PEMBERTON TOWNSHIP, Plaintiff/Respondent/Cross Appellant.	: : : : : :	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: DOCKET NO: A-003684-21 T1
vs.	: :	**CIVIL ACTION**
ROCCO BERARDI, ANTONIA BERARDI, DAIRY QUEEN, NU SOUL CAFÉ, GRISSEL CATALAN, JAY'S STUDIO JEWELERS, ELLY PREMIUM LAUNDRY, ERNIES BARBER SHOP, DR. LORRAIN VARELA, DPM, PEMBERTON TOWNSHIP MUNICIPAL UTILITIES AUTHORITY and BOARD OF CHOSEN FREEHOLDERS of the COUNTY OF BURLINGTON, Defendants/Appellants/Cross Respondents.	: : : : : : :	On Appeal from a Final Judgment of the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L BUR L 954-18 Sat Below: The Honorable Aimee Belgard, J.S.C.

BRIEF ON BEHALF OF DEFENDANT/APPELLANT/CROSS RESPONDENTS ROCCO BERARDI AND ANTONIA BERARDI

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Dated: November 16, 2022
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On the Brief

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INTRODUCTORY STATEMENT

This appeal, arising from a condemnation case involves a very narrow issue, i.e., whether the condemnor's appraisal of a property taken in fee simple estate, based on the capitalization of income, requires valuation based on market rents, when the actual rent of the anchor supermarket of the subject shopping center is a, below market, thirty-year-old lease negotiated before the existence of any improvements on the property? Both New Jersey case law and generally accepted appraisal practice would answer "yes". But, the law division judge and an arbitrator disagreed with that conclusion.

PROCEDURAL HISTORY

This case involves the taking of a shopping center (Lot 19 and adjoining vacant property Lot 18) located in the town center of Browns Mills, Pemberton Township in New Jersey under the local redevelopment act. (N.J.S.A. 40A:12A-1 et seq.) The Complaint, filed May 4, 2018, in paragraph seven provides that "the township is acquiring a fee simple interest in the properties. (Da-1)

Notwithstanding that May 4, 2018 is the date of taking, pursuant to defendants' motion, an Order was entered by the Hon. Robert E. Bookbinder, J.S.C. on February 20, 2019, (Da10) designating January 27, 1994 as the date of valuation pursuant to N.J.S.A 20:3-30(d)as that was the date of the designation of the property as[1] within an area "in need of redevelopment." See Housing Authority of City of Newark v. Ricciardi 175 N.J. Super. 13 (App. Div. 1980).

The controlling statute as to the date of valuation in this case is based upon a finding by the legislature that after a declaration of blight there is a natural

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[1] 1T Motion 02/20/2019
2T Motion 10/14/2020
3T Motion 08/18/2021
4T Arbitration Hrg.02/07/2022
5T Arbitration Hrg.02/08/2022
6T Arbitration Hrg.02/10/2022
7T Arbitration Hrg.02/18/2022

decline in property values. [2] In this case, the natural decline was aggravated by the filing of a prior eminent domain action condemning the subject property. That case was voluntarily dismissed immediately prior to trial.[3]

The Complaint names Rocco Berardi (Lot 19) as well as the seven tenants remaining in possession on lot 19 as of the date of taking, May 4, 2018.

Pursuant to the Order of Judge Bookbinder, J.S.C. Jerome McHale & Associates, Inc. (McHale) submitted a new appraisal designating January 27, 1994 as the date of valuation, but while his report valued lot 18 as a fee simple estate as he had done for both lots 18 and 19 initially, his new appraisal for lot 19 was an opinion of only the leased fee estate, and he rendered no opinion as to the value of the fee simple estate. McHale was very careful in his transmittal

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[2] These amendments had been introduced in 1966 as Assembly Bills Nos. 204 and 252 with the following statement appended:

After an area has been declared blighted by a municipality there is a natural decline in property values resulting both from the desire of the inhabitants to immediately relocate and the natural reluctance on the part of buyers to purchase property within the affected area. There is no time period during which these development agencies must acquire the property needed to carry out the proposed plan. The purpose of this bill is to assure a property owner the compensation to which he is morally entitled and to prevent the undue hardship which will accrue as a result of the inevitable diminution in property values between the date of the declaration of blight and the institution of condemnation proceedings.

These bills were ultimately passed by the 1967 Legislature as Assembly Bills Nos. 347 and 349. See also, Report of Eminent Domain Revisions Commission, pp. 24-28 (April 15, 1965), citing *Wilson v. Long Branch, 27 NJ 360 (App. Div. 1958).*

[3] See Pemberton Township v Berardi 378 N.J. Super. 430 (App. Div. 2005)

letter and appraisal (Da13;Da18;Da20) to point out that the purpose of the appraisal and the "property rights appraised" clearly stated that the opinion was of the leased fee in order to comply with the ethics requirement of the Appraisal Institute.

Defendants' motion to bar Plaintiff's expert from using the Acme Contract rent in his income approach and sales of "the leased fee" of shopping centers was denied by the Honorable Aimee R. Belgard, P.J.C.V. October 14, 2020. (Da108) (2T 32-34) Because of covid restrictions, the parties agreed to arbitration.

The orders transferring this case to arbitration preserved this issue for appeal. (Da110;Da113;Da123)

The relevant issue before the Arbitrator was the determination of the market value of the total of the interests making up the fee simple estate including any furniture, fixtures and equipment (FF&E) integrally related to the use of the property as of the date of the taking but valued as of January 27, 1994. There is no appeal from the award as to Lot 18 or the FF&E issue. The arbitration award was rendered March 22, 2022 (Da115); Order for Final Judgment was entered 6/21/22 (Da123) Defendant, Berardi filed a Notice of Appeal. (Da209)

STATEMENT OF FACTS

As indicated in the August 6, 1962 lease (Da126) whereby Tayfors, Inc. leased, the then vacant land to Acme Market Inc., also agreeing to build the store to Acme specifications as the anchor store for an entire shopping center to be laid out in Exhibits attached to the lease. Under paragraph 44 of the lease ACME acted as the general contractor, built and financed the construction, and gave a $180,000.00 mortgage to be paid off 60 days after completion, at which time the landlord could obtain financing. In return, ACME received a 15-year lease beginning November 1, 1963 together with seven (7) additional five-year option at the low rent of .77 cents per sq. foot, totaling fifty years.

McHale at (Da43) claimed the Acme intended to move to the new Pine Grove shopping center as of Jan 27, 1994, however, such a move did not take place until 1996 and only after an agreement signed May 31, 1995 between the Township and two separate Acme entities whereby the Township agreed to forego its own acquisition of the Pine Grove property in favor of Acme Stores Properties, Inc. (ASPI) as its nominee and "fast track the approval process for a new proposed shopping center about two blocks away from the subject. (Da147). (6T38 4-10). The Township was granted the option to sublet the existing Acme store on the subject property, however Berardi obtained a summary judgment terminating the Acme lease March 15, 1999 (Da165). (6T36-13;38-10)Plaintiff

adopted the Ordinance (Da168) authorizing condemnation of the subject property January 15, 1998. (6T 41-13-25) The Acme building on the subject remained vacant as of the date of taking March 5, 2018.

Rocco Berardi is an Italian immigrant, who came to this country working on a ship in 1966, left the ship in Buffalo, NY and got a job with a cousin in a Pizzeria. (5T57 14-25)Twenty-two years later, after hard work, he was in a position to buy a property and ended up buying the Browns Mills shopping center, the subject property. (5T 58 17-24)Contrary to McHale's misinformation that he paid $2 million in 1988, he actually paid $2,475,000.00 as shown in the closing documents. (Da171;Da174;Da178;Da179;Da181;Da182) (6T 30-1-32-22)

Over almost the six years of operation before the redevelopment designation up to the January 27, 1994 valuation date, the shopping center was busy and Berardi brought most of the rents up to market value. The successful operation of the shopping center was best illustrated by the overage rent of the Rite Aid drug store which aside from the Acme, at 6323 square feet was the only store over 3,000 square feet and was ignored in McHale's income calculations, relied upon so heavily by the arbitrator. As shown on (Da184) and the testimony of the bookkeeper 6T(110-19-117-2). Rite Aid's gross sales grew from $1,735,402.00 for year ending September 1988 to $3,150,300.00 for the year

ended September 1995 or a growth of over 80% in less than 6 years. The overage rent went from $718.39 for 1988 to $33,424.00 for the last quarter 1994 and 9 months of 1995. Clearly this shopping center was economically vibrant and successful as of the date of valuation.

LEGAL ARGUMENT
POINT I
DEFENDANT'S MOTION TO BAR EVIDENCE OF THE THIRTY-YEAR-OLD ACME LEASE SHOULD HAVE BEEN GRANTED AS A MATTER OF LAW (Da108)

A. The Law of New Jersey and the text of the Appraisal Institute both agree that an Appraisal for a condemnation taking of fee simple estate cannot be lower than as valued by "Market Rent" when using the income capitalization approach.

The taking in this case is the fee simple estate free and clear of the remaining leaseholders as of the date of taking all of whom were named as defendants. The title that the plaintiff will ultimately convey to the redevelopers is the title taken in this case, the fee simple estate free and clear of any leasehold interests. The designation of a date of valuation of January 27, 1994 pursuant to the intent and purpose of N.J.S.A. 20: 3-30 (d), does not change the fact that the "property" taken, for which "just compensation" must be paid is the fee simple estate. There is just one award, in obedience to the constitutional and statutory requirements which must constitute the summation of all the values of the separate interests of the property. State v. Hudson Circle Service Center, Inc., 46 N.J. Super. 125, 131(App. Div. 1957) Merchantville v. Malik & Son, LLC,429 N.J. Super.416, 427(App.Div.2013). The award in this case must include any separate interest such as the leasehold interest of the Acme that was actually terminated in 1999.

The trial judge did not seem to grasp the point of law defendants were arguing on the motion to bar evidence of the Acme contract in McHale's calculation of gross income in the income approach. The trial judge acknowledged the defense argument that market rents should be utilized in this case, as a matter of law, but said:

> ". . . but I'm not seeing any case law that --specifically addresses that... said that the case of State by State Highway v. Hudson Circle. . . specifically said that proof by way of capitalization of rent should not be limited to such capitalization of the actual rents received if evidence is available to support the owner's contention that a higher rental value then the rent reserved exists and that the jury should be permitted to consider evidence to such greater amount and its capitalization." (2T32-20; 33-15).

Thus, the trial judge denied the motion on ground that the issue is simply a fact issue for the jury. It is not. As a matter of constitutional law, the property taken is the fee simple estate. An appraisal used to determine the just compensation for the taking of property must value the property interest being taken. McHale admitted several times in his appraisal that by using the Acme $.77 lease, he was appraising only the leased fee. Nichols Eminent Domain at 12.1[5] at 12-34," . . . states, "compensation". . . implies full indemnity to the owner [when his property is taken]." The property taken here is the fee simple estate. The fee simple estate defined in McHale's appraisal(Da20)is, "absolute ownership unencumbered by any other interest or estate . ."

McHale uses The Dictionary of Real Estate Appraisal 6th Ed. 2015 to define the leased fee interest as:

> "The ownership interest held by the lessor, which includes the right to the contract rent specified in the lease, plus the reversionary right when the lease expires." (Da20)

In Hudson Circle, supra, the property owner, defendant, appealed from the verdict of a jury trial involving the taking of property, a portion of which was leased to "Jersey Truck Center, which operated the gas station. The lease provided that in addition to the rent and other charges, the tenant would buy the supplies designated by this owner and pay to the owner, the posted "tank wagon price." The lease incorporated within its terms the contract referable to the gallonage and a 2 cent per gallon additional rental payment.

A witness from Texaco was barred from testifying that in the market, Texaco paid tenants usually up to 2 cents a gallon for leases.

The Appellate Court reversed the trial court's ruling excluding the evidence saying that the evidence was admissible and was not an attempt to prove business profits, but rather was relevant to the question of "valuation."

Thus, the opinion certainly does not support the position that the condemnor can substitute an appraisal of a "leased fee" for this taking of the entire property interests represented by the fee simple estate, by basing its value on a 30 year old lease that was negotiated as essentially a land lease instead of

a lease representing market rent. This is not simply an evidence ruling, it goes to the basis upon which to determine just compensation. See Casino Reinvestment Development v. Katz, 334 N.J. Super. 473 (Law Div. 2000). (Discussed below in Point III)

Evidence of the Acme contract lease should never have been presented to a trier of fact because it has absolutely no relevance to the fee simple value in this case. That is not to say that evidence of the actual contract rent should not be evidential in any case. The actual rent agreed upon between a landlord and tenant may be the best evidence of the anticipated income, depending on the circumstances of the case. But not as to this Lease! The Acme lease (Da126) was negotiated thirty years before the date of valuation when the lessor/owner had nothing but vacant land. The lease was a variation of a type of land lease. The owner had the leasee (Acme) act as its general contractor to build the building and parking area to Acme's terms and specifications as designed by Acme. Thus, Acme put the owner in business with its anchor store allowing the owner to then finance construction of the rest of the units over the next few years.

This was totally unlike any comparable situation to leasing space in an existing shopping center over thirty years later. None of the characteristics that appraisers look for in comparable leasing transactions are present. First of all

the market conditions thirty years before were never ever referenced by McHale. The standing of the parties and the motivation of the owner was entirely different from an owner renting the existing building to a hypothetical new tenant. McHale himself never suggested that the Acme lease represented market rent in 1994, his argument was that it was the legally binding contract rent that a buyer would be stuck with for approximately the next 20 years. That would be so if he were buying the "leased fee estate" as McHale was appraising the property. But, that is not at all relevant or material to the valuation of the fee simple estate. The Appraisal of Real Estate, 15th Ed. Recognized as authoritative by New Jersey Courts, states at pg. 415:

> ...When the fee simple estate is valued, the presumption is that the property is available to be leased at market rates. When an appraisal involves the valuation of the fee simple interest in a leased property, the valuation of the entire bundle of rights applies.

POINT II
THE ARBITRATOR SHOULD NEVER HAVE USED THE ACME LEASE FOR ANY PURPOSE.(Da115;Da116)

At the outset of the hearing, the Arbitrator stated that since our application to the trial judge to preclude the plaintiff from using the Acme lease as a basis for calculating the income was rejected by the trial court, he would allow that lease into evidence and would ultimately determine whether it carried any weight or not. (4T 23-3 to 8)

McHale acknowledged that he only valued the property interests being taken as a leased fee (4T 132-13 to 25, 134 – 11, 12)Then, after Brody explained the difference between a fee simple estate and a leased fee (6T 163-24 thru 167-8), and described an example of how a purchaser of the leased fee would have to go out and buy out the individual tenants leasehold rights in order to get the unencumbered fee simple estate necessary to redevelop the property (6T 167-14; 169-16); the Arbitrator just didn't get it saying:

> "In my mind, one of the issues is, what's the value of this property with a 77 cent sq./ft. lease for the Acme, and, you know, you can gussy it up with all kinds of leasehold interest, but at the end of the day, what's this property worth if somebody like Orlando comes along and wants to buy it. That's the way I'm looking at this. (6T 170 18 to 24).

That perspective misses the point that the two appraisers are valuing two different concepts of "this property." The taking by the plaintiff was the fee

simple estate, unencumbered by any lease hold interest. Thus, the complete bundle of sticks is the "property" for which "just compensation" must be paid. McHale valued only the "leased fee," leaving out the value of the leasehold interest, thus, not valuing the "property" rights taken by the plaintiff. The arbitrator stated in his opinion:

> "Any reasonable buyer would certainly consider the financial impact of this lease in determining what it would be willing to pay for this site. To suggest that the Acme lease can be ignored in determining its market rent is manifestly unreasonable." (Da119)

Thus, the arbitrator's award relying upon the Acme lease represents an opinion of the "leased fee" value of the property rather than the value of the "property" taken which was the unencumbered fee simple estate. Thus, the judgment incorporating this arbitration award must be vacated as being unconstitutional and manifest denial of justice.

POINT III
THE AWARD CANNOT BE CURED BY SIMPLY REDOING THE MATH AND ADDING TWO DOLLARS A SQUARE FOOT TO THE ARBITRATORS' CALCULATIONS.(Da115;Da116)

The arbitrator indicated in his opinion, what he believed all along, that defendants and their appraisal witness were "manifestly unreasonable" and based his conclusion of value on that mistaken idea. Even in his final comments after conclusion of the hearing, the Arbitrator could never get over the idea that:

> "if Orlando is going to buy this property, and the revenue is .77 cents a square foot, why would I pay and base my decision upon an appraisal that says, well the market rent is $8.50?" (7T 191 16-20)

Accordingly, the defendants' and their experts' credibility in the eyes of the arbitrator was improperly evaluated. By way of illustration, the plaintiff's appraiser had testified that Berardi bought lot 19 in 1988 for two million dollars. While Rocco Berardi was testifying and producing the closing papers from that transaction to prove that McHale was wrong and that he had in fact paid $2,475,000.00 in 1988, the arbitrator responding to plaintiff's counsel's objections said:

> "So the problem is this potentially maybe Mr. Berardi overpaid, ..."(6T14 23-25)

Thus, the arbitrator ignored the false assumption of McHale's opinion and concluded on a value which is only approximately $200,000.00 more than Berardi paid for the property, about five and a half years before. Considering

the increase in the actual rent roll and the increase in the Rite Aid overage rent from $746.00 in 1988 to the $33,000.00 in 1993; as well as the success of the stores indicated by the Rite Aid sales increase averaging 20% per year, his conclusion is clouded by his unwillingness to accept as valid any inference from the evidence in favor of the property owner, because of his underlying misperception of the property interests involved. More importantly, in 1988 Berardi only bought the leased fee, subject to the Acme lease.

Both appraisers determined non-reimbursable expenses in terms of percentages derived from studies by outside sources. The only inclusion, of any input from Brody, was to apply the absolute dollar amount used by Brody derived from his percentage analysis applied to a much higher base. Thus, bringing the net income even lower.

The arbitrator's analysis of the capitalization rate was also derived by relying upon McHale's high rate based upon the idea of a high tenant turnover belied by the evidence.

The government has to turn square corners when taking property by eminent domain, see F.M.C Stores Co. v. Borough of Morris Plains 100 N.J. 418, 426 (1985). In this case the plaintiff served a misleading appraisal that did not value the property taken. The arbitrator treated the defendant's position as "manifestly unreasonable" based upon his inability or unwillingness

to recognize the difference between valuing the "fee simple estate" and a "leased fee."

It should be clear that the arbitrator relied heavily upon McHale's appraisal. But McHale's appraisal was inherently contradictory throughout and his methodology was contradictory to the instruction in Casino Reinvestment Development Authority (CRDA)v. Katz, supra. In that case, McHale as the appraiser for CRDA, doing a fee simple appraisal, ignored the existing lease on each of two separate buildings making up the subject property, but used the lease of the other as a comparable for each. By combining that lease as a comparable with other leases that were lower, he produced an opinion of value based upon his "market leases" that was lower than that reflected by the actual leases. Judge Winkelstein, A.J.S.C, noted that the McHale appraisal used the income capitalization approach by converting the anticipated benefits, i.e. cash flow and rents into property value. Katz 334 N.J. Super, 476. While CRDA argued that it should be up to the commissioners or a jury to decide if the actual rents should be used, the court concluded that by omitting the actual rent in those circumstances, McHale did not provide full indemnity to the owners thus violating the injunction of State v. William Rohrer Inc., 80 N.J. 462, 467, that just compensation must be paid for the owner's loss, not what the condemning

authority gains. Thus, in that case, the court concluded as a matter of law, that the appraisal did not reflect the actual loss to the property owner.

In the instant case, McHale while using the contract rent for the Acme, ignores the actual rent in his calculations as to the two stores greater than 2,000 square feet. First he reduced the actual contract rent of West Coast Video of $38,500 to $29,400 by using a market rent of $10.50 instead of the actual rent of $13.75. Thus, he chips away $9,100 from West Coast Video's contribution to the rent roll. Then the overage rent from Rite Aid is omitted by McHale, even though he had read the lease and knew it provided for overage rent. He later saw that Brody had included the overage rent for Rite Aid, but he did not want to amend his report to include the $33,000 overage rent in his rental income because his rental income then starts to get too high for his preconceived and misguided notion that the final opinion of value shouldn't be much above what he thought Berardi paid for the leased fee estate he bought in 1988. This is contrary to the general rule as to a fee simple appraisal, stated in Nichols §12B.08[1] §12B-44 "it is the economic [market], rather than the actual rent that matters," actual rents are often the best indication of value.

The overage rent was not included in the Income and Expense reports before Donna Fanetti started doing that in 1994, so she didn't include it either, whether she was aware of it or not. Mr. Berardi told us that his friend and lawyer,

Lou Gallo, Esq. advised him, and it was likely that Gallo, an accountant, or other professional made an informed decision to leave the overage rent out in accordance with accepted tax practices based on Lawrence Assoc. v. Lawrence Twp., 5 N.J. Tax 481 (1983).

As shown on the chart (Da214) using even the $4.00 market rent found by the arbitrator, and the contract rent for 1994, as market rent, the total rent received is $432,752.00.

The contract rents as shown in the leases in effect in the year 1994 representing market rent are set forth below including the overage rent for Rite Aid, the arbitrator's $4.00 market rent for the Acme, and McHale's estimate of market rent for the vacant former bank site.

The chart uses contract leases in effect during the calendar year 1994, as market rent with two minor exceptions. The Chinese restaurant 10-year Lease expired September 30, 1995. We used $16.00 as the 1995 lease was $17.00. The Laundry Lease was May 1, 1995. But for these minor exceptions, the calculations are based on the actual contract rents that were in effect during the year 1994. We suggest that these rents are the best evidence of market rent for the income capitalization approach for the taking in this case.

If this court were to exercise its original jurisdiction, the appropriate finding for the value of lot 19 should incorporate that rental income number. Then even using the arbitrator's over stated 7% [4] vacancy rate and overstated expenses from Brody, the math would indicate a value for lot 19 of $3,334,619.00 using a 10% capitalization rate.

$432,752 less 7% vacancy
-30,293
$402,459
-65,400 Brody's expenses
$337,059 Net operating income (N.O.I.)

Capitalized at a 10% cap. rate the value would give a market value for Lot 19 of $3,334,059.00 at 10.25% = $3,288,380.00.

[4] There was one vacant unit of 1,125 sq. ft. that represents 2.85% of the leaseable area.

CONCLUSION

Wherefore, for the reasons set forth above, this case should be remanded to the trial court for a new trial on the issue of the value of Lot 19 without disturbing the findings as to Lot 18 or the enhancements from the furniture, fixtures and equipment. If the court wishes to exercise its original jurisdiction, it could amend the award to conform with the evidence of market rent set forth above.

Respectfully submitted
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Dated: November 16, 2022. By: _____
PETER H. WEGENER

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
DOCKET NO. A-003684-21 T1

PEMBERTON TOWNSHIP

Plaintiff,

vs.

ROCCO BERARDI, ANTONIA BERARDI, DAIRY QUEEN, NU SOUL CAFE, GRISSEL CATALAN, JAY'S STUDIO JEWELERS, ELLY PREMIUM LAUNDRY, ERNIES BARBER SHOP, DR. LORRAIN VARELA, DPM, PEMBERTON TOWNSHIP MUNICIPAL UTILITIES AUTHORITY, and BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON,

Defendants.

Civil Action

COURT BELOW:

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION: BURLINGTON COUNTY

Hon. Aimee Belgard, J.S.C.

Docket No. L-BUR-954-18

BRIEF ON BEHALF OF PLAINTIFF/CROSS-APPELLANT PEMBERTON TOWNSHIP (REVISED JANUARY 4, 2023)

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PRELIMINARY STATEMENT

This appeal involves the condemnation of a dilapidated shopping center and its surrounding vacant land (the "Property") purchased by Defendants/Appellants Rocco Berardi and Antonia Berardi (the "Berardis") in Pemberton Township for $2,475,000 in August of 1988. Although condemnation cases are guided by the principles of "just compensation," the Berardis sought a government-funded windfall in demanding $4,295,000 for the Property under a January 27, 1994 date of valuation. The Berardis unsuccessfully asked the Arbitrator to believe that the value of the Property **increased by 175% in a mere 5.5 years,** when the economy was still recovering from the stock market crash of 1987, in a rural town with depressed demographics, for a deteriorating property which had been declared in need of redevelopment. Having failed to convince the Arbitrator that a binding, long-term lease on the Property should be disregarded, the Berardis now appeal to this Court for a second bite at the proverbial apple.

The Berardis argue that a binding 30-year anchor tenant lease at the Property should be ignored for valuation purposes because the Township "took" the Property under a fee simple. However, the Township did not actually "take" the Property until May 4, 2018. More importantly, New Jersey jurisprudence holds that property *must* be valued "under normal market conditions based on *all surrounding circumstances* at the time of the taking." State by Com'r of Transp. v. Silver, 92 N.J.

507, 514 (1983)(emphasis added). Not a single case, statute, or regulation in New Jersey that has ever held that a fair market valuation should disregard existing leases in favor of a "fee simple" valuation.

The Arbitrator, acting within his limited role in determining the market value of the Property, properly held that the market value *had* to account for the existence of the long-term lease under relevant case law. No arms-length buyer would *ever* pay $4,845,000 for the Property in 1994 while it was encumbered with a $0.77 per square foot thirty-year lease. The Berardis, in directly challenging the Arbitrator's factual findings rather than the Trial Court's interlocutory order, have exceeded the permissible bounds of appeal under the October 20, 2021 Consent Order.

However, although the Arbitrator properly determined the market value of the Property in accordance with parameters previously set by the Trial Court, the Trial Court *did* err in two rulings: 1) setting the date of valuation at January 27, 1994 instead of May 4, 2018; and 2) denying the Township's Motion to Bar the Expert Report and testimony of Charles Land ("Land Report") on furniture, fixtures, and equipment ("FFE") as a net opinion. These two errors inflated the true Market Value of the Property, resulting in the Berardis receiving millions more than their due.

The Trial Court erred when it set the date of valuation at January 27, 1994 rather than the date the Township filed its Complaint and declaration of taking. The express purpose of the valuation date, and the provisions of N.J.S.A. 20:3-30, is to

ensure that condemnees receive the "fair market value" of their properties, as if the taking never occurred. Yet the Berardis recouped *more* than their fair share because the Township did not take the Property—a commercial strip mall that generated rent from multiple tenants—until May 4, 2018. The Berardis' rights to the Property were *not* extinguished until 24 years after the Property was declared in need of redevelopment, and the Berardis continued to collect rent for another 24 years, every penny of which ended up in their pockets. This constituted double recovery by the Berardis—a result that contradicts the very purpose of condemnation law.

The Trial Court also erred in failing to bar the Charles Land Report, a threadbare and conclusory "expert opinion" in support of the Berardis' claim for $550,000 in FFE. The Land Report was cobbled together from a walkthrough of the Property conducted on May 18, 2018, to which FFE values were retroactively ascribed as of 1994. Several of the stores in Land's report *did not even exist* as of January 27, 1994. Significantly, Land's report failed to reach a conclusion that these items actually enhanced the fair market value of the Property—a critical element of any FFE claim.

For the reasons set forth below, this Court should reject the Berardis' appeal, and grant the Township's cross-appeal by reversing the February 20, 2019 Order setting the date of valuation at January 27, 1994 and August 24, 2021 Order denying the Township's motion to bar the Land Report, and remand for a new arbitration.

PROCEDURAL HISTORY

On May 4, 2018, the Township commenced the present condemnation action and deposited the sum of $920,000 with the Clerk of the Superior Court, which represented its estimate of fair market value as of 2018. Da1. On June 14, 2018, the Court entered an order that recognized the Township's entitlement to immediate and exclusive possession of the Shopping Center. Pa58. On July 19, 2018, the Court entered a final order declaring that the Township properly exercised its power of eminent domain to acquire the Property and appointed three disinterested commissioners to appraise the Property. Pa59.

On October 1, 2018, the Berardis filed their motion to set January 27, 1994 as the valuation date. Pa62. On February 20, 2019, the Court entered an Order granting the Berardis' motion, over the Township's opposition, entering an order establishing the date of valuation in this action as January 27, 1994, the date when the Township initially designated the Property as an "area in need of redevelopment", and ordered the Township to provide a new appraisal and offer to the Berardis based on that date. Da102.[1] On July 31, 2019, the Township's expert Jerome J. McHale, MAI

[1] The Parties were provided with Judge Bookbinder's tentative written opinion prior to the oral argument, but this tentative opinion was apparently never filed by the Court. The Township cannot locate a clean copy of the tentative opinion in their records.

("McHale") issued a new written appraisal valuing the Property at $2,260,000 as of January 27, 1994. Da012. Because the Property's anchor tenant, ACME, was still in possession of a below-market leasehold for another twenty-five years as of January 27, 1994, McHale factored the lease into his calculation of the market value of the Property. Ibid. ACME had vacated the premises as of May 4, 2018, so McHale's prior valuation did not include same in its analysis. Ibid.

After a hearing on October 31, 2019 at which McHale provided testimony, the Commissioners agreed with the Township's updated appraisal based upon the January 27, 1994 valuation date. Pa64. On November 15, 2019, the Berardis appealed the Commissioners' award. Pa68. Subsequent to the issuance of the Commissioner's report, the parties engaged in limited discovery. The Berardis produced an appraisal report by Jon P. Brody, MAI, CRE, dated November 10, 2019, which estimated the Property's value as of January 27, 1994, to be $4,295,000 with an additional $550,000 for FFE based upon an October 18, 2019 supplemental itemization report of Charles Land ("Land"). Pa70, Pa137. Brody concluded that the Berardis were entitled to $4,845,000 in just compensation. Ibid.

Several additional interlocutory rulings were issued by Judge Belgard. On October 2, 2020, the Township filed a motion *in limine* seeking to bar the admission of Land's expert report as a net opinion, which he and Brody summarily found were functionally related to the "then existing uses" in 1994. Pa155. Mr. Berardi's sworn

certification and deposition testimony directly contradicted Mr. Land's assertion that he confirmed that the stores and items listed in his report were present in 1994. Mr. Land's conclusion that those stores and items were present in 1994 is further contradicted by Brody's appraisal report which lists a different set of stores present on the Property as of January 27, 1994. The Township moved to bar Land's conclusion as to the value of the items present on the property as of January 27, 1994 (which Land failed to reach a conclusion as to how these items enhanced the fair market value of the Property) as speculative and an impermissible net opinion. Ibid.

On October 14, 2020, the Court denied the Township's motion without prejudice, indicating that the Township should depose Mr. Land to determine the basis for his conclusions. Pa157. After the deposition was completed, the Township renewed its Motion in Limine to Bar Land's testimony. Pa159. This motion was denied by the Court. Pa161. The Berardis also filed a motion to bar the Township's expert, Jerome McHale, from using the Acme contract rent in his calculation of gross income in his income approach and the introduction of evidence of sales of shopping centers based on terms of leased fee, which was denied on October 14, 2020. Da108.

On October 20, 2021, the Court entered a Consent Order transferring the matter to binding arbitration before Judge Feinberg. Da110. The Order was later amended on January 25, 2022 to transfer the matter for arbitration to a different arbitrator. Da113. The only issue for arbitration was the fair market value of the

Property as of the date of the valuation (subject to issues specifically reserved for appeal in the Court's October 20, 2021 Order, including the unresolved issues of remediation, withdrawal of deposit funds, the motions to bar expert testimony, and the setting of the valuation date). Da110. The arbitration occurred over the course of several days on February 7, 8, 10 and 18, 2022.[2] The arbitrator, Hon. Francis J. Orlando (Ret.) ("Arbitrator") issued a written Opinion on March 22, 2022 concluding that the Market Value of the Property as of January 27, 1994 under the parameters set by the Trial Court was $2,947,216.00--$95,625.00 for Lot 18, $2,688,556.00 for Lot 19, and $163,035.00 for the Furniture, Fixtures, and Equipment. Da116. The Arbitrator explained his rationale for the opinion as follows:

> Lot 18
> Jerome McHale ("McHale"), Pemberton Township's appraiser and Jon Brody ("Brody"), the Berardi's appraiser, each employed the Sales Comparison Approach to value vacant Lot 18. I have determined that the most appropriate comparable land sale to determine the market value of Lot 18 is the sale of the property located at the N.E. Corner Lakehurst and Ridge (Block 857, Lot 21), Pemberton Township, New Jersey. This property sold for $112,500.00 on

[2] The Township adopts the Berardis' designation of transcripts for the sake of continuity:
1T Motion 02/20/2019
2T Motion 10/14/2020
3T Motion 08/18/2021
4T Arbitration Hrg.02/07/2022
5T Arbitration Hrg.02/08/2022
6T Arbitration Hrg.02/10/2022
7T Arbitration Hrg.02/18/2022

May 31, 1994. I employed an overall 15% adjustment because of this site's superior physical character and larger size when compared to Lot 18. I therefore conclude that the market value for Lot 18 is $95,625.00.

Lot 19

Both McHale and Brody employed the income capitalization approach to estimate the market value of Lot 19.

ACME

I have reviewed the reports and testimony of McHale and Brody. McHale opined that because the ACME store is subject to a long term lease (6-5 year options) at $0.77 S/F, the ACME building rent should be analyzed at the contract rent of $0.77 S/F. Brody analyzed comparative rents of other supermarkets making adjustments for location, utility and age and determined that the appropriate market rental for the ACME is $8.50 S/F. Although McHale opined that the ACME's contract rent is the appropriate benchmark for determining ACME's market rental he did present comparable grocery store rents and made adjustments for age, condition and size. I have examined the comparative rentals presented by both Brody and McHale. The ACME building is old, is below average condition and in need of deferred maintenance (McHale Report p. 18, 28) and grossly substandard in size for a supermarket. I therefore determine that the market rental for the ACME before factoring in the contract rent of $. 77 S/F is $4.00 S/F. Judge Winkelstein, sitting as a trial court Judge before being appointed to the Appellate Division ruled in Casino Reinvestment Development Authority v. Katz, 334 N.J. Super. 473 (L. Div. 2000) that a property's actual rent and income history must be a factor that is considered in determining a property's market rent. The measure of damages in this condemnation case is the fair market value as determined by what a willing buyer and a willing seller would agree to, neither being under any compulsion to act. Village of 514 South Orange v. Alden (supra). The ACME building is subject to a long term lease at $.77 S/F. Any reasonable buyer would certainly consider the financial impact of this lease in determining what it would be willing to pay for the subject site. To suggest that the ACME lease can be ignored in determining its market rent is manifestly unreasonable. I determine that the market rent of $4.00 S/F for the ACME must be adjusted downward by 50% to account for the long term lease

> at $0.77 S/F. I, thus, conclude that the market rent for the ACME building is $2.00 S/F.
>
> COMPUTATION OF MARKET VALUE FOR LOT 19
> I applied the $2.00 S/F rent to ACME's leased space of 14,200 S/F to arrive at an annual rent of $28,400.00. I find and determined Brody's estimates of the annual rent for the other stores in the shopping center, as set forth on page 64 of his report, to be reasonable and adopt those annual rental computations.
>
> I conclude there was an annual rent of $366,642.00. I applied a 7% Vacancy and Collection Loss (25,665) and arrived at an effective gross income of $340,977.00. I adopted Brody's estimate of total operating expenses of $65,400.00 as reasonable and determined the net income to be $275,577.00. I applied a capitalization rate of 10.25% and thus conclude that the market value for Lot 19 as of January 27, 1994 is $2,688,556.00.
>
> FURNITURE FIXTURES and EQUIPMENT (FFE)
> Furnishing, fixtures and equipment that are a functional unit of a building condemned are compensable if a reasonably willing purchaser would pay substantially more for the building with such items included than he would without them, City of Long Branch v. Jui Yung Liu. I have reviewed the report of Mr. Land and his testimony and conclude the enhancement value of the furnishings, fixtures and equipment to be $163,035.00.
>
> Da116.

On June 21, 2022, the Parties executed a Consent Order confirming the Arbitration Award and entering Final Judgment against the Township in the amount of $2,947,216.00 and preserving the right to appeal the Arbitrator's decision as set forth in the October 20, 2021 Order. Da123.

Due to the fact that the Arbitrator's decision regarding market value of the Property is, of necessity, based upon the restrictions set forth by the Trial Court's interlocutory rulings and the express terms of the October 20, 2021 Consent Order,

any successful appeal or cross-appeal of the interlocutory rulings would affect the June 21, 2022 Final Judgment.

COUNTER-STATEMENT OF FACTS

The Township substantially disagrees with certain factual recitations by the Berardis, and as such, submits a counter-statement of material facts.

The Berardis were the owners of Lots 18 and 19 in Block 775 within the Township, which are together known as the Browns Mills Shopping Center and located at 100 Pemberton-Browns Mills Road (the "Shopping Center"). Dal, ¶ 9. A Preliminary Investigation Report adopted December 27, 1993 noted that "[a] substantial number of buildings located within the investigation area are characterized by unsafe, unsanitary, dilapidated, obsolete conditions that exist to varying degrees throughout the area. Pa1. In addition, many buildings within the investigation area are so lacking in sufficient light and space as to be conducive to unwholesome living or working conditions…[such as:]

- Commercial establishments and apartment complexes that provide inadequate traffic circulation on-site cause awkward vehicular movements that impact traffic safety on the busy county road network that serves the central business district
- Land uses that attract loiterers, drug dealers, and vagrants threaten the safety of residents and shoppers who visit the area
- Litter, debris, and poor trash containment facilities create an eyesore in the district and contribute to unsanitary conditions at some locations

- Old buildings in the district display dilapidated conditions that include soffits falling away from walkway overhangs, missing sections of roof, boarded up windows, siding falling away from walls
- Some buildings were built to the lot line with windowless walls, and security concerns among property owners have caused window openings to be closed in with siding, thereby restricting the amount of natural light allowed in to commercial and residential buildings."[3]

Pa7.

On January 27, 1994, the Township Council adopted Resolution No. 43-1994 in response to the blighted conditions of the Shopping Center and the surrounding area. Pa15. Through this resolution, the Township Council determined that the "Browns Mills Town Center Redevelopment Area" (the "Redevelopment Area"), which included the Shopping Center, was an "area in need of redevelopment" under the Local Redevelopment and Housing Law (the "LRHL") (codified as amended at N.J.S.A. 40A:12A-1 to -73). Ibid. Upon this determination, the Township Planning Board prepared, and the Township Council later adopted, a redevelopment plan for the Redevelopment Area.

In the years to follow, the Township succeeded in many of its efforts to revitalize the Redevelopment Area, but not with respect to the Shopping Center, which continued to stagnate. In 2002, after a breakdown of discussions with the Berardis to resolve the issues with the Shopping Center, and negotiations to purchase

[3] The Berardis did not challenge these findings at the meetings before the Township.

the Shopping Center, the Township commenced a condemnation action to take the Shopping Center by eminent domain, which resulted in the published decision of Twp. of Pemberton v. Berardi, 378 N.J. Super. 430, 434 (App. Div. 2005). Pa17. The Township, however, never filed a declaration of taking and later abandoned the proceedings. Ibid. Later, in 2006, the Township Planning Board approved certain improvements to the Shopping Center, but the Berardis never completed them. Pa26. In 2009, the Berardis returned to the Planning Board, which granted approved an amendment to the prior approval, but again the Berardis never completed the proposed improvements. Pa37. In 2010, the Planning Board granted the Berardis further modification of the plan to the develop the Shopping Center, which facilitated their obtainment of federal tax-exempt bonds for the proposed capital improvements, but once again the Berardis never completed these improvements. Pa46.

Thereafter, the Township Planning Board conducted further investigation into whether the Redevelopment Area continued to meet the criteria for an "area in need of redevelopment" under the LHRL, and on August 7, 2013, the Township Council adopted Ordinance No. 14-2013, which again authorized the Township to pursue the acquisition of the Shopping Center by negotiated purchase or eminent domain for the purposes of redevelopment. Pa51. On April 4, 2018, the Township Council adopted Ordinance No. 5-2018, which authorized the acquisition of the Property by

negotiated purchase or eminent domain in an amount not to exceed $920,000.00. Pa54.

LEGAL ARGUMENT

I. PRECEDENTIAL CASE LAW IN NEW JERSEY HOLDS THAT A LONG-TERM LEASE SHOULD BE FACTORED INTO MARKET VALUE OF A PROPERTY (1T13:11-16:5; 1T32:5-34:19).

A. The Berardis' Attempts To Bootstrap An Appeal Of The Arbitrator's Factual Determinations Regarding The ACME Lease Are Improper And Outside The Bounds Of Permissible Appeal (Not Raised Below).

Although the Berardis frame their introductory statement as arising from a "very narrow issue" involving whether market rent should be used in lieu of a below-market, thirty year-old lease in the valuation of the Property, they have improperly bootstrapped a challenge of the Arbitrator's factual findings in this appeal. The only issues preserved for appeal after the Trial Court transferred the matter to binding arbitration were specifically set forth in the Trial Court's October 20, 2021 Consent Order; all others were subject to the limited parameters set forth in N.J.S.A. 2A:23B-23. Da111. The Berardis thus have exceeded the permissible bounds of this appeal by including challenges to the factual determinations of the Arbitrator.

N.J.S.A 2A:23B-23 states that the court shall vacate an award made in arbitration only upon six limited grounds:

(1) the award was procured by corruption, fraud, or other undue means;

> (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
> (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;
> (4) an arbitrator exceeded the arbitrator's powers;
> (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c. of section 15 of this act not later than the beginning of the arbitration hearing; or
> (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.
>
> N.J.S.A 2A:23B-23.

The statutory restrictions were expanded in the October 20, 2021 Consent Order, but only for five limited issues:

> The arbitrator's decision shall be final and binding in accordance with N.J.S.A. 2A:23B-23 except that the Superior Court of New Jersey retains jurisdiction to hear an appeal of the following interlocutory orders entered in this matter (1) Order establishing the date of valuation of January 27, 1994; (2) the order denying Plaintiff's motion in limine barring the testimony of the Defendants' furniture, fixture, and equipment expert, Charles Land based on certain items not being present as of January 27, 1994; (3) The Order denying Defendants' motion barring the Plaintiff's expert, Jerome McHale, from using the Acme contract rent in his calculation of gross income in his income approach and the introduction of evidence of sales of shopping centers based on terms of leased fee; (4) all issues related to environmental cleanup and (5) all issues related to withdrawal of deposit funds.
>
> Da111.

The October 20, 2021 Consent Order further contained a footnote stating that "[s]hould any issue be appealed and reversed and/or remanded, the matter shall then return to arbitration." Da111.

As the boundaries of any permissible appeal were limited to the Trial Court's Order establishing the date of valuation, the Order denying the Township's Motion to Bar the Land Report, and the Order denying the Berardis' Motion to Bar McHale from using the ACME lease (and the Berardis have not set forth any grounds for appeal based upon N.J.S.A 2A:23B-23), the Berardis' current appeal clearly exceeds those jurisdictional boundaries. The Berardis cannot appeal any factual findings of the Arbitrator and are limited solely to an appeal of the Trial Court's denial of their Motion to Bar McHale from using the ACME lease.

As a threshold matter, Point II and Point III of the Berardis' appeal brief challenging the Arbitrator's factual findings should be rejected without further consideration of this Court.[4]

[4] The Township also objects to the Berardis' other challenges of the Arbitrator's factual findings for the same reason, such as the Arbitrator's finding that the "The ACME building is old, is below average condition and in need of deferred maintenance (McHale Report p. 18, 28) and grossly substandard in size for a supermarket." Da118. Moreover, despite the Berardis' repeated allegation that the purchase price of the Property in 1988 was $2.475M instead of $2M, the Arbitrator did not base his decision on the 1988 purchase price of the Property.

B. The Arbitrator Correctly Determined That The 30-Year ACME Lease Adversely Affected Market Value Of The Property As Of January 27, 1994.

Turning to the sole legal question posed by the Berardis' appeal, the Berardis' argument that an appraiser needs to evaluate the "fee simple" of the Property and not the "lease fee" has zero legal merit. No New Jersey Court has ever held, as a matter of law, that an appraiser must ignore all long-term leases on a condemned property in favor of a so-called "fee simple" valuation. Instead, New Jersey courts have held the *complete opposite* of what the Berardis espouse—that in an arm's length transaction, a potential purchaser of the property would certainly consider a long term lease, and value the property accordingly. Casino Reinvestment Dev. Auth. v. Katz, 334 N.J. Super. 473, 485–87 (Law. Div. 2000). This holding is based upon the guiding principle in eminent domain proceedings—that "the condemnor is obligated to pay 'just compensation' for the property obtained, which is defined as 'the fair market value of the property…determined by what a willing buyer and a willing seller would agree to, neither being under any compulsion to act.'" City of Asbury Park v. Asbury Park Towers, 388 N.J. Super. 1, 9 (App.Div.2006). "Determining the fair market value of a parcel is not a science, but rather it involves an estimation based on a number of variables." Id. at 9.

"[T]here is no precise and inflexible rule for the assessment of just compensation. The Constitution does not contain any fixed standard of fairness by

which it must be measured. **Courts have been careful not to reduce the concept to a formula**." Jersey City Redevelopment Agency v. Kugler, 58 N.J. 374, 387-89 (1971)(emphasis added). "Our courts have consistently refrained from mandating that a specific methodology be used in appraising condemned property." State by Com'r of Transp. v. Caoili, 135 N.J. 252, 270–71 (1994). An appellate court should only determine whether the method used at trial was *reasonable*. Ibid. In other words, is it reasonable for a hypothetical arms-length buyer to ignore the $0.77 square foot ACME lease binding him/her to below-market rent for the next 25 years?

The answer to that, as the Arbitrator correctly found, was **no**. In determining "fair market value in a condemnation case [we] attempt to ascertain 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.** State by Com'r of Transp. v. Silver, 92 N.J. 507, 514–15 (1983)(emphasis added)." "In making a determination as to value, then, all the considerations which would influence a willing buyer and a willing seller in coming to terms as to price should be laid before the trier of fact." Vill. of S. Orange v. Alden Corp., 71 N.J. 362, 368 (1976)(holding that in a hypothetical transaction involving a commercial property in a suburban business district, one such consideration on value would be the nearby availability of parking facilities.)

The Berardis' own expert, Brody, admitted to this very concept in his cross-examination, agreeing with the Township that the accepted definition of "market value" makes no reference to fee simple or lease fee. 7T17:21-25. The Berardis themselves knowingly purchased the Property subject to the ACME lease, and accounted for the below-market rent in their asserted $2.475M purchase price. Brody agreed that any potential buyer would have been aware of the ACME lease as of January 27, 1994. 7T18:1-4; 7T18:23-20:17. He did not explain how a potential buyer would then disregard that long-term lease in favor of ascribing a $8.50 market rent.

The Berardis cannot cite to any New Jersey case that holds that an appraiser must only value the fee simple of a property in an eminent domain proceeding. Casino Reinvestment Dev. Auth. v. Katz, one of the few New Jersey condemnation cases that even touch upon the concept of long-term leases, held that it is error for an appraiser *not* to factor a long-term lease into fair market value. The Law Division case held that "[i]n this case the appraiser did not consider the actual rents from the property as an element when he arrived at fair market value. The appraiser considered only hypothetical comparable rents. I recognize that the property's actual rent and income history should not be the sole basis upon which to determine market rent subject to capitalization, but the cited authority is clear that it must be a factor. By failing to consider the actual rental history of the property, the appraiser's value

did not reflect the actual loss to the property owner." Katz, supra, 334 N.J. Super. at 485.

Although the Court in Katz found that the actual rents were higher than the market rent and thus should have been factored into the analysis, the opposite must also hold true. If actual rents were lower than market rents, an owner would be *overly* indemnified if awarded more than what he could have reasonably expected. Katz went so far as to draw a distinction between tax assessments, which must be based upon the potential rent, and condemnation proceedings, holding the "need for permanency that exists for property tax assessments does not carry the same weight when property is valued for condemnation purposes, where full indemnification of the property owner, not a stable tax base, is the goal. If the owner is to be fully indemnified, actual rents must be considered. The analogy to valuation for local property taxes is misplaced." Id. at 487.

The Berardis have not articulated any reasonable basis why the factfinder, standing in the shoes of a potential buyer, would pay market rent for the ACME space when the known conditions as of January 27, 1994 lock the buyer into a 25-year lease. Any reliance on "appraisal standards" from the treatise the Appraisal of Real Estate is also misplaced, as the 15th Edition of the treatise takes care to distinguish between an appraisal definition of fee simple and the legal definition of fee simple:

> The legal profession defines the term fee simple slightly differently than the valuation profession does because legal definitions generally serve a different purpose. Whereas definitions of fee simple used by the appraisers highlight the encumbrances on property, legal definitions tend to focus on duration. That is, legal definitions of the term generally do not mention the four powers of government or encumbrances. Instead, in a legal setting, the fee simple estate is one that endures for an indefinite period, as opposed to an estate of a shorter duration like a life estate or term of years. For example, in Black's Law Dictionary, 11th ed., the term fee simple is defined as follows:
>
> An interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs, esp. a fee simple absolute.
>
> Pa164.

The Appraisal of Real Estate goes on to note that:

> Appraisers must clearly identify-and appraisal reports must clearly convey the property rights that are the subject of an appraisal. In the case of a fee simple estate, a definition on its own may not be adequate. The appraisal report should clearly state any encumbrances affecting the property. The underlying premises of the valuation, including any expectations about occupancy, must be identified by the appraiser and clearly stated in the appraisal report. The methods applied to arrive at the value opinion must reflect the presumed conditions.
>
> In some cases, "what is to be valued"-particularly the interest to be appraised and the definition of that interest-**is dictated by applicable law or regulation**. Appraisers are responsible for knowing which laws or regulations apply and for complying with those laws and regulations.
>
> Pa165.

These excerpts are included to demonstrate that even appraisal standards do not control what is being valued in this instance. It remains the Township's contention that the Appraisal of Real Estate, and any other treatises relied upon by the Berardis, are ultimately irrelevant as New Jersey case law is the sole authority on the issue of

this valuation. New Jersey case law holds that long-term leases would be considered by a potential buyer and thus impact market value of the Property.

It must be emphasized that the Township did not take the property until May of 2018. Although the Berardis claim that the entire "bundle of rights" in fee simple was extinguished by the Township after January 27, 1994, the truth is that no such thing occurred. The Berardis retained every single one of their ownership rights to the Property, including the right to collect rent from the tenants, up until May of 2018. The Township originally valued the property at $920,000 with a valuation date of March 5, 2018 and increased it to $2,260,000 for a valuation date of January 27, 1994 upon the Court granting the Berardis' election of the earlier date. Da012. Even when accounting for the Berardis' argument that the declaration of need for redevelopment negatively impacted the Property, *if* the Berardis' argument about fee simple being taken by the Township after January 27, 1994 is taken at face value, the Berardis must legally disclaim any right to rents collected after the date of valuation. The Berardis make no such disclaimer. What the Berardis want is, in effect, double recovery—the right to the higher fee simple valuation of the Property as of January 27, 1994 *and* the right to retain all rents for 24 years after the date of valuation. These rights cannot co-exist.

If the ACME had stayed on as tenants until 2018, when the taking occurred, ACME would have (only if the same lease had been extended) had a derivative claim

against the Township for the value of its leasehold compared to market rent. This did not happen. ACME vacated the premises and its lease was terminated well after January 27, 1994. The use of a January 27, 1994 valuation date, *which the Berardis themselves demanded,* requires that the appraiser ignore any events which occurred after January 27, 1994. The date of valuation *could* have been the date of taking, when the Berardis were free and clear of the ACME lease. They failed to elect this date of taking and are bound by their own actions.

A reasonable buyer would take into account <u>everything that is known, or relatively known</u>, about the Property at the time of valuation in purchasing the property for fair market value. The Berardis' own expert admitted the following:

> "JUDGE ORLANDO: And that's for the witness to answer. And it didn't seem like Mr. Brody had a difficult time understanding the question, and he gave the, as I understand his answer is, you take into consideration events that occur prior to the date of valuation and you take into consideration events after the date of valuation that would have been reasonably expected to occur on January the 27th, 1994. Is that sort of a sum, an accurate summary of your testimony, sir?
> THE WITNESS: Yes."
>
> *7T16:5-15.*

He further admitted that a "**prudent buyer would have been aware of the ACME lease before buying the property**":

> "Q: Okay. Now, the -- would a -- is it – the Acme Lease that was in effect as of January 27, 1994,is it your professional opinion that a reasonable buyer would have ignored the Acme Lease at 77 cents a square foot if they were considering purchasing the property at that time?

> A: I think a prudent buyer with a prudent attorney would have the lease and they would have read the lease to find out that Acme actually built the building."
>
> *7T19:17-25.*

The Berardi Defendants themselves testified that they purchased the Property for an alleged $2.475 million knowingly subject to the ACME lease of $0.77 per square foot:

> "Q: Okay. Now if we turn to the third page which has the rent roll, under the first tenant listed is Acme. Do you see that?
> A: Acme is on the top, yes.
> Q: Yes. It says 14,200 square feet with a rent of 77 cents per square foot. Is that what you understood when you purchased the property in 1988?
> A: Yes. This is what was the rent that was paid on -- on 1988 when I bought the center. Correct.
> Q: And the Acme -- so the Acme rental was generating $10,998 annually, right?
> A Yes. The rent was that.
> Q: Yes. And it indicates the law – you purchased this in 1988. The lease was due to expire in 1989, and it had five -- well, this says five five-year renewals.
> A: Yes.
> Q: Is that how you understood it?
> A: Yes.
> Q: So that would have been 25 years after 1989 Acme had rights to lease the property?
> A: Yes.
> ***
> Q: And so that -- so Acme had rights to this site until the lease that was represented to you through Maven Realty through 2014.
> A: I don't understand the question.
> Q: Acme lease --
> A: Acme --
> Q: -- was in effect if they exercise their options through 25 years after December 31st, 1989. You understood that, right?
> A: Yes. You know, there was five five-year options with original term.

7T81:15-83:8.

The record is clear that as of January 27, 1994, the ACME lease would lock any owner of the Property to $0.77 per square foot for the 14,200 square foot space, for the next foreseeable 25-years. It is wholly unreasonable for any arms-length buyer to disregard the ACME lease as of January 27, 1994, and the Township should not be treated any differently from such an arms-length buyer under the principles of just compensation. The Trial Court did not err in its October 14, 2020 Order denying the Berardis' Motion to Bar McHale from using the ACME lease in his valuation.[5]

II. THE TRIAL COURT ERRED IN RULING THAT THE DATE OF VALUATION IS JANUARY 27, 1994 INSTEAD OF THE MAY 4, 2018 DATE OF TAKING AS IT AWARDS THE BERARDIS DOUBLE RECOVERY ON A RENT-PRODUING PROPERTY (2T6:7-7:18).

The Trial Court committed reversible error in granting the Berardis' Motion to set the date of valuation at January 27, 1994. The Township commenced its litigation and filed its declaration of taking on May 4, 2018, which is the appropriate date of valuation. Although the provisions of N.J.S.A. 20:3-30 permit the

[5] The Township also strongly objects to the consideration and inclusion of any exhibits that were not before either the Trial Court or the Arbitrator in this matter, such as Da214, which appears to be a chart of actual rent constructed solely for this appeal.

determination of just compensation as of the date of the earliest of several events (including the date possession of the property being condemned is taken by the condemnor in whole or in part, the date of the commencement of the action, the date on which action is taken by the condemnor which substantially affects the use and enjoyment of the property by the condemnee, and the date of the declaration of blight by the governing body upon a report by a planning board pursuant to N.J.S.A. 20:3-38), facts unique to this case require that the valuation date be fixed at the date the Township actually took possession of the Property rather than a rote application of the statute especially when there is a twenty-four year time period between the Area in Need Designation and the date of taking.

The concept of "just compensation" is encapsulated in both federal and state constitutions, which prohibit the taking of private property for public use without fairly compensating the property owner. U.S. Const. amend. V; N.J. Const. art. I, ¶ 20. In addition to this constitutional mandate, the Township's condemnation of the Shopping Center is subject to the provisions of the Eminent Domain Act of 1971 (the "EDA"), N.J.S.A. 20:3-1 to -50, together with N.J.S.A. 40A:12A-8(c) of the LRHL. However, just compensation does *not* entitle the Berardis to what constitutes double recovery—profit from the rent-producing commercial Property from 1994 to 2018, when the Township actually took possession, as well as the market value of the Property as of January 27, 1994 premised upon what a third-party buyer would

pay for complete possession and ownership of the Property some twenty four years preceding the eminent domain action.

The clear intent and purpose of just compensation is to put the owner in the same position as if the condemnor had never resolved to take the subject property. U.S. v. Reynolds, 397 U.S. 14, 15 (1970). Thus, the owner is due the "fair market value" of the property, which means 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." Hous. Auth. of New Brunswick v. Suydam Invs., L.L.C., 177 N.J. 2, 20 (2003). Here, if the Township never declared the Property in need of redevelopment, the Berardis would either reap the passive income generated by the site from 1994 to 2018, *or* sell the Property to a third-party buyer, *but not both* as of January 27, 1994.

To set the valuation date as of January 27, 1994, therefore, would allow the Berardis to reap a windfall at the expense of the public and render "just compensation" a fallacy. The Berardis, whose failure to redevelop (or at the very least to maintain) the Property without municipal intervention contributed to the blight designation. Although the determination of an area in need of redevelopment *can* affect the fair market value of an acquired property before the time of the taking, that does not entitle the Berardis to double recovery.

The relevant statutes and caselaw offer a safeguard against the depreciation or inflation of value that could result from the imminence of a prospective taking in N.J.S.A. 20:3-30 and -38 of the EDA, but these safeguards were never meant to act as both a sword and shield in a condemnation action. Under N.J.S.A. 20:3-30,

> Just compensation shall be determined as of the date of the earliest of the following events: (a) the date possession of the property being condemned is taken by the condemnor in whole or in part; (b) the date of the commencement of the action; (c) the date on which action is taken by the condemnor which substantially affects the use and enjoyment of the property by the condemnee; or (d) the date of the declaration of blight by the governing body upon a report by a planning board pursuant to [N.J.S.A. 20:3-38.]
>
> N.J.S.A. 20:3-30.

While under N.J.S.A. 20:3-38,

> The value of any land or other property being acquired in connection with development or redevelopment of a blighted area shall be no less than the value as of the date of the declaration of blight by the governing body upon a report by a planning board.
>
> N.J.S.A. 20:3-38.

See also, Twp. of W. Windsor v. Nierenberg, 150 N.J. 111 (1997); Jersey City Redev. Agency v. Kugler, 58 N.J. 374 (1971); Hous. Auth. of Newark v. Ricciardi, 176 N.J. Super. 13 (App. Div. 1980).

Courts are *not* bound to enforce the literal effect of these statutes if doing so would result in an injustice or abrogation of the intent of the statute. See, Twp. of Piscataway v. S. Washington Ave., LLC, 400 N.J. Super. 358, 371-74 (App. Div.

2008). In S. Washington Ave., LLC, the Appellate Division affirmed the valuation date as the date the condemnor filed the declaration of taking, even though the condemnor filed the complaint almost five years earlier. Id. at 370, 374. In doing so, the Appellate Division rejected a strict application of N.J.S.A. 20:3-30(c) and declined to commit to the "arbitrary application of N.J.S.A. 20:3-30" in setting a valuation date. Id. at 372-73.

Likewise, one of the principal purposes of N.J.S.A. 20:3-30(d) is to protect the owner against the adverse effects on value caused by a declaration of blight. See Nierenberg, 150 N.J. at 124 (citing Ricciardi, 176 N.J. Super. at 19). But where such value suffers not because of the conduct of the condemnor, but rather unrelated market factors due to the owner's failure to modernize a fifty-eight year old strip mall, this purpose is not served. The purposes of N.J.S.A. 20:3-30 are not limited to the protection of owners, but extend to the protection of condemnors as well. See, S. Washington Ave., 400 N.J. Super. at 372 (One of the purposes of N.J.S.A. 20:3–30 is "to protect condemnors from the effects of inflation."); see also Nierenberg, 150 N.J. at 137 (The objective of N.J.S.A. 20:3-30(c) is "neither to reward nor to punish either party to a condemnation," regardless "whether the governmental action prompts an increase or a decrease in the value of the property.").

With these principles in mind, our caselaw recognizes that the owner of private property taken for public use "is not entitled to reap a windfall," at the

expense of the public, as a result of condemnation. State, Dept. of Envtl. Prot. v. S. Nalbone Trucking Co., Inc., 128 N.J. Super. 370, 377 (App. Div. 1974). Nor is the owner entitled to unjust enrichment as a result of the circumstances of condemnation. See Hous. Auth. of Camden v. United Ajax Corp., 129 N.J. Super. 119, 123 (App. Div. 1974) (holding that owner who received insurance proceeds for fire damage occurring between the valuation date and the taking date is not entitled to full compensation as of the date of valuation).

Here, the designation of the Property as an area in need of redevelopment was a result, not the cause, of the depressed conditions of the Property. The building was constructed in 1960 and was thirty-four years old by January 27, 1994. And, Judge Orlando found as a matter of fact in his valuation decision that as of January 27, 1994,"[t]he ACME building is old, is below average condition and in need of deferred maintenance (McHale Report p. 18, 28) and grossly substandard in size for a supermarket." And, by the time of the 2018 declaration of taking, it only got worse due to the Berardis neglect. The depreciation of value of the Property was not the result of the imminence of a prospective taking—which is the very evil these statutes are calculated to meet—but rather the result of market forces unrelated to the Township's inclusion of the Property in an area declared in need of redevelopment.

The very foundation of condemnation law seeks but one result: To compensate the owner as if the condemnation, and all the circumstances which

surround it, never occurred. The Berardis sought an earlier valuation date to reap the benefits of an increased valuation as of 1994 versus 2018, and in the process improperly retained the profits from the rent-generating commercial Property for twenty-four years. This is the very definition of unjust enrichment. Because reflexive adherence to the strict application of N.J.S.A. 20:3-30(d) belies the very purposes of the statute, the Trial Court's February 20, 2019 Order setting a valuation date of January 27, 1994 should be reversed.

III. THE TRIAL COURT ERRED IN DENYING THE TOWNSHIP'S MOTION IN LIMINE TO BAR THE LAND REPORT AS A NET OPINION (3T6:24-10:2).

Because condemnation cases involve dueling expert appraisals regarding Market Value, it is vital that the expert opinions comply with N.J.R.E. 703, which "mandates that expert opinion be grounded in 'facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence, but which is the type of data normally relied upon by experts.'" Townsend v. Pierre, 221 N.J. 36, 54 (2015) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008)). "The net opinion rule is a 'corollary of [N.J.R.E. 703] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data.'" Id. (alteration in original)(emphasis added). It was therefore reversible error for the

Trial Court to deny the Township's Motion to bar the expert report of Charles Land as a net opinion.

The net opinion rule "requires that an expert 'give the why and wherefore that supports the opinion, rather than a mere conclusion.'" Id. (quoting Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)). An opinion that "present[s] solely a bald conclusion, without specifying the factual bases or that logical or scientific rational that must undergird that opinion" is not entitled to be given any weight by the Court. Polzo, 196 N.J. at 583-84 & n.5.

"An opinion based on false assumptions is unhelpful in aiding the jury in its search for the truth, and is likely to mislead and confuse." Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 682 (3d Cir. 1991). Thus, "[a]n expert's conclusion 'is excluded if it is based merely on unfounded speculation and unquantified possibilities.'" Townsend, 221 N.J. at 55 (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997). "An expert's opinion . . . based on erroneous or nonexistent facts is worthless." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 543-44 (1995) (finding expert report based on inaccurate factual assertion insufficient to defeat motion for summary judgment). See also Beadling v. William Bowman Assocs., 355 N.J. Super. 70, 87 (App. Div. 2002) ("An expert opinion that is not factually supported is a net opinion or mere hypothesis to which no weight need be accorded. Opinions that lack a foundation are worthless."). The Appellate Division

has previously affirmed a trial court's exclusion of an expert report that lacks "verification of the accuracy of the data." Towers Associates v. E. Orange City, 16 N.J. Tax 483, 484 (App. Div. 1997).

In City of Long Branch v. Jui Yung Liu, 203 N.J. 464, 4 A.3d 542 (2010), the Supreme Court upheld the jury's finding that the property owners (in this case, restaurant owners) were not entitled to any compensation for the FFE. The decision noted that "[the City's appraiser] Hugh A. McGuire Jr., who testified that the fair market value of the Lius' property was $927,000 as of May 14, 2001…included in that appraisal figure the value of the property's furnishings, fixtures, and equipment because he compared the value of the Lius' property to that of other restaurants, which were sold with their equipment. McGuire also testified that the contents of a restaurant, such as plates, silverware, and cash registers, would not all constitute a functional unit within a building condemned through eminent domain." Id. at 486. In contrast, the property owners offered the expert testimony of FF&E appraiser Harski, "who classified as FF & E such items as cutlery, cash registers, coffeemakers, plates, pots, signs, furniture, flower holders, a sound system, televisions, bar equipment, sinks, counters, grills, ovens, refrigerators, freezers, and a walk-in cooler." Id. at 487. Harski did not opine on the value of the real estate with or without the FFE, similar to what Land did here. Ibid.

The jury found that although the building on the Liu property and the various FFE therein formed a single functional unit, they found that a reasonably willing purchaser of the Liu property would not pay substantially more for that property with the equipment in place. Nor would a reasonably willing buyer of the Property here pay substantially more for the outlets, pizza ovens, refrigerators, and the like.

Here, it is apparent that Land and Brody submitted a net opinion on FFE by inventorying nearly every floor tile, wall, and ceiling in the Property and calling it a "fixture." Land's report is merely a bare inventory of 516 items which he concluded (without factual basis) were present in 1994, including nonsensical items such as tiles, lights, "soap dispenser[s]," "paper towel holder[s]," appliances, shelving, electrical outlets, sinks, toilets, "toilet paper holder[s]," "wall cover[s]," "dropped ceiling," "plywood partitions," "circuit breaker panel[s]," paintings on windows, wall-to-wall carpeting, counters, and cabinets. Pa281-Pa336. Lot 19 was appraised "as improved," which inherently meant that everything that was already in the property would factor into the real estate value. A third-party buyer would never offer Market Value on the Property if that buyer had to pay separately for each and every electric outlet, tile, light, wall cover, dropped ceiling, circuit breaker panel, carpeting, counter, and cabinet.

Significantly, none of the items in Land's report add any value to the "as improved" state of Lot 19. Market value requires the parties to place themselves in

the shoes of a hypothetical buyer, who would offer a fair price for the Property *as-is* in the hopes of renting the units out to tenants with similar equipment needs. Items needed to get a certificate of occupancy, such as toilets and ceiling tiles, are inherently included in the market value of a property. The same rationale also applies to the larger equipment inventoried by Land. There were several iterations of restaurant tenants who continued to use the existing kitchen equipment in the units when the previous tenant vacated. The value of such equipment was "baked" into the lease agreement and rent, not separately accounted for. Pasquale Berardi testified that a tenant coming in would not start "taking tiles off the wall," but would "use whatever's there" in a turnkey operation. 7T123:23-124:6.

No purchaser would be "reasonably willing" to pay substantially more for Lot 19 with such FFE included. At a minimum, no purchaser would permit the addition of a 34% markup on appraiser values that *already* include subcontractor fees, to benefit some "phantom" general contractor. Land valued the FFE as if a *new* tenant wanted the exact same setup, rather than an existing tenant who would already have the benefit of the existing items in the unit. This approach is not the correct method of calculating just compensation for existing FFE, as it far exceeds any reasonable replacement value.

The Berardis have provided zero authority that they are entitled to receive the 1994 value of FFE that existed at the Property in 2018. They cannot credibly prove

that each and every fixture in Land's 2019 report actually existed in 1994 (especially when many of the tenants in 2018 were not there in 1994). The February 20, 2019 Order, under which Judge Bookbinder set the valuation date of January 27, 1994, did not make any exceptions for the FFE. Da102. The Court granted the Berardis' motion under N.J.S.A. 20:3-30, which states that "just compensation shall be determined as of the date of the earliest of the following events . . . (d) the date of the declaration of blight by the governing body upon a report by a planning board pursuant to section 38 of P.L.1971, c.361 (C.20:3-38)." Having voluntarily chosen that route to benefit from the higher property value of 1994, the Berardis cannot ask for compensation for FFE that only existed in 2018.[6] This is further borne out by the testimony of Brody, who noted that "[w]ell, we're dealing with a hypothetical sale as of January 27th, 1994. And under that hypothetical sale scenario, they would not be taking their equipment. It would be in place and be part of the fee-taking of the property as per the complaint." 7T146:3-7.

[6] Moreover, in a blatant attempt to over-inflate the purported value of the FFE, Land added a 10% general contractors overhead, a 10% general contractors profit, 12% architect or engineering fees and 2% plans and permitting surcharges to the value of all 516 items. Ibid. These miscellaneous fees added up to a 34% markup on values that *already* include subcontractor fees, ostensibly for the benefit of a fictitious general contractor but in reality just the Berardis themselves. These fees are not supported by any actual legitimate facts justifying their inclusion or a legal basis that permits them to be tacked on at the tail end, rather than already built into the book value.

The Trial Court erred when it denied the Township's Motion to Bar the Land Report. Land depended solely upon Defendants' verbal representations that the items were present at the Property in 1994, without making any independent investigation to verify the statements. At the time that the Township renewed its Motion to Bar the Land Report as a net opinion, it had taken the depositions of Land, Rocco Berardi, and Rocco Berardi's son Pasquale Berardi. These depositions strongly indicated that the Land Report was already unreliable in this regard. At his deposition Land then noted that the presence of the items was confirmed by inspection in 2018. The report is silent as to how Mr. Land confirmed the presence of those items in 1994. Mr. Land addressed this issue at his deposition in the following exchange:

> Q. You conclude on page 2 of your report that the value of the fixtures and equipment was $616,635 as of January 27, 1994, correct?
> A. Correct, sir.
> Q. And did you make a determination that the items you valued
> were present on the property as of January, 1994?
> A. Yes. Both Mr. Berardis were there to tell me that the items had been there as of condemnation date, and that's on an item-by-item basis.
> . . . .
> Q. So other than Mr. Berardi, senior or junior, telling you these items
> were present in January of 1994, you didn't make any independent investigation to verify those statements, correct?
> A. Correct.

Pa209.

Yet in his certification to the Court and deposition testimony, Rocco Berardi contradicted Land's conclusion that the 516 items were present in 1994. Rocco Berardi submitted a sworn certification to the Court and later testified indicating that in 1994, the Crown Chicken space was occupied by a Chinese Restaurant. Pa343. In his report Land concluded that the total value of the items in the Nu Soul Cafe in 1994 was $63,514. Rocco Berardi certified that there was a Fish Market in the Nu Soul Café space in 1994. Ibid. Land also concluded that WTM Contractors was present in the Shopping Center in 1994, and that the value of the items present in WTM totaled $43,875. Again, Rocco Berardi contradicted this conclusion by certifying that there was a thrift store in this space in 1994. Ibid.

In fact, not once during his deposition did Rocco Berardi indicate that he had confirmed the presence of any of the 516 items in 1994 to Land. It is clear from the deposition testimony and Rocco Berardi's sworn certification that Land never confirmed the existence of any, let alone all 516 of the items listed in his report. The absence of these stores at the Property in 1994 contradicts Mr. Land's report, which states:

> At your request we have **examined the trade fixtures for the commercial ventures which were operating at the Pemberton Mall on January 1994**. The attached reports detail the improvements which were on the premises on May 28, 2018. In our opinion the reproduction value of the fixtures which

> inure to the real estate is $734,948 and the sound, or depreciated, value of these fixtures is $616,635 as of January 27, 1994.
>
> Pa282.

The Land Report explained that the value conclusions were based on "Means Construction Cost Date, 52nd Edition **for the year 1994** and Marshall and Swift Valuation Service . . . In addition **we have relied on our own library of information** which includes catalogs and offering from suppliers of the equipment described in these reports." Id. at 4. Thus, Land's conclusion was highly speculative.

For a clearer summation, Brody's real estate appraisal report directly contradicted Land's assertion that these stores and the 516 items were present in 1994. Brody's report lists the stores present as of January 27, 1994. Bayer Cert. Ex. A ("Brody Appraisal") at pg. 49-52. Contrary to Mr. Land's report, the appraisal report does not list WTM Contractors, Nu Soul Café, Dr. Louise Varella, La Villa Pizza, Elly's Laundry or Crown Chicken as present in 1994. Id.

To compound the unreliability of Land's net opinion, Brody baldly concluded that 516 items added "enhancement value to the property as a result of the improvements in furniture, fixtures and equipment that were functionally related to the then existing use" of $550,000—a voluntary decrease of the $616,635 appraisal by Charles Land by $66,635, simply because Brody "knew" how Land operated. 6T237:1-13.

Land's report was nothing more than a net opinion. Although he estimated the market value of the items themselves, Land does **not** reach a conclusion that these items actually **enhanced** the fair market value of the Property, or to what amount a reasonable buyer would pay for such items on top of the base valuation as he explicitly testified that was not his area of expertise:

> "Q: Mr. Land, just a couple more questions. You testified earlier on your cross-examination that you're
> 7 not a licensed real estate appraiser, correct?
> A: Correct.
> Q: And that's not your area of expertise, correct?
> A: No, I am -- not at all.
> Q: So you have not expressed an opinion that the fair market value of the subject property, using the income approach, is $616,635 greater than the -- due to the opinion you've rendered in this case, correct?
> A: In general, that is correct. I can only say it's valuable and it's here.
> Q: But you don't give an opinion -- right, but you're not giving an opinion as to the impact of fair market value. That's a real estate appraiser question, correct?
> A: That's correct."
>
> *5T209:5-22.*

As the Berardis' expert admitted, many of the items would be required simply to get a certificate of occupancy from the Township:

> Q: Do you need, don't you need, you need a bathroom, the restaurant needed a bathroom to get a certificate of occupancy, correct?
> A Correct."
>
> *5T90:11-14.*
>
> "Q: Okay. To get a certificate of occupancy you needed to provide electricity and heating to the restaurant, correct?

A: Correct."

5T91:11-14.

Land testified that he is not qualified to make a conclusion as to the enhancement value that the 516 items identified in his report brought to the Property as he is not a real estate appraiser:

> "Q: You don't do property appraisal -- real property.
> A: I am not a real estate appraiser at all.
> *5T129:8-10.*

> "Q: You don't render -- you don't render an opinion as to the value or impact on value of real estate, if any, in connection with furniture, fixtures,and equipment, is that correct?
> A: That is correct."

5T163:15-19.

At trial, Brody did not add any additional explanation or conclusion as to how these items enhanced the value of the Property above his $4,295,000 income approach estimate. Rather, he arbitrarily reduced Land's full value of the FFE and concluded that the FFE constituted an additional $550,000 of valuation.

CONCLUSION

Just compensation is, at its core, an equitable principle designed to place the property owner in the same—but not better—position that he or she was before the taking. The Berardis' attempt to otherwise convince this Court, as it attempted to

unsuccessfully convince the Arbitrator, that it was entitled to ignore a 30-year lease on the biggest space in the Property is not reasonable, not credible, and not just compensation.

For the foregoing reasons, the Township respectfully requests that the Court affirm the inclusion of the ACME lease in the calculation of Market Value, and reverse: 1) the Trial Court's February 20, 2019 Order granting the Berardis' motion to set the date of valuation as of January 27, 1994, and 2) the Trial Court's 8/24/21 Order denying the Township's motion to bar Defendants from entering the testimony and expert report of Charles Land into evidence. This matter should be remanded for a new arbitration trial consistent with these rulings, per the terms of the October 21, 2021 Consent Order.

Pashman Stein Walder Hayden, PC
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Pemberton Township

By: *s/s Andrew Bayer*
Andrew Bayer

Dated: January 4, 2023

PEMBERTON TOWNSHIP, Plaintiff/Respondent/Cross-Appellant	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: DOCKET NO: A-003684-21 T1
VS.	:	CIVIL ACTION
ROCCO BERARDI, ANTONIA BERARDI, DAIRY QUEEN, NU SOUL CAFÉ, GRISSEL CATALAN, JAY'S STUDIO JEWELERS, ELLY PREMIUM LAUNDRY, ERNIES BARBER SHOP, DR. LORRAIN VARELA, DPM, PEMBERTON TOWNSHIP MUNICIPAL UTILITIES AUTHORITY and BOARD OF CHOSEN FREEHOLDERS of the COUNTY OF BURLINGTON, Defendants/Appellants/Cross Respondents.	:	On Appeal from a Final Judgment of the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L BUR L 954-18 Sat Below: The Honorable Aimee Belgard, J.S.C.

REPLY BRIEF AND OPPOSITION TO CROSS APPEAL ON BEHALF OF DEFENDANT/APPELLANT/CROSS RESPONDENTS ROCCO BERARDI AND ANTONIA BERARDI

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APPENDIX VOLUME III (Da215)

PRELIMINARY STATEMENT

In this condemnation case, the sole issue is the market value of the "property" (fee simple estate) taken by the Plaintiff as of the date of valuation in 1994. For all practical purposes, the only direct evidence of that is the opinions of the appraisers. The credibility of the opinion of the appraisers is ordinarily based upon the facts and factors upon which the opinion is based and its consistency with generally accepted appraisal practice. There is no disagreement as to the definition of the two key concepts of the property interest utilized by the two Appraisers.

The property rights appraised by Plaintiff's appraiser as to Lot 19 was a "leased fee interest defined by McHale as:

> "The ownership interest held by the lessor, which includes the right to the contract rent specified in the lease plus the reversionary right when the lease expires."

As authority for that definition McHale cites" Appraisal Institute, The Appraisal of Real Estate, 14th ed. Chicago, I.L. Appraisal Institute, 2013 pg. 72. (Da 020)

He then, as to his appraisal of Lot 18, defines the property rights appraised of the "fee simple estate" as:

> "absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and is escheat."

As to authority for that definition, McHale cites, "Appraisal Institute, The Dictionary of Real Estate Appraisal, 6th ed., Chicago, I.L.; Appraisal Institute, 2015, pg. 40. (Da020)

The property interest taken in this case defined in the Complaint and the Declaration of Taking (Da001) is the fee simple estate as to both Lots 18 and 19. The Complaint named all the remaining tenants. The reversionary right as to the Acme lease was in the fee interests owned by Rocco Berardi. The property interest taken by the Plaintiff as designated in Complaint and Declaration of Taking and now owned by the Plaintiff is the entire fee simple estate as of the date of Taking, May 4, 2018.

By valuing the taking of Lot 19 as a leased fee instead of the fee simple estate actually taken, Plaintiff's violated the intent and purpose of the controlling statutes N.J.S.A. 20:3 – 30(d) and 20:3-38 as well as the New Jersey Constitution, Art. I, ¶ 20. The legislature's statement attached to the bill stated:

> "The purpose of this bill is to assure a property owner the compensation to which he is normally entitled and to prevent the undue hardship which will occur as a result of the inevitable deterioration in property values between the Declaration of Blight and the institution of condemnation proceedings."

The property taken in 2018 was the fee simple estate. The property to be valued as of 1994 was the fee simple estate. The fee simple estate in 1994 included the leased fee measuring the right to receive the contract rent and the reversionary rights as to any leases that might be terminated as well as the leasehold interests of any existing tenancies. That is why, as Jon Brody, M.A.I., testified that acting on behalf of a developer who had acquired the leased fee, he then had appraised the individual leasehold interests of the various tenants whose property interests had to be acquired in order for the redeveloper to have the fee simple interest, free of any leasehold interest. That is also why the Complaint in this case names all of the remaining tenants left as of the date of taking. All of the other interests of prior tenancies, including the Acme Lease, were already in Berardi by virtue of the reversion. (3T168 1;169 17)

By any definition, a fee simple estate means that it is free and clear of any leasehold interest. By any definition, one who acquired a piece of real property that is subject to an existing lease has acquired something less than a fee simple estate. We suggest that is true no matter whether you use a definition established under generally acceptable appraisal standards or generally accepted legal real estate practice.

LEGAL ARGUMENT
POINT I
DEFENDANT'S MOTION TO BAR EVIDENCE OF THE THIRTY-YEAR OLD ACME LEASE SHOULD HAVE BEEN GRANTED AS A MATTER OF LAW. (Da108)

A. Plaintiff seeks to have the Court ignore the distinction between the property interests of a "fee simple estate" and a "leased fee estate."

Plaintiff frames the issue on this appeal as "...A LONG-TERM LEASE SHOULD BE FACTORED INTO MARKET VALUE OF A PROPERTY. Thus, plaintiff simply chooses to ignore the difference between the appraisal of a 'fee simple estate" and a "leased fee estate." (Pb13)

Plaintiff prefaced its argument as to Point I (Pb2) stating "no arm's length buyer would ever pay $4,845,000.00 for the property in 1994 while it was encumbered with a $0.77 per square foot thirty-year lease." He essentially repeats the same mantra in paragraph two of (Pb19) and the same thought was expressed several times by the arbitrator. The answer is in the definition of the property interest taken by the condemnor. The property taken is the fee simple estate, so the compensation is for the sum of the total property interests being taken including the Acme leasehold interest. Accordingly, if one paid Brody's $4.8 million, that would include payment for all the leasehold interests including the Acme, all interests in the Furniture, Fixtures and Equipment (FF&E), and the fee simple in Lots 18 and 19. The property interest owned by the prospective purchaser of the fee simple estate would no longer be subject to the $0.77 cent Acme lease.

B. The Appraisal Standards Set Forth by the Appraisal Institute are an Appropriate Authority Upon Which to Rely for Evidence of Appraisal Standards.

The next staggering revelation from plaintiff is that "any reliance on 'appraisal standards' from the Treatise the Appraisal of Real Estate is also misplaced...," because the 15th Ed. makes a distinction between the appraisal definition of fee simple and the legal definition. Plaintiff cites to a discussion of the "fee simple estate" at (Pa164-165).

We could probably all agree that the Appraisal Institute would not be an appropriate authority upon which to rely for a legal opinion. However, as an arbiter of appraisal standards it is considered to be the "bible" of the profession and certainly in this case it was relied upon by plaintiff's expert appraiser in defining the property interests that he appraised and upon which the arbitrator relied.

Moreover, the context of the discussion in the Appraisal text, of the definition of the fee simple estate is that while the definition includes the "full bundle of rights," there are often minor encumbrances like public utility easements or reciprocal access easements that as a practical matter are more or less ignored, "unless one of those encumbrances is a lease" (Pa164). The fact is, that while legal definitions in some cases may serve a different purpose, such as defining a duration like a life estate, in this case, as in almost all condemnation

cases, the issue is the market value of the property rights taken. Accordingly, the legal definition in this case, i.e., that the property is free and clear of all encumbrances (including leases) of record is the same as the appraisal definition. Further, the testimony of McHale in giving an opinion of value as a leased fee is based on the generally accepted standards as established by the same generally accepted appraisal standards, but which is essentially misleading, irrelevant, and prejudicial. (1T132 13-23)

The taking was of the fee simple estate and based upon generally accepted appraisal standards as set forth in the Appraisal Institute text, 15th ed. Pg. 415:

> "...When the fee simple estate is valued, the presumption is that the property is available to be leased at market rates. When an appraisal involves the valuation of the fee simple interest in a leased property, the valuation of the entire bundle of rights applies."

The fact is that since the issue in Eminent Domain cases is the amount of just compensation, usually represented by the market value, as testified to by Appraisers, following generally accepted standards of the Appraisal Institute, New Jersey Court's often rely upon the standards referenced in The Appraisal Institute's text, The Appraisal of Real Estate. We don't have to look very far. In discussing this point at (Pb17), Plaintiff cites State by Commissioner of Transportation v. Caoili 135 N.J. 252, 270 (1994). The Court states:

> "Three valuation methodologies may be used in appraising condemned property with a reasonable probability of a

> zoning change: reproduction cost, capitalization cost, and the comparable [sale] value. American Institute of Real Estate Appraisers, The Appraisal of Real Estate 51-53 (1983)..."

The Court then went on to point out that Plaintiff's experts used the comparable sales approach. (Actually both parties' experts used the comparable sales approach). The issue was whether the Court should require the Gorga approach of using sales as zoned and adding a premium, versus using comparable sales of the likely rezoning which was not yet a reality and subtracting a discount. The point here is that the Court relied upon the Appraisal text to establish the potential methodologies available and determined that both methods were acceptable.

Again, in Casino Reinvestment Development (CRDA) v. Katz, 334 N.J. Super 473, 485 (Law Div. 2000), the case primarily relied upon by plaintiff, states:

> "In assessing the earning power of a property, income is estimated using the income and expense history of the subject property, The Appraisal of Real Estate, (Appraisal Institute 11th ed. At 482."

Again, the point is that the New Jersey Courts continually rely upon and cite The Appraisal of Real Estate text. Please note that while the eleventh edition is not available to us, the twelfth edition published less than a year after the Katz decision states at pg. 297:

> "Historical income and current income are significant, but the ultimate concern is the future. The earning history of a property is important only insofar as it is accepted by buyers as an indication of the future. Current income is a good starting point, but the direction and expected pattern of income change are critical to the capitalization process."

Please note that both comments are directed toward establishing an estimate of income expectations for a first-year income but, let's look at Katz and understand its holding.

Clearly the Court was dealing with a fee simple taking as the tenant Atlantic City Linen Supply was a named defendant in these two consolidated cases. The case arose as defendants moved to dismiss on grounds that the offer letter and appraisal violated the requirement of bona fide negotiations required by N.J.S.A. 20: 3-6 in that the CRDA appraiser, the same McHale as in the instant case, based his opinion of the fee simple value on market rents rather than on the actual contract rents. The leases were of ten years with five renewal options, one of which had already been exercised indicating a likely renewal of the other as the tenant was operating out of both buildings. McHale didn't use the actual rent for either building as a comparable rental, but did use the rental of the other building in each case along with other "comparable" leases and opined to a value significantly less than if based on the actual leases.

The court in Katz relied upon State v. William G. Rohrer, Inc., 80 N.J. 462, 467, (1979) determining that it has long been the rule that just

compensation is paid for the owner's loss, not what the condemning authority gains. Further, the court at p. 485, relied upon the well-established principle that the owner must be placed in as good a position financially as if the property had not been taken. The court then observed that "This very valuable leasehold is one of the things that a buyer would consider in the open market at fixing a price. Further, the court cited Nichols on Eminent Domain and The Appraisal of Real Estate text previously discussed, that actual income is generally accepted as an element to be considered and the in assessing the earning power of a property income and expense history used. The court then held that by failing to consider the actual rental history, the McHale opinion of value did not reflect the "actual loss" to the owner and he was not placed in as good of a position as before the government action. Under the circumstances, the court held that a potential purchase would have considered the long-term lease with its favorable rent.

Obviously, Plaintiff's reliance upon Katz is misplaced. Firstly, because as defendant stated in their initial brief at Db 11, "The actual rent agreed upon between a landlord and a tenant may be the best evidence of the anticipated income, depending on the circumstances of the case. But not as to this lease, that had been negotiated thirty years before, under circumstances where the subject property was a vacant piece of land. This lease was not a lease that anyone could

consider as a comparable or as an indicator of market value of the fee simple estate. Secondly, because the market value of the fee simple estate in 1994 would have required compensation for the entirety of all the property interests as a taking of the fee simple estate, but the leases in Katz had no market value as leasehold interests they were above market.

Plaintiff's remaining argument as to Point I is that defendant is getting a double recovery because they were still able to collect some rents while the property deteriorated in value while under the blight designation and the Township's success in moving the Acme to its new Penns Grove Shopping Center the property decreased in value, perhaps even to the $920,000 FMV as of March 2018. The argument that while his $4M capital was tied up for twenty-four years in this property, an asset the Township was systematically, by its actions, depreciating its value, the Berardi's are somehow getting a double recovery, is so lame it shouldn't require a response; the legislative intent of N.J.S.A.20:3-30(d) and 20:3-38 as discussed in Point II may provide further explanation.

POINT II

THE ORDER SETTING THE DATE OF VALUATION AS JANUARY 27, 1994 IS CONSISTANT WITH THE CONTROLLING STATUTES N.J.S.A. 20: 3-30(d) AND 20:3-38.(Da102)

The controlling statutes on this issue are set forth below:

N.J.S.A. 20:3-30(d):

> Just compensation shall be determined as of the earliest of the following events....(d) The date of the Declaration of Blight by the governing body upon a report by the planning board pursuant to [N.J.S.A. 20:3-30]

N.J.S.A. 20:3-38:

> The value of any land or other property being acquired in connection with a development or redevelopment of a blighted area shall be no less than the value as of the Declaration of Blight by the governing body upon a report by a planning board.

In spite of the above statutory mandate, Plaintiff argues that the statutes should not apply "especially when there is a twenty-four-year time period between the area in need designation and the date of taking." Plaintiff's persistence in raising this argument should get some kind of negative recognition for chutzpah! The Plaintiff not only was the party who waited twenty-four years, but eight years after the designation filed an eminent domain action on September 30, 2002 naming all the tenants as defendants to condemn the fee simple estate before taking a voluntary dismissal on the eve of Trial, three years later after an Appellate Division ruling that the Township had to file a Declaration of Taking before the actual trial. Pa 017 or 378 Super 430 (App

Div. 2005). By that move, the plaintiff caused a number of tenants to relocate and drive the property value down.

Plaintiff contends at (Pb27), that courts are not bound to enforce the literal effects of these statutes if so doing would result in an injustice or an abrogation of the intent of the statute citing Township of Piscataway vs. Washington, LLC, 400 N.J. Super. 358, 371-74 (Law Div. 2008). Neither the Piscataway case nor West Windsor v. Nierenberg, 150 N.J. 11 (1997) is on point. These are not redevelopment cases interpreting the statutory sections in question. Those cases deal with 20:3-30 (c), "the date on which action is taken by the condemnor which substantially affects the use and enjoyment of the property": That, is a mixed question of law and fact. That is an entirely different issue, see: Nierenberg supra, at 135.

The controlling statute in the instant case is based upon a finding by the Legislature that after a declaration of blight there is a natural decline in property values. These amendments had been introduced in 1966 as Assembly Bills Nos. 204 and 252 with the following statement appended:

> After an area has been declared blighted by a municipality there is a natural decline in property values resulting both from the desire of the inhabitants to immediately relocate and the natural reluctance on the part of buyers to purchase property within the affected area. There is no time period during which these development agencies must acquire the

> property needed to carry out the proposed plan. The purpose of this bill is to assure a property owner the compensation to which he is morally entitled and to prevent the undue hardship which will accrue as a result of the inevitable diminution in property values between the date of the declaration of blight and the institution of the condemnation proceedings.

These bills were ultimately passed by the 1967 Legislature as Assembly Bills Nos. 347 and 349. See also, Report of Eminent Domain Revisions Commission, pp 24-28 (April 15, 1965), citing *Wilson v. Long Branch, supra.*

Accordingly, the Legislature avoided creating a burden on the property owner to prove that the declaration caused a loss in value, and denied the condemnor the right to create a litigable issue by claiming to the contrary.

This issue is spelled out in Newark Housing Authority v. Ricciardi, 176 N.J. Super. 13 at 19 (1980):

> [1,2] Because the alternative valuation date is based on the presumption that a blight declaration will adversely affect value, the Legislature did not impose on condemnees, the obligation to prove that an actual decline in value between the declaration date and the taking date was in fact attributable to the declaration. Nor did it, conversely, offer condemnors the defensive opportunity to prove that an actual decline was attributable to causes other than the declaration. Rather, it chose to establish an absolute standard to be uniformly applied to all blighted area takings on the altogether reasonable theory that that standard in the overwhelming majority of cases, would assure the property owner of no more than his constitutional right to just compensation. Certainly as to those cases, application of an absolute standard has the notable virtue of producing a just

> result without the expenditure by the litigants and the courts of the resources which would otherwise be required to prove or disprove a causal connection between the blight declaration and the decline in value. Thus, the Legislature may be inferred to have determined as well that if an individual property owner, from time to time, may obtain more favorable compensation as a result of uniform application of the absolute standard, such an occasional occurrence is not only outweighed by the advantages of uniform application but also offset by the rule of law which immunizes condemnors from the requirement of paying any compensation for diminution of value resulting from a blight declaration where there is never a subsequent taking and the diminution is insufficient to meet the standard of destruction of beneficial use. Cf. *Washington Market Enterprises v. Trenton 68 N.J., 197, 122 (1975)*. Indeed, the Supreme Court in *Jersey City Redevelop. Agency, supra*, fully recognized these consequences of the alternative valuation date and specifically declined to hold that they in any way affected the constitutionality of that provision.

As indicated by the Appellate Division in Ricciardi, and applicable here,...the applicability of the blight date for valuation would seem to be beyond argument. (Ricciardi, at 20)

It has been well recognized by both the Legislature and our Courts that a declaration of blight or as in this case that property is subject to eminent domain under the redevelopment statute has a negative impact on the property owner. Our Supreme Court in Jersey City Redevelopment Agency v. Kugler, 58 N.J. 374, 382-384 (1971), acknowledged the inequity of visiting such depreciation on the property owner and then making him wait years before the property is

actually taken and just compensation measured and given to him. Kugler, suggests that if the Legislature had not given this protection to the property owner, the Court in a case similarly situated to this would have.

The purpose of the controlling statutes is for the protection of property owners situated as in this case. As the Supreme Court stated in Kugler's closing paragraph:

> There is no suggestion, nor could there be sensibly, in the case before us that the rule of damages prescribed by the 1967 amendments detrimentally affects the property owner's right to just compensation. On the contrary, its purpose is to give recognition to and to overcome in substantial measure the devaluation of the owner's property that occurs between the date of declaration of blight and the actual taking of the land. What the Legislature has said-and we regard it as eminently equitable and entirely consistent with the mandate for just compensation-is that the value of land which has been declared blighted should be fixed at "no less than" the value as of the date of the declaration. We perceive no conflict between that minimum base and the Constitutional guaranty. [58 N.J. at 385].

POINT III

THE TRIAL COURT APPROPRIATLY DENIED PLAINTIFF'S MOTION TO BAR THE LAND REPORTS AS A NET OPINION.(Pa161)

A. Furniture, Fixtures and Equipment (FF&E) That are a Functional Unit of a Building Condemned in an Eminent Domain Act are Compensable.

The New Jersey Supreme Court in City of Long Branch v. Liu, 203 N.J. 464, 489 (2010) indicated that it was indisputable that FF&E that are a functional unit with building taken by Eminent Domain were compensable.

The Liu Court points out that the guidelines for establishing compensability were established in State v. Gallant, 42 N.J. 583, 590 (1964), wherein the Court first quoted Justice [then Judge] Cardozo in Jackson v. State, 213 N.Y. 34, 106 N.E. 758 (Ct of App. 1914).

> "It is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of secondhand machinery and in so doing discharge the full measure of its duty. Severed from the building, such machinery commands only the prices of secondhand articles; attached to a going plant, it may produce an enhancement of value as great as it did when new. The law gives no sanction to so obvious an injustice as would result if the owner were held to forfeit all these elements of value."

The Court when on to state:

> The value of a factory containing industrial equipment employed in the business for which the property is being used is ordinarily greater than that of an empty and idle building. Such equipment in place adds more to the value of the realty than its second-hand salvage value separated from the premises. An owner, who is under no duress, and where the building and machinery are a functional unit, would

> undoubtedly sell only at a price which would reflect that increased value. Where, therefore, a building and industrial machinery housed therein constitute a functional unit, and the difference between the value of the building with such articles and without them, is substantial, compensation for the taking should reflect that enhanced value. This, rather than the physical mode of annexation to the freehold is the critical test in eminent domain cases. See *Harvey Textile Co. v. Hill*, 135 *Conn.* 686, 67 *A.2d* 851 (*Sup. Ct. Err.* 1949); *Jackson v. State, supra. Gallant, supra* at 590.

As indicated in the Liu opinion, (pg. 489) this was the basis for the Model Charge §9.13. (Da215)

Also, see N.J.S.A.20:3-2(d) which may enlarge the scope of the compensable items but cannot limit the Constitutional mandate of Gallant. The statute incorporates many of these items with the definition of property for Legislative purposes.

The important point in Liu is that the Supreme Court found that the Appellate Division in that case was mistaken in concluding as a matter of law, that all the FF&E in the Liu building did not constitute a single functional unit. The Court did not reverse because the trial court properly presented the factual dispute to the jury. Liu, supra, at 493. The jury in that case simply reached the wrong conclusion because of conflicting evidence regarding relocation benefits and the admission of a video taken after the City had taken possession of the building showing damaged equipment.

The Liu property was a multi-use building on the Long Branch boardwalk housing different units including a café, a pizza stand, a night club, and a restaurant among other uses, the Supreme Court held that, "the jury was free to conclude, as it did, that at least some of the FF&E formed a single functional unit with the building and was equally free to conclude that a reasonably willing purchaser would not have paid "substantially more for that property with the FF&E". Liu supra at 491. The proofs in the Liu trial were substantially the same as in this case. The rebuttal evidence was different. In Liu, the condemnor showed a video depicting the FF&E having been trashed and evidence that defendant's teenage children were responsible.

Charles Land, inspected the building, accompanied by the owner Rocco Berardi, and appraiser Jon Brody on May 28, 2018. He examined the trade fixtures for the commercial ventures which were operating at Browns Mills Shopping Center in January of 1994. Land has been President of Sidney Land Inc. located in Weehawken N.J. since 1966 and engaged in field inspection, estimating and pricing commercial and industrial personalty, furniture, fixtures, and equipment for over fifty years and has testified innumerable times in Eminent Domain cases.

The Land report gives a reproduction value as well as a depreciated value utilizing manuals known and used in the industry including Means Construction

Cost Data 52d Edition for the year 1994 and Marshall & Swift Valuation Service along with catalogs and offerings from suppliers of the equipment described in his testimony. **(2T131 10-25, 132 1-7).**

The numerous items include the obvious example of the pizza oven along with its partition and sheetrock on stud frame along with venting to over the roof, as well as many others obviously functionally integrated to the existing uses.

It is also important to note that McHale, when asked to address the issue of FF&E shown at pg. 66 of his appraisal report, referred to refrigeration equipment and simply said:

> "That's all equipment. That's not part of the real estate that I valued.
>
> If you look below that photograph, same right-hand side center photograph, that is the pizza restaurant. Most...you got a Coke machine. You got tables. Those tables are bolted into the real estate, but they can be taken out and easily removed. I did not value that..."
> **(1T114 13-17, 116 1-8)**

He then went on to say he simply appraised the property by the income approach as a typical retail space, "a vanilla box." (**1T116, 4-8**) He therefore gave no consideration to those items which were obviously related functionally to those uses as of the taking were integrated into that use and added substantial value to the property as devoted to the existing use at the time of the taking.

The purpose of the Court in Gallant was to protect the property owner and others similarly situated as leasehold owners from the loss of value when articles attached to an ongoing concern, where they produce an enhancement value often as great as it did when new, are then separated and worth nothing but secondhand salvage value.

Land did not make any claim for the "coke machine" in the photographs referenced by McHale. Neither did he include claims for pots, pans, or cutlery. A review of his testimony reveals that he basically included the tenant fit ups that go beyond the "vanilla box" provided in typical retail space referred to by both Brody and McHale. Items such as refrigerated display cases, walk in coolers with refrigeration, illuminated menu signs, range hoods, grease interceptors, are all obviously a functional part of a building devoted to use as a restaurant. This is also the same type of FF&E the Court in Liu said the jury was free to conclude formed a functional unit with the building and that could enhance the value the property for its purpose.

We must always remember that the fact finder is charged with determining "just compensation" for the taking of the shopping center for its highest and best use as the use as of the date of taking. The remaining tenants and the property owner are to be compensated wholly for what they have lost. Not what the

government is getting. See: State v. Rohrer, 80 N.J. 462 (1974) wherein the Court cites Nichols, Eminent Domain § 12.21 at 12-86.11(3d Ed. 1978) saying:

> [T]he just compensation to which an owner is entitled when his property is taken by Eminent Domain is regarded in law from the point of view of the owner and not the condemnor.

Obviously, the focus is on what is the loss to the owner or leaseholder. The Court in Gallant was certainly well aware that the State had no use for the looms, and they represented nothing more than scrap or salvage value after the taking. However, the defendants are entitled to compensation based upon the increased value represented by the FF&E that constitutes a functional unit within the condemned shopping center building.

B. Land's Testimony as to the Value of the FF&E was Consistent with N.J.R.E. 703.

N.J.R.E. 703 says:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the proceeding. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

We can agree that the "net opinion" rule is a corollary of N.J.R.E.703. That the equipment was there as of the date of taking in 2018, was established by the owner, Charlie Land and Jon Brody, all eyewitnesses. The equipment value was established by Land based upon his personal inspection, and cost

manuals and catalogues of a type reasonably and usually relied upon by experts in the field of appraising FF&E, as well as product valuations dating back to 1994.

Jon Brody, who relied upon his own inspection of the property and his understanding of the uses of the equipment he viewed and upon his forty plus years of experience observing the behavior of buyers and sellers in commercial transactions testified. **(3T178,12-25;237,6-25)**

Plaintiff at (Pb 34) still does not accept that the intent and meaning of the controlling statutes discussed in Point II is that the "property" taken in 2018 is the "property" that is to be valued as of the market as it existed in 1994. The "property" doesn't change, the market value of the "property" is simply determined as of market values in 1994.

West Coast Video's FF&E was not "property" taken in this action. But, Dr. Varela's tenant fit up included partitions for examining rooms and reception area was. Some of the tenants, including the Rite Aid, Barbershop and Dairy Queen were there at least from 1994 and installed the FF&E that was the FF&E that was taken in 2018, but valued based on 1994 prices. The amount of rent of Dr. Varela and the three long-term tenants was based on the fact that they paid for their own tenant fit-ups. Even the other existing tenants had signage and set up costs over and above the vanilla box. In any event the issue here is simply

admissibility, it was for the arbitrator to determine the enhancement value. The Arbitrator reduced Land's actual value of $616,635 to $163,035 approximately a 75% reduction. Despite the rather parsimonious award, defendant in an effort to keep this case as simple as possible, did not appeal this issue.

However, most importantly it should be clear as established in Gallant and reiterated by the New Jersey Supreme Court in Liu, FF&E that functions as a unit with the building as devoted to a specific use is compensable as a matter of law. Whether a pizza oven which bakes the pizza served in a pizzeria is part of a functional unit with the building would seem to be rather self-evident. The same would seem to be true as to other tenant fit-ups that serve the use of the tenant such as the partitions that separate the waiting room from the clinical areas of a doctor's office. In any event, this is the province of the fact finder to determine along with the enhancement value as demonstrated by the evidence and the appropriate inferences that can be drawn from that evidence.

CONCLUSION

Wherefore, for the reasons set forth above, this case should be remanded to the trial court for a new trial on the issue of the value of Lot 19 without disturbing the findings as to Lot 18 or the enhancements from the furniture, fixtures and equipment. If the court wishes to exercise its original jurisdiction,

it could amend the award to conform with the evidence of market rent set forth above.

Respectfully submitted
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Attorneys for Defendants/
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Rocco Berardi & Antonia Berardi

Dated: February 21, 2023. By: _____
PETER H. WEGENER

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-003684-21 T1

PEMBERTON TOWNSHIP

Plaintiff,

vs.

ROCCO BERARDI, ANTONIA BERARDI, DAIRY QUEEN, NU SOUL CAFÉ, GRISSEL CATALAN, JAY'S STUDIO JEWELERS, ELLY PREMIUM LAUNDRY, ERNIES BARBER SHOP, DR. LORRAIN VARELA, DPM, PEMBERTON TOWNSHIP MUNICIPAL UTILITIES AUTHORITY, and BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON,

Defendants.

Civil Action

COURT BELOW:

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION: BURLINGTON COUNTY

Hon. Aimee Belgard, J.S.C.

Docket No. L-BUR-954-18

REPLY BRIEF ON BEHALF OF PLAINTIFF/CROSS-APPELLANT PEMBERTON TOWNSHIP

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PRELIMINARY STATEMENT

The Berardis' arguments in opposition to the Township's Cross-Appeal are utterly without merit. They wholly ignore the Township's very first point—that it is *not* the Arbitrator's factual determinations that are subject to appeal here—but that the *sole* issues preserved for appeal are those explicitly set forth in the Trial Court's October 20, 2021 Consent Order. Under the October 20, 2021 Consent Order, the provisions of which the Berardis wholeheartedly *agreed* to when moving this case to arbitration, only five limited issues were preserved for appeal:

> (1) Order establishing the date of valuation of January 27, 1994;
>
> (2) the order denying Plaintiff's motion in limine barring the testimony of the Defendants' furniture, fixture, and equipment expert, Charles Land based on certain items not being present as of January 27, 1994;
>
> (3) The Order denying Defendants' motion barring the Plaintiff's expert, Jerome McHale, from using the Acme contract rent in his calculation of gross income in his income approach and the introduction of evidence of sales of shopping centers based on terms of leased fee;
>
> (4) all issues related to environmental cleanup and
>
> (5) all issues related to withdrawal of deposit funds.

The Berardis have critically failed to answer that vital issue on appeal: how did the Trial Court err in denying the Berardis' motion barring the McHale Report from using the Acme contract rent?

The answer to that question is that the Trial Court **did not err**. Instead, the Trial Court rightfully decided to leave the credibility of McHale's findings in the hands of the Arbitrator, who in his role as the factfinder determined that that the

market value of the Property *had* to account for the 30-year ACME lease in an arms-length transaction. However, rather than confining their appeal to the Trial Court's Order, the Berardis have mounted a collateral attack on the Arbitrator's factual findings. These arguments remain outside the bounds of permissible appeal and must be dismissed as procedurally inappropriate.

The Berardis' tedious arguments espousing a "fee simple" taking versus a "leased fee" disregard the core principles of New Jersey case law regarding the determination of market value. Although the Berardis cite to the Legislature's intent in passing N.J.S.A. 20:3-30(d), they engage in no discussion of what such "compensation" truly encapsulates. New Jersey courts have defined "just compensation" as "the fair market value of the property…determined by what a willing buyer and a willing seller would agree to, neither being under any compulsion to act.'" City of Asbury Park v. Asbury Park Towers, 388 N.J. Super. 1, 9 (App. Div.2006). This Court has repeatedly emphasized that there is no hard or fast rule in determining market value, so as to preserve the inherent flexibility of equitable principles underlying condemnation. Contrary to the Berardis' insistence that the Trial Court's ruling should have been dictated by the treatise The Appraisal of Real Estate, it is New Jersey case law that continues to define just compensation in the event of a taking. The Trial Court recognized these precepts when it denied the Berardis' motion to bar the McHale Report's analysis of the ACME lease.

Ultimately, the Berardis seek to have their cake and eat it too; they ask this Court to eviscerate the Trial Court's Order permitting the factfinder to take the ACME lease into account, on the grounds that a "fee simple" was taken as of January 27, 1994. However, the Township did not take the property, whether by fee simple or otherwise, until May of 2018. During the period of twenty-four years, the Berardis continued to possess the Property, collect rent, and generate profit, which they refuse to disgorge to the Township after the declaration of blight. If the Township had truly taken a "fee simple" of the Property on January 27, 1994, why shouldn't the Township have the rights to the excess rent as of the date of valuation?

Furthermore, the Berardis have persisted in this fallacy that the FF&E that existed at the Property in 2018 need to be valued as of January 27, 1994. There is zero legal basis for this novel proposition. The evidence adduced at Charles Land's and Jon Brody's depositions clearly establish that there is no credible evidence that the FF&E existed at the Property on January 27, 1994. Therefore, the FF&E report constituted an impermissible net opinion.

This Court should affirm the inclusion of the ACME lease in the calculation of Market Value, reverse the Trial Court's February 20, 2019 Order setting the date of valuation as of January 27, 1994, and reverse the Trial Court's August 24, 2021 Order denying the Township's motion to bar the testimony and expert report of Charles Land.

LEGAL ARGUMENT

I. THE BERARDIS CANNOT COLLATERALLY ATTACK THE ARBITRATOR'S FINDINGS OF FACT UPON APPEAL (NOT RAISED BELOW).

The Berardis' continued attack of the Arbitrator's determinations of fact in their opposition brief is procedurally improper, as the only issues specifically preserved for appeal after the Trial Court transferred the matter to binding arbitration are specifically set forth in the Trial Court's October 20, 2021 Consent Order. Other than the strict statutory grounds in N.J.S.A 2A:23B-23, the Beradis were limited to five specific issues upon appeal:

> (1) Order establishing the date of valuation of January 27, 1994;
>
> (2) the order denying Plaintiff's motion in limine barring the testimony of the Defendants' furniture, fixture, and equipment expert, Charles Land based on certain items not being present as of January 27, 1994;
>
> (3) The Order denying Defendants' motion barring the Plaintiff's expert, Jerome McHale, from using the Acme contract rent in his calculation of gross income in his income approach and the introduction of evidence of sales of shopping centers based on terms of leased fee;
>
> (4) all issues related to environmental cleanup and
>
> (5) all issues related to withdrawal of deposit funds.
>
> Da111.

The October 20, 2021 Consent Order did not provide the Berardis with an avenue to challenge the Arbitrator's determination to use the ACME lease in his calculation of

market value. Nor have the Berardis asserted any grounds under N.J.S.A 2A:23B-23 to vacate the award.

The Berardis' current appeal, specifically as it includes collateral attacks on the Arbitrator's findings of fact and/or challenges the Arbitrator's discretion to credit the McHale Report, is outside the scope of permissible appeal. Those arguments directed at the Arbitrator's findings of fact must be stricken, and the Berardis' appeal of same in Section II and III of their brief must be denied.

II. THE BERARDIS' ARGUMENTS REGARDING FEE SIMPLE ARE A RED HERRING, AS THE DEFINITION OF MARKET VALUE REQUIRES THE CONSIDERATION OF ALL CIRCUMSTANCES WHICH MAY IMPACT AN ARMS-LENGTH BUYER (1T13:11-16:5; 1T32:5-34:19).

Despite the Berardis' repeated (and, at times, meandering) discourse, no New Jersey Court has ever held, as a matter of law, that an appraiser must ignore all long-term leases on a condemned property in favor of a so-called "fee simple" valuation. Naturally, the Township would take the Property as fee simple when the taking is completed (an outcome that did not occur until May of 2018). However, the *value* of the Property as fee simple is determined by "the fair market value of the property…determined by what a willing buyer and a willing seller would agree to, neither being under any compulsion to act." City of Asbury Park v. Asbury Park Towers, 388 N.J. Super. 1, 9 (App. Div.2006). The Berardis fail to set forth why the

Trial Court erred, as a matter of law, in leaving it to the discretion of the Arbitrator in his role as factfinder as to whether the ACME lease should be factored into market value.

Condemnation cases in New Jersey hold that potential purchaser of the property *would* consider a long term lease in the value of the property. Casino Reinvestment Dev. Auth. v. Katz, 334 N.J. Super. 473, 485–87 (Law. Div. 2000). The inherent flexibility in that approach refutes any gross oversimplification of market value to that merely determined under a "fee simple" taking. Put another way, the Berardis' position would invalidate the holdings of State by Com'r of Transp. v. Silver, 92 N.J. 507, 514–15 (which acknowledged that the market value is impacted by normal market conditions based on all surrounding circumstances at the time of the taking), Vill. of S. Orange v. Alden Corp., 71 N.J. 362, 368 (1976)(ascribing value to the nearby availability of parking facilities), and Katz.

Nor is there any authority for the Berardis' biased supposition that a long-term lease must be accounted for in market value when it *increases* the value of a property, but not when it *decreases* the value of a property. "The property's actual rent and income history should not be the sole basis upon which to determine market rent subject to capitalization, but the cited authority is clear that it must be *a* factor." Katz, supra, 334 N.J. Super. at 485 (emphasis added). No exception or carve out

was made in Katz, or any of the cases that followed it, for long-term leases that had a detrimental effect on the market value of a property.

The Berardis also erroneously assert that a mere treatise, the Appraisal of Real Estate, should trump prevailing case law which establishes a flexible, case by case approach to the determination of market value. The Appraisal of Real Estate is not a persuasive authority, much less a precedential authority, to either the Trial Court or to this Court. Nor was the model jury charge on condemnation in the record below, which the Berardis have recently appended to their opposition papers. See, Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 2:5-4(a) (2024)("It is, of course, clear that in their review the appellate courts will not ordinarily consider evidentiary material which is not in the record below by way of adduced proof, judicially noticeable facts, stipulation, admission or a recorded proffer of excluded evidence.")

As New Jersey case law holds that long-term leases would be considered by a potential buyer and thus impact market value of the Property and the Trial Court did not err in leaving it to the Arbitrator's discretion on whether to factor the ACME lease into a determination of just compensation, this Court should not disturb those holdings.

III. THE PRINCIPLES OF EQUITY REQUIRE A REVERSAL OF THE TRIAL COURT'S FEBRUARY 20, 2019 ORDER ESTABLISHING A VALUATION DATE OF JANUARY 27, 1994 (2T6:7-7:18).

The purpose of N.J.S.A. 20:3-30 is not to provide either the condemner or the property owner with a windfall. Instead, the statute was intended to "equalize" the effects of any declaration of blight while giving due consideration to the actual circumstances surrounding the property itself in calculating just compensation. Its primary consideration, first and foremost, is to ensure equity to all parties. Although the statute enumerates several dates by which valuation of a property can be calculated, it remains a core principle of our judicial system that courts are not bound to enforce the literal effect of these statutes if doing so would result in an injustice or abrogation of the intent of the statute. Here, the Legislature cannot have intended to provide the Berardis with the market value of the Property as of January 27, 1994, yet permit them to reap the benefits of twenty-four years of surplus rental income until the Township actually took the property on May 4, 2018.

The facts unique to this case are likely a case of first impression. The Berardis maintained possession and control over the Property for decades after the declaration of blight as discussions to renovate the Property between the Township and the Berardis stalled and resulted in litigation. During this twenty-four year period, the Berardis continued to rent the Property to tenants and reaped profit thereby. Because

of these unique facts, the valuation date should be fixed at the date the Township actually took possession of the Property rather than a rote application of the statute.

The Berardis have secured "double recovery" in that they have profited from the rent-producing commercial Property from 1994 to 2018, as well as the market value of the Property as of January 27, 1994, to the detriment of the Township and the public. The Berardis failed to maintain a minimum level of safety and appeal in the Property, which depreciated its value and ultimately lead to the blight designation. As this Court has held, the owner of private property taken for public use "is not entitled to reap a windfall," at the expense of the public. State, Dept. of Envtl. Prot. v. S. Nalbone Trucking Co., Inc., 128 N.J. Super. 370, 377 (App. Div. 1974).

The Trial Court erred in disregarding the issue of double-recovery by the Berardis, and at a minimum should have carved out an offset of just compensation to account for the Berardis' rental profits during the twenty-four year period between the declaration of blight and the date of taking. The Trial Court's February 20, 2019 Order setting a valuation date of January 27, 1994 should be reversed.

IV. THE LAND REPORT IS A NET OPINION BECAUSE ITS CONCLUSIONS ARE NOT GROUNDED IN FACTS OR DATA (3T6:24-10:2).

There can be no dispute that the Land Report is a net opinion. Contrary to the Berardis' fervent attempts to categorize the report as inventorying pizza ovens and other industrial-type equipment, the overwhelming majority of the items are banal objects that no third-party buyer of the Property would *ever* pay for. This included tiles, lights, "soap dispenser[s]," "paper towel holder[s]," appliances, shelving, electrical outlets, sinks, toilets, "toilet paper holder[s]," "wall cover[s]," "dropped ceiling," "plywood partitions," "circuit breaker panel[s]," paintings on windows, wall-to-wall carpeting, counters, and cabinets. Pa281-Pa336. More fundamentally, the Berardi's Opposition misunderstands the Township's legal argument—that the Land Report is not based on any concrete facts or data from the Berardis' chosen date of valuation, January 27, 1994.

There is no case law or statute holding that FF&E are subject to the same date of valuation as the Property itself. In other words, although by the Trial Court's February 20, 2019 Order the *Property* had to be valued as of January 27, 1994, the FF&E was not included in the Order. Again, the Township did not actually take the Property or any of the FF&E inside until May 4, 2018. The designation of blight on January 27, 1994 did not have *any* impact on the value of the FF&E, which the Berardis' tenants continued to own and use up until the date of taking. It is also nonsensical for the Berardis (and their expert) to assume that FF&E existing in 2018 also existed in the Property as of January 27, 1994. In fact, Rocco Berardi and

Pasquale Berardi both testified that several of the stores that existed in 2018 did not exist in 1994, which meant that the equipment could not have existed in the Property on the court-ordered date of valuation.

The Land Report is a net opinion because his bald conclusions (or, more accurately, his bald assumptions) are not supported by factual evidence or other data. The Land Report is not based upon any evidence that the items existed in the Property as of 1994. Instead, Land depended solely upon the Berardis' verbal representations that the items were present at the Property in 1994, without making any independent investigation to verify the statements. The Berardis also admit that many of the tenants in 2018 were not there in 1994, despite initial attempts by Rocco Berardi to claim that each and every item in Land's Report existed on the premises in 1994. Land's conclusions regarding the value of phantom items were highly speculative.

Significantly, FF&E are not attributed value simply because they exist at the condemned property. A purchaser must be reasonably willing to pay an *additional amount* on top of the market value of the Property because the FF&E specifically enhance said market value in an "as improved" state. Toilets, sinks, and ceiling tiles are inherently included in the market value of a property. Put differently, a homebuyer would not find that toilets, electrical outlets, and lights substantially

enhanced the value of the property because the expectation is that those items are already factored into the market value.

Land never reached a conclusion that these items actually enhanced the fair market value of the Property, or to what amount a reasonable buyer would pay for such items on top of the base valuation. Land explicitly testified that he was not rendering such an opinion:

> "Q: You don't render -- you don't render an opinion as to the value or impact on value of real estate, if any, in connection with furniture, fixtures,and equipment, is that correct?
> A: That is correct."
>
> *5T163:15-19.*

Brody inherently acknowledged the unreliability of the Land Report when he voluntarily knocked off $66,635 from the $616,635 appraisal by Charles Land, simply because Brody "knew" how Land operated. 6T237:1-13.

The Trial Court erred when it denied the Township's motion to bar the Land Report as a net opinion. The Land Report was an unreliable expert opinion that should never have been brought to the fact-finder's attention.

CONCLUSION

For the foregoing reasons, the Township respectfully reiterates that the Court affirm the inclusion of the ACME lease in the calculation of Market Value, and

reverse: 1) the Trial Court's February 20, 2019 Order granting the Berardis' motion to set the date of valuation as of January 27, 1994, and 2) the Trial Court's 8/24/21 Order denying the Township's motion to bar Defendants from entering the testimony and expert report of Charles Land into evidence.

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By:____*s/s Andrew Baye*r_____
Andrew Bayer

Dated: March 8, 2023