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PRIVILEDGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

Mayor Michael Becker
Commissioner Brenda Taube
Commissioner Maury Blumberg
Municipal Building
9001 Winchester Avenue
Margate City, New Jersey 08402

RE: Absecon Island Coastal Storm Risk Reduction Project/Brigantine Inlet to Great Egg Harbor Inlet, Absecon Island, New Jersey Shore Protection Project
Request for Legal Opinion

Dear Mayor Becker, Commissioner Taube and Commissioner Blumberg:

This is in response to a June 20, 2014 letter that I received from City Solicitor John Scott Abbott, Esq., that requested a legal opinion as to whether the State of New Jersey (the State) can proceed with the proposed *Absecon Island Coastal Storm Risk Reduction Project*, also referred to as the *Brigantine Inlet to Great Egg Harbor Inlet, Absecon Island, New Jersey Shore Protection Project* (the Project) over the objections of the City of Margate City's (the City) governing body and the directly affected private property owners.

The Major Issues

The resolution of this question required an examination of two major issues:

A. *Does the State have the authority to exercise the power of eminent domain - that is, to take by condemnation - governmentally-owned and privately-owned property for shore protection purposes without the consent of the titleholders; and*

B. *Assuming the State has the required statutory authority, is it proceeding*

in an arbitrary, capricious and unreasonable manner, or in an otherwise unlawful manner, in the instant situation.

In the course of addressing the major issues presented, I will also cover the items identified in Solicitor Abbott's letter:

1. The ability of the State to implement a partial taking;

2. The legality of Executive Order (EO) #140 and its application to the City;

3. Possible ramifications if the City challenges the State's authority to undertake the Project including (i) the possible loss of State discretionary funding to the City and (ii) the potential liabilities to third parties, *i.e.*, private property owners and other municipalities if the City delays and/or prevents the Project from proceeding;

4. The estimated costs and time to mount a challenge against the State and an assessment of the likelihood of success.

Documents Reviewed

In formulating my opinion, I reviewed a series of relevant documents, many of which are identified in Attachment "A". They provided a timeline, the background for the Project's evolution and information concerning the disputes that have resulted from the Project's proposed implementation.

It should also be noted that an extensive review of the DEP's and the Corps' files was outside the scope of this assignment. The purpose of such a review would be to determine whether any errors, particularly those of a procedural nature, were committed in connection with the Project. For example, the Corps as a federal agency is subject to the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, and historically has not consistently complied with its provisions.

Brief Overview of the Critical Facts

Construction of the Project was authorized by Congress in the Water Resources Development Act of 1999. In 2003, the State and Corps entered into a Project Cooperation Agreement. The State has presented the City with a State Aid Agreement that identified their respective responsibilities going forward.

The State Aid Agreement requires, among other things, that the City provide easements for municipally and privately-owned beachfront properties. To date, the City has refused to enter into the Agreement and acquire the easements apparently based on a number of factors including City Ordinance #2001-14 (which required voter approval prior to the City's approval of any dunes project, including appropriating funds, entering into any cooperative agreement or acquiring

property); the results of the November 5, 2013 non-binding referendum (where the voters overwhelming rejected the City's participation in the Project); that the existing shore protection measures consisting of some bulkheads and dunes provided adequate storm protection; that approximately 90% of the Superstorm Sandy property damage was incurred along the City's bayside, rather than on the beachfront; and general public opposition to the Project.

As a result of Superstorm Sandy, Governor Christie issued three EOs. EO #108, dated November 2, 2012, declared a state of emergency and a limited state of energy emergency and EO #114, dated November 13, 2012, rescinded EO #108.

The third gubernatorial proclamation, EO #140, dated September 25, 2013, some eleven months following Superstorm Sandy, is of particular relevance to the current situation. The Governor's invocation of emergency powers long after the conclusion of the Sandy-related emergency is both curious and legally questionable.

EO #140 established an Office of Flood Hazard Risk Reduction Measures in the DEP; directed the Attorney General to take immediate action to acquire the necessary easements and other real estate interests required for the system of Flood Hazard Risk Reduction Measures; and provided that no municipality "shall enact or enforce any order, rule, regulation, ordinance or resolution, which will or might in any way conflict with any provisions of this Order, or which will in any way interfere with or impede its achievement."

In the Superstorm's wake, Governor Christie indicated that those communities protected by dunes suffered far less property damage than unprotected communities. He noted his strong support for measures to complete a continuous dune system from Sandy Hook to Cape May. The Governor was not reluctant to publicly "call out" the oceanfront property owners who refused to voluntarily donate a portion of their property for dune projects and sought constitutionally-protected just compensation for the loss of their ocean views. Following the New Jersey Supreme Court's decision in *Harvey Cedars v. Karan*, 214 N.J. 384 (2013) which modified the rules pertaining to property valuation, the Governor asserted: "If you [affected oceanfront owners] were hoping to get some six-figure payment for the loss of your view, I think the Supreme Court put a stake in that today." nj.com, July 9, 2013.

The Administration's position respecting legitimate disagreements concerning the universal efficacy of the Project is reflected in two of the documents identified in Attachment "A". They are particularly significant for assessing the current status and tenor of the State-City dispute and the State's intention to not take local objections into account.

The first is the December 4, 2013 letter from DEP Commissioner Bob Martin (the Commissioner) to the City's governing body. The Commissioner responded to and rejected City Resolution #232 that requested that the City be removed from the Corps' Project or that the Project be revised to exclude the construction of engineered dunes.

The Commissioner's response took a hard line. It reflected an unwillingness to find a

middle ground that would address the City's concerns:

> The State would prefer to move forward in Margate with cooperation and assistance of the municipality. However, the project will be completed in Margate regardless of whether Margate chooses to cooperate. The State will not allow the safety of New Jersey's citizens to be jeopardized by any municipal official's refusal to take reasonable action to protect citizens and property as mandated by Executive Order 140. **If Margate does not provide the municipal easements and work with the State to acquire the necessary easements from the private property owners, the State will directly take the property interests, regardless of whether they are privately, quasi-municipally, or municipally owned.** (emphasis added).
>
> Rest assured, the statewide project will be constructed, including in Margate. If your municipality would like to have a seat at the table in deciding how the beach will be used and managed in the future, now is the time to act. Further delay is not an option. **The State will proceed to take and then control the properties without your cooperation.** (emphasis added).

Similar views were expressed in a February 26, 2014 letter from Acting Attorney General, John Hoffman, to the Mayor respecting City Ordinance #2001-14 which required voter approval for dune-related actions and expenditures. According to the Acting Attorney General, EO #140 and other applicable law (State preemption of contrary local enactments) prevents the City from enforcing the local ordinance to the extent that it would interfere with or impede the State's acquisition of shore protection easements.

A. Can the State Take Private and Public Property For Shore Protection Purposes Without the Owners' Consent?

Based on the documents, it is clear that if the City does not execute the State Aid Agreement, the State will "proceed to take and then control the properties without . . . [local] cooperation." It appears that the State is poised to take this action in a matter of weeks.

The statutory source of authority for taking the property is N.J.S.A. 12:3-64, a statute that has been on the books in some form since 1918 and was last amended in 1953. That section provides in pertinent part:

> The Department of Conservation and Economic Development [the predecessor to DEP] **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. (emphasis added).

. . .

> 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.

There has been only one appellate court ruling that construed N.J.S.A. 12:3-64. The landowner in *State v. Archer*, 107 N.J. Super. 77 (App. Div. 1969), claimed that there was no statutory authorization to enable the State to acquire property for hurricane and shore protection purposes. But that objection was soundly rejected by the appellate court which held that:

> [t]he 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 outlined in the act. Participation by the Department in the federal flood control program *via* this act is fully warranted. To the same effect, we conclude that the taking is for a public purpose, even though the program necessarily only affects particular areas.

As indicated in N.J.S.A. 12:3-64, if the landowners do not consent, the State is authorized to take the property in accordance with the condemnation statutes which are now complied in the Eminent Domain Act of 1971 (the EDA), N.J.S.A. 20:3-1 *et seq.* The EDA sets forth detailed procedures which a condemning authority must comply with. Those requirements would not present any impediments to the State as it has had extensive experience acquiring property for public purposes.

But the affected landowners have the right to object to the condemnation. See R. 4:73-1; *Bergen County v. Hackensack*, 39 N.J. 377 (1963) (the condemnee has the opportunity to object to the proposed condemnation). However, assuming that the State proceeds in strict accordance with the EDA's procedural requirements, a substantive challenge to the proceedings will be an "uphill battle." To be successful, the objectors will need to clearly demonstrate that the condemnation was an abuse of discretion, undertaken in bad faith or otherwise wrongful. See the discussion in the next section for the circumstances that could be helpful in objecting to the condemnation.

In the event that the State seeks to condemn private property, the City may seek to intervene in that litigation. The City's ability to intervene would be governed by the general intervention rule. R. 4:33; *State v. Lanza*, 74 N.J. Super. 362 (App. Div. 1962), aff'd 39 N.J. 595 (1963).

There is another issue that needs to be considered if the State is interested in acquiring property owned by the City and previously devoted to public use. The application of this rule was recently discussed by the Appellate Division in *Township of Readington v. Solberg Aviation Co.*, 409 N.J. Super. 282, 321 (App. Div. 2009), certif. denied, 201 N.J. 154 (2010):

> The doctrine of prior use "denies exercise of the power of condemnation where the

proposed use will destroy an existing public use or prevent a proposed public use unless the authority to do so has been expressly given by the Legislature or must necessarily be implied." *Twp. of Weehawken v. Erie R.R. Co.*, 20 N.J. 572, 579 (1956). It is applicable to municipal condemnations of utilities or the land of another municipality, **"but it has no place where the condemnor is, in essence, the sovereign, either federal or state."** *Ibid.* When the doctrine is invoked, "a comparative evaluation of the proposed and existing use in terms of public benefit becomes a subject of judicial indulgence to a greater or less degree." *Id.* at 580. (emphasis added).

Based on the foregoing, the prior use doctrine would not provide assistance to the City in opposing the State's condemnation of governmentally-owned property (*e.g.*, street ends, access ways or beaches). But the municipality would still be able to advance the same types of objections to the taking as any other condemnee.

In response to item 1. raised in City Solicitor Abbott's June 20th letter: it is my opinion that the State has the statutory authority to condemn both private and public property for the Project.

Executive Order #140

Item 2 in Mr. Abbott's letter inquired as to the legality of EO #140 and its application to the City. It is understandable that the Governor would utilize the emergency powers of his office immediately prior to, during, and immediately after Sandy. In that regard, it should be noted that the emergency declaration contained in EO #108 (November 2, 2012) was rescinded eleven days later by EO #114 (November 13, 2012).

On September 25, 2013, nearly a year after the storm while the state was well along in the rebuilding phase, the Governor issued EO #140. The proclamation was purportedly grounded on the chief executive's emergency powers (N.J.S.A. App. A:9-33 *et seq.*) and on the military and veterans laws (N.J.S.A. 38A:3-6.1 and 38A:2-4).

Following a lengthy preamble, EO #140 contained four operative sections. Two of the sections are not controversial: section one created an Office of Flood Hazard Reduction Measures (the Office) in the DEP and section three authorized it to seek and obtain cooperation from other state agencies.

The other two sections are more troublesome. Section two directed the Attorney General to take immediate action to coordinate legal proceedings to acquire real estate interests, including easements for flood hazard reduction measures. The inclusion of this direction in the EO seems unnecessary since the DEP already had the express statutory to acquire property for these purposes in N.J.S.A. 12:3-64. In an apparent effort to send a message to potential objectors, section four prohibited local governments from enacting or enforcing any orders, rules, regulations, ordinances, or resolutions "which will or might in any way conflict with any of the provisions of this Order,

or which will interfere or impede its achievement." According to the Acting Attorney General's February 26, 2014 letter, Ordinance #2001-14 conflicts with EO #140 and the City is otherwise preempted from enforcing its provisions. While an EO issued during an actual emergency might effectuate the temporary suspension of a validly enacted local law, it seems like a stretch for an EO issued eleven months following an emergency to permanently repeal such local enactments.

If the executive order becomes a factor in future litigation, it should be noted that there is unsupportive case law respecting the use of executive orders to enable the housing of State prisoners in County jails. See, *e.g., County of Gloucester v. State*, 132 N.J. 141, 150 (1993) ("The determination of whether an 'emergency' exists requires a fact-specific analysis. There is no temporal rule of thumb for determining when an 'emergency' ceases to exist").

At this point, I view EO #140 largely as a distraction from the more pressing issues. There is really no reason for the State to rely on it, other than for strategic purposes, to confound the issues and as a makeweight. If the State proceeds with the condemnation of the affected properties it has sufficient and independent authority pursuant to N.J.S.A. 12:3-64 and the EDA, without more than a passing, if any, reference to the executive order.

> *In response to item 2. raised in Mr. Abbott's letter: it is my opinion that EO #140 is a "non-issue." As such, it is not worth the City's effort to challenge unless the State relies on the EO as independent support for the Project. As indicated above, I do not anticipate that will occur.*
>
> *B. Assuming the State has the required statutory authority, is it proceeding in an arbitrary, capricious and unreasonable manner, or in an otherwise unlawful manner, in the instant situation.*

The State is relying on the Corps, DEP coastal engineers and perhaps other consultants in support of the Project design. The predominant theme has been that a generally continuous wall of high dunes from Sandy Hook to Cape May is essential to protect the shore from recurrent Sandy-like damages. It has been claimed that arbitrary breaks in the continuity of the dune system would serve as a conduit for floodwaters and threaten serious harm.

But it appears that there have been some exceptions to the lockstep approach – for example, in Wildwood. It has also been claimed that the current structures in the City consisting of some bulkheads and some dunes provided substantial protection for the beachfront and that approximately 90% of the Sandy-related property damage in the municipality was along the bayfront. Additionally, it has been asserted that the absence of high dunes in the City does not result in any increase in the threat potential to adjacent municipalities.

The problem with these claims is the absence of technical support. If the City is serious about challenging the Project it needs to immediately retain credible coastal engineering experts who can seriously question the Corps' and State's assumptions. Additionally, the City would need to authorize a searching review of the procedural aspects of the Corps' and State's process to

determine whether there have been any "fatal flaws." In the absence of that type of coordinated approach, there is no hope of presenting a serious challenge to the Project's implementation.

Possible Ramifications

Item 3 in the City Solicitor's letter questioned whether there would be any adverse ramifications as a result of legally challenging the implementation of the Project in the City. In particular, whether the State would deprive the City of discretionary funding and whether the City would be subject to challenges from private parties or governmental entities that may result from the litigation.

The issue of "retaliation" by the State government against a municipality that seeks in good faith to protect its residents is a sensitive subject, particularly in the current political climate. While anything is possible, any retaliatory action would be subject to various forms of challenge.

It is not clear that an action by a private party or governmental entity claiming that the Project was delayed would be legally cognizable. While I have not researched the issue at this point, it would appear that the City would have a substantial amount of immunity based on the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.*, and other legal authority.

Estimated Costs/Time Factors/Likelihood of Success

This litigation will require a very serious and coordinated effort by a team of legal and technical experts. As a solo practitioner, I would only take on this assignment if it was in association with a larger firm as the complexity of this matter would require more than one lawyer's involvement.

The costs of the efforts are impossible to estimate with any degree of precision, particularly since without very high caliber coastal engineering or similar testimony, the City's opposition is going nowhere. But in an effort to put a number on the table, if the City is not prepared to spend a minimum of $200,000, it should not start down this road. That estimate is not intended as a "cap" – rather it is an attempt to indicate that this will be very costly.

As for timing, the City needs to start now and not wait for the State to file the condemnation case. I cannot emphasize this strongly enough.

The likelihood of success is another difficult issue. While I am hopeful that City will be able to raise serious legal and factual issues in the litigation, this is not a case that should be brought because there is a high expectation that the City will prevail. The reason why the case should be brought is because it is the right thing to do and the State is acting in a cavalier manner in light of the reasonable concerns and issues that have been raised by the Project opponents.

* * * * *

I would be pleased to discuss this matter with you in greater detail, at your convenience.

Very truly yours,

Lewis Goldshore

LEWIS GOLDSHORE

att.

cc: J. S. Abbott, Esq., City Solicitor
R. Deaney, Business Administrator

Attachment "A"

1953

• March 19, 1953, N.J.S.A. 12:3-64. Broadly authorizes the DEP as successor to the Department of Conservation and Economic Development to acquire title "by gift, devise or purchase or by condemnation" to any lands in the State, including riparian lands, in its discretion, as may be necessary and advisable. Lands acquired under this statute shall be used for the improvement or development of any waterfront or oceanfront property or to provide access to any lands of the State.

1969

• September 24, 1969, *State v. Archer*, 107 N.J. Super. 77 (App. Div. 1969). This Appellate Division ruling involved a challenge by a municipality to the State's condemnation of property for the purpose of hurricane and shore protection. The court interpreted N.J.S.A. 12:3-64 and held that "[t]he statute in question 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. To the same effect, we conclude that the taking is for a public purpose, even though the program necessarily only affects particular areas."

2001

• September 13, 2001, City Ordinance #2001-14, an ordinance requiring submission to the voters of any ordinance approving the development of a dunes project in the City of Margate City.

2012

• November 2, 2012, Executive Order #108, Governor Christie, declaration of a State of Emergency and a limited state of energy emergency as a result of Superstorm Sandy.

• November 13, 2012, Executive Order #114, Governor Christie, rescinding the emergency declarations contained in Executive Order #108.

2013

• May 6, 2013, letter from City Solicitor Abbott to the City's governing body regarding the City's participation in the Project concluding that Ordinance #2001-

14 required that any proposal to join the Project or to expend monies pertaining to it must be submitted for voter approval.

• July 8, 2013, US Army Corps of Engineers (Corps), Review Plan, Implementation Documents, The Brigantine Inlet to Great Egg Harbor Inlet, Absecon Island, New Jersey, Coastal Storm Damage Reduction Project.

• August 15, 2013, City Resolution #162 of 2014, regarding the City's participation in the Project for voter approval on the November 5, 2013, general election ballot.

• September 25, 2013, Executive Order #140, Governor Christie, creating an Office of Flood Hazard Risk Reduction Measures in the Department of Environmental Protection (DEP) and authorizing the Attorney General to immediately take action to acquire the necessary easements in real property for the system of Flood Hazard Risk Reduction Measures.

• November 5, 2013, City voters in a nonbinding referendum overwhelmingly rejected the City's participation in the Project.

• November 21, 2013, City Resolution #232 of 2013, requesting that the DEP initiate and coordinate a meeting with the Corps to explore the various alternatives for a comprehensive beachfront protection system.

• December 4, 2013, letter from DEP Commissioner Bob Martin (the Commissioner) to the City's governing body responding to and rejecting City Resolution #232 which requested that the City be removed from the Corps' Project or that the Project be revised to exclude the construction of engineered dunes.

• Undated. Deed of Dedication and Perpetual Storm Reduction Easement to be executed by private grantees and the City as grantor.

2014

• February 24, 2014, letter from Mayor Michael S. Baker (the Mayor) to the Commissioner, Assistant Attorney General Apy and David Rosenblatt of the DEP, indicating that a Corps' representative was quoted in the press as advising that participation in the Project was not compulsory and requesting further information regarding whether the Wildwood communities were being treated in a preferential manner.

• February 26, 2014, letter from Acting Attorney General, John Hoffman, to the Mayor advising that City Ordinance #2001-14 did not constitute a legal obstacle to the City's voluntarily providing shore protection easements for municipally-owned

beach properties within the Project.

• March 24, 2014, letter from City Solicitor John Scott Abbott, Esq., to the City's governing body concerning the Project and describing meetings on March 21, 2014 with federal and State representatives.

Undated

• Corps/DEP publication, Absecon Island Shore Protection The Planning Behind the Project.