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July 3, 2014
Via e-mail (deaney_Richard@margate-nj.com) and regular mail

Richard Deaney, Administrator
City of Margate
9001 Winchester Avenue
Margate, NJ 08402

RE: Brigantine Inlet to Cape May Inlet – Absecon Island Shore Protection Project
Margate City, Atlantic County

Dear Mr. Deaney:

We have been retained by the City of Margate to provide an opinion with regard to the following questions listed in City Solicitor John Scott Abbott's June 20, 2014 letter pertaining to the "Brigantine Inlet to Cape May Inlet – Absecon Island Shore Protection Project (the "Shore Protection Project") proposed for the City of Margate and adjacent communities:

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

2. The legality of Executive Order No. 140 dated September 25, 2013;

3. Possible ramifications to the City if it were to resist the State's efforts to condemn easements for the purpose of implanting the shore protection project;

4. Possible loss of State funding to Margate;

5. Potential liability to third parties, i.e. private property owners and other municipalities if the City of Margate delays it and/or prevents the Absecon Island Beach Replenishment Program; and

6. Estimated costs and time to mount a challenge against the State and the prospects of success for such a challenge.

It is my understanding, from having reviewed Margate City Resolution 232 of 2013 and Mayor Becker's February 24, 2014 letter to DEP Commissioner Martin, that the City's principle concern with and objection to the Shore Protection Project has to do with the inclusion of sand dunes as part of the design. With that in mind, my responses to the questions listed in Mr. Abbott's letter are as follows:

1. Does the State have the ability to implement a partial taking?

The short answer is yes. The State in general and the Department of Environmental Protection (DEP) in particular are vested with broad powers to condemn private property for valid public purposes. One statute in particular, N.J.S.A. 12:3-64, which is referenced in Governor's Executive Order 140 ("E.O. 140") discussed below, authorizes DEP to acquire, by condemnation if necessary, title to any lands in the State, provided that "*... 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.*" All lands so acquired shall be subject to the jurisdiction and control of the Department.

This provision, on its face, appears to be limited in scope. First of all, as originally enacted, the authority to acquire land was limited to the Board of Commerce and Navigation (a predecessor to the current Tidelands Resource Council) and to *riparian* lands only, and not to all land. This, together with the fact that the statute as currently written provides that any lands to be acquired *shall remain subject to the jurisdiction and control of the Department*, can be read as implying that it applies only to land which has some kind of recreational component associated with it.

This language notwithstanding, the one court case construing the statute indicates that its application is much broader, and was properly utilized in the circumstances that are virtually identical to those faced by Margate. In Archer v. Borough of Union Beach, 107 NJ Super. 77 (App. Div. 1969), the Appellate Division affirmed the legality of a condemnation proceeding brought by the Department of Conservation and Economic Development, DEP's predecessor agency, to acquire lands for the purpose of hurricane and shore protection. The condemnation actions were undertaken pursuant to the Federal Flood Control Act of 1962, which required, as a condition of local cooperation, that the local cooperating agency provide "without cost of the United States, all lands, easements and rights-of-way necessary for the construction of the project."[1].

[1] Substantially identical language is found in the Federal Legislation authorizing the Absecon Island Project and in the State Federal Project Partnership Agreement through which the Project is being funded.

The Archer Court ruled that the State's actions were valid and, in so doing, stated as follows:

> 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 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.
> State v. Archer, Supra. at107.

So, the limiting language of N.J.S.A. 12:3-64 notwithstanding, the State's ability to condemn property for shore protection purposes was upheld. In my opinion, it is unlikely that a court would see the circumstances presented in Margate any differently.

2. The legality of Executive Order 140 and its application to Margate

The legality of E.O. 140 involves three separate inquiries. First, was it a lawful exercise of the Governor's emergency powers when it was signed? Second, does it remain so today? Third, is the preference for the construction of sand dunes, berms and engineered beaches reasonable, or is it arbitrary and capricious?

A. Was the Executive Order lawful when adopted?

The answer to this question is almost certainly yes. E.O. 140 was signed by Governor Christie on September 25, 2013, some 11 months after Superstorm Sandy. It was issued not in response to the immediate emergency posed by the storm, but in response to what it describes as the need for the immediate creation of a comprehensive system of flood hazard risk reduction measures, and for "a single state entity responsible for the rapid acquisition of property" vital to the implementation of those reconstruction and risk reduction efforts. It directed the Commissioner of DEP to create an Office of Flood Hazard Risk Reduction Measures, and gave it responsibility to lead and coordinate DEP's efforts "... to acquire the necessary interests in real property to undertake whatever flood hazard risk reduction measures that the state and federal governments thought necessary." These measures were to include "protective sand dunes, berms

and engineered beaches".

Interestingly, E.O. 140 did not declare an emergency in the conventional sense. Instead, it made reference to Executive Order No. 104, which was signed by the Governor on October 27, 2012, declaring a state of emergency resulting from the "significant and widespread dangers" posed by Superstorm Sandy. E.O.104 took effect immediately upon signing and remained in effect until such time as it was determined by the Governor that an emergency no longer exists. Neither order has been rescinded.

Explicit authority to exercise emergency powers is accorded to the Executive by the Disaster Control Act, App. A: 9-30 et seq. Section 34 of that Act, entitled "Emergency powers of governor", serves as direct authority for executive orders. Both E.O. 104 and E.O. 140 make reference to the Disaster Control Act as authority for the emergency actions taken.

The legality of executive orders has been examined by the courts in a limited number of settings. In all but one of those instances, those orders were sustained as a valid exercise of the executive's authority. The leading case, Worthington v. Fauver, 88 NJ 183 (1982), involved a crisis caused by the overcrowding of the State's prisons. Governor Byrne promulgated an executive order directing that some prisoners be relocated to county jails until such time as the Legislature came up with a more permanent remedy. A law suit was filed challenging the legality of the Governor's action. The Supreme Court upheld the action as proper, finding it to be rationally related to the goal of protecting the public and tailored to the gravity of the emergency. Worthington, *Supra*. at 203.

In Communication Workers of America v. Christie, 413 N.J.Super. 229 (App. Div. 2010), the Appellate Division invalidated an executive order which sought to extend pay to play restrictions to labor unions and labor organizations. The Court found that no emergency existed as contemplated by the Disaster Recovery Act, and also found no valid legislative authority for the action taken. The Court did observe, however, that when executive orders are issued in response to a legitimate emergency, they should be given "*the widest latitude of judicial interpretation and the burden of persuasion would rest heavily upon any who might attack.*" CWA v. Christie, Supra at 260, emphasis added.

Applying the Worthington and CWA v Christie standards to E.O. 140, it is highly unlikely that a court would find the initial exercise of the Governor's emergency powers through E.O. 104 in response to Superstorm Sandy to be anything other than rationally related to the goal of protecting the public and tailored to the gravity of the emergency. This is especially true since, as pointed out above, NJSA 12:3-64 gives the State the authority to condemn interests in land for shore protection purposes, and E.O. 140 governs only how that power is to be exercised.

The declaration of emergency set forth in E.O. 140 is not as clear cut as the immediate emergency that arose in the wake of the storm. It is more akin to the emergency declared by Governor Byrne that was the subject of the Worthington decision, i.e. it was an institutional crisis. But unlike the executive order dealt with in CWA v. Christie, it was rationally related to a valid legislative enactment (the power to condemn land for shore protection) intended to protect the public. That being the case, it is highly unlikely that a court would second guess the Executive.

B. Is the continued duration of E.O. 140 lawful?

The answer to this question is, most likely, yes. The immediate emergency posed by Superstorm Sandy in 2012 has obviously passed, but E.O. 140 asserts that the continued absence of comprehensive flood hazard risk reduction measures (i.e. engineered beaches with dunes) and the resistance to those measures by recalcitrant property owners or municipalities poses a separate and continuing emergency.

The Supreme Court in Worthington addressed the issue of how long an emergency might last, but only indirectly. Governor Byrne's initial Executive Order was limited in duration and was thereafter extended by him several times. The Court found the extension of the emergency to be valid in the absence of a legislative fix to the crisis, but observed that the powers afforded to the Executive by the Disaster Control Act are not open-ended: they could only be exercised as long as an emergency posed a threat to the public and did not permit the executive to declare what is essentially a permanent emergency. Worthington, Supra. at 203. Beyond that, the Court expressed no opinion as to how long an emergency declaration can remain in place.

Quite frankly, it is difficult to predict how a court would respond to the argument that the circumstances addressed by E.O. 140 do not pose an "emergency" as contemplated by the Disaster Recovery Act. While the case can be made that the emergency has passed, the potential for future storms will always exist. The admonition in CWA v. Christie that emergency declarations should be given the "widest possible latitude" by the courts suggests that the courts would not want to intrude in what is essentially a political judgment that a comprehensive system of engineered beaches and dunes are the best means of protection against what is believed to be an increased risk of future storms and that because of that, local objections should be over-ridden.

C. Is the requirement for construction of engineered beaches, including dunes, as mandated by E.O. 140, lawful?

E.O. 140 effectively compels local participation in the Shore Protection Project. The inquiry then becomes whether the requirement for the use of engineered beaches that include sand dunes (as required by the Army Corps of Engineers' standard design) is a reasonable response to the hazards presented by coastal storms, sea level rise and climate change, even in circumstances where individuals or local officials are opposed to their construction.[2]

The general rule with respect to the judicial review of governmental actions is that as long as the action is not contrary to law and there is some rational basis for it, that action will be upheld. The agency decision does not have to be the correct one, or even the most correct – it need only have *some* rational basis. An agency action will be found to be arbitrary and capricious only when there is absolutely no basis upon which the action is grounded. And finally, courts accord agency determinations even greater deference when the actions involve the agency's technical expertise.

Not having any technical expertise in this field, I am not in a position to answer the question of whether, from a technical perspective, sand dunes are needed in Margate. The case could perhaps be made by experts that the local conditions are such that dunes are not needed as part of a comprehensive system of flood hazard reduction. However, given the abundance of field research which indicates that the protective capacity of a beach and dune system is directly related to the volume of sand in that system, and in light of the anecdotal information which indicates that engineered beaches with dunes weathered Superstorm Sandy better than beaches without those features, it is unlikely that a court would substitute its judgment for that of DEP and the Army Corps of Engineers and find the dunes to be wholly unnecessary.

3. Possible ramifications to Margate if it resists

It is impossible to state with any certainty what the possible ramifications to Margate might be if it resists the State's efforts to implement a program for acquiring easements and constructing sand dunes. The Disaster Response Act, at App. A 9-40, states that

> It shall be the duty of the members of the governing body and of each and every officer, agent and employee of every political subdivision of this state and that each member of all other governmental bodies, agencies and authorities of any nature whatsoever fully to cooperate with the Governor and the civilian defense

[2] The Corps' General Design Memorandum specifies dunes of a uniform width and with heights of 16.0' or 22.0' msl, depending on their location in the State.

director in all matters affecting any emergency is defined by this act.

E.O. 140 echoes that requirement, stating that

> No municipality, county, or any other agency or political subdivision of this state shall enact or enforce any order, rule, regulation, or resolution, which will or might in any way conflict with any of the provisions of this Order, or which will in any way interfere with or impede its achievement.
> [E.O. 140 at page 4]

On February 26, 2014, acting Attorney General John Hoffman wrote to Mayor Becker. The Attorney General took the position that although City Ordinance 2001-14 prevents the municipality from providing the required easements to the State, the ordinance is pre-empted by State law and has been superseded by Executive Order. Since the statutes governing the exercise of emergency powers by the executive indicate that executive orders have the same preemptive effect as statutes, it is likely that any court presented with the issue would find that Margate is obliged to comply with E.O. 140. Because of that, I do not believe it is worth speculating what actions, if any, the State might take against Margate, other than seeking a court order to enforce compliance with E.O. 140.

4. Possible loss of state funding to Margate

Although Mr. Abbott's letter asked this question, I do not believe that I am in a position to answer it. Whether and to what extent Margate's refusal to comply with E.O. 140 may result in a loss of state funding would require a review of each and every State funding program in which Margate participates. In theory, legal action by Margate challenging the legality and the application of E.O. 140 should have no impact on other state funding programs, but I am simply not in a position to opine on that issue one way or the other.

5. Potential liabilities to third parties, i.e. private property owners and other municipalities if the City of Margate delays and/or prevents the Absecon Island Beach Replenishment Program

As is the case with Question No. 4 above, it is difficult to respond to the concern that the City might have potential liability to private property owners and other municipalities if its actions delay and/or prevent the Shore Protection Program from being implemented. Municipalities and elected officials generally enjoy immunity from liability of any sort unless

they take actions that fall within the purview of the Tort Claims Act or are intended to deprive individuals of rights accorded to them under the Constitution or statute.

The City's participation in a legal action that would either delay or prevent implementation of the Shore Protection Program would arise in one of two ways. Either the City would initiate a lawsuit seeking to have the requirement that sand dunes be constructed as part of the Program declared *ultra vires,* or it would defend a lawsuit brought by the State to compel participation in the Shore Protection Program. In either event, unless Margate was relying on a competent expert opinion which supported the lack of a need for sand dunes as part of the Shore Protection Project, then its actions might be construed as unreasonable, possibly exposing it to legal liability.

None of this means that even if third parties or other municipalities do not have a cause of action against the City or its officials, they might nevertheless initiate litigation if they believe that they have suffered damages or have been deprived of legal rights as a result of Margate's actions. The worst possible circumstances in which this could occur is, of course, if another major storm occurred and property owners and adjacent municipalities could demonstrate that they suffered damages that would not have occurred had the Shore Protection Program been implemented.

Beyond making these observations, I am not in a position to meaningfully discuss the potential liability should the City seek to challenge implementation of the Shore Protection Project.

6. Estimated costs and time to mount a challenge against the State and prospect of success

I will attempt to answer these questions in reverse order. First, I believe, for the reasons explained above, that the prospect of a successful challenge to the requirement that Margate provide construction easements as part of the Shore Protection Project is low. The *only* circumstances in which Margate might be able to convince a court that the requirement for sand dunes of the type proposed in the Shore Protection Project is wholly without merit is if a compelling technical argument can be made to support that position. I believe that this would be very difficult to do.

With respect to the estimated cost and time required to mount a challenge, my experience with other matters which, though substantively different, were procedurally similar, tells me that a legal challenge would cost in the range of $25,000-$30,000 (depending, of course, on the

hourly rates being charged). As for the time required, it is likely that an attorney would require at least 30 days from the receipt of a supporting expert opinion to prepare a complaint and order to show cause seeking temporary restraints that would prohibit the State from requiring the construction of sand dunes as part of the project.

There is a caveat to all this, which has to do with the fact that the design for the Shore Protection Project has been developed by the Army Corps of Engineers, and that the bulk of the spending will be Federal. It is possible that the Corps would have to be joined as a party, making it possible that the matter would end up in Federal court. This would greatly escalate both the complexity and the cost of any litigation.

I trust that the foregoing addresses the City's concerns with respect to these matters. I appreciate the opportunity to provide you with this advice, and will be happy to answer any questions that this letter may raise.

Sincerely,
SOKOL, BEHOT & FIORENZO

Neil Yoskin

NY/cl
cc : John Scott Abbott, Esq. jsabbottlawoffice@comcast.net

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