public purpose for the taking of the Birnbaum property. The Birnbaum's challenge the CRDA's taking on four grounds: (1) The CRDA has not established that the taking is for a specific and valid public purpose; (2) The CRDA has not established the taking is necessary; (3) the CRDA is required to find the Birnbaum property is blighted prior to the taking; and (4) the CRDA has not provided adequate assurances the taking is for a public purpose and not for the benefit of private interests. The Court will address all of these issues in this opinion.

The Birnbaums' position is that the CRDA has failed to show that there is any specific planned use for the Birnbaum property, let alone a public use. The Birnbaums argue the CRDA is doing nothing more than land banking and land banking for some future use is not a valid public

purpose without any specific plans. The Birnbaums also argue that the taking is not necessary and that the taking is for the benefit of Revel Casino, not for a public purpose. On the other hand, the CRDA maintains that the public purpose is the establishment of a tourism district to support and foster New Jersey's ailing gaming and tourism industries. The CRDA maintains that its actions are in accordance with the statutory authority and mandates of the Atlantic City Tourism District Act as well as consistent with the legislative findings adopted as part of the Atlantic City Tourism District Act. The CRDA also argues that the Master Plan for the Tourism District and the South Inlet Mixed Use Development Project provide the level of specificity required to justify the taking.

The public purpose requirement included in both the Federal and State Constitution establishes a limitation on the power of government to exercise eminent domain. "Public purpose" is not limited to roadways, parks, and schools. "[A] 'public use' is anything that tends to enlarge resources, increase the industrial energies, and manifestly contributes to the general welfare and the prosperity of the whole community." Twp. Of W. Orange v. 769 Associates, L.L.C., 172 N.J. 564, 573 (2002). Courts generally defer to the Legislature's determination of what constitutes a valid public purpose. "For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." Kelo v. City of New London, 545 U.S. 469, 483, 125 S.Ct. 2655, 2664, 162 L.Ed.2d 439, 453-54. In the Kelo case the United States Supreme Court reaffirmed the long established, broad constitutional interpretation of "public purpose," giving deference to legislative judgments as to what constitutes a "public purpose."

For the reasons outlined in this opinion, this Court concludes that the State of New Jersey's effort to promote tourism in Atlantic City and assist the ailing gaming industry is a valid public purpose to justify the taking of the Birnbaum property. This Court finds that this is a legitimate

governmental undertaking to promote the general welfare and part of the plan contained within the Atlantic City Tourism District Act. The Court also concludes that the public purpose outlined in the Atlantic City Tourism Act is entitled to deference. In reaching this decision, this Court has examined the Atlantic City related legislation from 1976 to the present. The Court finds compelling and gives significant weight and deference to the history of legislation over the last forty years with the common public purpose of promoting tourism in Atlantic City, supporting the development of the gaming industry, creating jobs, and assisting in the redevelopment of Atlantic City.

The Court gives deference to the legislative findings made in support of the enactment of Atlantic City legislation from 1976 to the present. The public purpose to justify the taking in this case is not merely based on the net opinion of an expert, or some limited factual support. The legitimate public purpose to support the taking of the Birnbaum property is a result of compelling, consistent and duly enacted public policy of the State of New Jersey. As the Court will discuss in this opinion the creation of the Tourism District is a legislative mandate imposed on the CRDA through the enactment of the Tourism District Act. Courts have consistently given regard to legislative findings of public use because “it is the province of the legislature to shape the contours of the ‘public use’ requirement.” Twp. Of W. Orange v. 769 Assocs., LLC. 172 N.J. 564,572 (2002) (citing Burnett...)

Following the 1976 referendum to legalize casino gambling, New Jersey has enacted a series of important laws with the common goal of promoting tourism as a catalyst to create jobs and to redevelop Atlantic City. A review of the legislation that is unique to Atlantic City reflects the importance of the tourism and gaming industry not only to Atlantic City but to the State of New Jersey. In 1976 the New Jersey voters approved the casino referendum and the New Jersey

Constitution was amended to legalize casino gambling in Atlantic City. N.J. Const., Art. IV, § VII,

¶ 2. Less than a year later, in 1977, the Legislature adopted the Casino Control Act. N.J.S.A. 5:12-

1. The Court finds compelling the declaration of policy and legislative findings of the Casino Control Act. The Court finds that at the heart of those findings, are the efforts to promote tourism, to create jobs, to promote the gaming industry, and to redevelop the City of Atlantic City. Among the legislative findings in support of the Casino Control act are the following:

- (1) The tourist, resort and convention industry of this State constitutes a critical component of its economic structure and, if properly developed, controlled and fostered, is capable of providing a substantial contribution to the general welfare, health and prosperity of the State and its inhabitants.
- (2) By reason of its location, natural resources and worldwide prominence and reputation, the city of Atlantic City and its resort, tourist and convention industry represent a critically important and valuable asset in the continued viability and economic strength of the tourist, convention and resort industry of the State of New Jersey.

[ N.J.S.A. 5:12-1. ]

The next significant legislation was the creation of the Casino Reinvestment Development Authority. The CRDA was created in 1984 and it was provided with broad powers to oversee the investment of gambling revenues for development projects as well as to promote the tourism industry in Atlantic City and throughout the State. N.J.S.A. 5:12-153. The CRDA was also charged with, among other things, maintaining public confidence in the casino gambling industry. N.J.S.A. 5:12-160.

Significantly, the legislature provided the CRDA with expansive powers of eminent domain in the CRDA enabling statute, N.J.S.A. 5:12-182. N.J.S.A. 5:12-182 provides in relevant part:

- a. The Legislature finds and declares that the achievement of the beneficial purposes of this 1984 amendatory and supplementary act requires the granting to the Casino Reinvestment Development Authority of the right of condemnation and the exercise by it of the right of eminent domain in the city of Atlantic City because special problems may arise or exist in



that city concerning the necessity for the acquisition of the property for projects for the public good under this 1984 amendatory and supplementary act ....

b. In the event the Casino Reinvestment Development Authority finds it is necessary to complete a project in the city of Atlantic City, the authority may acquire any real property in the city, whether a fee simple absolute or lesser interest and whether for immediate use, that the authority may find and determine is required for public use, and upon such a determination, the property shall be deemed to be required for a public use until otherwise determined by the authority; and with the exceptions hereinafter specifically noted, the determination shall not be affected by the fact that such property has theretofore been taken for, or is then devoted to, a public use, but the public use in the hands or under the control of the authority shall be deemed superior to the public use in the hands or under the control of any other person, association or corporation.

c. If the Casino Reinvestment Development Authority is unable to agree with the owner or owners thereof upon terms for the acquisition of any such real property in the city for any reason whatsoever, then the authority may acquire, and is hereby authorized to acquire, after consultation with the appropriate agency of the city by way of notification 30 days prior to the filing of condemnation proceedings, such property, whether a fee simple absolute or lesser interest, by condemnation or the exercise of the right of eminent domain pursuant to the provisions of the "Eminent Domain Act of 1971," P.L.1971, c. 361 (C. 20:3-1 et seq.) and the "Relocation Assistance Act," P.L.1971, c. 362 (C. 20:4-1 et seq.).

d. The power of the authority to acquire real property by condemnation or the exercise of the power of eminent domain in the city shall be a continuing power and no exercise thereof shall be deemed to exhaust it.

e. The Casino Reinvestment Development Authority and its duly authorized agents and employees may enter upon any land in the State for the purpose of making such surveys, maps or other examinations thereof as it may deem necessary or convenient for its authorized purposes.

[N.J.S.A. 5:12-182.]

The Court finds compelling the broad legislative authority to acquire property by eminent domain vested in the CRDA. The Court holds that the CRDA has the authority to acquire property through the power of eminent domain to carry out the legislative mandate. The Court is satisfied that the legislative intent of the eminent domain enabling statute was to give the CRDA broad powers to achieve the goals of promoting tourism, creating jobs, and promoting the casino industry. Here, the CRDA is exercising the power of eminent domain for the public purpose

mandates set forth by the Legislature in the Atlantic City Tourism Act.

The CRDA has a very broad eminent domain legislative authority, compared, for example, with the power of eminent domain granted by the Legislature to municipalities under the Local Redevelopment and Housing Law (hereinafter "LRHL") N.J.S.A. 40A:12A-1 to -73, which contains very detailed reasons, limitations and procedures before municipalities may exercise the power of eminent domain for redevelopment purposes. The Court highlights the following section of N.J.S.A. 5:12-182.

The Authority may acquire *any* real property in the city, whether a fee simple absolute or lesser interest and whether for *immediate use*, that the authority may find and determine is required for public use, and upon such a determination, the property shall be deemed to be required for a public use until otherwise determined by the authority.

[ N.J.S.A. 5:12-182(b). ] (emphasis added).

The court finds that the legislative intent was to give the CRDA, a state created agency, broad flexibility to accomplish the public purpose objectives spelled out in the duly enacted legislation.

The Court has also examined the legislative findings included in the 2001 "Casino Reinvestment Development Authority Urban Revitalization Act" "that was adopted to facilitate the development of entertainment-retail districts for the city of Atlantic City and to promote urban revitalization throughout the State." N.J.S.A. 5:12-173.11. Among the legislative findings relative to this act were the following:

During the past 25 years, the development of Atlantic City's multi-billion dollar casino industry and the CRDA's investment of hundreds of millions of dollars in housing, commercial and nonprofit projects have greatly benefited the people of New Jersey and have served as a model for many other states and countries that wished to emulate Atlantic City's successful record of casino development and economic growth;

It is altogether fitting and proper on the occasion of the 25th year of legalized casino gaming in Atlantic City to establish a new program to facilitate the next phase of Atlantic City's development into a regional, national and international "destination resort" and at

the same time, to insure that substantial commitments are made to projects to revitalize urban areas and promote continued economic growth throughout the State.

[ N.J.S.A. 5:12-173.10. ]

The Casino Reinvestment Development Authority Urban Revitalization Act confirms the continuing historical commitment of the State of New Jersey to promote tourism and the gaming industry as a public purpose. This act also acknowledges the successes of the CRDA as an agent of economic growth that has greatly benefited the people of New Jersey.

With the downturn in the Atlantic City casino industry beginning around 2008, predominantly as a result of the development of casino gambling in surrounding states, as well as the national recession, the State of New Jersey began the process of determining how to deal with these critical challenges. The Governor's Advisory Commission on New Jersey Gaming, Sports, and Entertainment was created and a report was issued to the governor and to the legislature on July 21, 2010. One key recommendation from the commission was the creation of a tourism district in the City of Atlantic City. The Court takes judicial notice of the findings and recommendations of the commission. The Report of the Governor's Advisory Commission on New Jersey Gaming, Sports and Entertainment, precipitated the Tourism District legislation.<sup>2</sup> The Report provides:

If Atlantic City cannot provide reasons for customers to make the trip, its decline will continue. Atlantic City has no choice but to reestablish itself as a true "destination resort" against its new convenience gaming competitors in surrounding states. Meeting this challenge will require aggressive actions by both the public and private sectors. At stake are thousands of direct and indirect jobs, thousands of ongoing construction jobs for the building trades, hundreds of millions of dollars in state and local taxes, billions of dollars in spending on New Jersey business and construction and other key economic benefits.

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<sup>2</sup> N.J.S.A. 5:12-1(b)(18): As recognized in the July 2010 Report of the Governor's Advisory Commission on New Jersey Gaming, Sports, and Entertainment, and as confirmed in subsequent legislative hearings held throughout the State, legalized casino gaming in New Jersey presently stands at a crossroads, facing critical challenges that jeopardize its important role in the State economy...

Jon F. Hanson, Report of the Governor's Advisory Commission on New Jersey Gaming, Sports and Entertainment, 15, July 21, 2010.

Soon after the issuance of this report, the Governor and the New Jersey Legislature began working on the enactment of the Atlantic City Tourism District Act. On January 10, 2011 the Atlantic City Tourism District Act N.J.S.A. 5:12-218, et seq. was passed by a 71-5 vote in the Assembly and a vote of 36-1 in the Senate. The Governor approved and signed the Tourism District Act on February 2, 2011. At the time of signing the law, the Governor stated:

The challenges faced today by the Atlantic City tourism and gaming industries have been a long time in the making and significant steps are needed to stop the decline and set a new course of economic growth, job creation, and return Atlantic City to the ranks of the best destinations in the world. But it can and must be done for the economic health of New Jersey as a whole.

[New Jersey Governor's Message, 2011 S.B. 11/S.B. 12]

The Tourism District Act directs the CRDA to establish the Atlantic City Tourism District. N.J.S.A. 5:12-219. The legislation established the area of Atlantic City to be designated as the Tourism District and authorized the CRDA to make adjustments to the area and expand the tourism district if the CRDA found it necessary. N.J.S.A. 5:12-219(a)(1) provides: "There shall be established by resolution of the authority the Atlantic City Tourism District, which shall consist of those lands within Atlantic City that comprise an area to be designated by the resolution." The Birnbaum property is within the statutorily created Tourism District area.

The Tourism District Act also requires the CRDA to adopt a Tourism District Master Plan. N.J.S.A. 5:12-219(e) provides: "In furtherance of the development of an economically viable and sustainable tourism district, the authority shall ... adopt a tourism district master plan." The act defines "Tourism District Master Plan" as "the authority's comprehensive master plan for the redevelopment of the tourism district. N.J.S.A. 5:12-218. Soon after the enactment of the Tourism

District Act, the CRDA began the process of adopting and creating a master plan. Public meetings were held and ultimately the CRDA adopted a Tourism District Master Plan on February 1, 2012 (Resolution 12-14) and readopted the plan on February 1, 2012 (Resolution 12-23).

The Court is of the opinion that the enactment of the Atlantic City Tourism District Act is the legislative declaration of a legitimate public purpose. The fundamental public purpose contained in this legislation is to promote tourism, to create and protect jobs in Atlantic City, and to assist the ailing gaming industry. This Court gives deference to this legislative determination. The CRDA is the statutory agent to achieve the legislative objectives. The CRDA enjoys broad powers to achieve the legislative mandates included in the Tourism District Act. This Court finds that this legislation speaks loud and clear, and the Court holds that the Atlantic City Tourism District Act establishes an abundantly appropriate public purpose for the use of eminent domain, that passes both federal and state constitutional muster, and that justifies the actions of the CRDA in taking the Birnbaum property.

**The Court holds that:**

- **The Tourism District Master Plan and the South Inlet Mixed Use Development Project were adopted by the CRDA in accordance with the Atlantic City Tourism District Act.**
- **The Tourism District Master Plan and the South Inlet Mixed Use Development Project contain a sufficient level of specificity to justify the taking of the Birnbaum property by eminent domain.**

The Birnbaums also argue the CRDA is required to provide a more specific public purpose for which the Birnbaum property is needed. The Birnbaums take the position that the CRDA has not come forward with any specific plans for the Birnbaum property. For all of the reasons outlined in this opinion, this court concludes that the Tourism District Master Plan and the South Inlet Mixed Use Development Project adopted by the CRDA in accordance with the mandates of the Atlantic City Tourism District Act provide a valid, sufficient, and specific public purpose to justify the taking of the Birnbaum property.

The Court will examine the actions of the CRDA ultimately leading to the efforts to take the Birnbaum property. Subsequent to enactment of the Atlantic City Tourism District Act the CRDA began the process of adopting and creating a master plan. Public meetings were held and the agency obtained input from experts, local leaders, government officials, business leaders and citizens, leading to the adoption of a Tourism District Master Plan by Resolution 12-14 and again readopted in Resolution 12-23.

A few months after the Master Plan was adopted, following a public meeting held on June 19, 2012, the CRDA adopted the South Inlet Mixed Use Development Project by Resolution 12-82. Birnbaum attended and spoke at this meeting. This project was adopted consistent with the objectives of the Master Plan to transform the inlet district of Atlantic City “into a vibrant, mixed-use area of the City that couples new open park space, education, and research and retail/entertainment ventures with the current mix of uses ...” (Resolution 12-82). Resolution 12-

82 also “authorized the purchase of property in the project area, by voluntary acquisition or by eminent domain, if necessary, all in furtherance of the South Inlet Mixed Use Development Project.” The following findings were incorporated into Resolution 12-82:

[T]he Project would be constructed in phases, with a mixed use residential and retail development including restaurants, specialty stores, boutiques and residential housing for rent and purchase that tie into the open space greenway of the Lighthouse District Park Project and potential uses for a higher educational site within the Inlet; and

The South Inlet Mixed Use Development Project serves the public interest, furthers the public purposes of the CRDA set forth in Section 12 of P.L. 1984, c.218 (C.5:12-160) and promotes health or social or economic well-being of the people of the State and, in particular, of the residents of the local government unit affected by the project, and is therefore an approved project.

Resolution 12-82 also directed the Executive Director to take action as follows:

The Executive Director is hereby authorized to acquire properties in the Project area, as enumerated in the resolution through negotiated purchase or eminent domain, as necessary, all in furtherance of the South Inlet Mixed Use Development Project and in accordance with applicable law, CRDA policy, and this Resolution.

In accordance with the resolution, Master Plan, and the South Inlet Mixed Use Development Project, the CRDA began the process of acquiring properties within the Tourism District. The Birnbaum property is squarely within the South Inlet Mixed Use Development Project area. The CRDA attempted to acquire the Birnbaum property through negotiations with the Birnbaums. The CRDA presented an appraisal of the Birnbaum property and made an offer of \$238,500 for the property. The Birnbaums did not accept the offer. This complaint now before the court was then filed.

The CRDA acknowledges that they have not identified the specific structure that will be placed on the subject property. The Court agrees with the CRDA’s position that they are not required to produce plans identifying specific uses or structures for the property. The Court agrees that like most large development projects, the process begins with the assemblage of land for a

public purpose. The Court in Casino Reinvestment Dev. Auth. v. Banin, acknowledged that most development projects begin with the public agency identifying and putting together an assemblage of land. 320 N.J. Super. 342, 355 (Ch. Div. 1998). Important in this analysis is that the CRDA is acting within the statutory mandate of the Atlantic City Tourism District Act and for the valid public purpose of promoting tourism and assisting the ailing gaming industry in Atlantic City. The Court also notes that in N.J.S.A. 12:182(b) of the CRDA enabling statute, the legislature provided the authority to take properties for public use whether immediate or not. This Court finds that the legislature intended to provide the agency with flexibility in achieving the legislative mandates.

The Court is also of the opinion that the resolutions passed by the CRDA Board, for the creation of the Master Plan as well as for the creation of the South Inlet Mixed Use Development Project, provide a great deal of specificity, sufficient in the Courts opinion to justify the taking of the Birnbaum property. It all starts with the property being located within the statutorily created Tourism District and within the South Inlet Mixed Use Development Project area. The Master Plan provides a framework for near, mid, and long term initiatives for the enhancement of Atlantic City, its economy, and the tourism market. The objectives of the Master Plan are to transform the inlet district area into a vibrant mixed use area of the City of Atlantic City with the creation of open park space as well as education, research, retail, and entertainment.

The Court finds that the South Inlet Mixed Use Development Project provides even greater detail as to the plan for the Birnbaum property as well as the other properties within the project area. The resolution indicates that the project will be conducted in phases and that it would include mixed use developmental, retail, restaurants, boutiques, and potential use for a higher education site within the project area. The Court is impressed with the level of detail as to future plans for the Birnbaum property and the other properties in this area. The CRDA is not just relying on a net



opinion from an expert or on limited facts to establish the plans for the Tourism District and for which properties to take. The Court concludes that the plans outlined in both the resolution adopting the Master Plan as well as the resolution adopting the South Inlet Mixed Use Development Project provide a sufficient level of specificity for the public use of the Birnbaum property and are consistent with the statutory mandates in the Tourism District Act and the public purpose of promoting tourism and assisting the ailing gaming industry. This Court concludes that the Birnbaum arguments regarding lack of specificity lack merit.

The Court is also not persuaded by the Birnbaums' argument that the CRDA may not land bank for an unspecified future use. The Court finds that the Legislature anticipated that at times property acquired by the CRDA would not be put to immediate use. The Legislature intended to provide the CRDA with flexibility to accomplish the objectives of the Atlantic City Tourism District Act. The eminent domain section of the CRDA enabling statute provides in relevant part: "[T]he authority may acquire any real property in the city, whether a fee simple absolute or lesser interest and *whether for immediate use* that the authority may find and determine is required for public use." N.J.S.A. 5:12-182(b) (emphasis added). The Legislature fully anticipated and approved the process of acquiring property for future public use. The Court is also not persuaded by the Birnbaums' argument that the CRDA has failed to meet the planning requirements required under federal law. As outlined in this opinion, the Court is satisfied that the CRDA, in the Master Plan and the South Inlet Mixed Use Development Project, has developed a detailed and comprehensive plan that more than justifies the taking of the Birnbaum property.

This Court acknowledges and empathizes with the Birnbaums desire to keep this family owned property. On the other hand, the Court is satisfied that the CRDA is acting within the statutory framework and objectives of the New Jersey legislature. For all of the reasons outlined

in this opinion, the Court holds that supporting and fostering New Jersey's ailing gaming and tourism industries by establishing a tourism district is a valid public purpose for which the CRDA may exercise eminent domain. There is no indication that the CRDA has acted in bad faith or abused its discretion in the development of the plans or the decision to take the Birnbaum property. The Court also finds that the Master Plan and the South Inlet Mixed Use Development Project provide more than a sufficient level of detail, were adopted with public input, in a measured process, and in furtherance of, as well as consistent with, the legislative directives.

**The Court holds that:**

- **The Birnbaum property is squarely within the statutorily created Atlantic City Tourism District and the South Inlet Mixed Use Development Project Area.**
- **The CRDA's determination that the Birnbaum property is necessary for the South Inlet Mixed Use Development Project is entitled to deference.**

The Birnbaums also argue that the CRDA has failed to provide an explanation as to why their property is necessary for the project because the CRDA has not purchased or attempted to acquire various vacant lots for sale that surround the Birnbaum property. The Birnbaums' position is that the CRDA does not have limitless discretion to decide what property to condemn and that courts set aside condemnations where the inclusion of a particular piece of property is arbitrary or otherwise unjustified. The CRDA's position is that judicial inquiry into the necessity of the taking of a specific property is rare and "[t]he court only interferes where there is a plain case of abuse of discretion in the exercise of the power of eminent domain in excess of the public use upon which it is bottomed in a particular instance." Burnett v. Abbott 14 N.J. 291, 294-295 (1954). The analysis of this issue is similar to the issue of lack of specific plans.

At the outset, this Court notes that it has made a finding that there is a valid public purpose for the taking of the Birnbaum property. In New Jersey, once a court makes a finding that there is a valid public purpose then judicial inquiry as to the issue of necessity of the taking for a specific property is limited. The following quote summarizes the principle,

The cases and authorities are in agreement that in condemnation proceedings the quantity of land to be taken, its location and the time of taking are within the discretion of the body endowed by the Legislature with the right of eminent domain... The amount and extent of the taking is left to the discretion of the legislative agent and it will not be interfered with by the courts when it is exercised in good faith.

Burnett v. Abbott, 14 N.J. 291, 294-95(1954).

This Court agrees that courts have a role in making an inquiry on the issue of necessity, however such inquiry is limited, particularly once the court makes a determination that the taking was for a public purpose. In this case, the CRDA is acting in accordance with the statutory mandate of the Atlantic City Tourism District Act. The Legislature established the boundaries of the project area and the CRDA proceeded to implement the legislative objectives for the Tourism District. The United States Supreme Court in the Kelo case stated the following:

It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.

This principle of deference to the condemning authority's action regarding the necessity to take a particular property is well established and generally courts do not disturb a condemning authority determination "in the absence of an affirmative showing of fraud, bad faith or manifest abuse." Twp. Of W. Orange v. 769 Associates, L.L.C., 172 N.J. 564, 572 (2002). In this case, there is no evidence of fraud, bad faith, or abuse of discretion in the actions of the CRDA.

The Birnbaums have presented out of state court decisions to support their position. This Court is not persuaded by those decisions. The Court has reviewed the case of Regents of the

Univ. of Minn. v. Chi. & N.W. Transp. Co., 552 N.W.2d 578, 580 (Minn. Ct. App. 1996) and is not persuaded by this case. In the State of Minnesota, there is a statutory requirement for a showing of necessity. As stated in that case, "In order to approve a petition for the acquisition of property by eminent domain, the trial court must determine whether the proposed taking appears to be necessary." Minn. Stat. § 117.075 (1994); "Necessity" in this context "means now or in the near future.". Regents 552 N.W.2d at 580. In New Jersey no such statutory requirement exists.

The taking of the Birnbaum property by the CRDA is also fundamentally different from the Minnesota case. Here, the Birnbaum property is not only included in the master plan, it was within the boundaries that the Legislature set out in the Atlantic City Tourism District Act. All of the possible Tourism District uses for the Birnbaum property have been approved by the CRDA when they adopted the Tourism District Master Plan and the South Inlet Mixed Use Development project. The CRDA is acting pursuant to the statutory mandates and consistent with the public purpose of promoting tourism and assisting the ailing gaming industry. This Court has found that there is a valid public purpose. This Court has also found that there is a justifiable level of specificity in the plans for the public use of this property and under those circumstances, and in the absence of any evidence of fraud, bad faith, and manifest abuse of discretion, this Court sees no reason to interfere with the decision of the CRDA that the Birnbaum property is necessary for the South Inlet Mixed Use Development Project

**The Court holds:**

- **The taking of the Birnbaum property is not for blight remediation or for purposes of economic redevelopment.**
- **The CRDA is not required to make a finding that the Birnbaum property is blighted because this is not a taking for redevelopment triggering the Blighted Areas Clause of the New Jersey Constitution.**
- **Even if this were a taking for redevelopment, subject to the Blighted Areas Clause of the New Jersey Constitution, the Court is satisfied the legislative enactments and declarations satisfy the constitutional requirement.**

The Blighted Areas clause of the New Jersey Constitution provides as follows:

The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment; and improvements made for these purposes and uses, or for any of them, may be exempted from taxation, in whole or in part, for a limited period of time during which the profits of and dividends payable by any private corporation enjoying such tax exemption shall be limited by law. The conditions of use, ownership, management and control of such improvements shall be regulated by law.

[ N.J. Const. art. VIII, § 3, ¶ 1. ]

The Birnbaums contend that the taking must be denied on the basis that there has been no finding that the Birnbaum property is blighted, as required by the Blighted Areas Clause of the New Jersey Constitution. The Birnbaums also contend that the South Inlet Development project is, as the name suggests, a development project subject to the constitutional limitation of the Blighted Areas Clause. The CRDA takes the position that the exercise of eminent domain in this case is not an act of blight remediation or for purposes of economic redevelopment. The CRDA asserts that the Birnbaums reliance in the landmark case of Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344 (2007) is misplaced.

In Gallenthin, the New Jersey Supreme Court interpreted the Blighted Areas Clause as both a “grant and limit” on the power of eminent domain, stating the following:

[T]he Blighted Areas Clause authorizes governmental entities to exercise eminent domain power in respect of "blighted areas." *N.J. Const.* art. VIII, § 3, ¶ 1. The provision grants

authority to those entities only to the extent allowed by our State Constitution. The clause operates as both a grant and limit on the State's redevelopment authority.

The Gallenthin case involves the municipal authority to exercise eminent domain as part of a municipal redevelopment plan. In that case the municipality classified the land as “in need of redevelopment” pursuant to N.J.S.A. 40A:12A-5(e) of the Local Redevelopment and Housing Law, which subjected the land to the municipal exercise of eminent domain. The town classified the land as “in need of redevelopment” on the basis the unimproved condition of the land rendered it “not fully productive.” The New Jersey Supreme Court held that a mere finding that the property was “not fully productive” was insufficient, and that the legislature did not intend N.J.S.A. 40A:12A-5(e) of the LRHL to apply in situations where that was the only basis for the designation of a property as “in need of redevelopment.”

The Supreme Court invalidated the Municipality's designation of the property “as in need of redevelopment” based on the improper application of the LRHL, therefore preventing the exercise of eminent domain on that basis. The Court concluded that while a municipal designation of redevelopment is entitled to deference, such determination must be supported by substantial evidence and not by a net opinion of an expert. The Court concluded that the legislature intended the statute to apply only to property that has become stagnant by reason of issues of title, diversity of ownership, or other similar conditions.

Chief Justice Zazzali spent a great deal of the opinion discussing the definition of blight, and reviewing the historical background of the definition. The Municipal power of eminent domain for development purposes flows from the statutory authority provided by the Legislature pursuant to the LRHL which empowers towns to designate areas in need of redevelopment as pursuant to the Constitutional authority of the Blighted Areas clause. Such a designation by a municipality, if supported by substantial evidence, triggers the authority of eminent domain.

The Gallenthin case addresses the power of a municipality to condemn property for municipal redevelopment plans as opposed to, in this case, the power of a statutorily created State Agency. In contrast with the broad powers of eminent domain granted to the CRDA by the legislature discussed in detail in this opinion, the power provided to municipalities is significantly more restricted. In redevelopment situations, municipalities are required to follow the LRHL while no such limitations apply to a state created agency with delegated authority to take property for a public purpose. This Court finds that the Local Redevelopment and Housing Law does not apply to the CRDA, it only applies to municipalities.

This Court holds the taking in this case is not for the redevelopment of a blighted area. The Atlantic City Tourism District, as the name suggests, is about promoting tourism and promoting the ailing gaming industry. The Tourism District Act was not enacted to establish a plan for remediation of stagnant and dilapidated areas with issues of diversity of title. This Court recognizes that in the creation of the Tourism District, some of the properties acquired by the CRDA may be considered blighted, but that does not change the public purpose from the creation of a tourism district pursuant to the statutory mandates of the Atlantic City Tourism District Act into the public purpose of redevelopment of a blighted area.

The Tourism District Act has nothing directly to do with a plan to redevelop a stagnant and depressed area that is devastating an older city. The Court recognizes that in implementing the public purpose objectives of promoting tourism and assisting the gaming industry, there will be a significant benefit to the area designated as the Tourism District. This action by the CRDA to take Birnbaum property is in accordance with the legislative findings and in furtherance of those public policy objectives established by the New Jersey Legislature.

The Court finds that if the Legislature intended for the CRDA to find blight prior to taking, they would have stated such an intent in the Atlantic City Tourism District Act or they would have placed a limitation on the CRDA's eminent domain power. No such requirement is in the legislation. The Tourism District Act did not limit the broad eminent domain power of the CRDA. N.J.S.A. 5:12-182(b) provides: "In the event the Casino Reinvestment Development Authority finds it is necessary to complete a project in the city of Atlantic City, the authority *may acquire any* real property in the city, whether a fee simple absolute or lesser interest and *whether for immediate use*, that the authority may find and determine is required for public use, and upon such a determination, the property shall be deemed to be required for a public use until otherwise determined by the authority." (emphasis added.)

The Court finds the CRDA is not taking the Birnbaum property for the purpose of redevelopment which triggers the Blighted Areas Clause of the New Jersey Constitution. The CRDA is properly acquiring the property for a valid public purpose as outlined in this opinion. This Court holds the CRDA is not required to make a finding that the property is blighted because the taking is pursuant to a plan to promote tourism and protect the important tourism, gaming, and entertainment industries and not for economic redevelopment or remediation. While the Birnbaum property may be in a blighted area, the actions of the CRDA to take the property for public use has nothing to do with such condition, the taking is in response to the statutory mandates of the Tourism District Act to develop a tourism district and are not connected to a redevelopment plan or a remediation plan or an effort to alleviate blight.

Even if this Court were to find that the taking of the Birnbaum property was pursuant to an economic redevelopment plan, subject to the blighted clause of the New Jersey Constitution, this court is of the opinion that the legislative enactments and findings are more than sufficient to



satisfy the constitutional blight requirement. The decision to include this property in the Tourism District was a deliberate decision of the Legislature based on valid legislative findings and declarations made over the last forty years. This Court has reviewed those finding as part of this opinion. In 1977 the Legislature adopted the Casino Control Act and declared: “Legalized casino gaming has been approved by the citizens of New Jersey as a unique tool of urban redevelopment for Atlantic City.” In 1984, the State Legislature created the Casino Reinvestment Development Authority to, among other things, “maintain public confidence in the casino gambling industry as a unique tool of urban redevelopment for the City of Atlantic City and to directly facilitate the redevelopment of existing blighted areas.” N.J.S.A. 5:12-160. In 2001 the legislature passed the Urban Revitalization Act to further support Atlantic City. N.J.S.A. 5:12-173.1; and in 2011 adopted the Tourism District Act.

This Court holds that these legislative enactments unique to Atlantic City and all the findings and declarations contained in the legislation as well as the legislative history are more than sufficient to satisfy the requirements of the Blighted Areas Clause of the New Jersey Constitution if the taking of the Birnbaum property was part of a plan to redevelop a blighted area. Comparing the comprehensive legislative findings and declarations in the context of a blight determination regarding Atlantic City, with the net opinions the town used to determine that that property was in the need for redevelopment in the Gallenthin case is like night and day. The Court’s concern in Gallenthin that the property was targeted for redevelopment without substantial findings of blight is not an issue in this case. This court concludes that the taking of the Birnbaum property is constitutional.

**The Court holds that:**

- **The doctrine of adequate assurances, established in CRDA v. Banin, 320 N.J. Super 342 is not applicable to the taking of the Birnbaum property.**

The Birnbaums argue that the CRDA is required to make, and has not, adequate assurances that the taking is legitimately for future public use and not for the benefit of private interests pursuant to CRDA v. Banin, 320 N.J. Super 342 (1998). The Birnbaums allege the tourism district use is undefined and appears to encompass any imaginable use and they are concerned the CRDA will simply convey the property from the Birnbaums to another private owner who will use it for his own private benefit. The circumstances of the taking of the Birnbaum property are significantly different from the circumstances in the Banin case. In this opinion, this Court has concluded that the taking of the Birnbaum property is for a valid public purpose and in accordance with the Atlantic City Tourism District Act and that the Birnbaum property is squarely within the legislatively created Tourism District area.

This Court has also concluded that the Tourism District Master Plan and the South Inlet Mixed Use Development Project provide a sufficient level of specificity as to the public use for the Birnbaum property. This Court has also determined that the CRDA's decision to take the Birnbaum property is entitled to deference. The basis for the Birnbaum taking is substantially different from the taking in the Banin case.

The issue in Banin was whether the underlying purpose of the taking was something other than the stated public purpose. *Id.* at 346. The present case is distinguishable from the case in Banin because in that case, there was a contract in place for the CRDA to transfer the property to a casino operator and the contract did not contain any specific limitation on future use. In that case, the taking was not a result of a direct legislative enactment, such as the Atlantic City Tourism District Act. In this case, there is no such contract in place to turn this property over to a private

operator and the public purpose for the taking is set forth in the Atlantic City Tourism District Act as found by this Court. The taking in Banin was prompted by a private entity with plans to transfer the property to that private entity as opposed to this case, where the Birnbaum property is being taken pursuant to mandates by the legislature and for a public purpose.

The court in Banin recognized this distinction:

[T]he court recognizes a body of case law which stands for the proposition that where a public agency acquires property by eminent domain it may thereafter put that property to a public use other than that for which it was initially acquired. Such cases can and should be distinguished from those situations where the public agency acquires the property for the purposes of conveying it to a private developer. In the former case the public agency is making the decision and still committing the property to a public use. In the latter situation, absent appropriate restrictions in the agreement between the public agency and the private developer, there are no assurances that the public interest will be protected.

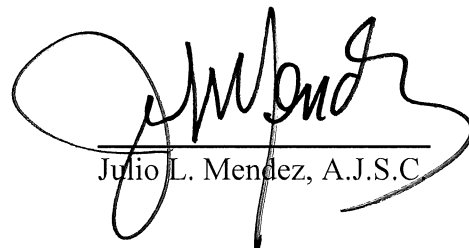
[ Id. 358-359. ]

In Banin, the court dismissed the condemnation cases having concluded that the “primary interest served...is a private rather than a public one and as such the actions cannot be justified under the law.” Id. 359. Unlike the taking in Banin, there is no plan or contract to transfer the Birnbaum property to a private entity for a private benefit. This taking is part of a larger legislative plan that created the Atlantic City Tourism District. The Court holds that the Tourism District Master Plan and South Inlet Mixed Use Development Project provide more than adequate assurances that the property will be used for the public purpose of promoting tourism and assisting the ailing gaming industry.

### CONCLUSION

The Court recognizes the Birnbaums connection to the property and their fight to prevent the taking of the property by eminent domain. However, the Court has analyzed the applicable statutes, legislative history, and case law and finds that the CRDA has acted pursuant to the authority granted to it and in furtherance of the objectives set forth by the Legislature when the Atlantic City Tourism District Act was adopted.

In this opinion the Court has carefully analyzed the arguments of the Birnbaums as well as the CRDA. For all of the reasons outlined in this opinion, the Court denies the application by Birnbaum to dismiss the complaint and grants a judgment in favor of the CRDA establishing the CRDA as duly authorized to exercise the power of eminent domain to take the Birnbaum property. The Court will not sign the declaration of taking for 45 days.



Julio L. Mendez, A.J.S.C.