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Sand Dunes: Friend or Foe?

By Daniel J. Granatell

We will go town by town and if we have to start calling names out of the selfish ones who care more about their view than they care about the safety and the welfare of their neighbors, then we are going to start doing that. - Governor Chris Christie¹

The State of New Jersey has historically been at the forefront of the progressive movement of individual rights. Where the Federal and State Constitution lacked adequate protection, the State government passed laws to further supplant these rights.² It appears, however, that since Hurricane Sandy the traditional mindset of New Jersey politicians has changed toward beachfront property owners.

This change of mindset has caused much tension within communities along the New Jersey Coast. The tension stems hundreds of private beachfront property owners' refusal to grant their local governments perpetual easements across sand dunes located on their property. These coastal municipalities in collaboration with the New Jersey Department of Environmental Protection ("NJDEP") and the United States Army Corps Engineers ("USACE) demand these easements as part of a pre-requisite to the receipt of federal funds.

Past attempts by municipalities to take legal action against holdouts were unsuccessful. The courts consistently found that any attempt to "take" sand dune

¹ Peter Haskell, *Christie Blasts 'Selfish' Homeowners Who Oppose Dunes To Protect Shore Communities*, CBS NEW YORK, Mar. 26, 2013, <http://newyork.cbslocal.com/2013/03/26/christie-blasts-selfish-homeowners-who-oppose-dunes-to-protect-shore-communities/>.

² William L. Kuzmin, *Eminent Domain Abuse: Now Your Land Can Be Taken For...Nothing*, New Jersey Lawyer, THE MAGAZINE, Aug. 2007, at 38, 39.

property requires eminent domain proceedings and payment of just compensation. In effect, coastal municipalities sought ways to circumvent this course of action due to the heavy cost associated with the constitutional right to just compensation. This is the reason that Governor Christie and other local government officials are exerting such political pressure on beachfront property owners to grant easements.³ The effectiveness of such political pressure could be seen in an upcoming New Jersey Supreme Court decision.

Pending before the New Jersey Supreme Court is *Borough of Harvey Cedars v. Karan*.⁴ The main issue in that case is whether the sand dunes along the beach provide a general or specific benefit to private beachfront property owners. At the trial level and affirmed by the appellate court, it was concluded that any incremental additional storm protection provided by the dune system was a general benefit.⁵ A reversal by the New Jersey Supreme Court will drastically change the law of eminent domain in the state of New Jersey.

This paper will **first** address the physical aspects of the sand dune system: the implementation of the New Jersey Recovery and Reinvestment Act and beach replenishment. The **second** part will examine the effects of Hurricane Sandy and the political pressures exerted on holdouts that refuse to grant perpetual easements. The **third** will focus New Jersey case law surrounding eminent domain. Specifically, this section will examine (i) eminent domain proceedings related to sand dunes, (ii) valuation of condemned property, (iii) differentiate

³ Without just compensation.

⁴ *Borough of Harvey Cedars v. Karan*, 40 A.3d 75 (N. J. Super. Ct. App. Div.), *cert. granted*, No. A-4555-10T3 (N.J. 2012).

⁵ *Id.* at 162.

general and specific benefits, and (iv) compare the sand dune system with other public uses. The **final** part will discuss potential remedies that could solve the problems between local governments and holdouts without a reversal by the New Jersey Supreme Court.

I. NJ Recovery and Reinvestment Act: Beach Replenishment

Shorelines are areas of unending conflict among the natural forces in wind, water, and land.⁶ Atmospheric disturbances generate winds, which in turn causes waves to move through the ocean and break on shore, releasing energy.⁷ A shore composed of easily displaced sediments, such as sands, gravels, or silts, will be washed in the direction of the advancing waves.⁸ Consequently, unless the displaced sediment is replaced with an equal amount of material from other areas, the shore erodes, leading to the loss of beaches.⁹

The process of beach erosion is timeless and is a recurring problem that people have dealt with since they began inhabiting the coastline.¹⁰ “Man, with his drive to control the shore for his own ends, often loses sight of this essential fact.”¹¹ The efforts to control the shore by private citizens and government have proven difficult, if not, catastrophic at times.¹²

Faced with the dilemma of an eroding shoreline, coastal municipalities are typically left with three options: (1) relocation, (2) construction of shore protection structures, or (3) beach replenishment.

⁶ UNITED STATES ARMY CORPS OF ENGINEERS, LOW COST SHORE PROTECTION...A PROPERTY OWNER'S GUIDE 4 (1981).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ UNITED STATES ARMY CORPS OF ENGINEERS, *supra*, note 6.

¹² *Id.*

Relocation often does not sit well with people that own homes on the beach. These people have invested time and money into these homes and the thought of moving defeats the purpose of living on the beach.

Common forms of shore protection structures include: bulkheads, seawalls, revetments, groins, and jetties.¹³ Bulkheads are retaining walls with the primary purpose to hold or prevent the sliding of soil.¹⁴ Although they provide some protection from wave action, severe wave action is usually beyond their capacity.¹⁵ “Seawalls, on the other hand, are massive structures used to protect backshore areas from heavy wave action.”¹⁶ Their size, however, generally makes them too expensive.¹⁷ Another form of structure is known as revetment. A revetment is a heavy facing on a slope that protects the adjacent upland from wave scour.¹⁸ The problem with these structures is that they only protect the land immediately behind them and not the adjacent areas.¹⁹ While the land that people generally want to protect from erosion is directly in front of them.

Groins, similar to jetties, are a form of shore protection that extends perpendicular from the beach into the ocean.²⁰ A groin is intended to build up an eroded beach by trapping the sediments lateral drift.²¹ These structures, however, only stop the erosion on one side of the barrier.²² Any accumulation of sand

¹³ UNITED STATES ARMY CORPS ENGINEERS, *supra* note 6, at 20.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 21.

¹⁹ UNITED STATES ARMY CORPS ENGINEERS, *supra* note 6, at 22.

²⁰ Jessica Vantine & Tiffany B. Zezula, *The Beach Zone: Using Local Land Use Authority to Preserve Barrier Islands*, 20 Pace Envtl. L. Rev. 299, 307-08 (2002).

²¹ *Id.* at 20.

²² *Id.*

produced by the structure is at the expense of an adjacent section of the shore.²³ In order to be effective, this requires the construction of numerous structures along the entire length of beach.²⁴ States, however, are hesitant to allow the construction of groins based on their improper use and construction in the past.²⁵ Additionally, the idea of permanent structures along the beach often does not sit well with local residents. These structures are visually unappealing and destructive to recreational activities. This leaves coastal municipalities with the most logical option of beach replenishment.

Beach replenishment is the process of *restoring* eroded shorelines.²⁶ Despite public perception, this process restores beaches, but *does not prevent erosion*. Artificial replacement restores the sand dunes, but is prone to wash away within a few years or in a major storm.²⁷ This forces replenishment project to be constant and enduring.²⁸

The sand used in replenishment projects is typically provided in one of two ways.²⁹ Sediment is either trucked to the coast or hydraulically dredged offshore.³⁰ While trucking comes with substantial mobilization costs and wears on local infrastructure, dredging offshore can amplify wave impact, causing greater erosion.³¹ Further, replenishment alter the natural processes of “barrier islands,

²³ *Id.* at 20.

²⁴ *Id.*

²⁵ *Id.*

²⁶ STEVE HAFNER, *BEACH STABILIZATION* (Richard Stockton College of New Jersey: Coastal Research Center), <http://intraweb.stockton.edu/eyos/coastal/25yrConference/Beach-Stabilization.pdf>.

²⁷ Vantine & Zezula, *supra* note 20, at 309.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

which through time, paradoxically, destroy the structures they were built to protect.”³²

Despite the costs, “[n]ourished shorelines provide two primary benefits: enhanced recreational activity and storm protection.”³³ The introduction of new sediment, after it has been eroded away, maintains or extends the width of the beach for people to enjoy.³⁴ Likewise, the replacement of sediment along the natural sand dunes provides protection from storm surge.³⁵ Additional benefits include restored natural habitats, increased coastal access, and reduced need for hard stabilization.³⁶

Although emergency replenishment projects along the Jersey Shore have been enacted since the devastating 1962 “Ash Wednesday Nor’easter.”³⁷ Local municipalities in collaboration with the NJDEP and USACE have recently taken a more proactive approach, mandating perpetual sand dune easements as precedent to any public funding.³⁸ These conditions are also incorporated in the New Jersey Recovery and Reinvestment Plan.³⁹

³² Vantine & Zezula, *supra* note 20, at 306.

³³ STEVE HAFNER, *BEACH STABILIZATION* (Richard Stockton College of New Jersey: Coastal Research Center), <http://intraweb.stockton.edu/eyos/coastal/25yrConference/Beach-Stabilization.pdf>.

³⁴ Elizabeth Kayatta, *Under the Boardwalk: Defining Meaningful Access to Publicly Funded Beach Replenishment Projects*, 39 B.C. Envtl. Aff. L. Rev. 449, 456 (2012).

³⁵ *Id.*

³⁶ *See id.*

³⁷ Mary Ann Spoto, *Fight against emergency beach replenishment causing waves among shore towns*, THE STAR-LEDGER (Newark, N.J.), Apr. 13, 2012, http://www.nj.com/news/index.ssf/2012/04/emergency_beach_replenishment.html.

³⁸ *Id.*

³⁹ Army Corps of Engineers, *NJ Recovery and Reinvestment Plan* (Mar. 23, 2013, 11:36 AM), <http://www.nj.gov/recovery/infrastructure/acoe.html>.

In 2009, President Barack Obama signed into law the American Recovery and Reinvestment Act.⁴⁰ The Act provided extensive funding for science, engineering research and infrastructure, and more limited funding for education, social sciences and the arts.⁴¹ With New Jersey's share of the Federal Act's funding, the state government created its own New Jersey Recovery and Reinvestment Plan.⁴² The plan incorporates \$51,259,000⁴³ worth of funding for beach replenishment projects along the New Jersey Coastline.⁴⁴ In order for the funds to be administered, however, USACE requires ownership or construction and public interest easements across private property, where restoration of privately owned property will occur.⁴⁵ USACE has put the pressure on the NJDEP and local municipalities to acquire such easements from the private beachfront property owners. Past attempts by the NJDEP and coastal municipalities have been unsuccessful due to resident's problems with loss in property value and the substantive content of the easement.⁴⁶

Although the plan calls for a fifty-year replenishment period, the easement remains perpetual. There is no proposed actual end to the project itself as beach replenishment requires ongoing maintenance and operation to remain effective.⁴⁷

⁴⁰ Brian Baldwin, *American Recovery and Reinvestment Act*, UNIVERSITY OF WASHINGTON, (Mar. 31, 2013), <http://www.washington.edu/research/gca/recovery/>.

⁴¹ *Id.*

⁴² *NJ Recovery and Reinvestment Plan*, *supra* note 39.

⁴³ Some funds will be dedicated to bulkheads, seawalls, etc.

⁴⁴ *NJ Recovery and Reinvestment Plan*, *supra* note 39.

⁴⁵ *Id.*

⁴⁶ Lauren Wanko, *Ship Bottom Residents Reluctant to Sign Easements to Build Dunes*, NJ TODAY, Apr. 3, 2013, <http://www.njtvonline.org/njtoday/video/ship-bottom-residents-reluctant-to-sign-easements-to-build-sand-dunes/>.

⁴⁷ Valentine & Zezula, *supra* note 20, at 309.

The reason that fifty years was chosen is because Congress needs to select a finite period in order to conduct an economic analysis of the project.⁴⁸

Besides the concept of perpetuity, many residents are also concerned about the terms and scope of the easement. Despite assurances from USACE and local officials about the scope and applicability of the language in the document, many residents remain concerned that the easement authorizes local government to construct anything they deem appropriate right in front of their homes.⁴⁹ They are concerned that the easement would confer the right to construct boardwalks, concession stands, public restrooms, boat rental locations, or storage facilities.⁵⁰ In an attempt to appease holdouts, USACE and NJDEP have issued letters of “clarification” or “explanation” that define the terms and scope of the easement, however, many residents remain skeptical.

II. Political Pressures of Hurricane Sandy

Hurricane Sandy caused billions of dollars of land, building, and personal damage along the New Jersey coast. As the waves came crashing down it destroyed homes and displaced lives. In response, coastal municipalities called for greater storm protections along the beachfront.⁵¹ Many residents urgently signed the easements as part of the New Jersey Recovery and Reinvestment Plan without

⁴⁸ Letter from David Rosenblatt, Administrator, NJDEP, to Johnathan Oldham, Mayor Borough of Harvey Cedars, May 5, 2006, http://www.longbeachtownship.com/images/explanation_of_easements.pdf.

⁴⁹ Letter from Craig R. Homesley, Real Estate Division, Chief Civil Projects Support Branch, U.S. Army Corps. Engineers, to David Rosenblatt, Administrator, NJDEP, and Joseph H. Mancini, Mayor of Long Beach Township, Jun. 17, 2010, http://www.longbeachtownship.com/images/explanation_of_easements.pdf.

⁵⁰ *Id.*

⁵¹ Ryan Hutchins & Seth Augenstein, *N.J. sand dunes protected Shore towns from Hurricane Sandy's wrath*, THE STAR-LEDGER (Newark, N.J.), November 6, 2012, http://www.nj.com/news/index.ssf/2012/11/nj_sand_dunes_protected_shore.html.

compensation for fear of the next storm or public repercussions their refusal to help protect their community.⁵²

For residents that refused to sign, local municipalities attempted to sway beachfront owners through public pressure. They threatened to deny holdouts building permits.⁵³ In some municipalities, the names and addresses of the holdouts were posted on governmental websites inciting confrontation in the community.⁵⁴ In others, the holdouts were guilt tripped by public statements such as “the very existence of our community depends on it.”⁵⁵ One local official even encouraged neighbors to sue the holdouts.⁵⁶

In these scenarios, the application of political pressure on holdouts is an attempt to circumvent eminent domain proceedings. Despite these attempts, the 5th Amendment of Federal Constitution mandates that “nor shall private property be taken for public use, without just compensation.”⁵⁷ Further, the New Jersey Constitution, which is controlling, prescribes that private property cannot be taken without just compensation.⁵⁸ Any other means to acquire private property without payment of just compensation is unconstitutional.⁵⁹

Local municipalities’ use of public pressure and coercion against holdouts raises questions of legality. While there is no evidence that any municipality has

⁵² Juliet Kaszas-Hoch, *Last Holgate Agrees to Sign Easement*, THE SAND PAPER. NET (Surf City, N.J.) Mar. 4, 2013, http://thesandpaper.villagesoup.com/p/last-holgate-holdout-agrees-to-sign-easement/970366?cid=1011421#UX_ji-BDvao.

⁵³ Mary Ann Spoto, *Long Beach Mayor: Dunes Tab is on Residents*, THE STAR-LEDGER (Newark, N.J.), November 26, 2012, http://www.nj.com/politics/index.ssf/2012/11/long_beach_mayor_dunes_tab_is.html.

⁵⁴ Township of Long Beach (Mar. 10, 2013), <http://www.longbeachtownship.com/>.

⁵⁵ Joseph W. Grather, *More on the Shore – Proposed Legislation Seeks to Limit Just Compensation, New Jersey Condemnation Law* (Mar. 25, 2013), <http://njcondemnationlaw.com/tag/beach-replenishment/>.

⁵⁶ James Osborne, *Shore towns near showdown with dune-building foes*, Philly.Com (Dec. 3, 2012), http://articles.philly.com/2012-12-03/news/35550241_1_dune-sandy-damage-barrier-islands.

⁵⁷ U.S. CONST. amend. V, § 2.

⁵⁸ *McCann v. Clerk of City of Jersey City*, 771 A.2d 1123, 1131 (2001).

⁵⁹ *Id.*

crossed the line and violated an individual's constitutional and civil right, it seems that they are getting awfully close.

The concept of exaction or the well settled doctrine of unconstitutional conditions, states that the government may not require a person to give up a constitutional right for a discretionary benefit conferred by government, where the benefit sought has little or no relationship to the property.⁶⁰ The idea is that the government cannot condition an individual's right to exercise a constitutional right.

In the present case, this is the constitutional right to receive just compensation when property is taken for a public purpose. Any attempt to condition the exercise of the right for a conferred discretionary benefit, such as the grant of a building permit, by the government is unconstitutional and unjustified.

The two seminal cases in this area of law are *Nollan v. California Coastal Comm'n*⁶¹ and *Dolan v. City of Tigard*.⁶² The Nollan's cause of action stemmed from their desire to bulldoze and construct a larger beachfront home in California.⁶³ The issue was that the Nollan's property separated two popular public beaches to the north and south.⁶⁴ For many years, people would walk along a small path in front of the property to access either of the beaches.⁶⁵ The Nollan's, however, planned to construct a larger home that would isolate the public and deny access from one beach to the other.⁶⁶

⁶⁰ *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

⁶¹ 483 U.S. 825, 829 (1987).

⁶² *Dolan*, 512 U.S. at 385.

⁶³ *Nollan*, 483 U.S. at 827.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Nollan*, 483 U.S. at 827.

As part of the construction process, they were required to obtain a “coastal development” permit from the California Coastal Commission.⁶⁷ They submitted a permit application in which they proposed to demolish the existing home and construct a three-bedroom home that conformed with the rest of the community.⁶⁸ The Nollans were later informed that their permit would only be granted subject to the condition that they allow an easement across the front portion of their property, so that the public could access either beach.⁶⁹ The *Nollan*’s Court found that petitioners could not be compelled to grant the easement across the property.⁷⁰ Imposing the easement condition on the Nollans would constitute a taking without just compensation.⁷¹ However, the Court noted that the local government could obtain the easement through eminent domain procedures.⁷²

The Supreme Court reached a similar conclusion in *Dolan*.⁷³ The State of Oregon enacted a comprehensive land use management program in 1973.⁷⁴ The program required all cities and counties to adopt a new comprehensive land use scheme that was consistent with the statewide land use planning goals.⁷⁵ In accordance with the program, the City of Tigard developed and codified its own comprehensive plan.⁷⁶ The plan required business property owners in the “Central

⁶⁷ *Id.*

⁶⁸ *Id.* at 828.

⁶⁹ *Id.*

⁷⁰ *Id.* at 841.

⁷¹ *Id.*

⁷² *Nollan*, 483 U.S. at 842.

⁷³ *Dolan*, 512 U.S. at 374.

⁷⁴ *Id.* at 377-78.

⁷⁵ *Id.*

⁷⁶ *Dolan*, 512 U.S. at 377-78.

Business District” to comply with a 15% open space and landscaping requirement, limiting all other structures, including paved parking, to 85% of the lot.⁷⁷

Litigation ensued because Petitioner Dolan wanted to expand her plumbing store located in the Central Business District.⁷⁸ Her proposed plan called for her to nearly double the size of her store to 17,000 square feet.⁷⁹ Although the plan conformed with the standards of the comprehensive scheme, the planning board conditioned approval upon her dedication of a portion of her land lying in the flood plain.⁸⁰ The court stated that “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,” is one of the principals of the Takings Clause.⁸¹ It further noted that under the doctrine of “unconstitutional conditions,” the government may not require a person to give up a constitutional right in exchange for a discretionary provided by the government.⁸²

Although there is no evidence that municipalities exacted property from residents or used unconstitutional conditions to take property, it is clear that the municipalities are attempting to circumvent eminent domain procedures. The law behind the condemnation of sand dune property is clear. Municipalities are well aware of the history and the courts’ consistent protection of private citizens’ constitutional rights and eminent domain. Yet, these same local governments

⁷⁷ *Id.*

⁷⁸ *Id.* at 379.

⁷⁹ *Id.*

⁸⁰ *Id.* at 380.

⁸¹ *Id.* at 384.

⁸² *Dolan*, 512 U.S. at 384.

attempt to find ways to acquire property without paying just compensation. This mindset was further exhibited by the introduction of a recent bill.⁸³

On March 7, 2013, the Senate Environmental and Energy Committee proposed a bill that would inhibit beachfront property owners' right to just compensation. The bill states that this is "an Act concerning compensation for *certain* condemned property."⁸⁴ The relevant portion of the bill reads as follows:

Just compensation for an easement over a portion of beachfront property condemned for the purpose of dune construction or beach replenishment shall include consideration of the increase in value to the entire property due to the added safety and property protection provided by the dune or replenished beach. Any additional rights of the public to access property held in the public trust arising as a result of the easement, or the dune construction or beach replenishment, shall not be considered to cause a diminution in the value of the entire property.⁸⁵

The purpose of the bill is to supplement the Eminent Domain Act of 1971.⁸⁶ The bill states that just compensation paid out to dune land owners should reflect the added safety and property protection provided by the dune or replenished beach.⁸⁷ The bill also provides that any additional rights of the public to access property "held in the public trust arising as a result of the easement, or the dune construction or beach replenishment, would not be considered to cause a diminution in the value of the entire property."⁸⁸ The bill would effectively limit

⁸³ Assemb. B. No. 3896, 215th Leg., 2nd Ann. Sess. (N.J. 2013).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Assemb. B. No. 3896, 215th Leg., 2nd Ann. Sess. (N.J. 2013).

the amount compensation paid out to property owners and rejects the concept of fair market value inherent in eminent domain.⁸⁹

Such legislation would inhibit the concepts fundamental to eminent domain.⁹⁰ The constitutional valuation mandate for compensation in eminent domain cases for the public good is fair market value.⁹¹ In deriving the fair market value of land taken, consideration for the added protection and safety should already be factored in the value. That's what makes it fair market value.

Enacting legislation that artificially reduces just compensation after the market has already discounted for it is "double dipping." The fair market valuation adjusts for costs and benefits.⁹² The benefit of increased value to the entire value is adjusted by the downside costs of the same in the market.⁹³ This proposed legislation attempts to discount the property a second time for added protections and safety. Constitutional invasion of the fair market value standard by discounting that which the market is already balanced is unconstitutional

III. Eminent Domain

It is clear that the New Jersey Recovery and Reinvestment Plan requires the grant of an easement by private beachfront property owners in order for the plan to be implemented. The plan, however, does not prescribe how the easements should be acquired. Aside from demanding residents to donate their property or attempt to regulate sand dunes, the most logical choice in property law is eminent domain.

⁸⁹ Milgram v. Ginaldi, A-1906-06T2, 2008 WL 2726727 (N.J. Super. Ct. App. Div. 2008), *cert. denied*, 962 A.2d 530 (2008).

⁹⁰ *Id.*

⁹¹ State by Com'r of Transp. v. Caoili, 639 A.2d 275, 279 (N.J. 1994).

⁹² *See generally id.*

⁹³ *Id.*

Eminent domain is the power of the government to seize private property for public use. “It is a right founded on the law of necessity which is inherent in sovereignty and essential to the existence of government.”⁹⁴ The State’s power of eminent domain, however, is still subject to the Federal and State Constitutional limitations.⁹⁵ The property acquired must be taken for a public use or purpose and the State must pay just compensation. Further, the taking cannot violate due process of law.⁹⁶

In New Jersey, the exclusive procedure for the taking of private property for public use is set forth in the Eminent Domain Act of 1971.⁹⁷ Any attempt to condemn such property interest without following procedures set forth in the Act or providing just compensation constitutes a violation.⁹⁸ The Act is applicable to every agency, authority, company, utility or any other entity having the power of eminent domain exercisable within the State of New Jersey.⁹⁹ The purpose of the Act was to make a uniform set of requirements for all state entities having the legal authority to condemn property.¹⁰⁰

i. Eminent Doman & Sand Dunes

The subject of sand dunes along the coast of New Jersey is not a novel or unfamiliar area of the law. In fact, the principle of eminent domain is well established and the case law is clear. The courts have consistently found that a

⁹⁴ Twp. of W. Orange v. 769 Associates, L.L.C., 800 A.2d 86, 90 (N.J. 2002) (citing State v. Lanza, 143 A.2d 571 (N.J. 1958)).

⁹⁵ State v. Heppenheimer, 23 A. 664 (N.J. 1892).

⁹⁶ 769 Associates, L.L.C., 800 A.2d at 90.

⁹⁷ N.J.S.A. 20:3-6.

⁹⁸ Milgram v. Ginaldi, A-1906-06T2, 2008 WL 2726727 (N.J. Super. Ct. App. Div. 2008), *cert. denied*, 962 A.2d 530 (N.J. 2008).

⁹⁹ N.J.S.A. 20:3-50.

¹⁰⁰ Monmouth County v. Wissell, 342 A.2d 199 (N.J. 1975).

demand for a perpetual easement granting public access to privately owned sand dunes constitutes a taking, requiring just compensation.¹⁰¹

In *Milgram v. Ginaldi*, the NJDEP tried to acquire a perpetual easement, through a preliminary injunction, without following eminent domain procedures, under the guise of preventing a nuisance.¹⁰² The *Milgram* court found that the demand for a perpetual easement across private property amounted to a taking without just compensation.¹⁰³ The *Milgram* court stated: “[t]he core issue here, is whether the State can force a private property owner, by way of preliminary injunction, to grant perpetual public access easement without first following the procedures in the Eminent Domain Act. We are satisfied that the answer to this question is ‘no.’”¹⁰⁴

Maffucci further supports the use of eminent domain proceedings and payment of just compensation to acquire easements across private beachfront owners’ property.¹⁰⁵ The *Maffucci* cause of action stemmed from Ocean City’s inability to negotiate a fair price over a fifty (50) by eighty (80) foot strip of beachfront property.¹⁰⁶ As a result the city instituted a condemnation action against the defendants.¹⁰⁷ At trial the easement was valued at one dollar (\$1.00), but the defendants were awarded thirty seven thousand dollars (\$37,000) in severance damages for the diminution in value of their remaining property.¹⁰⁸ The appellate

¹⁰¹ *Milgram*, A-1906-06T2, 2008 WL 2726727, at *3; *City of Ocean City v. Maffucci*, 740 A.2d 630 (N.J. Super. Ct. App. Div. 1999), *cert. denied*, 744 A.2d 1208 (N.J. 1999).

¹⁰² *See Milgram*, A-1906-06T2, 2008 WL 2726727, at *3.

¹⁰³ *See id.*; N.J.S.A. 20:3-1 to 50.

¹⁰⁴ *Milgram*, A-1906-06T2, 2008 WL 2726727, at *3.

¹⁰⁵ *Maffucci*, 740 A.2d at 630.

¹⁰⁶ *Id.* at 631.

¹⁰⁷ *Id.*

¹⁰⁸ *Maffucci*, 740 A.2d at 632.

court affirmed and found that loss of view, loss of access, loss of privacy, and loss of use are compensable.¹⁰⁹

ii. Valuation of Condemned Property

The fundamental principle of eminent domain is that the government cannot condemn private property without “just compensation.”¹¹⁰ “When the State takes private property for a public purpose under the provisions of the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 to – 50, the property owner is entitled to just compensation.”¹¹¹

The statute provides that where the whole property is taken, the measure of damages is fair market value at the date of taking.¹¹² However, when the condemnation only amounts to a partial taking, the owner is entitled to “severance damages.”¹¹³ Severance damages are measured by the diminution in value of the remaining property.¹¹⁴ This calculation includes both the value of the land seized by the government and the decline in value of the remaining land.¹¹⁵ With respect to sand dunes, the courts have recognized that loss of view, access, use, and privacy are elements taken into consideration when calculating diminution in value.¹¹⁶

Specifically, the *Maffucci* court cited cases from other jurisdictions that came to the same conclusion.

¹⁰⁹ *Id.* at 641.

¹¹⁰ N.J.S.A. 20:3-6.

¹¹¹ *Maffucci*, 740 A.2d. at 640.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 641.

Items such as view, access to beach property, freedom from noise, etc., are unquestionably matters which a willing buyer in the open market would consider in determining the price he would pay for ... real property.... [T]o the extent that the reasonable expectation of their continuance is destroyed by construction placed upon part taken, this owner suffers damages for which compensation must be paid.¹¹⁷

The court went further on to note that “a property owner is entitled to present evidence concerning, and receive compensation for, all damage to the value of the remainder resulting from a partial taking of real property,” including “aesthetic damage and loss of view” of the city's skyline and mountains behind it.¹¹⁸

More recently in *City of Ocean City v. 2825 Wesley Ave. Condo. Ass'n*, the appellate affirmed a finding that defendant was entitled to severance damages for the loss of view, direct access to beach, and infringement of the residents’ privacy rights.¹¹⁹ In that case, Ocean City brought a condemnation action against the owners of beachfront duplexes to obtain a strip of land for sand dune construction and maintenance.¹²⁰ The project involved the construction of new sand dunes along seven miles of beachfront property to protect the beach.¹²¹ The town commissioners issued a report declaring that just compensation to be awarded was valued at one dollar (\$1.00).¹²² The Court, however, disagreed.

Where the seizure only constitutes a partial taking of a larger parcel, the owner is entitled to recover the difference in the fair market value of their property in its “‘before’ condition and the fair market value of the remaining portion after the

¹¹⁷ *Pierpont Inn, Inc. v. State*, 70 Cal.2d 282 (1969), *overruled on other grounds*, *Los Angeles County, Metro. Transp. Authority v. Continental Dev. Corp.*, 16 Cal.4th 694 (1997).

¹¹⁸ *La Plata Elec. Assoc. v. Cummins*, 728 P.2d 696, 696-97 (Colo.1986).

¹¹⁹ *City of Ocean City v. 2825 Wesley Ave. Condo. Ass'n*, 796 A.2d 291, 293 (N.J. Super. Ct. App. Div. 2002).

¹²⁰ *2825 Wesley Ave. Condo. Ass'n*, 796 A.2d at 293.

¹²¹ *Id.*

¹²² *Id.*

construction of the improvement of the portion taken.”¹²³ The court found that the pertinent factors such as “view, access to beach property, freedom from noise, etc.,” were undoubtedly factors a potential buyer would consider in determining the price for any given piece of real property.¹²⁴

So far, the courts have consistently recognized that State government must follow eminent domain proceedings and pay just compensation for condemned property.¹²⁵ They have also recognized that loss of view, access, use, and privacy are elements taken into consideration when calculating diminution in value.¹²⁶ However, the finding that beach replenishment creates a specific benefit to private beachfront property holders would drastically alter these clearly established principles laid out above.

iii. General vs. Specific Benefit

In certain limited circumstances, the project for which the land is being condemned confers a special benefit to the rest of the parcel.¹²⁷ In such cases, the value of the special benefit may offset the award to which the “defendant would otherwise be entitled for damage to the remainder.”¹²⁸ In contrast, general benefits are those produced by the improvement, which, a condemned land owner shares in common with all other property owners in the area.¹²⁹ General benefits may not be considered to reduce compensation. In fact, “neither side in a condemnation case is entitled to have the jury consider the project’s general benefits to the property,

¹²³ *2825 Wesley Ave. Condo. Ass'n*, 796 A.2d at 293.

¹²⁴ *Id.*

¹²⁵ *McCann*, 771 A.2d at 1131.

¹²⁶ *Nollan*, 483 U.S. at 827.

¹²⁷ *Borough of Harvey Cedars*, 40 A.3d at 8.

¹²⁸ *Id.*

¹²⁹ *Id.* at 81.

either to increase or decrease a compensation award.”¹³⁰ Thereby, the applicable rule in a normal condemnation case is that the “proper basis of compensation is the value of the property as it would be at the time of the taking disregarding depreciation or inflation.”¹³¹ In the present case, this prevents the jury from hearing testimony about the benefits provided by the restoration and maintenance of the sand dune: primarily storm surge protection.

Now pending before the New Jersey Supreme Court is *Borough of Harvey Cedars v. Karan*.¹³² The sand dune at issue in *Borough of Harvey Cedars* is one part of a line of dunes that will eventually run the length of the ocean side of Long Beach Island.¹³³ Borough of Harvey Cedars challenged the determination that the easement conferred a general benefit to the beachfront property owner.¹³⁴ The appellate court affirmed the trial court’s decision, despite recognition that the house is now safer from storm damage.¹³⁵ The trial court found that the construction did not confer a special benefit to defendants, but a general benefit that protected the island and its inhabitants from the “destructive impact of hurricanes and nor’easters.”¹³⁶ Defendants’ were awarded \$375,000 in damages.¹³⁷

The central question on certification is “whether the public construction of an oceanfront dune reaching twenty-two feet in height, for which the Borough condemned an easement on defendant’s land, conferred a *special benefit* to

¹³⁰ *Ridgewood v. Sreel Investment Corp.*, 145 A.2d 306 (N.J. 1958).

¹³¹ *Id.*

¹³² *Borough of Harvey Cedars*, 40 A.3d at 75.

¹³³ *Id.*

¹³⁴ *Id.* at 77.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

defendant.”¹³⁸ This question answered in the affirmative would not only drastically change previous sand dune case law, but make it obsolete. The finding that the sand dunes confer a special benefit would allow the jury to hear evidence relating to the value it conferred particularly to the beachfront property owner.¹³⁹ Essentially, this would allow the jury to hear testimony that the sand dunes provide storm protection.¹⁴⁰ The value of this protection would then be used to offset the against the just compensation awarded by the jury.¹⁴¹

As indicated by the cases above,¹⁴² the finding of a special benefit conferred would make procedures under the Eminent Domain Act nothing but a mere formality. The town commissioners in *2825 Wesley Ave. Condo. Ass'n* found the value of the easement to be one dollar (\$1.00).¹⁴³ Likewise, the trial court in *Maffucci* also concluded the value to be one dollar (\$1.00).¹⁴⁴ The destruction caused by Hurricane Sandy further supplants this position. As discussed earlier, there is much public discussion about the benefits provided by sand dunes and their ability to prevent storm destruction. It is difficult to imagine a “jury of your peers” from coastal municipalities that are not aware of this public discussion or suffered the consequence of Hurricane Sandy.

iv. Sand Dunes & other Public Uses: Do they Really Confer a Special Benefit?

¹³⁸ *Borough of Harvey Cedars*, 40 A.3d at 77.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *2825 Wesley Ave. Condo. Ass'n*, 796 A.2d at 293; *Maffucci*, 740 A2d. at 640.

¹⁴³ *2825 Wesley Ave. Condo. Ass'n* 796 A.2d at 293.

¹⁴⁴ *Maffucci*, 740 A2d. at 640.

New Jersey courts have consistently applied a flexible and deferential standard to determine what constitutes a public use.¹⁴⁵ A public use is considered anything that tends to increase resources, industrial energy, and contributes to the general welfare of the community as a whole.¹⁴⁶

Since 1891, the courts have recognized that condemnation of private property for use as public roads satisfies the public use requirement.¹⁴⁷ In *City of Trenton v. Lenzner*, the acquisition of a privately owned and operated parking lot seized by the city for its own operation was fair and adequate taking.¹⁴⁸ The court has also acknowledged that redevelopment of blighted areas was specifically recognized by the New Jersey Constitution as public purpose.¹⁴⁹

Even more telling of the broad recognition of public purpose occurred in *Mount Laurel Twp. v. MiPro Homes, L.L.C.*¹⁵⁰ Mount Laurel Township sought to acquire land “to limit the development, thereby to limit the overcrowded schools, traffic congestion and pollution that accompanies development.”¹⁵¹ The court found that this is consistent with the public interest in acquiring open space for recreation and conservation purposes.¹⁵²

¹⁴⁵ *State Highway Comm'r v. Totowa Lumber & Supply Co.*, 232 A.2d 655 (N.J. Super. Ct. App. Div. 1967) (citing *State Highway Comm'r v. Davis*, 209 A.2d 633 (N.J. Super. Ct. App. Div. 1965), *cert. denied*, 215 A.2d 30 (N.J. 1965)).

¹⁴⁶ *769 Associates, L.L.C.*, 800 A.2d at 91 (public use is synonymous with public benefit, public advantage, or public utility).

¹⁴⁷ *North Baptist Church v. Orange*, 22 A. 1004 (N.J. 1891).

¹⁴⁸ *City of Trenton v. Lenzner* 109 A.2d 409 (N.J. 1954).

¹⁴⁹ *Vineland Const. Co., Inc. v. Twp. of Pennsauken*, 928 A.2d 856, 868 (N.J. Super. Ct. App. Div. 2007).

¹⁵⁰ *Mount Laurel Twp. v. MiPro Homes, L.L.C.*, 910 A.2d 617 (N.J. 2006).

¹⁵¹ *MiPro Homes, L.L.C.*, 910 A.2d at 618.

¹⁵² *Id.*

A key aspect of the definition of a “public use” is that it must contribute to the general welfare of the community as a whole.¹⁵³ Coincidentally, this is the basis of the argument used by government officials, like Governor Christie, for “taking” sand dune property.¹⁵⁴ They argue that the sand dunes provide storm protection to the entire community.¹⁵⁵ Given that they are acknowledging the overall benefit sand dunes provide to the entire community, it is hard to recognize the existence of a special benefit conferred to the beachfront property owners.

As stated in *State v. Interpace Corp.*, “general benefits are those produced by the improvement which a property owner may enjoy in the future in common with all other property owners in that area.”¹⁵⁶ The *N.J. Tpke. Auth. v. Herrontown Woods, Inc.* court further explained “with respect to special benefits the question was whether there was advantage likely to accrue to this property...over and above the advantages to other property in that vicinity.”¹⁵⁷ It is clear that sand dunes provide an overall benefit and promote the general welfare of the community, but the extent that beachfront property owners are provided with a benefit above and beyond other residents is questionable.

In *Borough of Harvey Cedars*, the court relied on the example set forth in *Sullivan v. North Hudson Railroad Co.*¹⁵⁸ The issue in that case was whether the

¹⁵³ N.J.S.A. 20:3-6.

¹⁵⁴ Melissa Hayes & Karen Sudol, *A duel over sand dunes as residents fight Christie plan to take land*, THE RECORD (Hackensack, N.J.), March 30, 2013, http://www.northjersey.com/news/sand_dunes.html?page=all.

¹⁵⁵ *Id.*

¹⁵⁶ *State v. Interpace Corp.*, 327 A.2d 225 (N.J. Super. Ct. App. Div. 1974).

¹⁵⁷ *The N.J. Tpke. Auth. v. Herrontown Woods, Inc.*, 367 A.2d 893 (N.J. Super. Ct. App. Div. 1976).

¹⁵⁸ *Sullivan v. North Hudson Railroad Co.*, 18 A. 689, 690 (N.J. 1889).

construction of railroad tract conferred a general or specific benefit to the private property owner.¹⁵⁹ The *Borough of Harvey Cedars* court reasoned:

that if a railroad project, *intended* to provide transportation and access to commerce for the general area, also happened to result in the draining of a swamp on a defendant's property thereby creating more usable dry land, that would be a special benefit to the defendant's property. Or, if the construction of a railroad embankment across a defendant's land also incidentally provided a retaining wall for defendant's millpond, that would be a special benefit. However, the *incremental* commercial benefit of *proximity* to rail transportation would only be a general benefit to the defendant's property.¹⁶⁰

Here, the *intended* purpose of construction and maintenance of the sand dunes is to provide the community with protection from violent storms. Similar to property owners near the railroad tract, the property owners that are in a closer proximity to the sand dunes will have an incremental benefit to the public use.¹⁶¹ For example, the beachfront property owner has an incremental benefit over the parcel of land immediately behind him. Both property owners generally benefit from the sand dune, but the beachfront property owner's benefit is arguably greater due to location.¹⁶²

There is also an absence of an incidental benefit to the beachfront property as explained in *Sullivan*.¹⁶³ There was no additional creation of dry land or retaining wall.¹⁶⁴ Conversely, beachfront property owners would lose their view, access to beach, use, and privacy.

Moreover, this problem is coupled by the fact that property owners immediately behind them are not forced to give up of their property, but still

¹⁵⁹ *Id.* at 690.

¹⁶⁰ *Borough of Harvey Cedars*, 40 A.3d at 79.

¹⁶¹ *See id.*

¹⁶² Likewise, beachfront property is more vulnerable to violent storms.

¹⁶³ *Borough of Harvey Cedars*, 40 A.3d at 79.

¹⁶⁴ *Id.*

benefit from the taking. Given that sand dune property is being seized for the municipalities general benefit, it is fair that beachfront owners are paid just compensation. This prevents beachfront property owners from bearing the full cost of providing a communities' general welfare.

IV. Potential Remedies

At its most fundamental basis, the problem between beachfront property owners and local government is money. The loss of view and diminution in the value of beachfront property is obviously a main concern for all holdouts.¹⁶⁵ These people have spent hundreds of thousands, if not millions, of dollars to purchase these homes. What differentiates the value of their home on the beach and the parcel of property immediately behind them is the view of the ocean and access to the beach.¹⁶⁶ It is understandable, if not fair, for them to receive some sort of compensation for their loss.

Further, the cost associated with eminent domain and the taking of such property is the main reason that coastal municipalities refuse to condemn these properties.¹⁶⁷ The combined cost of condemning these properties would be exorbitant and the strain on coastal municipalities budget would be unreasonable.¹⁶⁸

A solution to this problem is offering beachfront property owners tax benefits, which, would offset over time or last the duration of the easement.¹⁶⁹ Beachfront

¹⁶⁵ Wanko, *supra* note 46.

¹⁶⁶ *See generally Id.*

¹⁶⁷ Osborne, *supra* note 56.

¹⁶⁸ *Id.*

¹⁶⁹ *See* Desirée Taylor, *Dune Projects Face Objection From Property Owners*, NJ Today, (Feb. 18, 2013), <http://www.njtonline.org/njtoday/video/dune-projects-face-objection-from-property-owners/>.

property owners pay some of the highest taxes in the state of New Jersey and they are being asked to grant easements to land that will still be included in their overall property tax determination.¹⁷⁰ This would provide beachfront property owners with compensation for their loss, while at the same time prevents coastal municipalities from making large cash payouts.

Besides the loss of view and diminution in property value with the construction of a 22 foot high sand dune in front of their property. The problem that many holdouts have with the easement is the substantive content.¹⁷¹ They believe that the language is loose enough to permit future construction projects such as boardwalks, restrooms, public access points, and ocean view loss due to the height of the dune.¹⁷² As one resident holdout explained his fear about the grant of a perpetual easement, “[s]omething can happen 30 or 40 years from now. A boardwalk could go in.”¹⁷³ USACE and NJDEP has tried to quell those concerns with letters of “clarification” or “explanation” about the language of the easement.¹⁷⁴

On June 17, 2010, USACE provided a letter that stated the easement only conferred the right to “construct, operate, patrol, maintain, repair, rehabilitate, and

¹⁷⁰ See Department of the Treasury: Division of Taxation (Jan. 10, 2013), https://www.net1.state.nj.us/Treasury/Taxation/TYTR_TLSPS_WEB/Taxlistsearch.aspx.

¹⁷¹ See Michael Molinaro, *Final Holgate Holdout Could Sign Easement Soon, Long Beach Twp. Mayor Says*, THE SAND PAPER. NET (Surf City, N.J), Feb. 26, 2013, <http://thesandpaper.villagesoup.com/p/final-holgate-easement-holdout-changes-lawyers/968205?cid=1043745#.UYAUueBDvao>.

¹⁷³ Kirk Moore, *Easements still stalling some N.J. beach restoration*, USA TODAY, January 15, 2013, <http://www.usatoday.com/story/news/nation/2013/01/15/sandy-beach-restoration-easements/1566372/>.

¹⁷⁴ Letter from Ray Cantor, Chief Advisor, NJDEP, to Joseph H. Mancini, Mayor of Long Beach Township, Mar. 12, 2013, <http://www.longbeachtownship.com/images/LBIDEPREvisedEasementAnswers.pdf>; Letter from Craig R. Homesley, Real Estate Division, Chief of Civil Projects Support Branch, U.S. Army Corps. Engineers, to David Rosenblatt, Administrator, NJDEP, and Joseph H. Mancini, Mayor of Long Beach Township, Jun. 17, 2010, http://www.longbeachtownship.com/images/explanation_of_easements.pdf.

replace a public beach, dune system, and other erosion control and storm damage reduction together with appurtenances thereto.”¹⁷⁵ The letter goes further to state that no other work, construction, maintenance may be conducted on lands covered by this easement.¹⁷⁶

As recently as March 12, 2013, NJDEP released another letter to Long Beach Township. The letter stated that the department has repealed public access requirements as part of the condition for receiving federal funding.¹⁷⁷ Additionally, they no longer require bathrooms and public parking every few blocks.¹⁷⁸ Despite these attempts to provide assurances to holdout residents, they have not been successful.

A remedy to this problem is for USACE and NJDEP to explicitly put these limitations in the easement, instead of issuing letters of “clarification” or “explanation.” These governmental entities should explicitly state that the easement does not confer the right to construct permanent structures such as boardwalks, restrooms, public access points, etc.

If the intended purpose of the letters is to assure people that government will not build these structures in front of their homes, then why not go the extra step and make the limitations legally binding? It is not clear why this simple solution has not been proposed. By making substantive changes to the easement it would

¹⁷⁵ Letter from Craig R. Homesley, Real Estate Division, Chief of Civil Projects Support Branch, U.S. Army Corps. Engineers, to David Rosenblatt, Administrator, NJDEP, and Joseph H. Mancini, Mayor of Long Beach Township, Jun. 17, 2010, http://www.longbeachtownship.com/images/explanation_of_easements.pdf.

¹⁷⁶ *Id.*

¹⁷⁷ Letter from Ray Cantor, Chief Advisor, NJDEP, to Joseph H. Mancini, Mayor of Long Beach Township, Mar. 12, 2013, <http://www.longbeachtownship.com/images/LBIDEPRevisedEasementAnswers.pdf>.

¹⁷⁸ *Id.*

provide people with the necessary assurance they require. The “take it or leave it” approach by USACE and NJDEP has, in turn, hurt themselves. Government officials and the media have cast holdouts as greedy and self-interested, but these same officials arguably failed to make any real concessions to beachfront property owners.

V. Conclusion

After an overall examination of the issue, it is fair to make some conclusions. The law behind sand dunes and eminent domain is clear. Coastal municipalities, NJDEP, and USACE cannot force holdouts to sign the easements and must follow the procedures set forth in the Eminent Domain Act.¹⁷⁹ Unless there is a reversal of *Borough of Harvey Cedars*¹⁸⁰ by the New Jersey Supreme Court, which, seems unlikely, the State of New Jersey will have reached an impasse. Further, the best option for both parties is compromise. The holdouts need to settle for a lower value for their property and the government needs to include the requested limitations in the easement. These two sides need to come together for the benefit of the community.

¹⁷⁹ N.J.S.A. 20:3-6.

¹⁸⁰ *Borough of Harvey Cedars*, 40 A.3d 75.