

FILED

AUG 05 2016

PREPARED BY THE COURT

**ATLANTIC COUNTY
LAW DIVISION**

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 SEWAGE CO.; and THE
CITY OF ATLANTIC CITY.

Defendants.

SUPERIOR COURT OF NEW JERSEY
ATLANTIC COUNTY
LAW DIVISION

DOCKET NO.: ATL-L-589-14

ORDER

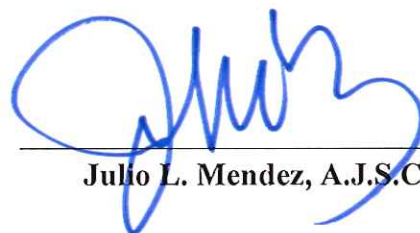
DATED: August 5, 2016

The Court upon having read the papers in this matter, having considered the arguments of PLAINTIFF, Casino Reinvestment Development Authority, represented by Stuart M. Lederman, Esq., and Rudy S. Randazzo, Esq., and DEFENDANT, Charles Birnbaum and Lucinda Birnbaum et al., represented by Robert McNamara, Esq., Dan Alban, Esq., and Peter Dickson, Esq., sets forth its findings of fact and conclusions of law upon the record, which are incorporated herein and upon other good cause shown;

IT IS on this 2nd day of AUGUST 2016, ORDERED:

1. For the reasons stated in the Court's opinion, the Court holds that the CRDA's condemnation of Defendant's property is a manifest abuse of the eminent domain power, and exceeds the CRDA's statutory condemnation authority;
2. The CRDA's condemnation is hereby denied.
3. This is a final order.

DATED: August 5, 2016



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

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AUTHORITY, a public corporate body of the
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SUPERIOR COURT OF NEW JERSEY
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LAW DIVISION

DOCKET NO.: ATL-L-589-14

Opinion

DATED: August 5, 2016

Decided: August 5, 2016

Stuart M. Lederman, Esq., and Rudy S. Randazzo, Esq. for Plaintiff Casino Reinvestment Development Authority.

Robert McNamara, Esq., Dan Alban, Esq., and Peter Dickson, Esq. for Defendant Charles Birnbaum and Lucinda Birnbaum et al.

Mendez, A.J.S.C.

In this condemnation action, Plaintiff CASINO REINVESTMENT DEVELOPMENT AUTHORITY, a public corporate body of the State of New Jersey (hereinafter the "CRDA"), filed a 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., (hereinafter the "Birnbaums") pursuant to N.J.S.A. 5:12-153 et seq. and N.J.S.A. 20:3-1, et seq. The Birnbaums filed opposition to the taking and sought to dismiss the complaint. On November 17, 2014, the Court initially granted CRDA's request to take the Birnbaums' property. Thereafter, the Birnbaums' filed a Motion for Reconsideration. On August 19, 2015, the Court granted the Birnbaums' Motion for Reconsideration in part and scheduled an evidentiary hearing

for the CRDA to provide reasonable assurances to justify the taking of the Birnbaums' property, particularly in light of Atlantic City's unprecedented financial crisis. The Court conducted a hearing on April 26, 2016. Thereafter, On May 27, 2016, Governor Christie signed into law S-1711/A-2569 the "Municipal Stabilization and Recovery Act," and S-1715/A-2570 the "Casino Property Tax Stabilization Act." The parties submitted supplemental briefs on the new laws' effects on the CRDA's ability to implement the Project.

For the reasons stated in this opinion, the Court holds that that CRDA has not provided reasonable assurances to justify the taking of the Birnbaums' property. The Court finds that based on the current unprecedented financial crisis in Atlantic City, the unique location of the Birnbaums' property, the history of unsuccessful economic development projects in this area of Atlantic City, the lack of any specific and viable plans of the use of this property, for all of these reasons this Court concludes that the CRDA's decision to condemn the Birnbaums' property is a manifest abuse of the eminent domain power and in this Court's opinion is not consistent with the statutory condemnation authority of the CRDA. The CRDA's condemnation is denied.

FACTUAL BACKGROUND

The Birnbaums' property is located at 311 Oriental Avenue¹ in Atlantic City, New Jersey and it is owned by Defendants, Charles and Lucinda Birnbaum. In 1969, Charles Birnbaum's parents purchased the property which is 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

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

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 (hereinafter the "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.

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. Unlike almost all other property owners within the south inlet area of Atlantic City who were for the most part very happy to sell their property to the CRDA for fair market value, the Birnbaums did not accept the offer from the CRDA and elected to challenge the CRDA's condemnation authority to take their property.

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 issues 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. On November 17, 2014, the Court issued a written decision and held that the CRDA was authorized to exercise the power of eminent domain for the taking of the Birnbaum property.

On November 24, 2014, the Birnbaums filed a Motion for Reconsideration arguing that due to Atlantic City's financial crisis, plans for Atlantic City are in flux and the projects requiring the Birnbaum property may not be implemented. After much reflection, particularly in light of the unprecedented financial crisis involving Atlantic City and the economic downturn, and upon a further review of all the facts and legal issues, the Court granted the motion for

reconsideration. The Court issued a written decision on August 19, 2015 and granted the Birnbaums' Motion for Reconsideration in part. The Court held that the CRDA is not authorized to acquire the Birnbaums' property until the CRDA provides the Court with reasonable assurances that the proposed use, justifying the taking of the Birnbaum property, will be implemented. The Court allowed 180 days for the CRDA to provide reasonable assurances that the project would be implemented. Thereafter, the CRDA filed a motion to renew the condemnation action against the Birnbaums' and the Court scheduled an evidentiary hearing on April 26, 2016. At the hearing the CRDA presented various witnesses including John Palmieri, executive director of the CRDA, Mary Rixey, the director of real estate and development for the CRDA, and Paul Weiss, the chief legal officer of the CRDA. Mr. Birnbaum provided testimony for the defense.

DISCUSSION AND ANALYSIS

"Eminent domain is the power of the State to take private property for public use. It is a right founded on the law of necessity which is inherent in sovereignty and essential to the existence of government [.]" State v. Lanza, 27 N.J. 516, 529 (1958). The State's power of eminent domain is subject to several constitutional limits: the property acquired must be taken for a public use, the State must pay just compensation in exchange for the property, and no person shall be deprived of his or her property without due process of law. See N.J. Const. art. I, ¶ 20. Even if those constitutional requirements are met, "the decision to condemn will not be enforced where there is a showing of "improper motives, bad faith, or some other consideration amounting to a manifest abuse of the power of eminent domain."" New Jersey Sports & Exposition Auth. v. Town of Kearny, 2016 N.J. Super. Unpub. LEXIS 1766, *19 (Law Div. July 27, 2016) (quoting In re E. Windsor Mun. Util. Auth v. Shapiro, 57 N.J. 168, 169, 270 A.2d 410

(1970), cert. denied, 401 U.S. 1010, 91 (1971)); see also City of Trenton v. Lenzner, 16 N.J. 465, 473 (1954), cert. denied, 348 U.S. 972, 75 (1955). In addition to the constitutional limitations on the power of eminent domain, the CRDA's condemnation power is authorized by statute, N.J.S.A. 5:12-182, and as such the condemnation power is limited to the authority provided by the statute.

In granting the motion for reconsideration the Court expressed its concern that the CRDA's plans to justify the taking of the Birnbaums' property will not be implemented in light of the unprecedented financial crisis surrounding Atlantic City. Specifically, the Court was concerned that the Birnbaums' property could sit vacant for many years before being put to a public use. The Birnbaums' property is unique; it sits in the penumbra of the former Revel and Showboat casinos, both now closed. It is also in close proximity to Tony Baloney's, one of the few remaining local establishments in this area. The economic downturn in Atlantic City has hit this area particularly hard. The Birnbaums' property is located in an area of Atlantic City that has been the site of many failed revitalization attempts. In the north east area of Atlantic City, several blocks of undeveloped land known as "Pauline's Prairie," have been waiting for many years for an economic redevelopment project to materialize. To this day large parcels of land in the area still remain vacant. Despite the good intentions of State agencies and a multitude of plans over the years, this area of the south inlet remains deserted. This history of failed projects for this area weighs heavily in the Court's analysis.

As stated in this Court's August 19, 2015 decision, "our Legislature did not intend, and the Constitution does not permit, property to be acquired and to remain idle indefinitely, without a reasonable assurance that the proposed plan to justify the taking will be implemented." Opinion p. 7-8. For those reasons, the Court required the CRDA to reevaluate the viability of the South

Inlet Mixed Use Development Project and to provide the Court with reasonable assurances that the Birnbaums' property, if condemned, would not sit idle. After carefully assessing the evidence presented at the hearing and for all the reasons in this opinion, this Court concludes that the CRDA, despite their good intentions, failed to provide the Court with reasonable assurances to justify the condemnation of the Birnbaums' property.

The CRDA describes their role as that of a "land aggregator and investment partner." The CRDA contends that under N.J.S.A. 5:12-182 they are statutorily authorized to "bank" land for a future project. The CRDA points out that they have nearly completed this function for the South Inlet Mixed Use Development Project. The CRDA has already purchased, or deposited funds to cover the necessary properties in the Project area. The CRDA has also deposited the estimated amount of just compensation for the Birnbaum property with the Court, and they have already incurred the majority of the administrative and professional costs. According to the CRDA, these costs constitute the bulk of the CRDA's financial commitment to assemble parcels for the Project. While the CRDA surely has the means to consummate the purchase of the Birnbaum property, the concern of this Court goes well beyond that. The Court is impressed with the description of the South Inlet Mixed Use Development Project, however, that is only an idea. An idea that in this Court's opinion based on the history of failed projects in this area and the financial crisis in Atlantic City and in the gaming industry is not likely to occur within the foreseeable future.

This Court disagrees with the CRDA's characterization of N.J.S.A. 5:12-182. It is well settled that the Legislature may delegate the eminent domain power to a government agency. Keyes Martin & Co. v. Dir., Div. of Purchase & Prop., Dep't of Treasury, 99 N.J. 244, 254 (1985) (citing Mt. Laurel Township V. Public Advocate of N.J., 83 N.J. 522, 532 (1980)).

Administrative agencies are creatures of statute that must comply with the substantive and procedural requirements of any applicable legislation. In re Closing of Jamesburg High Sch., 83 N.J. 540, 549 (1980) (citing Elizabeth Fed. Sav. & Loan Ass'n v. Howell, 24 N.J. 488, 499 (1957)). The Legislature may not vest such an agency with “unbridled or arbitrary power.” Keyes, 99 N.J. at 254 (quoting Ward v. Scott, 11 N.J. 117, 122 (1952)). An administrative agency’s discretion must be “hemmed in by standards sufficiently definitive to guide its exercise.” Id. N.J.S.A. 5:12-182 describes the condemnation authority granted to the CRDA as follows:

- 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, **including inflated land values resulting from speculation and intentional obstruction of a landowner or speculator to the acquisition of needed property in order to exact an unreasonable and prohibitive purchase price.**
- 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, ...
- 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.).

N.J.S.A. 5:12-182 (emphasis added). Contrary to the CRDA's assertion, N.J.S.A. 5:12-182 does not authorize the CRDA to bank land in the hopes that it will be used in a future undefined project. One of the key legislative concerns stated in N.J.S.A. 5:12-182 is to address "inflated land values resulting from speculation and intentional obstruction of a landowner or speculator to the acquisition of needed property in order to exact an unreasonable and prohibitive purchase price." N.J.S.A. 5:12-182(a). In this case, there is no evidence of any efforts on the part of Birnbaum to intentionally inflate the value of his property. Mr. Birnbaum simply wants to keep his family home which holds significant sentimental value to him. When Mr. Birnbaum first learned of the CRDA's plans to take his property he did everything he could to learn what the CRDA planned to do with his property. (Birnbaum Cert. ¶ 28). Mr. Birnbaum may have been more open to selling his property if the CRDA had a defined plan for the property. Also significant in the Court's analysis is that property values in Atlantic City are decreasing as evidenced by the great number of tax appeals filed, resulting in reduced tax assessments². This Court concludes, there is no basis to be concerned of inflated land values and speculation at this time, and as such there is no justification for the taking of the Birnbaum property pursuant to N.J.S.A. 5:12-182.

This Court is also of the opinion that the statutory condemnation authority granted to the CRDA is not without its limits. Indeed, the Legislature empowered the CRDA to acquire by eminent domain any real property in the City if that property is "**necessary to complete a project.**" N.J.S.A. 5:12-182(b), (c). Here, the Birnbaums' property is not necessary to complete a project because there is no viable project planned for the property at this point in time. Instead

² This Court is all too familiar with this issue. This Court had presided over several cases involving tax appeals and substantial reductions in the tax assessments.

the CRDA is banking land in the hopes of attracting a developer at some future point in time. This would be a different case if the CRDA had more specific plans to use the Birnbaums' property or if Atlantic City's economy was thriving. Based on the proofs presented to the Court by the CRDA, such a project does not exist at this time.

In this Court's view, the CRDA is not empowered to condemn a property only to have it sit idly, potentially for years on end, as they wait for right project to present itself. This has already happened in many of the surrounding properties that sit vacant waiting for a project to come forward. While well intentioned, the South Inlet Mixed Use Development Project is only a conceptual plan. The likelihood of that plan becoming reality within a reasonable time period based on the current financial crisis in Atlantic City is remote. If such a viable plan comes along, nothing prevents the CRDA from renewing its efforts to take the Birnbaum property if necessary.

In granting the Birnbaums' motion for reconsideration, the Court highlighted its concern that the Project would not be implemented because of the economic uncertainty surrounding Atlantic City. When the Court made its first decision one year ago Atlantic City was already in a dire financial condition, the same is true today. On May 27, 2016, Governor Christie signed into law S-1711/A-2569 the Atlantic City "Municipal Stabilization and Recovery Act," and S-1715/A-2570 the "Casino Property Tax Stabilization Act." With the passing of the Municipal Stabilization Act and the Casino Property Tax Stabilization Act, there is even more uncertainty surrounding the City's future and the CRDA's ability to make use of the Birnbaums' property.

The Casino Property Tax Stabilization Act diverts the investment-alternative tax away from the CRDA and reallocates it to Atlantic City itself. The Casino Property Tax Stabilization Act states in relevant part as follows:

Notwithstanding the provisions of section 3 of P.L.1984, c.218 (C.5:12-144.1) or any other law to the contrary, including subsection k. of section 5 of P.L.2011,

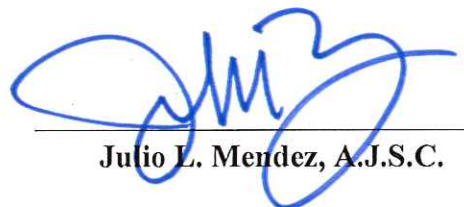
c.18 (C.5:12-219), the moneys received after the effective date of P.L.2016, c.5 (C.52:27BBBB-18 et al.), by the State Treasurer derived from the payment of the investment alternative tax in the amount specified in paragraph (2) of subsection a. of section 3 of P.L.1984, c.218 (C.5:12-144.1) and the investment alternative tax in the amount as specified in section 17 of P.L.2013, c.27 (C.5:12-95.19), except for any amount thereof pledged for the payment of bonds issued by the Casino Reinvestment Development Authority or otherwise contractually obligated by the authority prior to the effective date of P.L.2016, c.5 (C.52:27BBBB-18 et al.), or any bonds issued to refund such bonds, shall be allocated to Atlantic City for the purposes of paying debt service on bonds issued by Atlantic City prior to and after the effective date of P.L.2016, c.5 (C.52:27BBBB-18 et al.)...

N.J.S.A. 52:27BBBB-25. The Act removes a portion of the CRDA's available funding. The CRDA argues that the impact of the Act is minimal because the Project is fully funded, and the CRDA still has other sources of funding available to them. While it is true that the costs of the acquisition and demolition of the properties are fully funded, the Project may still require additional funds. John Palmieri, executive Director of the CRDA, explained that projects sometimes need to be incentivized with an investment from the CRDA. Even though the land aggregation aspect of the Project is fully funded, under the new law the CRDA will have less funds available to incentivize the Project if needed, thus making it more difficult to attract developers. While the CRDA contends that they have other sources of funding, any loss of funding during these uncertain economic times is significant. Likewise, the overall casino revenue is going down, which also impacts the available funds to incentivize projects by the CRDA. With everything that is going on in Atlantic City, the CRDA's plate is full. This Court also gives significant weight to the fact that even when Atlantic City was economically thriving, and the CRDA was fully funded, economic development in the south inlet area did not fully materialize as evidenced by the large vacant parcels of property in the area known as Pauline's Prairie.

The Municipal Stabilization and Recovery Act exacerbates the uncertainty underlying Atlantic City's future and whether the Birnbaums' property will be put to a public use. The Act requires Atlantic City to adopt a five-year recovery plan. That plan is then reviewed by the Commissioner of Community Affairs. The Commissioner has the discretion to reject Atlantic City's proposed plan. If that plan is rejected, then State officials will take over portions of Atlantic City's governance. If the CRDA's plans for the Birnbaums' property do not fit with the City's, or the State's, economic development plans, then those plans will not be implemented. This all adds up to great uncertainty surrounding Atlantic City, and at this time that uncertainty renders the implementation of plans for the south inlet area unlikely.

In Conclusion, this Court is of the opinion that to meet constitutional and statutory muster to justify the taking of the Birnbaum property, there must be a reasonable assurance that the Birnbaums' property will be put to some public use within a reasonable time period. While it is true that the land aggregation phase of the Project is fully funded, that fact does not ensure that the Birnbaums' property will be put to a public use within the next year or the next ten years. That uncertainty renders this taking unjustifiable in this Court's opinion. The CRDA has provided no assurance that if this condemnation is granted, the Birnbaums' property will not sit idle for years while the CRDA waits for an interested developer.

For all the aforementioned reasons, this Court concludes that the CRDA's condemnation of the Birnbaum property is a manifest abuse of discretion and also, for all of those reasons, the taking is not within the condemnation statutory authority granted to the CRDA by New Jersey statute. The CRDA's condemnation is hereby denied.



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

DATED: August 5, 2016