NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

EDWARD SHELTON and ANTOINETTE SHELTON, husband and wife, Plaintiffs, v. PLANNING BOARD OF THE CITY OF TRENTON, CITY OF TRENTON, and the CITY COUNCIL OF THE CITY OF TRENTON, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION-MERCER COUNTY DOCKET No.:MER-L-0068-05 CIVIL ACTION OPINION

Decided: December 16, 2005

Vincent J. Mangini for the plaintiffs (Stark & Stark, attorneys; Mr. Mangini, on the brief).

Robert C. Leventhal for the defendant City of Trenton Planning Board (Backes & Hill, attorneys; Mr. Leventhal, on the brief).

Joseph A. Alacqua for the defendant City of Trenton.

FEINBERG, A.J.S.C.

FEINBERG, A.J.S.C.

This matter comes before the court by way of a complaint in lieu of prerogative writs filed by Edward Shelton and Antoinette Shelton ("Shelton"), challenging the actions of the Planning Board of the City of Trenton (hereinafter "Planning Board") and the City Council of the City of Trenton (hereinafter "City Council") with respect to the expansion and amendments to the Champale Redevelopment Area.

Shelton owns property at Block 74B, Lots 147 and 148, as designated on the Tax Maps of the City of Trenton, Mercer County, New Jersey, also known as 1016-1018 Lamberton Street, Trenton, New Jersey 08611 (hereinafter "Shelton Property"). The Shelton Property is located adjacent to a redevelopment area created by the City of Trenton (hereinafter "City") in April 1997, and known as the Champale Redevelopment Area.

A review of the historical background regarding the original redevelopment plan for the Champale Site is warranted. The original plan addressed the need to turn an abandoned industrial property, vacant since 1987, into a vibrant and functional community and to reverse the spread of blight conditions in the area. The Champale Site includes a large portion of the block between Lamberton Street to the South and Cliff Street to the North and between Lamberton Road to the East

and Centre Street to the West. In April 1997, the City designated the Champale Site as a redevelopment area and adopted the Champale Redevelopment Plan.

Shortly thereafter, the New Jersey Department of Transportation ("NJDOT") began implementing plans to construct a tunnel entrance from Lamberton Road to Route 29. Accordingly, the Champale Redevelopment plans were put on hold pending the construction of the tunnel. After the completion of the NJDOT highway project, the City Council considered expanding and amending the redevelopment area.

On September 16, 2004, the City Council adopted Resolution No. 04-601. The Resolution authorized and directed the Planning Board to hold a hearing on the proposed amendment to the Champale Redevelopment Plan. (Pl. App., Ex. A1). Resolution No. 04-601 entitled "Resolution Authorizing and Directing the Planning Board to Hear and Review Proposed Changes to the Champale Redevelopment Plan," in relevant part, states: "WHEREAS, pursuant to the Local Redevelopment and Housing Law, the Planning Board of the City of Trenton shall be given the opportunity to review said Redevelopment Plan and make recommendations thereto prior to action by the City Council of the City of Trenton." Ibid.

On October 28, 2004, the Planning Board held a public hearing to consider whether the Champale Redevelopment Area

should be expanded to include, among other lots, the Shelton Property. During the October 28th hearing, Bill Valocchi (incorrectly referred to as William Deluce in the transcript), Supervising Planner for the City of Trenton made presentations to the Planning Board regarding both the area in need of redevelopment for the Expanded Study Area and the Amended Redevelopment Plan.

During his testimony, Mr. Valocchi referred to the packet of information that outlines the redevelopment criteria and gives a general and vague description of the expanded neighborhood. (Pl. App., Ex. A2). The report contains six pictures, demonstrating the exterior status of structures in the area, as well as two maps that outline the proposed expansion area. In order to prepare this packet, Mr. Valocchi and various staff members conducted "a windshield survey" to determine the status of the property. (T1:5-24 to 5-25).[1] The six selection criteria for each category include: excellent, good, fair, poor,

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[1] References to the Transcripts are as follows:
T1 = Transcript, dated October 28, 2004 (Planning Board hearing consisting of forty-four pages)
T2 = Transcript, dated November 22, 2004 (City Council hearing consisting of one page)
T3 = Transcript, dated December 16, 2004 (City Council hearing consisting of sixteen pages)
T4 = Transcript, dated February 17, 2005 (City Council hearing consisting of four pages)
Cert1 = Audiotape Inaudibility Certification, dated September 28, 2005 (November 22, 2004 hearing)
Cert2 = Audiotape Inaudibility Certification, dated September 28, 2005 (February 3, 2005 hearing)

boarded buildings, and vacant. (Pl. App., Ex. A2). Using these categories, Mr. Valocchi explained how the expanded area met the redevelopment criteria:

> The areas selected due to the presence of those conditions that make the area eligible to be designated as an area of redevelopment under state law mainly and this is -- condition A, the generality of the buildings is sub-standard, unsafe, unsanitary, dilapidated, essentially the general conditions of the area, as opposed to one building, two buildings here but generally there is a number of buildings throughout the area that meet this criteria.
>
> After conducting the site review of the proposed redevelopment area, in valuating the area the Division of Planning considered this area can be -- an area in need of redevelopment and again as of state law, as per condition A and E, and condition A which is in your packet, again is just a generality of the area that's sub-standard and you have that condition in front of you.
>
> In this expanded area there are a number of buildings that are dilapidated and in need of repair. Of all the structures in the expanded area 67 percent are in need of some type of repairs, ranging from complete reconstruction or demolition to substantial maintenance, and there is three photos in your packet that demonstrate criteria A.
>
> We also believe that this meets criteria E, under state law. The growing lack of -- lack of proper utilization of the area is called -- condition and title, of -- ownership of the real property therein, or other conditions resulting in a stagnant or not -- fully productive condition of -- potential use law. And -- serving the public health.

[T1:8-1 to 9-6.]

At the conclusion of the presentation on expansion, the Planning Board invited questions and comments from the public. Shelton, among other members of the public, directed questions and comments to the Planning Board with respect to the area in need of redevelopment. Specifically, Mr. Shelton opposed the expansion, addressed certain parking requirements, renovation plans for the property and the negative impact the Route 29 tunnel project has had on the area. (T1:41-24 to 43-22). Throughout the hearing, other members of the public voiced their concerns. After concluding the public comments, the Board unanimously voted that "the proposed amended area is declared an area in need of redevelopment." (T1:31-11 to 31-24).

Thereafter, Mr. Valocchi outlined the amendments to the plan and the redevelopment objectives of creating a business and residential area. (T1:32-1 to 34-23). Furthermore, he described the condominium complex, parking requirements, and general growth goals for the future. (T1:34-21 to 41-19).

Upon completion of the October 28th hearing, the Planning Board passed a motion recommending that City Council: (1) designate the expanded area as an area in need of redevelopment, and (2) adopt amendments to the Champale Redevelopment Area. (T1:43-24 to 44-15). The Planning Board did not memorialize these recommendations in a formal resolution.

Instead, Mr. Valocchi prepared a report for City Council entitled "Report from the City of Trenton Planning Board to the City Council of the City of Trenton regarding: The proposed amendments to the Champale Redevelopment Area" (hereinafter "Valocchi Report"). (Pl. App., Ex. B3).

The Valocchi Report is a two-page document that summarizes the basic expansion and amendment perspectives and notes that "the public voiced concerns that they may lose their properties for new development." Ibid. The report does not contain any specific analysis of the Planning Board's reasoning and was not signed by any Planning Board members.

On November 22, 2004, City Council voted to adopt the Planning Board's recommendation with regard to the expansion of and amendments to the Champale Redevelopment Area. However, the transcript does not reveal any discussion of whether the Expanded Study Area qualifies as an area in need of redevelopment. In fact, a certified shorthand reporter found most of the transcript inaudible and unable to be transcribed. (Cert1, Pl. App., Ex. B6). The only audible part of the transcript relates to passage of an ordinance "approving the amendments between the Champale Redevelopment Area Plan" and noting the "public hearing on this ordinance will also take place on December the 16th." (T2:2-1 to 2-18; Cert1, Pl. App., Ex. B5). The transcript of the proceedings on November 22, 2004

is one page. In Resolution No. 04-693, dated November 22, 2004, the City Council noted that it reviewed the "report submitted by the Planning Board of the City of Trenton" and the exhibits from the public hearing and ultimately determined that the expansion study area was an area in need of redevelopment. (Pl. App., Ex. A8).

On December 16, 2004, City Council held a public hearing for a second reading of the ordinance approving the amendments to the Champale Redevelopment Area. At the meeting, Mrs. Shelton voiced her objections to the plan and noted that she spoke in opposition to the expansion and amendments at the Planning Board hearing. (T3:3-1 to 3-11). Furthermore, Mrs. Shelton criticized the apparent mistreatment of certain property owners within the context of redevelopment planning. (T3:3-23 to 6-12). In addition, Mrs. Shelton requested that City Council "postpone the final vote of this plan, till after the holiday" in order to allow a professional planner to give testimony on her behalf. (T3:5-1 to 5-9). Thereafter, Mrs. Shelton presented pictures to argue that the structures in the expanded area are not blighted. (T3:5-10 to 5-15). In addition, Mr. Shelton spoke regarding the impact the Redevelopment Plan would have on their ability to park vehicles. "Right now we have 57 feet on the side, and an additional 100 feet on the back. We don't even have a parking spot when they're done." (T3:7-4 to 7-6).

Following plaintiffs' presentation, City Council decided to postpone the matter for a later meeting. (T3:16-4 to 16-6).

On February 3, 2005, as noted in the agenda, City Council was scheduled to resume consideration of the ordinance to adopt the Amended Redevelopment Plan. (Pl. App., Ex. B9). However, there is not an audible transcript of the February 3, 2005 hearing. (Cert2, Pl. App., Ex. B11). Thereafter, on February 7, 2005, the City Clerk published a notice in The Times that stated that City Council had passed, on first reading, an ordinance adopting the Amended Redevelopment Plan. (Pl. App., Ex. B10).

On February 17, 2005, there was a second reading of the ordinance for amendments to the Champale Redevelopment area before City Council. (T4:2-1 to 2-4). At the public hearing, Brian Shelton questioned whether the potential condemnation of his property was necessary to open a new street in the redevelopment area. (T4:2-10 to 2-18). Dennis Gonzalez, the Acting Director of the Department of Housing and Economic Development, refused to answer the question because he believed it to be premature. (T4:3-2 to 3-14). Thereafter, City Council unanimously approved the adoption of the ordinance without setting forth any reasons on the record. (T4:4-1 to 4-24). The transcript of the proceedings is four pages. Resolution No. 05-102, adopted on February 17, 2005, states that "City Council has

made changes to the Planning Board's recommended amendment to the redevelopment plan for the Champale Redevelopment Area." (Pl. App., Ex. B15). However, the transcript of the City Council meeting on February 17, 2005 does not reveal any discussion or deliberation about the changes to the amendments.

On January 6, 2005, Shelton filed a complaint in lieu of prerogative writs challenging the Planning Board's and City Council's area in need of redevelopment designation. Shelton granted City Council a thirty-day extension to file a responsive pleading and granted the Planning Board a sixty-day extension to file a responsive pleading. On March 31, 2005, City Council filed an answer to the complaint.

On April 5, 2005, Shelton filed an amended complaint in lieu of prerogative writs to amend and add counts challenging the amended redevelopment plan adopted by City Council on February 17, 2005. On April 14, 2005, the Clerk of the Superior Court returned the amended complaint in light of its having been filed after the first responsive pleading. On June 10, 2005, this court signed a consent order for leave to file the amended complaint. The amended complaint was filed on the same date.

The Planning Board filed its answer to the amended complaint on May 20, 2005. City Council never filed an answer to the amended complaint. A fully executed Consent Case Management Order was entered on October 21, 2005. The court

received the Shelton trial brief and accompanying exhibits on October 31, 2005. The City Council and Planning Board filed trial briefs on November 30, 2005 and December 1, 2005 respectively.

ANALYSIS

I.

STANDARD OF REVIEW

Municipal bodies "are presumed to act on the basis of adequate factual support and, absent a sufficient showing to the contrary, it will be assumed that their enactments rest upon some rational basis within their knowledge and experience." Bryant v. Atlantic City, 309 N.J. Super. 596, 610 (App. Div. 1998). As such, the "heavy burden" of overcoming the presumption of validity to municipal actions "can be overcome only by proofs that preclude the possibility that there could have been any set of facts known to the legislative [municipal] body … [that] would rationally support that the enactment was in the public interest." Id.

Redevelopment designations are entitled to the same presumption of validity applicable to all municipal determinations. Levin v. Twp. Of Bridgewater, 57 N.J. 506, 537-39 (1971); see also Hirth v. City of Hoboken, 337 N.J. Super. 149, 161 (App. Div. 2001). "Thus, judicial review of a

redevelopment designation is limited solely to whether the designation is supported by substantial credible evidence." Concerned Citizens of Princeton v. Borough of Princeton, 370 N.J. Super. 429, 452 (App. Div. 2004). "Accordingly, it is not for the courts to 'second guess' a municipal redevelopment action, 'which bears with it a presumption of regularity.'" Id. At 452-53 (quoting Forbes v. Board of Trustees of Twp. of So. Orange Village, 312 N.J. Super. 519, 532 (App. Div.), cert. denied, 156 N.J. 411 (1998)).

Therefore, the challenger can only overcome the presumed validity of a redevelopment designation by demonstrating that the determination is arbitrary and capricious, and thus not supported by substantial evidence in the record.

II.

ALLEGED PROCEDURAL DEFECTS

Shelton asserts that when a local agency fails to follow the requisite statutory procedures and guidelines, such action or inaction may deprive the local agency of jurisdiction to act, may violate due process, or otherwise may require a determination or decision of the local agency growing out of the procedural violation to be vacated or declared void. Stafford v. Stafford Zoning Bd., 299 N.J. Super. 188, 196 (App. Div.) aff'd 154 N.J. 62 (1997); Witt v. Borough of Maywood, 328 N.J. Super. 432, 453-454 (Law Div. 1998), aff'd o.b. 328 N.J. Super.

343 (App. Div. 2000); Wyzykowski v. Rizas, 132 N.J. 509, 525-526 (1993). Consequently, Shelton argues that the determinations regarding the Expanded Study Area should be vacated and/or declared void ab initio due to the nature and extent of the procedural defects at Planning Board and City Council hearings.

In response, defendants claim that any procedural defects are minor and should be discounted as harmless. For example, in Wilson v. Long Branch, the Supreme Court upheld the Planning Board's declaration of a blighted area despite the fact that investigatory authority was granted by way of resolution as opposed to ordinance. 27 N.J. 360 (1958). Defendants argue that this case is analogous because minor procedural irregularities are de minimis and generally disregarded by the courts. As stated below in further detail, the court is not persuaded that the procedural defects in this case are substantial. However, as will be noted herein, the court has serious concerns regarding the absence of a thorough record before the City Council.

A. PRELIMINARY INVESTIGATION BY THE BOARD

Under the Local Redevelopment and Housing Law ("LRHL"), when exercising redevelopment and rehabilitation functions, a local governing body shall have the power to "cause a preliminary investigation to be made...as to whether an area is in need of redevelopment." N.J.S.A. 40A:12A-4a(1). The planning

board has the power to conduct the preliminary investigation and make an appropriate recommendation when authorized by the local governing body. N.J.S.A. 40A:12A-4b(1). The governing body authorizes the Planning Board's investigation by resolution. N.J.S.A. 40A:12A-6a.

In this case, Resolution No. 04-601 is titled "Resolution Authorizing and Directing the Planning Board to Hear and Review Proposed Changes to the Champale Redevelopment Plan." (Pl. App., Ex. A1). In relevant part, the resolution states: "WHEREAS, pursuant to the Local Redevelopment and Housing Law, the Planning Board of the City of Trenton shall be given the opportunity to review said Redevelopment Plan and make recommendations thereto prior to action by the City Council of the City of Trenton." Ibid. Shelton argues that the Planning Board acted improperly because the resolution lacks the express authorization language of conducting a "preliminary investigation." Instead, the resolution merely requested that the Planning Board "hear and review proposed changes to the Champale Redevelopment Plan." Shelton further argues that the resolution is silent on the investigation into the Expanded Study Area.

The New Jersey Supreme Court has noted that legislative enactments designed to encourage and effectuate redevelopment

"warrant liberal judicial construction in order to effectuate the beneficent legislative design." Levin, 57 N.J. at 512.

> Judicial review of a blight determination must be approached with an acute awareness of the salutary social and economic policy which prompted the various slum clearance and redevelopment statutes. To effectuate those policies, we are obliged to interpret the powers granted to the local planning board liberally and to accept its exercise of the powers so long as a necessarily indulgent judicial eye finds a reasonable basis, i.e., substantial evidence, to support the action taken. In short, while the board's discretion in administering the law is not unfettered, its vista is a broad one.

Id. At 537. See also Princeton, 370 N.J. Super. At 443 ("the case law demonstrates, the LRHL has been liberally and flexibly interpreted precisely so that it can be adapted to meet the diverse redevelopment needs of all New Jersey municipalities.").

In the case at bar, the City Council clearly intended a preliminary investigation and did direct the Planning Board, by resolution, to consider the proposed Amended Plan, the most salient amendment being the inclusion of the Expanded Study Area. Under the liberal interpretation of the LRHL, this procedural defect is de minimis because the Planning Board attempted to address the Expanded Area and the Amendments at the hearing. Consequently, this alleged defect does not require the court to vacate and reverse.

B. ABSENCE OF A FORMAL RESOLUTION

Shelton contends that the Planning Board's determination that the Expanded Study Area qualifies as an area in need of redevelopment is defective because the recommendation was not memorialized by a formal written resolution. In relevant part, the governing provision of the LRHL states:

> After completing its hearing on this matter, the planning board shall recommend that the delineated area, or any part thereof, be determined, or not be determined by the municipal governing body to be a redevelopment area. After receiving the recommendation of the planning board, the municipal governing body may adopt a resolution determining that the delineated area, or any part thereof, is a redevelopment area.
>
> [N.J.S.A. 40A:12A-6b(5)]

The above statutory language does not require the Planning Board to formally memorialize the recommendation. In fact, the next sentence of the LRHL states that the municipal governing body adopts a resolution after receiving the recommendation. The court does not interpret the term "recommendation" as needing a formal written resolution since the statute expressly requires a Council resolution and is notably silent on the requirement of a Planning Board resolution.

Furthermore, the case law cited by Shelton is unpersuasive because it relates to a separate and unrelated Planning Board

function. Clearly, the Municipal Land Use Law ("MLUL") requires the Planning Board to memorialize its decisions by resolution because it is a final determination from which there may be a direct appeal. However, the Planning Board's actions under the LRHL are merely recommendations, and not final determinations from which there may be a direct appeal. Therefore, under a liberal interpretation, the Planning Board's report of its recommendation is sufficient because it demonstrated the Board's decision and attached a copy of the investigation report. (Pl. App., Ex. B3).

C. IS A BIFURCATED HEARING REQUIRED?

Shelton argues that it was improper for the Planning Board to consider the redevelopment designation of the Expanded Study Area and the proposed Amended Plan during the same hearing. Despite this objection, there is nothing in the LRHL that requires two separate hearings to address the following two issues: (1) whether the Expanded Study Area was an area in need of redevelopment, and (2) whether amendments to the redevelopment plan should be adopted.

N.J.S.A. 40A:12A-6 specifically requires a public hearing on the issue of whether the area in question is an area in need of redevelopment. However, under N.J.S.A. 40A:12A-7, the legislature does not require a specific public hearing on the issue of amending a redevelopment plan. (See N.J.S.A. 40A:12A-

7(e) noting that the Planning Board must submit a report containing a recommendation on the redevelopment plan and N.J.S.A. 40A:12A-7(f) noting that the Planning Board may have to prepare and transmit a proposed redevelopment plan). Thus, addressing both issues in the context of one hearing is not inconsistent with the LRHL.

The Planning Board did, however, address each of the issues separately within the context of a single hearing on October 28, 2004. As noted in the transcript, one Planning Board member stated:

> The first part -- we're addressing right now is a determination that in this area -- in question, is an area in need of redevelopment. And that was the presentation that Mr. [Valocchi] just gave to us. If it is determined that is an area in need of redevelopment, then the Board will consider the amendment to the redevelopment plan. So, at this point, what we are addressing is any comments that you may have with respect to whether this is an area in need of redevelopment, pursuant to the criteria of Mr. [Valocchi] discussed in his presentation.
>
> [T1:11-20 to 12-5.]

Furthermore, the Board did give members of the public, such as Mr. Shelton, an opportunity to speak and separately address each of the issues. (T1:41-24 to 43-22).

Additionally, pursuant to N.J.S.A. 40A:12A-6(b)(5) and N.J.S.A. 12A-7(e), the Planning Board's determinations are

merely recommendations to City Council, and thus do not have a binding legal effect. Therefore, Shelton was not prejudiced by the fact that both issues were addressed in the context of one hearing.

D. NOTICES

Shelton claims that the Planning Board's recommendation that the Expanded Study Area be designated an area in need of redevelopment should be voided because there is no proof that the notices were mailed to individual property owners. Furthermore, Shelton asserts that the notice was defective because the content was misleading.

N.J.S.A. 40A:12A-6b(3) sets forth the notice requirements prior to the public hearing on the determination of a redevelopment area. In pertinent part, the statute states:

> The hearing notice shall set forth the general boundaries of the area to be investigated and state that a map has been prepared and can be inspected at the office of the municipal clerk. A copy of the notice shall be published in a newspaper of general circulation in the municipality once each week for two consecutive weeks, and the last publication shall be not less than ten days prior to the date set for the hearing. A copy of the notice shall be mailed at least ten days prior to the date set for the hearing to the last owner, if any, of each parcel of property within the area according to the assessment records of the municipality. A notice shall also be sent to all persons at their last known address, if any, whose names are noted on the assessment records as claimants of an

> interest in any such parcel. The assessor of the municipality shall make a notation upon the records when requested to do so by any person claiming to have an interest in any parcel of property in the municipality. The notice shall be published and mailed by the municipal clerk, or by such clerk or official as the planning board shall otherwise designate. ***Failure to mail any such notice shall not invalidate the investigation or determination thereon.***
>
> [N.J.S.A. 40A:12A-6b(3) (emphasis added).]

In this case, the public was sufficiently on notice that the Planning Board was conducting a public hearing on the potential redevelopment of this area. First, the notice for the October 28, 2004 Planning Board meeting was published in the Trenton Times on October 13, 2004 and October 18, 2004. (Pl. App., Ex. A4). Second, the notices were properly mailed to all interested persons pursuant to the mailing list. (Pl. App., Ex. A5). This is also evidenced by the fact that plaintiffs and other interested citizens attended the October 28, 2004 Planning Board Meeting. Finally, even if the notice was not properly mailed, the statute clearly states that "failure to mail any such notice shall not invalidate the investigation or determination thereon." (N.J.S.A. 40A:12A-6b(3)).

Moreover, the content of the notice is not misleading. The first paragraph specifically references the date, time, and place of the Planning Board hearing. (Pl. App., Ex. A5). The remaining paragraphs detail the purpose of the meeting and the

LRHL procedures. Ibid. The notice also states that "maps of the Project Area, the proposed amended Redevelopment Plan for the Project Area have been prepared and may be inspected at the Office of the Clerk." Ibid. Even if the notice contains excess information, the Supreme Court has already noted that "surplus information did not destroy the efficacy of the otherwise satisfactory notice." Wilson v. Long Branch, supra, 27 N.J. at 383. Therefore, the court finds that defendants sufficiently met the notice requirements of the LRHL.

III.

SUBSTANTIVE ISSUES

A. THE DETERMINATION THAT THE EXPANDED STUDY AREA QUALIFIES AS AN AREA IN NEED OF REDEVELOPMENT DOES NOT MEET THE STATUTORY CRITERIA.

Relying on the obligation imposed by boards to make specific findings of fact as set forth in the MLUL, Shelton argues that these standards apply equally to the LRHL inasmuch as a reviewing court is required to determine whether there is sufficient evidence in the record to support the agencies determination. Lincoln Heights v. Twp. of Cranford, 314 N.J. Super. 366, 386 (Law Div. 1998) aff'd 321 N.J. Super. 355 (App. Div. 1999) certif. denied 162 N.J. 131 (1999); Morris Cty. Fair Hous. V. Boonton Twp., 228 N.J. Super. 635, 646 (Law Div. 1988).

Shelton claims that the Planning Board and City Council erred in relying on an expert report that did not adequately

establish that the Expanded Study Area qualifies as an area in need of redevelopment under the statutory criteria contained in N.J.S.A. 40A:12A-5. In response, defendants argue that the Expanded Study Area determination is supported by the Investigation Report, Mr. Valocchi's testimony, public statements, and the lack of contradictory evidence. A careful review of this record, quite simply, leads to only one conclusion. The record is woefully inadequate to support the determination by the governing body and is therefore arbitrary, capricious and unreasonable.

Pursuant to N.J.S.A. 40A:12A-5, a governing body must use the statutory conditions to demonstrate that an area is in need of redevelopment. In the present case, defendants assert that sections (a) and (e) are established. In pertinent part, the statute states:

> A delineated area may be determined to be in need of redevelopment if, after investigation, notice and hearing...the governing body of the municipality by resolution concludes that within the delineated area any of the following conditions is found:
>
> a. The generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living or working conditions.
>
> e. A growing lack or total lack of proper utilization of areas caused by the condition

> of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.
>
> [N.J.S.A. 40A:12A-5.]

As the case law clearly states, redevelopment designations receive heightened deference and a strong presumption of validity. Levin, supra, 57 N.J. at 537-39; See also Hirth, supra, 337 N.J. Super. at 161. However, this presumption can be overcome by the court if the designation is arbitrary and capricious, and thus not supported by substantial evidence. Concerned Citizens of Princeton, supra, 370 N.J. Super. at 452.

For instance, in ERETC, L.L.C. v. City of Perth Amboy, the appellate division reversed and remanded a redevelopment designation to the Planning Board because there was inadequate substantiation of the statutory criteria. 381 N.J. Super. 268 (App. Div. 2005). The court noted that "nowhere in the report did Carr [the city planner] undertake an analysis of the statutory criteria as it applied to each of the properties in the designated Area." Id. at *. Furthermore, the investigative report and testimony "were conclusory and failed to include any evidence to support his determination that buildings were 'substandard, unsafe, unsanitary, dilapidated, or obsolescent.'" Id. at *. At the Planning Board hearing, Carr testified that:

> he inspected the buildings from the outside, contacted the tax assessor's office to determine whether there were any outstanding tax liens and contacted the code enforcement officers to determine whether there were any outstanding violations on any buildings in the area.
>
> [Id. at *.]

Notably, the court advised the planner of the specific procedures that he failed to investigate and detail in his report:

> 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."
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> [Id. at *.]

Ultimately, the appellate division held that failure to sufficiently investigate each parcel prior to designating the area in need of redevelopment required the matter to be reversed and remanded to the Planning Board.

In this case, analogous to ERETC, Mr. Valocchi's investigation was inadequate and resulted in unsubstantiated net opinions. During his testimony, Mr. Valocchi referred to the packet of information that outlines the redevelopment criteria and gives a general and vague description of the expanded

neighborhood. (Pl. App., Ex. A2). The report contains six pictures, demonstrating the exterior status of structures in the area, as well as two maps that outline the proposed expansion area. In order to prepare this packet, Mr. Valocchi and various staff members conducted "a windshield survey" to determine the status of the property. (T1:5-24 to 5-25). The six selection criteria for each category include: excellent, good, fair, poor, boarded buildings, and vacant. (Pl. App., Ex. A2). Using these categories, Mr. Valocchi explained how the expanded area met the redevelopment criteria:

> The areas selected due to the presence of those conditions that make the area eligible to be designated as an area of redevelopment under state law mainly and this is -- condition A, the generality of the buildings is sub-standard, unsafe, unsanitary, dilapidated, essentially the general conditions of the area, as opposed to one building, two buildings here but generally there is a number of buildings throughout the area that meet this criteria.
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> After conducting the site review of the proposed redevelopment area, in valuating the area the Division of Planning considered this area can be -- an area in need of redevelopment and again as of state law, as per condition A and E, and condition A which is in your packet, again is just a generality of the area that's sub-standard and you have that condition in front of you.
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> In this expanded area there are a number of buildings that are dilapidated and in need of repair. Of all the structures in the expanded area 67 percent are in need of some type of repairs, ranging from complete

> reconstruction or demolition to substantial maintenance, and there is three photos in your packet that demonstrate criteria A.
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> We also believe that this meets criteria E, under state law. The growing lack of -- lack of proper utilization of the area is called -- condition and title, of -- ownership of the real property therein, or other conditions resulting in a stagnant or not -- fully productive condition of -- potential use law. And -- serving the public health.
>
> [T1:8-1 to 9-6.]

The testimony and report lack the necessary detail and facts to support the determination reached by the Planning Board and City Council. Mr. Valocchi's windshield survey indicates that his staff only examined and considered the exterior condition of the properties for the Expanded Study Area. In order to conduct a proper investigation, the procedures and techniques outlined by the appellate division in ERETC are required. Furthermore, the court is concerned by the fact that these net or conclusory opinions were accepted by the Planning Board and City Council with little to no deliberation on the record. (See T1, T2, T3, T4). The lack of dialogue and consideration is especially troubling with regard to the inaudible City Council hearings on November 22, 2004 and February 3, 2005. (Cert1, Pl. App., Ex. B6; Cert2, Pl. App., Ex. B11).

"Judicial review of a redevelopment designation is limited solely to whether the designation is supported by substantial credible evidence." Concerned Citizens, supra, 370 N.J. Super. at 452. Since the Planning Board and City Council have failed to properly investigate and demonstrate the causal connection, the determination that the Expanded Study Area qualifies as an area in need of redevelopment is arbitrary and capricious. Therefore, this court reverses and remands the matter to the Planning Board and City Council.

B. INSUFFICIENT RECORD TO SUPPORT FINDINGS BEFORE COUNCIL

The City Council considered the Expanded Study Area and Amendments to the Redevelopment Plan at its meetings on November 22, 2004, December 16, 2004, February 3, 2005, and February 17, 2005. Shelton contends that the inadequacy of the transcripts from the above-mentioned Council hearings requires that this court remand the entire matter for proper consideration on the record. In response, defendants claim that there is no requirement that Council record or transcribe its meeting when it considers the designation of a redevelopment plan.

First, Shelton argues that the lack of an audible transcript from the November 22, 2004 City Council meeting requires that this court remand the Expanded Study Area matter for proper consideration on the record. In fact, the only

audible part of the one-page transcript relates to passage of an ordinance "approving the amendments between the Champale Redevelopment Area Plan" and noting the "public hearing on this ordinance will also take place on December the 16th." (T2:2-1 to 2-18; Cert1, Pl. App., Ex. B5).

In response, defendants claim that the resolution demonstrates that Council was familiar with Planning Board's Expanded Study Area investigation. In Resolution No. 04-693, dated November 22, 2005, the City Council noted that it reviewed the "report submitted by the Planning Board of the City of Trenton" and the exhibits from the public hearing and ultimately determined that the expansion study area was an area in need of redevelopment. (Pl. App., Ex. A8). The court finds that the record from the November 22, 2004 City Council meeting is inadequate because it does not provide any dialogue or discussion on whether the Expanded Study Area qualifies as an area in need of redevelopment. (T2:2-1 to 2-17; Cert1).

Furthermore, the transcripts from the other hearings are also grossly insufficient to support the findings by the City Council. First, on December 16, 2004, Shelton addressed Council with their concerns and opposition to the expansion. (T3:2-21 to 10-15). Following plaintiffs' presentation, City Council decided to postpone the matter for a later meeting. (T3:16-4 to 16-6). On February 3, 2005, as noted in the agenda, City Council was

scheduled to resume consideration of the ordinance to adopt the Amended Redevelopment Plan. (Pl. App., Ex. B9). However, there is not an audible transcript of the February 3, 2005 hearing. (Cert2, Pl. App., Ex. B11). On February 17, 2005, after one question about condemnation, the City Council unanimously approved the adoption of the ordinance without setting forth any reasons on the record. (T4:4-1 to 4-24). Resolution No. 05-102, adopted on February 17, 2005, states that "City Council has made changes to the Planning Board's recommended amendment to the redevelopment plan for the Champale Redevelopment Area." (Pl. App., Ex. B15). However, the transcript of the City Council meeting on February 17, 2005 does not reveal any discussion or deliberation about the changes to the amendments.

"Without such a record, courts are unable to engage in judicial review and ordinarily should remand for further proceedings." Scardigle v. Borough of Haddonfield Zoning Bd. of Adjustment, 300 N.J. Super. 314, 323 (App. Div. 1997); Carbone v. Palling Bd. of Twp. of Weehawken, 175 N.J. Super. 584, 586 (Law Div. 1980)(remanding the matter to the planning board because there was not verbatim record); Lawrence M. Krain Assoc. v. Mayor of Twp. of Maple Shade, 185 N.J. Super. 336, 341 (Law Div. 1982)(remanding the matter to the board of adjustment because the court can not determine whether conduct is arbitrary and capricious without a verbatim recording). The court finds

that the transcripts in the present case demonstrate that Council failed to properly discuss and consider the expansion and amendments. Therefore, the court reverses and remands the matter to the City Council for a detailed consideration on the record.

Also, in the past, this court has confronted the failure of the Board and City Council to properly record proceedings. Therefore, the City should take steps to secure proper functioning machines and/or hire a stenographer to appear at these proceedings.

IV.

REMAINING ISSUES:

As noted heretofore, the matter is reversed due to the inadequate record before the Board and the City Council. Therefore, the court need not address the position by Shelton that the action(s) by the Board and City Council violated the provisions of N.J.S.A. 40A:12A-7a or 7d. The court, however, will address two issues identified in the next section.

A. COPY OF RESOLUTION TO THE DEPARTMENT OF COMMUNITY AFFAIRS

Shelton claims that the City violated N.J.S.A. 40A:12A-6b(5) by failing to provide the Commissioner of the Department of Community Affairs ("DCA") with a copy of Resolution No. 04-693, dated November 22, 2004, until April 22, 2005. (Pl. App., Ex. A9). Accordingly, the City was not notified that Resolution

No. 04-693 was consistent with smart growth principles until May 2, 2005. (Pl. App., Ex. A10). Thus, Shelton argues that the ordinance adopting the Amended Redevelopment Plan is void because it was adopted on February 17, 2005, two months prior to the commissioner's approval. The City did not require DCA approval for the Expanded Study Area, however, but was only required to provide DCA with notice of the redevelopment area designation because the Expanded Study Area is a smart growth area where redevelopment is to be encouraged.

In pertinent part, N.J.S.A. 40A:12A-6b(5) states:

> After receiving the recommendation of the planning board, the municipal governing body may adopt a resolution determining that the delineated area, or any part thereof, is a redevelopment area. Upon adoption of a resolution, the clerk of the municipality shall, forthwith, transmit a copy of the resolution to the Commissioner of Community Affairs for review. If the area in need of redevelopment is not situated in an area in which development or redevelopment is to be encouraged pursuant to any State law or regulation promulgated pursuant thereto, the determination shall not take effect without first receiving the review and approval of the commissioner.
>
> [N.J.S.A. 40A:12A-6b(5).]

Here, the Expanded Study Area, is situated in Planning Area One under the State Development and Redevelopment Plan, which is classified as an area where redevelopment is to be encouraged. See N.J.S.A. 52:18A-196. In fact, "smart growth areas," in

which development and redevelopment are to be encouraged, are consistently defined throughout the New Jersey Statutes to include Planning Area One. See, e.g., N.J.S.A. 52:27D-10.5 ("'Smart growth area'" means an area designated pursuant to [ ] (C.52:18A-196 et seq.) as Planning Area 1 (Metropolitan) ..."). Therefore, the City did not require approval from the DCA prior to the redevelopment area designation taking effect. However, in light of the court's determination that the absence of a complete record requires reversal, the issue is moot.

B. ORDINANCE FAILS TO INCLUDE AN EXPLICIT AMENDMENT TO THE ZONING MAP

Shelton claims that the ordinance adopting the Amended Redevelopment Plan cannot be effective until the City amends the zoning map. As noted heretofore, the determination by the City Council is reversed based on the absence of adequate evidence in the record to support its determination. Consequently, this argument is also moot. The court notes, however, that in relevant part, N.J.S.A. 40A:12A-7(c) states:

> The redevelopment plan shall supersede applicable provisions of the development regulations of the municipality or constitute an overlay district within the redevelopment area. When the redevelopment plan supersedes any provision of the development regulations, the ordinance adopting the redevelopment plan shall contain an explicit amendment to the zoning district map included in the zoning ordinance.

[N.J.S.A. 40A:12A-7(c).]

Therefore, an amendment to the zoning map is only required when a redevelopment plan supersedes the development regulations of the municipality. Here, the Amended Plan constitutes an overlay district, as opposed to superseding the development regulations. (Pl. App., Ex. B17). At the Planning Board hearing on October, 28, 2004, Mr. Valocchi discussed the overlay zoning aspects of the Amended Plan:

> We are adding a new overlay district, let me step back one moment. The existing area is currently zoned -- business B, which it allows residential development and also businesses. That designation will be expanded to the entire area. Which basically allows -- a residential and businesses in the former store fronts there.
>
> We are creating a new district, a condominium zone, overlay district that will overlay over part of the business B district.
>
> And that's number three on page 6, relative to the condominiums in the district this redevelopment area in part, may be suitable as a residential condominium complex, as such the following overlay zoning district shall apply. Otherwise all uses and restrictions as specified under B2(a)(1) shall apply.
>
> Basically what that means is that it -- this is developed as a condominium they need to be -- they need to meet the conditions in here, if the developer -- goes away and there's not going to be a condominium developer, they have to meet the existing zoning, what it is now. So this Board may

> be back -- if this project doesn't happen, and somebody else comes up they have to meet what's there, they have to meet the existing zoning, which these folks are -- a lot of these properties already in that zone classification.
>
> [T1:34-14 to 35-14.]

Therefore, the Redevelopment Plan constitutes an overlay district within the redevelopment area, and an amendment to the zoning map was unnecessary.

CONCLUSION

For all of the reasons stated herein, the court reverses and remands the matter to the Planning Board and City Council for proper consideration and deliberation on the record.