

NJ Appellate Division Upholds Beachfront Property Owners Right to Compensation in Pre-Sandy Breach of Easement Agreement Suits

John J. Reilly

Greenbaum, Rowe, Smith & Davis LLP Client Alert

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The New Jersey Appellate Division issued a published decision on October 28, 2013 in *Petrozzi v. City of Ocean City*, a consolidated appeal involving pre-Superstorm Sandy circumstances in which beachfront property owners claimed damages for breach of dune easement agreements and inverse condemnation against the City of Ocean City and the New Jersey Department of Environmental Protection (DEP).

In the easement agreements, the City had agreed to limit the height of the dunes to not more than three feet above the average elevation of the bulkhead. In 1994, however, DEP amended the Coastal Area Facility Review Act (CAFRA) regulations to include dune construction and maintenance as a regulated activity, thereby requiring the City to apply for a permit to alter the height of the dunes. After the height of the dunes increased by natural accretion in excess of the height limitation in the easements, the City applied to DEP for a CAFRA permit to reduce the dune height; however DEP denied the application. At about the same time, the property owners commenced their suits.

As to the breach of easement agreement claims, the Appellate Division (as had the trial court) distinguished between the property owners who entered the easement agreements prior to DEP's 1994 CAFRA amendments and those who entered the easement agreements subsequent to the amendments. With respect to owners who had entered the easement agreements prior to the CAFRA amendments, the trial court concluded that the City had not breached the agreements and the owners were not entitled to damages because the CAFRA regulations rendered performance (of the agreed upon dune height limitation) impossible or impracticable and the owners had received the benefit of added storm protection. The Appellate Division agreed that the CAFRA amendments had rendered the easement limitation on dune height impossible or impracticable to perform, but disagreed that the owners were not entitled to damages, ruling that these owners were entitled to an equitable amount of restitution and remanding the matters.

With respect to the owners who entered the easement agreements after the CAFRA amendments, the trial court had found there had been a breach by the City and awarded damages. The Appellate Division agreed that these owners were entitled to damages for breach, but concluded that the trial court had determined the amount of damages without sufficient findings and remanded these matters as well.

Published Articles (Cont.)

The Appellate Division provided direction on the calculation of damages (whether as restitution or as damages for breach) with reference to condemnation case law. Consideration is to be given not only to the quantifiable decrease in value for the loss of ocean view due to the increased dune height – as the Appellate Division had addressed in its condemnation opinion in *Ocean City v. Maffucci* – but also to the offset by any quantifiable, non-speculative, reasonably calculable, increase in value by the storm protection benefits of the dune project - as the Supreme Court recently announced in its condemnation opinion in *Harvey Cedars v. Karan*.

The Appellate Division also affirmed the dismissal of the inverse condemnation claims against the City and DEP, as the properties had not been deprived of all or substantially all of their beneficial use.