

**FILED**

MAR 3 1 2004

JUDGE JAMES P. HURLEY

BY THE COURT

SALVATORE QUAGLIARIELLO, et als.	: SUPERIOR COURT OF NEW JERSEY
Plaintiffs	: LAW DIVISION
vs.	: MIDDLESEX COUNTY
TOWNSHIP OF EDISON, et als.	:
Defendants	: DOCKET NO. L-2992-02
	: DECISION AND JUDGMENT
	:

This matter comes before this court by way of a Complaint in Lieu of Prerogative Writs. Plaintiffs, Salvatore Quagliariello, his wife Elvassa Quagliariello, and the Oak Tree Bus Service, Inc. (hereinafter "Plaintiffs"), seek, among other things, to have Ordinances 0.1296-2002 and 0.1296-2000, adopted by the Township of Edison (hereinafter the "Township"), declared invalid and unenforceable. Plaintiffs challenge the recommendation of the Township Planning Board (hereinafter the "Planning Board"), and the declaration by the Township of Edison that Plaintiffs' properties constitute an area in need of redevelopment. Plaintiffs are the owner of all the implicated properties, designated on the tax map of Edison Township as Block 556, Lots 2G3, 2J2, 2H2, 2E2, 2P, and 2E (hereinafter the "Subject Properties"). The Subject Properties are located in the Local-Business (hereinafter "L-B") District Zone.

From the Subject Properties, Plaintiffs operate a one bay gas station and bus operations for their school and charter bus company, a two bay body shop, a paint room, a three bay bus repair shop, and a rear addition to accommodate larger buses (the entire bus operations building is

hereinafter “the Building”). The Building is located on Lots 2G3, 2J2 and a portion of 2H2. The use is a permitted use and the location of the Building complies with the L-B Zone bulk regulations. The second floor of the Building contains an apartment that is presently leased, although prior to the current resident, it was last occupied five years ago.

Mr. Quagliariello’s brother operated the auto repair portion of the Building until his death in 1998. The auto repair portion of the Building is currently not in use, although it is still completely functional. Plaintiffs leased the area in 1999 for two years until the tenant bought his own property and relocated.

The gas station was last operated in December of 1998, when the State Department of Environmental Protection (hereinafter “DEP”) temporarily closed it because the older underground gas tanks leaked and contaminated the soil. Plaintiffs are conducting an on going environmental clean up and remediation for the soil contamination. Plaintiffs removed the underground storage tanks and installed seven monitoring wells but, to date, Plaintiffs have not received approval from the DEP to cease clean up and reopen the gas station. While there has been interest expressed in buying the gas station, the environmental remediation costs, in excess of \$251,000, render sale currently unfeasible.

Plaintiffs also operate a school and charter Bus Company from the Subject Properties, as well as a towing operation, on which they maintain property liability insurance and a valid fire safety permit for welding and cutting. Plaintiffs have contracts with the Edison and Plainfield Boards of Education for the transportation of school children. In 2002, Plaintiffs had twelve (12) school buses, including eight (8) full sized buses and four (4) vans, which are inspected and certified every six (6) months by the State of New Jersey. In 2002 Plaintiffs also had five (5) fully certified, inspected, and

licensed charter buses to conduct the charter bus operations. At the time of trial Plaintiffs had fifteen (15) part-time certified drivers, and four (4) other office employees, including a dispatcher. According to Mr. Quagliariello, associated with the bus operation, Plaintiffs on occasion, sell school buses that can no longer be used due to their age. Plaintiffs have a valid New Jersey used vehicle dealer license.

Plaintiffs also operate a towing business from the Subject Properties in which they utilize one (1) flatbed truck and two (2) tow trucks. The towed autos are stored in Lot 2J2.

Lot 2E2 is known as 519 Plainfield Road, and is improved with a single-family residence. Plaintiffs have owned this property as a rental property for thirty (30) years. The current tenant has been there for the past three (3) years and previous tenants continually occupied the house. The rear of Lot 2E2 abuts Lot 2J2 and is about eight (8) feet below lot 2J2 and separated by a retaining wall.

Lot 2P is known as 16 Marion Street, and is also improved with a single-family residence. Plaintiffs have owned this property as a rental property for twenty-eight (28) years. The present tenant has resided there since March 2003, and the prior tenant was there for fifteen (15) years. Plaintiffs installed a partial new roof and between tenancies Plaintiffs renovated the inside of 16 Marion Street.

Lot 2E is vacant and separated from the rest of the area by Beverly Street. Lot 2E is covered with stone and gravel and is used for parking buses. Plaintiffs also own Lot 2W1, which is adjacent to, and used in conjunction with, Lot 2E. Lot 2W1 is not part of the Subject Properties.

On September 12, 2001, the Township Council adopted Resolution R. 632-092001, authorizing the Planning Board to conduct a preliminary investigation, pursuant to *N.J.S.A.* 40A:12A-6, to determine whether the Subject Properties qualified as an area in need of

redevelopment. The Planning Board requested its planner, Thomas Sheehan, P.P., A.I.C.P., to prepare a preliminary investigation report. On January 14, 2002, the Planning Board considered Mr. Sheehan's recommendation. On February 20, 2002, the Planning Board held a public hearing, at which the Plaintiffs had an opportunity to be heard regarding Mr. Sheehan's Preliminary Investigation Report. At the close of the hearing, the Planning Board found that the Subject Properties constituted an area in need of redevelopment and recommended that the Township Council declare the Subject Properties an area in need of redevelopment.

On February 27, 2002 the Council adopted Resolution No. 147-022002, designating JSM at New Dover, LLC (hereinafter "JSM") as the redeveloper for the redevelopment of the Subject Properties, and Resolution No. 150 022002, authorizing the retention of McGuire & Associates to provide appraisal services for the Subject Properties. The Township subsequently adopted Ordinance No. 1295-2002, which ratified the Redevelopment Plan for the Oak Tree Bus Terminal Area and Ordinance No. 1296-2002, which authorized the Subject Properties to be acquired for redevelopment purposes.

Pursuant to the Local Redevelopment and Housing Law, *N.J.S.A.* 40A:12A-1, a municipality may take action to facilitate new construction and redevelopment of blighted lands within its borders. Before an area may be declared in need of redevelopment, the governing body of the municipality must, after investigation, notice and hearing, find at least one of the conditions set forth in *N.J.S.A.* 40A:12A-5. The pertinent conditions are as follows:

- (a) The generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living or working conditions;
- (b) The discontinuance of use of buildings previously used for commercial, manufacturing, or industrial purposes; the abandonment of such

buildings; or the same being allowed to fall into so great a state of disrepair as to be untenable;

- (c) . . .
- (d) Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community;
- (e) A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare. *N.J.S.A. 40A:12A-5*

The Township declared the Subject Properties an area in need of redevelopment based on a report from their planner, Mr. Sheehan. In his Preliminary Investigation Report, dated December 14, 2001, Mr. Sheehan determined: (a) that the bulk of the existing structures were not conducive to wholesome living or working conditions; (b) the deteriorating and fallow condition of the commercial structure and the former bus terminal facility rendered it untenable; (d) the subject properties have excessive lot coverage and a poor arrangement of obsolescent structures and site circulation that create an obsolete layout, creating a detriment to the safety, health, and welfare of the community; and (e) that the bulk of the site has been in a stagnant, unproductive condition for more than the minimum ten-year requirement, and the area suffers from a lack of proper utilization due to the obsolescence of the existing site infrastructure.

Essentially, Mr. Sheehan found that the existing structures were not conducive to wholesome living conditions because the property has an obsolete layout and was in a stagnant, unproductive condition for more than the minimum ten-year requirement. At trial however, the Township was unable to produce any evidence of tax liens or building, safety, or health code violations.

Interestingly, Mr. Sheehan did not testify at trial. Instead, the Township relied on the expert testimony of professional planner Robert D. Cotter, P.P., A.I.C.P., who conducted an independent study of the Subject Properties. Mr. Cotter visited the subject properties on a Sunday in April 2003, but only viewed the outside of the property. Mr. Cotter testified that under *N.J.S.A. 40A:12A-1*, criterion (a) does not apply to Lots 2E2 and 2P, but does apply to the residential unit above the bus garage because it is subjected to the emissions of diesel fumes, oils, and other fluids present on the site, thereby representing “an opportunity” for unwholesome living conditions. He further opined that criterion (b) applies to the defunct gas station because it is “currently unusable” while undergoing environmental clean up and criterion (d) applies to the garage structure because of deterioration in the form of cracking on the walls and damage to the gutters. He concluded that the layout of the site is obsolete by today’s standards because there was no evidence of a site drainage system, no curbing or sidewalks, and no specific traffic direction within the property, although there was no proof of traffic accidents, fall down injuries, or flooding. Finally, he testified that criterion (e) applies because of the failed gas station at the most prominent corner of the property and because there is no evidence of any significant investments in the Subject Properties, and there has been a decline in the number of employees, which is evidence of a stagnant and declining business.

At trial, Mr. Cotter stated that a redevelopment area may include properties that do not fulfill the statutory criteria for redevelopment if the inclusion of these properties is necessary for the successful implementation of a redevelopment plan. Mr. Cotter acknowledged that the two single-family dwellings (Lots 2P and 2E2) as well as the vacant property (Lot 2E), were not in need of redevelopment, but were nevertheless included in the Subject Properties. According to Mr. Cotter, it is beneficial to make the redevelopment area as large as possible. In fact, Mr. Cotter testified that if

he “were drawing the boundary lines [he] probably would have included more property on Marion” and would have “brought in the two properties on the corner.<sup>1</sup>” (4T31). Nevertheless, Mr. Cotter concluded the Subject Properties were in need of redevelopment chiefly because of the obsolete layout and the deleterious impact to the general health, safety and welfare resulting from the adverse traffic conditions on site.

Mr. Cotter’s findings and explanations are interesting in that he stated the two residential properties, and the vacant lot, are *not* in need of redevelopment, but their inclusion is reasonable because they are necessary for the larger project.<sup>2</sup> According to Mr. Cotter then, three (3) of the six (6) parcels of land, or fifty (50) percent, included in the Subject Properties are not actually in need of redevelopment. Additionally, a parcel also owned by Plaintiffs, Lot 2W1, was not included. More interesting is the fact that two other parcels, improved by single-family dwellings, adjacent to the Subject Properties and owned by individuals other than Plaintiffs, were left out of the redevelopment area. By not including the neighboring two parcels or Plaintiffs’ smaller parcel, the Township created an irregular shaped redevelopment area under single ownership. This gerrymandering alone is enough to give this court concern as to the Township’s motive.

In an action in lieu of prerogative writs challenging a determination that an area is in need of redevelopment, a trial court must decide whether the determination is “supported by substantial evidence.” *N.J.S.A.* 40A:12A-6b(5). However, because judicial review is limited to determining whether there existed substantial evidence to support a declaration that an area was in need of redevelopment, the decision of the governing body is afforded a presumption of validity. See *Hirth*

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<sup>1</sup> Mr. Cotter was referring to the adjoining property owned by individuals other than Plaintiffs.

<sup>2</sup> A parcel of land may be necessary for inclusion in a redevelopment scheme despite the fact that the property itself it is not actually in need of redevelopment. See *Forbes v. Township of South Orange*, 312 *N.J. Super.* 519 (App. Div. 1998).

*v. City of Hoboken*, 337 N.J. Super. 149 (App. Div. 2001); *Levin v. Township Comm. of Township of Bridgewater*, 57 N.J. 506 (1971). To set aside a governing body's declaration of redevelopment, a plaintiff must show that the determination was based on unsupported findings and that the action was arbitrary, capricious or contrary to law. *Spruce Manor Enterprises v. Borough of Bellmawr*, 315 N.J. Super. 286, 293 (Law. Div. 1998). It is not a court's function to determine if it would have concurred in the designation, but rather only to determine if the designation is supported by substantial evidence. *Forbes v. Board of Trustees of Township of South Orange Village*, 312 N.J. Super. 519, 532 (App. Div. 1998). If the "decision is supported by substantial evidence, the fact that the question is debatable does not justify substitution of the judicial judgment for that of the local legislators." *Lyons v. City of Camden*, 52 N.J. 89, 98 (1968). Arbitrary and capricious action means willful and unreasoned action in disregard of the circumstances. *Bayshore Sewerage Co. v. Department of Environmental Protection*, 122 N.J. Super. 184, 199 (Ch. Div. 1973). "Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." *Id.*

Generally, 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", and thus, "public use" is synonymous with "public benefit," "public advantage," or "public utility." *Township of West Orange v. 769 Associates*, 172 N.J. 564, 572-573. (quoting Julius L. Sackman, 2A *Nichols' The Law of Eminent Domain* § 7.02[2] (3d ed. rev.1990)). It is not necessary for the entire community to directly enjoy or utilize the condemned property for the taking to constitute a public use, and the fact that a private party may benefit from the taking does not render the taking private. *Id.* at 573; See *County of Ocean v. Stockhold*, 129 N.J. Super. 286, 289

(App. Div. 1974).

However, if there is evidence of improper motive or bad faith that prompted the exercise of condemnation power, a court may act to reverse the ordinance authorizing the acquisition. *Township of West Orange*, 172 N.J. at 577. When the exercise of eminent domain results in a substantial benefit to specific and identifiable private parties, “a court must inspect with heightened scrutiny a claim that the public interest is the predominate interest being advanced.” *Id.* (citing *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981)). In determining whether projects with substantial benefit to private parties are for a public purpose, the trial court must examine the “underlying purpose” of the condemning authority in proposing a project as well as the purpose of the project itself. *Id.* There are no set characteristics to determine whether a taking is for a private or public purpose; rather, each set of facts must be examined on a case-by-case basis. Some factors to consider when making such a determination are: (1) the history leading up to the declaration that the property is in need of redevelopment; (2) the intent and purpose of the acquisition of the property; (3) who is affected by the acquisition of the property; (4) is there a single owner affected by the proposed taking; (5) what is the size of the area determined to be in need of redevelopment; (6) is there proof of any health or building code violations on the property; and (7) is there evidence of abandonment of the property, such as tax or other liens on the property. While none are dispositive, these factors may help determine whether the Township had substantial evidence to support their declaration in need of redevelopment and whether the acquisition of the property was for a public, rather than private, purpose.

The issue here is whether the Township’s decision to declare the Subject Properties an area in need of redevelopment was arbitrary, capricious, or unreasonable. This court finds that it was, as the

Township failed to present substantial evidence to support their declaration of the Subject Properties as an area in need of redevelopment. The procedural background of this matter is somewhat convoluted and requires further explanation. According to testimony at the Township Council meetings, prior to the Township's decision regarding Plaintiffs' property, the Township issued permits to allow property, now known as the Oak Tree Pond property, to be developed by a private party to construct a Walgreen's Pharmacy. However, after intense public objection to the redevelopment of the Oak Tree Pond property, the Township looked elsewhere. It did not have to look far, as it found Plaintiffs' property diagonally across the street. The Township authorized the redevelopment of the Subject Properties. The Township then attempted to acquire, and eventually sell, the Subject Properties to JSM to construct a Walgreen's Pharmacy. When a declaration in need of redevelopment appears to be limited to a small area under single ownership, as it does here, courts must look closely to determine whether the declaration is for a private benefit instead of a public use.

The Township's decision to declare the Subject Properties an area in need of redevelopment amounts to a determination that the Subject Properties are obsolete in design, underutilized, and partially inactive. According to the Township, this is because: the gas station is inactive and undergoing environmental clean up; Plaintiffs have unsuccessfully attempted to sell the Subject Properties; the blacktop around the Building has pot holes; the side of the Building has cracks; there is drainage build-up in the gutters of the Building; there are two boarded-up windows in the Building; there are vehicles with "For Sale" signs parked on the Subject Properties; and the number of employees and the amount of business has decreased over the past few years.

As described in *Spruce Manor*, the Legislature did not intend to allow local governments to declare areas in need of redevelopment simply because design standards or zoning ordinances

change. See *Spruce Manor* 315 N.J. Super. at 297 (holding that while the City found the apartment complex did not meet today's standards, there was no basis on which to conclude the complex was overcrowded, and obsolescence does not amount to depreciation or wear and tear, but rather is the process of falling into disuse and relates to the usefulness and public acceptance of a facility). After careful examination, it is clear to this court that the Township's criticisms are superficial, and even taken as a whole, this court finds they do not amount to substantial evidence to support a declaration that the area is in need of redevelopment.

Proofs at trial demonstrated that the driveway and parking areas of the Subject Properties were last paved ten years ago. According to Plaintiffs, a pothole was intentionally left in an effort to slow cars that would frequently use the driveway as a short cut through traffic. Two windowpanes would often break when the garage door would close, so Plaintiffs replaced the glass with a wooden board. Over the past year, Plaintiffs re-grouted and re-painted the building and the signs and cleaned up the gutters. Moreover, Mr. Cotter conceded at trial that Plaintiffs never received a notice of a building code violation, notice of a violation under the Occupational Safety and Hazard Act, or any complaint concerning injuries on the Subject Properties. The Building also conforms to all applicable regulations under the Township's Uniform Fire Code. Additionally, Plaintiffs have always paid real estate taxes on all of the Subject Properties.

Because the gas station is undergoing an environmental clean up, it has been inactive since 1998. Plaintiffs expended over \$251,000 in an effort to complete the clean up and obtain approval from the DEP to continue operations. Plaintiffs also attempted to sell the gas station, but were prevented from doing so due to the high cost of the environmental clean up. This is an indicator that Plaintiffs did not intend to abandon the use of the gas station but rather have a substantial interest in

its improvement. Plaintiffs have attempted to sell not only the gas station but also the entire Building and bus business. Their intent is to sell the entire bus business and property “lock, stock, and barrel” so that Mr. Quagliariello could retire. (1T77). The fact that Plaintiffs were unsuccessful in their attempts to sell the property does not, in any way, demonstrate abandonment, deterioration, or unwholesome living or working conditions.

There have been buses with “For Sale” signs parked on the Subject Properties. Proofs at trial show that school buses may only be used for twelve (12) years and then must be replaced with a new vehicle. With respect to the buses with “For Sale” signs, Plaintiffs have a valid used vehicle dealer license and Plaintiffs occasionally sell school buses that can no longer be used for school bus purposes. Normally, Plaintiffs sell three to four buses a year, but because Mr. Quagliariello was looking to retire and wanted to sell the business, it follows that he would not be purchasing new buses to replace the old buses. It is also clear that the decline in the number of buses and employees, and the amount of business done by Plaintiffs, is due to Mr. Quagliariello’s desire to retire.

It is important to remember that it is not a court’s function to determine if it would have concurred in the Township’s designation, but rather to ensure that designation was not arbitrary, capricious, or unreasonable. This court finds that there is simply no basis on which anyone could conclude that redevelopment is necessary other than for a desire to construct a Walgreen’s Pharmacy.

There is absolutely no suggestion of Plaintiffs’ intent to abandon the Subject Properties or the business. To the contrary, Plaintiffs were operating a business on the Subject Properties that, among other things, transported children to and from school, which is an inherently beneficial use. See *Scholastic Bus Co., Inc. v. Zoning Board of Borough of Fair Lawn*, 326 N.J. Super. 49 (App. Div. 1999) (holding that a bus business for the transportation of school children, fulfilling the public

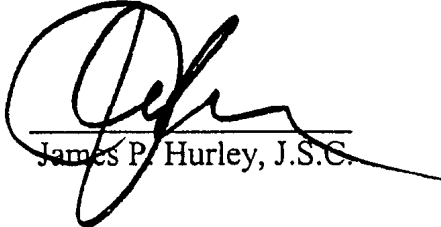
obligation to transport school children, is inherently beneficial). The totality of the Township's complaints essentially amount to a pothole in the pavement, two boarded-up windows, a few cracks, and a gutter that needed to be cleaned. The Subject Properties were kept in better condition than many people keep their own homes. The Subject Properties are certainly not deteriorated, nor are they violating any laws, regulations, or ordinances. This court finds that there is no substantial evidence to support a finding that the Subject Properties are an area in need of redevelopment.

The adoption of the Redevelopment Plan did not serve any legitimate public purpose and, in fact, has the effect of closing down a lawful, functioning business. If allowed, the Township's action would result in a public taking for a private purpose, namely, to build a Walgreen's Pharmacy. To satisfy the constitutional requirements, a taking need only be rationally related to a conceivable public purpose. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984). While redevelopment normally constitutes a legitimate public purpose, if the declaration in need of redevelopment is arbitrary, capricious or unreasonable, it is nothing more than a mechanism used to acquire private property for a private purpose. Because the Township is unable to demonstrate the public purpose for the taking, this court deems the taking of the Subject Properties as purely for private use and therefore unconstitutional. Accordingly, the Ordinances determining that Plaintiffs' properties constitute an area in need of redevelopment is set aside. It is therefore,

ORDERED and ADJUDGED on this 31 day of March, 2004 as follows:

1. Ordinance No. 0.1296-2002 authorizing the acquisition of Plaintiffs' property is hereby set aside and deemed null and void; and

2. Ordinance no. 0.1294-2002 authorizing the issuance of a bond to the extent that it applies to the acquisition of Plaintiffs' property is hereby set aside and deemed null and void; and
3. Ordinance No. 0.1295-2002 adopting the redevelopment plan is hereby set aside and deemed null and void; and
4. All resolutions adopted by the Township Council that relate to the Plaintiffs' property as an area in need of redevelopment are hereby set aside and deemed null and void; and
5. All resolutions of the Township Planning Board relating to Plaintiffs' property as an area in need of redevelopment are hereby set aside and deemed null and void; and
6. Plaintiffs' requests for costs is hereby granted; Plaintiffs' request for counsel fees is denied pursuant to R. 4:42-9.



James P. Hurley, J.S.C.