AMERICAN ARBITRATION ASSOCIATION
**Commercial Arbitration Tribunal**

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| HOUSING AUTHORITY OF THE CITY OF NEWARK,<br><br>Claimant,<br><br>v.<br><br>DEVILS RENAISSANCE DEVELOPMENT LLC and DEVILS ARENA ENTERTAINMENT LLC,<br><br>Respondents. | Case No. 18 115 01051 10 |

**AWARD**

We, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreements entered into by the above-named parties dated February 2, 2005 and January 24, 2006, and having been duly sworn, and having heard the proofs and allegations of the parties, do hereby AWARD as follows:

## I. Introduction

On June 17, 2010, Claimant Housing Authority of the City of Newark ("NHA") filed a Demand for Arbitration against Respondents Devils Renaissance Development LLC ("DRD") and Devils Arena Entertainment LLC ("DAE")(collectively, the "Devils")[1], requesting damages associated with the development and lease of a sports and entertainment arena in downtown

[1] Respondents are affiliates of The New Jersey Devils LLC, which owns the New Jersey Devils professional hockey club.

Newark, New Jersey known as the Prudential Center (the "Arena"). The NHA's claim, as amended, seeks $13,569,048 in rent for the years 2007 through 2011 (Lease years 1 through 4) and $1,606,933.43 as reimbursement for relocation (and other[2]) expenses incurred in displacing tenants and property owners to accommodate the Arena and surrounding development.

The Devils asserted counterclaims against the NHA seeking many millions of dollars in damages for the NHA's alleged breaches of various provisions of the parties' contracts and for fraud, as more fully described below. The Devils also seek a declaration or confirmation of their right to set-off these damages against its rent obligations at the Arena.

Ten days of hearings were conducted in July and October 2011,[3] chronicled in testimony from nineteen witnesses and approximately 1,900 exhibits.[4] The case was skillfully presented by counsel. Following the hearings, the parties submitted voluminous proposed findings and rulings in accordance with the schedule created by the parties, as reflected in The Stipulated Case Management Order (#5). Set forth below is the Panel's decision on the contested issues.[5]

## II. Findings of Fact

In 2002, Sharpe James, the mayor of the City of Newark (the "City") from 1986 through 2006, began serious consideration of a project to construct a sports and entertainment center in downtown Newark. The hope was that this project would serve as the centerpiece of a broader redevelopment plan that would revitalize a "blighted" area south and west of Newark

[2] In addition to relocation expenses, the NHA seeks reimbursement for a sewer fine in the amount of $41,625 imposed by the New Jersey Department of Environmental Protection. The Devils have conceded that the NHA is entitled to be reimbursed for this fine.

[3] The hearings were effectively stayed by a state court action involving some of the issues addressed in this proceeding. At the request of the parties, the hearings were continued from July to October, 2011 to allow for settlement discussions.

[4] The Devils objected to five additional exhibits included with the NHA's Post-Hearing Reply Brief. The Panel has only considered evidence submitted during the hearings.

[5] The terms of the operative Agreements require the issuance of findings of fact and conclusions of law by the Panel.

Pennsylvania Station. As one might expect, funding for such a massive undertaking was a significant hurdle.

Fortuitously, in late 2001, the City entered into a settlement agreement with the Port Authority of New York and New Jersey ("Port Authority") to resolve a lawsuit regarding the lease of land on which Newark Airport is situated. The settlement provided that the Port Authority would pay $12.5 million per year in additional rent for thirty-five years to a government entity designated by the City to be used for capital projects. The accrual of the funds commenced on January 1, 2002 upon execution of a supplement to the Port Authority lease, and two years of payments ($25 million) were placed into escrow in 2002 and 2003.

On or about June 29, 2004, the City assigned the annual rent stream from the Port Authority settlement to the NHA[6] pursuant to a Services Agreement (the "First Services Agreement"). (JX-1). The First Services Agreement also authorized and directed the NHA to securitize the remaining thirty-three years of rent payments. Specifically, pursuant to a Bond Indenture Agreement, the NHA sold $200,420,000 Port Authority-Port Newark Marine Terminal Additional Rent-Backed Bonds, Series 2004 secured by the additional rent payments by the Port Authority. (RX-931). Including interest, the NHA received approximately $220 million in aggregate proceeds for the prospective redevelopment project.

The City next began the process of designating land in downtown Newark as an "area in need of redevelopment" pursuant to the New Jersey Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 *et seq.* This area was later termed the Newark Downtown Core Redevelopment District (the "Core District"). On July 14, 2004, the City Council of Newark

[6] The NHA is a public body corporate and politic of the State of New Jersey. It is the largest housing authority in the State of New Jersey and one of the largest in the nation. The NHA administers the City's "Section 8" voucher program, which allows low-income residents to reside in privately owned housing. The NHA oversees the administration of over 8,000 low-income public housing units. The NHA is also a statutory redevelopment entity, authorized to undertake redevelopment projects that complement its low-income housing goals.

passed Resolution 7RBA, which designated the Core District as an "area in need of redevelopment" (as defined by statute).[7]

On October 6, 2004, the City (acting through its Municipal Council) passed Ordinance 6S & FF, which adopted the Newark Downtown Core District Redevelopment Plan and Amendment to the Newark Urban Renewal Plan (the "Redevelopment Plan"). The Core District under the Redevelopment Plan is comprised of approximately twenty-four acres bounded by Market Street and Edison Place to the north, Broad Street to the west, Green and Lafayette Streets to the south, and McCarter Highway and Mulberry Street to the east. At the time, the primary land use within the Core District was surface parking lots and a dilapidated shopping mall.

The Redevelopment Plan included a proposed major league sports venue to serve as a catalyst for a mixed use development that would add to the market-rate housing stock, expand the range of retail and entertainment offerings, and attract businesses. The contemplated development in the Core District included: (1) a sports and entertainment arena (18,000 seats); (2) an administration building for the Newark Board of Education; (3) retail, office, and commercial space; (4) residential units; (5) a community center; (6) a 300 room Class A hotel; and (7) ancillary parking.

The Redevelopment Plan also called for the realignment of certain streets in the Core District to improve the vehicular circulation pattern, and the linking of the Core District with mass transit at Newark Pennsylvania Station. The road realignment project, referred to as the

[7] In March 2004, Mayor James appointed a Blue Ribbon Advisory Commission to evaluate and make recommendations with respect to the proposed redevelopment plan for the Core District. The Commission was led by Dean Patrick Hobbs of Seton Hall Law School. Dean Hobbs was called as a witness by the Devils in these proceedings, and he testified credibly as to the activities of the Blue Ribbon Commission and his involvement in the subsequent disputes between the Devils and the NHA. Following numerous hearings and meetings, in a Report dated August 19, 2004, the Blue Ribbon Commission concluded that the first phase of the plan (principally the Arena and ancillary facilities) was sound and could serve as a catalyst for additional development in downtown Newark. As to the proposed deal with the Devils (discussed below), the Commission judged the terms to be "fair and reasonable when compared to similar arrangements throughout the country." (RX-7, at pp. 7-8).

"Circulation Project," was funded by a grant from the New Jersey Department of Transportation ("DOT") under an agreement dated January 1, 2002 between Essex County and DOT. (RX-1).

On October 6, 2004, the City Council passed Resolution 7RBC, which designated the NHA as the Redevelopment Entity for the Core District and authorized the City to enter into a Second Services Agreement with the NHA.[8] Resolution 7RBC also authorized the NHA to negotiate and enter into redevelopment agreements with the Devils and other entities with properties in the Core District.[9]

In order to fulfill the purposes of the Redevelopment Plan, the City needed to acquire and assemble the properties comprising the Core District, and relocate tenants. Although there were various individual property owners, approximately 95% of the land was owned by three entities: Edison Properties LLC, d/b/a Station Plaza Newark Downtown Core Urban Renewal Company, LLC ("Edison"); Lopez Properties, LLC, d/b/a Lafayette Broad, LLC ("Lopez"); and the Trustees of the Old First Presbyterian Church of Newark (the "Church").

On November 9, 2004, the City entered into a Memorandum of Agreement ("MOA") with the Devils, Edison, Lopez, and the Church. (JX-3 at p. 269). The MOA expressed the concept that the City would forego lengthy, contentious and expensive condemnation proceedings and would instead acquire the land owned by Edison and Lopez on the future Arena

[8] The City and the NHA entered into the Second Services Agreement on January 15, 2005. (JX-4). The Agreement authorizes the NHA to act as the City's agent in carrying out its redevelopment activities, and provides the NHA with indemnification rights in connection therewith. Throughout the relevant period, the evidence showed that representatives and attorneys for the City and the NHA acted interchangeably in pursuit of the redevelopment project. To further complicate matters, the NHA subsequently delegated its project redevelopment authority to an entity that it created called the Newark Downtown Core Redevelopment Corporation ("NDCRC") pursuant to a Redevelopment Agreement dated January 26, 2006. (JX-8). It appears the NDCRC was later dissolved or disbanded, and the Panel deems its cameo involvement as immaterial to the parties' rights and obligations.

[9] The City Municipal Council created an Oversight Committee to ensure that the Second Services Agreement and any redevelopment agreements entered into by the NHA were in "substantial compliance" with the Redevelopment Plan. (JX-3 at p. 205). The Oversight Committee was comprised of four members of the Council, the Mayor or his designee, the City Business Administrator, Corporation Counsel, two residents of the City, and one member of the Blue Ribbon Commission. Counsel for the NHA reviewed proposed contractual arrangements between the NHA and third parties with the Oversight Committee. (RX-925).

site in exchange for similarly-sized properties on sites adjacent to the Arena as part of a global "land swap." The Church also owned land on the Arena site and it agreed to lease certain of its property to the Devils for use as a parking garage, in exchange for similar property near the Arena.

In 2004, the City commenced negotiations with the Devils and its principals, Jeff Vanderbeek ("Vanderbeek") and Mike Gilfillan ("Gilfillan"), on a financial package that might entice the Devils to bring the hockey team to Newark (from the Meadowlands), and develop, construct and lease the Arena. The principal players in these discussions were the City's Business Administrator, Richard Monteilh ("Monteilh"), and Mayor James, and to a lesser extent, Harold Lucas ("Lucas"), the Executive Director of the NHA. The Devils were interested in exploring a move because their lease at the Continental Airlines Arena (now known as the IZOD Center) at the Meadowlands was due to expire at the conclusion of the 2007 hockey season. The Devils considered several locations across the country, and, as is customary, they analyzed the projected costs and revenues associated with different venues. Of particular relevance here, the Devils vetted their parking requirements, both from an adequacy and financial perspective, and the Devils' principals expressed these expectations to City representatives from the outset of the discussions and repeatedly thereafter.[10]

Indeed, Mayor James confirmed in his testimony the Devils insisted that sufficient parking spaces be available for fans (as had been the case in the Meadowlands). The Devils also maintained that they should receive a fair allocation of the parking revenue earned by these spaces. The evidence clearly established that parking was an important issue for the Devils, and

[10] In determining whether to come to Newark, the Devils prepared several iterations of financial models, including "base" and "aggressive" versions, which projected that the Devils would receive approximately $4-5 million in parking revenues annually in Newark. (RX-905, 906). These projections were apparently based upon the assumption that the Devils would receive a share of parking revenue from nearby parking operators in the form of a $5 per car surcharge for Arena events.

that City representatives, including Mayor James and Monteilh, continuously assured the Devils that they would share in parking revenues if they moved the hockey club to Newark.

On February 2, 2005, after extensive negotiations, the NHA and the Devils executed two of the key documents in this case - the Redevelopment Agreement ("RDA") and the Arena Lease Agreement ("Lease"). (JX-2, 3).

Generally, the RDA set forth the rights and obligations of the NHA as the statutory development entity and DRD as the designated redeveloper for the Arena site. The RDA also imposed obligations on the NHA with respect to its anticipated redevelopment agreements with other redevelopers, including Edison and Lopez.

In § 3.2 of the RDA, the parties established a "Preliminary Term,"[11] during which the parties agreed to accomplish certain conditions by a "Commitment Date, " which was initially set as July 1, 2005. To graduate from the "Preliminary Term" to the "Primary Term," the Devils were required to satisfy certain conditions precedent delineated in § 3.3(a) and the NHA was required to satisfy the conditions in § 3.3(b).

Included among the conditions precedent of the NHA was an obligation to obtain fee simple title to all parcels of land comprising the Project Site, § 3.3(b)(iii); to deliver the Site in "cleaned and cleared" condition, with all owners, occupants and tenants removed and relocated, § 3.3(b)(iv); and to execute and deliver a "Parking Agreement" by and among the NHA, the City, Edison, Lopez, Prudential Insurance Company, DAE and each Other Redeveloper "establishing procedures, rates and payments to [DAE] with respect to parking spaces in the Downtown Area," § 3.3(b)(xi).

For its part, DRD agreed, *inter alia*, as a condition precedent to the Primary Term, to obtain a legally binding financing commitment in the amount of the greater of $100 million or

[11] Capitalized terms in this Award are intended to correspond with their usage in the Agreements.

the project budget less the NHA's contribution, § 3.3(a)(i); and to obtain for the NHA's review a Guaranteed Maximum Price ("GMP") commitment from a general contractor for the Arena, § 3.3(a)(iii).

Section 6.10 of the RDA required the NHA to "cause" each Other Redevelopment Agreement with Other Redevelopers, including Edison and Lopez, to contain a "binding covenant" to run with any land transferred to the Other Redeveloper under the land swap program, committing to pay parking revenues to the Devils. Section 6.10 provides in full:

> 6.10. Parking. The Parties contemplate that there will be a minimum of three thousand five hundred (3,500) parking spaces in the Downtown Area that will be available to the public during Arena Events. The Redeveloper (or its designated Subdeveloper) shall construct, or cause the construction of, a minimum of one thousand (1,000) parking spaces[12] on the Parking Site, and shall cause such parking spaces to be completed and available for public parking not later than the Completion Date for the Arena Project. In addition, the Redeveloper and its Affiliates shall have the right, but not the obligation, to construct parking spaces on any other portion of the Project Site and shall retain all Parking Rights (as defined in the Arena Lease Agreement). The Authority shall, as contemplated by the MOA, enter into other redevelopment agreements with respect to other portions of the Redevelopment Area (each an "Other Redevelopment Agreement") with other redevelopers (each an "Other Redeveloper"), and shall cause, and such Other Redevelopment Agreements shall provide for, the construction of not less than three thousand five hundred (3,500) parking spaces (including any parking spaces constructed by the Redeveloper or its Affiliates on the Parking Site or elsewhere on the Project Site) within the Downtown Area. The Authority shall ensure that such parking spaces are completed and available for public parking not later than the Completion Date for the Arena Project. The Authority shall cause each Other Redevelopment Agreement to contain the following covenant, which shall be binding upon each Other Redeveloper that is a party thereto and its successors and permitted assigns and shall run with any land transferred to such Other Redeveloper:

[12] The 1,000 space requirement was reduced to 583 in the parties' July 16, 2007 Letter Agreement. (RX-520).

> *The [Other Redeveloper] covenants and agrees that, if at any time there are any parking spaces in the [describe area for which the Other Redeveloper has been designated as a "redeveloper"] that are made available to the public, the [Other Redeveloper] shall (a) become a party to the Master Parking Agreement dated as of _____, 200_ among the Authority, the City of Newark, Devils Arena Entertainment LLC, Edison Properties, LLC, Lopez Properties, LLC and Prudential Insurance Company (such agreement, as it may be amended, modified or supplemented from time to time, the "Parking Agreement") (either by entering into such agreement upon the initial execution and delivery thereof or by executing the delivering a counterpart to such agreement in a form reasonably satisfactory to the other parties thereto), and (b) perform all of its obligations under, and otherwise comply in all respects with, the provisions of the Parking Agreement, including, without limitation, any provisions that require the [Other Redeveloper] to (i) make such parking spaces available to patrons of the [Arena] during the periods specified therein, (ii) collect fees or other amounts from such patrons, and/or (iii) require the [Other Redeveloper] to make payments to Devils Arena Entertainment LLC or any of its affiliates.*
>
> Each Other Redeveloper Agreement shall provide that the Operator shall be a third party beneficiary of such covenant and shall have the right to enforce such covenant against the applicable Other Redeveloper. The Authority shall deliver copies of all Other Redevelopment Agreements to the Redeveloper so that the Redeveloper can confirm the Authority's compliance with this Section 6.10.

In Article VIII of the RDA, the NHA agreed to assume responsibility for certain infrastructure repairs and improvements in the Core District, including the widening and relocation of Lafayette Street, the relocation of utilities and the acquisition, design and development of an Entrance Plaza[13] where the Devils could hold events for their fans and sell souvenirs.

As to the construction of the Arena, the parties agreed that the target date for completion would be October 1, 2007, to permit testing of the Arena before the Devils hockey team opened

[13] Defined as "a paved, open space to be developed on the Entrance Plaza Site [as depicted on a plan of 8 lots on Block 164] and made available for pedestrian use." (RDA, p. 10).

the 2007 season. Specifically, the parties agreed in the RDA that the Arena Completion Date would be the date on which the project (i) achieved Substantial Completion ; (ii) satisfied the standards set by the National Hockey League ("NHL") for NHL arenas; and (iii) was available for the playing of NHL games. (RDA, p. 5).

The Lease governs the parties' rights and obligations with respect to the NHA's lease of "the Facility" to DAE and the engagement of DAE to operate and manage the Facility. The Facility is defined in § 2.1 of the Lease as "the Arena Site, the Entrance Plaza Site, the Entrance Plaza, Arena and the Arena Improvements." The Parties agreed in § 4.1 of the Lease that the term would commence (the "Commencement Date") on the day following "Substantial Completion"– the date on which the City issues a temporary Certificate of Occupancy ("TCO"). Thereafter, the Lease Year would run from July 1 of each calendar year through June 30 of the following year, with the first partial year extending from the Commencement Date through June 30 of the following year.

Under Article 5 of the Lease, DAE's Rent consists of four components: 1) a Base Rent Payment, 2) a Sports Program Payment, 3) a Job-Training Program Payment, and 4) an Additional Rent Payment. The Base Rent Payment starts at $1,000,000 for the first year; increases by $100,000 annually for the second through tenth years; continues at $2,000,000 for the eleventh through twentieth years; and then increases an additional $100,000 annually for the twenty-first through thirtieth year of the Lease. (Base Rent for any Renewal Term is set at $2,000,000 annually.)

The Sports Program Payment Amount starts at $250,000 and increases to $350,000 after the twentieth year. The Job-Training Program Payment Amount follows a similar program. The

Additional Rent Amount equals the greater of $2,000,000 or set percentages of various revenue streams (e.g. concessions, naming rights, advertising revenues, suite rents), subject to a cap.

The parties agreed in § 5.2 of the Lease that if the Commitment Date were extended by DRD beyond September 1, 2005 pursuant to § 3.2(b)(ii) of the RDA (due to failure of the NHA to assemble the land, i.e., satisfy the Land Condition), the Base Rent payment for the first year would be reduced by a specified formula.

In § 5.3 of the Lease, the parties agreed that all Rent would be subject to reduction or abatement during the period of any Untenantable Condition or Access Rights Default, and, if a Lease Year is shorter than 365 days, each of the Base Rent Payment, Sports Program Payment, Job-Training Payment and Additional Rent Payment would be reduced to:

> the product of (x) the scheduled amount of such payment, and (y) a fraction, the numerator of which shall be the number of days in such partial year, and the denominator of which shall [be] 365.

An "Untenantable Condition" is defined as either (i) the Facility being in a condition that violates NHL rules or regulations; (ii) a material portion of the Facility being restricted or otherwise unsuitable for customary usage; or (iii) the Ice or Floor being unsuitable or unsafe for its intended purpose. (Lease, p. 22). An Access Rights Default occurs when the NHA breaches DAE's Access Rights to the Facility in a manner which materially interferes with DAE's exercise of its Operating Rights. (Lease, § 6.7).

DAE is required to pay the Rent Amounts on September 1 of each year for the preceding Lease Year. The NHA has the right pursuant to § 5.4 of the Lease to audit DAE's Rent calculations. The NHA has audited the Devils for the first three years of the Lease, and has found

no material issues with the Devils' Rent calculations, which resulted in no changes to the amount owed by the Devils, although the Devils have withheld Rent based on a set-off.

With respect to parking, the NHA agreed to secure a parking agreement for the benefit of the Devils from Other Redevelopers in the Core District, which would include the covenant required by § 6.10 of the RDA. Section § 6.8.3 of the Lease provides:

> 6.8.3 Other Redevelopers. The Authority shall ensure that, not later than the Commencement Date, at least three thousand five hundred (3,500) parking spaces (including any parking spaces constructed by the Redeveloper or its Affiliates on the Project Site) are available for public parking within the Downtown Area. Furthermore, during the Term of this Agreement, the Authority shall cause (a) each Other Redevelopment Agreement to (i) contain the covenant set forth in italics in Section 6.10 of the Redevelopment Agreement, which shall be binding upon each Other Redeveloper that is a party thereto and its successors and permitted assigns and shall run with any land transferred to such Other Redeveloper, and (ii) provide that the Tenant shall be a third party beneficiary of such covenant and shall have the right to enforce such covenant against the applicable Other Redeveloper, and (b) each Other Redeveloper that has any parking spaces in the area for which it has been designated as a redeveloper to execute and deliver the Parking Agreement in the manner provided for in Section 6.10 of the Redevelopment Agreement. The Authority shall deliver copies of each Other Redevelopment Agreement to the Tenant so that the Tenant can confirm the Authority's compliance with the foregoing sentence.

The parties also agreed that the NHA would make available parking spaces in lots controlled by a Public Entity (at specified times) and that DAE would have "the right to impose fees or charges for such parking spaces as determined by [the Devils] in its sole discretion and to collect, receive and retain all gross income, revenues, and other consideration of every kind and description from such parking spaces…." (Lease, § 6.8.2).

In Article 8 of the Lease, DAE assumed responsibility for all capital work and improvements to the Arena, and it was vested with the "sole and exclusive right….to undertake

Capital Improvements to the Facility as [DAE] shall deem appropriate in its sole discretion…." To fund these improvements, the NHA agreed to establish a Capital Fund Account, in which the NHA would deposit a set amount on each Payment Date (September 1), starting at $1,000,000 in the first year, and increasing to $3,000,000 by year thirty (as set forth in Schedule 8.2). The Devils were entitled to draw from the Capital Fund to pay for improvements pursuant to a regimen set forth in §§ 8.2.2 and 8.2.3. The NHA has not deposited any monies into the Capital Fund Account.

The Parties agreed in § 9.2 of the Lease that if at any time the City or a Governmental Authority imposed an "Excess Tax," [14] the NHA would be responsible to pay the tax or, failing such payment, DAE "would have the right to deduct the amount of any Excess Tax paid by the Tenant, the Club or any other Person whose relationship with the Tenant, the Club or the Facility gave rise to the Excess Tax from the amount of Rent otherwise due…."

In § 16.10 of the Lease, the parties agreed to a "set-off" provision, which provides that DAE:

> shall have the right, in addition to any other rights or remedies it may have, and notwithstanding anything to the contrary in this Agreement, to set-off against any payments due from [DAE] to the [NHA], including any Rent, any amount that the City or the [NHA] owes to [DAE], the Club or their respective Affiliates (including any payment of Excess Taxes) and the amount of any Losses (including attorneys' fees and expenses) it incurs as a result of an Authority Default.

"Losses" is defined § 10.5.1 as:

> losses, liabilities, damages, suits, claims, judgments and expenses of any nature (including, without limitation, reasonable attorneys' fees and expenses, whether in actions between the Parties or

[14] "Excess Tax" includes any Admissions Tax which is imposed on users or patrons of the Arena in excess of the current taxes applicable to general admissions tickets and collected and remitted by DAE (or affiliates). (Lease, Appendix A, p. 9).

> actions brought by third parties . . . arising from, arising out of, or in connection with . . . any breach of, or misrepresentation in, this Agreement or any other Transaction Document[15] then in effect by [DAE or DRD].

See also Lease, § 10.5.3 (incorporating defined term of "Losses" in connection with NHA's agreement to indemnify the Devils). An "Authority Default" includes "[t]he failure of the Authority to keep, observe, or perform any of the material terms, covenants or agreements contained in [the Lease]…." (Lease, § 16.1.2 (d)).

In both the Lease and RDA, the NHA represented and warranted its ability to execute, deliver and perform its obligations under the Transaction Documents. (Lease, § 20.2; RDA, § 16.2). Additionally, the NHA affirmatively waived any claim to sovereign immunity as to disputes arising under the Agreements and agreed that its "execution, delivery and performance" under the various Transaction Documents "constitute private, proprietary and commercial acts rather than public or governmental acts." (Lease, § 17.4; RDA, § 23.3).

Contemporaneous with the RDA and Lease, the NHA pursued redevelopment agreements with Edison and Lopez to acquire their properties in the Core District and address their economic interests as redevelopers as part of the land swap contemplated by the MOA. The NHA also recognized that it was contractually required to supply a parking agreement that would satisfy the Devils' requirements. To abbreviate matters, it is sufficient to say that Edison was not receptive to the notion of paying any parking revenues to the Devils. The NHA floated the idea of Edison paying the Devils $5 per car during Arena events, but Edison immediately rejected it. Edison proposed instead that the NHA should cause the City to create an Arena Revenue District ("ARD") that would include property owners in the Core District. Under this scheme, the City

[15] "Transaction Documents" means "[the Lease], the [RDA] … and the Parking Agreement [the agreement the NHA is required to produce under § 3.3 (b)(xi) of the RDA], and all other agreements and instruments entered into in connection with or pursuant to [the Lease] or such other agreements." (Lease, Appendix A, p. 22).

would impose a surcharge on all cars parked in the Core District and the money would go toward designated purposes (but not directly to the Devils) or revert to the City. The NHA never presented to Edison any draft redevelopment agreement that included the specific covenant required by § 6.10 of the RDA and § 6.8.3 of the Lease. Ultimately, the NHA "kicked the can down the road," and never addressed in any binding way with the parking operators the NHA's parking commitment to the Devils.[16] The NHA approved the Edison (Station Plaza) RDA on July 27, 2005 by Resolution No. 05-07-27-12. (RX-54, p. 271).

By July 28, 2005, the Devils understood that the NHA had not included the RDA § 6.10 covenant in the redevelopment agreement with Edison.[17] Vanderbeek wrote to the NHA advising that the failure to include the § 6.10 covenant constituted a breach of the RDA and the Lease and that the Devils were reserving all rights and remedies. (RX-68). The Devils threatened to abandon the project if the parking situation was not resolved to its satisfaction.

In an effort to resolve the parking problem and other disputes, the parties enlisted the help of Dean Hobbs (the former Chair of the Blue Ribbon Commission) and Prudential Insurance Company's CEO, Art Ryan ("Ryan"). On August 4, 2005, Hobbs and Ryan convened an initial meeting in a boardroom at Prudential's offices, attended by Vanderbeek and Gilfillan, the Devils' attorney, Joseph Leccese from Proskauer Rose LLP, Monteilh and Glen Scotland

[16] The final Edison RDA included (as Exhibit E) an aspiration for an ARD policy that would generate revenues through various taxes and fees to be applied to expenses or improvements in the Core District, with any residual revenues reverting to the general treasury of the City. (JX-5). Compare RX-866, p. 102 (7/1/05 draft Edison RDA proposing a reduction in Devils' obligations by amount of lost parking revenue). It was apparently intended that this device would enable monies to be channeled to the Devils by the City through a parking arrangement with the NHA or the City. The NHA's extant parking obligations to the Devils were considered in a single (non-binding) sentence in Exhibit E (III) to the Edison RDA, which provides: "With this new policy in place, the various agreements between or among the City, the NHA and the Devils would be modified to provide that the financial impact to the Devils would not be materially adverse." Similar terms are contained in the Lopez RDA. (JX-9, Exh. C).

[17] The Devils knew that Edison was hostile to paying parking monies to the Devils and that the covenant would not be included in the Edison RDA. The Devils, however, never waived or released any entitlement to a parking arrangement with the NHA.

("Scotland"), the attorney for the NHA. At this meeting, the parties discussed in general terms what needed to be accomplished for the Arena project to proceed.

The parties re-assembled the following day at Seton Hall Law School and the negotiations continued with the assistance of Dean Hobbs. Ultimately, the parties settled upon the pursuit of an arrangement which would guarantee the Devils $2.7 million per year for parking revenues (a reduction in the Devils' original expectations) whether or not an ARD were implemented, and Monteilh (the City) and the NHA agreed to sign a letter codifying these and other terms. Monteilh testified that he "believed that the Devils were entitled to this revenue" and that through the proposed arrangement, "we agreed to get it for them." (10T 133:15-18). Monteilh further acknowledged that "Jeff [Vanderbeek] would have relied on" the promise of receiving parking revenue in deciding to go forward with the Arena. (10T 138:1-5). The letter was drafted initially by Scotland and is on the City's letterhead. Mayor James directed Monteilh to sign and deliver the letter on behalf of the City. The letter was also signed by Lucas on behalf of the NHA. This letter (JX-6), dated August 5, 2005, is referred to by the parties as the "Parking Letter" and provides, in relevant part:

> The Authority and the City acknowledge, however, that the establishment of the Arena revenue district[18] is not a certainty and that, if the district is not established, the Devils and the Arena Operator will need to recoup this $2.7 million in expected revenues annually. The Authority and the City are fully committed to developing, in consultation with the Devils, a mechanism (which will, in all likelihood, require an amendment to the Devils RDA and/the [sic] Arena Lease Agreement between the Authority and Arena Operator (the "Devils Lease")) by which the Arena Operator will realize such revenues in the event the district is not implemented.

[18] As previously noted, the Arena Revenue District (ARD) was the concept advanced by Edison by which a parking surcharge or other revenue raising devices could be implemented by the City and used to distribute monies to the Devils in satisfaction of the NHA's contractual obligations to the Devils.

> In order to execute the Station Plaza RDA, the Authority and the City must be comfortable that the Authority and the Devils will work cooperatively to reach a solution regarding these expected parking revenues that is consistent with the Station Plaza RDA and satisfies the conditions specified in Sections 3.3(a)(viii) and 3.3(b)(xi) of the Devils RDA.[19]
>
> Accordingly, each of us will meet, discuss and negotiate in good faith, between now and the Commitment Date (as defined in the Devils RDA and as it may be extended in accordance therewith), with respect to an amendment to the Devils RDA and the Devils Lease or other mutually acceptable arrangement that (i) provides that the implementation of the district will not have an adverse impact on the Devils, the Arena Operator and their patrons (whether as a result of increased taxes or otherwise), (ii) guarantees that the Arena Operator receives the annual $2.7 million payments whether or not the district is implemented, and (iii) resolve any other differences with respect to the parties' expectations.
>
> While we are hopeful that we can resolve these issues through our continued cooperation, in the event we do not reach an agreement on such an amendment or other arrangement by the Commitment Date, then at all times on and the following the Commitment Date each of the Devils and the Authority will have and may exercise any and all rights and remedies available to it under the Devils RDA (including the parties' respective rights to terminate the Devils RDA for failure to satisfy the conditions in Sections 3.3(a)(viii) and 3.3(b)(xii)). Nothing in this letter shall be deemed to waive any party's rights under the Devils RDA.
>
> If the terms set forth in the two preceding paragraphs are acceptable to the Devils, please execute the acknowledgement set forth below and return it to the undersigned at your earliest convenience. Thank you for your hard work and cooperation in this matter and we look forward to proceeding aggressively to bring this project to fruition.

As of July 1, 2005, the Commitment Date set in the RDA, the preconditions for the commencement of the Preliminary Term had not been satisfied. On July 31, 2005, the NHA and the Devils executed a letter agreement extending the Commitment Date to September 1, 2005 (the "Letter Agreement"). (RX-70). Pursuant to ¶ 2(ii) of the Letter Agreement, DRD reserved

[19] The Edison RDA was executed on August 5, 2005, the same day as the Parking Letter.

its right under § 3.2(b)(ii) of the RDA to extend the Commitment Date by way of written notice for a period of not less than 30 days if the Land Condition had not been accomplished.

The Land Condition included the responsibility of the NHA to obtain fee simple title to the land on which the Arena would be situated and to deliver this land in "cleaned and cleared" condition. As of October 31, 2005, the Land Condition had not been met because the NHA had not acquired fee simple title to all the parcels of land and delivered the land in cleaned and cleared condition.[20] Accordingly, pursuant to ¶ 2(ii) of the Letter Agreement and § 3.2(b)(ii) of the RDA, on October 31, 2005, DRD extended the Commitment Date to November 30, 2005. (RX-121).

Beginning in or about December 2005, the NHA became anxious about the ability of the Devils to provide their financing commitment pursuant to § 3.3(a)(i) of the RDA. On December 27, 2005, Lucas sent a letter to the Devils purporting to terminate the RDA due to the failure of the Devils to obtain financing. (RX-143). In response, Vanderbeek argued that ¶ 2(ii) of the July 31, 2005 Letter Agreement and § 3.2(b)(ii) of the RDA permitted the Devils to unilaterally extend the Commitment Date if the Land Condition had not been satisfied and that the Devils were only required to provide financing as of the (extended) Commitment Date. (RX-144). The Devils extended the Commitment Date under the terms of the Letter Agreement to December 30, 2005.

At another impasse in January 2006 regarding the Devils' portion of the financing for the Arena, the conditions for the Commitment Date and the still elusive parking plan, the parties returned to Dean Hobbs and Ryan. Another meeting was held, at which several issues were

[20] The NHA finally acquired title to all land on the Arena Site two years after the original deadline, when the land swap with Edison, Lopez and others closed in July 2007.

discussed, including satisfaction of the Land Condition and the removal of utilities on Lafayette Street, the Devils obtaining a letter of credit, and, of course, the parking agreement.

As to the utilities, the former Lafayette Street was to be relocated as a part of the Circulation Project. This was important to the construction of the Arena because former Lafayette Street ran through the Arena footprint and the Arena could not be completed until Lafayette Street was moved (straightened). Lafayette Street also sat on top of a number of vital utilities, including a Verizon duct bank and PSE&G lines that would have to be removed and relocated as part of the project.

As to parking, the City and the NHA had not produced a specific parking agreement or fulfilled the requirement in the Parking Letter to develop a parking plan that would provide the mechanism for the Devils to receive $2.7 million in parking revenue annually.[21] By this time, however, the parties had already expended significant amounts of time and money on the project. Accordingly, on January 24, 2006, the parties executed an agreement regarding the conditions precedent set forth in the RDA called the Agreement Regarding Commencement of Primary Term, or the Primary Term Agreement (the "PTA"). (JX-7).

The PTA either acknowledged the satisfaction of, or waived, the conditions precedent to the commencement of the Primary Term as defined in the RDA. In § 2(A)(i) of the PTA, the Devils committed to producing an irrevocable standby letter of credit in the amount of $100 million within one business day after having received a certified resolution from the NHA that the PTA had been authorized. In § 2(B)(v), the Devils waived the condition that the Arena Site, including Lafayette Street, be delivered to the Devils by the Commitment Date in exchange for a

[21] Monteilh testified that among "the many things on [his] plate at the time" the parking issue "didn't get the attention it should have gotten in retrospect." (10T 138:13-16).

promise that the former Lafayette Street would be cleaned and cleared, and all utilities removed and relocated, by May 1, 2006.

The parties agreed that because damages as a result of the failure to deliver a cleaned and cleared Lafayette Street would be difficult to calculate, such a failure would result in liquidated damages in the amount of $20,000 for each day after May 1, 2006 that the former Lafayette Street was not delivered in proper condition, up to a maximum amount of $2,000,000, unless the Devils were able to achieve the Arena Completion Date by October 1, 2007, in which case no liquidated damages would be assessed.

In § 2(B)(xi) of the PTA, the Devils waived the parking agreement condition set forth in § 3.3(b)(xi) of the RDA in exchange for a promise by the NHA to use its "best efforts" to develop a "Satisfactory Parking Plan," and absent such a Plan, to arbitrate the terms of an "appropriate arrangement." Section 2(B)(xi) provides:

> In consideration for the waiver by the Redeveloper of the condition set forth in Section 3.3(a)(xi) [sic 3.3(b)(xi)] of the RDA, the Authority agrees to use its best efforts to develop a plan (a "Satisfactory Parking Plan") for parking in the Downtown Area that (a) is acceptable to the Parties (each in its sole discretion), (b) has no adverse impact on the Redeveloper, the Operator or their patrons (whether as a result of increased taxes or otherwise, unless approved by the Redeveloper), and (c) is consistent with the terms and principles of the letter from Richard Monteilh, Business Administrator of the City of Newark and Harold Lucas, Executive Director of the Authority, to Jeffrey Vanderbeek, President and Chairman of the Redeveloper, dated August 5, 2005 (the "Parking Letter"). In the event the Parties do not approve in writing a Satisfactory Parking Plan by October 1, 2006, the Authority and the Redeveloper shall each submit to binding arbitration before a sole arbitrator[22] who will be selected pursuant to the procedures set forth in Section 15.3 (a) of the RDA (except that the arbitrator shall not be required to have experience in the design or construction of projects), whereby the arbitrator shall determine the terms of an appropriate arrangement among the Redeveloper and the Authority (and if applicable, the City) regarding parking

[22] Later changed to this Panel.

> and the allocation of parking revenues that is consistent with the terms of Section 6.10 of the RDA, Section 6.8 of the Arena Lease Agreement and the Parking Letter. Such arbitration shall be conducted in accordance with the procedures set forth in Section 15.3 of the RDA. Any award rendered by the arbitrator pursuant to this Section 2.B(xi) shall be final and binding upon the Redeveloper and the Authority and non-appealable, and a judgment of any court having jurisdiction may be entered on such award. If the Redeveloper requests, the Authority shall use its best efforts to cause the City to become a party to such arbitration. Notwithstanding anything to the contrary in this Agreement, if the City refuses, Redeveloper shall be entitled, in lieu of arbitration, to bring an action in a court of competent jurisdiction. Nothing in this Agreement shall constitute a waiver by any party of any of its rights under the RDA, the Arena Lease Agreement, the Parking Letter or any other Transaction Document with respect to any matters relating to parking, the Parking Agreement or any parking revenues and the parties' rights and obligations under the Parking Letter shall not be adversely affected or terminated by virtue of the execution of this Agreement or the Commitment Date having occurred.

In § 3 of the PTA, the parties acknowledged and agreed that the RDA Preliminary Term expired on and the Primary Term commenced on January 24, 2006, and that "all notices and other communications delivered by the [NHA] purporting to terminate the RDA are void ab initio and shall have no effect."

In § 9 of the PTA, the parties incorporated by reference § 17.14 of the RDA, in which, among other things, the NHA waived any claim of sovereign immunity, and agreed to be treated as a commercial entity for purposes of these Agreements. Additionally, in § 4 of the PTA the parties agreed that in the event of any conflict between the RDA and the PTA, the PTA would control.

On January 26, 2006, the NHA passed Resolution No. R-06-01-26-19, authorizing the execution of the PTA. (RX-893). On January 30, 2006, one business day after the passage of the NHA resolution authorizing execution of the PTA (which occurred on a Friday), the Devils

delivered a $100 million irrevocable standby letter of credit in favor of the NHA from CIT Group. (NHA-502).

In May 2006, Mayor James announced that he would not be seeking re-election and the political will behind the project began to dissipate. The favorite to be the next mayor, Cory Booker, had publicly denounced the Arena project. Upon his election, Mayor Booker commissioned the law firm Florio, Perrucci, Steinhardt & Fader, to issue a report (the "Fader Report")(RX-870) to provide:

> a comprehensive and factual outline of: the Arena Project; the contractual agreements in place; the vehicular and pedestrian circulation projects that are part of (or essential for the success of) the Arena Project; the monies spent to date on the Arena Project and the various circulation projects; the additional monies needed to complete these projects, as well as a discussion of the risks, challenges, and concerns regarding same; and a discussion of the various options available at this time to the City. (Fader Report, p. ii).

The Fader Report, dated October 27, 2006, was largely critical of the project, but concluded that it had passed "the point of no return." The Fader Report opined that the RDA and the Lease were enforceable Agreements and that if the Booker administration attempted to terminate the project, "[i]t is likely that a court, under these Agreements, would order the public entities to specifically perform the contract." The Fader Report recommended, however, that the new administration attempt to "renegotiate" the terms of the Agreements between the Devils and the NHA.

As previously noted, under § 5.1 of the RDA, the NHA was responsible for acquiring title to the parcels necessary for construction of the Arena. With respect to land acquired through condemnation, payment came from the Construction Fund, and DRD was responsible for amounts above the $220 million public contribution. In § 5.5(d)(iv) and (x), the NHA agreed to

diligently pursue condemnation actions before commissioners appointed by the New Jersey Superior Court, and, to the extent so directed by DRD, to pursue appeals of any award made by the commissioners. In § 5.5(d), the NHA agreed that "[n]otwithstanding anything to the contrary in [the RDA], in the event the Authority commences an Eminent Domain proceeding or takes any other action with respect thereto without the written consent of the Redeveloper, the Redeveloper shall not be responsible for any Site Costs incurred as a result thereof, and such Site Costs may not be paid or reimbursed from the Construction Fund." As to the funding of acquisitions, in § 5.5(e) of the RDA, the NHA agreed that the Devils "shall not be required to sign or submit any Joint Requisition if," *inter alia*, the NHA "failed to take any action specified in clauses (i)-(iv) or (x)(z) of Section 5.5(d)[dealing with condemnation procedures], if and to the extent requested by the Redeveloper."

Regarding the relocation of tenants, in § 5.5(f), the NHA undertook to pay for the relocation of tenants living in properties acquired for the project under New Jersey law and agreed that it would not make relocation payments in excess of amounts budgeted for such relocation without the authorization of the Devils.

In or around April 2005, an initial budget was provided by attorneys at Scotland's law firm, and the Devils took these numbers as the baseline for budgeting acquisitions and relocations at the Site. The parties then met on a regular basis to discuss the funds that were expected to be consumed in acquiring properties.

The parties dispute the NHA's compliance with these property acquisition and relocation provisions, as more fully discussed in the Panel's rulings of law below.

While the NHA was attempting to acquire properties on the Arena Site, the NDCRC, in conjunction with the City, was pursuing the Circulation Project, the process of realigning the

streets in the Core District. The NHA was funding the Circulation Project through a grant from the New Jersey DOT, which was capped at $30 million, an apparently arbitrary number. The Fader Report estimated that there would be an $18 million shortfall to complete the Circulation Project.

Initially, when construction of the Arena was contemplated, the parties agreed that the land comprising the Arena Site would be acquired and cleared for construction by the NHA no later than the summer of 2005. This goal was not met, due in part to the delays by the NHA in acquiring the land and relocating tenants. As such, the Devils were required to begin construction on part of the Arena Site, while existing structures remained on other areas.

Additionally, as part of the Circulation Project, Lafayette Street was realigned and Mulberry Street was widened. Ultimately, under the PTA, the NHA agreed to provide the Devils with former Lafayette Street in a cleaned and cleared condition by May 1, 2006. The PTA required that as part of the process of "cleaning and clearing" Lafayette Street, "all utilities located" underneath would be relocated. One of these utilities was a critical duct bank owned by Verizon. In February 2006, the various parties met to develop a plan to work around the Verizon Duct. Eventually, it was determined that instead of removing the Verizon duct bank, a protective concrete encasement would be built around the duct to protect it from vibrations from the construction. The Verizon duct bank was removed in or around May 2007 when asbestos abatement work was completed. These and other construction delays and issues are further considered by the Panel in its rulings of law below.

On October 19, 2007, City officials granted a (limited) TCO for the purpose of a media event, and, on October 20, 2007, the City issued a second TCO for other portions of the Arena.

On October 25, 2007, the Arena opened to the public and hosted a Bon Jovi concert.

On October 27, 2007, Dan Craig, an official from the NHL, inspected the Arena to ensure that it was "hockey ready." After testing the ice, netting, and dasher boards, Craig signed off on the playing of hockey shortly before the start of the game. The New Jersey Devils hosted their first NHL hockey game in the Arena on October 27, 2007. (A disappointing debut as the Devils lost 4-1 to Ottawa.)

Under § 4.1 of the Lease, the Lease Term began the day after Substantial Completion, i.e., the day after the TCO was issued on October 19, 2007, or October 20, 2007.[23] As of that date, the NHA had not delivered the entire Entrance Plaza, and indeed, did not own all of the land comprising the Entrance Plaza Site. Instead, the NHA delivered a "Temporary Entrance Plaza" that enabled the use of approximately 25% of the Entrance Plaza Site. On or about July 16, 2009, the NHA (NDCRC) obtained title to the last parcel of land encompassing the Entrance Plaza Site. On October 30, 2009, Birdsall Engineering notified the NDCRC and the Devils that construction of the Entrance Plaza had been completed as of that date. (RX-766).

On January 6, 2010, the City passed Ordinance 6PSFH, imposing a five (5%) percent surcharge on tickets for major places of amusement. (RX-777). The Ordinance, effective April 1, 2010, applied to events at the Arena, and DAE and its affiliate, New Jersey Devils LLC ("NJD"), were notified by the State that they were required to remit such taxes to the State. (RX-793, 836, 837). In 2010, DAE and NJD paid $742,953.35 to the State under the ticket surcharge Ordinance. (RX-811). On September 1, 2010, the City repealed the ticket surcharge Ordinance. (RX-808). The Devils claim a right to set-off from any Rent owed to the NHA the amounts paid under the Ordinance (as "Excess Taxes") by the Devils or NJD.

[23] The Panel addresses below the dispute between the parties as to whether the TCO dated October 19 or the TCO dated October 20 should be considered the operative trigger for Substantial Completion.

Each Lease Year runs from July 1 to June 30 of the following year; however, because the Commencement Date occurred on October 20, 2007, the first Lease year was 255 days long. Pursuant to § 5.3 of the Lease, the Rent is reduced by "a fraction, the numerator of which shall be the number of days in such partial years, and the denominator of which shall be 365." The "proration factor" per this formula is 255/365, or 0.698630.

Additionally, the parties agreed in § 5.2 that in addition to any other reduction or abatement, if the Commitment Date was extended by DRD beyond September 1, 2005 pursuant to § 3.2(b)(ii) of the RDA, the Base Rent payment for the first year would be reduced by a set formula:

> the product of (x) $12,500,000 and (y) a fraction, the numerator of which shall equal the lesser of (A) the aggregate number of days by which the Commitment Date is extended beyond September 1, 2005, and (B) the aggregate number of days between October 1, 2007 and the Arena Completion Date, and the denominator of which shall be 360.

Because the Commitment Date was extended by DRD past September 1, 2005, the Devils claim that the Base Rent Payment is reduced by the product of $12,500,000 and 26 (the number of days between October 1, 2007 and the Arena Completion Date, October 27, 2007) divided by 360, or $902,778. According to the Devils' calculations, the Base Rent for Year One was (-$209,628). The Devils claim the right to carry over $209,628 to the following year, effectively making the first year Base Rent Payment $0.

The Sports Program Payment for Year One was $250,000 reduced by the Devils' proration factor to $173,288. The Job-Training Payment for Year One was $250,000 reduced by the Devils' proration factor to $173,288. The Devils made these Payments.[24]

[24] The Devils' payments were based on a proration factor of 253/365, or 0.6931506. (RX-701).

The Lease requires that certain revenue earned by DAE be considered for Additional Rent in the event they exceed a $2,000,000 floor. (Lease, § 5.1(d)). Because the applicable percentage of revenues in Year One was $1,767,680, which is less than $2,000,000, the Devils claim the scheduled amount for the Additional Rent Payment for the first Lease Year should be $2,000,000 reduced by the proration factor. The parties disagree as to whether the Additional Rent for the first Lease Year should be a prorated portion of $2,000,000, or the actual revenues produced during the partial year under the revenue-sharing component of Additional Rent ($1,767,680).

During years two through four of the Lease, the Lease provides that the Rent Payments were as follows:

a. The Base Rent Payment was $1,100,000, $1,200,000 and $1,300,000, respectively;

b. The Sports Program Payment was $250,000/year;

c. The Job-Training Payment was $250,000/year;

d. The Additional Rent Payment was $2,000,000/year.[25]

The Devils have not made these payments, asserting a set-off right.

One final note on parking: Devils Broad Street LLC ("DBS") is a single-purpose entity responsible for the financing and maintenance of the Devils' parking garage. As part of its operations, DBS maintains contractual arrangements with other parking operators in the area to ensure that sufficient spots are available during Arena events. While DBS receives a marginal profit on each space that is actually sold, DBS pays a license fee for each spot regardless of whether it is sold.

[25] The Additional Rent for year four remains subject to audit by the NHA, although the issue may now be moot.

As to DBS's operation of the Arena parking garage owned by the Devils, DBS pays a number of expenses relating to its operation, including parking taxes, property taxes, utility costs, labor costs, and rent to the owner of the land on which the garage sits, the Church.

Regardless of whether these arrangements are profitable for the Devils or DBS (and the testimony established that they probably are not), the Panel deems DBS's parking arrangements as distinct from the contractual issues between the Devils and the NHA, and immaterial to this Award.

Finally, the Panel observes that the parties and their highly competent counsel have characterized the parties' course of dealings in a manner most supportive of their respective positions. In the case of the NHA, it disparages the Devils as "greedy" developers unmindful of the substantial public contribution to the Arena project. The Devils, in turn, point to their efforts to foster a "renaissance" in downtown Newark, and the serial "misrepresentations" of City and NHA officials. As is often the case, there are shades of grey here. This proceeding is unusually complex – it is, in essence, a large construction case layered on top of a commercial lease, municipal finance and property development dispute. Ultimately, the parties' claims have been adjudicated by the Panel in accordance with the terms of the operative documents and the evidence, as is our charge, and without regard to the parties' characterizations of motives.

## III. Rulings of Law[26]

### 1. The NHA's Rent Claim

The NHA claims that the Devils (DAE) owe Rent for years one through four, as summarized in the following chart:

[26] Sections below include additional findings of fact as required for the disposition of the parties' claims.

| Lease Year | Base Rent | Sports Program | Job-Training Program | Additional Rent | Total |
|---|---|---|---|---|---|
| #1 (2007-08) | $ 698,630.00 | $ 174,657.00 | $ 174,657.00 | $ 1,767,680.00 | $ 2,815,624.00 |
| #2 (2008-09) | $ 1,100,000.00 | $ 250,000.00 | $ 250,000.00 | $ 2,000,000.00 | $ 3,600,000.00 |
| #3 (2009-10) | $ 1,200,000.00 | $ 250,000.00 | $ 250,000.00 | $ 2,000,000.00 | $ 3,700,000.00 |
| #4 (2010-11) | $ 1,300,000.00 | $ 250,000.00 | $ 250,000.00 | $ 2,000,000.00 | $ 3,800,000.00 |
| Sub-total | $ 4,298,630.00 | $ 924,657.00 | $ 924,657.00 | $ 7,767,680.00 | $ 13,915,624.00 |
| Less Amount Paid | | | | | ($ 346,576.00) |
| Net Amount Due | | | | | $ 13,569,048.00 |

The Rent due under the Lease for years two through four is undisputed by the parties (except to the extent that the Devils assert a right of set-off for all Rent due based upon the counterclaims at issue), and therefore this discussion pertains to the amount of Rent due for year one (2007-2008).

The NHA claims that the Additional Rent Payment for year one should be the actual revenues earned ($1,767,680) under the revenue-sharing formula set forth in § 5.1(d) and should not be the prorated portion of $2 million. The Devils argue that the Lease unambiguously provides that Additional Rent is the greater of $2 million or the revenue-sharing figure, which amount should then be prorated pursuant to § 5.3 of the Lease.

Additional Rent is defined in the Lease as the greater of $2 million or the sum calculated by the revenue-sharing formula. (Lease, § 5.1(d)). However, in the case of a partial year, § 5.3 of the Lease provides, in pertinent part, that:

> If any Lease Year shall be shorter than 365 days, each of the Base Rent Payment, Sports Program Payment, Job-Training Payment and Additional Rent Payment shall be reduced to the product of (x) the scheduled amount of such payment, and (y) a fraction, the numerator of which shall be the number of days in such partial year, and the denominator of which shall [be] 365.

Notwithstanding the plain language of § 5.3 that the "scheduled amount" of all Rent due under § 5.1 "shall be reduced," the NHA argues that the scheduled amount of the Additional Rent is the revenue-sharing experience because that was greater than a prorated portion of $2 million, and that the revenue-sharing number should not be prorated because as the actual revenue during the shortened first year it is, in essence, already a prorated number. Under the NHA's construction, the Additional Rent Payment would be the actual revenue-sharing number of $1,767,680 (as opposed to the $2 million floor reduced by the proration factor of 0.698630 to $1,397,260, as the Devils argue based upon the explicit terms of § 5.3).

The Panel disagrees with the NHA's position. Section 5.3 of the Lease is unambiguous and we are compelled to follow its terms. Simply put, § 5.3 calls for the proration of the scheduled amount of all Rent Payments, and under § 5.1(d) the scheduled amount of the Additional Rent Payment to be prorated is the greater of $2 million or the revenue-sharing number. We discern no compelling logic in exempting Additional Rent from the express requirements of § 5.3.

Next, the NHA's Rent claim for the first year of the Lease is based upon the calculation that this partial year was for 255 days because a TCO was issued on October 19, 2007, which the NHA contends was Substantial Completion under the Lease. Substantial Completion is defined (as applicable here) as the date the City issued a TCO. (Lease, § 4.1). Substantial Completion triggers the Commencement Date of the Lease. Section 4.1 of the Lease sets the term of the Lease and indicates that the Devils' Operating Obligations (the Commencement Date) shall start

at 12:01 a.m. on the day following Substantial Completion. Therefore, according to the NHA, the Commencement Date is October 20, 2007, and the first year was for the period October 20, 2007 through June 30, 2008, or 255 days.

The Devils argue that the first TCO (October 19, 2007) only existed for one day to accommodate a media event, and should not trigger the Commencement Date of the Lease. Instead, the Devils maintain that the TCO that was issued on October 20, 2007 and was valid for sixty days pursuant to the New Jersey Uniform Construction Code triggered the Commencement Date as of October 21, 2007, which would make the partial year 254 days.

There is no dispute that the Commencement Date is the day following the issuance of a TCO. Neil Midtgard ("Midtgard"), the City's construction official, testified that the TCO of October 19, 2007 was valid for sixty days pursuant to New Jersey State Code, with a deadline to meet certain conditions by December 18, 2007. (11T 33:22-23; NHA-439A (the TCO noting a compliance date of December 18, 2007)).

The Panel concludes that the October 19, 2007 TCO was sufficient to trigger Substantial Completion and hence the Commencement Date on October 20, 2007. The Panel finds that the first Lease year was 255 days, resulting in a proration factor of 0.698630 for purposes of calculating the Rents for the first year. As a result, the first year Rent is as follows: the Base Rent Payment is $698,630 (Base Rent of $1,000,000 prorated by 0.698630)[27]; the Sports Program Payment is $174,657 ($250,000 prorated by 0.698630); the Job-Training Program Payment is $174,657 ($250,000 prorated by 0.698630); and the Additional Rent Payment is $1,397,260 ($2,000,000 prorated by 0.698630). The total Rent calculation for year one is therefore $2,445,204.

By way of summary, DAE shall pay Rent to the NHA as follows:

[27] The Panel addresses below the Devils' claim for a reduction or abatement of Base Rent under § 5.2 of the Lease.

| | | |
|---|---|---|
| Year One: | As Calculated Above | $2,445,204 |
| Year Two: | Stipulated | $3,600,000 |
| Year Three: | Stipulated | $3,700,000 |
| Year Four: | Stipulated | $3,800,000 |
| Total Rent Due to the NHA: | | $13,545,204 |
| Less: Rent Paid by DAE: | | ($346,576) |
| Rent Award to the NHA: | | $13,198,628 |

**2. The NHA's Claim for Reimbursement of Relocation Expenses**

The NHA seeks reimbursements in the total amount of $1,606,933.43, which includes tenant relocation expenses of $1,166,296.44 and associated attorneys' fees of $440,636.99.

A. **Property Relocation Expenses**

The NHA's arbitration demand seeks reimbursement for expenses associated with six properties:

| **Tenant** | **Relocation Expense** |
|---|---|
| 1. Iandor Fine Arts, a/k/a Tarin Fuller | $551,311.89 |
| 2. Multicolor Corp., a/k/a Jorge Aguayo | $245,227.46 |
| 3. Newark Metametrics | $123,381.71 |
| 4. Sumei Multidisciplinary Art | $134,372.75 |
| 5. Youth Development Clinic | $ 9,564.00 |
| 6. William Mikesell & Associates | $102,438.63 |
| **Total** | $1,166,296.44[28] |

At the outset of the hearings, the Devils withdrew their objections to four of the above claims (nos. 3-6 above), totaling $369,757.09, leaving only the expenses for Iandor Fine Arts ("Iandor") and Multicolor Corp. ("Multicolor"), totaling $796,539.35, at issue, plus the disputed attorneys' fees. (NHA-647).

Under § 5.5(f) of the RDA, the NHA was required to "remove and relocate any owners, tenants ... in accordance with the Relocation Assistance Act of 1971, *N.J.S.A. 20:4-1, et seq*.; provided, that the [NHA] shall not make any payment to any owner ... in excess of the amount

[28] These expenses include searching for replacement locations, moving and storage fees, professional fees, and reimbursement for loss of personal property.

budgeted for removal and relocation expenses for such Project Parcel under the Site Budget, unless, ... (ii) the [NHA] is compelled to make such payment by a court of competent jurisdiction in connection with an Eminent Domain proceeding approved by the Redeveloper ...."

The process for the NHA to obtain reimbursement for out-of-pocket Site Costs is outlined in § 5.9 of the RDA. In summary, the NHA was required to submit a Joint Requisition to DRD for any Site Costs, and DRD had five days to sign and deliver the Joint Requisition to a trustee for payment to the NHA from the Construction Fund, provided that DRD had the right to dispute "whether the costs and expenses for which the Authority is seeking reimbursement are Site Costs" and proceed to the Expedited Arbitration Process, and DRD also had the right not to sign or deliver the Joint Requisition if it was "contesting the Authority's characterization of such costs and expenses as Site Costs by appropriate proceedings ...." (RDA, § 5.9 (a)).

The Devils contend that the NHA was required to obtain written approval from the Devils for the Iandor and Multicolor relocation costs and that it failed to do so. The Devils' principal argument in this regard is that it is not responsible for relocation costs that exceeded amounts in the Site Budget to be prepared by the Devils (as defined in § 5.1(c) of the RDA). Although there was no evidence of an actual "Site Budget" as defined in the RDA, the Devils contend that DRD representatives met weekly with the NHA to discuss line items on various budget spreadsheets, and that these spreadsheets were sufficient for the NHA to know the limits of its authority. (RX-476, p. 16; 2T 268:4-275:5). The NHA contends that the so-called Site Budget (apparently RX-94 or its ancestors) did not comply with the requirements of § 5.1 (c) of the RDA because it did not include all the required elements of the Site Budget or all of the necessary properties' costs, amongst other deficiencies.

The NHA is correct that none of the proffered spreadsheets comply with the requirements of § 5.1 (c). The "Draft 3/15/05" budget (RX-27) is, as its name suggests, only a "draft" and does not include Multicolor. The estimate for Iandor was also grossly understated. David Steinfeld ("Steinfeld"), the financial analyst for the Devils, conceded these points. On a subsequent "draft budget" (RX-26), the appraisal values, in addition to other budgeted amounts, were missing for the disputed properties. (RX-26 at 19-20). Additionally, the budget dated 9/7/05 did not include Iandor**.** (RX-94). Steinfield confirmed that not every property was included in what the Devils now argue was the Site Budget, and that the Devils never sent the Site Budget to the NHA. (2T 302:3-305:25).

Most importantly, it is apparent from the testimony and the acquisition and relocation regime set forth in the RDA that the parties were to work together to acquire properties and relocate tenants. The frequent meetings between the parties demonstrated to the Panel's satisfaction that the parties knew and understood the acquisition and relocation plan for each property.

Ultimately, the relocation expenses for Multicolor totaled $245,227.46. (NHA-39, 96-100). On May 11, 2009, the New Jersey Office of Administrative Law (OAL) ordered the NHA to pay Multicolor's relocation expenses, which were a direct result of the condemnation of the property formerly located at 2-20 Liberty Street where Multicolor was a tenant. Aguayo v. Housing Authority of the City of Newark, 2009 WL 1357429 (May 11, 2009 N.J. Adm.). Ellen Michelle Harris ("Harris"), the Chief Legal Officer for the NHA, testified credibly that the payment of $245,227.46 was part of a settlement stemming from the OAL proceeding. (1T 350:4-11). Although the NHA did not obtain formal written approval from the Devils to pay these costs, it was sufficient under § 5.5 (f) of the RDA that the payment was ordered by a court

of "competent jurisdiction in connection with an Eminent Domain proceeding approved by the [Devils]." The subsequent relocation expense proceedings before the OAL were directly connected to and resulted from the Eminent Domain proceeding to acquire the properties where these tenants were located, and was approved by the Devils. Although the Devils claim (as discussed below) that the NHA failed to follow its instructions in appealing and prosecuting the property acquisitions, the Devils do not dispute that they approved of the taking of the tenant's properties by condemnation.

The Devils also argue that $112,500 in hold-over rent that Multicolor owed to the NHA was improperly forgiven by the NHA, and should be deducted from any relocation costs owed by the Devils. The Devils argue that it is "mandatory" for the NHA to collect outstanding rent pursuant to N.J.S.A. 20:3-19, which provides that after a declaration of taking the tenant "shall be deemed a trespasser and shall be then liable for rents." N.J.S.A. 20:3-19 also provides that "[i]f the owner or tenant occupies the property with the condemnor's permission on a rental basis for a short term or for a period subject to termination on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short term occupier."

Here, it appears that Multicolor was not a trespasser per se, but had the NHA's permission to remain on the property until a suitable alternative space was found for relocation. Therefore, the NHA believes that it had the unilateral right to waive or forgive the $112,500 in rent. Perhaps without the confines on the parties' obligations in the RDA that would be correct, as the NHA points out that "[it] has the right to collect such rent, but no obligation to do so," pursuant to N.J.S.A. 20:3-19. The NHA further argues that the Devils would not approve of relocation requests which made relocation efforts more difficult for Multicolor, allowing the NHA to use its discretion to forgive rent. Harris testified that the NHA did not collect the rent

because of all the issues surrounding reimbursement, and the NHA made a decision "not to stress him [Aguayo] further." (1T 194:9-13; 1T 359:12-25 -360:1-6). Harris further testified that, as a result, the rent due of $112,500 was not deducted from the relocation expenses. (1T 194:9-13).

Although the NHA may have discretion under the law as to whether to collect rent after condemnation proceedings have been initiated, the obligations of the parties under the RDA do not give the NHA such unilateral, unfettered discretion. The NHA cannot expect the Devils to incur the costs associated with all of their decisions, especially where the Devils were contesting many of the expenses associated with Multicolor. The Panel therefore finds that the NHA should have deducted the amount of rent that Multicolor owed from the relocation expense payments made to Multicolor, or at least sought the Devils' permission to waive the rent. The Panel holds that the amount of $112,500 shall be deducted from the Multicolor relocation amount of $245,227.46, reducing the claim to $132,727.46.[29]

Next, the NHA claims $551,311.89 for reimbursement of relocation expenses for Iandor. The NHA relies on the Order of the OAL that determined that "under N.J.A.C. 5:11-4.4, the NHA's duty to provide relocation assistance and related storage payments to Ms. Fuller and Iandor ended effective December 31, 2009 …." (NHA- 49). The Devils did not authorize the payments to Iandor. However, a court of competent jurisdiction (OAL) upheld the payments to Iandor for relocation expenses which were directly connected to the condemnation proceedings for the property at 18-20 Columbia Street where Iandor was located. (RDA, § 5.5 (f)).

[29] The Devils also argue that the NHA should have deducted $5,100 for equipment DRD purchased from Multicolor but which Multicolor absconded with when it vacated the property. Harris confirmed that DRD paid for the equipment. She does not know what happened to it. (1T 194:4-8). The Panel finds that the Devils have not established that the NHA is legally responsible for the Multicolor equipment. DRD presumably retains its rights against Multicolor.

The Devils argue that the NHA did not timely terminate the payments to Iandor, but instead allowed her (Fuller) to enjoy 6,500 square feet of storage space even after she moved to a new apartment in March 2008. The Devils note that Fuller's original space was only 5,500 square feet. The NHA contends that the Devils never suggested putting her possessions in a smaller space. Steinfeld testified that he did view the storage space with a representative from the NHA, but that he did not contact anyone from the NHA or follow up with any correspondence in regard to possible overspending on the Iandor storage space. (2T 315:10-25 – 316:1-9).

While it might have been prudent to reassess the Iandor space and possibly reduce the costs of storage after Fuller moved into a new apartment, the Devils did not provide evidence as to the value of the space that should have been deducted from March 2008 through December 31, 2009 when the OAL ordered the termination of relocation expenses. Therefore, we do not have sufficient evidence to determine the value of the storage space that reasonably could have been deducted from the relocation expense amount.[30]

In summary, the Panel finds that the Devils shall reimburse the NHA for the Iandor relocation costs incurred in the amount of $551,311.89.

Accordingly, the Panel awards the NHA $684,039.35 for the reimbursement of relocation costs associated with Iandor and Multicolor, in addition to the amounts stipulated for the other four properties, for a total of $1,053,796.44.

**B. <u>The NHA's Claim for Attorneys' Fees for Property Relocations and Acquisitions</u>**

[30] The Devils complain that a conflict of interest existed because a NHA employee involved in the relocation efforts was romantically involved with Ms. Fuller. Even if a conflict of interest existed, there was no evidence of any damages, as the employee had no authority to approve payments to Iandor. The Devils also maintain that the NHA authorized payment for an art appraisal done by Halima Taha, who the Devils explicitly disapproved. Again, the Devils have not demonstrated that it incurred any damages as a result of this appraisal.

The NHA seeks reimbursement for $440,636.99 in attorneys' fees and expenses related to the acquisitions of properties and the relocation of tenants, as described above. The NHA maintains that these attorneys' fees and expenses were charged by their outside counsel, Florio, Perrucci, Steinhardt & Fader ("Florio Firm"). (NHA-117). The NHA contends that the Devils are liable for these legal expenses because they are reimbursable "Acquisition Costs" under § 1.1 of the RDA. The Devils argue that the time entries on the bills were redacted and therefore it is impossible to know whether all of the fees related to the relocation of tenants and acquisition of the properties. The Devils also maintain that the NHA has not provided evidence that the fees were actually paid to the Florio Firm.

The legal bills included in NHA-117 do include the name of each property or tenant for which time was spent (as well as charges for general eminent domain work), the attorney's initials and names, the date and time for each entry, and a summary of the monthly time entered by each attorney. Harris confirmed that the NHA incurred legal fees from the Florio Firm for the work related to relocations and acquisitions for the Arena. (1T 181:2-11; 1T329:13-17). It is not a prerequisite that the attorneys' fees be paid in advance for the Panel to issue an award. Grow Co. v. Chokshi, 403 N.J. Super. 443, 471-72 (App. Div. 2008).

The Panel finds that credible evidence was presented that these expenses were reasonably incurred by the NHA in connection with its acquisition and relocation efforts for the Project and are therefore Acquisition Costs. Therefore, the Panel awards attorneys' fees of $440,636.99 to the NHA as part of its relocation claim.

3. **The Devils' Claim for Excessive Acquisition Costs** [31]

Similar to the Devils' argument that the Panel should deny the NHA's claims for reimbursement of relocation expenses because they exceeded the Site Budget, or some facsimile

[31] This claim of Respondents is considered out of sequence because it relates to the discussion immediately above.

thereof, the Devils contend that they should be reimbursed for the acquisition costs of four properties that exceeded the Site Budget by $2,087,449.45. The Devils argue that the NHA's actions resulted in the Devils paying for excessive Site Costs for the following four properties:

| Property | Amount Budgeted | Amount Paid | Amount Over |
|---|---|---|---|
| Nationwide | $1,295,000 | $1,889,149.45 | $594,149.45 |
| Chang | $903,000 | $1,349,000 | $446,000 |
| Aguayo | $1,125,000 | $1,975,000 | $850,000 |
| Urban Renewal | $1,202,700 | $1,400,000 | $197,300 |
| Total | | | $2,087,449.45 |

As previously determined, it is apparent from the record that a full and complete Site Budget as defined in the RDA was never prepared by the Devils, or at least was not provided to the NHA. The Devils contend that there was no requirement for them to provide an actual and complete Site Budget to the NHA since the parties met weekly to discuss the budget. However, as noted above, the budgets that were discussed and entered in evidence did not include all of the affected properties. The Devils cannot expect the NHA to rigidly adhere to an incomplete Site Budget. In any event, the Panel finds that the Devils approved the acquisitions of the properties in dispute, leaving only the amount paid for the properties at issue.[32]

The Devils contend that the NHA breached § 5.5(d)(x) of the RDA by failing to appeal and properly prosecute eminent domain proceedings. Section 5.5 (e) of the RDA excused the Devils from approving or submitting a Joint Requisition to the Construction Fund if the NHA "failed to take any action" specified in various clauses of § 5.5 (d). Pursuant to **§** 5.9 (a) of the RDA, the Devils had recourse to challenge the acquisition costs by not approving the Joint Requisitions, so long as the Devils were contesting the NHA's "characterization of such costs

[32] The NHA was unable to locate the Joint Requisition for the Urban Renewal property. However, there is no dispute that the Devils approved of the payment for the acquisition of this property. (RX-481).

and expenses as Site Costs by appropriate proceedings," or by approving them and then proceeding to expedited arbitration under § 15.3 of the RDA. (RDA, § 5.9).

Here, the Devils approved the acquisition costs in the Joint Requisitions. Although the Devils now maintain that the NHA did not comply with their directions to pursue appeals in three acquisitions, and to properly prosecute the other acquisition, the Devils still approved the Joint Requisitions for the costs for the acquisitions of the disputed properties pursuant to the OAL determinations even after having knowledge that the appeals were not filed. The Devils did not utilize the expedited arbitration procedures to the extent that they were disputing the payments.

The Devils have the burden to show that if the appeals had gone forward or that certain legal steps were taken by the NHA, the NHA would have prevailed and paid lower amounts. See McMann v. Mockler, 503 S.E.2d 894, 896 (Ga. App. 1998); Garcia v. Kozlov, Seaton, Romanini & Brooks, 179 N.J. 343, 358 (2004).

With these facts and principles in mind, a brief discussion of each of the disputed property acquisitions follows.

Chang Property (17-19 Liberty Street)

The NHA obtained an appraisal of the property for $975,000. (NHA-227, 228). The property owner's appraisal was for $1,425, 000. (NHA-234). The Devils authorized an offer of $975,000. (NHA-226). After negotiations were unsuccessful, on January 19, 2007, the panel of commissioners determined the compensation for the property of $1,349,000. (NHA- 219). The Devils expressed their dissatisfaction with the amount and requested that the NHA appeal. (RX-

481). After full knowledge that no appeal had been filed, however, the Devils executed the Joint Requisitions for the acquisition on May 20, 2007. (NHA-220, 221).

The Devils argue that the failure of the NHA to appeal was a violation of § 5.5 (d)(x) of the RDA. (RX-481, p. 2 of 2). While this could constitute a violation of the Devil's rights, the Devils under § 5.9 (a), were not obligated to sign a Joint Requisition. They also could have challenged the costs through the Expedited Arbitration Process, but did not.

Even if the NHA had filed an appeal, the Devils have not shown that they would have prevailed. See McMann v. Mockler, supra; see also Daugert v. Pappas, 704 P.2d 600 (Wash. 1985). The Devils have offered no substantive evidence that the NHA would have prevailed on appeal, or that the fair value of the property was anything other than the amount determined by the OAL. Therefore, the Panel finds for the NHA as to the Chang Property.

Jorge Aguayo's Property (2-20 Liberty Street)

The Devils argue that the NHA did not follow their instructions to appeal the commissioner's determination of the value of the Aguayo property, and because of the NHA's inaction, the Devils incurred additional costs over budget to acquire this property. However, contrary to the Devils' belief, an appeal was timely filed. (NHA-193B, 193C).

The NHA's appraisal for the Aguayo property inclusive of equipment was for $1,544,000. (NHA-177). The owner's appraisal was for $2,752,000. (NHA-188). The commissioner's report inclusive of machinery and equipment was for $2,133,300. (NHA-181). The Devils participated in settlement negotiations and ultimately executed Joint Requisitions for full payment of the amount of the commissioner's determination. (NHA-171, 172, 174, 182, 189, 193). Similar to the situation in Chang, the Devils were not obligated to sign the Joint Requisitions for the acquisition costs of this property if it wanted to pursue an expedited

arbitration. Furthermore, unlike Chang, an appeal was filed and the Devils could have pursued this matter, but chose to settle. There is also no evidence that if the appeal had gone forward, the Devils would have prevailed.

For the above reasons, the Panel finds for the NHA as to the Aquayo property acquisition.

Urban Renewal Property (18-20 Columbia Street)

The NHA's appraisal for the Urban Renewal property was $1,100,000. (NHA-322, 324). The property owner's appraisal was $1,750,000. (NHA-318). The NHA's appraiser revised his appraisal to a minimum of $1,400,000 due to some discrepancies. (NHA-306, 319, 320). The property was acquired for $1,400,000, which was the amount determined by the commissioners. The NHA argues that this was the lowest possible amount for the purchase price, citing City of Passaic v. Shennett, 390 N.J. Super. 475, 486 (App. Div. 2007). See also Authority of the City of Brunswick v. Suydam Investors, L.L.C. 177 N.J. 2, 15 (2003). The Devils argue that it requested the NHA to file an appeal of the commissioner's determination. (RX-420, 481).

Here, although the NHA did not comply with the Devils' instructions to appeal, the Devils have not shown that it would have prevailed by obtaining an order that the property would have been acquired for less. See McMann v. Mockler, supra. Therefore, the Panel finds for the NHA as to this property acquisition.

Nationwide Realty Property (14-24 Edison Place)

The Devils argue that the NHA failed to prosecute this matter, missed a deadline to file an expert report regarding value, and then failed to request an adjournment. Because of these failures, the Devils argue that they were compelled to settle or go to trial unprepared. (RX-466). Although the Devils executed a Joint Requisition for the purchase of the property (NHA-286),

and paid the determined amount for the property, they reserved the right to challenge it. (RX-466, p. 2).

The NHA appraisal was for $1,295,000 not including severance damages. (NHA-289). The property owner's appraisal was for $2,325,000, which included $1,325,000 in real property valuation plus $1,000,000 in severance damages. (NHA-273). On January 8, 2007, the commissioners awarded $2,270,000 for the taking of the property which included $1,270,000 for the real estate and $1,000,000 in severance damages. (NHA-298). The Devils disputed the severance damages. (NHA-297). In February 2007, the NHA filed an appeal of the commissioner's award. (NHA-269). The NHA engaged in settlement negotiations and reached a settlement of $1,889,149.45, which was $330,000 below the commissioner's award. (11T 143:13-15; 144:18-145:3; NHA-269). The Devils consented to the settlement. (NHA-279, 286).

The NHA argue that there is no basis for the Devils' claim that the NHA failed to request an adjournment of the trial. (NHA-277 at R6594). The Devils have not shown that the Nationwide property would have been acquired for less if the NHA had timely filed an expert report and prosecuted the case in some other manner. Again, the burden is on the Devils to show they were damaged by the NHA's failure to file an appeal and to prosecute according to the Devils' instructions. See McMann V. Mockler, supra. There is no evidence that the Devils would have prevailed. Therefore, the Panel finds that the Devils have not established by a preponderance of the evidence that it incurred damages due to the NHA's acts or omissions. The Devils' claim for reimbursement of the acquisition costs is denied.

**4. The NHA's Sewer Fine Claim**

The NHA claims reimbursement for a sewer fine imposed by the New Jersey Department of Environmental Protection (NJDEP) in the amount of $41,625. (NHA-31, 32, 34, 35). The Devils

do not dispute responsibility for the fine amount. Accordingly, the Panel finds in favor of the NHA on its sewer fine claim and awards the sum of $41,625.

5. **The Devils' Parking Claim**

The Devils claim that the NHA has breached its obligations under the parties' Agreements to provide the Devils with parking revenues. As a consequence, the Devils assert an entitlement under the PTA to a parking plan generating at least $2.7 million per year for the duration of the Lease. The NHA argues, *inter alia*, that there is no binding commitment for parking revenues, that the Parking Letter was deemed an unenforceable document by the New Jersey Superior Court, and that no appropriate parking plan can or should be crafted by the Panel without the involvement of the Other Redevelopers (Edison and Lopez) and the City of Newark, which has declined to participate in these proceedings.[33]

There can be no doubt that the parties intended for the Devils to share in parking receipts associated with Arena events. This intent was confirmed by every percipient witness, including Mayor James and Monteilh for the City/NHA, and Vanderbeek and counsel for the Devils. Indeed, from the inception of the discussions about the prospect of a sports complex in Newark, the Devils insisted on a revenue stream from parking facilities, and those revenues were a significant component of the Devils' financial modeling and expected return on capital.

As the discussions matured, the NHA's commitment to produce a satisfactory parking plan was expressed in every important document. Under the RDA, as a condition to DRD performing its obligations relating to the Primary Term, the RDA required that "[t]he

[33] Under the PTA, the NHA was required to "use its best efforts to cause the City to become a party to this arbitration." (PTA, § 2(B)(xi)). There was scant, if any, tangible evidence of efforts by the NHA to involve the City in this arbitration, let alone "best efforts." Rather, the NHA's legal strategy has been to argue that it is powerless to provide any parking revenues to the Devils because it never obtained approval for the Parking Letter from its own Board (despite Lucas' signature thereon) and it is not a taxing authority. For its part, the City has disavowed the Parking Letter (although it was signed by its Business Administrator with the Mayor's permission and is on City letterhead) because the Parking Letter was never submitted to or approved by the City Council.

Authority, the City, the Operator [DAE], Edison Properties, LLC, Lopez Properties, LLC, Prudential Insurance Company and each Other Redeveloper shall have executed and delivered a parking operations agreement establishing procedures, scheduling, rates and payments to the Operator [DAE] with respect to parking spaces in the Downtown Area…." (RDA, § 3.3(b)(xi)).

Similarly, under § 6.10 of the RDA and § 6.8.3 of the Lease, the NHA was required to cause all other redevelopment agreements that were entered into with Other Redevelopers such as Edison and Lopez to contain the specific covenant set forth in § 6.10 of the RDA. That covenant required the Other Redevelopers to collect fees from their parking patrons during Arena events and make payments to the Devils. The NHA never attempted to present Edison (or Lopez) with the contractually mandated parking covenant, or pressure them to include such a covenant through its eminent domain powers.[34]

After the Edison RDA was finalized and the dispute erupted, the parties agreed in the Parking Letter to negotiate in good faith for a parking plan that "guarantee[d]" payment to the Devils of $2.7 million per year, regardless of whether the ARD were implemented. (Parking Letter, p. 2). Although such a parking plan was expected to be produced by the Commitment Date, it never materialized and there was little effort by the NHA to create one. Accordingly, the parties negotiated the PTA on January 24, 2006, which imposed new obligations on the NHA with respect to the issue of parking. Specifically, the NHA agreed to "use its best efforts to develop a plan … for parking in the Downtown Area that (a) is acceptable to the Parties (each in its sole discretion), (b) has no adverse impact on the Redeveloper, the Operator or their patrons (whether as a result of increased taxes or otherwise, unless approved by the Redeveloper), and (c) is consistent with the terms and principles of the [Parking Letter]." (PTA, § 2(B)(xi)). The

[34] The Panel is well aware that Edison flatly rejected the notion of paying any parking revenue to the Devils, so the formal presentation of the parking covenant would likely have been a futile gesture. This, of course, begs the question of why the NHA committed to the covenant in the first instance.

PTA further required the parties to arbitrate the parking issue if no "Satisfactory Parking Plan" were reached by October 1, 2006. The appointed arbitrator(s) would then determine the terms of an appropriate arrangement between the Devils and the NHA (and, if applicable, the City) regarding parking and the allocation of parking revenue that is consistent with § 6.10 of the RDA, § 6.8 of the Lease, and the Parking Letter. There is no dispute that the parties have not developed such a Satisfactory Parking Plan, hence these proceedings. The Panel therefore has the clear contractual authority to construct a parking arrangement consistent with the provisions cited in the PTA.[35]

There is no merit to the NHA position that an appropriate parking arrangement cannot be determined by this Panel because the Superior Court of New Jersey ruled in parallel litigation that the Parking Letter is not an enforceable agreement. Housing Authority of the City of Newark, et al. v. Devils Renaissance Development LLC, No. ESX-L-4832-10. In that case, the Court reasoned that "the Parking Letter cannot constitute an agreement between the signatories as to the parking issues because the only authorities capable of binding the City and the Authority did not vote on the terms contained therein. In order to be bound, the Authority needed formal approval by the Authority's Board of Commissioners; the Business Administrator needed the vote of the full City Council…. Neither was ever sought or received from the record provided here." (10/27/10 Summary Judgment Decision, at p. 5). The Court further determined that the Parking Letter was more akin to an unenforceable "agreement to agree." The Court recognized, however, that under the PTA the "proper venue for the parking revenue issue is in arbitration given the contractual obligations between the Devils and the [NHA]…." (10/27/10 Motion for Reconsideration Decision, at p. 2).

[35] Under the PTA, the Panel's decision on the parking arrangement "shall be final and binding" and "non-appealable." (PTA, § 2(B)(xi)).

The issue presented here is not whether the Parking Letter is itself an enforceable agreement; it clearly is not. The PTA instructs only that the Parking Letter's terms be considered by this Panel as guiding principles in determining a parking arrangement that is consistent with the relevant expressions in the Parking Letter, the RDA and the Lease. [36] All of these documents, and the credible testimony respecting their origins, confirm that the Devils were to receive parking revenues associated with Arena events, whether through a City-sponsored surcharge or program (such as the ARD), or through the promised covenant with Other Redevelopers, or through another vehicle created by the NHA or the City (the NHA's principal under the Second Services Agreement). The Devils were indifferent as to the source of the monies. Moreover, the credible evidence quantified that expectation at $2.7 million per year, for the duration of the Lease, a figure which was arrived at through extensive compromise and negotiation.

Nor are the Devils estopped from advancing their claim for a parking plan by any statements or rulings in the Superior Court litigation. Under New Jersey law, collateral estoppel applies where:

> (1) [T]he issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

In re Estate of Dawson, 136 N.J. 1, 20 (1994); Hennessey v. Winslow Twp., 183 N.J. 593, 599 (2005).

[36] The Panel's consideration of the Parking Letter as evidence of the parties' intent with respect to a "Satisfactory Parking Plan" is consistent with the Superior Court's finding that "[e]vidence of the terms of the Parking Letter will in any event be permitted in the arbitration. The entire Parking Letter is, after all, incorporated into the RDA [sic PTA]." (7/28/10 Decision, at p. 4).

The sole issues determined by the Superior Court were the enforceability of the Parking Letter as a contract, and the arbitrability of the parking plan dispute. The parties never litigated and the Court never decided the "identical" issue of whether the Devils were entitled to a parking arrangement under the PTA or the scope and contours of such an arrangement. Indeed, the Court expressly held that the substantive parking issue was to be determined in arbitration.

The Panel recognizes the constraints on "an appropriate arrangement" allocating parking revenues because neither the City of Newark nor the Other Redevelopers are parties to this arbitration. In the case of the City, the Panel finds and believes that the City's renunciation of the Parking Letter, and its failure to participate in this arbitration, is part of a coordinated strategy with the NHA to frustrate commitments made to the Devils by the prior administration. Notably, in litigating the validity of the Parking Letter before the Superior Court, the City's attorney represented to the Court that the City would participate in the arbitration. (Tr. 7/16/10 at 36, 40) (City Counsel: "As Your Honor asked me as an initial determination whether we want to participate if there is in fact arbitration proceeding, we certainly would, because there's a lot at stake for the City….")); (7/28/10 Decision at p. 6) ("The City, at oral argument, candidly stated if the parking issues went to arbitration, it would join, if only to protect its own interests."). These concerted efforts are plainly designed to present the Devils with a breach for which there is no remedy.

The Panel finds and holds that the proper means for the Devils to realize the benefit of its bargain with the NHA in a manner consistent with the requirements of the PTA is to permit the Devils to exercise its right to set-off against "any payments due to [the NHA]" under the Lease the amount agreed to by the parties as an appropriate revenue allocation to the Devils, namely

$2.7 million per year, for the duration of the Lease.[37] (Lease, § 16.10). Any contrary result would violate the Devils' right to a parking arrangement consistent with the myriad representations of the NHA and the City and the letter and spirit of the parties' Agreements.[38]

In light of this ruling, the Panel deems it unnecessary to consider whether the Devils are entitled to relief under its claim for fraud or misrepresentation. We would be remiss, however, if we did not note that the record exposed a persistent pattern of oral and written assurances by City and NHA officials to the Devils that they would share in parking revenues. The defense to these representations is ostensibly, 'the Devils should not have relied on these (supposedly ambiguous or conditional) commitments' or 'the Devils should have known that requisite approvals had not been obtained.' The NHA waived sovereign immunity and agreed in the RDA and the Lease to be treated as a private citizen. No private citizen would be entitled to evade commitments under these circumstances. While we do not question the sincerity and integrity of the public figures associated with the Arena project, the Devils should not be required to suffer financially from the NHA's professed inability to carry through on its promises.

6. **The Devils' Claim For Parking Revenue Under § 6.8.2 of the Lease**

The Devils assert that the NHA is required to turnover rental income received by the NHA from its lease of a parking lot on Green Street to Mulberry Green Realty, LLC ("Mulberry"), an entity within the Lopez corporate organization. The NHA owned the parking lot until April 4, 2011, when it sold the lot to Mulberry for $5.07 million. As part of the

[37] The first year shall be prorated based on the fraction of 255/365, or 0.698630. There was no evidence that the parties discussed indexing the $2.7 million for inflation as with other economic terms in the Lease.

[38] The set-off provision of the Lease applies to "any amount that the City or the [NHA] owes to [DAE]" (in addition to "Losses" incurred by the Devils as a result of a NHA Default). The mandate of the PTA is for the Panel to "determine the terms of an appropriate arrangement" between the Devils and the NHA (and the City, if it had elected to participate in these proceedings). The effectuation of this arrangement through the set-off clause is consistent with the instructions in the PTA, and the applicable provisions of the RDA and the Lease. The Panel expresses no opinion on whether the NHA can recover from the City the parking revenues awarded to the Devils herein pursuant to the indemnification clause in the Second Services Agreement, or whether the City can fund this Award through implementation of an ARD.

transaction, Mulberry paid the NHA $533,054.11, in "disputed rental payments." (RX-817). Prior to the sale, Mulberry reported $190,277.10 in receipts during evenings and weekends. (RX-56).

Section 6.8.2 of the Lease provides:

> The [NHA] shall ensure that all parking spaces controlled by any Public Entity that are within the Downtown Area . . . are available for Arena patrons. . . and [DAE] shall have the right to impose fees or charges for such parking spaces as determined by [DAE] in its sole discretion and to collect, receive and retain all gross income, revenues and other consideration of any kind and description from such parking spaces . . . .

As a threshold matter, there was no evidence introduced regarding the $533,054.11 paid to the NHA by Mulberry in "disputed rental payments" other than the purchase and sale agreement. The Panel is therefore unable to determine whether this payment is within the scope of § 6.8.2 of the Lease. Moreover, § 6.8.2 applies to lots "controlled" by a Public Entity, and the Green Street lot, although owned by the NHA, was apparently "controlled" by Lopez as the operator. At a minimum, the Devils have not established by a preponderance of the evidence that any monies paid by Mulberry to the NHA should be considered income from parking spaces controlled by a Public Entity (during the times specified) as contemplated by § 6.8.2 of the Lease.

Accordingly, the Panel finds in favor of the NHA on the Devils claim for $723,331.21 in rental income damages under § 6.8.2 of the Lease.

7. **The Devils' Capital Fund Claim**

Section 6.8.2 of the Lease requires the NHA to deposit into the Capital Fund Account the amounts set forth on Schedule 8.2. The payment schedule for the relevant years is as follows:

Year 1: $1,000,000

| | |
|---|---|
| Year 2: | $1,100,000 |
| Year 3: | $1,200,000 |
| Year 4: | $1,300,000 |

The NHA concedes that it owes $3.6 million in Capital Fund Payments for Lease Years 2 through 4, but argues that the Capital Fund Payment for the first year (which was a partial year, i.e., 255 days) should be prorated, reducing the amount due by approximately $300,000. The NHA correctly observes that the Capital Fund Payment mirrors the Base Rent. The NHA argues that since the Base Rent is prorated, the Capital Fund Payment should also be prorated.[39]

The problem with the NHA's argument is that the Lease expressly provides for proration of Base Rent. Specifically, § 5.3 of the Lease requires that in the event any "Lease Year shall be shorter than 365 days," the various Rent Payments (including Base Rent) are prorated. There is no cognate provision requiring or permitting proration of the Capital Fund Payment. The language of Section 8.2 is unambiguous and should be applied as written.

Accordingly, the Panel finds in favor of the Devils on its Capital Fund claim and orders the NHA to deposit $4,600,000 into a Capital Fund Account to be drawn upon by the Devils in accordance with the procedures in § 8.2 of the Lease.

8. **The Devils' Claim for Repayment of Advances and Legal Fees**

The Devils claim $445,334.84 for advances allegedly made from the Construction Fund to facilitate the NHA's completion of its infrastructure obligations, and approximately $2.2 million in legal fees incurred in connection with this arbitration and the related Superior Court litigation.

[39] The Devils originally maintained that the Capital Fund Payment should be paid directly to the Devils in reimbursement of alleged capital repairs. This argument has been abandoned, and the Devils request only the Capital Fund Payment be deposited in the Capital Fund Account.

These claims were not set forth in the Devils' statement of claims, and, with respect to attorneys' fees, the only evidence of such fees was one sentence of testimony from a Devils executive. The Devils sought to introduce these claims by a motion to amend on October 19, 2011, close to the end of the hearings. The Panel denied the motion to amend, but permitted the Devils to articulate the claim in its post-hearing briefs as a matter of completeness.

The Panel hereby confirms its ruling that these claims were not timely asserted and rejects any effort by the Devils to introduce them into the proceedings. The Panel expresses no view on the merits of the claims, or the entitlement of the Devils (or the NHA) to reasonable attorneys' fees for breaches of the Lease or the RDA.

9. **The Devils' Claim For Late Delivery of the Entrance Plaza**

The Devils claim a rent reduction or abatement under § 5.3 of the Lease because the entire Entrance Plaza was not delivered upon Commencement of the Lease.[40] Section 5.3 of the Lease provides for a reduction in all Rents during the period of any Untenantable Condition or Access Rights Default. An Untenantable Condition is defined as, *inter alia*, a situation where the "use or occupancy of any material portion of the Facility is not permitted or is materially restricted under any Applicable Law or otherwise is unsuitable for customary usage . . . ." An Access Rights Default occurs when the NHA materially interferes with DAE's exercise of its Operating Rights.

The evidence is undisputed that the Entrance Plaza was not delivered in full by the Commencement Date of the Lease.[41] The issue presented here is whether the Entrance Plaza constitutes a material portion of the Facility or whether the late delivery was a material

[40] The Devils claim that the Plaza was completed in October 2009. The NHA argues that the Devils are bound by earlier assertions that the Entrance Plaza was delivered on April 9, 2009.
[41] The NHA was required to deliver the Facility on the Commencement Date. The Facility is defined as including the Entrance Plaza. (Lease, § 2.1).

interference with the Devils use and operation of the Arena. On balance, the Panel believes that the Entrance Plaza, although large in comparative size, is not a material portion of the Facility, and that the failure of the NHA to timely deliver the entire Plaza did not materially impair the benefits of the Lease to the Devils. There was limited evidence on the function of the Plaza, and the Panel does not view it as a critical component of the Devils' financial expectations.

As importantly, and even assuming a breach, the Devils' proposed formula of a rent reduction based on a square footage allocation is not a reasonable approach to assessing a rent reduction for the Entrance Plaza. It simply is unreasonable to assume that the Entrance Plaza has the equivalent value of the Arena. The Devils' proof of lost revenue opportunities (from "fan fests" and the like) was anecdotal at best, and fails to satisfy the criteria for proof of lost profits (or even lost revenues). Having failed to prove damages with reasonable precision, the Devils at most would be entitled to an award of nominal damages (i.e., $1.00), which the Panel declines to award.

**10. <u>The Devils' Excess Tax Claim</u>**

On January 6, 2010, the City passed Ordinance 6PSFH, effective April 1, 2010, imposing a five (5%) percent surcharge on admissions charges to major places of amusement, such as the Arena. The Ordinance was repealed on September 1, 2010. During the life of the Ordinance, the Devils (and affiliates) collected and paid a total of $742,953.35 in surcharge revenues to the State, which was supposed to forward the money to the City.[42]

Section 9.2 of the Lease requires the NHA to pay any Excess Tax imposed by the City, and, if it fails to do so, entitles DAE to deduct the amount from any Rent due to the NHA. "Excess Tax" is defined to include taxes in excess of ticket prices, regardless of whether they are

[42] The NHA's argument that the Ordinance was passed as part of a "global settlement agreement" is unsupported by a writing and is immaterial to the obligations of the parties under the Lease absent a formal amendment or written waiver.

paid by patrons or DAE. The NHA concedes that the surcharges collected by DAE under the Ordinance constitute Excess Taxes as defined.

Under the plain language of the Lease, the amount remitted to the State by the Devils is an Excess Tax for which the Devils are entitled to reimbursement (or set-off). Whether the payment is a "pass-through" from patrons is irrelevant. (It is similarly irrelevant whether the monies were forwarded to the City by the State, a fact which is unclear from the record.) Moreover, there is no obvious "windfall" to the Devils, as the NHA argues, because as a matter of basic economics the more money patrons pay in taxes, the less inclined they may be to attend events and the less money they may have available to spend in the Arena. In any event, the terms of § 9.2 of the Lease are unambiguous and should be enforced as written.

Accordingly, the Panel finds in favor of the Devils on its Excess Tax claim, and orders that the sum of $742,953.35 either be paid to DAE by the NHA or set-off against any Rent obligations of DAE under the Lease.

**11. <u>The Devils' Claim for a Rent Reduction Due to Extension of the Commitment Date</u>**

The Devils seek an abatement or reduction of Base Rent of $902,778 based upon a "Reduction Amount" calculation established in § 5.2 of the Lease. The claim is premised upon the undisputed facts that the Commitment Date was extended past September 1, 2005, and that the Arena was not completed by October 1, 2007. More specifically, as set forth in § 5.2 of the Lease, the Devils seek a reduction of the Base Rent Payment for the first Lease Year equal to $12,500,000 times a fraction, the numerator of which is the number of days between October 1, 2007 and the Arena Completion Date of October 27, 2007 (i.e., 26 days), and the denominator of which is 360. Since the Devils contend that the first year Base Rent Payment was prorated to $693,151 under § 5.3 of the Lease, the Base Rent for Year One was a negative $209,628. The

Devils seek to carry over the negative balance of $209,628 to the following year, effectively making the first year Base Rent Payment $0.

The NHA contends that the Rent reduction provision constitutes a non-enforceable liquidated damages provision. The NHA also raises several factual defenses to this claim, including that since no Reduction Amount would be due if the Arena Completion Date occurs on or before October 1, 2007, the NHA should not be liable for any Reduction Amount because the delay in achievement of the Arena Completion Date past October 1, 2007 was caused by poor performance or delays to the Project by the Devils and their contractors.

In reply, the Devils dispute these defenses and argue that the Reduction Amount is not liquidated damages but a bargained for rent reduction.

In § 3.2 of the RDA, the parties agreed to establish a Preliminary Term of the Agreement, during which the parties agreed to work to meet certain conditions by a set "Commitment Date."

Subject to the rights of the parties to extend the date, the Commitment Date set in the RDA was July 1, 2005.[43]

To proceed past the Preliminary Term to the Primary Term of the Lease, the RDA set forth several conditions precedent to the obligations of the NHA in § 3.3(a), and to the obligations of Devils in § 3.3(b). Among the preconditions to the obligations of the Devils, including construction of the Arena, was the obligation of the NHA to obtain fee simple title to all of the land comprising the Arena Site and to deliver this land to the Devils in a "cleaned and cleared" condition (i.e., the "Land Condition"), and the obligation of the NHA, the City of Newark and various redevelopers to execute and deliver the Parking Agreement. (RDA, §§ 3.2(b)(i); 3.3(b)(iii), (iv) and (xi)).

As of July 1, 2005, the Land Condition set for the Preliminary Term of the RDA had not been met. As a result, on July 31, 2005, the NHA and DRD executed a Letter Agreement providing that the Commitment Date shall "be deemed to be September 1, 2005" as permitted in the RDA, § 3.2(b)(i). (RX-70). The parties also agreed in the Letter Agreement that the Commitment Date could be further extended by mutual agreement of the parties, and that the Devils reserved their right under § 3.2(b)(ii) of the RDA to unilaterally extend the Commitment

[43] Section 12.5(c) of the RDA sets forth the schedule of construction for the Arena Project, including that the Devils "shall use commercially reasonable efforts" to (a) within 90 days of the Primary Term Agreement Commencement Date submit any Approvals (other than building permits) necessary to commence construction; (b) upon receipt of the Approvals, within 90 days submit applications for the Building Permits; (c) commence construction within 60 days of receipt of the Building Permits; and, (d) if certain preconditions set forth in § 3.3(b) of the RDA had been met by July 1, 2005 (including, for example, the NHA turning over the Site in a "cleaned and cleared" condition and a Parking Agreement being executed and delivered) cause the Arena Project to achieve Substantial Completion by the Scheduled Completion Date, which the RDA defined as October 1, 2007. However, if the preconditions in § 3.3(b) were not timely met, and the Commitment Date was extended later than September 1, 2005, then the Devils were to achieve Substantial Completion "by the October 1 immediately following the date that is twenty-seven (27) months after the Commitment Date." The parties did not address why the October 1, 2007 Arena Completion Date, or this section of the RDA, was not amended in light of the extended Commitment Date and the subsequent agreements in the PTA.

Date by way of written notice for a period of not less than 30 days if the Land Condition had not been met. The validity of this Letter Agreement is not disputed by the parties.

As of October 31, 2005, the NHA had neither acquired fee simple title to all the parcels of land on the Arena Site nor delivered the land in a cleaned and cleared condition. Accordingly, under ¶ 2(ii) of the Letter Agreement and § 3.2(b)(ii) of the RDA, on October 31, 2005, DRD unilaterally exercised its right to extend the Commitment Date and indicated that the Commitment Date is "deemed to be" November 30, 2005. The Devils also indicated that the Base Rent Payments would therefore be subject to reduction as allowed in the RDA and § 5.2 of the Lease. (RX-121, 143).

Beginning in or about December 2005, however, the City and NHA became anxious over the ability of the Devils to provide their financing commitment pursuant to § 3.3(a)(i) of the RDA. On December 27, 2005, Lucas on behalf of the NHA sent a letter to the Devils purporting to terminate the RDA for the failure of the Devils to obtain financing, effective in 30 days. (RX-143).

By way of return letter, Vanderbeek explained to Lucas that ¶ 2(ii) of the July 31, 2005 letter and § 3.2(b)(ii) of the RDA permitted the Devils to unilaterally extend the Commitment Date if the Land Condition had not been satisfied, and that the Devils were only required to provide financing as of the (extended) Commitment Date. The Devils also on that date exercised their right to further extend the Commitment Date under the terms of the Letter Agreement because the Land Condition still had not been met, and that the Commitment Date was now "deemed to be December 30, 2005." Again, the Devils indicated that the Base Rent Payment

would be reduced as permitted in § 5.2 of the Lease, and that it would continue to extend the Commitment Date if the Land Condition was not met.[44] (RX-144).

These matters resulted in negotiations that ultimately led to the PTA being executed effective as of January 24, 2006. In § 3 of the PTA, the parties acknowledged and agreed that, for all purposes of the RDA and the Transaction Documents, and notwithstanding anything contrary in those documents or any notices from the parties, the Commitment Date and the Primary Term Commencement Date "shall be deemed to be January 24, 2006." The parties also agreed that "all notices and other communications delivered by the [NHA] purporting to terminate the RDA are void ab initio and shall have no effect."

Prior to the PTA, the Devils had only extended the Commitment Date to December 30, 2005. The parties presented little testimony about the meaning of the "shall be deemed" language as to the Commitment Date, but a fair and reasonable reading of the language and evidence is that the parties agreed, as permitted in the Letter Agreement, that the Commitment Date had been extended to January 24, 2006. Therefore, in total, the Commitment Date was extended 145 days beyond September 1, 2005.

As a result of this extension of the Commitment Date, the Devils seek a reduction of Base Rent under § 5.2 of the Lease. That section in the Lease expressly provides that, in addition to any other reduction or abatement, if the Commitment Date was extended by the Devils beyond September 1, 2005 pursuant to § 3.2(b)(ii) of the RDA, the Base Rent payment for the first year would be reduced by a set formula "equal to the Reduction Amount."

The Reduction Amount is a defined term in the RDA, and provides in relevant part that if the "Arena Completion Date" (a defined term) occurs on or prior to October 1, 2007, then there

[44] Coincidentally, on the same date, the City of Newark Office of Uniform Construction issued a Stop Work Order to the Arena Construction, which the Devils contend was an attempt to exert political pressure on the Devils. (NHA-467).

is no Reduction Amount available to the Devils. However, if the Commitment Date was extended beyond January 1, 2006 (which it was under the PTA), and if the Arena Completion Date occurs after February 1, 2008 (which it was not), then the Devils would have the right to a Reduction Amount of $12,500,000. Otherwise, the RDA indicates that the Reduction Amount shall be:

> the product of (x) $12,500,000 and (y) a fraction, the numerator of which shall equal the lesser of (A) the aggregate number of days by which the Commitment Date is extended beyond September 1, 2005, and (B) the aggregate number of days between October 1, 2007 and the Arena Completion Date, and the denominator of which shall be 360.[45]

The RDA defines the Arena Completion Date as the day on which the Project had (1) achieved Substantial Completion, (2) all standards and requirements imposed by the National Hockey League have been satisfied, and (3) is available for the playing of NHL games. Thus, mere Substantial Completion of the work would not necessarily mean that the Arena Completion Date had been met.

The parties agree that the Arena Completion Date did not occur on or before October 1, 2007, and, in fact, occurred sometime thereafter. In this regard, Midtgard, the Uniform Construction Code official for the City of Newark, acknowledged that as of October 1, 2007, the Arena was not ready to host events, including NHL games, and could not have been issued a TCO. A series of partial TCO applications were made and partial TCOs were issued, including one issued on October 19, 2007 for limited areas for a media event, and one with the same date, but signed on October 20, 2007 for other limited areas. The Devils hosted the first true public event on October 25, 2007 (the Bon Jovi concert), but, for reasons that are unclear, it appears the

[45] Exhibit J to the RDA provides various examples of how the Reduction Amount calculations would work under different Commitment Dates and Arena Completion Dates.

City did not actually issue the TCO for that event until the following day, October 26, 2007, and that TCO required the use of a fire watch due to concerns of smoke evacuation from the stairwells.[46]

On October 27, 2007, officials from the NHL arrived at the Arena to inspect it, and after extensive testing of the ice, netting, and dasher boards, Dan Craig, the NHL's arena expert, signed off on the playing of hockey shortly before the puck dropped on October 27, 2007.

The Panel finds that the Devils could not have hosted a NHL game in the Arena before October 27, 2007, nor have passed the NHL inspection, because they were still in the process of finalizing the ice surface, netting and boards as of that morning. Accordingly, October 27, 2007 is the Arena Completion Date, notwithstanding any dispute over the date when the first TCO was issued.

**A. <u>The NHA's Defenses to the Devils' Claim for a Reduction Amount</u>**

The NHA raises several legal and factual defenses to the Devils' claim for a Reduction Amount, including that the Reduction Amount is a species of liquidated damages, and, just like the liquidated damages clause of $20,000/day for the Lafayette Requirements (explained below), the claim is legally unenforceable because:

(a) The clauses are "unreasonable" because they overstate any damages the Devils may have actually sustained;

(b) The liquidated damages clauses cannot be enforced due to allegedly false and fraudulent claims by the Devils that their existing lease for the Meadowlands arena would require the Devils to pay severe penalties if the Arena were not completed in time for the 2007-2008 season;

[46] The Certificate of Occupancy was eventually issued on March 26, 2009 when all issues were finally resolved.

(c) The overlapping liquidated damages clauses cannot both be enforced, since they purport to compensate the Devils for the same harm – delay in the completion of the Arena; and

(d) Whatever delay damages are awarded, the NHA is entitled to a set-off of $213,261.88, representing the amount already paid by the NHA relating to the Lafayette Street modifications.

Second, even if legally enforceable, the NHA contends that no Reduction Amount or liquidated damages associated with the Lafayette Requirements (as explained below) should be allowed because the Devils are responsible for delay in achievement of the Arena Completion Date after October 1, 2007. Put simply, the NHA contends that it should not be liable for at least a delay of 26 days (from October 1 to October 27, 2007) since the Devils' actions, inactions and mismanagement, and the poor performance of its design and construction team, caused or substantially contributed to at least 26 days of delay. The NHA cites to some evidence to support its position that the Devils were the cause of the October 1, 2007 Arena Completion Date not being met, thereby negating any liability of the NHA for a Reduction Amount or liquidated damages.[47]

[47] On these factual defenses, the NHA contends, among other things, that the Devils controlled the design and construction of the Arena, and that there are at least seven distinct delays during the Arena's construction that were caused by the Devils and the Devils' contractors which amount to 26 days of delay:

First, the Devils changed construction managers (not once, but twice) from Hunt/Bovis to Blanchard to Gilbane, and that these changes caused much turmoil on the ground, delayed the ordering of materials needed for construction, and, at one point, reduced the number of workers on the site.

Second, the Devils caused the late delivery of precast seating, which led to significant delays in the completion of the Arena's roof, which delays were further exacerbated by the harsh winter weather.

Third, the Devils' contractors and subcontractors performed well below what was required to complete the job on time.

Fourth, due to various code violations by the Devils' contractors and subcontractors, construction on the site was halted a number of times by stop work orders issued by Newark's Office of Uniform Construction Code.

Fifth, the Devils demanded that at least eight Project Parcels be re-appraised prior to purchase, a process which increased the timetable for acquisitions by three to six weeks per property.

Sixth, the Devils' failure to timely secure financing for the project led the Authority to stop approving construction expenditures from the Construction Fund until the Devils' financing was secured.

Seventh, the Arena's unresolved fire safety issues and the Devils' unpaid construction fines led to delays in the issuance of the initial TCO for the Arena.

The Devils vigorously dispute these legal and factual positions of the NHA. Since the damages to be assessed, if any, related to the Reduction Amount and the Lafayette Requirements both hinge on why the key October 1, 2007 Arena Completion Date was not met, an analysis of the delays associated with the Project to account for at least 26 days of delay (from October 1 to 27, 2007) is critical. This analysis is set forth below as part of the discussion of the Devils' claim for liquidated damages for the late completion of the Lafayette Requirements.

**12. The Devils' Claim for Liquidated Damages of $2,000,000 for Late Completion of the Lafayette Requirements**

The Devils seek liquidated damages of $2,000,000 for the late completion of the Lafayette Street work as outlined in § 2(v)(b) of the PTA. The claim is ultimately rooted in Article VIII of the RDA, under which the NHA agreed to be responsible for certain infrastructure improvements in the Core District, including the widening and relocation of Lafayette Street and the development of an Entrance Plaza.[48]

As explained above, to proceed past the Preliminary Term to the Primary Term, the RDA required the NHA to obtain fee simple title to all of the land on which the Arena sat (including the Lafayette Street area) and to deliver this land to the Devils in "cleaned and cleared" condition (the Land Condition). (RDA §§ 3.2(b)(i); 3.3(b)(iii) & (iv)).

A significant problem was that the former Lafayette Street had to be restructured and straightened, but it contained a number of utilities, including a Verizon duct bank and PSE&G lines under its path that would have to be removed and relocated as part of the project. As early as August 2005, the City had been in discussions with individuals at Verizon and PSE&G regarding the large amount of work that had to be done in order to remove the utilities and permit

[48] One objective of the (State-funded) Circulation Project was to straighten Lafayette Street by moving the western half to the south so that it aligned with the eastern half. The Authority was responsible for the Lafayette Street work, which included property acquisitions, relocations and demolitions.

construction of the Arena. (RX-152). The City on numerous occasions argued that the utility companies, and not the City or the NHA, should be financially responsible for the removal of the utilities. These attempts included a letter from Mayor James to Verizon in October 2005, demanding that Verizon pay for utility relocation. (RX-103, 140). The Devils and the City hosted weekly "Mayor meetings" beginning in the late spring of 2005, in an attempt to keep everyone on track. After the Mayor meetings, the Devils would include in "action letters" to the NHA and the City tasks relating to the utility clean up and removal, and track the due date and status of these tasks. (See, e.g., RX-36, 42, 55, 58, 59, 71, 80, 88, 91).

Beginning in or about December 2005, MAST Construction was retained as the NHA's/NDCRC's representative for certain aspects of the Arena Project and the Circulation Project. (NHA-7). Richard Brown, MAST's Senior Vice President, testified that in early 2006, Mast learned of various problems that would make completion of the Lafayette Requirements by May 1, 2006 highly doubtful. On January 3, 2006, 21 days before the execution of the PTA, the City hosted a "coordination" meeting regarding the removal of utilities under former Lafayette Street during which representatives from Verizon stated that the project would take 10-12 months to complete. (RX-152, p. 2).

The parties agree that the utilities under Lafayette Street were not cleaned, cleared and relocated by December 30, 2005, which was the last date of the extension of the Commitment Date by the Devils. (RX-144). The problems with the NHA's inability to achieve the Land Condition, among others, eventually led to an important term in the PTA related to the work required of the NHA to acquire, clean, clear, and deliver to the Devils the complete Lafayette Street area (called the "Lafayette Requirements" in the PTA).

Under § 2(B)(v) of the PTA, the Devils waived the condition that the Arena Site, including the former Lafayette Street, be delivered to the Devils by the Commitment Date in consideration for a promise that Lafayette Street be cleaned and cleared, and all utilities removed and relocated by May 1, 2006. The parties further agreed in the PTA that because damages as a result of the failure to deliver a cleaned and cleared Lafayette Street would be difficult to calculate, such a failure would result in liquidated damages in the amount of $20,000 for each day after May 1, 2006 that the former Lafayette Street was not delivered in a proper condition, up to a maximum amount of $2,000,000, "provided that the Authority shall have no obligation to make such payments if the Arena Completion Date occurs on or prior to October 1, 2007." In agreeing to this provision, the parties expressly recognized and agreed that the liquidated damages "are a reasonable estimate of the [Devils'] damages in the event of a Lafayette Default and that they have negotiated the above amounts in an attempt to make a good faith effort to quantify the amount of the [Devils'] damages arising from a Lafayette Default, despite the difficulty in making such determination."

The parties arrived at the liquidated damages amount after negotiations. For example, Jim Cima, the Devils' Senior Vice President of Development ("Cima"), estimated what he thought the reasonable damages might be if there was a delay, and Scotland, the NHA's attorney, acknowledged that the amount was based on a damages estimate. (4T 30:7 -31:25; 10T 97:15-25). According to Vanderbeek, at the signing of the PTA there was a great concern that if the Lafayette Requirements were not met, including making the area cleaned, cleared and ready for the Devils to start construction by the required date, it would affect the construction cost and schedule since that was an area that the Devils had planned to stage equipment. Furthermore,

this would or could affect the opening of the Arena. The evidence confirmed that the May 1, 2006 date was selected and agreed to by the parties to maintain the schedule.

Of most importance was the Verizon duct bank because it ran through some of the footings of the office and practice facility buildings. In February 2006, the various parties met again, this time with MAST, to attempt to develop a plan to work around the Verizon duct. It became clear that due to the Verizon duct bank the Lafayette Requirements were not going to be satisfied because Lafayette Street would not be delivered in a cleaned and cleared condition by May 1, 2006.

Ultimately, it was determined that instead of removing the Verizon duct bank, a temporary protective concrete encasement would have to be built around the duct to protect it from vibrations during construction, as this was the only option to allow construction in that area to continue. The protective concrete encasement was essential because the Verizon duct bank fed highly sensitive and trafficked areas, including Newark Airport and the FBI building.

The Devils' architect (HOK) was engaged to redesign the footings and foundations of the office and practice facility to allow the concrete slab (and the duct bank) to remain in place, and eventually one of the Devils' contractors performed the work to encase the ductwork. (See, e.g., RX-191, 193, 210, 227, 228, 257, 267).

The design and construction effort took some time, and affected the Devils to at least some extent, but it appears that the temporary encasement work was completed as of the week of July 21, 2006, at a cost of $213,261.88. (NHA-450). The NHA reimbursed the Devils for this expense. (NHA-455). Nothing in the invoices associated with work, however, indicates that it was intended to or in fact compensated the Devils for delays, impacts or disruptions to the

project associated with the late completion of the Lafayette Requirements.[49] However, it also appears that the redesigned foundations may have actually saved the Devils approximately $340,000 in construction costs. (RX-375).

But for the Verizon duct bank encasement work, and as otherwise consistent with the PTA, the NHA delivered the Lafayette Requirements to the Devils on May 1, 2006 "cleaned and cleared."

The Devils contend that the problems with removal of the Verizon duct bank caused significant delays to the construction of the Arena and increased costs to the Devils, at least up to the time the duct bank was encased. Once the concrete duct slab was in place, the work-around permitted construction to proceed above the slab and the duct bank. There was little, if any, evidence of any construction delays to the Project caused by the encasement process once the temporary encasement was in place, even as to the office and practice facility.

Eventually, the Verizon duct bank's electrical connections were relocated to the new line in March or April 2007, and the old Verizon duct bank was removed in or about June or July 2007; the eastern portion of Lafayette Street was delivered in early October 2007, shortly before the Arena opened. Again, there was little, if any, evidence that the duct bank relocation and removal after June 2007 impacted the construction schedule or the eventual Arena Completion Date. In fact, on July 20, 2006, after Lafayette Street was delivered and after the slab was completed, the Devils acknowledged that the Arena was on schedule, with a completion date of September 2007. (RX-372).

Although the Devils contend that on several occasions after May 1, 2006, certain contractors encountered underground obstructions and/or underground storage tanks (UST)

[49] For this reason, among others, the Panel rejects the contention of the NHA that the payment for the work to redesign the foundations is duplicative of liquidated damages for late completion of the work.

under former Lafayette Street that had not been previously removed by the NHA, those impacts and costs appear to be negligible.[50] Any subsequent work associated with the Lafayette Requirements was not shown by the parties to be either significant or to have caused any impacts to the construction schedule.

For all intents and purposes, the NHA substantially completed the work associated with the Lafayette Requirements by the end of July 2006 when the duct bank was covered, the footings were redesigned and installed, and the work could proceed unimpeded by the Lafayette Requirements at that time. Thus, subject to NHA's other legal[51] and factual defenses[52], it appears that the liquidated damages for the late completion of the Lafayette Requirements would run from May 1, 2006 to July 21, 2006 when the temporary encasement work on the duct bank was completed.

The key factual issue remaining therefore to the assessment of liquidated damages and to the application of the Rent Reduction provision of the Lease is: Who is responsible for the delays which caused the Arena Completion Date to occur after October 1, 2007?

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[50] For example, RX-357 indicates approximately $8,400 was expended for the costs to remove several tanks, including delay costs. RX-484 shows a cost of $3,900 to remove another tank. Brown testified that when a UST was found during the Circulation Project it was generally removed by an engineering firm within a week for less than $5,000 (assuming the UST had not leaked), without any adverse effect on the construction schedule. On a project that exceeded $300,000,000 in costs, these minor events and costs are inconsequential, not unexpected, and were not shown to have had any impact on the construction schedule.

[51] As noted above, Mayor Booker commissioned the Florio Firm to issue a comprehensive report on the Arena Project and the contractual agreements in place. As to the Lafayette Street requirements, the Fader Report observed that the May 1, 2006 deadline had already been missed, thereby acknowledging that the NHA had failed to deliver Lafayette Street in a cleaned and cleared condition as required by the PTA. (RX-870, p. 89). Ultimately, however, the Fader Report concluded that the RDA and the Lease were enforceable Agreements and that if the Booker administration reneged on its promises,"[i]t is likely that a court, under these Agreements, would order the public entities to specifically perform the contract." (RX-870, p. 84). In other words, the Fader Report recognized that the NHA had bound itself to commercial terms in a bargained-for exchange, and it was untenable for Mayor Booker to scrap the deal.

[52] Although the NHA contends that the Devils waived enforcement of the liquidated damages provision in the PTA related to the Lafayette Requirements, the parties' agreement regarding the delivery of Lafayette Street and resulting liquidated damages was never amended, and Brown indicated that he had no authority to bind the NHA to modify the explicit terms of the PTA related to the Lafayette Requirements. Further, the Devils were discussing with the NHA or their representatives to possibly waive the liquidated damages for the late Lafayette Requirements under certain conditions, but the parties never reached an agreement on that point. ((RX-378). We find therefore that the NHA did not prove that the Devils waived enforcement of the liquidated damages clause.

Pursuant to the liquidated damage clause in the PTA and the Reduction Amount for the extended Commitment Date in the Lease, damages are payable to the Devils only if the Arena Completion Date was achieved after October 1, 2007. Since the Arena Completion Date was not until October 27, 2007, the NHA contends that it carried its burden of proving that the Devils' actions, or those of its contractors, caused or substantially contributed to at least 26 days of delay, especially after the concrete cover was placed on the Verizon duct bank in July 2006.

Under New Jersey law, a liquidated damages provision is presumptively reasonable, and the NHA bears the burden of demonstrating otherwise. Wasserman's Inc. v. Middletown, 137 N.J. 238, 249 (1994) (quoting Westmount Country Club v. Kenney, 82 N.J. Super. 200, 205 (App. Div. 1964)). The NHA admits that it has the burden to prove that the liquidated damages clause is not enforceable. The Panel must look at four factors in assessing whether the NHA has met its burden: (1) the difficulty in calculating actual damages; (2) whether the parties intended the provision to be a penalty; (3) whether actual damage were sustained; and (4) whether the parties' bargaining power was equal. MetLife Cap. Fin. Corp. v. Wash. Ave. Assocs., L.P., 159 N.J. 484, 494 (1999).

Furthermore, liquidated damages are not recoverable by the Devils if the delays to the Arena were caused by the Devils. Utica Mut. Ins. Co. v. DiDonato, 187 N.J. Super. 30, 41 (App. Div. 1982) ("authorities permit the contractee to recover liquidated damages but only to the extent that the delay is not caused by the contractee himself") (citations omitted); Buckley & Co., Inc. v. State of New Jersey, 140 N.J. Super. 289, 313 (Law Div. 1975) (assessment of liquidated damages by State against construction contractor was inappropriate as to delays that resulted from acts of commission and omission of State); Wayne Knorr, Inc. v. Dept. of Transp.,

973 A.2d 1061, 1091-92 (Pa. 2009) ("It is particularly well settled that a party may not retain liquidated damages for the amount of delay caused by its own actions.").

This construction claim is somewhat unusual in that the party claiming liquidated damages for delayed construction is usually the owner of the construction project, and the party challenging the liquidated damages clause (the party allegedly owing the liquidated damages) is usually the contractor. Here, the customary roles are reversed.

Neither party chose to call a construction expert or scheduling expert to analyze the Project, explain the critical path of the construction sequence that was necessary to timely achieve the October 1, 2007 Arena Completion Date, identify the specific delays and events that impacted that critical path, and to assign and assess fault for those delays. That would be one of the traditional methods to prove causation and impacts to the critical path in the schedule on a construction project.

Instead, the NHA primarily relied upon factual testimony and records to show that the Devils and their contractors, and not the NHA or the work for the Lafayette Requirements, were the root cause of delays and impacts. The NHA did not call any construction contractors or designers, except for Ted Totten ("Totten") of Cives Steel, to testify as to the reasons for the delayed completion. Furthermore, Messrs. Vanderbeek, Lavalette and Gheduzzi, all of the Devils, did not have full knowledge of the construction issues, as Gheduzzi was not deeply immersed in the daily issues on the Arena, and Lavalette was involved in the Arena "from a business and financial aspect, not day-to-day doing the construction" and had no active role in Gilbane's construction activities. Vanderbeek was even less immersed in the construction details.

The NHA raises several arguments to support its position.

**Change in Construction Managers and Poor Performance by Early Contractors**

Hunt/Bovis was the original construction manager for the Arena, but it was replaced in the spring of 2006. (NHA-490, 491, 518). After Hunt/Bovis, Wm. Blanchard Company was hired as an interim construction manager for 30 to 60 days. Gilbane Construction was then retained as construction manager, and began work in the summer of 2006, before signing a formal contract in October 2006.

The NHA contends that the transition in construction managers delayed the project because the construction permits had been issued by Newark's UCC office to Hunt/Bovis, and Gilbane, as the replacement construction manager, was required to apply for new permits in its own name, and construction could not continue until those new permits were issued. However, no substantive or credible proof was presented that the change in permits actually caused a delay.

Next, the NHA contends that the transition from Hunt/Bovis was shown to have had caused some delay to the Project due to the incomplete drawings prepared by HOK, the Devils' architect, up through March or April, 2006. Hunt/Bovis needed those drawings to prepare and submit a proposed Guaranteed Maximum Price (GMP) to the Devils in early April 2006. (NHA-541 at M72 (item 1.9)). Hunt/Bovis did not submit the proposed GMP contract, however, until May 4, 2006 (NHA-515) – about one month late – because Hunt/Bovis had received incomplete Arena drawings from HOK on February 10, 2006, and did not receive the full, corrected and complete drawings until March 9, 2006. (8T233:12-237:12; RX-229).[53]

[53] Much testimony was presented as to whether Hunt/Bovis acted only as the preconstruction manager on the Arena project. Much of the debate centers on the June 1, 2005 "Amendment No. 1" to the contract between Hunt/Bovis and the Devils, whereby Hunt/Bovis was to negotiate, coordinate, and administer (on behalf of the Devils) various Project contracts and purchase orders, as listed in "Amendment Attachment B" to that Amendment No. 1. (NHA-491 at R4933-4934). Although there was conflicting testimony on this point, the preponderance of the evidence showed that Hunt/Bovis may have in fact performed some services of a typical construction manager on the Arena Project, and the inability of the Devils and Hunt/Bovis to reach an agreement on an acceptable GMP in the spring of 2006 caused the Devils to negotiate with, and eventually retain, Gilbane.

On May 4, 2006, Tim Romani of ICON, the Devils' construction consultant, prepared a "comprehensive" report for Vanderbeek and Gilfillan in which Romani noted Hunt/Bovis' "abysmal performance" and that Hunt/Bovis' "ineffective preconstruction services are well documented." (NHA-653 at DRD-H3362). He was also highly critical of HOK, and HOK's engineering consultants. (NHA-653 at DRD-H3360).

In June 2006, Blanchard proclaimed that the Project was in a "state of disarray caused by Hunt/Bovis' departure." (NHA-700 - email from Blanchard to Lavalette). The Devils were also highly critical of the performance of their own contractors, and specifically blamed Hunt/Bovis for "substantial delays." For example, on May 16, 2006, Vanderbeek wrote to Hunt/Bovis, complaining, "[a]s we have previously communicated, we have been extremely dissatisfied with the services you have provided in connection with the Arena Project…. Further, we have incurred and will continue to incur substantial delays and additional costs as a direct result of your failure to deliver on your promises." (NHA-517).

However, these general statements, or press reports, about early project problems are not by themselves definitive proof that the October 1, 2007 date would not have been met. There was no schedule analysis presented by the NHA to prove this point. By all accounts, Gilbane came up to speed quickly on the Project, was actively engaged by late July 2006, was developing a proposed Guaranteed Maximum Price for the work with an anticipated completion prior to October 1, 2007, and that the Devils were still anticipating Substantial Completion by September 2007. (RX-372).

Thus, although the earlier performance issues with the Hunt/Bovis team may have created the impression of a project in disarray, the NHA did not prove that any such early project issues did in fact cause a delay in the completion of the project past October 1, 2007.

Subsequent events, however, show that these early problems may have had serious carry over effects that eventually plagued Gilbane in its performance.

For example, in mid-August 2007, Gilbane reported that the logic and sequence in its construction schedule for the precast concrete work "did not work," but that otherwise the Cives Steel "is on schedule." (RX-377). By late August 2007, however, the design and detailing "was beginning to slow Cives." (RX-381).

Eventually, Gilbane prepared a proposed GMP, and Gilbane and the Devils executed a contract effective October 27, 2006. (NHA-496). Importantly, the Gilbane contract calls for Gilbane to achieve Substantial Completion of the Arena by October 15, 2007 – fourteen days after the required Arena Completion Date. The Devils did not explain this significant discrepancy in the completion dates, and it is convincing evidence that by the time the contract was signed the Project had slipped approximately fourteen days.

**Delays Post-Summer of 2006**

Totten, the President of Cives Steel Company, Northern Division, also testified to the disruption caused by the departure of Hunt/Bovis and the eventual impact it had on the Project. Cives had been involved on the Project since the summer of 2005 providing "design assist" services for the steel work. Eventually, Cives was retained by the Devils to fabricate, deliver and install the large quantities of steel required for the Project. (NHA-774).

Totten testified that shop drawings are generally submitted to the construction manager for approval before they go to the engineer for review. Cives' normal procedure was to submit the shop drawings to Hunt/Bovis, but during the transition Cives could not get shop drawings approved resulting in "a bit of turmoil." Similarly, Cives often had questions (Requests for Information) about the job specifications, which were directed to Hunt/Bovis. After Hunt/Bovis

left, and while the manager was being transitioned, there was a period of time when construction issues and questions took some time to sort out and delayed Cives' work.

More importantly, Totten testified about delays during Gilbane's management of the Project. Totten testified that the purchase and installation of the precast concrete seating in the Arena was a critical element of the construction sequence. The precast concrete seating was ultimately ordered by Gilbane, but it arrived approximately two months late. This two month delay directly affected and delayed the progress of the work because, among other things, the construction of the roof (including the steel) was delayed because the precast concrete had to be lowered into the structure by crane before the roof was installed. Totten testified credibly that these delays, combined with the fact that this pushed other work into the (unusually harsh) winter weather, caused the steel work to be completed three months late.

These points were also confirmed by NHA-660, which is Cives' March 28, 2007 letter to the Devils documenting delays and impacts to Cives' work. These facts were not rebutted by the Devils, and effectively addressed the Devils' earlier position in NHA-662 that Cives was responsible for some delays. Although Totten indicated that Gilbane undertook efforts to accelerate the work, the evidence shows that there were impacts and delays that directly affected the critical path to completion of the Project, and that, most importantly, the NHA did not cause these delays and they were not caused by the late completion of the Lafayette Requirements.

The evidence also showed that there were extraordinary efforts by Gilbane to complete the design and construction of the Project once it was fully engaged. Despite these efforts, the impacts from earlier design and construction problems and issues – none of which were the fault of the NHA, or related to the late completion of the Lafayette Requirements – caused at least several weeks of delay to the concrete and steel work and, ultimately, the Project completion.

Of great importance are RX-407 and RX-409, which were not discussed by witnesses, but were introduced into evidence and considered by the Panel. These include a memo dated January 4, 2007 from Bill Crawley of the NDCRC to various City officials recounting what had transpired at the weekly construction meeting with the Devils, Gilbane, the NDCRC, and MAST, in which it was reported:

> At our regularly scheduled Tuesday afternoon construction management meeting the Devils/Gilbane finally responded to our outstanding request for an updated construction schedule. In response the Devils/Gilbane provided a proposed construction schedule that would achieve substantial completion by 29 October. In attendance were Jim Cima, Gilbane's Executive Officer, NDCR and City Construction Manager MAST Construction, Director Adams and Dawn Macey-Wright. My reason for bringing this issue to your attention is not to cause any alarm but to let you know that the completion date has changed from 1 October to 29 October 2007.
>
> I believe that the Devils may actually make substantial completion by 29 October 2007, According to the Devils and Gilbane. The greatest variable is the impact of the weather on the construction process. I spoke directly with Jeff Vanderbeek and he has assured me that the Devils will do everything within their power to complete the project ahead of schedule but I think it is important to make a note that they have gone on the record with the proposed 29 October date. Of course, NDCRC and the City will continue to do everything we are tasked to do to complete the various tasks (SWAPS, Circulation, etc) to prepare for the Puck Drop date of 1 October and lay the groundwork for future redevelopment within the Downtown Core. (RX-407, 409) (emphasis added).

Similarly, although not discussed in testimony, but included within the mountain of (1,900) exhibits introduced, was the Gilbane construction schedule, updated as of January 5, 2007, which confirmed that Gilbane was now predicting a Substantial Completion date of October 29, 2007. (RX-413).

In a key letter of March 16, 2007, Gilbane confirmed to the Devils that its schedule showed that Substantial Completion had "slipped into mid November" 2007, and Gilbane was

proposing significant acceleration efforts to recoup lost time and recover the contractually-scheduled completion date of October 15, 2007. (NHA-654). The Devils, to their credit, approved of these efforts and costs in an attempt to mitigate the delays to the schedule.

By all accounts, the Devils incurred significant costs to accelerate the work and achieve the Arena Completion Date. However, as explained above, the Arena Completion Date of October 1, 2007 was not met. The delays and impacts testified to by Totten, and confirmed in Gilbane's own records, did in fact cause an impact to the Project schedule sufficient to push the Arena Completion Date past October 1, 2007.

In sum, the Panel finds that the Devils or their contractors were responsible for at least 26 days of impact and delays, resulting in an Arena Completion Date after October 1, 2007.[54] Furthermore, it is more probable than not that the late completion of the Lafayette Requirements was not a substantial contributing factor to the failure to achieve the October 1, 2007 Arena Completion Date, especially because of the mitigation efforts associated with the Verizon duct bank.

Since we find that the late completion of the Lafayette Requirements did not affect the Project past July 2006, the NHA has met its burden of showing that at least 26 days of the delay were the responsibility of the Devils, and that those delays caused the Arena Completion Date to occur after October 1, 2007. As such, the Devils are not entitled to a Reduction Amount or an

[54] The NHA contends that the Devils' refusal to pay outstanding City inspection fines until October 17, 2007, delayed the issuance of the TCO. We do not find that to be the case, and, in fact, the Devils did not pay those fines until Midtgard reduced them from $326,000 to $65,000, and there was other work ongoing at that time that precluded the achievement of the Arena Completion Date. Also, the issues associated with the City's demand that the Arena stairwells be smoke-proofed and/or pressurized, and the Devils' submittals of a variation request to the City seeking relief from that requirement (which was denied), did not delay the Arena Completion Date because the City eventually allowed a fire watch at events, including the first hockey game on October 27, 2007.

assessment of liquidated damages for the Lafayette Requirements. There is therefore no need to address in detail any of the other legal or factual defenses raised by the NHA.[55]

Accordingly, the Panel finds in favor of the NHA on the Devils' Rent Reduction and Liquidated Damages claims.

## IV. Conclusion

By way of summary and conclusion, the Panel Awards as follows:

A. The Panel finds in favor of the NHA on its claim for Rent and orders DAE to pay the sum of $13,198,528.00 as Rent for years one through four of the Lease.

B. The Panel finds in favor of the NHA on its claim for relocation expenses and associated attorneys' fees and orders DRD to pay the sum of $1,494,433.43.

C. The Panel finds in favor of the NHA on its claim for reimbursement of the sewer fine and orders DRD to pay the sum of $41,625.00.

D. The Panel finds in favor of the NHA on the Devils' claim for reimbursement of acquisition costs.

E. The Panel finds in favor of the Devils on its parking plan claim and declares and

[55] The panel rejects the NHA's contention that the delayed Arena Completion Date was caused by the Devils demanding that at least eight Project Parcels be re-appraised prior to purchase because those issues, even if true and material, did not affect the late completion of the Lafayette Requirements caused by the Verizon duct bank problems. Also, the Devils' alleged failure to timely secure financing for the Project is not a valid argument or defense as that issue was resolved by the parties via the terms of the PTA.

As for other legal defenses raised by the NHA, the Panel does not believe that the Rent Reduction clause of the Lease is a liquidated damages provision. It is simply a customary abatement of rent due the inability of the tenant to use and enjoy the property. Nor does the Panel accept the argument that enforcement of the Lease provision for the Reduction Amount in addition to the Lafayette Street liquidated damages provision would permit double recovery for the same conditions and events. The two provisions are not co-extensive, and the Rent Reduction provision applies in situations different to those to which the liquidated damages clause was designed to address. Moreover, the $20,000 per day in liquidated damages was a reasonable estimate of the cost of delays and was negotiated. As such, this provision is not a penalty. Wasserman's, 137 N.J. at 250 (holding that a liquidated damages clause is not a penalty when it was an estimate of damages, not an "in terrorem agreement to deter a party from breaching the contract") (quoting Wassenaar v. Panos, 331 N.W.2d 357, 362 (Wis. 1983)). In fact, the Lafayette Street liquidated damages clause was a "good faith effort to estimate in advance the actual damage that will probably ensue" from the failure of the NHA to meet its obligations with respect to Lafayette Street. Wasserman's Inc., 137 N.J. at 249. Regardless, as part of the bargaining process, the Devils agreed that these damages would not be assessed if, despite the NHA's breach, the Arena was completed by October 1, 2007.

determines that the terms of an appropriate parking arrangement under the PTA shall entitle DAE to set-off from its Rent obligations under the Lease the sum of $2,700,000.00 annually from the Commencement Date of the Lease through expiration, with the first Lease year prorated based on 255/365 days, or 0.698630.

F. The Panel finds in favor of the NHA on the Devils' claim for parking revenue under § 6.8.2 of the Lease.

G. The Panel finds in favor of the Devils on its Capital Fund claim and orders the NHA to deposit the sum of $4,600,000.00 into the Capital Fund Account.

H. The Panel finds in favor of the NHA on the Devils' claim for repayment of advances and legal fees.

I. The Panel finds in favor of the NHA on the Devils' claim for late delivery of the Entrance Plaza.

J. The Panel finds in favor of the Devils on its Excess Tax claim and orders the NHA to pay DAE the sum of $742,953.35, and, failing such payment, DAE shall be entitled to a set-off of this sum from its Rent obligations under the Lease.

K. The Panel finds in favor of the NHA on the Devils' claim for the Rent Reduction Amount under § 5.2 of the Lease.

L. The Panel finds in favor of the NHA on the Devils' claim for liquidated damages associated with the Lafayette Requirements.

M. Amounts awarded herein may be netted between the applicable parties, and any net sum due and owing by a party shall be paid within thirty (30) days of the date of this Award. Any amounts not so paid shall bear interest at the rate applicable to state court judgments in the State of New Jersey.

N. All claims for interest, costs or attorneys' fees are denied except as found herein.

O. The administrative fees of the American Arbitration Association totaling $20,400.00 and the compensation and expenses of the Panel totaling $339,870.90 shall be borne equally by the parties.

P. This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute one and the same instrument.

Q. This Award is in full resolution of all claims and counterclaims submitted to this arbitration. To the extent any such claim or counterclaim is not specifically mentioned herein, it is denied.

Dated: April __, 2012 _____
David L. Evans, Chairman

Dated: April __, 2012 _____
Michael R. Libor, Arbitrator

Dated: April __, 2012 _____
Donna Wilkerson, Arbitrator

I, David L. Evans, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

_____ _____
Date David L. Evans, Chairman

I, Michael R. Libor, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

_____ _____

Date Michael R. Libor, Arbitrator

I, Donna Wilkerson, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

_____ _____

Date Donna Wilkerson, Arbitrator