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LEGAL MEMORANDUM

To: Brian Tipton, Esq.

From: Jon Drill, Esq. and Katie Razin, Esq.

Date: September 17, 2018

Re: Whether the Affordable Housing Option B properties can qualify for redevelopment under the Local Redevelopment and Housing Law so as to allow for entry into a PILOT between the Township and the Warehouse Developers

Issue

The issue addressed in this memo is whether the properties included in Affordable Housing Option B (the warehousing development proposed by the Warehouse Developers represented by Florio, Petrucci) qualify for redevelopment and a redevelopment plan under N.J.S.A. 40A:12A-1 et seq., the Local Redevelopment and Housing Law (the "Redevelopment Law"), so as to allow for entry into a financial arrangement with the Township known as a payment in lieu of taxes ("PILOT").

The issue arises because the Warehouse Developers in their proposal set forth in the letter from Brian Tipton, Esq. to Jon Drill, Esq. dated September 12, 2018 (the "Tipton Letter") have included a PILOT as part of its development proposal. As noted in the memo to Jon Drill, Esq. from Seth Tipton, Esq. dated September 12, 2018 (the "Tipton Memo"), which is attached as exhibit B to the Tipton Letter, a PILOT is authorized under N.J.S.A. 40A:20-1 et seq., the Long Term Tax Exemption Law (the "Tax Exemption Law"), for projects subject to a redevelopment plan adopted by a municipality pursuant to the Redevelopment Law.

EXHIBIT A

Critically, the Township can legally enter into a PILOT with the Warehouse Developers under the Tax Exemption Law only if the properties at issue are subject to a redevelopment plan adopted by the Township pursuant to the Redevelopment Law. And, the properties cannot be made subject to a redevelopment plan unless the properties are first declared an area in need of redevelopment under the Redevelopment Law.

Brief Answer

As will be explained in detail below, it is our opinion that the properties included in Affordable Housing Option B cannot be deemed to be an area in need of redevelopment so cannot qualify for redevelopment and a redevelopment plan under the Redevelopment Law. As such, it is our further opinion that the Township cannot legally enter into a PILOT with the warehouse developers under the Tax Exemption Law.

Discussion

I

The discussion of the issue at hand must start with a summary of the relevant provisions of the Redevelopment Law.

The Redevelopment Law creates a process and the criteria for designation of an area in need of redevelopment. N.J.S.A. 40A:12A-5 provides that a delineated area may be determined to be in need of redevelopment if, after investigation, notice and hearing as provided in N.J.S.A. 40A:12A-6, the governing body of the municipality by resolution concludes that within the delineated area certain conditions are found to be present. As to the properties included in Affordable Housing Option B, the warehouse developers principally rely on subsections (c) and (e) of N.J.S.A. 40A:12A-5 in support of their argument that those properties can be deemed to be an area in need of redevelopment.¹ We disagree that those subsections support such a determination in this case. We agree that none of the other subsections set forth in N.J.S.A. 40A:12A-5 apply in this case.

The two statutory provisions which the Warehouse Developers principally rely on provide, in relevant part, as follows:

¹ The Warehouse Developers also argue that condition "h" is available for such a determination. In our opinion, subsection "h" does not apply to this case, and the argument that it does apply, at best, is without merit. The subsection (h) argument will be addressed at the end of this memo.

c. Land that is owned by the municipality, the county, a local housing authority, redevelopment agency or redevelopment entity, or unimproved vacant land that has remained so for a period of ten years prior to the adoption of the resolution, and that by reason of its location, remoteness, lack of means of access to developed sections or portions of the municipality, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital.

e. A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real properties therein or other similar conditions which impede land assemblage or discourage the undertaking of improvements, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare, which condition is presumed to be having a negative social or economic impact or otherwise being detrimental to the safety, health or morals, or welfare of the surrounding area of the community in general.

II

We will now discuss how the courts have treated and interpreted each of the above two sections of the N.J.S.A. 40A:12A-5 and how the courts have applied them to various factual scenarios.

Subsection "c"

N.J.S.A. 40A:12-5(c) has been interpreted rather strictly by the courts, which has been the case since as early as 1998. In Winters v. Twp. of Voorhees, 320 N.J. Super. 150 (Law Div. 1998), the Township interpreted the statute in a manner that allowed for two distinct categories of eligible land to be designated as areas in need of redevelopment. One category was land that is owned by public entities. The second category was unimproved vacant land that is not likely to be developed by means of private capital. The Township therefore concluded that ownership of a tract by the Township was all that was needed in order for the municipality to declare the site an area in need of redevelopment, asserting that the qualifying language, "and that by reason of its location, remoteness, lack of means of access to developed sections or portions of the municipality, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital" did not

qualify the phrase "Land that is owned by the municipality". Id. at 154.

The Winter court disagreed, highlighting that the Redevelopment Law was enacted to provide a mechanism to promote the development of land that is not likely to be improved by private effort. The court held that the statutory language mandates that in order to designate land owned by a municipality to be an area in need of redevelopment, there must be a finding that the tract, by reason of location, remoteness, lack of means of access to developed sections or portions of the municipality or topography or nature of its soil, is not likely to be developed through the instrumentality of private capital. Ownership of the tract by the municipality is not, standing alone, sufficient to support a redevelopment designation. Id. at 155-56.

Requiring substantial evidence showing that the land is not likely to be developed by instrumentality of private capital comports with the articulated legislative declaration of the underlying purpose for the enactment of the Redevelopment Law. Id. at 155. As such, the court found that there must be a finding of public ownership of land, plus a determination that there is substantial evidence that the land is not likely to be developed through the instrumentality of private capital, in order to declare a site a redevelopment area under N.J.S.A. 40A:12A-5(c). Id. at 157. Even where the land is not publicly owned, as is the case here, a substantial showing beyond mere vacancy for an extended period of time - i.e., that the property is unlikely to be developed through the instrumentality of private capital - would be required.

More recently, the New Jersey Supreme Court had held, as to all of the statutory subsections under the LRHL, that in order to support a determination of an area in need of redevelopment, "substantial evidence" must be provided. Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 372-373 (2007). In that regard, and as detailed further below, in reviewing redevelopment determinations, courts have been rather reluctant to uphold municipal determinations as to an area in need of redevelopment based on the criteria set forth in N.J.S.A. 40A:12A-5(c) and (e).

An example in terms of subsection "c" is City of Long Branch v. Anzalone, 2008 WL 3090052 (App. Div. 2008). The Long Branch court reviewed the City's determination that certain areas of Long Branch were areas in need of redevelopment pursuant to N.J.S.A. 40A:12A-5(a), (c), (d) and (e). The subsection (c) criterion was deemed satisfied by the City and the trial court based upon the vacancy of

15% of the land area for at least ten years, and an additional 9% that became vacant more recently. Id. at 24. The City's study concluded that this constituted evidence of growing "non-investment and dis-investment phenomena." Id. at 6.

The homeowners in the area appealed from the trial court's judgment in favor of the City. The Appellate Division considered whether the determination as to areas in need of redevelopment were supported by substantial evidence. Id. at 15-16. As to subsection (c), the trial court noted the City's study which found that the vacancy rate served as the basis for the City's determination pursuant to N.J.S.A. 40A:12A-5(c) that the designated area was unlikely to be developed by private capital. However, the Appellate Division held that more was needed for a determination as to an area in need under subsection (c), specifically that because of certain conditions the land is not likely to be developed through the instrumentality of private capital. Those conditions are "location, remoteness, lack of means of access to developed sections or portions of the municipality, or topography, or nature of the soil." Since no basis was provided to satisfy that criteria, the Appellate Division invalidated the designation and determined that further review was necessary at a plenary hearing. Id. at 24.

Subsection "e"

N.J.S.A. 40A:12-5(e) has also been interpreted rather strictly by the courts. In Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 348 (2007), the Borough classified Gallenthin's largely vacant wetland property as an area in need of redevelopment under subsection 5(e) because the property's unimproved condition rendered it "not fully productive." Id. The trial court and Appellate Division upheld Paulsboro's redevelopment designation. Id.

Concluding that the Legislature did not intend N.J.S.A. 40A:12A-5(e) to apply in circumstances where the sole basis for redevelopment is that the property is "not fully productive", the Supreme Court invalidated the Borough's redevelopment classification, holding that subsection "e" applies only to areas that, as a whole, are stagnant and unproductive because of issues of title, diversity of ownership, or other similar conditions. Indeed, the Court relied on the principles of statutory interpretation, "where general words follow specific words in a statutory enumeration, the general words are construed to embrace *only objects similar in nature* to those objects enumerated by the preceding." Consequently, the Court interpreted the phrase "or other conditions" not as a universal catch-all referring to any eventuality or scenario, but rather, referring to

circumstances of conditions of title or diverse ownership. Id. at 367.

The Gallenthin Court held that the property could not legally be designated as a redevelopment area on the basis that plaintiffs were not utilizing the property in a fully productive manner and that there existed portions of the property that could be more productive to the municipality because, those considerations, standing alone, were insufficient to support the designation of the property as "in need of development". Id. at 370-371. The Court noted that there was no evidence produced to establish that the broader redevelopment area suffered from "[a] growing lack or total lack of proper utilization" caused by "condition of the title ... of the real property therein." Id. To the contrary, the Court noted that the record demonstrated that plaintiffs owned their property with clear, quieted title. Id.

To repeat from above, the Supreme Court in Gallenthin held, as to all of the statutory subsections under the Redevelopment Law, that in order to support a determination of an area in need of redevelopment, "substantial evidence" must be provided. 191 N.J. at 372-373. In that regard, in reviewing redevelopment determinations, courts have been rather reluctant to uphold municipal determinations as to an area in need of redevelopment based on the criteria set forth in N.J.S.A. 40A:12A-5(c) and (e).

An example in terms of subsection "e" is City of Long Branch v. Anzalone, 2008 WL 3090052 (App. Div. 2008). As set forth above, the Long Branch court reviewed the City's determination that certain areas of Long Branch were areas in need of redevelopment pursuant to N.J.S.A. 40A:12A-5(a), (c), (d) and (e). As to subsection (e), the court found that same was not met because the basis of diversity of ownership suggested by the City was not substantiated. The study relied upon for the designation had focused on economic factors, which showed lower values and tax ratables than in the more affluent areas of the City. In other words, the property was deemed in need of redevelopment because it was "not fully productive." The court held that a determination that a property owner is not utilizing his or her property in a fully productive manner, standing alone, is not sufficient to meet this criterion under subsection e). Id. at 24 (citing Gallenthin, supra, at 370-72). More specifically, the phrase "or not fully productive" cannot justify a redevelopment designation because reliance on that phrase alone would render a part of the statute meaningless, *i.e.*, the Court in Gallenthin had deemed the specific condition of "stagnant" to be "the operative criterion" and

further the condition of a "growing lack or total lack of proper utilization" must be caused by one of the specific problems named in the preceding clause, which are "the condition of the title" and the "diverse ownership of the real property." Id. at 20.

III

We will now apply the law as set forth above to the facts of this case and explain the basis for our opinion that the Option B properties cannot legally meet the statutory criteria under subsection (c) or (e) to qualify as an area in need of redevelopment.

As to subsection (c), the properties are not municipally or publicly owned. And, while they are privately owned and are vacant and have remained so for some time, under the applicable case law, it must also be shown by substantial evidence that by reason of their location, remoteness, lack of means of access to developed sections or portions of the municipality, etc., the properties are unlikely to be developed through private capital. Despite the fact that the properties have remained undeveloped, it is not for lack of access or location. To the contrary, the properties have a good location, are situated along a major highway (I-78), and have good access to intersecting Route 173. Further, there are no prohibitory land conditions leading to inutility. Rather, the land is developable in that there are no significant environmental features or soil-related concerns which would otherwise inhibit construction. Finally, the properties are not remote, but rather usable plots that simply have not been developed to date. There is no substantial evidence to support that the Option B properties meet the subsection (c) criteria.

As to subsection (e), the basis for designation as an area in need of redevelopment must relate to stagnation based upon diversity of ownership or other conditions relative to the same. Quite simply, there are no issues of ownership or title affecting the Option B properties that have been brought to our attention. Further, the fact that the properties have remained undeveloped, "for sale", and/or have not been as economically productive to the owners as may be possible or desired is not alone a basis for designation. Indeed, the relevant question is not whether the properties are being used for the highest or best or most productive use, but whether the non-use of the property is directly tied to ownership or title matters affecting the development and resulting in stagnation of the property. Here, there is no question they are not. As such, there is not substantial evidence that the Option B properties meet the subsection (e) criteria.

IV

This section of the memo is our response to the Tipton Memo which, as set forth above, is included as exhibit B to the Tipton Letter. The Tipton Memo argues that the properties included in Affordable Housing Option B can qualify for redevelopment under the previously referenced subsections, (c) and (e), as well as subsection (h). We summarize the Tipton Memo arguments below and respond to each with the reasons we believe the arguments must fail.²

As to subsection (c), the Tipton Memo claims that the Option B properties are unimproved and have unique conditions, such as the unfinished status of the I-78 and Route 173 interchange and the fact that the Santini lot lacks sewer access. However, as stated above, the facts are that the Option B properties have good highway access. While completion of the cloverleaf interchange would be an added benefit, it is not a deterrent that has led to a lack of access or resulting vacancy for the zoned uses of the properties. Further, the lack of sewer access for a presently-undeveloped property is not a *per se* unique quality for a plot of land in Warren county. Many properties throughout the County lack sewer access until a plan and process is developed as to how to it will be accessed and sewer access obtained. Again, this is not a condition that has led to stagnation. In addition, and in contrast to Price v. City of Union, 2018 WL 027552 (App. Div. 2018), a case cited in the Tipton Memo where development approvals had been obtained and the property still remained fallow, no applications for development for the Option B properties have been submitted to the Township land use boards for more than 10 years. The facts and conditions presented do not constitute sufficient or substantial evidence under the Gallenthin standard.

Further, the case law cited in the Tipton Memo in support of a redevelopment designation under subsection (c) also fails to provide sufficient support. But for the Price case, which does not lend support because it is distinguishable, none of the other cases cited

² While the Tipton Memo argues that the Option B properties can qualify for redevelopment under subsections (c), (e) and (h), the Tipton Memo in footnote 3 states that the Township (it is actually the Land Use Board) would have to engage an expert to prepare a report on the need for redevelopment to support the redevelopment designation. The expert that was engaged to prepare a report on whether the Old Greenwich School is in an area in need of redevelopment (and who concluded that the Old Greenwich School is in an area in need of redevelopment) was Township and Land Use Board planning expert Beth McManus. We consulted with Ms. McManus as to her opinion on whether the Option B properties could be deemed to be in an area in need of redevelopment and she has advised us that she would not be able to so opine, essentially for the reasons set forth above in the within memo.

in the Tipton Memo sufficiently addresses sustaining a subsection (c) redevelopment designation.

For example, in Iron Mountain Information Management Inc. v. City of Newark, 405 N.J. Super. 599 (App. Div. 2009), cited in the Tipton Memo as a case which upheld a redevelopment determination, the focus of the court and issue at hand for review related to provision of notice of redevelopment actions to commercial tenants. The case was not decided on the basis of the validity of the redevelopment under any particular subsection of the Redevelopment Law. Thus, even though the municipal action in determining that an area was in need of redevelopment was affirmed, reliance on Iron Mountain for support of a designation under any particular subsection of N.J.S.A. 40A:12A-5 is misplaced. Iron Mountain provides no factual or legal support for a redevelopment designation under subsection (c).

Similarly, in Powerhouse Arts Dist. Neighborhood Ass'n v. City Council of City of Jersey City, 413 N.J. Super. 322, 336 (App. Div. 2010), cited in the Tipton Memo as a case which upheld a redevelopment designation, the focus was not on a designation of redevelopment based on the criteria set forth in N.J.S.A. 40A:12A-5. Rather, the principal issue before the court was the validity of the redevelopment ordinance before the City Council. In Powerhouse, the court explained that an amendment to a redevelopment plan is governed by the provisions of N.J.S.A. 40A:12A-7, rather than those of N.J.S.A. 40A:12A-5, so the City Council did not have the obligation to reevaluate any of the properties under the criteria enumerated in the latter section while it was adopting a redevelopment plan pursuant to the former section. And, the court made clear that only the ordinance adoption was at issue under the subject challenge. While the court briefly discussed the underlying redevelopment designation, it did so in the context of the addition of greater property to the plan and without analysis of particular statutory criteria to the property at issue. Rather, the court found that, since there was no indication as to what was "stale" about the original redevelopment area designation, the plaintiffs had failed to demonstrate why the lots no longer satisfied the statutory criteria to qualify as in need of redevelopment. Id. at 337. Powerhouse fails to provide support for why the Option B properties would qualify for a redevelopment designation under subsection (c).

Finally, the Tipton Memo cites Mifco, Inc. v. Twp. Comm. of Neptune, 2009 WL 668930 (App. Div. 2009) in support of its subsection (c) redevelopment designation argument, stating that the property there was designated based upon its non-conforming shape and heavy traffic flows on nearby streets. Id. at 3. What the Tipton Memo fails to mention is that in Mifco there was no subsection (c) finding

by the planning board. Rather, the designation was made under subsections (d), (e) and (h). The Appellate Division ultimately concluded that designation was appropriate under subsection (d). Again, the issue was not vacancy of land or conditions that led to a likelihood that the property would not be developed, and as such, the case similarly does support a claim for subsection (c) redevelopment designation.

As to subsection (e), the Tipton Memo argues that designation is appropriate due to the fact that the properties have been listed for sale on multiple occasions and have not sold. The failure to sell is simply not evidence of title or ownership conditions leading to impediments in land assemblage or which have discouraged the undertaking of improvements resulting in stagnation. The failure to be able to sell the Option B properties does not support a redevelopment designation under subsection (e).

Further, the case law cited in the Tipton Memo in support of a redevelopment designation under subsection (e) also fails to provide sufficient support.

For example, as noted above, in Iron Mountain Information Management Inc. v. City of Newark, 405 N.J. Super. 599 (App. Div. 2009), cited in the Tipton Memo as a case which upheld a redevelopment determination, the focus of the court and issue at hand for review related to provision of notice of redevelopment actions to commercial tenants. The case was not decided on the basis of the validity of the redevelopment under any particular subsection of the Redevelopment Law. Thus, even though the municipal action in determining that an area was in need of redevelopment was affirmed, reliance on Iron Mountain for support of a designation under any particular subsection of N.J.S.A. 40A:12A-5 is misplaced. Iron Mountain provides no factual or legal support for a redevelopment designation under subsection (e).

Similarly, in 62-64 Main St., L.L.C. v. Mayor & Council of City of Hackensack, 221 N.J. 129 (2015), a case cited in the Tipton Memo in support of a redevelopment designation under subsection (e), the New Jersey Supreme Court held that the redevelopment designations at issue fell under N.J.S.A. 40A:12A-5(a), (b), and (d). There was no discussion or review of redevelopment designation under subsection (e).

We add that it is notable that the Mifco court found, supra. at 2, that the designation there was not supported under subsection (e), since the trial judge had concluded that the subsection (e) criteria

had not been met because the planning board relied upon an interpretation of subsection (e) struck down by the Supreme Court in Gallenthin. The Tipton Memo fails to mention this.

The final point raised in the Tipton Memo suggests that a redevelopment designation is justified under subsection (h). That subsection provides that the designation of the delineated area "is consistent with smart growth planning principles adopted pursuant to law or regulation." N.J.S.A. 40A:12A-5(h). Critically, however, the Tipton Memo cites to no particular smart growth planning principle adopted pursuant to law or regulation. The subsection (h) argument is, at best, without merit. Quite simply, a redevelopment designation in this case is not available under subsection (h). For purposes of completeness, however, we will address the specifics of the Tipton Memo's argument in this regard.

The Tipton Memo argues that the applicable criteria under subsection (h) is met by alleging that the Township is exploring the concept of rezoning the subject corridor to permit light industrial uses. First, even if that were accurate (and it is not accurate because the Land Use Board is not considering amending the Master Plan to provide for that - the only thing occurring presently is that the Township is exploring with the Warehouse Developers the concept of warehouse development in exchange for the Warehouse Developers constructing and owning 100% of the Township's affordable housing obligation), the Tipton Memo fails to note what "particular smart growth planning principle adopted pursuant to law or regulation" that would be consistent with. Without that, any contemplated re-zoning does not meet the criteria under subsection (h) as a matter of law. Second, a rezoning to allow warehouse use or, for that matter, light industrial use, can proceed without the Option B properties having to be determined to be an area in need of redevelopment. The Municipal Land Use Law, under which the rezoning process would occur, does not require redevelopment. See, N.J.S.A. 40:55D-1 et seq.

Finally, the Tipton Memo argues that consistency with the Township Master Plan would meet the criterion of subsection (h). Not only is this false as a matter of law (as subsection (h) requires the designation of an area as in need of redevelopment to be consistent with "particular smart growth planning principle adopted pursuant to law or regulation," and not the Township Master Plan), but the proposed development of the Option B properties for warehousing is currently inconsistent with the existing Township Master Plan. While the Tipton Memo correctly notes that the RO (Research Office) zone (in which the Dowel and Voorhees properties are situated) promotes

the development of commercial uses, the Township Master Plan states that, as to the RO zone, warehouses are only permitted when provided in connection and clearly subordinate to (i.e. not more than 20% of) a permitted use in the zone and further provided that no outside storage of vehicles is provided. As such, the precise warehousing use proposed for the Option B properties is inconsistent with the Township Master Plan. In fact, it is for this very reason that the Warehouse Developers have made their Master Plan review request. If the Warehouse Developers truly believed that their proposal was consistent with the Master Plan, they would have made a re-zoning request and not a Master Plan review request.

For all of the foregoing reasons, there is no basis for a redevelopment designation of the Option B properties under subsection (h).

Conclusion

As explained in detail above, it is our opinion that the properties included in Affordable Housing Option B cannot be deemed to be an area in need of redevelopment so cannot qualify for redevelopment and a redevelopment plan under the Redevelopment Law. As such, it is our further opinion that the Township cannot legally enter into a PILOT with the warehouse developers under the Tax Exemption Law.