Superior Court of New Jersey

CHAMBERS OF
JUDGE MARLENE LYNCH FORD
ASSIGNMENT JUDGE

OCEAN COUNTY COURT HOUSE
P.O. BOX 2191
TOMS RIVER, NJ 08754-2191
732-929-2176

March 28, 2016

Please see Attorney List Attached for Distribution:

RE: **In the Matter of Various Matters Filed by the NJ DEP for the Exercise of Eminent Domain for Shore Protection Purposes**
Docket No.: OCN-L-2919-15; OCN-L-3066-15; OCN-L-3067-15; OCN-L-3068-15; OCN- L-3069-15; OCN-L-3070-15; OCN-L-3071-15; OCN-L-3077-15; OCN-L-3097-15; OCN-L-3204-15; OCN-L-3205-15; OCN-L-3206-15; OCN-L-3275-15; OCN-L-3285-15; OCN-L-3286-15; OCN-L-3287-15; OCN-L-3288-15; OCN-L-3289-15; OCN-L-3290-15; OCN-L-3291-15; OCN-L-3292-15; OCN-L-3296-15; OCN-L-3319-15; OCN-L-3356-15; OCN-L-3410-15;OCN-L-3420-15;OCN-L-3438-15; OCN-L-227-16

Enclosed please find Memorandum of Decision on Return Date of Plaintiff's Orders to Show Cause and Defendants' Cross Motions to Dismiss.

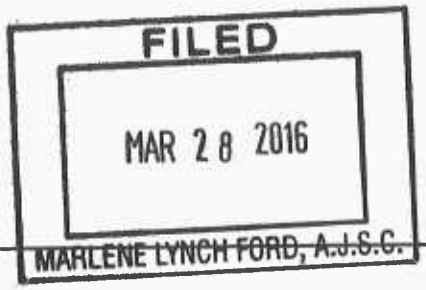
Very truly yours,

Marlene Lynch Ford

Marlene Lynch Ford, A.J.S.C.

MLF/jc
enclosure

PREPARED BY THE COURT



IN THE MATTER OF VARIOUS MATTERS FILED BY THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION FOR THE EXERCISE OF EMINENT DOMAIN FOR SHORE PROTECTION PURPOSES

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION/CIVIL PART
OCEAN COUNTY

Docket No.: OCN-L-2919-15; OCN-L-3066-15; OCN-L-3067-15; OCN-L-3068-15; CN-L-3069-15; OCN-L-3070-15; OCN-L-3071-15; OCN-L-3077-15; OCN-L-3097-15; CN-L-3204-15; OCN-L-3205-15; OCN-L-3206-15; OCN-L-3275-15; OCN-L-3285-15; OCN-L-3286-15; OCN-L-3287-15; OCN-L-3288-15; OCN-L-3289-15; OCN-L-3290-15; OCN-L-3291-15; OCN-L-3292-15; OCN-L-3296-15; OCN-L-3319-15; OCN-L-3356-15; OCN-L-3410-15; OCN-L-3420-15; OCN-L-3438-15;OCN-L-227-16

CIVIL ACTION

Memorandum of Decision on Return date of Plaintiff's Orders to Show Cause and Defendants' Cross-motions to Dismiss

Oral Argument March 4, 2016

The above referenced matters came before the Court on March 4, 2016, the adjourned return date of various Orders to Show Cause filed by the State of New Jersey, Department of Environmental Protection, Office of Flood Hazard Risk Reduction Measures, (hereinafter referred to as "DEP"). The Plaintiff, DEP, seeks final judgment confirming the proper exercise of eminent domain and the appointment of three condemnation commissioners to conduct a hearing to resolve the issue of just

compensation due the property owners in question for the proposed taking of their properties.

These applications are opposed by the Defendants, all private property owners upon whose land the DEP proposes to take perpetual easements for dune construction, for maintenance and for public beach purposes to enable public access.

Attached hereto is a complete list of the cases affected by this decision, as well as the appearances of counsel of record.

The objections raised by the various property owners, the Defendants, are substantially identical. For the convenience of the parties and the Court, this opinion shall be applicable to all matters listed by docket number in the caption and as set forth in the attachment to this written opinion.

Preliminary challenges to the power of eminent domain are to be determined by the Court before the appointment of condemnation commissioners. See: State v. Zinc, 40 N.J. 560, 572 (1963). This includes not only a challenge to the right to exercise eminent domain, but to claims that the condemnor is taking more property and rights than those described in the complaint. State v. Orenstein, 124 N.J. Super. 295, 298 (App. Div. 1973). If there are issues other than value and damages to be decided, those issues must be presented and decided by the Court before it enters final judgment appointing condemnation commissioners. State v. Ornstein, supra.

The Defendants oppose the DEP's exercise of eminent domain, and have filed their answers and cross-motions to dismiss the DEP's complaint. Essentially, the Defendants (hereinafter collectively referred to as "Property Owners") request that the

Court resolve certain preliminary challenges to the exercise of eminent domain by the DEP based upon a lack of a grant of statutory authority. If the Court finds the DEP has condemnation authority, the Property Owners argue the DEP has failed to comply with procedural requirements required by the Eminent Domain Act ("EDA") for the exercise of eminent domain by a public entity.

The Property Owners ask the Court to defer or stay a decision on the application of the DEP for final judgment and appointment of condemnation commissioners, pending a resolution of the threshold objections raised by the Property Owners, and the conclusion of a plenary hearing on the bad faith arguments of the Defendants. The Property Owners ask the Court to restrain the DEP from acting on any declaration of taking, including the construction of the dunes or other shore protection efforts, pending resolution of the issues raised by them in their cross-motion.

Factual Background

The Property Owners are owners in fee simple of real property, primarily residences, that front on the beaches of the Atlantic Ocean. DEP has directed notice to them of its intent to take by the exercise of eminent domain a perpetual and assignable storm reduction easement to "...construct, preserve, patrol, operate, maintain, repair, rehabilitate and replace a public beach..." and a dune system for shore protection purposes.

The DEP has retained the services of a professional real estate appraiser and has provided all property owners a copy of same, which computed the before and after value of the properties as a result of the proposed taking. The DEP appraiser opined that the

values of the properties in question were actually increased when the before and after values of the properties were computed. In other words, the proposed takings for shore protection purposes caused the value of the remainders to be enhanced. As a result, the DEP has offered nominal consideration to all property owners as just compensation for the taking of private property for public use.

The range of compensation offered is from about $300 to about $3,000.

The background of how the DEP and the Property Owners have come to this impasse is instructive. The DEP and the Army Corps of Engineers, ACOE or federal partner, have engaged over the course of many years in a comprehensive shore protection project or projects designed to address protection of the fragile ecosystem of the Jersey Shore. With regard to the subject property owners, the DEP and ACOE have designated this project as the "Manasquan Inlet to Barnegat Inlet Storm Damage Reduction Project," which is a joint venture of the Army Corps of Engineers and the DEP. This project is one of several currently being administered and conducted by the two public entities. The purpose of the project is to provide storm damage reduction for the Ocean County municipalities along the coast, from Point Pleasant Beach at the Manasquan Inlet to Berkeley Township, which is the last town before Island Beach State Park. This represents a stretch of coast line that is about 14 miles long.

The source of federal authority for this project relates back to the Water Resources Development Act of 1986, P.O. 99-662, pursuant to which Congress was authorized to provide federal funding for beach nourishment and shore protection projects for a period not exceeding 50 years. Without reciting all the legislative history, it is apparent that over

the course of the last 30 years the ACOE determined that the most appropriate shore protection effort would be the expansion of the beaches by the deposit of sand taken from off the coast into the area washed by the mean high tide, that is the so called "Public Trust" area, and for the construction of beach berms and dunes to protect against hurricane and storm damage.

Although disputed between the property owners and the DEP, it is clear that a condition of the receipt of federal funds is that the state partner assure reasonable public access to the area that benefits from the federal funding. The Property Owners underscore that the project does not mandate the acquisition of private property for public use, and to the extent that it is limited to a period of 50 years, does not expressly warrant a permanent acquisition of an interest in property.

Although disputed by the DEP, it is apparent that the ACOE requires the state partner, in this case the DEP, to address issues of public access to beaches that were enhanced and protected by public funds, but did not condition specifically the acquisition of an interest in private property to create a public beach as a condition of federal funding. On the other hand, the ACOE does not preclude the state entity from exercising the power of eminent domain in a manner consistent with statutory and constitutional parameters.

It is also apparent that the obligation to obtain the necessary shore protection easements or other interests in property to enable the completion of the DEP/ACOE shore protection project lies with the state partner, DEP.

While shore protection projects have been ongoing for decades, the 2012 Superstorm Sandy, which devastated the New Jersey coast and in particular the area that is the subject of this project, underscored the need for accelerating out shore protection efforts. In areas where the ACOE had completed construction of an expanded beach and dune system prior to November 2012, when the storm struck, the dunes spared landward properties from Sandy's destructive force. In other areas, where Army Corps had not replenished beaches and constructed dunes, homes and properties suffered extensive damage. The pre-existing beach and dunes, if any, (with the exception of certain notable areas, for example Seaside Park) from Point Pleasant Beach to Berkeley were insufficient to protect landward homeowners. Where the dunes, if any, were too narrow, had gaps or were uneven, the storm breached and exploited these deficiencies and caused substantial destruction to structures. More than three years after the storm, the shore continues to rebuild.

In January 2013, in response to the devastation caused by Sandy, the Federal government enacted the Disaster Relief Appropriations Act of 2013, Pub. L. No. 113-2 (Sandy Relief Act). It appropriates $3.461 billion to the Army Corps for construction of shore protection projects in New Jersey and other states affected by Sandy. Previously, in large-scale shore protection projects, the State was required, among other tasks, to provide a percentage of the project funding. Under the Sandy Relief Act, the Federal government will cover 100% of the design, construction, and engineering costs for projects where beach replenishment had previously been constructed. The full funding by

the federal government is a powerful incentive for the State to complete property acquisitions necessary to complete the project.

On July 18, 2014 the NJDEP and the ACOE entered into a Project Partnership Agreement ("PPA") for construction of the project, which is defined as:

> ...the hurricane and storm damage reduction project for Manasquan Inlet to Barnegat Inlet, New Jersey which provides for a sand fill dune and berm..."

Property Owners rely upon this language to buttress their argument that the project as defined in the PPA did not include the acquisition of private property for public beach purposes. The project is also defined for a period of 50 years, and the Property Owners' further allege the action of the DEP in taking property in perpetuity exceeds the scope of the project.

Over the course of time, and even in the years that preceded Sandy, the DEP had embarked on a campaign to acquire from property owners a deed in easement for shore protection and the construction of dunes and berms. These were often acquired for little if no consideration. Many property owners voluntarily executed these deeds in easements, even though they also contained language which referred to the right of the DEP to operate *public beaches* in perpetuity upon what is presently privately owned beachfront property.

The responsibility of acquiring the appropriate rights in real property, in order to complete the project, lies with the state partner to the agreement, the DEP. The Property Owners in this matter, despite the ongoing efforts of the DEP, have refused to execute the form of easement provided to them by the DEP. The Army Corps will not open bids to

construct a project until the State certifies that the State has all of the required easements in hand.

In September 2013, Governor Christie promulgated Executive Order No. 140 (Order). The Order established the Office of Flood Hazard Risk Reduction Measures (Office) within the NJDEP to be "responsible for the rapid acquisition of property vital to (Sandy) reconstruction efforts." The Order noted that "pursuant to N.J.S.A. App. A: 9-51.5, municipalities are authorized to enter upon and take possession and control of property necessary for the construction of Flood Hazard Risk Reduction measure."

Acting upon the perceived authority of the Executive Order, municipalities attempted to acquire shore protection easements without adhering to the requirements of the Eminent Domain Act. This Court has previously ruled that Executive Order No. 140 does not and cannot confer upon the various governmental bodies a right to take a shortcut past the normal eminent domain procedures which are constitutionally required to protect the interests of private property owners in eminent domain actions. Minke Family Trust v. Long Beach Township, (Opinion by Judge Grasso, AJSC). This Court follows that line of reasoning.

In the matter now before the Court, the objections raised by the Property Owners as to the exercise of eminent domain by the DEP can be summarized as follows:

1. The DEP lacks the authority under N.J.S.A. 12:3-64 to take perpetual easements on private property for shore protection or to create public beaches. The Property Owners challenge that nature of the taking, i.e., an easement, not fee simple; that it is in perpetuity when the project by

definition is for 50 years, and that it is for the purpose of shore protection and to establish public beach access to the Property Owners' beach front private properties. In addition, the property owners maintain that Executive Order 140 does not confer upon the DEP a grant of authority to expedite the taking of these interests in private property, thereby circumventing the eminent domain process.

2. The DEP, if found by the Court to be authorized to institute eminent domain proceedings relative to the properties in question, may not take an interest in the property less than fee simple, i.e., an easement in perpetuity. Property Owners argue the proposed takings, easements, are ultra vires, relying upon the express statutory language of N.J.S.A. 12:3-64;
3. *Roe v. Archer* 107 N.J. Super. 77 (App. Div. 1969) is distinguishable and not binding on this Court as justification for DEP to take property for shore protection or public beach access purposes;
4. The DEP failed to engage in good faith, pre-litigation bona fide negotiations with the Property Owners pursuant to N.J.S.A. 20:3-6, and therefore the complaints must be dismissed;
5. The proposed takings by the DEP constitute an abuse of eminent domain power, and therefore the exercise of eminent domain is done in bad faith and is arbitrary, unreasonable and capricious.

As a result of the defects in the procedure used by the DEP, the Property Owners seek reasonable fees and costs pursuant to N.J.S.A. 20: 3-26; the discharge of any Lis

Pendens and the vacation of any filed Declaration of Taking. The Property Owners seek dismissal of all complaints in this matter filed by the DEP.

With regard to the Property Owners in the Bay Head/Mantoloking area, these property owners argue the proposed project is unnecessary since their immediate shore front is protected by a pre-existing rock revetment which has been maintained privately by these ocean front property owners. These Property Owners argue the proposed takings are superfluous and unnecessary, and therefore the proposed takings are in bad faith as arbitrary, capricious and unreasonable. These Property Owners ask the Court to find that a prima facie showing of bad faith has been established which would trigger their right to a plenary hearing to determine whether or not the power of eminent domain, as proposed to be exercise by the DEP, is done in bad faith, is arbitrary, capricious and unreasonable, and that the complaints should therefore be dismissed as to their properties.

The Court has considered the submissions of the parties, the applicable law and the oral argument of Counsels for the parties. The Court will address the following questions presented to it by these motions.

I. Is the DEP authorized to take by eminent domain the proposed interests in the property? Is that authority conferred upon the DEP by Executive Order 140?

Property Owners argue the NJDEP has exceeded its Constitutionally-provided legislative authority by attempting to acquire easements in perpetuity upon private property for the creation of a "public beach." Property Owners maintain that the NJ Constitution provides the agency with only the powers expressly granted by the

Legislature and that those powers do not include the authority for the NJDEP to acquire land in connection with shore protection purposes. Property Owners also contends the NJDEP recognizes N.J.S.A. 12:6A-1, et seq. as the governing authority for shore protection along the Atlantic coast and the state's tidal waterways and that this statute does not include lands beyond the high water mark.

The DEP relies upon the statements contained in the Certification of William Dixon, filed in opposition to this motion, as well as the "Supplemental Declaration of Susan Lewis" filed in a federal law suit entitled Jenkinson's Pavilion, et al v. United States Army Corps of Engineers, et al,. Civ. Action 3:14 cv 07809 (PGS) (LHG), in the United States District Court for the District of New Jersey. Mr. Dixon is the Manager of the DEP Bureau of Coastal Engineering, and Ms. Lewis is the Chief of the Real Estate Division for the Baltimore District of the US ACOE, which is responsible for the Manasquan to Barnegat Inlet project. In Ms. Lewis declaration, she states: "15. ...the Army Corps requires that the NJDEP acquire easement attached as Exhibit 3 to support construction, operation, maintenance, and periodic nourishment of the Project's dune and berm system on Plaintiffs' properties. . ." In addition, Ms. Lewis confirmed that as a condition of federal funding the state partner to the project was required to provide proof of public access and use as a condition of receipt of federal funding. She further states that the Deeds of Easement are generally consistent with the perpetual beach storm damage reduction easement that the ACOE required.

The right of the DEP to acquire property by condemnation to support shore protection projects and public access has long been recognized in this jurisdiction. Public

entities have used the eminent domain procedures to acquire private property to protect against storm damage, beach erosion and ecological deterioration due to natural forces. Public entities have likewise used eminent domain to acquire and protect property used for recreational purposes, including for the establishment of public beaches and to ensure public access to the shore within the public trust area.

This Court concludes that the DEP is authorized under the broad delegation of authority to protect the fragile coastal system to take property for public beach purposes and for shore protection purposes.

The DEP is the lead state agency in the coordination of shore protection programs. The DEP in its current department configuration is a comprehensive Department of state government which, over many years, has acquired through consolidation and reorganization of state government many boards and agencies that were historically dedicated to protection of the fragile coastal region and immediate shores, both on the ocean, the bays and the various bodies of water and marshland that are located within the coastal region of the state.

The Property Owners claim Executive Order 140 does not authorize the present takings, as the Governor of New Jersey cannot create or delegate the power of eminent domain. Moreover, Property Owners argue Executive Order 140 goes beyond the language of N.J.S.A. 12:3-64. The Property Owners also contends Executive Order 140 referenced emergency powers that are not relevant to what the NJDEP was instructed to accomplish. Furthermore, Property Owners allege the Plaintiff's actions exceeded the directives in Executive Order 140, as the Order did not direct the takings of perpetual

easements upon private property to create public beaches. The Court has ruled, in Minke Family Trust v. Township of Long Beach, Docket No. OCN-L-2154-98 (Law. Div., Ocean County) (Opinion by Vincent Grasso, A.J.S.C.) Executive Order 140 cannot be a substitute for compliance with the substantive and procedural requirements of the Eminent Domain Act (EDA). This Court is in accord with that opinion, and therefore this argument as a basis for dismissal of the Plaintiff's complaints is without merit. See also: City of Margate v. United States Army corps of Engineers, Civ. Action No. 1:14-CV-7303 (D. N.J. Jan. 15, 2015) (Opinion of Bumb, J., U.S.D.J.). It is the understanding of the Court that the DEP has abandoned its reliance upon this executive order as a source of authority to take private property for shore protection or related purposes without adhering to the EDA.

II. **May the DEP take an interest in property, pursuant to the express language of N.J.S.A. 12:3-64 which is less than a fee simple interest, i.e., a perpetual easement?**

N.J.S.A. 12:3-64 provides:

> The Department of Conservation and Economic Development may acquire title, *in fee simple*, in the name of the State, by gift, devise or purchase or by condemnation in the manner provided in chapter one of the Title Eminent Domain (20:1-1 et seq.) to any lands in the State, including riparian lands, of such area and extent which, in the discretion of the department, may be deemed necessary and advisable. All lands so acquired shall be subject to the jurisdiction and control of the Department.
>
> The Department may enter upon and take property in advance of making compensation therefor where for any reason it cannot acquire the property by agreement with the owner.
>
> Upon the Department exercising the right of condemnation and entering

> upon and taking land in advance of making compensation therefor it shall proceed to have the compensation fixed and paid to the owner, as provided in said chapter one of the Title Eminent Domain.
>
> Lands thus acquired shall be used for the improvement or development of any waterway, stream, river or creek or any waterfront or oceanfront property or to give access to any lands of the State.

The Property Owners argue that even if the power of eminent domain is conferred upon the DEP for shore protection purposes, the statue requires any title be taken in "fee simple." In addition, Property Owners allege N.J.S.A. 12:3-64 does not authorize the NJDEP to take private property to create *perpetual easements* upon private property for shore protection to establish a public beach. As such, Property Owners argue the Court should enforce the statute as written, which states the NJDEP may acquire title in fee simple only. The Property Owners further argues there is no need for interpretation or construction of the plain language of the statute, as the Legislature chose not to authorize the acquisition of properties in less than fee simple.

The Property Owners claim N.J.S.A. 12:3-64, et. seq., does not authorize the NJDEP to take property to create a "public beach" for the purposes of protecting the shore. The Property Owners contend that Section 64 has nothing to do with beach protection and the creation of public beaches when placed in the context of riparian and waterfront legislation. The Property Owners suggest that Section 64 was adopted to authorize the State's reacquisition, in fee simple, of riparian lands not owned by the State and to permit the State to make profitable use of lands the State historically owned alone. Property Owners additionally argue that statutes addressing beach protection do not

authorize condemnation at all, but rather address interactions with the federal government.

The DEP relies upon the holding in State by Roe v. Archer, 107 N.J. Super. 77 (App. Div. 1969): "...The statute [N.J.S.A. 12:3-64] is general legislation for the public benefit and is to be read broadly so as to permit the Department to achieve the salutary purposes outlined in the act. Participation by the Department in the federal flood control program via this act is fully warranted." It is not the position of this Court to deviate from the holding of *Archer*, in that this legislation is to be broadly construed to achieve the purposes of shore protection, and is a legislative source of authority for condemnation actions that acquire interests in property for these purposes.

III. **Is this Court bound by the holdings in *State v. Archer*?**

Property Owners allege that DEP's reliance on *State by Roe v. Archer*, 107 N.J. Super. 77 (App. Div. 1969), the sole case the NJDEP claims has authorized its takings, is misplaced, as the court in that case made no reference to the subject of the NJDEP authority in connection with shore protection. In *Archer*, the Borough of Union Beach appealed from the order appointing condemnation commissioners entered by the trial court. The Department of Conservation and Economic Development (the predecessor to the DEP) took certain lands for the purpose of "hurricane and shore protection" pursuant to the authority under N.J.S.A. 12:3-64. The Appellant in that matter, as now, alleged there is no statutory authority for the Department to take the lands for this particular public use. The Court found, in construing the application of that statute to a federal funded shore protection project and takings associated therewith:

> "... Appellant challenges the right of the department to bring condemnation proceedings for the purposes of hurricane and shore protection on the grounds that there is no statutory authorization presently existing for such purposes. It is also contended that the taking in question are not for public use...
>
> We have no doubt of the power of the department under the statute in question to maintain these condemnation proceedings. The statute is general legislation for the public benefit and is to be read broadly so as to permit the department to achieve the salutary purposes outland in the act...."
>
> [State v Archer, 107 N.J. Super. 77, 79 (App. Div. 1969).]

Although the Property Owners urge this Court to decline to follow *Archer*, as wrongly decided, this Court as a trial court is bound by the authority of the published appellate decision. It is for the Appellate Division to determine whether or not *Archer* is still good law. That decision is binding on this trial court.

In any event, Property Owners argue *Archer* does not stand for the proposition that the DEP may take land for permanent easements to establish a public beach.

The sole source of authority to condemn in this case derives from N.J.S.A. 12:3-64, which authorizes the DEP to take property for shore protection purposes in "fee simple." Property Owners allege this statute is entitled to strict construction, and that a lesser taking, an easement, is not authorized by the statute. While the statute is entitled to strict construction, it is also entitled to reasonable interpretation that if a lesser inclusive taking would be reasonable, that the condemning authority would not be so limited as to only be permitted to take in fee simple. The Court finds that the language of the statue was not intended to limit a taking to a lesser degree, for example a temporary easement or in this case a permanent easement, rather than a total taking of property. It is within the

policy judgment of the condemnor to determine the nature and extent of the public need, subject of course to constitutional or express statutory boundaries.

Property Owners further allege the proposed taking of a permanent easement, in connection with a project which by its terms is limited to 50 years, is unauthorized. The Court finds no merit to this argument, since it would be nonsensical to impose upon the condemnor the obligation to renegotiate all easements at the expiration of 50 years, especially when it is plainly obvious there will always be a need for shore protection measures. In the future, what form these measures take may be dictated by developments in technology; environmental factors like climate change, or any other considerations that are driven by the passage of time and the ability of science and technology to understand and address issues of shore protection. To impose upon the condemnor an inability to acquire a permanent easement, which is in reality only a less comprehensive taking of the bundle of rights in property that is fee simple, defies logic and common sense.

The arguments of the Property Owners do not comport, however, with the plain language of the statue, that the mission of the department is to include the acquisition of lands used for "...the improvement or development of any waterway, stream, river or creek or any waterfront or oceanfront property or to give access to any lands of the State." N.J.S.A. 12:3-64. It defies logic and common sense that broad right to acquire property for public use would not also include the acquisition of lesser interests in real property, including a temporary or permanent easement, as opposed to full simple acquisition. The storm damage reduction easements which the DEP seeks to acquire

clearly fall within the concept of an acquisition of property that the DEP is authorized to obtain as part of a comprehensive shore protection program.

The Court finds that the DEP is authorized to take less than fee simple interests in property for shore protection and public beach purposes, and that the language of 12:3-64 was not intended to limit that right, given the broad delegation of authority by the legislature to the DEP to manage a comprehensive plan for shore protection and public access. The Court is persuaded that the EDA, which was adopted for the purpose of creating uniformity in practice and procedures for the exercise of eminent domain by public agencies and bodies, conferred upon the DEP a broad grant of authority, including the right to take an interest in property less than fee simple if appropriate for the project in question. That judgment is left to the discretion of the public body.

The Court also finds no merit to the argument that the DEP is restricted in taking permanent easements for public access for recreational beaches, which are enhanced by the public funds committed to the shore protection project. The federal partner to the project requires public access as a condition to public funding. This access can be achieved in a number of ways, including ways suggested by the Property Owners, which would not impact private property rights. However, it is within the discretion of the public entity to determine the nature and extent of public access. The fact that this proposal—a public access easement on a portion of the ocean front property owned in fee simple by the private property owners—is not acceptable to the Property Owners is of no consequence. All public takings, to some degree, are controversial and even upsetting to a private property owner, for example, the expansion of a public right of way to

accommodate more traffic may render a person's tranquil street into a highway. The discretion about achieving this goal of public access is left to the judgment of, in this case, the condemnor, the DEP. That policy will not be second guessed by the Court. The federal policy, that public funds may not be used to enhance and benefit a private property without also guaranteeing public use and access to that property, is a fundamental component to the receipt of federal funds for this project. The value of the loss of exclusive use of the beach is a proper consideration in fixing just and reasonable compensation, a determination to be made in the first instance by condemnation commissioners. Harvey Cedars v. Karan, 214 N.J. 384, 389 (2013).

IV. Did the DEP fail to engage in good faith pre litigation bona fide negotiations with the Property Owners?

Private property owners are constitutionally entitled to just compensation when private property is taken for a public purpose. N.J.S.A. 20:3-6 requires the condemnor to complete certain pre-litigation steps which are jurisdictional, i.e. the failure to complete these steps will result in the dismissal without prejudice of the condemnation complaint. The condemnor must first appraise the before and after value of the property, giving the property owner the right to accompany the appraiser during the inspection; second, the condemnor must then engage in bona fide negotiations with the property owner, and shall also furnish the condemnee with a written offer of the full amount of the appraisal, and disclose the appraisal reports used to form the basis for that offer. "The reasonableness of pre-negotiation disclosure centers on the adequacy of the appraisal information; it must permit a reasonable, average property owner to conduct informed and intelligent

negotiations...." State by Comm'r Transp. V. Carroll, 123 N.J. 308, 321 (1991). Although the extent of the negotiations in this case constituted the provision of an offer, nominal in amount, and not acceptable to the property owners, the fact that the negotiations were limited to a nominal offer of compensation does not render these procedures as defective. The issue of just compensation is properly an issue left for resolution by the condemnation commissioners, or in a later trial with or without the benefit of a jury. This Court finds, although the process was truncated, it was nonetheless bona fide and consistent with the statute

When viewed in the totality of circumstances, is the exercise of eminent domain by the DEP in bad faith, in that it is arbitrary, capricious and unreasonable?

It is unfortunate that the Property Owners in this case, who seek only to exercise their constitutionally protected rights associated with the ownership of private property, have been subjected to vilification, encouraged by many public figures. The same Constitution that protects the rights of the Property Owners, however, also protects the freedom of speech and opinion by persons, no matter how contentious or ill-conceived is the criticism directed to the Property Owners, and no matter how uncomfortable these perceived unwarranted verbal attacks by public officials were to the property owners.

The conduct of the DEP in negotiating with the Property Owners and otherwise in exercising the power of eminent domain is not deemed in bad faith merely because other citizens or public officials sought to vilify citizens who insisted upon adherence to the statutory and Constitutional rights they have as property owners.

V. With regard to the Bay Head/Mantoloking ocean front property owners, is the existence of a preexisting rock revetment for shore protection purposes render the proposed taking by the DEP unreasonable, arbitrary, and capricious?

Relying upon Texas Eastern Transmission Corp. vs. Wildlife Preserves, Inc., 48 N.J. 261 (1966), these Property Owners argue that they have established a prima face case of arbitrariness of the taking, and therefore are entitled to a plenary hearing on the issue of the authority of the DEP to condemn in this instance. In that case, defendant, Wildlife Preserves, alleged the taking was arbitrary and capricious because the proposed pipeline horn land and there was a viable alternative for the pipeline which would cost less environmental damage. Ultimately, the Supreme Court held, based upon the reports and affidavits of experts proffered by the defendants, there was sufficient prima facie proof of arbitrariness to require the plaintiff to come forward with proofs on the issue of the feasibility of the alternate means to the end sought by the condemnation action.

The Bay Head/Mantoloking Property Owners, who are defendants in this condemnation action, rely upon the expert report of Andrew Raichel, P.E., (Exhibit A to the Defendant's brief in opposition to the Order to Show Cause). Mr. Raichel was the designer and Engineer of Record for the construction of the rock revetment that was constructed in 2014. Raichel opines that the revetment was designed to withstand a 100 year storm event and has sufficient rock size and elevation for that event. His analysis also concluded that overtopping (water running over the revetment) was not likely to occur, even with the most conservative of assumptions, and if it did occur, would have

very minor consequences as a result of same. Their expert further opines that the ACOE did not factor into their analysis the cost savings benefit of the pre-existing revetment relative to the expenditure of public funds for this project.

The rock revetment is approximately one mile long and the owners of the oceanfront properties have spent millions of dollars to maintain and construct this alternative means of storm damage protection.

These Property Owners argue the Court should stay the proceedings for the purpose of conducting a plenary hearing to receive additional evidence that the existing storm damage revetment is as effective as the proposed dune and berm system which is part of the project. These Property Owners further argue that the State has failed to show that excluding the 1,800 feet of rock revetment or the approximate one mile beach covered by the revetment from Point Pleasant Beach to Mantoloking would result in compromising the shore protection value remaining part of the project. Since the proposed project is therefore superfluous, these Property Owners argue they have demonstrated a prima facie showing of arbitrariness warranting a plenary hearing. See: Texas Eastern Transmission Corp., 48 N.J. at 276; Bridgewater v. Yarnell, 64 N.J. 211, 215 (1974).

The Plaintiff, DEP, opposes this application and argues that the standard for a stay and plenary hearing should be not whether or not these Property Owners have shown a prima face case of arbitrariness but rather whether there is an affirmative showing of fraud, bad faith or manifest abuse, relying upon West Orange v. 769 associates, 172 N.J. 564 (2002). The Township of West Orange sought to condemn private property for the

purpose of a dedicated public street. The defendant alleged that the proposed condemnation was not for a public purpose but rather to advance the interest of a private developer, hence that it was in bad faith. Justice Zazzali noted that the normal standard of review was manifest abuse of discretion; however, the facts upon which his comments were based differ vastly from this case, which is more in line with the Texas Eastern Transmission case, supra. The West Orange case is clearly distinguishable from this matter, where the issue is whether or not the Property Owners have established a prima facie case of arbitrariness to warrant a plenary hearing on the good faith of the condemnor in proceeding with eminent domain.

This Court finds that the Bay Head/Mantoloking Property Owners have established a prima facie case of arbitrariness which warrants the scheduling of a plenary hearing after a brief period of discovery. These Property Owners have put forth expert opinion as to the efficacy of the pre-existing shore protection measure in the form of the rock revetment. Under *Texas Eastern* and *Yarnell*, it is clear that a plenary hearing is warranted, to afford these Property Owners the opportunity to advance their arguments as to whether or not the proposed taking is unnecessary and superfluous when the existing rock revetment offers shore protection at least equal to if not superior to the dune and berm plan advanced by the DEP, without compromising the efficacy of the entire project.

Conclusion

For the reasons set forth in this order, the Property Owners' motion to dismiss the condemnation complaint in all matters except the Bay Head/Mantoloking matters shall be

denied, and an Order for Final Judgment shall be entered, together with an Order Appointing Condemnation Commissioners.

With regard to the "rock revetment" argument impacting the Bay Head/Mantoloking Property Owners, the Court will set this matter down for a plenary hearing. There shall be an expedited period of discovery for 60 days, and the parties shall appear before the Court on April 19, 2016 at 10:00 a.m. for a case management/trial scheduling conference at which time a date for the plenary hearing date shall be set.

Counsel for the Plaintiff shall submit a proposed form of order consistent with this decision.

Respectfully submitted,

MARLENE LYNCH FORD, A.J.S.C

IN THE MATTER OF VARIOUS MATTERS FILED BY THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION FOR THE EXERCISE OF EMINENT DOMAIN FOR SHORE PROTECTION PURPOSES	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION/CIVIL PART OCEAN COUNTY Docket No.: OCN-L-2919-15; OCN-L-066-15; OCN-L-3067-15; OCN-L-3068-15; CN-L-3069-15; OCN-L-3070-15; OCN-L-3071-15; OCN-L-3077-15; OCN-L-3097-15; CN-L-3204-15; OCN-L-3205-15; OCN-L-3206-15; OCN-L-3275-15; OCN-L-3285-15; OCN-L-3286-15; OCN-L-3287-15; OCN-L-3288-15; OCN-L-3289-15; OCN-L-3290-15; OCN-L-3291-15; OCN-L-3292-15; OCN-L-3296-15; OCN-L-3319-15; OCN-L-3356-15; OCN-L-3410-15; OCN-L-3419-15; OCN-L-3420-15; OCN-L-3438-15

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