

New Jersey Appellate Court Upholds NJDEP's Authority to Take Easements for Coastal Protection Projects

John J. Reilly

Greenbaum, Rowe, Smith & Davis LLP Client Alert

July 2017

In a June 22, 2017 published decision in numerous consolidated condemnation cases, the New Jersey Appellate Division held that the New Jersey Department of Environmental Protection (NJDEP) has the statutory authority to condemn private property for perpetual easements for shore protection purposes, including the right of the public to access and use the easement areas.

The post-Superstorm Sandy shoreline restoration projects at issue in *State of New Jersey Department of Environmental Protection v. North Beach 1003, LLC, etc.* were The Long Beach Island Project and the Manasquan Inlet to Barnegat Inlet Storm Damage Reduction Project, which encompass the entire 18-mile length of Long Beach Island and 14 miles along the northern Ocean County coast.

The Court found that NJDEP is authorized under existing state law to acquire perpetual easements and has discretion to include the right of public access and use under the statute and pursuant to the public trust doctrine. The relevant statute provides that NJDEP may acquire title in fee simple (complete ownership) to any lands in New Jersey of such area and extent that it may deem necessary and advisable for the improvement or development of waterways and waterfront or beachfront property. NJDEP is also authorized to construct dunes on the ocean shorefront to prevent or repair damage by erosion or storm.

The Court determined that the statutory power to acquire a fee simple includes the power to acquire lesser interests, based upon the plain language and the context of the statutory terms "such area and extent" and "improvement or development." The Court referred to its 1969 decision in *State v. Archer*, in which it ruled that NJDEP's predecessor was authorized to condemn property for purposes of shore protection. The Court also noted that since that decision, the Legislature has taken no action to change or amend the holding in *Archer*.

In its decision, the Court also rejected the challenge that NJDEP had not conducted required pre-complaint bona fide negotiations. Describing the issue as fact specific and requiring case-by-case inquiry, the Court concluded that NJDEP had complied with the statutory requirements and that its appraisal report provided adequate information to permit the owner to conduct negotiations.

The Appellate Division specifically did not address whether takings of perpetual easements were necessary in front of certain properties in Bay Head and Mantoloking, which are already protected by a rock revenant, as the trial court has not yet rendered a decision concerning those properties.

Published Articles (Cont.)

The author of this Alert, **John J. Reilly**, is Chair of the firm's Condemnation & Eminent Domain Practice Group.