

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-5825-06T2

DUTCH NECK LAND COMPANY, LLC,  
and COLUMBIA CONTAINER SERVICES,  
LLC,  
Plaintiffs-Appellants,

v.

CITY OF NEWARK; MUNICIPAL COUNCIL  
OF THE CITY OF NEWARK; THE CENTRAL  
PLANNING BOARD OF THE CITY OF  
NEWARK; and MORRIS DOREMUS AVENUE  
ASSOCIATES, LLC,

Defendants-Respondents.

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Argued April 28, 2008 - Decided May 14, 2008

Before Judges Lintner, Sabatino and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-8232-06.

Edward F. McTiernan argued the cause for appellants (Gibbons P.C., attorneys; Mr. McTiernan and Jason R. Tuvel, on the briefs).

Victor A. Afanador and Steven J. Tripp argued the cause for respondents (Lite, DePalma, Greenberg & Rivas, LLC, attorneys for respondents City of Newark, Municipal Council of the City of Newark, and Central Planning Board of the City of Newark; Wilentz, Goldman & Spitzer P.A., attorneys for respondent Morris Doremus Avenue Associates, LLC; Mr. Afanador, Mr. Tripp,

and Anne S. Babineau, of counsel; Jamie M. Bennett, Mr. Tripp and Ms. Babineau, on the joint brief).

PER CURIAM

Plaintiffs, Dutch Neck Land Company, LLC ("Dutch Neck") and Columbia Container Services, LLC ("Columbia Container"), are the respective owner and lessee of nearly seven acres of commercial property in the City of Newark ("the City"). Plaintiffs filed this action in lieu of prerogative writs, upon learning that the City had adopted an ordinance in December 2005 amending its 1964 Redevelopment Plan so as to slate plaintiffs' property for acquisition. Before discovery, the Law Division dismissed plaintiffs' action with prejudice, and plaintiffs thereafter appealed.

We vacate the dismissal order and reinstate this case in the Law Division for reconsideration in light of supervening case law. Such a remand will also enable the parties and the trial court to explore, this time with the benefit of discovery, various claimed irregularities, documentation gaps, and other issues that fairly implicate the validity of the Plan amendment.

I.

The pertinent history of this matter dates back to at least July 24, 1963, when the City's Municipal Council ("the Council")

adopted a resolution<sup>1</sup> directing the City's Central Planning Board ("the Planning Board") to investigate whether certain areas in the City qualified as "blighted areas."<sup>2</sup> After the Planning Board presumably conducted the requested hearing and made findings of blight and associated recommendations, the Council adopted a corresponding resolution on November 6, 1963.<sup>3</sup> That resolution designated as "blighted" an area generally bounded by the Passaic River on the north, Doremus Avenue and Newark Bay on the east, the Lehigh Valley Railroad Line and Port Street on the south, and the Passaic Branch of the New York Bay Railroad on the west.

Seven months later, on June 18, 1964, the Council passed a resolution adopting a redevelopment plan ("the Plan") identified as the "NJR-121 Industrial River Urban Renewal Plan." The Plan was generated in April 1964 by the City's Housing Authority.

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<sup>1</sup> A copy of that Council resolution from 1963 is not contained in the record, but it is cross-referenced in a January 19, 2005 Council resolution.

<sup>2</sup> We shall use in this opinion the terms "blighted area" and "area in need of redevelopment" interchangeably. See Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 360-63 (2007).

<sup>3</sup> The record does not contain the 1963 Planning Board resolution recommending a blight designation, assuming there was one, nor the 1963 Council resolution adopting that designation.

The Plan apparently<sup>4</sup> was based upon the legal authority of the former statutes that preceded the enactment in 1992 of the Local Redevelopment and Housing Law ("LRHL"), N.J.S.A. 40A:12A-1 to -49.<sup>5</sup> The corresponding land maps that the Plan cross-referenced covered a large portion<sup>6</sup> of the City's area. Some of the properties within the area had residential uses in 1964, but the majority appear to have been industrial or other commercial uses.

Among other things, the 1964 Plan declared that "[t]he major part of the properties in the project area will be acquired for clearance and redevelopment." However, "[t]he exceptions [to acquisition] are properties whose improvements

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<sup>4</sup> As we will discuss more in Part II, infra, because the Law Division's ruling arose out of defendants' motion to dismiss initially filed pursuant to Rule 4:6-2(e), the record before us is incomplete, lacking the full relevant chronology and the particulars of the City's redevelopment efforts that led to the present litigation.

<sup>5</sup> We cannot tell from the present record whether the Plan was specifically authorized by the former Blighted Areas Act, N.J.S.A. 40:55D-21.1(e) (repealed 1992 and superseded by the LRHL); the 1946 Urban Redevelopment Law, L. 1946, c. 52 (repealed 1992); the 1944 Redevelopment Companies Law, L. 1944, c. 169 (repealed 1992); or some combination of those statutes. The Plan document from 1964 simply recites that "[t]he Urban Renewal Plan also constitutes the Redevelopment Plan under the provisions of applicable State statutes," without identifying those statutes.

<sup>6</sup> At oral argument before us, plaintiffs' counsel represented that the entire Plan, as amended, presently covers nearly one-third of the City's total land.

are substantial and in good condition or conservable and their use[s] compatible with the uses proposed by this Plan as shown [on the accompanying maps]." The Plan contemplated that certain portions of the redevelopment area would be used for public and semi-public purposes, and that the remainder of the area would be zoned for industrial uses. Related commercial uses were also allowed in the industrial areas. The Plan also specified various zoning requirements for building heights, lot coverage, setbacks, off-street parking, off-street loading, landscaping, lighting, storage, density, flood plain control, and easements.

With respect to the determination of blight, the Plan stated:

Certain properties in the project have been preliminarily judged as being subject to upgrading to standard condition through the accomplishment of a backlog of normal maintenance, while certain others have been judged as deteriorated and substandard. Further investigation may bring a decision that rehabilitation action would be more appropriate in certain cases.

The Plan also declared that "[t]he elimination of substandard structures will be accomplished by slum clearance and redevelopment." Additionally, it stated that "[t]he spread of slums and blight will be checked by the renewal of the [p]roject [a]rea and a good industrial area will result from it."

The parcels classified in 1964 as "to be acquired" were identified on a land acquisition map associated with the Plan. The Plan stated that properties in the "not to be acquired" category could be reclassified for acquisition in the future, if their owners did not comply with specified criteria and restrictions. In particular:

If the owners of such "not to be acquired" property are unable or unwilling to comply or conform with the regulations, controls or restrictions applicable to each such parcel, the Housing Authority of [the City], in order to achieve the objectives of [the Plan] reserves the right to acquire any such non-conforming or non-complying "not to be acquired" property. Upon acquisition of such property the Housing Authority . . . may, at its option, clear such property for redevelopment or may dispose of such property without demolition of any existing structures or improvements but expressly subject to the pertinent and appropriate provisions, regulations, controls and restrictions of the Plan.

Reciprocally, the Plan provided that property initially identified as "to be acquired" may be reclassified as "not to be acquired" where either (1) the property owner desired "to clear and redevelop or rehabilitate the property to acceptable condition," or (2) the property is in "standard condition," the use planned for it is "compatible" with the Plan, and the Housing Authority is satisfied that not acquiring the property would be "inducive [sic] to the implementation" of the Plan. An

exhibit attached to the Plan set forth minimum rehabilitation standards to guide such rehabilitation work.

The original Plan contained a sunset provision, specifying that "as it may be amended from time to time, [the Plan] shall be in effect for a period of forty (40) years from the date of its approval by the [Council]." Since the Plan was approved by the Council on June 18, 1964, this forty-year period seemingly would have expired on June 18, 2004.<sup>7</sup> The record does not indicate whether a forty-year sunset provision was similarly contained in the City's original blight designation for the redevelopment area.

Section F of the 1964 Plan provided that it may be amended periodically, "upon compliance with the requirements of all applicable laws, by the [Council], upon its own initiative or upon the recommendation of the Housing Authority or the . . . Planning Board." Such amendments require the written consent of

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<sup>7</sup> The expiration of the forty-year sunset is unclear from the present record. A report from the planner retained by the City, Schoor DePalma, Inc. ("Schoor DePalma"), states, to the contrary, that the Plan is "effective for a period of thirty years from the date of its adoption and/or last amendment." At oral argument, the City's attorney indicated to us that one or more amendments to the original Plan may have revised the forty-year sunset provision, and inserted language that extends the life of the Plan beyond June 18, 2004 to at least the present time. Because the record provided to us does not contain the various interim Plan amendments since 1964, we cannot verify that point.

"the purchaser, or lessee, of any land in the Project Area, previously acquired in accordance with [the Plan], whose interests therein are materially affected by such amendment."<sup>8</sup>

Pursuant to that provision, the Plan has been periodically amended thirteen times between June 1964 and June 2005. According to a recital in the so-called "[Fourteenth] Amendment" to the Plan that is at the heart of this appeal, each time the Plan was amended, some kind of proceeding took place before the Planning Board, followed by a ratification of the amendment by the Council.<sup>9</sup> Plaintiffs allege that the City would routinely give advance written notice of such a proposed amendment, individually, to any owners whose properties were going to be reclassified as property to be acquired.<sup>10</sup>

One of the large properties within the redevelopment area was a forty-six-acre portion that included a tar manufacturing

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<sup>8</sup> Plaintiffs do not appear to contend, at least at present, that they are covered by this proviso.

<sup>9</sup> The recital states that the Council approved the first Plan amendment on December 1, 1965, the second on November 22, 1966, the third on April 16, 1969, the fourth on March 21, 1973, the fifth on February 18, 1976, the sixth on December 21, 1977, the seventh on April 1, 1981, the eighth on August 6, 1986, the ninth and tenth on September 16, 1987, the eleventh on January 23, 1991, the twelfth on September 16, 1998, and the thirteenth on September 21, 2005.

<sup>10</sup> This is a disputed issue that was not resolved in the proceedings before the Law Division.

facility. Between 1988 and 1994, that tar manufacturing facility was demolished. Thereafter, the forty-six acres were divided into three commercial use parcels: a 37.67-acre tract that Columbia Container continues to use as a storage facility, a 6.66-acre tract used by Maher Truck Terminal ("Maher"), and a small 1.66-acre salvage yard used for commercial vehicles.

The specific property at issue in this litigation is the 6.66-acre tract, which is identified on the City's tax maps as Block 5016, Lots 4 and 5. For many years, the property has been used in the transportation business for the operation of what is described in the complaint as an "off dock empty container terminal." As we understand it, the premises store empty containers that are used in shipping through the Port of New York and New Jersey. The terminal is operated by Maher, a marine transportation company. Maher, which is not a party to this litigation, allegedly is a profitable, active enterprise that employs twenty workers at the site.

Although the history of title to the property is not completely provided in the record, it appears that Columbia Container entered into a contract on September 29, 2005 to acquire the property from an entity identified as 295 Doremus

Urban Renewal Associates, L.P. ("295 Doremus").<sup>11</sup> On February 17, 2006, Columbia Container assigned its purchase rights to Dutch Neck. On that same date, 295 Doremus deeded the property to Dutch Neck.<sup>12</sup> At present, Dutch Neck leases the property to Columbia Container which, in turn, subleases it to Maher.

It is undisputed that the property at issue in this appeal is physically situated within the project area delineated in the 1963 blight designation and the 1964 Plan. The parties also agree that the subject property was not classified as land "to be acquired" in the 1964 Plan. It is undisputed that the not-for-acquisition status of the subject property was not changed in the amendments to the Plan prior to the Fourteenth Amendment.

The most recent municipal actions, which sparked this litigation, occurred in 2005. On January 19, 2005, the Council passed a resolution authorizing the Planning Board to conduct a new investigation on whether the redevelopment study area "continue[d] to meet the criteria of an [a]rea [i]n [n]eed [o]f [r]edevelopment." The resolution targeted the subject property

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<sup>11</sup> The subject properties are situated next to what is commonly known as 295 Doremus Avenue, Newark, shown on the tax map as Block 5060.01, Lot 130.02. This lot, which is not designated for redevelopment, was included in the sale to Dutch Neck in February 2006, and is also utilized by Maher as a sub-lessee.

<sup>12</sup> The consideration paid for these transactions is not reflected in the record; nor is there any indication of the market value of the property.

(Block 5016, Lots 4 and 5), along with two other parcels in Block 5016 (Lots 20 and 30).<sup>13</sup>

The January 2005 resolution specifically directed that the Planning Board "shall conduct a public hearing, after giving due notice of the . . . proposed area and the date of the hearing to any persons who are interested in or would be affected by a determination that the area delineated in the notice is a redevelopment area." Additionally, the Council instructed the Planning Board to consider at the meeting "[a]ll objections" to a determination that the properties remain blighted, and that such objections were to be "made part of the public record." Following the hearing, the Planning Board was to make a specific recommendation to the Council as to whether "all or some of the [listed] properties should continue" to be classified as in need of redevelopment, and to amend the existing Redevelopment Plan accordingly.

In response to the Council's January resolution, the Planning Board commissioned the Schoor DePalma firm to conduct the requested investigation. David G. Roberts, a licensed planner with Schoor DePalma, authored the resulting study.

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<sup>13</sup> The record does not indicate that any litigation arose concerning the redevelopment of Lots 20 and 30.

Meanwhile, on September 21, 2005, the Council amended the Plan for a thirteenth time. Our record contains no information about the content of that thirteenth amendment or its relationship, if any, to the property at issue in this litigation. Eight days later, on September 29, Columbia Container obtained the rights to purchase the property.

Before the Schoor DePalma report was completed, the Council passed a resolution on October 5, 2005, rescinding the January 2005 resolution that had authorized the Planning Board's new investigation. In rescinding its prior action, the Council noted that the boundaries of the redevelopment area already included the subject parcels, thereby allegedly making it unnecessary for the Planning Board to conduct a new investigation. In essence, the City contends that because the subject property had already been declared blighted in 1963, there was no legal reason for the Planning Board to re-examine that finding in 2005.

At or about the same time,<sup>14</sup> the City's Housing Authority transmitted a written request to the Planning Board, asking that it convene a public hearing to consider a Fourteenth Amendment to the Plan. The Planning Board scheduled the hearing, as

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<sup>14</sup> The contents and date of the Housing Authority's communication to the Planning Board are not documented in the record.

requested, for October 17, 2005. In the meantime, on October 13, Schoor DePalma issued a written report, concluding, among other things, that the subject property and the two other identified parcels in Block 5016 remain "an area in need of redevelopment" under the LRHL's criteria at N.J.S.A. 40A:12A-5(d) and (e). The report recommended that "these underutilized properties be acquired in order to facilitate the implementation of the [Plan]."

The City contends that public notice of the Planning Board's October 17, 2005 hearing was duly advertised in The Star Ledger on September 30, 2005, and again on October 7, 2005.<sup>15</sup> Regardless of what appeared in the newspaper, it is undisputed

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<sup>15</sup> The actual contents and legal sufficiency of those notices are not clear from the present record. Significantly, the September 30 notice pre-dated the Council's October 5 resolution rescinding the Council's earlier January 2005 resolution directing the Planning Board to hold a public hearing on whether the properties remain blighted. We therefore assume, but are unable to verify, that the September 30 public notice stated that the upcoming Planning Board hearing was to address the underlying blight designation, and not just an amendment to the Plan. The October 7 public notice post-dated the October 5 resolution changing the nature of the Planning Board's upcoming hearing. We do not know what the October 7 notice said, or whether it differed from the September 30 notice. The partial record supplied to us raises substantial questions about whether the details advertised in the September 30 public notice fairly corresponded to the hearing that the Planning Board actually conducted on October 17, and whether the interim public notice on October 7 cured any material discrepancies.

that plaintiffs did not receive individual written notice of the October 17 hearing.

The record does not contain a transcript of the October 17 hearing. The parties advise us that Roberts, as the City's expert who prepared and signed the October 13 report, testified at the hearing. In his report, Roberts opined that the overall Study Area remained in need of redevelopment because it (1) was "detrimental to the general welfare of the City" due to "the presence of deleterious land uses and faulty arrangements of uses and parcels of land"; (2) "exhibit[ed] a stagnant or not fully productive condition of land potentially useful and valuable to and serving the public health, safety and welfare;" and (3) was used in a manner that was "contrary to the objectives" of the 1964 Redevelopment Plan.

With respect to plaintiffs' 6.66 acres, Roberts reported that the parcel "is primarily utilized as a truck chassis depot<sup>16</sup> operated by Maher Truck Terminals." Roberts also noted that "[c]ontainer storage was also observed on this parcel, but not to the extent observed at [the nearby 37.7-acre parcel used by] Columbia Container Services." Roberts further commented that:

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<sup>16</sup> This description of the use varies from the description in plaintiffs' complaint as an "off dock empty container terminal." We cannot tell if that descriptive variation makes any legal difference.

Active trucking operations were observed in the parcel; however, the site itself can be characterized as being marginally improved. The tax assessor has assigned a "Vacant" classification to the larger of the two tax lots (Lot 4). Both lots together contain relatively little permanent improvements to the land (perimeter fencing and security booth). Out of a total assessed value of approximately \$1.41 million, the assessed improvements account for only \$2,100.

Roberts opined that such "outdoor storage uses represent[] a means of producing income with little or no investment to this land located in the City." He further stated:

While these uses fulfill the needs of the users of the properties, the uses involve marginal investment in site improvements, generate negligible employment opportunities and contribute little to the City's overall fiscal condition. The uses in the Study Area consume valuable land that could otherwise be available for much more productive uses as envisioned by the [Redevelopment Plan] and crucial to the long term development of the "Portway" around Newark Airport and the Port of Newark and Elizabeth.

Based on these findings, Roberts concluded that "[t]he private sector has brought about a land use pattern in the Study Area that does not promote the public purposes of the [Redevelopment] Plan." He added that "[t]he extensive nature of such an expanse of outdoor storage in conjunction with the presence of junkyard runs contrary to the objectives of the [Plan]." He further opined that those conditions "are not

likely to improve through private market forces alone." He also emphasized "the critical need for sites for distribution facilities to support the growth of Newark Airport and Port Newark & Elizabeth." Consequently, Roberts recommended that the properties be acquired by the City for redevelopment, in the form of a Fourteenth Amendment to the Plan.

After its October 17, 2005 hearing, the Planning Board adopted Roberts's recommendations and conveyed them to the Council. The record does not contain a Planning Board resolution, or any other independent documentation, showing the actual wording of the Planning Board's recommendation. However, the fact of the Board's recommendation is noted in a recital within the Council's ensuing ordinance.

Thereafter, on December 5, 2005, by a vote of six to zero with three abstentions, the Council adopted an ordinance adopting the recommended Fourteenth Amendment to the Plan. Our record does not contain copies of the public notices that may have been issued concerning the Council's proposed adoption of this ordinance, or the posted agenda for the December 5 Council meeting. It is undisputed that the City did not furnish plaintiffs individually with advance or post-enactment individualized notice of the ordinance.

Meanwhile, Columbia Container was negotiating with Dutch Neck about the transfer of the property. While those negotiations were pending, Columbia Container attempted to obtain information from the City about the property's redevelopment status.

Specifically, on November 29, 2005, Columbia Container served on the City a request under the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 to -13, for a copy of the Redevelopment Plan. The City did not answer that request. Then, on December 2, Columbia Container wrote to the City's zoning officer, requesting details about the zoning for the subject property. The zoning officer responded on December 5, coincidentally the same day that the Council adopted the Fourteenth Amendment. In his letter response, the zoning officer stated that the property was located within an industrial district, and that its existing use as a storage facility for shipping containers was a permitted use. He added, without further explanation, that the subject property was located "in an area covered by the 'Industrial River Redevelopment Plan.'" The letter made no mention, however, of the proposed Fourteenth Amendment to the Plan that would be enacted later that same day.

In March 2006, the City entered into a contract with Morris Doremus Avenue Associates, LLC ("Morris") to redevelop the study area, including the subject parcels. To this day, Morris continues to be the designated redeveloper.<sup>17</sup>

On October 5, 2006, Dutch Neck and Columbia Container filed an eleven-count complaint in lieu of prerogative writs in the Law Division against the City, the Council, the Planning Board and Morris. Among other things, plaintiffs' lawsuit seeks to invalidate both the December 2005 ordinance adopting the Fourteenth Amendment to the Plan, as well as the ensuing March 2006 redevelopment agreement between the City and Morris.

More specifically, Counts One and Five of the complaint assert that the blight designation for the property is unsupported by the evidence. Counts Two and Three allege that the City failed to comply with the LRHL's procedural requirements on designating property as blighted or in need of redevelopment. Count Four invokes equitable estoppel, based upon the City's failure to inform plaintiffs in a timely manner about the December 2005 ordinance. Count Six alleges an OPRA violation for the City's alleged failure to respond adequately to requests for information. Count Seven alleges that all

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<sup>17</sup> We were informed at oral argument that Morris has not yet brought condemnation proceedings concerning the subject property.

regulations relating to the redevelopment project are presumptively unreasonable, because the City has not reexamined its master plan every six years, as required by N.J.S.A. 40:55D-89. Counts Eight through Ten allege procedural errors that have denied plaintiffs equal protection and due process of law. Finally, Count Eleven alleges that the Newark-Morris redevelopment agreement is void.

In lieu of answering the complaint, Morris filed a motion to dismiss it under Rule 4:6-2(e) for failure to state claims upon which relief may be granted. Morris principally argued that the complaint was not viable because it was based on an incorrect contention that the Council's December 2005 ordinance had redesignated plaintiffs' property as blighted. Additionally, Morris argued that plaintiffs' challenge was untimely because it was filed more than forty-five days after the City had adopted the December 2005 ordinance.

The City defendants (the City itself, the Council and the Planning Board) joined in Morris's motion to dismiss. Given the pendency of defendants' pre-answer motions, it appears that discovery was not conducted, and that no further responses were tendered to Columbia Container's OPRA requests.

After hearing oral argument, the motion judge issued a bench ruling and a corresponding order on June 1, 2007. The

judge granted defendants' application, and dismissed plaintiffs' complaint with prejudice.

Among other things, the motion judge found that plaintiffs' prerogative writs action was time-barred under Rule 4:69-6(a) because plaintiffs had not brought suit within forty-five days of the adoption of the December 2005 ordinance. The judge noted that plaintiffs were too late in attempting to challenge, in effect, the underlying blight designation from 1963.<sup>18</sup> Accepting defendants' contention that the original blight designation was still valid, the judge ruled that there was no legal need for the City to redesignate the area for redevelopment. The judge reached that conclusion in spite of the Council's initial attempt to pursue such a redesignation in its January 2005 resolution, which it subsequently rescinded in October 2005. Given that premise, the judge reasoned that defendants had no statutory obligation under the LRHL to provide plaintiffs and other property owners in the redevelopment area with individualized notice of the Fourteenth Amendment to the Plan.

The judge found that plaintiffs' claims raised no matters of important public interest or novel constitutional issues. The judge further noted that case law provides that the mere

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<sup>18</sup> The judge's trial ruling actually refers to the blight designation as occurring in 1964, the year the Plan was adopted.

passage of time does not, in and of itself, warrant the revocation of a municipal blight designation. The judge also rejected plaintiffs' separate arguments that (1) the Fourteenth Amendment to the Plan is invalid because the City has not updated its master plan within the past six years, (2) the redeveloper agreement with Morris is invalid, and (3) the plaintiffs have sustained a constitutional injury.

With respect to plaintiffs' allegations of OPRA violations, the judge did not make any findings as to the City's OPRA compliance or non-compliance. The judge simply determined that any such violations arising out of Columbia Container's informational requests could not, as a matter of law, provide a basis for invalidating the Plan itself.

Plaintiffs now appeal. They primarily argue that the motion judge dismissed their action prematurely, in a manner contrary to the permissive standards of Rule 4:6-2(e). As part of that argument, plaintiffs contend that there remain a variety of unanswered questions and undocumented assumptions that entitle them to discovery before their substantive claims of invalidity can be adjudicated fairly.

Plaintiffs further contend that the trial court improperly deemed their complaint to be untimely. They argue that they did not have adequate notice of the December 5, 2005 ordinance and

the predicate actions by the Planning Board and the Council leading up to that ordinance. They maintain that the public interest warrants an extension of the presumptive forty-five-day filing period under Rule 4:69-6(a). They also rely upon our recent opinion in Harrison Redev. Agency v. DeRose, 398 N.J. Super. 361 (App. Div. 2008), as support for their ability to challenge the municipality's blight designation and the associated Plan amendment, despite the passage of the forty-five days from the December 2005 ordinance.

Defendants oppose these arguments, and contend that the Law Division's dismissal order was procedurally and substantively correct. They further argue that the specific holding of DeRose, which arose in the context of defenses interposed by a property owner in a condemnation action, is not on point here.

## II.

We begin with a recognition that, as the Supreme Court has instructed, a reviewing court assessing the dismissal of a complaint under Rule 4:6-2(e) must "'search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43

N.J. Super. 244, 252 (App. Div. 1957)); see also Banco Popular N. Am. v. Gandi, 184 N.J. 161, 165 (2005). The review must be performed in a manner that is "generous and hospitable." Printing Mart, supra, 116 N.J. at 746. Our role is simply to determine whether a cause of action is "'suggested'" by the complaint. Ibid. (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)).

Although no discovery was conducted in the Law Division, the parties did present to the motion judge a limited amount of documentary evidence beyond the four corners of the complaint. Those documents included such items as the Council's January and October 2005 resolutions, the December 5, 2005 Council ordinance, and the Schoor DePalma report. As our recitation of the factual and procedural history readily shows, however, there are considerable gaps in that documentation. For example, we do not have, among other things, a copy of the 1963 blight designation, the public and individual notices that accompanied the Planning Board's 1963 blight investigation, a transcript of the 1963 Planning Board hearing (if it exists), the first thirteen amendments to the Redevelopment Plan, the public notices respectively associated with the actions of the Planning Board and the Council in 2005, the Housing Authority's 2005 request to the Planning Board, a transcript of the October 17,

2005 Planning Board hearing, the Council's published agenda for December 2, 2005, or a transcript of that Council meeting. Consequently, our review of this matter is handicapped by those omissions.<sup>19</sup>

We also are mindful of the general principle that when "matters outside the pleading are presented to and not excluded by the court [on a Rule 4:6-2(e) motion to dismiss], the motion shall be treated as one for summary judgment and disposed of as provided by [Rule] 4:46, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion." R. 4:6-2. Although plaintiffs did have an opportunity to provide more documents to the motion judge, in response to the selected documents supplied to the court by defendants, the record amassed in the Law Division is nonetheless substantially incomplete. For purposes of our review, that partial record raises as many questions as it answers. We therefore are reticent to treat this record as akin to a record developed on summary judgment after a full discovery process has run its course. In particular, we suspect that the discovery process here would have been likely to unearth

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<sup>19</sup> We do not fault counsel for not including those items in the appendices on appeal, since they were not presented to the motion judge. See R. 2:5-4(a). Nonetheless, the limited documents in the present record provide us with a very incomplete picture of the critical events.

documents revealing, more fully, the actual chronology of the municipal actions concerning the Redevelopment Plan and the subject property.

Even if we were to treat the present appeal as emanating from an order for summary judgment under Rule 4:46, rather than from a Rule 4:6-2(e) dismissal, our standards of review would still be indulgent to the plaintiffs. As our case law holds, in deciding a summary judgment motion a court must determine, after viewing the evidence in a light most favorable to the non-moving party, whether a genuine issue of material fact exists that precludes judgment in the movant's favor. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "The 'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Ibid. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)) (alteration in original). On appeal, we review a grant of summary judgment de novo, likewise considering the proofs in a light most favorable to the non-movants, here the plaintiffs. Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007).

Bearing in mind these standards, we are persuaded that the Law Division dismissed plaintiffs' entire action, with

prejudice, prematurely. In our view, this case should be remanded for further consideration and factual development. We reach that conclusion, in part, because of the potential implications of our recent opinion in DeRose, supra, 398 N.J. Super. 361, to the motion judge's finding of untimeliness. We also support a remand because the limited record before us raises significant concerns about the propriety of the Plan's Fourteenth Amendment that should be explored further in the trial court.

In DeRose, id. at 396-401, 406-08, we held that the minimal amount of notice that a property owner is to receive under Section 6 of the LRHL, N.J.S.A. 40A:12A-6, when the property is being considered for designation as in need of redevelopment, falls short of the constitutional requirements of due process. See also Brody v. Vill. of Port Chester, 434 F.3d 121, 127 (2d Cir. 2005). To remedy that potential constitutional deprivation, we held that a property owner that receives no more than such minimal notice preserves the right to contest the property's blight designation by way of a defense in an ensuing condemnation action brought by the municipality or its assigned redeveloper. DeRose, supra, 398 N.J. Super. at 421. We noted that the preservation of such a defense by a condemnee is in

harmony with cognate provisions in the Eminent Domain Act, N.J.S.A. 20:3-5. Id. at 414.

However, we also noted in DeRose that a property owner's ability to wait until a condemnation suit to challenge a blight designation may be curtailed if the municipality exceeds the minimum notice called for under the LRHL, and contemporaneously informs the owner (1) that the "property has been designated by the governing body for redevelopment"; (2) that "the designation operates as a finding of public purpose and authorizes the municipality to take the property against the owner's will"; and (3) of the "presumptive time limit within which the owner may take legal action to challenge the designation." Id. at 413. Because the notice in DeRose failed to meet these requirements, we vacated the trial court's order declaring the owner's defenses to the blight designation untimely under Rule 4:69-6(a). Id. at 421.

We agree with defendants that the specific holding of DeRose does not apply here, because this is an action in lieu of prerogative writs, and the dispute has not reached the stage of a condemnation action. That procedural difference does not mean, however, that the constitutional and equitable principles expressed in DeRose are completely inapplicable to this case.

Plaintiffs have argued that, for reasons that are unclear,

the City deviated in this instance from its alleged usual pattern of providing individual notice to owners in the redevelopment area when their properties are being reclassified under the Plan from a "not to be acquired" status to a "to be acquired" status. That alleged prior custom, given the principles set forth in DeRose as well as general principles of equality of treatment, may bear upon the time constraints within which plaintiffs may fairly contest the blight designation.

Defendants argue that the City's past practice of conducting hearings on changes in acquisition status, and allegedly giving affected owners individual notice of such changes, was gratuitous and not required by the LRHL. That may be so, but the City's customs over the past four decades may have created expectations and reliance interests sufficient, whether as a constitutional or an equitable matter, to justify relaxation of the presumptive forty-five-day period under Rule 4:69-6(a). At a minimum, the matter needs to be remanded so that these notice issues and alleged customs can be more fully explored.

The supervening decision in DeRose also raises the very distinct possibility that, even if this action is dismissed, plaintiffs would preserve their ability to contest the blight designation at a later time as a defense in condemnation. We

cannot tell from the sparse record before us what sort of notices the Planning Board and the Council gave to property owners in the 1960's when the blight designation and the Plan were adopted. We suspect that the notices did not go beyond the bare requirements of the statutes predating the LRHL, and thus did not conform to the stricter constitutional requirements recognized in DeRose. If that suspicion is true, then the parties will simply be back in court when and if the City, or its redeveloper Morris, proceeds with the acquisitions.

In the interests of judicial economy, there may be practical virtues in having the propriety of the blight designation and Plan amendment resolved in this action, rather than tabling those issues for a later eminent domain proceeding. Although we are not suggesting a routine exception to DeRose for pre-condemnation prerogative writ challenges, the idiosyncratic features of this redevelopment matter may warrant hearing the substantive issues now, rather than later. Again, this is a concern that should be considered on remand by the trial court, with the analytic guidance of DeRose.

In calling for a remand, we also draw some significance from the Supreme Court's June 2007 decision in Gallenthin, supra, 191 N.J. 344. Gallenthin clarified the substantive grounds upon which a municipality may declare a property in need

of redevelopment under subsection (e) of the LRHL, N.J.S.A. 40A:12A-5(e). Id. at 359-73. The Court rejected the Borough of Paulsboro's expansive construction of the "blight" concept under subsection (e), finding that it was inconsistent with the meaning of the Blighted Areas Clause conveyed in art. VIII, § 3, ¶ 1 of our State Constitution. Id. at 365. In particular, the Court rejected Paulsboro's equation of "blight" to "areas that are not operated in an optimal manner." Ibid.

We express no views as to whether the blight designations that are presumably contained in the City's 1963 resolution (a document which we have not even seen), the original 1964 Plan, the October 2005 Schoor DePalma report, and the December 2005 ordinance and Fourteenth Amendment, satisfy the substantive criteria of Gallenthin. In any event, because Gallenthin was decided by the Supreme Court twelve days after the motion judge ruled in this case, the motion judge did not have the benefit of its teachings. Given that fortuitous sequence of events, we believe it appropriate for the trial court to reconsider its determinations, now in the context of post-Gallenthin redevelopment law.<sup>20</sup> At a minimum, Gallenthin bears upon whether

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<sup>20</sup> In DeRose, we presumed that the Supreme Court would give Gallethin "pipeline retroactivity" and thus apply it to a redevelopment plan originally adopted in 1998. DeRose, supra, 398 N.J. Super. at 420.

there is sufficient "public interest" here to warrant a relaxation of the usual forty-five-day time frame for a prerogative writ action. See Concerned Citizens of Princeton, Inc. v. Mayor & Council of Princeton, 370 N.J. Super. 429, 445-47 (App. Div.), certif. denied, 182 N.J. 139 (2004) (underscoring the "interest of justice" factor in extending the time for suit under Rule 4:69-6(c)).

Apart from a renewed examination of the timeliness issue, we also find it appropriate to remand this case to explore further the other procedural and substantive issues presented in this appeal, and assorted issues which are otherwise manifest from a reading of the limited record before us. As we have already noted, the gaps in documentation in the record, and the City's abrupt series of decisions in October 2005 to rescind the January 2005 resolution calling for a renewed blight assessment and to instead convert the Planning Board session into a hearing on a Fourteenth Amendment to the Plan, could suggest potential irregularities of process that may nullify the validity of the Plan amendment.

The record is also spotty on what actually transpired at the October 2005 Planning Board meeting, and thereafter, at the December 2005 Council meeting. The potential dissonance between the advertised hearing notices of September 30 and October 7,

and the actual Planning Board session on October 17, 2005 is also unresolved. Further questions are implicated with respect to the power of the Housing Authority, rather than the Council as the City's governing body, to request the Planning Board to consider amending the Redevelopment Plan. See N.J.S.A. 40A:12A-7(f) (specifying that "[t]he governing body" may direct the Planning Board to prepare a revision of a redevelopment plan).<sup>21</sup> All of these significant issues can be explored on remand as well.<sup>22</sup>

While the matter is on remand, the trial court also should reconsider its initial assumption that the municipality's blight designation from 1963, and its Redevelopment Plan from 1964, remain viable after the passage of more than four decades. We recognize that, as we stated in Downtown Residents for Sane Dev. v. City of Hoboken, 242 N.J. Super. 329, 340 (App. Div. 1990), the "[m]ere passage of time does not erase [the] validity of a

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<sup>21</sup> We recognize that this issue was not specifically raised by plaintiffs in their complaint. Even so, the underpinnings of the Housing Authority's legal role in this matter are manifestly implicated by the record. We therefore direct the trial court, sua sponte, to examine the issue further.

<sup>22</sup> These factual issues, particularly as to notice, overlap with the factual issues germane to timeliness. Consequently, we suggest that the trial court coordinate discovery so that all parties have a fair chance to obtain the relevant information. Should the trial court find that plaintiffs' complaint still is untimely, it may consider reaching the substantive issues anyway so that a fuller record is presented on any second appeal.

blighted area designation." However, we also recognize that additional facts and circumstances may qualify that general principle. Ibid. We remit to the trial court on remand, with the benefit of a fuller record to be developed, the question of whether the forty-five-year-old blight designation and the forty-four-year-old Plan in this case are valid and should remain in force in all respects. The Plan's relationship to the City's master plan may also warrant closer scrutiny.<sup>23</sup> See N.J.S.A. 40A:12A-7(d).

In expressing these various concerns, we are not saying that, at the end of the day, the City's blight determination as to the subject property or the Plan's Fourteenth Amendment will be declared invalid. We simply note that the present record is inadequate to make that judgment, either way, with confidence.

Finally, with respect to plaintiffs' discrete allegations of OPRA violations, we share the motion judge's view that the OPRA statute does not appear to authorize, as a remedy, the nullification of the municipality's ordinance. See N.J.S.A. 47:1A-6. Even so, it was premature to dismiss plaintiffs' OPRA claims, with prejudice, without making more detailed findings as

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<sup>23</sup> We do agree with the motion judge that the enforceability of the City's agreement with Morris, which contains an allegedly illegal liquidated damages clause, is not a ripe issue. Consequently, the trial court need not reexamine that particular issue on remand.

to the extent of the insufficiency of the City's responses and without specifying a remedy.<sup>24</sup> Consequently, we remand for such additional findings, see Rule 1:7-4, and whatever relief under OPRA may be appropriate.<sup>25</sup>

III.

For these reasons, the Law Division's order of June 1, 2007 is vacated without prejudice. The matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION

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<sup>24</sup> We note that the OPRA count of the complaint seeks not only an invalidation of the City's actions, but also damages, counsel fees, and other relief as may be justified.

<sup>25</sup> We recognize that the OPRA claims, as a practical matter, may overlap with discovery in this litigation concerning the other issues. We leave it to the trial court's discretion to deal with that overlap, and to consider severing or staying the OPRA claims until discovery has been completed.