



PINELANDS PRESERVATION ALLIANCE

Bishop Farmstead ♦ 17 Pemberton Road ♦ Southampton, NJ 08088
Phone: 609-859-8860 ♦ ppa@pinelandsalliance.org ♦ www.pinelandsalliance.org

December 13, 2021

Common Council of Egg Harbor City
500 London Avenue
Egg Harbor City, NJ 08215

Re: December 15, 2021 Special Meeting to Discuss the Findings and Recommendations of the Egg Harbor City Municipal Land Use Board to Declare the Egg Harbor City Lake Park Area In Need of Redevelopment

Dear Council Members:

We are writing to urge you to reject the November 16, 2021 recommendation of the Egg Harbor City Planning Board that the Egg Harbor City Lake Park be designated as an Area in Need of Redevelopment. As we will explain below, there are many legal obstacles to any such designation and redevelopment which the town ought to carefully consider before proceeding.

1. The Statutory Criteria For A Designation Of An Area In Need of Redevelopment Have Not Been Met

Under New Jersey's Local Redevelopment and Housing Law ("LRHL") and associated caselaw, a municipal designation of an area in need of development must be supported by substantial, credible evidence. See N.J.S.A. 40A:12A-6(b)(5)(c); Gallenthin Realty Development, Inc. v. Borough of Paulsboro, 191 N.J. 344 (2007). Specifically, at least one of several conditions within the area to be redeveloped must be met. In this case, the Planning Board's report cited two applicable statutory criteria.

First, under N.J.S.A. 40A:12A-5(c): "Land that is owned by the municipality, the county, a local housing authority, redevelopment agency or redevelopment entity, or unimproved vacant land that has remained so for a period of ten years prior to adoption of the resolution, and that by reason of its location, remoteness, lack of means of access to developed sections or portions of the municipality, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital."

Second, under N.J.S.A. 40A:12A-5(e): "A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real properties therein or other similar conditions which impede land assemblage or discourage the undertaking of improvements, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare, which condition is presumed to be having a negative social or economic impact or otherwise being detrimental to the safety, health, morals, or welfare of the surrounding area or the community in general."

A finding that either criterion is met must be supported by substantial, credible evidence. The Supreme Court of New Jersey stated in Gallenthin that "The substantial evidence standard is not met if a municipality's decision is supported by only the net opinion of an expert ... a municipality must establish a

record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met.” Id. at 373.

In ERETC, LLC v. City of Perth Amboy, 381 N.J.Super. 268 (App. Div. 2005), the court refused to uphold the municipality’s redevelopment designation. In the context of a property hosting an occupied warehouse building, the city planner

“failed to include any evidence to support his determination that buildings were ‘substandard, unsafe, unsanitary, dilapidated, or obsolescent.’ N.J.S.A. 40A:12A-5(a). He acknowledged that he did not inspect the interiors of the buildings, did not review applications for building permits, did not review occupancy rates or the number of people employed in the area. He did no investigation into whether the properties were ‘properly utilized’ or whether they were ‘fully productive’ or ‘potentially useful and valuable for contributing to and serving the public health, safety and welfare.’ N.J.S.A. 40A:12A-5(e). For example, Carr made reference to neither the occupancy rate nor the number of local residents employed in plaintiff’s buildings. His only negative finding was with reference to the ‘underutilized’ parking lot on plaintiff’s property, but he failed to investigate whether the employees utilized public transportation rather than drove their own vehicles to work.”

Id. at 280.

Other cases demonstrate the type and quantity of evidence that must be met to designate an Area in Need of Redevelopment. In Hirth v. City of Hoboken, 337 N.J.Super. 149 (App. Div. 2001), the city’s planner demonstrated that within the industrial-zoned section of the city to be redeveloped, specific blocks were over 75% undeveloped, property values had plummeted 26% within a multiyear period, and the city had lost thousands of manufacturing jobs during the prior decades. See Hirth at 162. The planner meticulously investigated the condition of buildings and their economic use in the area to find an overall state of deterioration that had existed for over ten years. Id. at 163. The court was thus satisfied that the town had demonstrated substantial, credible evidence for the existence of multiple designation criteria under the statute.

As to N.J.S.A. 40A:12A-5(c), the parcels here are owned by the municipality. However, its inability to be developed by private capital is not clear- there are, after all, some businesses operating on the site through leases with the town. The land is not vacant- it is a park and there is a campground on site. It is not remote from other developed areas of the town- it is only 3 miles from the center of town and 2.5 miles from a developed industrial area. It is accessible by Philadelphia Avenue/Route 563 and not, to our knowledge, needed for access to another property to be developed. And there is nothing abnormal about the topography or nature of the soil- it is wooded with uplands and wetlands- typical for this Pinelands region. In short, none of the conditions under (c) are present.

The Study Area also does not meet any of the conditions under N.J.S.A. 40A:12A-5(e). There is a deed restriction mandating that the property remain a park, but that certainly is not preventing “proper utilization” of the area. The proper utilization under that deed restriction is exactly what the land is currently used for- a park serving the community. It is a popular area for families and visitors to camp, swim, and relax in the woods- uses that are incredibly beneficial and important for the public, not “stagnant and unproductive.” Having public spaces in the outdoors for recreation undoubtedly serves the public health, safety and welfare by giving anyone the ability to recreate safely. It is well-established by public health experts that public parks and green areas enhance physical, mental, and emotional well-being- and that is only truer during a pandemic when options for recreation and relaxation are more limited.¹ There is no

¹ https://www.cdc.gov/healthplaces/healthtopics/parks_resources.htm;
<https://www.washingtonpost.com/business/2020/07/31/public-parks-health-coronavirus/>

conceivable way in which the current condition of the land can be presumed to be having a negative social or economic impact or being detrimental to the safety, health, morals, or welfare of the surrounding area or community in general.

The relevant caselaw requires a careful consideration by the town of what constitutes an area in need of redevelopment under 40A:12-5(e). In Gallenthin, the Supreme Court of New Jersey held that stagnancy or lack of productivity had to have come about through issues of title. A property being “not fully productive” alone was not a basis for redevelopment designation. Moreover, the legislature since amended the statute to remove the term “not fully productive” and replace it with “unproductive,” making the hurdle for redevelopment even steeper. The court in Gallenthin even noted the inherent public value of natural features like wetlands. Here, there is no stagnancy or lack of productivity created by issues of title in this case- there is a beneficial, public use precisely as intended by the conveyer of the property and guaranteed by the Colwell Deed restriction.

In addition to the lack of detail in the Egg Harbor City Report, cases like Hirth show that the LRHL is meant to address truly blighted areas in which the existing land uses, or lack thereof, are incongruous with the potential of the area and even the intention behind its original zoning. This could not be more different from the situation here, where the parkland proposed to be redeveloped was specifically given to the city on the condition that it remain parkland. The idea that there is deterioration causing a public health concern is the opposite of the truth, to the point of being comical. While there perhaps could be improvements to the park, its overall current use is exactly what was intended and is a positive for the city and its residents.

The Local Redevelopment and Housing Law was not meant to do anything remotely like what is being proposed. It is meant to address “deterioration in housing, commercial and industrial installations, public services and facilities and other physical components and supports of community life, and improper, or lack of proper, development...” N.J.S.A. 40A:12A-2. Clearing woods and eliminating a public park could **cause** deterioration or even elimination of public facilities and supports of community life.

2. The Use Egg Harbor City Intends to Establish At The City Park Is Not Permissible Under the Colwell Deed, And Further, It Is Not Clear That Egg Harbor City Has The Legal Authority To Condemn Its Own Property That Is Already In Public Use

If the Common Council approves the recommendation of the Land Use Board, it will likely face a slew of other legal obstacles in redeveloping this site, because the circumstances of this case appear to be novel and likely to provoke legal challenges.

It is now public knowledge that the interest behind redevelopment of the park is in the establishment of a commercial warehouse facility. This use is clearly incompatible with the park as envisioned by the original grantor- otherwise why would the city pursue condemnation? The reality facing the city is that the Colwell Deed prohibits the type of arrangement it apparently has in mind, as the grantor provided the City Park land on the condition that it was “forever to remain public.” Courts considering a municipality’s authority to use public land for commercial purposes have strictly construed deed restrictions, as in Lander v. Village of South Orange, 58 N.J. 509 (1971), where the Supreme Court prohibited a municipality from establishing a fee-based swimming pool complex on its property on the grounds that an applicable deed restriction required that the land be used only as a free public playground. There, the municipality itself planned to charge fees for use, and it contemplated subsidies for families unable to afford the fees. In the case of Egg Harbor City’s park, it is highly doubtful a warehouse could pass muster under Lander, because a private business by definition is not “public” but only available to paying customers, and the intensive nature of a warehouse is incongruous with the original intent of the grantor. In short, a court is highly unlikely to allow such a use under the terms of the Colwell Deed.

To overcome this obstacle, the Egg Harbor City Land Use Board recommended pursuing condemnation redevelopment. This is a legally questionable and perilous move. Under the longstanding Prior Public Use doctrine, New Jersey courts have prohibited the exercise of the power of condemnation “where the proposed use will destroy an existing public use or prevent a proposed public use unless the authority to do so has been expressly given by the Legislature or must necessarily be implied.” Weehawken Tp. v. Erie R. Co., 20 N.J. 572 (1956) (citations omitted). The doctrine is often invoked in disputes between competing entities with eminent domain powers, for example, municipalities and common carriers or public utilities such as railroads or pipelines. See id.; Norfolk Southern Ry Co. v. Intermodal Properties, LLC, 215 N.J. 142 (2013). Here, however, if Egg Harbor City moved forward with redevelopment it would have to exercise its eminent domain power to condemn its own property. There are not two competing authorities per se, only one governing body seemingly employing eminent domain against itself, i.e., its own residents who use and benefit from the park. But there are arguably competing interests at play here, and in the absence of statutory authority, it is questionable whether the governing body has the ability to condemn its own property.

Both the LRHL and New Jersey’s Eminent Domain Act contain provisions that specifically discuss condemnation of private property, with the latter defining a “Condemnor” as “the entity, public or private, including the State of New Jersey, which is condemning **private property** for a public purpose under the power of eminent domain.” N.J.S.A. 20:3-2 (emphasis added). A “Condemnee” is correspondingly defined as “the owner of an interest in the **private property** being condemned for a public purpose under the power of eminent domain. Id. (emphasis added). And while the Eminent Domain Act elsewhere discusses eminent domain power over public property already devoted to public purpose, this provision is in the specific context of the municipality’s acquisition or possession of the property in question. The LRHL also gives a municipality the power to “acquire, by condemnation, any land or building which is necessary for the redevelopment project...” N.J.S.A. 40A:12A-8(c). These provisions strongly suggest that in the scenarios they contemplate, there is some obstacle to ownership beyond what Egg Harbor City is experiencing with the City Park. Egg Harbor City already owns the park and has no need to acquire it, as the statutes repeatedly state in the context of condemnation. For these reasons, we do not think the governing body has statutory authority to condemn the park property under the circumstances here.

Going down the condemnation redevelopment path would allow the municipality to take property from the public and redirect it to a private interest through redevelopment. In addition to the host of other legal problems raised above, it should be noted that any government exercising its eminent domain powers must be doing so for a valid public purpose. It is not clear what public purpose will be served by redeveloping the Study Area. And it is all the more problematic because the deed restriction in place intended to preserve the park for the public forever. In sum, this governing body cannot use the redevelopment process solely to rid itself of a condition which benefits the town’s residents.

3. Additional Obstacles To Pursuing Redevelopment Of The Study Area

If the city does pursue redevelopment at the park, it will face other obstacles, as well. The Study Area is documented habitat for Pine Barrens Treefrog and other protected species and contains wetlands. Any applicant for development will need to apply to the Pinelands Commission and satisfy strict requirements under the Pinelands Comprehensive Management Plan to ensure there will be no adverse impacts to the local environment. Additionally, it is not even clear whether most of the site could be developed at all, because most of the Study Area is in the Forest Area, the second-most restricted management area in the Pinelands.

Finally, residents previously raised valid concerns about the consultant for the developer who has acknowledged its desire to build a sales facility at the park. This individual is the former Egg Harbor City planner and acted in that capacity recently. In his testimony before the Egg Harbor City Land Use Board on November 16, 2021, he spoke at length about his 2019 meeting with the Pinelands Commission about redeveloping the site, at a time when he was employed by Egg Harbor City. He gave an impression of actively pursuing the development of the site in 2019. Because he now works for the very entity that wants to pursue this development, there is a question of whether it was appropriate for him to have represented the developer before the city, his former government employer, on November 16.

4. Conclusion

We urge this governing body and the municipality to look for alternative development opportunities that will not take away valuable public space from the community. We respectfully ask that this body **reject** the recommendation of the Land Use Board that the Study Area be designated as an area in need of redevelopment. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Gold". The signature is fluid and cursive, with a long horizontal stroke at the end.

Andrew Gold
Legal Director