JERSEY CITY REDEVELOPMENT AGENCY, Plaintiff/Appellant, v. TEAM RHODI, Defendant/Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003518-23 ON APPEAL FROM: LAW DIVISION HUDSON COUNTY DOCKET NO. HUD-L-4592-18 SAT BELOW: HON. JEFFREY R. JABLONSKI, A.J.S.C. Civil Action

BRIEF ON BEHALF OF APPELLANT JERSEY CITY REDEVELOPMENT AGENCY'S INTERLOCUTORY APPEAL

PAUL V. FERNICOLA & ASSOCIATES, LLC
219 Broad Street
Red Bank, New Jersey 07701
(732) 345-0600
Attorneys for Plaintiff/Appellant, Jersey City Redevelopment Agency

PAUL V. FERNICOLA, ESQ.
Of Counsel

ROBERT E. MOORE, ESQ.
On the Brief

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PRELIMINARY STATEMENT

Having granted Plaintiff/Appellant Jersey City Redevelopment Agency's ("JCRA" or "Appellant") motion seeking leave to file interlocutory appeal, this Appellate Division recognizes the constitutional imperative of providing just compensation to the owner of real property acquired for public use. For this reason, Appellant was forced to seek interlocutory review of the trial court's rulings dated June 7, 2024 holding the zoning under the Morris Canal Redevelopment Plan controls the parties' analysis of the just compensation for JCRA's acquisition of Defendant/Respondent Team Rhodi's ("Team Rhodi" or "Respondent") property via its power of condemnation. JCRA filed its motion seeking to strike Respondent's appraisal report for failing to account for the risks and costs associated with obtaining multiple use variances based upon the Highest and Best Use, 8-story, mixed-use building containing 95 residential dwelling units and ground floor commercial space, as opined by Respondent's appraiser. In arriving at that conclusion, Respondent's appraiser violated well-established condemnation law; including the Project Influence Doctrine; by applying the zoning under the Morris Canal Development Plan and failing to consider the underlying R-2 zoning in which Respondent's Property is located. Respondent's appraiser testified during his deposition that the zoning under the Morris Canal Development Plan "supersedes"

the zoning to which the Property is currently subject. This methodology is simply incorrect and violates New Jersey condemnation law.

In addition, Respondent's appraiser failed to make any adjustments for the Property's lack of development approvals and variances that would need in accordance with the Respondent's conclusion of the Property's Highest and Best Use on the Date of Valuation. Respondent's experts admitted that several variances/approvals would be necessary based upon the Highest and best Use analysis of Respondent's appraiser, yet Respondent's appraiser failed in his analysis to reflect the cost and risk a hypothetical willing buyer would face should they purchase the subject Property without development approvals on the Date of Valuation. This failure renders Respondent's appraisal report unduly speculative and requires the court to engage in its gatekeeper role and bar Respondent's appraisal report to prevent speculative evidence from being presented to the jury.

Rather than simply deny Appellant's *in limine* motion, the trial court went a step further and made an overall ruling directly contradicting well established New Jersey condemnation law: that an appraiser is to use the zoning for the new redevelopment project or the redevelopment plan adopted pursuant to N.J.S.A. 40A:12A-7 when arriving at its opinion of fair market value. The statute states in part, "No redevelopment project shall be undertaken or carried out except in accordance with a redevelopment plan . . ." The "Scope of the Project Rule" also

known as the "Project Influence Doctrine" in New Jersey and across the United States provides that when determining just compensation for the taking of property, the Scope of the Project Doctrine excludes value attributable to the governmental project for which the property was acquired. For decades, New Jersey courts have followed the United States Supreme Court's seminal decision on the Scope of the Project Rule, and New Jersey courts have uniformly held that the zoning in place *prior to* the adoption of the redevelopment plan shall be used to determine just compensation for the taking of property. Hence, the zoning contained in the Morris Canal Redevelopment Plan is the redevelopment project for which the Property is being acquired shall be *excluded* as the zoning in place on the applicable Date of Valuation pursuant to the Scope of the Project Rule.

Having now found that interlocutory review of the trial court's rulings are necessary, this Appellate Division must reverse the trial court's incorrect legal ruling that the redevelopment plan and ***not*** the underlying zoning existing prior to the adoption of the Morris Canal Redevelopment Plan is the operative zoning for determining just compensation; as well as the trial court's denial of Appellant's *in limine* motion to bar such baseless and incorrect testimony from being presented to the jury.

PROCEDURAL HISTORY

Appellant relies upon the recitation of the procedural history contained in its brief filed in support of Appellant's motion seeking leave to file an interlocutory appeal dated June 27, 2024. It is necessary to reiterate the following:

On January 12, 2024 Appellant filed a Notice of Motion *in limine* seeking to bar Respondent's appraisal report for applying the Morris Canal Redevelopment the JCRA's taking of the Property. The Honorable Jeffrey R. Jablonski, A.J.S.C. entered an Order on June 7, 2024 denying JCRA's motion. Pa1[1]. In addition, during oral argument on Appellant's motion, Judge Jablonski ruled the zoning contained in the Morris Canal Redevelopment Plan controlled the parties' analysis as to the fair market value of the subject Property.[2] Judge Jablonski ruled:

> The Court, therefore, finds that the automatic consideration and application of what this Court also finds is an outdated R-2 zoning certainly overlooks that basis and that a perspective [sic] purchaser would certainly acknowledge, not the zoning, is not the R-2 zone but certainly it was done comprehensively would be the zoning governed by the Morris County redevelopment plan. That this court finds is the operative zoning for the property as is of the date of evaluation [sic]. **Any issues, therefore, that have to do with the calculus on the ultimate fair market value that is determined was based – this court finds based property on the Morris Canal redevelopment zone and not the R-2 zone.**

[1] Appellant relies upon the Appendix filed on or about June 27, 2024 in support of Appellant's motion seeking leave to file an interlocutory appeal.

[2] "1T" refers to the transcript of oral argument dated June 7, 2024 before the Honorable Jeffrey R. Jablonski, A.J.S.C.

> As a result, the fact finder should be able to consider both the opinions provided by Mr. Stack as well as Mr. Sussman and allow the jury to make a determination as to whether the proper adjustments were made under that zoning calculus in coming to the fair market value . . . that the fact finder will ultimately address and ultimately conclude.
>
> 1T25:25-26:21 [emphasis added].

This ruling runs contrary to established condemnation law and requires reversal prior the matter proceeding to the jury.

APPELLANT'S STATEMENT OF FACTS

Appellant relies upon the Statement of Facts contained in the brief filed in support of Appellant's motion seeking leave to file an interlocutory appeal dated June 27, 2024.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S RULING CONTRADICTS WELL ESTABLISHED CONDEMNATION LAW (1T4:9-15)

The Appellate Division has allowed JCRA to file an interlocutory appeal in the current matter as the decision of the trial court that the Morris Canal Redevelopment Plan is the operative zoning in place as of the Date of Valuation contradicts well established condemnation law and the Scope of the Project Rule. Appellant does not merely seek interlocutory review of the denial of its *in limine* motion to bar Respondent's appraisal report; Appellant seeks interlocutory review

of the trial court's incorrect recitation of condemnation law. 1T25:25-26:21. Allowing the June 7, 2024 ruling to stand would fly in the face of the New Jersey Supreme Court's direction to courts to engage in their "gatekeeping role" to prevent speculative evidence from being presented to the jury. See, Borough of Saddle River v. 66 East Allendale, LLC, 216 N.J. 115 (2013); see also, County of Monmouth v. Hilton, 334 N.J. Super. 582 (App. Div.), *cert. denied*, 167 N.J. 633 (2001). The trial court's ruling that the zoning reflected in the Morris Avenue Redevelopment Area is the controlling zoning for determining just compensation should be reversed at this stage of the condemnation action as such a ruling is squarely contradicted by established New Jersey condemnation law.

The fair market value of the property taken is the general measure of the award of just compensation. State v. Gorga, 26 N.J. 113 (1958). "Just compensation in its most general terms means fair market value as of the date of taking determined by what a willing buyer and a willing seller, neither being under any compulsion to act, would agree to." See, Hilton, *supra* at 587.

Instructive to this Appellate Division's inquiry is the Scope of the Project Rule also known as the Project Influence Doctrine, which stands for the proposition that the proper basis for determining just compensation is the fair market value of the property, on the Date of Valuation, **disregarding either the depreciating threat of or the inflationary reaction to the proposed redevelopment project**. Jersey City

Redevelopment Agency v. Kugler, 58 N.J. 374, 379 (1971). It is the Project Influence Doctrine which renders the trial court's decision erroneous.

In condemnation proceedings, the Scope of the Project Rule establishes that:

> … the proper basis of compensation is the value of property as it would be at the time of the taking (or at the time fixed by the statute, such as the date of commencement of the condemnation proceeding) **disregarding either the depreciating threat of or the inflationary reaction to the proposed public project**.
>
> Kugler, *supra* at 379 [emphasis added].

The Scope of the Project Doctrine excludes value attributable to the governmental project for which the property was acquired. See, Kugler, *supra* at 379; United States v. Miller, 317 U.S. 369 (1943); United States v. Reynolds, 397 U.S. 14 (1970). In United States v. Miller, the U.S. Supreme Court stated as follows:

> [S]pecial value (of the condemned property) to the condemnor **as distinguished from others who may or may not possess the power to condemn**, must be excluded, as an element of market value.
>
> Miller, *supra* at 375. [emphasis added].

Under the Scope of the Project Rule what is to be disregarded is a value-creating enhancement directly related to the government's public project. Just compensation does not include any enhancement in value which would not exist **but for** the publicly-funded public project. See, Kugler, *supra* at 379; Miller, *supra*; Reynolds, *supra*. Here, the Morris Canal Redevelopment Area would not exist *but for* the Jersey City's redevelopment designation. To be clear, the redevelopment

plan ***is*** the public project. N.J.S.A. 40A:12A-7 states in relevant part: "**No redevelopment project shall be undertaken or carried out except in accordance with a redevelopment plan** adopted by ordinance of the municipal governing body . . . [emphasis added]."

Therefore, increases in value attributable to the benefits from the very public project for which a property is condemned, shall not be considered in determining just compensation for the taking of the property. See, Kugler, *supra* 379 (the rule "is that the proper basis of compensation is the value of the property as it would be at the time of the taking…disregarding either the depreciating threat of or the inflationary reaction to the proposed public project"); see also, Housing Auth. of Atlantic City v. Atlantic City Expo, 62 N.J. 322 (1973).

In Kugler, *supra*, the New Jersey Supreme Court cited a number of authorities in support of the general rule that compensation should be fixed, "disregarding either the depreciating threat of or the inflationary reaction to the proposed public project" including State v. Nordstrom, 54 N.J. 50, 54 (1969); United States v. Cors, 337 U.S. 325 (1949); Cole v. Boston Edison Co., 157 N.E. 2nd 209, 212 (Mass. 1959); City of Cleveland v. Carcinoma, 190 N.E. 2nd 52 (Ohio Ct. App. 1963). Federal courts recognize the Scope of the Project Rule as an evidentiary rule, excluding from the calculation positive and negative fluctuations in market value squarely attributable

to the public project for which the taking is made. See, United States v. Virginia Elec. & Power Co., 365 U.S. 624, 636 (1961), see also, Reynolds, *supra* at 16-17.

The Appellate Division in Jersey City Redevelopment Agency v. Mack Properties Co., 280 N.J. Super. 553 (1995) took great pains to elucidate the correct zoning used to determine just compensation in the face of a trial judge's demonstrable error. The Mack property was undeveloped and located in the I-2 "intensive industrial" zone which allowed warehouses and other industrial uses. JCRA acquired the Mack property to convert the warehouse to high-density office and residential mixed use as part of the Harsimus Cove South Redevelopment Plan. JCRA's expert opined the subject property's Highest and Best Use to be industrial development, however Mack's expert opined the property's Highest and Best Use was high-rise, residential and office development based on the surrounding properties. In the alternative, Mack's expert opined the property could be developed as an office building that complied with the *existing* I-2 zone. The Mack court reiterated the holding of the Kugler Court:

> There is no question that the proper basis for compensation is the value of the property as it would be at the time of the taking **disregarding either the depreciating threat of or the inflationary reaction** to the proposed public project.
>
> Mack, *supra* at 569 [emphasis added].

The Mack Court carefully explained that JCRA's proposed use would **not** be "a factor in enhancing the value of the subject property as of the date of taking."

Rather, "JCRA's contemplated changes in connection with its proposed project, involving office and residential use, may be relevant as to the adaptability of the property to Mack's proposal, and to the issue of highest and best use of the property for the purpose of fixing value." Mack at 569. Therefore, New Jersey condemnation law requires the inflationary or depreciating effects of the redevelopment project for which the property was acquired to be disregarded when arriving at just compensation. See, Kugler, *supra* 379. In Jersey City Redevelopment Agency v. Costello, 252 N.J. Super. 247 (App. Div. 1991) the court reiterated the rule: "In general, a fair market value determination **should not be based upon enhancement caused by the very project for which condemnation is sought**." Id. at 255, fn. 4 [emphasis added].

In the present matter, the fact that Appellant and Respondent opine similar Highest and Best Uses for the Property does not support the trial court's ruling that the Morris Canal Redevelopment Plan should be applied when determining just compensation. The trial court's ruling contradicted well established Scope of the Project Rule and interlocutory review is required to prevent a valuation trial being held based upon the application of incorrect zoning. There can be no doubt in the present matter that the zoning pursuant to the Morris Canal Redevelopment Plan was adopted in furtherance of Jersey City's redevelopment of the area. Therefore, Respondent's use of the zoning under the Morris Canal Redevelopment Plan is

improper as a matter of law and should be barred from presentation to the jury. The trial court not only allowed this, but ruled the Morris Canal Redevelopment Plan was the "operative zoning" for the subject Property as of the Date of Valuation.

The Honorable Maurice T. Gallipoli, A.J.S.C., addressed this very issue in the unpublished decision City of Hoboken v. Horst Savickas, Law Division, HUD-L-3109-04 (February 14, 2006). Pa197. Applying the Project Influence Rule, the Court determined that the defendant was not entitled to just compensation based upon the zoning under the redevelopment plan, but that the prior zoning controlled the analysis when estimating fair market value in the condemnation action. In Savickas, Hoboken brought an *in limine* motion to bar the defendant's expert appraisal report which was based in part upon the change in zoning contained in the redevelopment plan which permitted residential uses in the formerly industrial-zoned area. The City of Hoboken had adopted the redevelopment plan on May 20, 1998. Under the redevelopment Plan, the property was located in Z-1 which permitted residential development. However, Judge Gallipoli determined that the zoning in place as of the date of taking was industrial pursuant to the Project Influence Doctrine.

In Savikas, the property owner's planning expert opined that based upon the residential zoning, the property could yield approximately forty-five (45) residential housing units. Based thereon, the appraisal report opined the property value to be

$5,600,000 based upon the **Z-1 allowance for residential development being in place** as of the date of valuation, taking the position that the redevelopment plan "supersedes the underlying zoning . . ." Pa202. Judge Gallipoli granted the City's motion in part, barring from evidence the aspects of the expert reports which automatically applied the residential zoning under the redevelopment plan to the property, **as also done by Team Rhodi's appraiser here and approved by the trial court.** Judge Gallipoli stated:

> [T]he expert opinions of both Steck and Steinhart are based on **the erroneous premise that the Z-1 zoning established by the Redevelopment Plan applied to the Subject Property on the date of value**. Both Steck and Steinhart **disregarded the I-1 zoning because they believed the Subject Property had been merely rezoned rather than made a part of a "traditional" redevelopment plan**. This treatment ignores the settled rule of law factoring out the project influences on value from the determination of just compensation.
>
> Pa207-208 [emphasis added].

Here, the R-2 zoning must be applied when estimating the Property's fair market value as of the Date of Valuation of June 3, 2019. JCRA's position is also supported by the unpublished ruling of the Honorable Mark A. Baber, J.S.C. in the matter Jersey City Redevelopment Agency v. Kerrigan, Docket No. HUD-L-4528-04 (Law Div. 2008) (Pa210) where Judge Baber confirms the Scope of the Project Rule prevents a property acquired via condemnation to be valued pursuant to the zoning in place under the applicable redevelopment plan.

The subject property in the Kerrigan case was zoned "Industrial" under Jersey City's 1963 ordinance. Pa210. In May of 1972, the property was declared a "blighted area" but no action was taken by the City for many years. Pa211. A new zoning ordinance was passed in 1974 where the subject property was zoned "R-4" which permitted residential development of 90 units per acre. Ibid. In 2001, a new ordinance eliminated several R-4 districts, to include the district in which the subject property was located. The 2001 ordinance expressly recognized the redevelopment plan takes precedence over the provisions of the ordinance.

During the commissioners hearing it was discovered the parties utilized vastly difference zoning assumptions under which to value the property: "JCRA's expert . . . testified as to the value of the property under the 1963 Industrial classification, while the Kerrigan's expert used the 2001 R-4 zoning as the basis for his opinion." Pa212. The court stated the question before it as:

> The City's zoning ordinance changed several times during that period, as did the Master Plan vision of what the future of the property should be. That being said, **the necessary determination is what the zoning of the property would have been absent anything done pursuant to the announcement of [the] public improvement and in implementation thereof**.
>
> Pa213.

Relying upon the above-cited caselaw from Kugler and Atlantic City, the court held:

> [T]he zoning classification that should form the basis of the valuation to be used in this case is the R-40, 90 unit per acre, zoning provided for in the 1974 zoning ordinance. **Nothing in the record suggests that that ordinance was "pursuant to" or "in implementation of" any plan for the redevelopment of the property**. Rather, it seems to have wholly disregarded the fact that the property had already been declared blighted and predates the adoption of the first redevelopment plan for either Liberty Harbor North or the entire Liberty Harbor area of which Liberty Harbor North is a part.
>
> Pa213 [emphasis added].

The Kerrigan and Savickas opinions, while unpublished, represent the actual application of the legal tenets of Kugler. During his deposition, Respondent's appraiser confirmed he performed no analysis as to the Property's value under the R-2 zoning in place on the Date of Valuation; June 3, 2019:

> Q: Based on your conclusion . . . that the Morris Canal Redevelopment Plan extinguished the subject property's prior zoning, would I be correct that **you performed no type of development yield under the prior R-2 zoning classification** for the subject Property?
>
> A: The, the prior zoning, **it is no longer relevant or has not been relevant in the 20 years, roughly, 20 years**. The – the underlying zoning has no affect on, on any approvals for any property in Jersey City as, as the process has become a re-zoning. And all of it is in keeping with the goals of the March plan and updates and the re-examinations that are being done. So everything is moving forward through the . . . redevelopment plan process.
>
> Pa164 [emphasis added].

This testimony (and the trial court's ruling related thereto) is contrary to the Scope of the Project Rule applied in the numerous cited New Jersey condemnation cases stating the underlying zoning is very "relevant" when determining the just compensation due for the acquisition of property via condemnation, as the zoning serves as the basis for the "legally permissible" prong of the "Highest and Best Use" analysis. See, State v. Caoili, 135 N.J. 252, 264-65 (1994); *see also*, State v. Gorga, *supra* at 116.

Allowing such evidence to be presented to the jury would contradict the New Jersey Supreme Court's instruction that trial courts shall engage in their "gatekeeper role" by preventing speculative or unsupported evidence from being presented to the jury. See, Saddle River, *supra*; see also, Hilton, *supra*. As the trial court's rulings conflict with well-established condemnation law, the Appellate Division should reverse the trial court's rulings of June 7, 2024.

POINT II

RESPONDENT'S EXPERT REPORT SHOULD BE BARRED FOR FAILING TO ACCOUNT FOR OBTAINING THE REQUIRED VARIANCES (1T5:15-23)

Plaintiff, Jersey City Redevelopment Agency ("JCRA") filed its *in limine* motion to bar Respondent from presenting its appraisal report dated March 10, 2023 to the jury since Respondent's Appraisal Report fails to adhere to established condemnation law when analyzing the fair market value of the subject Property, in

not only failing to apply the appropriate zoning as discussed *supra*; but by also failing to apply an appropriate adjustment to account for the lack of developmental approvals on the Date of Valuation consistent with Respondent's appraiser's opinion of the property's Highest and Best Use. Therefore, Respondent's appraisal report must be barred from presentation to the jury as unduly speculative.

When a property is acquired through the power of eminent domain, the landowner is entitled to receive just compensation from the condemning authority which measured as the acquired property's fair market value as of the Date of Valuation. Saddle River, *supra* at 137. Just compensation is the fair market value of the property acquired as of the date of taking; which is determined by "what a willing buyer and a willing seller would agree to, neither being under any compulsion to act." State v. Silver, 92 N.J. 507, 513 (1983).

The fair market value is the "value that would be assigned to the acquired property by knowledgeable parties freely negotiating for its sale under normal market conditions based on all surrounding circumstances at the time of the taking. Id. at 514. Any knowledgeable market participant would consider the need to obtain numerous variances that would be required to construct Respondent's proposed development before proceeding with the transaction.

The Court's decision in Saddle River outlined the methodology for valuing property based on a use which is different than the current use. The Court stated that

the "jury must first value the property in its current condition, considering the zoning at the time of the taking, which establishes the base value. See, Caoili, *supra* at 271-273. Then, the jury may consider whether a premium would be added to that value by the parties to a sale given the reasonable probability of the approval of the site plan. Any premium must be adjusted for the risk of the change occurring or being approved before being added to the as-is value. Id., see also, Saddle River, *supra* at 140. Some courts have also indicated that the property could be valued based on the proffered use with a discount taken for the risks associated with the zone change or variance approval not occurring. See, Caoili, *supra* at 271-273.

This rationale is based upon the New Jersey Supreme Court's reasoning in State v. Gorga, 26 N.J. 113 (1958):

> Zoning amendments are not routinely made or granted. A purchaser in a voluntary transaction would rarely pay the price the property would be worth **if the amendment were an accomplished fact**.
>
> See, Gorga, *supra* at 118 [emphasis added].

Later, the New Jersey Supreme Court would expand on this reasoning, explaining:

> We view Gorga as expressing a preference that condemned property be valued under the existing ordinance and then some value be added to reflect the likelihood of the proposed zoning change. That approach most clearly identifies the "premium" of the likelihood of a zoning change that should be reflected in the fair market value of the condemned property. Perhaps that "premium" approach more effectively assures that **the current fair**

> **market value of the condemned property is not the value of the property as though the proposed change were a *fait accompli***. We do not, however, read or apply the observations in Gorga to mandate that in the valuation process experts must use additional instead of subtraction.
>
> See, Caoili, *supra* at 272-273 [internal citations omitted] [emphasis added].

In County of Monmouth v. Hilton, 334 N.J. Super. 582 (App. Div. 2000) the Appellate Division rejected the same methodology employed by Respondent's appraiser when estimating the fair market value of the subject Property to be fundamentally untenable and legally defective. In Hilton, the defendant's appraiser had valued the property based upon the property's probable assemblage with continuous parcels. The Court in Hilton equated a future or prospective assemblage with an impending grant of a variance or zone change, meaning it was permissible to consider a potential variance or zone change as the basis of the property's Highest and Best Use as long as there was evidence of a reasonable probability in the near future. However, the defendant's appraiser in Hilton failed to treat it as a *prospective* assemblage, thus the Appellate Division held that his appraisal was defective:

> [W]e are persuaded that appraising the value of the defendant's property as if a four-lot assemblage had already taken place as of the date of taking and then basing the Highest and Best Use on such assemblage constituted a fundamentally untenable and legally unsupportable approach. …
>
> But it (assemblage/variance/zone change) cannot be the basis for determining market value as if the assemblage had already taken place. **This distinction between**

> **enhancing market value and constituting the basis of market value is, in or view, critical** and it is that distinction that rendered Defendants' appraisal methodology legally defective.
>
> Hilton, *supra* at 590-591 [emphasis added].

The Court set forth the necessary two-step analysis that must be engaged in:

> [T]he first step in the **two-step trial process** is for the judge to make an initial, gatekeeping determination of whether an assemblage was probable in the near future as measured from the date of taking based on the evidence before him relating to market conditions and the circumstances particular to the property.
>
> …
>
> If the judge determines that an assemblage including defendant's property was reasonably probable at a near-future time from the date of taking, then, according to the prescription of both Gorga and Caoili, **the jury must be instructed to consider in its determination of fair market value the premium a willing buyer would pay for the probability of a future assemblage over and above the fair market value as represented by the existing use of the property**.
>
> See, Hilton, *supra* at 590 [emphasis added].

The Hilton Court likened the probable assemblage issue to that of a probable zoning change, stating, "we are persuaded that this issue is conceptually no different from the effect on market value of a prospective zoning change. The two situations are virtually identical in their salient character, that is, the prospect of a change in the basic circumstances surrounding the property that, it if occurs after the date of taking, would then permit a highest and best use different from and more profitable to the owner that the use existing or permissible as of the date of taking." Hilton,

supra at 549. The Hilton court rejected the appraiser's report for treating a property assemblage as a "fait accompli" (as described in Caoili, *supra* at 273) rather than assigning a premium that a willing buyer would pay for a property with the reasonable probability of an assemblage or zoning change. Hilton, *supra* at 590.

In Hilton, the Appellate Division quoted Chief Just Weintraub's rulings in State v. Gorga:

> The important caveat is that the true issue is not the value of the property for the use which would be permitted if the amendment were adopted. Zoning amendments are not routinely made or granted. A purchaser in a voluntary transaction would rarely pay the price the property would be worth if the amendment were an accomplished fact. No matter how probable an amendment may seem, an element of uncertainty remains and has its impact on the selling price. At most a buyer would pay a premium for that probability in addition to what the property is worth under the restrictions of the existing ordinance . . . if the parties to a voluntary transaction would as of the date of taking give recognition to the probability of a zoning amendment in agreeing upon the value, the law will recognize the truth.
>
> Hilton, *supra* at 591, *quoting* Gorga, *supra* at 117.

As discussed *supra*, Respondent's appraiser confirmed he applied the incorrect zoning when arriving at his valuation conclusion. Pa106; Pa108. Respondent's appraiser confirmed during his deposition that an 8-story mixed use building would only be permitted under the Morris Canal Redevelopment Plan zoning and not permitted under the R-2 zoning:

> **Q: Do you agree that under the R-2 zoning class that eight stories was not permitted?**
>
> A: 20 years ago, that's correct. **Yes. It was four stories or less**.
>
> Q: And do you agree that under the form of R-2 zoning classification that a mid-rise, multi-family residential development was **not a permitted use in the R-2 zoning**?
>
> …
>
> A: **Yes**.
>
> Pa167-168 [emphasis added].

During his deposition, it became clear that Respondent's appraiser failed to properly account for the risk and costs associated with obtaining such variances/approvals to construct the proposed eight-story multi-purpose building on the subject Property which Respondent argues constitutes the Property's Highest and Best Use. Respondent's appraiser effectively valued the Property as already having developmental approvals for the hypothetical 8-story development on the Date of Valuation contrary to established condemnation law which requires Respondent's appraisal report from being barred from presentation to the jury.

During his deposition, Respondent's appraiser also confirmed that an eight-story structure would only be permitted under the Morris Canal Redevelopment Plan zoning and would not be a permitted use under the R-2 zoning:

> Q: And then the next second zoning permits a maximum building height of eight stories. That also is [a] reference to the Morris Canal Redevelopment Plan?
>
> A: Yes, sir.

> **Q: Do you agree that under the R-2 zoning class that eight stories was not permitted?**
>
> A: 20 years ago, that's correct. **Yes. It was four stories or less**.
>
> Q: And do you agree that under the form of R-2 zoning classification that a mid-rise, multi-family residential development was **not a permitted use in the R-2 zoning**?
>
> …
>
> A: **Yes**.
>
> Pa167-168 [emphasis added].

In the current matter, while Respondent's experts have opined as to the reasonable probability of a zoning change/variance allowing Respondent's proposed development to meet the "legally permissible" prong of the Highest and Best Use analysis, Respondent's appraiser has failed to provide evidence to allow the jury to engage in the second step of the analysis set forth by the Hilton court; what premium would a willing buyer pay for the Property which, as of the Date of Valuation of June 3, 2019, had no development approvals or variances to allow Respondent to satisfy the "legally permissible" prong of the Highest and Best Use analysis. Therefore, Respondent's appraisal report should be barred from presentation to the jury as unduly speculative.

Respondent's professional planner testified during his deposition that numerous variances would be required for the proposed building which Respondent contends is the Highest and Best Use of the Property:

> Q: Your proposed eight-story, 98 residential unit development, can you identify the number of variances that would be required for that development if the R-2 zoning classification was applied to the subject property?
>
> A: It would be a D variance, for starters. Pretty much, **every aspect of the building would be a variance. It does not conform to the R-2.**
>
> Pa180 [emphasis added].

Respondent's appraiser failed to make the necessary adjustments to reflect the additional cost and risks associated with obtaining a zoning change/variance to allow the proposed Highest and Best Use despite acknowledging the hypothetical 8-story, 98 residential unit development building proposed as the Property's Highest and Best Use was not a permitted use under the R-2 zoning and would require two (2) additional use variances due to exceeding the maximumly permitted height and density standards which existed under the R-2 zoning.

Respondent's appraisal report makes the following adjustments to his valuation analysis, according to the Site Comparison Adjustment Grid, related to development approvals:

- Comparable Sale #1 = -2.5% sold "subject to" approvals
- Comparable Sale #2 = 0% sold with "no" approvals
- Comparable Sale #3 = -5% sold with approvals
- Comparable Sale #4 = -5% sold with approvals
- Comparable Sale #5 = -5% sold with approvals
- Comparable Sale #6 = -5% sold with approvals
- Comparable Sale #7 = -5% sold with approvals

Pa122.

Because Respondent's appraiser did not consider the R-2 zoning, he made no further adjustment to reflect the risk and cost of obtaining multiple use variances. In contrast, JCRA's appraiser made two (2) separate adjustments; (1) developmental approvals, and (2) a separate -20% adjustment to account for the costs and risk to obtain three (3) use variances required to develop the Property under the R-2 zoning district. Pa86. JCRA's appraiser's separate zoning/variance adjustment properly reflects the added costs and risks associated with obtaining the three (3) use variances under the R-2 zoning. JCRA's appraisal expert explains the zoning/variance adjustment in his appraisal report as follows:

> As of the effective date of valuation herein, the subject property has no development approvals in place and, under the R-2 zoning district regulations, use variances would be required to development the property at a higher density than permitted in the R-2 district (55 units per acre). We have concluded there is a reasonable probability of a zone change or use variances for a mid-rise building, density and building height to allow the subject property to be developed at a higher density, **however the required zone change or use variances have not yet been obtained and the additional risk and expense associated with obtaining a zone change or use variance must be considered**. None of the comparable sales required a zone change or use variances. Therefore, **in order to account for the subject property's added risk and expense associated with obtaining the necessary zone change or use variances, a downward adjustment was applied to all of the comparable sales to reflect this factor**.
>
> Pa88 [emphasis added].

Respondent's appraiser failed to make such variance adjustment despite acknowledging the development proposed as the Highest and Best Use of the subject Property would not be permitted under the R-2 zoning and also required two (2) additional use variances for height and density. For those reasons, this Appellate Division must engage in its gatekeeping role to bar such speculative evidence as directed by the New Jersey Supreme Court in Saddle River.

CONCLUSION

For the foregoing reasons, Appellant's interlocutory appeal should be granted and the trial court's orders of June 7, 2024 be reversed.

PAUL V. FERNICOLA & ASSOCIATES, LLC
Attorneys for Plaintiff/Appellant, Jersey City Redevelopment Agency

By: /s/ Paul V. Fernicola, Esq. ____
PAUL V. FERNICOLA, ESQ.
I.D. No. 011711990

Dated: August 19, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

JERSEY CITY REDEVELOPMENT AGENCY, Plaintiff-Appellant, v. TEAM RHODI, LLC, Defendant-Respondent.	APPEAL NO. A-003518-23 **ON APPEAL FROM**: Superior Court of New Jersey Law Division – Hudson County Docket No. HUD-L-4592-18 **SAT BELOW**: Hon. Jeffrey R. Jablonski, A.J.S.C.

BRIEF ON BEHALF OF RESPONDENT, TEAM RHODI LLC

Of Counsel
Anthony F. DellaPelle, Esq.
adellapelle@mrod.law
(I.D. No. 028511987)

On the Brief
Michael Realbuto, Esq.
mrealbuto@mrod.law
(I.D. No. 342232020)

McKIRDY, RISKIN, OLSON & DELLAPELLE, P.C.
201 Littleton Road, Suite 135
Morris Plains, NJ 07950
(973) 539-8900
Attorneys for Defendant-Respondent, Team Rhodi, LLC

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PRELIMINARY STATEMENT

Receiving full indemnity – that is, "just compensation" – for the government's taking of private property is a fundamental requirement of the federal and state constitutions, and the sole remaining issue for the fact finder in this case is the amount of just compensation owed to Team Rhodi, LLC (hereafter, "Team Rhodi) for the taking of its private property by the Jersey City Redevelopment Agency (hereafter, "JCRA"). The fact finder did not yet decide just compensation in this case because this appeal has been brought by JCRA before a jury trial has occurred. With that one constitutional issue still outstanding, the Trial Court lawfully denied JCRA's eleventh-hour dispositive motion *in limine* because it found that Team Rhodi's expert opinions should be presented to the trier of fact. In particular, the Trial Court found that Team Rhodi's expert reports were grounded in market evidence and followed prevailing Supreme Court authority, which holds that the "highest and best use" of private property taken by eminent domain be determined by a wide factual inquiry into all reasonably probable uses.

The admissibility of evidence in condemnation cases is controlled by the following hypothetical: what facts would a willing buyer and a willing seller in the marketplace consider in negotiating a sale of the Team Rhodi property on the date of valuation? In this matter, JCRA suggests that a willing buyer and a willing seller would negotiate that sale by considering historic zoning of the property which has

not been in effect for more than 25 years. Contrary to JCRA's assertion, the automatic application of outdated zoning overlooks the required hypothetical open-market real estate transaction, and would only serve to limit the constitutional just compensation owed to Team Rhodi for the taking of its property. In fact, both parties' appraisal experts conclude that no buyer or seller of the Team Rhodi property would consider the outdated "R-2 zoning" as the applicable land use regulation for the property on June 3, 2019. Rather, a prospective purchaser would acknowledge that the City of Jersey City undertook comprehensive zoning reform over many years throughout the City by utilizing redevelopment planning and zoning efforts, as opposed to applying outdated zoning. JCRA requested the Trial Court, and now requests this Appellate Court, to disregard market facts and the subject property's "highest and best use." JCRA's pre-trial request only serves to limit the compensation that can be paid to Team Rhodi for the taking before a jury even hears and considers the relevant facts.

JCRA's interlocutory appeal is truly remarkable because it complains about Team Rhodi's real estate appraisal, which is based upon a "reasonable probability" of zoning approvals, even though JCRA's own appraiser *also* concludes that there was a "reasonable probability" of zoning approvals at the Team Rhodi property on the date of valuation. The mere difference between the two valuation theories is that Team Rhodi, in attempting to achieve just compensation for the taking, went one

step further than JCRA's appraiser by obtaining an independent analysis from a professional planner which also concluded that there was a "reasonable probability" of a zoning change. The Trial Court found these facts to be significant and lawfully denied JCRA's dispositive motion *in limine*.

Perhaps most importantly, JCRA's entire argument hinges upon a significant mistake or oversight concerning the owner's valuation and market evidence: JCRA argues that Team Rhodi failed to account for differences between the subject property and the "comparable sales" used, but Team Rhodi's appraiser clearly applies adjustments to six of his seven "comparable sales" to account for the differences between the status of approvals of the comparable sales and the Team Rhodi property. To the extent that JCRA disagrees with the *quantum* of each approval adjustment, JCRA is completely at liberty to explore this topic during cross-examination at trial. Accordingly, the Trial Court's decision should be affirmed and the question regarding the amount of just compensation owed to Team Rhodi for the taking should be presented to the jury in the trial court after a full development of the facts.

PROCEDURAL HISTORY

Team Rhodi hereby adopts the procedural history contained in JCRA's brief to the extent that it objectively recites the six years of litigation that led its pre-trial interlocutory appeal. However, Team Rhodi rejects the legal argument and

conclusory allegations contained in JCRA's procedural history regarding its interpretation of Team Rhodi's appraisal and the Trial Court's June 7, 2024 decision. To that end, Team Rhodi's counterstatement of facts and responsive legal argument is contained in the following sections of this brief.

COUNTERSTATEMENT OF FACTS

This matter involves JCRA's taking of Team Rhodi's commercial property located at 309-323 Johnston Avenue, Jersey City, New Jersey (the "Property") (designated as Block 19003, Lots 1-7 on the official tax maps of the City of Jersey City). Pa3-Pa11. The sole remaining issue for the fact finder in this case is the amount of just compensation owed to Team Rhodi for the taking of its private property by JCRA. Pa53-Pa54.

Team Rhodi's case-in-chief is supported by market data and the expert opinions of a professional planner (Jeff Wenger, P.P.) and an appraiser (Maurice Stack, MAI). JCRA's Trial Court motion sought to bar the opinion and report of Team Rhodi's appraiser, Mr. Stack, prior to trial. Pa62.

The appraiser, Mr. Stack, concluded, *inter alia*, that there was a reasonable probability of zoning approvals at the Team Rhodi property on the date of valuation in this condemnation matter. Pa112. JCRA's own appraiser *also* concluded that there

was a reasonable probability of zoning approvals on the date of valuation.[1] Pa80-Pa81.

Out the outset of his analysis, Mr. Stack opined that the Property, "from a market standpoint, involves a transit-oriented development ("TOD") site located in Jersey City's Gold Coast market area, ideally linked to public transportation." Pa100. Mr. Stack noted that the Property's "[u]nique physical attributes include the subject's extensive street frontage in the heart of this booming development sector of downtown Jersey City with 200 feet along Johnston Avenue, a main commercial street, and the influence of two (2) highly visible corners offering additional frontage of 95 feet along both Monitor Street and Pine Street." Pa101. Accordingly, Mr. Stack found that, since the Property is "[l]ocated steps away from the Liberty State Hudson-Bergen Light Rail Station and within close proximity to commuter ferry and PATH service, the subject is well positioned for a mixed-use (retail space and luxury apartments) within the core of a booming development area." Id.

In addition to considering the market's demand for the Property, Mr. Stack examined Jersey City's current zoning restrictions, local development trends, regional market data and approvals in the area, a concept plan prepared by Team

[1] JCRA's most recent appraisal was authored by Mark Sussman, MAI. Mr. Sussman's appraisal applies the outdated R-2 zoning, but – significantly - also concludes that "there is a reasonable probability of a zone change or variance(s) to allow the subject property to be developed at a density of 200 units per acre, with the inclusion of affordable housing units." Pa80-Pa81.

Rhodi, and the independent planning evaluation of Jeff Wenger, P.P. Pa106-Pa112. In balancing the scope these facts that would be considered by market participants (*i.e.*, a local/regional developer/investor), Mr. Stack determined "a reasonable probability existed on the effective date that the City would approve development of an 8 story, mixed-use building with a gross floor area of 125,000+/- sf (6.58 FAR) that facilitates 95 residential units (90 market-rate units and 5 affordable housing units), and is complimented by ground floor commercial space, attractive amenities and secure parking i.e., the ideal improvement for the subject site." Pa112.

Based on Mr. Stack's analysis of Jersey City's master plan and land use policy, observations as an active local market participant, as well as his extensive interactions with local market buyers, sellers, brokers and professional planners, he concluded that "a prospective buyer would acquire the subject property without approvals based on the reasonable probability that an as of right (AOR) development plan requiring modest deviations and variances would be approved by the Jersey City Planning Board on the effective date." Pa120. Nevertheless, Mr. Stack found that an "appropriate adjustment is warranted to account for an incremental value attributable to approvals secured by the seller in each [comparable sale] transaction." Id. In other words, his appraisal accounts for the fact that the subject property was not approved for development, and only had a probability that it could obtain approvals with any required zoning relief, when comparing the subject property to

any comparable sales used in his appraisal that already had approvals, by making adjustments to account for the differences and the risks.

Although JCRA does not appear to dispute the independent evaluation and conclusion of Team Rhodi's planner, Jeff Wenger, P.P., a summary is warranted because it confirms and supports Mr. Stack's "highest and best use" conclusion. Mr. Wenger has uniquely applicable experience in this matter because he previously worked for the Jersey City Division of City Planning for over 19 years and was responsible for writing redevelopment plans, zoning amendments, Master Plan amendments, as well as conducted hundreds of staff reviews of major site plan applications and advised the City on a wide range of planning issues. Pa125-Pa126. Here, Mr. Wenger was asked to evaluate "what development approvals would have been reasonably probable to have been approved by the City of Jersey City for [the Property] as of June 3, 2019, the date of valuation for the condemnation action referenced above." Pa125. To undertake this assignment, Mr. Wenger reviewed "market activity, development trends, and land use regulatory changes for the area immediately surrounding the site as indicators of the neighborhood's accelerating transformation and of the City's policy course with regard to land use regulation for this area." Id. After a careful review of the Property's physical characteristics and location, Mr. Wenger concluded that the Property is dimensionally ideal for high-density residential development. Pa128-Pa129.

Moreover, Mr. Wenger concluded that the Property's ideal development potential aligned closely with the redevelopment trends in the area and Jersey City's desire to facilitate development. He specifically addressed the outdated R-2 zoning that was superseded by the MCRP, and opined as follows:

> [R]efusing to reconsider the existing R-2 zoning for the site would have been difficult to justify. The R-2 zoning was designed for new townhouse infill development on Jersey City's commercial streets that the City no longer believed could support retail, allowing only 4-story construction with 55 residential units per acre, which comes to 3 residential units on a standard lot. Ground floor commercial uses are conspicuously not permitted in the R-2. This zone was conceptualized around the 1960s when Jersey City began to decline as it had become apparent that Jersey City could no longer support all of its retail streets. The primary retail streets remained in the NC Neighborhood Commercial zone, while secondary commercial streets were placed in the R-2 zone, which did not permit retail uses even though ground floor retail would have been the contextual development pattern. This was, sadly, Jersey City throwing in the towel on many of its commercial streets, recognizing the shrinking retail demand and shrinking population base of the city, and trying to concentrate retail on the few remaining streets that could be supported. **As Jersey City's decline was successfully halted in the 1980s and growth picked up speed in the 1990s and continued to accelerate to this day, the R-2 zone has slowly vanished from the Jersey City zoning map. Today, only a few random strips of the R-2 zone remain as Jersey City's continued growth now provides a more positive context that can support all the historic commercial streets in the city. Thus, the R-2 zone district has been removed from most areas of the city and only remains on the map in small leftover areas that have not required attention from the Division of Planning. Continuing to enforce the R-2**

> **zoning standards in a now hot real estate market with a growing population and clear demand for new commercial space would be tantamount to Jersey City turning its back on its own success. It is therefore quite clear that increased building height, density, and an expansion of permitted uses would be supported and approved by the City for development projects in this area by 2019.** (emphasis added) [Pa133].

After considering the ideal dimensions of the Property for a large apartment building, the site's proximity to new road and rail transportation infrastructure, and the powerful market demand for residential space in the immediate vicinity, Mr. Wenger concluded that it was "very probable that 8-story mixed-use residential development would have been approved on the subject property prior to 2019." Pa135. Additionally, Mr. Wenger at his deposition explained that his analysis completely assumed that the applicable redevelopment plan actually in place including the subject property (the Morris Canal Redevelopment Plan) was not in place for the purpose of this condemnation matter, but nevertheless concluded that it was highly probable that an 8-story building with 98 apartments would have been approved for the reasons set forth in his report. Pa181. In sum, both of Team Rhodi's experts grounded their opinions in market evidence and facts that would be considered by any buyer of the subject property on the date of value and concluded that it was reasonably probable that the subject property would have received approvals for a multi-family development as of the date of value. The Trial Court

found these facts to be dispositive and lawfully denied JCRA's dispositive motion *in limine*. 1T 19:18-26:25.

LEGAL ARGUMENT

I. THE TRIAL COURT'S JUNE 7, 2024 ORDER WAS BASED UPON COGENT FACTS AND WELL-ESTABLISHED EMINENT DOMAIN LAW. (Pa1; 1T 19:18-26:25).

JCRA's appeal must be viewed through the lens of applicable eminent domain law. Condemnation proceedings are different from other civil actions because they involve the involuntary seizure of private property, where the sole issue at trial is the amount of constitutional just compensation owed to the condemnee for the government's taking. State v. New Jersey Zinc Co., 40 N.J. 560, 573-574 (1963). Condemnation proceedings are an "informational inquisition" designed to recreate a hypothetical sale of the subject property in order to indemnify the owner for its loss and, importantly, there is no burden of proof upon either party. Paterson Redevelopment Agency v. Bienstock, 123 N.J. Super. 457, 459-460 (App. Div. 1973).

In Village of South Orange v. Alden Corp., 71 N.J. 362 (1976) the Supreme Court echoed that the test of compensation was the probable sales price between willing, but uncoerced parties:

> When we speak of "value" as a measure of just compensation, we are referring to market value; and when we speak of market value we mean the price which would be mutually agreeable to a willing buyer and a willing

> seller, neither being under compulsion to act. [Id. At 367-368]

The fundamental objective of a condemnation proceeding is to recreate in the courtroom all factors which would bear upon the negotiations between the hypothetical buyer and seller of the subject property. If the real estate marketplace would recognize a fact as relevant to the assessment of the transferable or market value of the subject property, then the factfinder may consider such facts. In that regard, one of the true hallmarks of a condemnation valuation trial is the liberal approach New Jersey courts have taken with respect to admissibility of evidence. State by Com'r of Transp. v. F. & J., 250 N.J. Super. 19, 26 (App. Div. 1991) ("[A]ny evidence which is reasonably probative of fair market value is admissible in a condemnation action.").

a) *IN LIMINE* MOTION PRACTICE IS AN IMPROPER PROCEDURE TO LIMIT TEAM RHODI'S CLAIM FOR JUST COMPENSATION.

JCRA's dispositive request to have the Trial Court bar Team Rhodi's appraisal before trial is against a clear policy established by our courts of letting the jury decide the issue of just compensation based on all the evidence, not the evidence as parsed out by *in limine* motions. The rule in New Jersey was succinctly stated in Bellardini v. Krikorian, 222 N.J. Super. 457, 464 (App. Div. 1988):

> We have noted an increase in *in limine* rulings on evidence questions in recent times. Such rulings are often in the abstract and not in the context of facts adduced at trial.

> Requests for such rulings should be granted only sparingly and with the same caution as requests for dismissals on opening statements.

More recently, Cho v. Trinitas Regional Medical Center, 443 N.J. Super. 461, 470 (App. Div. 2015), certif. den. 224 N.J. 529 (2016), guided Courts and practitioners as follows:

> Even when a limited issue is presented, "[o]ur courts generally disfavor in limine rulings on evidence questions," because the trial provides a superior context for the consideration of such issues. State v. Cordero, 438 N.J. Super. 472, 484-85, 105 A.3d 1129 (App.Div.2014), certif. denied, 221 N.J. 287 (2015). Although a trial judge "retains the discretion, in appropriate cases, to rule on the admissibility of evidence pre-trial," id. at 484, we have cautioned that "[r]equests for such rulings should be granted only sparingly." Ibid. (quoting Bellardini v. Krikorian, 222 N.J. Super. 457, 464 (App. Div. 1988); see also Biunno, Weissbard & Zegas, *Current N.J. Rules of Evidence*, comment 1 on *N.J.R.E.* 105 (2015). This is particularly true when the "motion in limine" seeks the exclusion of an expert's testimony, an objective that has the concomitant effect of rendering a plaintiff's claim futile. See Bellardini, supra, 222 N.J. Super. at 463-64.

Cho's holding was ultimately adopted by the Supreme Court Rules Committee by amendment to Rule 4:25-8 in September 2020.

JCRA's appeal asks the Court to make findings of fact before a jury has an opportunity to hear the full presentation of evidence. At best, JCRA's disagreement is directed at the weight to be given to the expert's testimony, not the admissibility thereof. For example, JCRA's entire appellate argument hinges upon a significant

mistake or oversight concerning the owner's valuation theory: JCRA argues that Team Rhodi failed to account for differences between the subject property and the "comparable sales" used (Pb1), but that argument is not supported by the record, as Team Rhodi's appraiser clearly applied negative adjustments to six of his seven "comparable sales" to account for the lack of approvals at the Team Rhodi property. Pa120-Pa122 ("[A]n appropriate adjustment is warranted to account for an incremental value attributable to approvals secured by the seller in each transaction.").

As in all contested condemnation cases, JCRA will have the opportunity at trial to cross-examine all of Team Rhodi's witnesses, including Mr. Stack, regarding the application of his market adjustments. "It is elementary that an expert witness is always subject to searching cross-examination on the basis for his opinion." County of Ocean v. Landolfo, 132 N.J. Super. 523, 528 (App. Div. 1975); State, by State Highway Comm'r v. Azzolina Land Corp., 101 N.J. Super. 103, 106 (App. Div. 1968).

b) TEAM RHODI'S EXPERT OPINIONS ON "HIGHEST AND BEST USE" ARE FACTUALLY AND LEGALLY SUPPORTED; THE "PROJECT INFLUENCE DOCTRINE" IS NOT APPLICABLE.

When exercising its gatekeeping function a condemnation case, the Court's analysis must start with the seminal case of State v. Gorga, 26 N.J. 113 (1958):

> The specific question is whether market value as of the date of taking may be affected by the prospect of an amendment of the zoning ordinance. Analytically, the question is one of fact. Abstractly considered, it would not matter whether the zoning change is probable or remotely possible if the parties to the sale would in fact be influenced thereby in fixing the price. . . .
>
> Zoning amendments are not routinely made or granted. A purchaser in a voluntary transaction would rarely pay the price the property would be worth if the amendment were an accomplished fact. No matter how probable an amendment may seem, an element of uncertainty remains and has its impact upon the selling price. At most a buyer would pay a premium for that probability in addition to what the property is worth under the restrictions of the existing ordinance. In permitting proof of a probable amendment, the law merely seeks to recognize a fact, if it does exist. In short if the parties to a voluntary transaction would as of the date of taking give recognition to the probability of a zoning amendment in agreeing upon the value, the law will recognize the truth. [Id. at 117].

Just compensation is a function of the value of property in light of its highest and best use. Highest and best use is defined as "the use that at the time of appraisal is the most profitable, likely use or alternatively, 'the available use and program of future utilization that produces the highest present land value." Ford Motor Co. v. Tp. Of Edison, 127 N.J. 290, 300 (1992) (*quoting* Inmar Associates, Inc. v. Tp. of Edison, 2 N.J. Tax 59, 64 (1980)).

One of the elements of a property's highest and best use is "legal permissibility," and "if the parties to a voluntary transaction would as of the date of

taking give recognition to the probability of a zoning amendment in agreeing upon the value, the law will recognize the truth." Gorga, 26 N.J. at 117.

Following Gorga, the Supreme Court clarified its operational approach in State by Commissioner of Transportation v. Caoili, 135 N.J. 252 (1994), establishing a clear two-step process. 135 N.J. at 265. In Caoili, a commercial use requiring a use variance was proffered as the highest and best use of the residentially zoned property along with the probability of obtaining a subdivision. In valuing the property, the owner's experts discounted the sale prices of the comparison properties by ten percent to account for the fact that the subject property there had not yet obtained a zoning variance. The Court's two-step approach was explained as necessary to avoid "unbridled speculation" on the fair market value of the property. Id. at 264 (internal quotation marks and citation omitted). Under Caoili's framework, a court must first determine whether there is sufficient evidence to support the conclusion that a zoning change is "reasonably probable." Id. at 265.

After that initial determination is made, the jury determines in a second step whether "a buyer and seller engaged in voluntary negotiations over the fair market value of the property [would reasonably believe] that a change may occur and will have an impact on the value of the property." Id. at 264–65. This determination does not require the jury to find that the zoning change is probable, nor to determine the degree of probability of the zoning change. Id. Instead, "even though the parties to

a voluntary transaction may not believe that a zoning change is more likely than not, their belief that there may be a change should be taken into account if that belief is reasonable and it affects their assessment of the property's value." Id. at 265 (internal quotation marks and citation omitted). The Court in Caoili concluded that a jury could consider future variance approval and potential subdivision of the property in the valuation analysis. Id. at 265, 267.

Relevant to the issue here, Caoili also addressed the appraisal mechanics which may be applied in arriving at the enhancement in value resulting from the existence of a reasonable probability. The court in Caoili stated that it makes no difference whether the appraiser adds a "premium" or subtracts a "discount" in arriving at the adjustment to sales data to account for the probability of a change. Regarding this issue, the Court stated as follows, "[w]e do not, however, read or apply the observations in Gorga to mandate that in the valuation process experts must use addition instead of subtraction... Accordingly, we reject the State's contention that the owners' evidence should have been excluded because it used commercially-zoned properties as comparable sales in arriving at an initial value of the property and then discounted that valuation in accordance with their estimation of the likelihood of such a variance to arrive at the property's fair market value on the date of taking." Id. at 273.

In the instant matter, Team Rhodi's appraisal, prepared by Maurice Stack, MAI, is consonant with the principles set down from our Supreme Court, as was recognized by the trial court. Mr. Stack's appraisal values the Property based on the reasonable probability that at development plan for a 95-unit multi-family requiring modest deviations and variances would have probably been approved by the Jersey City Planning Board on the valuation date, and then discounts the value where appropriate to reflect that the Property has no approvals. Pa106-Pa112; see Caoili, 135 N.J. at 273. This is the precise methodology that was also used by the JCRA's appraiser, who himself concluded that it was reasonably probable that the subject property would have received approvals on the date of value for an 87-unit multi-family development, and then also discounts the value for lack of approvals. Pa80-Pa81; Pa86; Pa120-Pa122.

Moreover, JCRA's argument regarding the applicability of the "Project Influence Doctrine" and "Scope of the Project" is farfetched in light of the "reasonable probability" analyses undertaken by Mr. Stack and Mr. Wenger. As demonstrated in Team Rhodi's expert reports, an application of the outdated R-2 zoning, which has not been in place since the late 1990s, should not apply to

determine just compensation in this matter as of June 3, 2019, because it would fall significantly short of satisfying the test to determine the "highest and best use." [2]

Finally, the two unreported, non-binding trial court opinions cited by the JCRA in its motion actually support Team Rhodi's position, not JCRA's. In City of Hoboken v. Horst Savickas, Law Division, HUD-L-3109-04 (February 14, 2006), the Court held that when a condemnee submits sufficient evidence demonstrating a reasonable probability of a zoning change, then the question should be submitted to the jury. Pa206-Pa208. Additionally, Jersey City Redevelopment Agency v. Kerrigan, Docket No. HUD-L-4528-04 (January 25, 2008) is not applicable or persuasive because the parties in that matter failed to address whether it would be reasonably probable that a zoning change would occur as of the date of valuation. Pa210-Pa214. Had the parties in Kerrigan undertaken a reasonable probability analysis like the experts for Team Rhodi did here, then the Court should have submitted the facts to the jury to decide as it ruled in Horst Savickas.

[2] The JCRA's appraiser seems to agree with this premise because he also concluded that the R-2 zoning was irrelevant and instead explained that a more modern approach would result in achieving approvals for an 87-unit development. Pa80-Pa81.

CONCLUSION

For the foregoing reasons, the Trial Court's decision should be affirmed and the question regarding the amount of just compensation owed to Team Rhodi for the taking should be presented to the jury in the trial court after a full development of the facts.

Dated: September 20, 2024

JERSEY CITY REDEVELOPMENT AGENCY, Plaintiff/Appellant, v. TEAM RHODI, Defendant/Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003518-23 ON APPEAL FROM: LAW DIVISION HUDSON COUNTY DOCKET NO. HUD-L-4592-18 SAT BELOW: HON. JEFFREY R. JABLONSKI, A.J.S.C. Civil Action

REPLY BRIEF ON BEHALF OF APPELLANT JERSEY CITY REDEVELOPMENT AGENCY IN FURTHER SUPPORT OF APPELLANT'S INTERLOCUTORY APPEAL

PAUL V. FERNICOLA & ASSOCIATES, LLC
219 Broad Street
Red Bank, New Jersey 07701
(732) 345-0600
Attorneys for Plaintiff/Appellant, Jersey City Redevelopment Agency

PAUL V. FERNICOLA, ESQ.
Of Counsel

ROBERT E. MOORE, ESQ.
On the Brief

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PRELIMINARY STATEMENT

The opposition brief filed on behalf of Defendant/Respondent Team Rhodi, LLC ("Respondent") fails to acknowledge (1) the New Jersey Supreme Court's ruling in Borough of Saddle River v. 66 E. Allendale, LLC which instructs courts to act as "Gatekeeper" by preventing unduly speculative evidence to be presented to the jury; and (2) the need for two separate negative adjustments for lack of development approvals as of the Date of Valuation **as well as** the variances required for Respondent's proposed Highest and Best Use of the subject Property. Instead of addressing the arguments raised in Appellant Jersey City Redevelopment Agency's ("Appellant" or "JCRA") interlocutory appeal, Respondent launches procedural attacks and relies upon general condemnation law.

Respondent has failed to provide any meaningful opposition to Appellant's arguments that the trial court set forth an incorrect recitation of condemnation law by ruling that the zoning under the Morris Canal Redevelopment Plan controls the parties' analysis of the just compensation for JCRA's acquisition of Respondent's property via its power of condemnation. Therefore, this Appellate Division should grant Appellant's requested relief and reverse the trial court's rulings of June 7, 2024.

LEGAL ARGUMENT

POINT I

APPELLANT'S *IN LIMINE* MOTION BEFORE THE TRIAL COURT WAS PROCEDURALLY PROPER

Contrary to Respondent's arguments, Appellant's *in limine* motion requested the trial court to make the purely legal determination of (1) whether Respondent's appraiser utilized the correct zoning; and (2) whether Respondent's appraiser adhered to the established condemnation laws of the State of New Jersey, when arriving at his conclusion of fair market value of the subject Property for the purpose of determining just compensation. As Respondent's appraiser failed to both utilize the correct zoning and make a negative adjustment to reflect the costs and risk to obtain use and bulk variance approval when valuing the property, the trial court's denial of Appellant's *in limine* motion should be overturned.

Respondent fundamentally ignores the central points of JCRA's legal argument in their opposition Appellant's interlocutory appeal. Respondent concedes its appraiser applied the zoning under the Morris Canal Redevelopment Plan and failed to consider the underlying R-2 zoning in which the subject Property is located when forming his opinion of the Property's highest and best use. In addition, Respondent concedes its appraiser failed to make any negative adjustments for the multiple variances that would be needed in accordance with the Respondent

appraiser's conclusion of the Property's Highest and Best Use. Respondent's planner testified that several variances would be necessary for a mixed-use residential development of the Property. However, Respondent's appraiser ignored well established condemnation law when he failed to make a negative adjustment to his comparable sales to reflect the cost and risk a hypothetical willing buyer would face when purchasing the Property without development approvals on June 3, 2019; the Date of Valuation.

Ignoring the fundamentally flawed methodology of its appraiser, Respondent instead relies on dicta at the very end of the Appellate Division's opinion in Bellardini v. Krikorian, 222 N.J. Super. 457 (App. Div. 1988) in support of its argument that Appellant's motion *in limine* is improperly brought at this time. However, that matter is distinguished by the difference in the analysis at issue: in Bellardini, the court considered expert testimony in the context of a medical malpractice matter, not a condemnation matter. Further distinguishing Bellardini from the current matter is the method in which the *in limine* motion was brought before the trial court. In Bellardini, the Appellate Division took issue with the trial court considering the motion at issue **after jury selection for the trial had already begun;** was "initially brought without papers or supporting briefs"; and trial judge having already set forth the schedule of opening arguments and witnesses. See, Bellardini at 461. The language cited by Respondent does not outright bar *in limine*

motions; the Appellate Division only advises trial courts that such motions may be inappropriately considered outside the context of "facts adduced at trial." Bellardini, *supra* at 464. JCRA's current motion does not request any issues of fact to be addressed, but whether Respondent's appraiser arrived at his opinion in accordance with established New Jersey condemnation law. Further, the Appellate Division's remand in Bellardini was based upon its disapproval of the trial judge barring the defendant's expert from testifying based upon his failure to provide treatise supporting his opinions. Id. at 463 ("It has long been established that an expert may rely on his own knowledge, as well as on facts supplied to him by others.")

Likewise, the Appellate Division's decision in Cho v. Trinitas Regional Medical Center, 443 N.J. Super. 461 (App. Div. 2015) does not outright bar *in limine* motions. The Appellate Division reversed the trial court's dismissal of the plaintiff's claims with prejudice based upon "a summary procedure on the day of trial." See, Cho, *supra* at 463. Respondent omits from its analysis that the Appellate Division addressed the "misuse of the motion in limine" to disguise a motion for summary judgment brought in violation of R. 4:46-1. Id. at 467.

The current matter is not a medical malpractice matter as in Bellardini and Cho, the matter currently before the Court is a condemnation matter. A motion to strike an expert report in a medical malpractice case is tantamount to a motion to dismiss because in medical malpractice matters, a plaintiff must prove, by a

preponderance of the evidence, negligence on the part of the medical service provider. Ordinarily, an expert is required to establish the duty of care that was owed to a plaintiff and how it was breached through the conduct of the defendant. Thus, if an expert is barred from testifying on behalf of a medical malpractice plaintiff, then the plaintiff is unable to meet this burden and the matter must be dismissed.

In contrast, "the burden of proof concept has no place" in an action in condemnation. Paterson Redevelopment Agency v. Beinstock, 123 N.J. Super. 457, 460 (App. Div. 1973). This is because "the sole issue is determination of just compensation" and "procedural rules involving the risk of failure to persuade are inapposite." Id. The State's "constitutional mandate requires that the owner be awarded just compensation for the property [it] has lost." Id. "Absent the production of such evidence by either party, the triers of fact will determine fair market value solely from the other party's evidence." Id. The Court set forth the necessary analysis a trial court must engage in to prevent unduly speculative evidence from being presented to the jury; comprised of two steps:

> [T]he first step in the **two-step trial process is for the judge to make an initial, gatekeeping determination** of whether an assemblage was probable in the near future as measured from the date of taking based on the evidence before him relating to market conditions and the circumstances particular to the property.
>
> …
>
> If the judge determines that an assemblage including defendant's property was reasonably probable at a near-

> future time from the date of taking, then, according to the prescription of both Gorga and Caoili, **the jury must be instructed to consider in its determination of fair market value the premium a willing buyer would pay for the probability of a future assemblage over and above the fair market value as represented by the existing use of the property**.
>
> See, County of Monmouth v. Hilton, 334 N.J. Super. 582, 590 (App. Div. 2000) [emphasis added].

This is how a trial court must perform its "gatekeeping role" as directed by the New Jersey Supreme Court in Borough of Saddle River v. East Allendale, LLC, 216 N.J. 115 (2013). The importance of the trial judge's role of gate keeper was stressed, as an incorrect approach would yield skewed results:

> [W]e are persuaded that appraising the value of defendant's property as if a four-lot assemblage had already taken place as of the date of taking and then basing highest and best use on such an assemblage constituted a fundamentally untenable and legally unsupportable approach . . .it cannot be the basis for determining market value as if the assemblage had already taken place. **The distinction between enhancing market value and constituting the basis of market value is, in our view, critical**, and it is that distinction that rendered defendant's appraisal methodology legal defective.
>
> Hilton, *supra* at 587 [emphasis added].

The Hilton Court likened the probable assemblage issue to that of a probable zoning change, stating, "we are persuaded that this issue is conceptually no different from the effect on market value of a prospective zoning change. The two situations are virtually identical in their salient character, that is, the prospect of a change in the basic circumstances surrounding the property that, it if occurs after the date of

taking, would then permit a highest and best use different from and more profitable to the owner that the use existing or permissible as of the date of taking." Hilton, *supra* at 549.

The Hilton court stated, "Thus, as we understand Caoili, the first step in the two-step process is for the judge to make an initial, gatekeeping determination of whether an assemblage was probable in the near future as measured from the date of taking based on the evidence before him related to market conditions and the circumstances particular to the property." Hilton, *supra* at 590.

Later, the Supreme Court of New Jersey reiterated the requirements of State v. Caoili, 135 N.J. 252 (1994) in Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115 (2013), stating, "The goal of Caoili . . . was to avoid having the jury hear and consider speculative evidence that a zoning change was reasonably probable when assessing what a reasonable buyer and seller would be willing to pay for the property." The New Jersey Supreme Court continued:

> [O]nly when the trial court has **first determined that the evidence is of a quality to allow the jury to consider the probability of a zoning change** should the jury be permitted to assess a premium based on that zoning change, as Caoili . . . explained.
>
> Saddle River, *supra* at 131 [emphasis added].

In Saddle River, the Appellate Division reversed and remanded, faulting the trial judge for not engaging in this two-step process of determining the evidence to be presented was not unduly speculative prior to allowing evidence to be presented

to the jury. Again, this is a critical difference between the court's role in a condemnation matter than in the matters relied upon by Respondent in its opposition Brief. In its motion before the trial court, Appellant JCRA raised two definitive, purely legal issues in its motion *in limine* and does not question the basis of Respondent's appraiser's opinion as to fair market value but the methodology in which he used to form his opinion of fair market value, unlike the cases relied upon by Respondent. The issues raised by Appellant sought the trial court engage in its gatekeeper role and review the quality of Respondent's evidence prior to it being presented to the jury. Therefore, JCRA's motion was properly before the trial court, contrary to Respondent's arguments.

POINT II

RESPONDENT FAILS TO ADDRESS APPELLANT'S ARGUMENTS AND INSTEAD RELIES UPON GENERAL CONDEMNATION LAW

Despite the "liberal approach . . . to admissibility of evidence" (Db11), that approach is tempered by the Court's gatekeeping function, which Defendant recognizes (Db15) but fails to address. Respondent's appraiser has produced a flawed analysis which the trial court must prevent the jury from being confused by, in furtherance of its gatekeeping function. "[A] fair market value determination should not be based upon enhancement caused by the very project for which

condemnation is sought." Jersey City Redevelopment Agency v. Costello, 252 N.J. Super. 247, 254 fn. 4 (App. Div. 1991). "[T]he proper basis of compensation is the value of the property as it would be at the time of the taking . . disregarding either the depreciating threat of or the inflationary reaction to the proposed public project." Jersey City Redevelopment Agency v. Kugler, 58 N.J. 374 (1971). Respondent utterly fails to address these arguments, merely referring to them as "far fetched." Db17.

Respondent relies upon standard eminent domain law in defense of its appraisal, however there is no analysis of the limitations of such information relied upon by an appraiser and limitations on what evidence is presented to the jury. Instead of addressing its appraiser's failure to make the two (2) proper adjustments, Respondent presents arguments related to the highest and best use analysis. Regardless of whether Appellant's appraisal expert agrees or disagrees with Respondent's appraisal expert as to the Highest and Best Use of the Property, and whether there exists a reasonable probability the necessary variances, Respondent's appraiser failed to make **both** of the legally-required adjustments to the comparable sales utilized to arrive at his opinion of just compensation.

As discusses *supra*, the Hilton court rejected the appraiser's report for treating a property assemblage as a "fait accompli" (as described in Caoili, *supra* at 273) rather than assigning a premium that a willing buyer would pay for a property with

the reasonable probability of an assemblage or zoning change. Hilton, *supra* at 590. In Hilton, the subject property was contiguous with three other non-conforming lots, all under separate ownership. The County's appraiser opined the property's highest and best use was as continued use as a protected, non-conforming five-family dwelling and used the comparable sales approach to value the property at $295,000.00. The County's appraiser stated he considered the value of the property as part of a prospective assemblage with the three contiguous lots, opining the highest and best use as an assemblage would be either town-house or restaurant use, which was less than the un-assembled value. In contrast, the property owner's appraiser valued the subject property as if an assemblage of the four lots had already occurred as of the date of taking and opined the highest and best use was to be developed as a 92-unit multifamily project, concluding the fair market value to be $729,000.00.

The Appellate Division stated, "we are persuaded that appraising the value of defendant's property as if a four-lot assemblage had already taken place as of the date of taking and then based highest and best use on such an assemblage constituted a fundamentally untenable and legally unsupportable approach." See, Hilton, *supra* at 586. Recognizing that a proposed future assemblage of differently-owned parcels could not serve as the basis of the highest and best use opinion, but that such a

prospective future assemblage "is not irrelevant" to determining the fair market value of the property to be acquired, the Appellate Division held:

> [I]f there is a probability that there may in the near future be an assemblage of lots into a single integrated unit supporting a particular highest and best use, a wiling buyer may well be willing to pay not merely for the property under its present constraints but, in addition to that present value, for the probability of such an assemblage as well. Obviously, the greater the probability, the more a buyer would be willing to pay for it . . . **But it cannot be the basis for determining market value as if the assemblage had already taken place. The distinction between enhancing market value and constituting the basis of market value is, in our view, critical, and it is that distinction that rendered defendant's appraisal methodology legal defective. (Emphasis Added).**
>
> See, Hilton at 587.

In Hilton, the Appellate Division quoted Chief Just Weintraub's rulings in State v. Gorga, 26 N.J. 113 (1958):

> The important caveat is that the true issue is not the value of the property for the use which would be permitted if the amendment were adopted. Zoning amendments are not routinely made or granted. A purchaser in a voluntary transaction would rarely pay the price the property would be worth if the amendment were an accomplished fact. No matter how probable an amendment may seem, an element of uncertainty remains and has its impact on the selling price. At most a buyer would pay a premium for that probability in addition to what the property is worth under the restrictions of the existing ordinance . . . if the parties to a voluntary transaction would as of the date of taking give recognition to the probability of a zoning amendment in agreeing upon the value, the law will recognize the truth.

Hilton, *supra* at 591, *quoting* Gorga, *supra* at 117.

As recognized by the New Jersey Supreme Court in Gorga:

> Here defendants' testimony was confined to the value the property would have if it were rezoned. No testimony was directed to the target, what a willing buyer would pay a willing seller as of the date of taking for the property as then zoned, taking into account the probability, as it then appeared, of an amendment in the near future. In support of his opinion of the then market value, an expert may advert to the value of the property would have if rezoned, but only by way of explaining his opinion of the existing market value.
>
> Gorga, *supra* at 118.

This is the exact approach taken by Respondent's experts in the current matter, which should be barred from presentation to the jury as it was specifically rejected by the New Jersey Supreme Court. Again, "the prospect and consequence of a probable zoning change may be readily translated into the probable-assemblage situation." Hilton, *supra* at 591. Based thereon, Respondent's appraiser failed to make a negative adjustment to his comparable sales to reflect the risk and cost of obtaining multiple variances to develop the subject Property as a mixed use development. The adjustments which Respondent claims were made represent an incomplete analysis by Respondent's appraiser. It is not enough to merely "account for the differences between the status of **approvals** of the comparable sales and the Team Rhodi property" (Db3 [emphasis added]) but Respondent's appraisal was also required to apply a negative adjustment for the variances that would be required to

construct Respondent's proposed Highest and Best Use under the existing R-2 zoning. Therefore, had the trial court utilized the correct standard regarding the applicable zoning as discussed *supra*, Respondent should have been barred from presenting such speculative "evidence" to the jury.

In addition, Appellant's arguments regarding the use of the redevelopment plan itself as the zoning on the Date of Valuation is supported by the Appellate Division's holding in Jersey City Redevelopments Agency v. Mack Properties Co., 280 N.J. Super. 553 (App. Div. 1995). There, JCRA's appraiser opined the highest and best use of the property to be industrial development based upon the property's located in an "intensive industrial use zone." However, the condemnee's appraiser opinion the property's highest and best use to be high-density office development based upon the surrounding development. There, the court stated the condemnor's "proposed use may be considered" in determining the fair market value of the property to be condemned. Mack, *supra* at 569. The Appellate Division confirmed that "there is no question that the proper basis for compensation is the value of the property as it would be at the time of the taking disregarding either the depreciating threat of or the inflationary reaction to the proposed public project." Ibid.

In the current matter, Respondent's appraiser's opinion of highest and best use is at least partially based upon the erroneous position that the provisions of the Morris Canal Redevelopment Plan applied as of the date of taking as the zoning to

determine the developmental potential of the Property. Respondent's experts ignored the R-2 zone which was the zoning in place at the time of the taking. The use of the redevelopment plan was the Property's zoning flies in the face of established redevelopment law – the project influence doctrine calls for the specific exclusion of any positive or negative fluctuations due to the redevelopment plan for which the subject property is being taken. *See*, Jersey City Redevelopment Agency v. Kugler, 58 N.J. 374 (1971).

For the foregoing reasons, the trial court's ruling that the zoning reflected in the Morris Avenue Redevelopment Area is the controlling zoning for determining just compensation should be reversed as it is squarely contradicted by established New Jersey condemnation law and Respondent's appraisal barred from presentation to the jury.

POINT III

RESPONDENT'S PLANNER ALSO UTILIZED INCORRECT "NEGOTIATED ZONING" UPON WHICH RESPONDENT'S APPRAISER BASED HIS ERRONEOUS ANALYSIS

Contrary to Respondent's assertion (Db7), Appellant disputes the evaluation by Respondent's Professional Planning Services Report prepared by Jeff Wenger, PP of New Strata, LLC dated March 9, 2023[1]. Pa124. Respondent's planner opined that he also ignored the R-2 zoning, instead using a non-existent "negotiated zoning"

[1] Appellant omitted any reference to the Wenger Report due to the page limit set forth in R. 2:8-1.

to provide a flawed foundation for Respondent's appraisal report. At no point did Wenger address Respondent's need for multiple variances for the proposed Highest and Best Use of the Property. As to the R-2 zone in which the subject Property is located, the New Strata Report states:

> As Jersey City's decline was successfully halted in the 1980s and growth picked up speed in the 1990s and continued to accelerate to this day, the R-2 zone has slowly vanished from the Jersey City zoning map. Today, only a few random strips of the R-2 zone remain as Jersey City's continued growth now provides a more positive context that can support all the historic commercial streets in the city. Thus, the R-2 zone district has been removed from most areas of the city and only remains on the map in small leftover areas that have not required attention from the Division of Planning. Continuing to enforce the R-2 zoning standards in a now hot real estate market with a growing population and clear demand for new commercial space would be tantamount to Jersey City turning its back on its own success. It is therefore quite clear that increased building height, density, and an expansion of permitted uses would be supported and approved by the City for development projects in this area by 2019.
>
> Pa133.

The New Strata Report opines as to the probable zoning that would be approved by the City for the subject Property:

> Given the subject property's ideal dimensions for a large apartment building that was achieved through a series of adjacent property acquisitions, the site's proximity to new road and rail transportation infrastructure, and the powerful market demand for residential space in the immediate vicinity of the site, it is easy to conclude that is [sic] was very probable that 8-story mixed-use residential development would have been approved on the subject

> property prior to 2019. This would match other new developments that had already been approved on nearby sites and meet the goals and objectives of Jersey City's master plan.
>
> Pa135.

Respondent's planner failed to examine what variances would be required to construct Respondent's proposed Highest and Best Use. First and foremost, Wenger admitted he did not consider the controlling R-2 zoning in place:

> Q: In arriving at your opinion that an eight-story development with 98 units would be granted as of June 2019, what zoning classification did you utilize?
>
> A: **I did not use a zoning classification** . . . I assumed that a new re-development plan or a plan amendment would be adopted for projects at that time.
>
> Q: Did you perform an analysis as to the type of development that was reasonably probable applying the R-2 zoning classification to the subject property?
>
> A: I am aware of the R-2 zoning. And **I did not think that that would be applied** were a development to take place there.
>
> Pa180 at 11:2-16 [emphasis added].

Indeed, Wegner admitted during his sworn deposition testimony that Respondent's proposed Highest and Best Use of an 8-story would require multiple variances:

> Q: Your proposed eight-story, 98 residential unit development, can you identify the number of variances that would be required for that development if the R-2 zoning classification was applied to the subject Property?

> A: It would be a D variance, for starters. Pretty much, **every aspect of the building would be a variance. It does not conform to the R-2**.
>
> Pa180 at 12:8:15 [emphasis added].

Instead of addressing the likelihood that a developer would obtain the variances necessary to construct Respondent's proposed Highest and Best Use, Wenger relies upon a customized redevelopment plan for every proposed project; achieved either through amending the zoning ordinance or amending the redevelopment plan to accommodate a redeveloper's proposed project. To wit, Wegner testified, ". . . I assumed that a new re-development plan or a plan amendment would be adopted for projects at that time." Pa180 at 11:7-9.

The impropriety of Wenger's opinion was explored during his deposition:

> Q: . . . Throughout your report, you use a term, "negotiated zoning". Can you provide me with the benefit of your definition of "negotiated zoning"?
>
> A: So what would happen many times is a developer would conceive of a development project that did not conform to existing zoning and would present their proposal to the planning department. And we would consider the proposal. And if we thought it had merit, we might seek some changes to it and require some public benefits or some design changes that we thought was beneficial to the public. And assuming the area was blighted, we would then be able to write a report to have it declared in need of redevelopment or in need of rehabilitation and then adopt a redevelopment plan for that site, or for the general area, depending on how . . . it worked out.
>
> Pa183 at 22:21-23:13.

As argued to the trial court, "there is no such thing as negotiated zoning." 1T13:18-19. During his deposition, Wegner acknowledged his approach did not comply with the Municipal Land Use Law. Pa183 at 23:14-18.

Respondent's appraisal expert based his appraisal analysis on Mr. Wegner's incorrect planning analysis. Pa111. Therefore, this Appellate Division should reverse the trial court's rulings and bar the presentation of Respondent's expert opinions from the jury.

CONCLUSION

For the foregoing reasons, Appellant's interlocutory appeal should be granted and the trial court's orders of June 7, 2024 be reversed.

PAUL V. FERNICOLA & ASSOCIATES, LLC
Attorneys for Plaintiff/Appellant, Jersey City Redevelopment Agency

By: /s/ Paul V. Fernicola, Esq.
PAUL V. FERNICOLA, ESQ.
I.D. No. 011711990

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