

Prepared by the Court

214 KINDERKAMACK, LLC a New Jersey  
Limited Liability Corporation,

Plaintiff,

vs.

BOROUGH OF EMERSON and BOROUGH  
OF EMERSON MUNICIPAL LAND USE  
BOARD,

Defendants.

DOLORES DELLA VOLPE, TRUSTEE,

Plaintiff,

vs.

BOROUGH OF EMERSON and BOROUGH  
OF EMERSON MUNICIPAL LAND USE  
BOARD,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - BERGEN COUNTY  
DOCKET NO. BER-L-1660-17

CIVIL ACTION

**FILED**  
MAY 04 2018  
GREGG A. PADOVANO, J.S.C.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - BERGEN COUNTY  
DOCKET NO. BER-L-1855-17

CIVIL ACTION

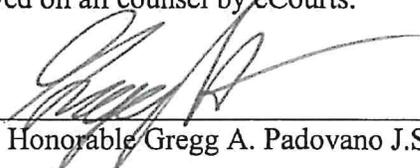
**ORDER**

**THIS MATTER** having come before the court as a series of motions filed by defendant Borough of Emerson (the "Borough"), defendant Emerson Municipal Land Use Board (the "Board") and non-party JMF Properties ("JMF") and Kevin X. Codey ("Codey") seeking to quash subpoenas issued by plaintiffs 214 Kinderkamack, LLC and Dolores Della Volpe, Trustee (collectively "Plaintiffs") and for a Protective Order pursuant to R. 4:10-3 and the court having reviewed all papers submitted including Plaintiffs' opposition and oral argument having been conducted and for the reasons set forth in the attached rider and good cause having been shown

**IT IS ON THIS 4<sup>th</sup> DAY OF MAY 2018**

**ORDERED** that the motions of the Borough, Board, JMF and Codey are hereby **GRANTED** in their entirety. The subject subpoenas issued on behalf of the Plaintiffs are hereby quashed pursuant to this Protective Order; and it is further

**ORDERED** that a copy of this Order be served on all counsel by eCourts.

  
Honorable Gregg A. Padovano J.S.C.

**214 KINDERKAMACK, LLC**  
**v.**  
**BOROUGH OF EMERSON**  
**and**  
**BOROUGH OF EMERSON MUNICIPAL LAND USE BOARD**

**Docket No. BER-L-1660-17**

**DOLORES DELLA VOLPE, TRUSTEE**  
**v.**  
**BOROUGH OF EMERSON**  
**and**  
**BOROUGH OF EMERSON MUNICIPAL LAND USE BOARD**

**Docket No. BER-L-1855-17**

**RIDER TO ORDER DATED MAY 4, 2018<sup>1</sup>**

---

Before the court are the following series of motions: 1) motion to quash a subpoena / notice of deposition and request for production of documents issued by plaintiffs 214 Kinderkamack, LLC (“214”) and Dolores Della Volpe, Trustee (“Della Volpe”) (collectively “Plaintiffs”) and for a Protective Order filed by the Borough of Emerson (the “Borough”); 2) motion to quash a subpoena / notice of deposition and request for production of documents issued by Plaintiffs and for a Protective Order filed by Borough of Emerson Municipal Land Use Board (the “Board”); and 3) motion to quash a subpoena duces tecum and ad testificatum issued by Plaintiffs and for a Protective Order filed by non-party JMF Properties. (“JMF”) and Kevin X. Codey (“Codey”). The

---

<sup>1</sup> Not for publication without the approval of the committee on opinions (See R. 1:36-1).

court considered all documents submitted in support of and in opposition to the motions and oral argument of counsel.

Plaintiffs here seek discovery in connection with their challenge to the designation of certain properties located in Block 419 of the Borough of Emerson. Plaintiffs served a notice to take oral deposition and request for production of documents upon Gary Schwinder (“Schwinder”) seeking the following information:

1. All documents, correspondence[,] notes prepared or received by you in connection with the investigation by the Board of whether Block 419 in the Borough of Emerson qualified as an area in need of redevelopment under the [Local Redevelopment and Housing Law, N.J.S.A. 40:12A-1, et seq.], including but not limited to letters, emails, and memoranda from or prepared by:
  - a. Louis Lamatina, Mayor of the Borough of Emerson (“Borough”);
  - b. Any past or current member of the Borough Council;
  - c. Robert Hoffman, Borough Administrator
  - d. Brigette Bogart, Borough Planner
  - e. Wendy Rubenstein, Douglas Doyle, Leslie Sontolongo of the law firm of DeCotiis, Fitzpatrick, Cole & Giblin, LLP
2. All notes taken by you during any meetings or telephone conferences he had with any individual identified in 1a through 1e above and/or any representative of JMF.

[Certification of John A. Stone, Esq. Exhibit “7”.]

Plaintiffs also served a subpoena duces tecum and ad testificatum for production of documents and testimony upon Kevin X. Codey (“Codey”), Vice President of Land Acquisitions of JMF Properties seeking the following information:

1. All documents comprising the entire file of JMF Properties, Emerson Redevelopment, LLC and Emerson Redevelopers Urban Renewal, LLC (Referred to collectively as “JMF” relating to the Redevelopment Agreement, Funding Agreement and/or Financial Agreement).

Without limiting the generality of the foregoing demand, your specific attention is directed toward the following items included in the foregoing demand:

- a. Copies of all file notes, whether handwritten, typed or electronic made and or maintained by any representative of JMF Relating to communications with officials of the Borough of Emerson and/or Land Use Board.
  - b. Copies of all communications to, from, or between the (sic) any representative of JMF and the offices of the Borough relating to the Redevelopment Agreement, Funding Agreement and/or Financial Agreement.
  - c. Copies of all communications to, from, or between the (sic) any representative of JMF and any official of the Borough of Emerson Land Use Board concerning the Block 419.
2. All documents comprising the entire file of JMF relating to JMF’s attempts to acquire any property located within Block 419.

Without limiting the generality of the foregoing demand, your specific attention is directed toward the following items included in the foregoing demand:

- a. Copies of all file notes, whether handwritten, typed or electronic made and or maintained by any representative of JMF relating to communications with any owner of property within Block 419.

- b. Copies of all communications to, from, or between the (sic) any representative of JMF and any owner of property within Block 419.
- c. Copies of all file notes, whether handwritten, typed or electronic made and or maintained by any representative of JMF relating to communications with any official of the Borough of Emerson.
- d. Copies of all communications to, from, or between any representative of JMF and any official of the Borough of Emerson.

[Id., Exhibit "8".]

Plaintiffs served a subpoena duces tecum and ad testificatum for production of documents and testimony upon Brigette Bogart, P.P. of Brigette Bogart Planning & Design Professionals, LLP ("Bogart"), seeking the following information:

- 1. All documents comprising the entire file of the Bogart firm relating to the preparation [of] its December 8, 2016 study report.

Without limiting the generality of the foregoing demand, your specific attention is directed toward the following items included in the foregoing demand:

- a. Copies of all file notes, whether handwritten, typed or electronic made and or maintained by any representative of the Bogart firm relating to communications with Borough and/or Board officials.
- b. Copies of all communications to, from, or between any representative of the Bogart firm and Borough and/or Board officials relating to the redevelopment investigation and/or study report.
- c. Copies of all materials reviewed, consulted and/or relied upon in the preparation of the study report including any notes whether handwritten, typed or electronic by any representative of the Bogart firm after consultation with any person.

- d. Copies of all file notes, whether handwritten, typed or electronic by any representative of JMF regarding the redevelopment investigation and/or study report.
  - e. Copies of all communications to, from, or between any representative of the Bogart firm and any representative of JMF regarding the redevelopment investigation and/or study report.
2. All documents comprising the entire file of the Bogart firm relating to any further investigation, review or analysis subsequent to January 1, 2017, of whether any area other than Block 419 within the Central Business District constitutes an area in need of redevelopment under the LRHL.

Without limiting the generality of the foregoing demand, your specific attention is directed toward the following items included in the foregoing demand:

- a. Copies of all file notes, whether handwritten, typed or electronic made and or maintained by any representative of the Bogart firm relating to communications with Borough and/or Board officials.
- b. Copies of all communications to, from, or between any representative of the Bogart firm and Borough and/or Board officials relating to any further investigation, review or analysis of whether any other area within the CBD constitutes an area in need of redevelopment under the LRHL.
- c. Copies of all invoices issued by the Bogart firm relating to any further investigation, review or analysis, subsequent to January 1, 2017, of whether any area other than Block 419 within the CBD constitutes an area in need of redevelopment under the LRHL.

[Id.]

Plaintiffs also served a subpoena duces tecum for production of documents and deposition testimony upon Louis J. Lamatina, Mayor of the Borough of Emerson (“Lamatina”), seeking the following information:

1. All documents, correspondence (including letters, emails, memoranda) notes prepared or received by you in connection with the investigation and/or designation of Block 419 in the Borough of Emerson as an area in need of redevelopment under the LRHL.
2. All documents, correspondence (including letters, emails, memoranda) notes prepared or received by you in connection with the issuance of the RFP.
3. All documents, correspondence (including letters, emails, memoranda) notes prepared or received by you in connection with the review of responses to the RFP, including, but not limited to the selection of JMF.
4. All documents, correspondence (including letters, emails, memoranda) notes prepared or received by you in connection with the negotiation and execution of:
  - a. Funding Agreement;
  - b. Redevelopment Agreement; and
  - c. Financial Agreement.
5. All documents, correspondence (including letters, emails, memoranda) notes prepared or received by you in connection with JMF’s, or any affiliate thereof, attempts to acquire any property located within Block 419.
6. All notes taken by you during any meetings or telephone conferences you had with any representative of JMF.
7. All correspondence sent by you to owners of property in Block 419 regarding the potential sale of said property to JMF or any affiliate thereof.

[Id., Exhibit “9”.]

Plaintiffs also served a subpoena duces tecum for production of documents and deposition testimony upon Robert Hoffman, the Administrator of the Borough of Emerson (“Hoffman”), seeking the following information:

1. All documents, correspondence (including letters, emails, memoranda) notes prepared or received by you in connection with the investigation and/or designation of Block 419 in the Borough of Emerson as an area in need of redevelopment under the LRHL.
2. All documents, correspondence (including letters, emails, memoranda) notes prepared or received by you in connection with the issuance of the RFP.
3. All documents, correspondence (including letters, emails, memoranda) notes prepared or received by you in connection with the review of responses to the RFP, including, but not limited to the selection of JMF.
4. All documents, correspondence (including letters, emails, memoranda) notes prepared or received by you in connection with the negotiation and execution of :
  - a. Funding Agreement;
  - b. Redevelopment Agreement; and
  - c. Financial Agreement.
5. All documents, correspondence (including letters, emails, memoranda) notes prepared or received by you in connection with JMF’s, or any affiliate thereof, attempts to acquire any property located within Block 419.
6. All notes taken by you during any meetings or telephone conferences you had with any representative of JMF.

[Id., Exhibit “10”.]

Plaintiffs served a subpoena duces tecum for production of documents and deposition testimony upon John Lazar, Councilman of the Borough of Emerson (“Lazar”), seeking the following information:

1. All documents, correspondence (including letters, emails, memoranda) notes prepared or received by you in connection with the investigation and/or designation of Block 419 in the Borough of Emerson as an area in need of redevelopment under the LRHL.
2. All documents, correspondence (including letters, emails, memoranda) notes prepared or received by you in connection with the issuance of the RFP.
3. All documents, correspondence (including letters, emails, memoranda) notes prepared or received by you in connection with the review of responses to the RFP, including, but not limited to the selection of JMF.
4. All documents, correspondence (including letters, emails, memoranda) notes prepared or received by you in connection with the negotiation and execution of :
  - a. Funding Agreement;
  - b. Redevelopment Agreement; and
  - c. Financial Agreement.
5. All documents, correspondence (including letters, emails, memoranda) notes prepared or received by you in connection with JMF’s, or any affiliate thereof, attempts to acquire any property located within Block 419.
6. All notes taken by you during any meetings or telephone conferences you had with any representative of JMF.

[Id., Exhibit “11”.]

Plaintiffs served a request for production of documents upon Douglas F. Doyle, Esq., counsel for the Borough seeking the following:

1. Please provide a complete and unredacted copy of the email correspondence dated on or about December 1, 2016 from Lesly Sotolongo, Esq., of the DeCotiis firm to Kevin Codey, a representative of JMF, related to "updated value spreadsheet" and please provide also a complete and unredacted copy of the referenced spreadsheet.
2. The following requests pertain to the bills for legal services submitted by DeCotiis firm to the Borough referenced below:

- a. Invoice Date: 04/10/17  
 File No. 14-011.25  
 Invoice No. 184343  
 File Description: JMP (sic) Properties-Redeveloper

<u>Date</u>	<u>Timekeeper</u>	<u>Description</u>
03/07/17	Frank X. Regan	Attend meeting with D. Doyle and K. Codey, JMF [balance of entry was redacted]

<u>Date</u>	<u>Timekeeper</u>	<u>Description</u>
03/13/17	Douglas F. Doyle	Conference call with developer regarding [balance of entry was redacted]

- b. Invoice Date: 06/13/17  
 File No. 14-011.22  
 Invoice No. 187600  
 File Description: Redevelopment

<u>Date</u>	<u>Timekeeper</u>	<u>Description</u>
05/16/17	Matthew C. Kallenberg	Conference call with developer regarding [balance of entry was redacted]

Please provide a complete and unredacted copy of the time entries cited above.

[Id., Exhibit "12".]

The defendants each moved to quash Plaintiffs' subpoenas and seeks a Protective Order. By way of brief background, the Borough here adopted a resolution (resolution number 199-04) designating certain properties, including a parcel owned by Plaintiff, as an area in need of redevelopment pursuant to N.J.S.A. 40A:12A-1 et seq., the Local Redevelopment and Housing Law ("LRHL") on September 7, 2004. Certification of Douglas F. Doyle, Esq. ¶2. A redevelopment plan was adopted by the Borough on July 11, 2006. Id. ¶3. Throughout 2008 and early 2009, the Board reviewed the properties included in the designated redevelopment area and confirmed that the subject properties were "an area in need of redevelopment" pursuant to the [LRHL]. Id. ¶¶4-5. Since the owners of the parcels subject of the designation did not undertake action to redevelop the parcels, the Borough issued a request for proposals ("RFP") during late 2015, early 2016. Id. ¶7. Based upon a response to the RFP, the Borough designated a redeveloper under resolution number 129-1. Id. ¶8. An agreement with the designated redeveloper, Emerson Redevelopers Urban Renewal, LLC ("ERUR") was executed. Id. ¶9. Based upon the fact that the initial study was performed during 2004, the Borough authorized an additional study of the subject area on August 16, 2016 under resolution number 221-16. Id. ¶¶9-10.

On December 8, 2016, the Board undertook a public hearing with regard to the updated review. Id. ¶¶12-13. During the public hearing, counsel for Plaintiff 214 Kinderkamack, LLC appeared and cross-examined the Borough/Board's planner, Brigitte Bogart. Id. ¶13. Other members of the public appeared and spoke during the public hearing. There was no request by any member of the public, including Plaintiff who was represented by counsel, to continue the hearing for additional testimony. Id. ¶¶15-16. The Board adopted a resolution on January 17, 2017 memorializing its determination and recommendation that the subject area (Block 419) within the Borough of Emerson be declared a "condemnation redevelopment area." Board's Brief at 3.

The agreement between ERUR and the Borough required that ERUR negotiate with the property owners of the parcels within the designated redevelopment area. Id. ¶17. Counsel for the Borough indicates that the parties shared "highly sensitive financial information concerning the amounts it had negotiated to pay property owners" within the designated redevelopment area. Id. ¶19. Counsel further states and asserts that

[i]t was also understood that ERUR's ability to comply with its financial obligations under the [redevelopment agreement with the Borough] was specifically contingent and conditioned upon securing all of the properties in the [p]roject [a]rea within a certain budget. Therefore, neither ERUR nor the Borough was in a position to pay substantially more than the [fair market value] of any and all of the properties in the [p]roject [a]rea. Revealing the property pricing information (including on the spreadsheet) would compromise ERUR's ability to acquire the properties for [fair market value] and later (if necessary) the Borough's duty to acquire the necessary properties for [fair market value]. Moreover, during those meetings which were described in my bills, strategic discussions took place with ERUR about completing the Project, acquiring properties in the Project Area and anticipating litigation. [Id. ¶¶22-23.]

The Borough now argues that Plaintiffs' subpoenas seeking the identified documents and request for depositions should be quashed and barred by Protective Order as they seek information which is privileged and not proper. The Borough argues that discovery in actions in lieu of prerogative writs is usually not permitted or encouraged as the action being challenged are based upon the record previously developed and established below. Borough's Brief at 12-13. The Borough also argues that Plaintiff is seeking information which is privileged by requesting an unredacted copy of a spreadsheet identifying certain values assigned to properties within the subject designated area as well as unredacted copies of certain bills of the Borough attorney. See Stone Certification, Exhibits "12" - "14". The Borough asserts that the unredacted information is within the chart is irrelevant to overall determination regarding the allegations under the complaint. See Borough's Brief at 16-22. The Borough argues that there is no basis to disclose the redacted information of its bills as requested by the Plaintiffs as the information sought is subject to privilege and is irrelevant. Id. at 22. The Borough also argues that Plaintiffs' request for deposition of the public officials should be quashed as Plaintiff is seeking to examine the deliberative process of the Mayor, Councilmember and Board member. Id. at 25-26. The Borough argues further that Plaintiff's deposition notice of the public officials is also barred by the legislative privileged. Id. at 27.

The Borough of Emerson Land Use Board argues that Plaintiff's deposition notice for Schwinder, the chairman of the Emerson Land Use Board, should be quashed and a Protective Order pursuant to R. 4:10-3 is warranted and should be entered. See Board's Brief at 3-4. The Board has presented similar arguments as presented by the Borough. The Board asserts that Schwinder should not be subject to deposition as Plaintiff should not be permitted to explore the deliberative process of the Board members. Board's Brief at 6-10. The Board also argues that the

documentary information requested is not relevant and is subject to privilege. Id. at 11-12. Furthermore, the Board argues, as does the Borough, that the parties are not generally entitled to discovery in actions in lieu of prerogative writs. Id.

JMF Properties and Kevin X. Codey, non-parties but subject of subpoena issued by Plaintiffs, joined in the Borough's motion and adopted the Borough's argument as their own.

The Plaintiffs argue in opposition to defendants' motions that

[t]he statutory procedures were ignored by defendants in order to achieve a politically desired development that will benefit JMF, a private, for-profit developer. Plaintiffs seek to obtain facts as to what happened by and between Borough officials and JMF prior to January 2017 blight designation and any information - documents or testimonial - that may support or refute [P]laintiffs' claim that the designation was a fait accompli to invoke the power of eminent domain to acquire the Block 419 properties.

[Plaintiffs' Brief at 1.]

Plaintiffs assert that the Borough has not offered any justification for any limitation on the discovery sought. Id. at 6. Plaintiffs argues extensively in their opposition papers that the "Borough did not follow the procedures set forth in the LRHL" and that the investigation and designation of Block 419 as an area in need of redevelopment must fail. Id. at 10.

Plaintiffs argue that the defendants did not follow the requisite procedures established under the LRHL and relevant case law and therefore discovery, as requested, should be permitted. Id. at 13. Plaintiffs assert that the review of the designation of Plaintiffs' property should not be limited to the record below and that additional discovery must be permitted in accordance with relevant case law including the holding in Lyons v. Camden, 48 N.J. 524, 533 (1967). Id. at 14-15. Plaintiffs assert that although plaintiff 214 had an attorney present before the Board's December 2016 hearing, it is not now barred from seeking discovery. Id. at 18-19.

Plaintiffs assert that they are entitled to receive unredacted copies of the documents previously provided with redactions. Id. at 14. Plaintiffs argue that the unredacted subject spreadsheet sought would likely lead to admissible evidence. Id. at 25. Plaintiffs also argue that unredacted copies of the legal billing records sought should be produced as they too may lead to admissible evidence. Id. at 32-34.

Plaintiffs argue that they do not seek to depose Borough officials in order to determine their mental impressions but to determine “what occurred among defendants and JMF beyond public view.” Id. at 34. Plaintiffs also assert that the information sought from deposition of the borough officials and JMF representative are not barred by any cognizable privilege. See Plaintiffs’ Brief at 37-50. Plaintiffs assert that the executive privilege asserted by defendants is not applicable as the relevant criteria under Wilson v. Brown, 404 N.J. Super. 557, 571-72 (App. Div. 2009) has been satisfied. Id. at 40.

The Borough, in reply papers, asserts that there is no basis to permit the discovery requested. Id. at 3, citing Catalpa Investment Group, Inc. v. Franklin Twp. Zoning Board of Adjustment, 254 N.J. Super. 270, 274-75 (Law Div. 1991). The Borough also argues that the motives of the defendants is rendered irrelevant by the presumption of municipal validity. Borough’s Reply Brief at 4, citing e.g. Sod Farm Assocs. v. Springfield Tp. Planning Bd., 298 N.J. Super. 84, 97 (Law Div. 1995). The Borough argues further that the unredacted emails and spreadsheet sought by Plaintiffs are not relevant to the ultimate issue of whether there was statutory compliance in the adoption of the subject designation. Id. at 11-14. The Borough also renewed its argument that the redacted spreadsheet information is privileged. Id. at 14-19. The Borough asserts that

[P]laintiffs' conclusory contention that the 'requested information may support [P]laintiffs' claim of collusion' ([P]laintiffs' Brief, pg 24) is unsubstantiated and incorrect, particularly since the fact of those negotiations is not in dispute and the right to those negotiations cannot be disputed.

[Id. at 19].

The Borough argues that the disclosure of the unredacted spreadsheet and emails which directly relate to the joint venture between the developer and Borough will irreparably damage the ability to negotiate property acquisition and have no impact on the ultimate issue of whether the subject properties were properly designated as an area in need of redevelopment. Id. at 21-22. The Borough also argues that the billing records are not relevant and will not lead to relevant information. Id. at 24. The Borough further argues that Plaintiffs have not provided any information to support their claims in connection with the deposition notices. Id. at 25-30. Furthermore, the Borough asserts that the information sought from the Borough officials is barred by the executive and legislative privilege. Id. at 33-35.

The Board argues in reply that Plaintiffs' opposition is based upon mere conclusory statements and arguments. Board's Reply Letter Brief at 1. The Board also argues that there is nothing in the record which reveals procedural errors or any other issue which supports Plaintiffs' claims of improper motives and/or noncompliance with statutory criteria to warrant Plaintiffs' discovery demands. Id. at 5.

This court recognizes that New Jersey's discovery rules are to be construed liberally in favor of broad pretrial discovery. Jenkins v. Rainer, 69 N.J. 50, 56 (1976). Accordingly, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ." R. 4:10-2(a). "Relevant evidence," although not defined in the discovery rules, is defined elsewhere as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." Payton v. New

Jersey Turnpike Authority, 148 N.J. 524 535 (1997) (citing N.J.R.E. 401). “The relevance standard does not refer only to matters which would necessarily be admissible in evidence but includes information reasonably calculated to lead to admissible evidence.” Berrie v. Berrie, 188 N.J. Super. 274, 278 (Ch. Div. 1983).

However, discovery is broad, but not unlimited. See K.S. v. ABC Professional Corp., 330 N.J. Super. 288, 291 (App. Div. 2000); Berrie v. Berrie, 188 N.J. Super. 274, 282 (App. Div. 1983). Courts do not permit a discovery “fishing exhibition” to establish otherwise unsupported accusations. See R. 4:10-2(c), R. 4:10-3, and Miller v. J.B. Hunt Transport, 339 N.J. Super. 144, 148 (App. Div. 2001), to wit: privileged work product. See also Medford v. Duggan, 323 N.J. Super. 127, 135 (App. Div. 1999).

Although the discovery rules are to be liberally construed, “[w]hen the burdens outweigh the benefits the tools of discovery become, intentionally or unintentionally, weapons of oppression,” the party may seek a protective order from the court pursuant to R. 4:10-3. Id. at 282. While the court acknowledges the well-settled law that discovery should be liberally granted, the court also notes that discovery is not limitless. New Jersey Court Rule 4:10-3 provides New Jersey Court Rule 4:10-3 provides that

[o]n motion by a party or by the person from whom discovery is sought, the court, for good cause shown or by stipulation of the parties, may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

- (a) That the discovery not be had;
- (b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

- (c) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (d) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (e) That discovery be conducted with no one present except persons designated by the court;
- (f) That a deposition after being sealed be opened only by order of the court;
- (g) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
- (h) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

The movant bears the burden of persuasion in showing that good cause exists for the issuance of a protective order. Kerr v. Able Sanitary and Environmental Services, Inc., 295 N.J. Super. 147, 155 (App. Div. 1996). “Good cause” is determined by a court upon a detailed analysis of the circumstances of the parties and issues involved. Mugrage v. Mugrage, 335 N.J. Super. 653, 657 (Ch. Div. 2000).

New Jersey Court Rules 4:14-7(a) and 1:9-2 provides that a subpoena may require the “production of books, papers, documents, electronically stored information, or other objects designated therein.” However, the court on motion may quash or modify the subpoena if, in its discretion, compliance would be unreasonable and oppressive. R. 1:9-2. The “reasonableness” standard has been articulated in New Jersey as the subpoenas “subject . . . must be specified with reasonable certainty, and there must be a substantial showing that they contain evidence relevant and material to the issue. If the specification is so broad and indefinite as to be oppressive and in

excess of the defendant's necessities, the subpoena is not sustainable." State v. Cooper, 2 N.J. 540, 556 (1949). Reasonableness is also viewed in light of the demandant's use of routine pretrial discovery, such as depositions and interrogatories. See Wasserstein v. Swern & Co., 84 N.J. Super. 1, 6-8 (App. Div. 1964), certif. den. 43 N.J. 125 (1964). The subpoena duces tecum should not be used in place of such discovery. See New Century Financial Services, Inc. v. Denegar, 394 N.J. Super. 595, 600 (App. Div. 2007).

Although the discovery rules are to be liberally construed, "[w]hen the burdens outweigh the benefits the tools of discovery become, intentionally or unintentionally, weapons of oppression," the party may seek a Protective Order from the court pursuant to R. 4:10-3. Id. at 282. While the court acknowledges the well-settled law that discovery should be liberally granted, the court also notes that discovery is not limitless. The general standard of discoverable information is relevance. See Pressler, Current N.J. Court Rule, comment 1 on R. 4:10-2. The relevance standard includes information reasonably calculated to lead to admissible evidence respecting the cause of action or its defense. See Pfenninger v. Hunterdon Central, 167 N.J. 230, 237 (2001); Payton, supra.

Plaintiffs have not demonstrated how the written information or depositions sought under the subject subpoenas will lead to relevant information as to why the Borough's designation and inclusion of the subject properties in the redevelopment area. The court has not been shown any information or argument indicating that the information sought under any of subpoena served here that would reasonably lead to relevant information. The complaints in these consolidated actions in lieu of prerogative writs challenge the designation of Plaintiffs' property as an area in need of redevelopment pursuant to the LRHL.

The court has not been provided with any information which reveals that the record below should or must be supplemented. The court finds that Plaintiffs' assertion that the discovery sought is required to address an alleged predetermined scheme or improper plan to designate the subject parcels and to conspire with the designated redeveloper or mislead the public and subject property owners is wholly unsupported by the record or argument and without merit and appear to be nothing more than an attempt to harass and unreasonably delay.

Furthermore, the court finds that there is no basis to warrant the depositions of the mayor, councilmember(s) and/or Board member(s) requested here. See Catalpa, supra. and New Jersey Turnpike Authority v. Sisselman, 106 N.J. Super. 358, 367 (App. Div. 1969) aff'd 54 N.J. 565 (1969) In Catalpa, supra, the trial court, when reviewing the application for a protective order in an action in lieu of prerogative writs, found "good cause" to quash a subpoena for deposition of members of a zoning board of adjustment. Catalpa, supra 254 N.J. Super. at 275. The trial judge in Catalpa, supra noted that "except in limited circumstances, the person challenging the decision of a board of adjustment may not inquire into the mental processes surrounding the decision of a board member." Id. referencing N.J. Sports & Exposition Auth. v. McCrane, 119 N.J. Super. 457, aff'd 61 N.J. 1 (1972); other references omitted. In Sisselman, supra, the appellate court, while denying the requested deposition of New Jersey Turnpike Commissioners, relied upon decision in United States v. Morgan, 313 U.S. 409 (1941) for the proposition that heads of administrative agencies are not subject to examination of their mental processes in connection with promulgation of regulations. Sisselman, supra at 367 references omitted. Emerson maintains a borough form of government. Under that form of government, although often described as a "weak mayor" form of government, the mayor has several enumerated duties and powers, not the least of which is to be the "head of the municipal government." See N.J.S.A. 40A:60-5. The Mayor is the chief

executive of the Borough. The fact that the Mayor, or members of the Borough Council for that matter, may have individual conversations with the municipal professionals prior to the public consideration and action by the governing body and/or Board is not specious, unusual or unpermitted conduct. Plaintiffs' allegations that the Mayor conducted discussion with the planner, designated developer or other parties does not indicate some grand conspiracy as implied by Plaintiffs.

Reviewing the allegations of the complaint, it is clear that the focus of any deposition would go directly and solely to the deliberative process of the Mayor and other Borough officials. Plaintiffs' allegations that the designation of the subject property as an area in need of redevelopment is not contingent upon the examination of the thought process of the mayor, councilmember and/or other Borough officials but rather is based upon whether there was substantial evidence to support said designation.

Plaintiffs attempt now to seek and present information which should have and could have been presented during the public hearings subject of this action. The issue of whether Plaintiffs were improperly denied the ability to present information or were improperly denied the right to challenge evidence presented during the public hearings will presumably be addressed at trial. The court finds that the discovery sought under the subject subpoenas in no way impacts the Plaintiffs ability to prosecute the complaints nor is the information requested likely to lead to relevant information in connection with the allegations under the complaint.

By counsel for Plaintiffs' own admission, there is not an allegation of fraud or conflict being asserted. The court finds, based upon all the facts presented, that Plaintiffs' subpoenas are clearly nothing more than a fishing expedition. The Plaintiffs have failed to provide evidence of good cause warranting the discovery sought. The court further finds that there is no basis to impose

the Mayor, Councilmember, or Board Member to deposition as the information being sought clearly goes to the heart of each party's deliberative process. There has been nothing put forward which reveal any conflict or otherwise impropriety of the Mayor, Councilmember, the planner who produced the report subject this action or Board members in their participation in this matter. Plaintiffs' claims in support of the request for discovery are comprised of nothing more than unsubstantiated, and factually unsupported allegations. There is nothing in the record which reveals that the Plaintiffs or any member of the public was denied an opportunity to address the Board or the Borough during the public hearings involved in this matter due to some corrupt or fraudulent action on behalf of any individual subject of the subpoenas.

The issue in controversy is whether the Borough or the Board's determination regarding the designation of the subject redevelopment area complies with the statutory requirements under the LRHL, Municipal Land Use Law and other statutory requirements and that issue is to be determined based upon the record established before the Board and/or Borough governing body. Without determining whether a specific privilege is applicable here, the court finds that the unredacted information sought with regard to the subject spreadsheet, email(s) and invoice(s), are irrelevant to the basic claim asserted under the subject complaints in this consolidated action. The negotiation with property owners, the Borough's negotiations with the designated redeveloper are not relevant to Plaintiff's challenge of validity of the redevelopment designation. The court is satisfied that the need to maintain confidentiality in the negotiation process at this point greatly outweighs Plaintiffs' desire to review the information based upon an unsupported theory of collusion and impropriety which has no relevance to the challenge to the designation subject of the complaints.

The court recognizes that the ultimate burden of proof for the designation under the LRHL to be satisfied is whether there was substantial evidence to support such designation. However, the Plaintiffs have not provided any information which this court finds now warrants the vast discovery sought. In fact, the court finds that the discovery sought (which is overly broad and seeks irrelevant information as to the ultimate issue for review) falls well beyond the bounds of the record below which is to be reviewed by this court and is nothing more than a means to harass and delay.

The court is satisfied that the defendants and non-party movants have provided a basis to issue a Protective Order barring disclosure of communications between and amongst the Mayor and Councilmember and the Borough/Board's planner, Brigette Bogart. There is no allegation that there was a violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. or that there a conflict of interest or impropriety with Ms. Bogart's retention or contractual duties or performance which might justify exploration of the parties' interaction. Instead, Plaintiff here is presumably seeking information regarding the preparation of and review of the redevelopment plan / designation. Again, the ultimate issue of whether the plan, and the procedure of its adoption, are in conformance with the relevant statutory criteria is to be determined upon the trial under this action in lieu of prerogative writs. Plaintiffs are not afforded the ability to reopen the hearings in this matter under the guise of discovery. To afford such indulgence would in effect subject every action of a municipal body to potentially be subject to reopening of hearings through litigation which the public and public bodies had previously believed to be final and concluded.

The court finds that Plaintiffs' arguments and posturing with regard to discovery and what was said prior to or leading up to the ultimate action of the Borough and/or Board with regard to the designation of and recommendation of redevelopment of Block 419 to be without merit as to the ultimate determination as to whether said designation of and recommendation of redevelopment complies or does not comply with the required statutory criteria. The court has not been presented with any shred of evidence which would imply that the discovery sought would impact the ultimate issue to be determined by this court. While Plaintiffs' allegations regarding whether the proper procedures were followed may prevail, that ultimate issue has yet to be determined and is left for trial. There has been nothing presented to this court which indicates that the allegations of procedural non-compliance has actually occurred or that such claims warrant the discovery now requested by Plaintiffs.

For the reasons set forth herein and based upon the argument of counsel, the motions to quash the subject subpoenas and for issuance of Protective Orders pursuant to R. 4:10-3 is **GRANTED.**