(X08) DOCKET NO: FST-CV18-6038249-S	:	SUPERIOR COURT
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REDEVELOPMENT AGENCY	:	JUDICIAL DISTRICT OF
OF THE CITY OF NORWALK, ET AL.	:	STAMFORD/NORWALK
	:	
V.	:	AT STAMFORD
	:	
ILSR OWNERS LLC, ET. AL.	:	MARCH 22, 2019

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' AMENDED MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

Defendants JASON MILLIGAN, MILLIGAN REAL ESTATE LLC, KOMI VENTURES, LLC, and WALL ST OPPORTUNITY FUND, LLC (the "Milligan Defendants"), by and through their undersigned counsel, hereby submit their Memorandum of Law in support of their Amended Motion to Dismiss Plaintiffs' Amended Complaint (the "Complaint") on the basis that Plaintiffs lack standing to prosecute their claims against the Milligan Defendants. Specifically, the Redevelopment Plan upon which the underlying Land Disposition and Development Agreement is conditioned has expired and/or has been replaced, rendering the LDA moot as a matter of law. For the reasons set forth herein, the instant Motion should be granted.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs REDEVELOPMENT AGENCY OF THE CITY OF NORWALK (the "Agency") and CITY OF NORWALK (collectively the "Plaintiffs") commenced the instant action by means of Writ, Summons, and Verified Complaint dated September 14, 2018. On or about December 18, 2018 the Plaintiffs filed their Request for Leave to Amend Complaint with their proposed Six Count Amended Complaint. On or about January 15, 2019, this Court

granted Plaintiffs' Request for Leave to Amend over the objection of all Defendants. Accordingly, Plaintiffs' Amended Complaint is the operative pleading in this matter.

On or about March 13, 2019, the Milligan Defendants filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction on the basis that the Redevelopment Plan approved in 2004 ("2004 Redevelopment Plan"), upon which the LDA was subject and conditioned, had expired as a matter of law and fact.

The expiration of the 2004 Redevelopment Plan was revealed by Tim Sheehan, the Executive Director of the Norwalk Redevelopment Agency, who testified a few days earlier that the 2004 Redevelopment Plan "expired" in June 2018. See Trial Tr. March 7, 2019, pp. 137-138. As a result, he testified, the 2004 Redevelopment Agency needed to start "from scratch" in creating a new redevelopment area, and a new redevelopment plan. See Trial Tr. March 5, 2019, p. 197.[1] Mr. Sheehan previously testified to the effect that he believed that the 2004 Redevelopment Plan was subject to the requirements of Conn. Gen. Stat. § § 8–127(c)(1) and needed to be recertified every 10 years. In fact, he testified that the Agency had formally sought an extension(s) of the ten year re-certification period, and that the last extension expired in June, 2018. See Trial Tr. March 7, 2019, pp. 137-138.

In 2016, according to the minutes and documents attached thereto, the Planning Committee proposed to re-approve the Redevelopment Plan for a period of 18 months. That passed unanimously on November 22, 2016. On December 13, 2016, the Norwalk

[1] Mr. Sheehan further was quoted in the Norwalk Hour as sating "And if the Plan expires, the plan expires. So the rights and remedies associated with that plan basically expire with the plan." (emphasis added). See https://www.thehour.com/news/article/A-new-undiclosed-proposal-emerges-from-four-days-13673874.php (last visited March 22, 2019). A copy of the Norwalk Hour article is attached hereto as Exhibit "A".

Redevelopment Agency took up the approval of the eighteen month extension, and the minutes reflect exactly the same thing, that the Agency requested that the Commission re-approve the Redevelopment Plan for a period of eighteen months. As such, the Redevelopment Plan was reapproved until June 2018. That action, in and of itself, is an Amendment to the Redevelopment Plan, as both a matter of fact, and law. The public parties took formal action, including public votes, to amend the plan, which is exactly what a Plan Amendment is, and is exactly what Tim Sheehan testified to. Accordingly, the Redevelopment Plan, as amended, has an "end date" of June, 2018. As such, Mr. Sheehan was correct in his testimony that the 2004 Redevelopment Plan expired in June 2018.

Four business days after this testimony, on March 13, 2019, the Milligan Defendants moved to dismiss the Complaint as moot, since the LDA that is the subject of this action, including the rights and remedies therein, is conditioned, predicated and intertwined with the expired 2004 Redevelopment Plan.

A. New Relevant Facts Since the Date of Mr. Sheehan's Testimony.

In the three business days between Mr. Sheehan's testimony, and the filing of the Motion to Dismiss, the Plaintiffs undertook action seeking to approve a new redevelopment plan for the Wall Street Area: the "Wall Street-West Avenue Neighborhood Redevelopment Plan", a plan larger in area and scope than the 2004 Redevelopment Plan (the "2019 Redevelopment Plan"). During that period, the new 2019 Redevelopment Plan was approved by (i) the Planning Commission, (ii) the Norwalk City Council, and (iii) the Redevelopment Agency.

In fact, the official website for the City of Norwalk expressly provides at the top under

"Recent Updates" as follows:[2]

> Recent Updates
>
> The Wall Street - West Avenue Neighborhood Plan was approved on March 13th, 2019. The Plan is available here as well as in hard copy at the Norwalk Redevelopment Agency located at Norwalk City Hall, 125 East Avenue, Room 202, Norwalk, CT 06851. The Plan consolidates, updates, and replaces the previous Wall Street Redevelopment Plan as well as the West Avenue Redevelopment Plan. (Emphasis added).

There is ample additional evidence that the 2019 Redevelopment Plan does not amend, but rather, replaces the 2004 Redevelopment Plan, including, among other things, information and documentation reflected on both the City of Norwalk's and Redevelopment Agency's websites, minutes from the Common Council, the Planning Commission, the Zoning Commission, and the Working Group. There is nothing in the 2004 Redevelopment Plan or the 2019 Redevelopment Plan that provides or reflects that the plans overlap or coexist, or that the 2019 Redevelopment Plan modifies the 2004 Redevelopment Plan pursuant to Conn. Gen. Stat. § 8-136.

To the contrary, the evidence demonstrates that the 2019 Redevelopment Plan is in accordance with Conn. Gen. Stat. § 8-127, which deals with the preparation and approval of new redevelopment plans. Additionally, the 2019 Redevelopment Plan does not reflect, reference, or incorporate the LDA or the Project reflected therein. Further, the existing Amended Complaint only references the now expired and replaced 2004 Redevelopment Plan.

As such, regardless of whether the 2004 Redevelopment Plan has expired, or whether it has been replaced, there is no longer an operative redevelopment plan to which the LDA refers, rendering the LDA moot.

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[2] See https://www.norwalkct.org/660/Wall-Street (last visited March 22, 2019).

B. Evidentiary Hearing Required Pursuant to Practice Book § 10–31(b).

Insofar as (i) the aforestated facts have all arisen in the last 14 days since Mr. Sheehan's testimony relative to the expiration of the 2004 Redevelopment Plan, and (ii) the Milligan Defendants' factual recitations herein do not constitute admissible evidence, consistent with the holding of the Connecticut Supreme Court in Schaghticoke Tribal Nation v. Harrison, 264 Conn. 829, 833, 826 A.2d 1102 (2003) and similar Appellate cases, due process requires that a trial-like hearing be held in which an opportunity is provided to present evidence relative to the Court's jurisdiction.

The Supreme Court has held, "[w]here a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. Gordon v. H.N.S. Management Co., 272 Conn. 81, 92, 861 A.2d 1160 (2004) ("[w]hen issues of fact are necessary to the determination of a court's jurisdiction ... due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses" [internal quotation marks omitted]); Schaghticoke Tribal Nation v. Harrison, 264 Conn. 829, 833, 826 A.2d 1102 (2003) (same).

Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. Lampasona v. Jacobs, 209 Conn. 724, 728, 553 A.2d 175 ("[i]n some cases ... it is necessary to examine the facts of the case to determine whether it is within a general class that the court has power to hear"), cert. denied, 492 U.S. 919, 109 S.Ct. 3244, 106 L.Ed.2d 590 (1989). An evidentiary hearing is necessary because "a court cannot make a critical factual [jurisdictional]

finding based on memoranda and documents submitted by the parties." Coughlin v. Waterbury, 61 Conn.App. 310, 315, 763 A.2d 1058 (2001). This includes the testimony of expert witnesses, if warranted. See Burton v. Dominion Nuclear Connecticut, Inc., 300 Conn. 542, 23 A.3d 1176 (2011); State v. Long, 268 Conn. 508, 519, 847 A.2d 862, 870 (2004); Pursuit Partners, LLC v. UBS AG, No. X08CV084013452S, 2014 WL 3906836, at *1 (Conn. Super. Ct. July 3, 2014); Ellenthal v. Inland Wetland & Watercourses Agency of Town of Greenwich, No. CV93-0129782 S, 1994 WL 228484, at *8 (Conn. Super. Ct. Apr. 19, 1994); Suarez v. Arias, No. FA084010513S, 2010 WL 3326799, at *1 (Conn. Super. Ct. July 23, 2010).

As such, due to the fact that a "jurisdictional determination is dependent on the resolution of a critical factual dispute", the Milligan Defendants move for an evidentiary hearing pursuant to Practice Book § 10–31(b).[3]

C. Plaintiffs' Complaint

For purposes of this Motion to Dismiss, the relevant factual allegations demonstrate that the underlying LDA and the Plaintiffs' Complaint are conditioned upon, intertwined with, or otherwise dependent upon the 2004 Redevelopment Plan, including, by way of explanation and not limitation, the approved Redevelopment Area, Project Site, Master Site Plan, and the Plan itself.

Plaintiffs allege that, in accordance with powers delegated to it under Chapter 130 of the Connecticut General Statutes, Plaintiff REDEVELOPMENT AGENCY OF THE CITY OF NORWALK (the "Agency") prepared a redevelopment plan entitled "Wall Street Redevelopment Plan" for the purposes of redeveloping approximately 67 acres in Norwalk to

[3] Practice Book § 10–31(b) provides in relevant part, "[i]f an evidentiary hearing is required, any party shall file a request for such hearing with the court."

address and materially improve substandard, deteriorated, and/or blighted conditions (the "Redevelopment Plan"). Pls.' Amend. Compl. at ¶ 9. The Redevelopment Area of the Redevelopment Plan encompasses approximately 67 acres of land in the City of Norwalk (the "Redevelopment Area"). Id. In the Redevelopment Plan, the Agency determined, in accord with the public purposes and provisions found in Chapter 130, that it would be in the best interests of the public to redevelop the Redevelopment Area to address and materially improve substandard, deteriorated, and/or blighted conditions. Id. at ¶ 10.

On May 19, 2004, the Housing Authority of the City of Norwalk reviewed the Redevelopment Plan and approved it in accordance with Connecticut General Statutes § 8-127. Id. at ¶12. The Redevelopment Plan thereafter was approved by the Agency and the Common Council for the City of Norwalk, among other various municipal agencies. Id. at ¶¶ 12-16.

On or around November 30, 2004, the Plaintiffs issued a Request for Proposals for the redevelopment of Parcel 2a including properties at the following addresses: 2, 18, 20, 21, 23, and 31 Isaacs Street, 61, 65, 71, 77, 83 and 97 Wall Street, and 717 and 731 West Avenue (the "Project Site"). Id. at ¶ 18.

On or about November 14, 2007, the Plaintiffs and Non-party Poko-IWSR Developers, LLC ("Poko") entered into a Land Disposition and Development Agreement (the "LDA") wherein Poko was designated as the approved Redeveloper for the Project Site, and both Poko and the Plaintiffs agreed to certain rights and responsibilities concerning the development of the Project Site. Id. at ¶¶ 22-23. The LDA sets forth certain rights and responsibilities of the Plaintiffs and Poko concerning the development of the Project Site in three phases, including, among other things, a phased construction process consistent with the Agency/City approved

Conceptual Master Site Plan whereby the Redeveloper would construct the Improvements in three consecutively occurring phases commonly referred to as Phase I, Phase II, and Phase III (LDA, Article III) (the "Master Site Plan"). Id. at ¶ 23.

Plaintiffs allege further that, as a modification to the LDA to facilitate acquisition and construction financing for the redevelopment, Plaintiffs and Poko entered into a Loan Recognition Agreement ("LRA"), which was thereafter amended on or about July 31, 2015 as the Amendment of the Loan Recognition Agreement (the "Amended LRA"). Id. ¶¶ 50-57. The Amended LRA, inter alia, assigns Poko's rights and obligations under the LDA relating to Phase II properties to Defendant ILSR OWNERS LLC ("ILSR"). Id. ¶ 57. Notably, Plaintiffs allege that, "[t]he LDA and Amended LRA, as written, were designed to carry out the Redevelopment Plan, as envisioned by the Agency and approved by the City and City agencies for the benefit of the citizens of Norwalk, as to the rights and obligations of each party to these agreements." Pls.' Amend. Compl. at ¶ 131. (Emphasis added).

Plaintiffs have brought a claim against Defendants ILSR for, *inter alia*, breach of the LDA. Specifically, Plaintiffs allege that that "ILSR's unpermitted transfer of the Properties to Wall St has caused, and will continue to cause, the Agency, the City and the citizens of Norwalk irreparable harm in that the redevelopment of the Wall Street area, as contemplated by the Redevelopment Plan, and as further described and negotiated in the LDA is threatened." Id. at ¶ 98. (Emphasis added).

Plaintiffs further allege that the Milligan Defendants have undertaken certain acts in violation of the LDA, including improperly attempting to circumvent the prohibited transfer clause of the LDA, demolishing one of the Properties, and taking steps to encumber and/or

improve the Properties by, among other things, executing a leasehold agreement between Wall Street, as landlord, and Komi, as Tenant, of the property at 23 Isaacs Street. Id. ¶¶ 112-121.

Notably, Plaintiffs allege that Wall Street's actions have caused, and will continue to cause, the Agency, the City and the citizens of Norwalk irreparable harm in that the redevelopment of the Wall Street area, as contemplated by the Redevelopment Plan, and as further described and negotiated in the LDA with respect to Parcel 2a is threatened. Pls.' Amend. Compl. at ¶ 121. (Emphasis added). Moreover, Plaintiffs claim that the improper conveyances of the Properties to Wall Street are an attempt to bypass and vitiate the terms of the LDA and LRA for the financial gain of ILSR, Jason Milligan and his various entities at the expense of the Redevelopment Plan and the revitalization of the Wall Street Area, as envisioned in the Redevelopment Plan. Id. ¶ 132. (Emphasis added).

Finally, Plaintiffs claim that they are entitled to preliminary and permanent injunctive relief against the Milligan Defendants on the basis that they have no adequate remedy at law because only the injunctive relief requested will protect the redevelopment of the Wall Street area, as contemplated by the Redevelopment Plan, and as further described and negotiated in the LDA. Id. ¶ 150. (Emphasis added).

D. The LDA Itself Requires an Operative 2004 Redevelopment Plan

In addition to Plaintiffs' allegations, the LDA itself expressly provides, on its face, that it cannot exist without the underlying 2004 Redevelopment Plan. Initially, certain "whereas clauses" of the LDA provide in relevant part as follows:

> **WHEREAS**, the Agency caused to be prepared a certain redevelopment plan entitled, "Wall Street Redevelopment Plan" in accordance with the provisions of Chapter 130 of the Statutes, which Redevelopment Plan as approved as hereinafter described, and as

same hereafter may be modified in accordance with the Statutes, is herein sometimes referred to as the "Redevelopment Plan" or "Plan", and

WHEREAS, the Redevelopment Plan affects a land area of approximately 67 acres located in Norwalk and denominated in the Redevelopment Plan as the Wall Street Redevelopment Plan Project Area (the "Project Area" or the "Wall Street Project Area"), which is divided into five Redevelopment Parcels, (referred to sometimes, collectively, as the "Development Parcels" or "Parcels"), including two "Tier I Redevelopment Parcels" (Parcel 2a and Parcel 3) and three "Tier II Redevelopment Parcels" (Parcel 1, Parcel 2b and Parcel 4), and…

WHEREAS, the Redeveloper has proposed to the Agency and the City a plan for redevelopment of a portion of the Wall Street Project Area consisting of property in Development Parcel 2a ("Project Site") together with related infrastructure and off-site improvements, which plan includes residential, mixed use, retail uses and parking, including replacement of the existing public parking spaces on the Isaacs Street Municipal Parking Lot and the Leonard Street Municipal Parking Lot and other improvements, within the Project Site in accordance with the Redevelopment Plan, and

WHEREAS, this Agreement sets forth the obligations and responsibilities of each of the parties hereto with respect to the implementation of the Redevelopment Plan and the construction and development contemplated within the Project Site." (Emphasis added).

Moreover, certain defined terms of the LDA specifically relate to subject Project Site parcels, which terms themselves are predicated upon the existence and operation of the 2004 Redevelopment Plan. Specifically the LDA sets forth the following relevant definitions:

i) Section 1.16, "Conceptual Master Site Plan [for the 2004 Redevelopment Plan] shall mean the site plan described as such in this Agreement, a copy of which is annexed hereto as Exhibit B and made a part hereof.";

ii) Section 1.30, "Infrastructure Improvements shall mean those public roadway and pedestrian improvements to be designed and to be newly constructed and/or to be rehabilitated, renovated, relocated and/or upgraded within and adjacent to the Project Site in order to facilitate the development of the Project.";

iii) Section 1.44, "Plan Requirements shall mean the provisions, guidelines and requirements set forth in the Redevelopment Plan with respect to development of properties subject to the Redevelopment Plan, including without limitation the requirements relating to Goals, Objectives and Strategies, Project Boundaries, Land Use, Design Standards, Streets and Utilities, Displacement and Relocation and Zoning.";

iv) Section 1.45, "Project shall mean all the activities described in this Agreement and the Redevelopment Plan to be undertaken by the Redeveloper and/or the City and the Agency within the Project Site."; and

v) Section 1.48, "Project Site or Project Property or Property shall mean the entire land area more particularly described in Exhibit D [setting forth 15 Project Site properties] attached hereto and made a part hereof (as the same may be expanded in accordance with this Agreement)."

The parties' obligations under the LDA expressly incorporate and reflect the aforestated definitions in connection with the rights and responsibilities of the owner of the Parcel Sites. These obligations are conditioned upon, and cannot be performed in connection with, a non-operative, replaced, Redevelopment Plan.

Perhaps most significantly, however, the LDA provides that the obligations of the Phase II and Phase III Redeveloper with respect to Improvements are conditioned upon the existence of the Project Site and Redevelopment Area contemplated by the 2004 Redevelopment Plan, as well as the 2004 Redevelopment Plan itself, as follows:

i) Section 2.2, "The Redeveloper shall construct on the Project Site within the time limits set forth in this Agreement, the Improvements ("Phase II Improvements") more particularly described in Section 2.2(B) below; together with surface and/or structured parking and circulation space, and appropriate landscaping and pedestrian and vehicular circulation areas, <u>which shall be developed and constructed in accordance with the Conceptual Master Site Plan, the Redevelopment Plan and the Plan Requirements</u>."; and

ii) Section 2.3, "The Redeveloper shall construct on the Project Site within the time limits sets forth in this Agreement, the Improvements ("Phase III Improvements") more particularly described in Section 2.3(B) below; together with surface and/or structured parking and circulation space, and appropriate landscaping and pedestrian and vehicular circulation areas, <u>which shall be developed and constructed in accordance with the Conceptual Master Site Plan, the Redevelopment Plan and the Plan Requirements."</u> (Emphasis added).

Further, Section 23.4 of the LDA, encaptioned "Development in Accordance with the Redevelopment Plan", requires all development under the LDA to be "in substantial conformance with the Redevelopment Plan and the Plan Requirements, as the same may be modified from time to time with the approval of the Agency (and, if required by law, the City) in accordance with this Agreement." Similarly, Part II, Section 301 expressly requires plans for Improvements to conform to the 2004 Redevelopment Plan, as do Sections 401 and 402. See Part II, Section 301, encaptioned "Plans for Construction of Improvements", which provides "[p]lans and specifications with respect to the redevelopment of the Property and the construction of Improvements thereon shall be in substantial conformity with the Redevelopment Plan, the Agreement, and all applicable State and local laws and regulations." Section 301 further requires that Construction Plans for Phases II and III shall be submitted to the Agency and Common Council "in reasonably sufficient completeness and detail to show that such improvements and construction thereof will be substantially in accordance with the provisions of the Redevelopment Plan and the Agreement."

As such, upon the expiration and replacement of the 2004 Redevelopment Plan with a new plan, which includes a new Redevelopment Area, new Plan Requirements, and a new Conceptual Master Site Plan, all of which must "start from scratch", and none of which references or incorporates the LDA therein, the LDA is rendered unenforceable and moot as a matter of law.

II. LEGAL STANDARD

"A motion to dismiss . . . 'properly attacks the jurisdiction of the Court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that

should be heard by the Court.'" Gurliacci v. Mayer, 218 Conn. 531, 544 (1991) (internal citation omitted). "The grounds which may be asserted in this motion are: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, and (5) insufficiency of service of process." Zizka v. Water Pollution Control Authority, 195 Conn. 682, 687 (1985); Connecticut Practice Book § 10-31. "Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong." Doe v. Roe, 246 Conn. 652, 661 (1998) (internal quotation marks omitted).

Mootness, however, "presents a legal question and implicates [a] court's subject matter jurisdiction, a threshold matter to resolve." Gladstein v. Goldfield, 325 Conn. 418, 424–25 (2017). "Mootness presents a circumstance wherein the issue before the court has been resolved or has lost its significance because of a change in the condition of affairs between the parties." (Internal quotation marks omitted.) Wilcox v. Ferraina, 100 Conn.App. 541, 547, 920 A.2d 316 (2007). "The test for determining mootness is not whether the [plaintiff] would ultimately be granted relief ... The test, instead, is whether there is any practical relief this court can grant the [plaintiff]." (Internal quotation marks omitted.) In re Jeremy M., 100 Conn.App. 436, 441–42, 918 A.2d 944, cert. denied 282 Conn. 927, 926 A.2d 666 (2007). A question is moot when no practical relief can follow from its determination. Furstein v. Hill, 218 Conn. 610, 627, 590 A.2d 939 (1991). "Subject matter jurisdiction must be addressed and decided whenever the issue is raised. The parties cannot confer subject matter jurisdiction on the court, either by waiver or consent." Candlewood Landing Condo. Assn., Inc. v. Town of New Milford, 1995 WL 631012

(Conn.Super.) (Pickett, J.) citing Sadloski v. Manchester, 228 Conn. 79, 84 (1993)). "Once the question of lack of jurisdiction of a court is raised, it must be disposed of no matter in what form it is presented and the court must fully resolve it before proceeding further with the case." Golden Hill Paugussett Tribe of Indians v. Town of Southbury, 231 Conn. 563, 570, 651 A.2d 1246 (1995) (internal brackets, quotation marks & ellipses omitted).

III. LAW AND ARGUMENT

The Plaintiffs' Complaint should be dismissed on the basis that it has been rendered moot by virtue of the fact that the 2004 Redevelopment Plan has expired and has been replaced. Specifically, the LDA upon which all causes of action in this case are predicated, is conditioned upon the approved Redevelopment Area, Redevelopment Plan, and Conceptual Master Site Plan, all of which are no longer operative as a matter of law.

As a threshold matter, Connecticut's Redevelopment Act, General Statutes § 8–124 *et seq.* sets forth the procedures that a redevelopment agency must follow in adopting a "new" redevelopment plan. Specifically, § 8–127 provides in relevant part as follows:

> "[b]efore approving any redevelopment plan, the redevelopment agency shall hold a public hearing thereon, notice of which shall be published at least twice in a newspaper of general circulation in the municipality, the first publication of notice to be not less than two weeks before the date set for the hearing. The redevelopment agency may approve any such redevelopment plan if, following such hearing, it finds that: (1) The area in which the proposed redevelopment is to be located is a redevelopment area; (2) the carrying out of the redevelopment plan will result in materially improving conditions in such area; (3) sufficient living accommodations are available within a reasonable distance of such area or are provided for in the redevelopment plan for families displaced by the proposed improvement, at prices or rentals within the financial reach of such families; (4) the redevelopment plan is satisfactory as to site planning, relation to the plan of conservation and development of the municipality adopted under section 8-23 and, except when the redevelopment agency has prepared the redevelopment plan, the construction and financial ability of the redeveloper to carry it out; (5) the planning agency has issued a written opinion in accordance with subsection (a) of this section that the redevelopment

> plan is consistent with the plan of conservation and development of the municipality adopted under section 8-23; and (6) (A) public benefits resulting from the redevelopment plan will outweigh any private benefits; (B) existing use of the real property cannot be feasibly integrated into the overall redevelopment plan for the project; (C) acquisition by eminent domain is reasonably necessary to successfully achieve the objectives of such redevelopment plan; and (D) the redevelopment plan is not for the primary purpose of increasing local tax revenues."

In interpreting General Statutes § 8–124 *et seq*., the Connecticut Supreme Court has held, "[s]trict compliance with each of the enumerated steps in the statute is a condition to the validity of the entire proceeding concerning a redevelopment plan." Sheehan v. Altschuler, 148 Conn. 517, 523, 172 A.2d 897, 900 (1961). The rule applicable to the corporate authorities of municipal bodies is that when the mode in which their power is to be exercised is prescribed, that mode must be followed. Jack v. Torrant, 136 Conn. 414, 419, 71 A.2d 705. Thus, failure to properly follow these statutory guidelines renders any redevelopment plan invalid. See Sheehan v. Altschuler, 148 Conn. 517, 523–24, 172 A.2d 897, 900 (Conn. 1961) ("Essential steps were not taken as required by the statute for the adoption of a redevelopment plan. The purported plan, as well as any attempted approval of it and any action taken under it, was invalid."). See Mar. Ventures, LLC v. City of Norwalk, 277 Conn. 800, 822, 894 A.2d 946, 960 (2006) ("In our decision today, we make explicit what was implicit in our decision in *Aposporos*, namely, that no renewed finding of blight is required for approval of a modification to a redevelopment plan unless the "amended" plan resulting from such modification is in fact not merely an amended plan, but a new plan." (Internal citations omitted, emphasis added).

Connecticut Appellate authority has held that where, as here, a contract refers to other documents and extrinsic materials, the terms and conditions of those documents

become part of the underlying contract. Specifically, the Connecticut Appellate Court has held, "[w]hen parties execute a contract that clearly refers to another document, there is an intent to make the terms and conditions of the other document a part of their agreement, as long as both parties are aware of the terms and conditions of the second document." Morales v. PenTec, Inc., 57 Conn. App. 419, 438, 749 A.2d 47, 58 (2000). See also Local 391, Council 4, AFSCME, AFL-CIO v. Dep't of Correction, 76 Conn. App. 15, 22, 817 A.2d 1279, 1284 (2003); (Lussier v. Spinnato, 69 Conn. App. 136, 141, 794 A.2d 1008, 1013 (2002); Espinal v. Child & Family Agency of Se. Connecticut, Inc., No. 568897, 2005 WL 834491, at *2 (Conn. Super. Ct. Mar. 14, 2005) ("It has been recognized that '[s]o long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document, including a separate document to which they are not parties, and including a separate document which is unsigned.'")[4]; Holmes v. Colorado Coal. for Homeless Long Term Disability Plan, 762 F.3d 1195, fn 13 (10th Cir. 2014) ("A document, even one that is not contemporaneous, may be incorporated by reference into a contract so long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt.") (Internal quotations omitted); Infinity Fluids, Corp. v. Gen. Dynamics Land Sys., Inc., No. CIV.A. 12-40004-TSH, 2013 WL 3158094, at *4 (D. Mass. June 19,

[4] See 11 S. Williston, Contracts (4th Ed.1999) § 30:25, p. 233-34 (Generally, all writings which are part of the same transaction are interpreted together…as long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document, including a separate agreement to which they are not parties, including a separate document which is unsigned.

2013) ("When a writing refers to another document, that other document, or the portion to which reference is made, becomes constructively a part of the writing, and in that respect the two form a single instrument."); Walker v. Builddirect.Com Techs. Inc., 2015 OK 30, ¶ 11, 349 P.3d 549, 553 ("extrinsic material is properly incorporated when the underlying contract makes clear reference to the separate document, the identity of the separate document may be ascertained beyond doubt, and the parties to the agreement had knowledge of and assented to the incorporation.").

Applying the law to the facts at hand, it is clear that the LDA cannot be lawfully enforced without reference to the 2004 Redevelopment Plan, which has expired and has been replaced as a matter of law. As will be demonstrated, insofar as there was no amendment to the 2004 Redevelopment Plan, and there is no overlap between the two plans, there is no longer an operative plan to which the LDA refers. Accordingly, Plaintiffs' causes of action have been rendered moot, and the instant Motion to Dismiss should be granted.

Additionally, to the extent that any claims remain against the Milligan Defendants for monetary damages, all such claims are predicated upon documents that no longer have legal validity, warranting the dismissal of the Complaint. At a minimum, however, the Motion for Temporary Injunctive Relief is rendered moot and should be dismissed. More specifically, Plaintiffs' claims for temporary injunctive relief are predicated on maintaining the status quo in connection with the purported development of an expired and replaced redevelopment area, redevelopment project, and redevelopment plan.

Finally, the Milligan Defendants contest Plaintiffs' argument that "Article XIV of the LDA clearly provides its duration is through July 2024 (coinciding with the 20-year life of the Redevelopment Plan)". See Plaintiffs' Opposition at p. 5. See also Section II, § 401. Insofar as the 2004 Redevelopment Plan was amended in 2016 to expire in June, 2018, the 2004 Redevelopment Plan expired, rendering the LDA moot.

IV. CONCLUSION

The Plaintiffs keep changing the playing field in the middle of the game, moving the proverbial goal posts. They first brought an Application for Pre-judgment Remedy against the Milligan Defendants predicated on the theory of fraudulent conveyance. That action, after pending for three months, was withdrawn and replaced by the current action, in which the Plaintiffs initially sought injunctive relief predicated entirely on the legal theory of specific performance. Those claim, after pending for two months, and after four days of hearings on their claim for preliminary injunctive relief, were withdrawn and substituted with new and different claims seeking similar injunctive relief. Now, the Plaintiffs have approved and passed a new Redevelopment Plan.

Each action by the Plaintiffs, however, brings with it intended, or unintended consequences. After the Director of the Norwalk Redevelopment Agency testified that the 2004 Redevelopment Plan was expired, actions were taken within days to establish and pass a new, larger, Redevelopment Plan for the Wall Street and West Avenue Neighborhoods. Whether those actions were taken in response to, or as a result of, the expiration of the 2004 Redevelopment Plan is of no import. The fact is, or will be demonstrated, that the 2004 Redevelopment Plan is expired and/or the new Plan replaces the old Plan. As such, the 2004

Redevelopment Plan is no longer operative, and the LDA, which is conditioned upon an operative 2004 Redevelopment Plan is moot. As a result of the foregoing, the instant Motion to Dismiss should be granted.

THE MILLIGAN DEFENDANTS

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EXHIBIT A

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Stalled Wall Street Place Development gets new life

By Justin Papp **Updated 9:23 am EST, Saturday, March 9, 2019**

IMAGE 1 OF 10 **Buy Photo**

Jason Milligan, owner of Milligan Realty, stands next to the mural he had painted on his building at 97 Wall Street Friday, October 19, 2018, in Norwalk, Conn. Milligan, who remains the subject of a lawsuit
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NORWALK — The city has received a plan to restart construction on the stalled Wall Street Place Development and will begin early stages of review sometime this month.

The news that Citibank affiliate Municipal Holdings LLC, the owners of the property, which is known colloquially as the "Tyvek Temple," had submitted a written proposal came during four days of hearings at Stamford Court House between developer Jason Milligan and city officials.

In June, the city filed a lawsuit against Milligan and ILSR Owners, an affiliate of

Port Chester, N.Y.-based developer POKO Partners, the former property owner, for conducting a sale of several properties within the footprint of the Wall Street Place Development that allegedly violated a Land Disposition Agreement governing the property that required Redevelopment Agency approval on any sale.

Norwalk Redevelopment Agency Executive Director Timothy T. Sheehan said the conversation would take place sometime in March in executive session, citing Freedom of Information Act Laws that allow real estate negotiations to proceed out of view of the public.

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"Assuming that there was consensus and there was support for the plan, if the plan is to move forward in terms of advancing to construction, it would have to go back to zoning and go through site plan approval, and then it would have to ultimately apply for its permitting through the building department," Sheehan explained, Thursday, after finishing the last of 8 days of cross-examination.

The property — part of "Phase One" of the redevelopment — for which preliminary plans to restart were submitted was not part of the sale to Milligan.

In May 2018, Milligan purchased 21, 23 and 31 Isaacs St., as well as 83 and 97 Wall St. from ILSR Owners, an affiliate of Port Chester, N.Y.-based developer POKO Partners, which are part of "Phase Two and Three" of the project.

The announcement **came after several months of negligence** on the part of Citibank.

In December, the city filed an injunction against the bank, citing its failure to respond to blight violations and asking for a 30-day deadline to remedy all violations. The suit also asks that Municipal Holdings pay damages and legal costs for the city for the "willful violation of the Blight Prevention Ordinance and Building Zone Regulations."

Municipal Holdings was assessed thousands of dollars in fines for failure to address the violations.

Sheehan stressed that the proposal was merely a first step toward restarting the development.

He was among several city officials cross-examined this week. Planning & Zoning Director Steve Kleppin, Chief Building Official and Blight Enforcement Officer William Ireland and Corporation Counsel Mario Coppola were also questioned.

Milligan, who has long opposed the Wall Street Place Development, said he has little faith that the development, which has been stalled since 2016, would get off the ground.

"I think there's nothing new here. This will be a big nothing-burger, this plan. I don't think it's going to work," Milligan said.

Milligan also seized on information delivered in Sheehan's testimony Thursday that the Redevelopment Agency's Wall Street Redevelopment Plan, written in 2004 and extended in 2014, had expired according to state statute as of June 2018. Sheehan said since before the former plan became expired, the Redevelopment Agency had been working to draft a new version.

"When you actually formulate the redevelopment plans, it goes through an approval process," Sheehan explained. "And if the plan expires, the plan expires. So the rights and remedies associated with that plan basically expire with the plan. You undertake the development of a new plan if you determine the area still requires the need of a redevelopment plan."

Thursday night, the Planning Commission of the Common Council was scheduled to review and possibly vote on the Wall Street-West Avenue Redevelopment Plan, which would replace the defunct Wall Street Plan.

The designation allows cities to appoint a Redevelopment Agency to seize and improve property in areas deemed “substandard, insanitary, deteriorated, deteriorating, slum or blighted."

Milligan questioned the designation for Wall Street, which he, and many others, say is not deteriorating and blighted, and speculated that the city was seeking attempting to designate the area as a means asserting more power in the neighborhood and pushing the stalled project ahead.

“You have the same exact players, Mario (Coppola) and Tim (Sheehan), trying to resurrect a thing that was on life support, died, flat lined, was legally dead, and they pulsed it back. And they're saying it's got a pulse," Milligan said. “We'll see if it's got a pulse, or if it should be in a coffin in the ground."

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CERTIFICATION

The undersigned hereby certifies that the foregoing Memorandum was sent via electronic mail this 22nd day of March, 2019 to the following counsel of record, to wit:

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