PREPARED BY THE COURT

STATE OF NEW JERSEY, by the DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiff, v. THE CITY OF MARGATE, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION ATLANTIC COUNTY DOCKET NO. ATL-L-2295-15 **ORDER** FILED DATED: December 8, 20 DEC 08 2015 ATLANTIC COUNTY LAW DIVISION

THIS MATTER having been brought before the Court, the Honorable Julio L. Mendez, A.J.S.C., upon application by PLAINTIFF, STATE OF NEW JERSEY, by the DEPARTMENT OF ENVIRONMENTAL PROTECTION (hereinafter the "State"), represented by Hill Wallack LLP, and upon proper notice to DEFENDANT, THE CITY OF MARGATE (hereinafter "Margate"), represented by Dilworth Paxson LLP, and the Court having read the papers filed for this motion, having considered the arguments of both parties, sets forth its findings of fact and conclusions of law upon the record, which are incorporated herein and upon other good cause shown;

IT IS on this 8th day of **DECEMBER, 2015 ORDERED** as follows:

1. The Court holds that the Supremacy Clause of the United States Constitution does not bar this Court from entertaining Margate's challenge to the State's condemnation action.

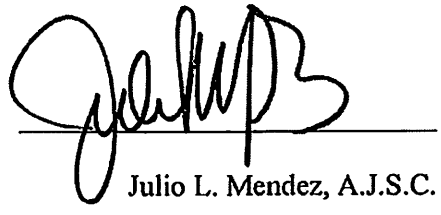
2. The Court holds that Margate is not barred from challenging the State's condemnation action on the basis that Margate has failed to timely exhaust their administrative remedies.

3. The Court finds that Margate has made a sufficient showing of arbitrariness to warrant a limited hearing on the issue of whether the State's taking constitutes a manifest abuse of its eminent domain power.

4. The Court will permit limited accelerated discovery including an exchange of expert reports and making experts available for video depositions.

5. The Court will conduct a case management conference by telephone on January 19, 2016 at 1:30pm, counsel for the plaintiff shall initiate the call.

6. The Court will schedule a hearings on February 3, 2016 at 9:30am and February 4, 2016 at 9:30am in Courtroom 3A at the Atlantic City Civil Courthouse.



Julio L. Mendez, A.J.S.C.

PREPARED BY THE COURT

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiff, v. THE CITY OF MARGATE, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION ATLANTIC COUNTY DOCKET NO. ATL-L-2295-15 **Memorandum of Decision** DATED: December 8, 2015

Memorandum of Decision

The State of New Jersey (hereinafter the "State") seeks to condemn permanent easements across eighty seven (87) oceanfront parcels, encompassing about sixty nine (69) acres, owned by the City of Margate (hereinafter "Margate") in order to construct a beach berm and dune in accordance with the Absecon Island Coastal Storm Risk Reduction Project (hereinafter "the Project"). The State also seeks to condemn temporary easements over two other municipally owned areas to be used during construction. The State seeks to acquire these easements under the Project Cooperation Agreement (hereinafter "PCA") entered into on July 23, 2003 between the State and the United States to participate in a hurricane and storm damage reduction project by the U.S. Army Corps of Engineers (hereinafter the "Army Corps") for Absecon Island.

On October 8, 2015, Plaintiff, the New Jersey Department of Environmental Protection filed a Verified Complaint and Order to Show Cause against the City of Margate, seeking to condemn the easements needed for the Project. On October 15, 2015 the Court signed an Order to Show Cause and scheduled a return date of November 20, 2015. On November 4, 2015,

Defendant, the City of Margate filed an answer and affirmative defenses, and a Motion to stay the condemnation action for one hundred eight (180) days for leave to conduct discovery.

FACTUAL BACKGROUND

In 1993 the Army Corps commenced a feasibility study investigating the need for action to reduce the storm damage suffered by the oceanic shore on Absecon Island and exploring various options to reduce that damage. The options studied by the Army Corps included both beachfill and bulkhead improvement as well the option of taking no action. Based upon effectiveness, feasibility and cost, the study concluded that the best option was beachfill and the construction of a system of dunes along the oceanfront in Margate, Ventnor, Atlantic City and Longport. The Army Corps completed the final version of the study in 1996 and submitted it to Congress. Congress adopted the Army Corps' recommendation as a part of the Water Resources Development Act of 1996 (hereinafter "WRDA"), P.L. 104-303, §101(b) (13), the relevant sections of the WRDA read as follows:

> (b) Projects Subject to Report.--The following projects for water resources development and conservation and other purposes are authorized to be carried out by the Secretary substantially in accordance with the plans, and subject to the conditions, recommended in a final report (or in the case of the project described in paragraph (10), a Detailed Project Report) of the Army Corps of Engineers, if the report is completed not later than December 31, 1996:
>
> ...
>
> (13) Absecon island, new jersey.-- The project for storm damage reduction and shoreline protection, Brigantine Inlet to Great Egg Harbor Inlet, Absecon Island, New Jersey, at a total cost of $ 52,000,000, with an estimated Federal cost of $ 34,000,000 and an estimated non-Federal cost of $ 18,000,000.

The New Jersey Department of Environmental Protection (hereinafter "the Department") signed the PCA with the Army Corps on July 31, 2003 and thereby the State opted into the Project and

assumed responsibility for acquiring any necessary easements. The Project did not move forward until more than a decade later when once again funding became available as part of the Sandy Relief Act and a second PCA was entered into on June 23, 3014.

After Superstorm Sandy, on January 29, 2013, the Federal government enacted the Disaster Relief Appropriations Act of 2013, P.L. No. 113-2 (hereinafter "Sandy Relief Act"). The Sandy Relief Act appropriates $3.461 billion to the Army Corps for the construction of shore protection projects in New Jersey and other affected states, including the Project.[1] Unlike the traditional 65/35 Federal/State cost sharing arrangement, under the Sandy Relief Act, the Federal government will cover 100% of the cost of the design, construction, and engineering for projects where beach replenishment had previously been constructed or approved –including the remaining construction for the Project. In January of 2014, in their Hurricane Sandy Limited Re-evaluation Report, the Army Corps recommended construction of the remaining features the Project. On June 23, 2014, the Army Corps and the Department amended the PCA to address the closeout of earlier constructed portions of the Project and executed a new Project Partnership Agreement (hereinafter "PPA") to address the remaining features of construction for the Project.

As of September 2013, approximately 2,850 necessary easements for various projects across the State had yet to be obtained. Presently, about 2,500 of those easements have been acquired voluntarily. The great majority of New Jersey coastal communities have voluntarily

[1] The relevant portion of the act reads as follows: "For an additional amount for "Construction" for necessary expenses related to the consequences of Hurricane Sandy, $ 3,461,000,000, to remain available until expended to rehabilitate, repair and construct United States Army Corps of Engineers projects: Provided, That $ 2,902,000,000 of the funds provided under this heading shall be used to reduce future flood risk in ways that will support the long-term sustainability of the coastal ecosystem and communities and reduce the economic costs and risks associated with large-scale flood and storm events in areas along the Atlantic Coast within the boundaries of the North Atlantic Division of the Army Corps that were affected by Hurricane Sandy"

participated in the project. In Margate, the State must acquire easements over forty seven (47) municipally owned blocks and lots, forty (40) paper streets or paper-street ends, and temporary easements for construction over two (2) municipally owned areas. Margate is the only municipality currently actively opposing the implementation of the project.

The Project had been known to Margate since its conception in 1996. Margate has opposed the project since 2000 as evidenced by the City's 2001 enactment of Local Ordinance 2001-14 which states in relevant part as follows:

> The Board of Commissioners shall not (i) approve any Dunes Project; appropriate any funds for a Dunes Project; (iii) enter into any Cooperative Agreement; nor (iv) authorize the acquisition of property or an interest in property, whether by purchase, eminent domain, or otherwise, for a Dunes Project, other than by means of an ordinance duly adopted by the Board of Commissioners, which ordinance shall, by its terms, not be effective until it has been submitted to and approved by the voters of the City of Margate City at an election duly scheduled for that purpose.

On November 4, 2013, Margate put to referendum the question of whether its citizens support the Project. A majority of Margate's citizen's voted against the Project; consequently, Margate continued to decline to grant the necessary easements to the Department and opposes the implementation of the project.

On October 1, 2014 the Department filed in the Atlantic County Clerk's Office three (3) Administrative Orders[2] purporting to take immediate, permanent easements in the City's beaches for the purpose of constructing the Project. On October 2, 2014, the Department and Margate entered into a Tolling and Standstill Agreement. On November 4, 2014 Margate's citizens participated in a second referendum and voted in favor of bringing legal action to stop the

[2] Administrative Orders No. 2014-13, 2014-14, and 2014-15.

Project. On November 24, 2014, Margate sought a temporary restraining order in the United States District Court for the District of New Jersey in the case captioned *Margate City et al. v. United State Army Corps of Engineers et al., No. 1:14-cv-05341.* The Court issued a restraining order and presided over evidentiary hearings on December 4, 2014 and January 15, 2015. That Court held that the State violated Due Process provisions of the United States Constitution by failing to follow Eminent Domain Act procedures. Ten months later on October 8, 2015, New Jersey filed this condemnation action that is now before this Court.

The Department and Margate's representatives met multiple times in order to discuss the Project; the Army Corps' representatives also attended several of these meetings. On January 9, 2015 representatives from the Department and the Army Corps met with Margate officials to discuss their Project design concerns. The Department and the Army Corps explained to Margate that the project could not be altered from the dune and beach berm. Counsel for Margate indicated that Margate would seek to discuss whether the Project design could be altered pursuant to language within the Sandy Relief Act with the Army Corps' Chief to persuade the Chief to change the Project's design. Neither the Department nor the Army Corps received any subsequent information or updates regarding Margate's proposition to persuade the Army Corp's chief to change the Project design. All efforts to seek a resolution between New Jersey and Margate have been unsuccessful.

The various issues before the Court are as follows: (1) whether the supremacy clause of the United States constitution bars this Court from considering Margate's challenge to the Project, (2) whether Margate is barred from challenging the Project due to their failure to exhaust administrative remedies, (3) whether the State of New Jersey has the authority to condemn the property, and (4) whether Margate is entitled to a hearing to determine whether the decision to

condemn the property is arbitrary and capricious or a manifest abuse of discretion. This Court will address all of the above issues in this opinion.

DISCUSSION AND ANALYSIS

I. Supremacy Clause Preemption

The State argues that the Supremacy Clause of the United States Constitution bars this Court from entertaining Margate's contention as to the relative merits of dune construction versus Margate's proposed bulkhead and berm improvements. The preemption doctrine arises from the second clause of article VI of the United States Constitution, which states that the laws of the United States "shall be the supreme Law of the Land..." U.S. Const., Art. VI, cl. 2; Feldman v. Lederle Labs., 125 N.J. 117, 133, 592 A.2d 1176 (1991), cert. denied, 505 U.S. 1219, 112 S. Ct. 3027, 120 L. Ed. 2d 898 (1992). "Federal regulations have the same preemptive effect as federal statutes." Id. at 134. "As long as the agency (1) intended to preempt state law; and (2) acted within the scope of its delegated authority, federal regulations will displace conflicting state laws." R.F. v. Abbott Labs., 162 N.J. 596, 619 (2000). "When considering issues of preemption, one starts with the assumption that the historic police powers of the states will not be superseded by a federal act absent the clear and manifest purpose of the federal government to do so." Beadling v. William Bowman Associates, 355 N.J. Super. 70, 84 (App.Div. 2002).

Federal law may expressly or impliedly preempt a state law. "Congress explicitly may express its intent to preempt state law." R.F. v. Abbott Labs., 162 N.J. at 619. Implied preemption occurs in two circumstances: (1) field preemption and (2) conflict preemption. See N.J. Div. of Youth & Family Servs. v. T.L.H., 2011 N.J. Super. Unpub. LEXIS 1798, *12-13

(App.Div. July 7, 2011). Field preemption occurs when a federal law is so pervasive that it occupies the entire field. Id. Conflict preemption occurs when a federal law and state law are directly in conflict such that compliance with both laws is impossible. Id.

The State argues that the Supremacy Clause of the United States Constitution preempts this Court from entertaining Margate's challenge of the federally adopted dune construction project. Through various provisions of the WRDA congress established a Federal-State partnership program for flood control and shore protection projects. 42 U.S.C. §1962d-5(a); 33 U.S.C.A. §2215. In accordance with the WRDA, the Army Corps conducted a feasibility study and made a specific project recommendation to Congress. Congress authorized the project as recommended by the Army Corps. The project goes forward only if the non-federal sponsor opts into the project, at which point that non-federal sponsor is bound by the determination of Congress as to the scope and specifics of the project. 33 U.S.C.A. §2213(a)-(c), (d) (1).

According to the State, once Congress through the WRDA authorized the Project as recommended by the Army Corps and thereafter New Jersey entered into the PCA in 2003 and the amended PCA in 2014, and thereby opted into the a federal/state partnership, the statutory terms of the federal program, the WRDA, became binding upon the State. The State cites Schultz v. Kott, 131, N.J. Super. 216 (App. Div. 1974) and Glukowsky v. Equity One, Inc., 180 N.J. 49 (2004) in support of their position.

Margate maintains that there is no actual conflict because the WRDA does not *require* the Army Corps or the State to actually do anything. The text of the WRDA states that the relevant projects are "*authorized* to be carried out by the Secretary *substantially in accordance* with the plans, and subject to the conditions, recommended in a final report ... of the Army Corps of Engineers..." First, the WRDA does not require the Project to be built at all—the

WRDA only authorizes the project. Also, the WRDA does not authorize the Project to be built precisely as it was designed over twenty (20) years ago, instead the WRDA authorizes a project "substantially in accordance with" the recommendation of the Army Corps. Similar to the WRDA, the Sandy Relief Act does not require the Project to the built, it only makes federal funds available in the event the Project is constructed.

Margate also argues that the Sandy Relief Act mandates that Margate's concerns about the Project design and underlying analysis should be considered because it requires that authorized Army Corps projects "incorporate current science and engineering standards" into previously authorized Army Corps projects.[3] According to the State, present day science and engineering standards were already taken into account. Pursuant to the Sandy Relief Act, the Army Corps reevaluated the Project based upon post-Sandy data, and recent engineering and scientific standards and codified their findings in the "Hurricane Sandy Limited Reevaluation Report" (hereinafter "HSLRR"). The HSLRR concludes that the Project is "technically sound, economically cost effective over the life of the project, and socially and environmentally acceptable." HSLRR p. 50.

The court will first examine the Shultz and Glukowsky cases. In Schultz, New Jersey by regulation and administrative decision defined "partially or totally disabled" as someone who was unable to engage in gainful employment or provide homemaking services. The Appellate

[3] The relevant section of the Sandy Relief Act reads as follows: "For an additional amount for "Construction" for necessary expenses related to the consequences of Hurricane Sandy, $ 3,461,000,000, to remain available until expended to rehabilitate, repair and construct United States Army Corps of Engineers projects...Provided further, That efforts using these funds shall incorporate current science and engineering standards in constructing previously authorized Corps projects designed to reduce flood and storm damage risks and modifying existing Corps projects that do not meet these standards, with such modifications as the Secretary determines are necessary to incorporate these standards or to meet the goal of providing sustainable reduction to flooding and storm damage risks."

Division held that these regulations conflicted with Federal statute, which defined "partially or totally disabled" as someone who was unable to engage in gainful employment, and held that New Jersey's regulations and administrative decision were invalid under the Supremacy Clause. Id. at 226-27. In that case the New Jersey regulation was in direct conflict with federal law and it was declared invalid.

Glukowsky involved a conflict between State and Federal regulations regarding mortgage lending. New Jersey opted into a Federal program that allowed state lenders to offer adjustable rate mortgages as long as the state lender complied with all the federal regulations that applied to federal lenders. Glukowsky, 180 N.J. at 57. A New Jersey statute prohibited state lenders from charging a penalty for prepayment of a mortgage loan. Federal regulations permitted federal lenders to charge a penalty for prepayment of a mortgage loan. A borrower sought to recover a prepayment penalty which would have been illegal under New Jersey law. See Id. The Supreme Court held that New Jersey's prepayment law was preempted by the Federal regulation. Id. at 72. Again, in that case the New Jersey regulation was in direct conflict with federal regulation and the court ruled that the statute was preempted by federal law.

This court begins the analysis that when considering issues of preemption, the court starts with the assumption that the historic police powers of the states will not be superseded by a federal act absent the clear and manifest purpose of the federal government to do so." Beadling v. William Bowman Associates, 355 N.J. Super. 70, 84 (App.Div. 2002). In other words, unless there is clear conflict with federal law, state law is given deference. Federal law may expressly or impliedly preempt a state law. "Congress explicitly may express its intent to preempt state law." R.F. v. Abbott Labs., 162 N.J. at 619. Unlike the Shultz and Glukowsky cases where the federal law established specific guidelines that were in direct conflict with New Jersey laws, here the

WRDA does not require the Project to be built at all—the WRDA only permitted the project and allowed States to participate or not to participate. Significantly, the WRDA authorizes a project "substantially in accordance with" the recommendation of the Army Corps. This is hardly a clear and manifest federal purpose that supersedes the protections afforded under New Jersey law.

Similar to the WRDA, the Sandy Relief Act does not require the Project to the built, it only makes federal funds available in the event the Project is constructed. The Sandy Relief Act does not mandate the specifics of the Project and allows for an update and review process taking into account the twenty (20) year time period since the adoption of the WRDA, and it permits consideration of current science and engineering standards. Again, in this Court's view, at a minimum it provides for some flexibility and it is not a direct mandate.

This Court is of the opinion that the Supremacy Clause of the United States Constitution does not bar this Court from entertaining Margate's contention as to the relative merits of dune construction versus Margate's proposed bulkhead and berm improvements, such a challenge by Margate coming before the Court in an effort to demonstrate that the Project is arbitrary and capricious, or a manifest abuse of discretion, as permitted by New Jersey law. In other words, Margate is seeking to have their day in court. This Court also notes that the federal supremacy argument was not raised in the federal court case, and the federal court in that case ultimately sent the case back to State court, holding that Margate was entitled to due process afforded by the Eminent Domain Act procedures. This is precisely the due process that this Court is providing to Margate. While great deference should be given to the adopted Project, which is part of the PCA between New Jersey and the federal government, this is not a situation where Federal law mandated the Project only as adopted. First, the federal government established a

funding mechanism for flood and shore protection, then it permitted the States to participate or not to participate, and finally it permitted for some minimal deviation in the implementation. For all of the aforementioned reasons, the Court concludes the Supremacy Clause of the United Sates Constitution does not bar Margate from having their day in court.

II. Administrative Exhaustion

The State also argues that Margate is barred from challenging the determinations made by the Army Corps and the State to proceed with the Project because Margate did not bring a timely challenge to those administrative decisions.

According to the State, the decision of the Army Corps in 1996 to recommend to Congress a shore protection project based on the construction of dunes could have been challenged in Federal district court under the Federal Administrative Procedures Act, 5 U.S.C. §702[4]. Any action to review the 1996 decision of the Army Corps had to be brought within six (6) years. The decision of the Department to enter into the PCA in 2003 was reviewable by the appellate division under R. 2:2-3(a):

> (a) As of Right. Except as otherwise provided by R. 2:2-1(a)(3) (final judgments appealable directly to the Supreme Court), and except for appeals from a denial by the State Police of an application to make a gun purchase under a previously issued gun purchaser card, which appeals shall be taken to the designated gun permit judge in the vicinage, appeals may be taken to the Appellate Division as of right
>
> ...

[4] "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

> (2) to review final decisions or actions of any state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer excepting matters prescribed by R. 8:2 (tax matters) and matters governed by R. 4:74-8 (Wage Collection Section appeals), except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise;

An action to review the 2003 decision of the Department to enter into the PCA had to be brought within forty-five (45) days. R. 2:4-1(b).

Margate's position is that the State has not identified any prior government determination that was final and appealable such that Margate should be precluded from challenging the State's condemnation authority in this proceeding. According to Margate, neither the WRDA nor the PCA constitute the State's final public purpose determination that required Margate to appeal. In order for a State action to "constitute a final decision, it should contain adequate factual and legal conclusions [and] should give unmistakable notice of its finality." North Bergen I, LLC v. DEP, 2011 WL 2682952 *3 (N.J. Super. Ct. App. Div. July 12, 2011). If a decision "contemplates further administrative action," an appeal thereof is "premature." Id. Margate points out that it was not until the State's October 2014 filing of administrative orders purporting to take the City's property that the State even attempted to proceed with the condemnation. The first time the State took any action that could be challenged – the filing of the administrative orders – Margate did challenge that action.

Margate also argues that administrative exhaustion is inapplicable because the State did not provide Margate with notice that it made a final public purpose determination subjecting Margate's land to condemnation until the State instituted this condemnation proceeding. In Harrison Redevelopment Agency v. DeRose, 398 N.J. Super. 361 (App.Div. 2008), the court

explained that constitutionally sufficient notice of such a determination requires notice that property owner that "(1) his or her property had[d] been designated for redevelopment, (2) the designation operate[d] as a finding of public purpose and authorize[d] the municipality to acquire the property against the owner's will, and (3) inform[ed] the owner of the time limits within which the owner may take legal action to challenge that designation." Id. at 62-63. The State maintains that DeRose is not applicable to this case. DeRose involved a determination that the defendant's property was blighted. Blighting is an individualized determination; the State argues that the guarantees of procedural due process, such as individualized notice, do not apply to legislative policy decisions such as the decision by the Army Corps, Congress and the Department to provide for shore preservation through construction of dunes. Bally Mfg. Corp. v. N.J. Casino Control Com, 85 N.J. 325 (N.J. 1981) (stating that "the fact that a proposed administrative rule or regulation will have a substantial impact on a particular entity does not, standing alone, require a trial type hearing as a matter of due process.." and that "[o]nly where the proposed administrative action is based on disputed adjudicative facts is an evidentiary hearing mandated.").

The State argues that this Court is barred from second-guessing the decisions of Congress and the Army Corps in the context of an eminent domain proceeding. The State primarily relies on New Jersey Transit Corp. v. Mori, 435 N.J. Super. 425 (App. Div. 2014) to support this argument. Mori involved the valuation of one acre of vacant land owned by the defendant and acquired by the plaintiff. Id. at 427. The plaintiff claimed the taking area was wetlands as determined by the Army Corps in 1996 and valued the property at $61,000. Id. at 428-29. At the trial level a jury awarded the defendant $425,000 for the land without indicating whether it valued the property as wetlands or uplands. In reversing the decision of the trial court, the

Appellate Division held that the Army Corps' had exclusive jurisdiction to determine whether the subject property was wetlands, and that their determination that the area was wetlands was dispositive and not reviewable by a state court. Id. at 429-32. The State contends that similar to Mori, the Army Corps' determinations regarding the Project are not reviewable by a state court.

According to Margate, Mori is distinguishable because the Army Corps' determination in Mori triggered an extensive administrative review process in which the defendant participated in.[5] Also, the defendant in Mori did not argue, as Margate does, that the plaintiff lacked the authority to condemn, instead the defendant only argued that land should not have been valued as wetlands as determined by the Army Corps.

The Court is not persuaded that Margate is barred from challenging the condemnation action filed by the State of New Jersey on the basis that they have failed to timely exhaust their administrative remedies. As the Court has previously indicated, the WRDA as well as the Sandy Relief Act both provided a mechanism for funding for shore protection and states were not mandated to participate. The adoption by Congress of the initial recommendation of the Project made by the Army Corps in 1996 was even before the State of New Jersey signed their first PCA with the federal government in 2003. The Project laid dormant for almost twenty (20) years, and no adverse action was taken against Margate until the funding was renewed by the Sandy Relief Act which precipitated the amended PCA that was completed on June 23, 2014. It was after this second PCA that the State of New Jersey renewed its efforts to implement the coastal protection

[5] The Corps issued a jurisdictional determination that the property was wetlands on August 15, 1996. In October of 2006 the defendant asked the Corps to verify that the subject property was not wetlands. On March 20, 2008 the Corps again determined that the area was wetlands. The defendant administratively appealed the Corps' 2008 determination. On December 1, 2008 the Corps upheld their March 2008 determination and informed the defendant he could apply for a Section 404 permit as the next step in the administrative process. The defendant failed to do so. See New Jersey Transit Corp. v. Mori, 435 N.J. Super. 425, 429-31 (App. Div. 2014).

plans. The first action taken by the State was the filing of administrative orders on October 1, 2014, and once Margate received notice of those orders they promptly challenged them in federal court which resulted in federal court setting aside the administrative orders because the State violated due process provisions of the United States Constitution by failing to follow the Eminent Domain Act procedures.

At no time was Margate provided with any notice or an opportunity to be heard regarding the PCAs that the State and federal government entered into. In the Court's opinion, the State entering into a PCA agreement with the federal government did not constitute a final administrative action which contained adequate factual findings and legal conclusions, and more importantly no notice was given as to its finality to Margate. Also significant in the Court's view is the fact that under the WRDA and the Sandy Relief Act, as the Court has previously highlighted, there is a level of flexibility regarding the final adopted Project. The important principle enunciated in DeRose is that notice of an adverse determination is essential to allow for the impacted property owner to have the ability to challenge the adverse determination. No such individualized notice was provided to Margate. All Margate is requesting is the opportunity to challenge the condemnation as permitted by New Jersey law. In this Court's opinion, Margate is entitled to have a hearing and enjoy the very due process that the federal court relied on when it set aside the administrative orders issued by the Department. Unlike in the Mori case, Margate has never had the opportunity to have their day in court and present arguments afforded to them under New Jersey law. This case is not about the value of property or the designation of property as blighted, this case is about condemnation of property and the rights afforded to the condemnee under the Constitution of the State of New Jersey and the Federal Constitution, as well New Jersey's Eminent Domain Act.

III. Authority to Condemn

The Constitution of the State of New Jersey imposes three limitations on the State's eminent domain power. First, the State must pay just compensation for property taken by eminent domain. N.J. Const., Art I, ¶ 20. Second, no person shall be deprived of his or her property without due process of law. Township of West Orange v. 769 Associates, LLC, 172 N.J. 564, 567 (N.J. 2002). Third, the property taken must be for a "public use." N.J. Const., Art. I, ¶ 20; see Id. The power of eminent domain, once granted, is then defined and detailed by the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 to -50. United Savings Bank v. State, 360 N.J. Super. 520, 528 (App.Div. 2003). New Jersey's Eminent Domain Act imposes additional procedural requirements on the eminent domain power such as the requirement that the condemnor must first attempt to acquire title to the subject property by bona fide negotiations with the prospective condemnee, and if the condemnee denies the condemnor's authority to condemn, the action must be stayed until that issue is finally determined. N.J.S.A. 20:3-6, 11.

In addition to the aforementioned limitations, a decision to condemn shall not be enforced where there has been a showing of "improper motives, bad faith, or circumstances revealing arbitrary or capricious action." Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc., 48 N.J. 261, 269 (N.J. 1966); see also Borough of Essex Fells v. Kessler Institute for Rehabilitation, Inc., 673 A.2d 856 (N.J. Super. Ct. 1995). If a challenger to an eminent domain action can make a *prima facie* case of the arbitrariness of the taking, then a Court will conduct a hearing and allow the parities to introduce additional evidence on the issue of arbitrariness. Texas Eastern Transmission Corp., 48 N.J. at 276; Tennessee Gas Transmission Co. v. Hirschfield, 38 N.J. Super. 132, 139 (App.Div. 1955); Bridgewater v. Yarnell, 64 N.J. 211, 215 (N.J. 1974)[6].

[6] The State argues that the question is not whether Margate can make out a *prima facie* case of arbitrariness but whether there is an affirmative showing of fraud, bad faith or manifest abuse.

In Texas Eastern, the plaintiff sought to acquire by condemnation a right of way across four tracts of land in Morris County, New Jersey. Texas Eastern Transmission Corp., 48 N.J. at 265. The defendant, a private wildlife preserve, argued that the plaintiff's exercise of eminent domain was arbitrary and capricious because the pipeline would cause immense harm to the land, and a viable alternate route for the pipeline was available which would cause much less damage to the property. Id. at 269. The defendant submitted affidavits of two experts in support of their claims. Id. at 270. The plaintiff, who was not required to utilize any particular route for the pipeline between the two points, suggested that the route proposed by the defendant would be much more costly. Id. at 266, 275. The Court stated that the affidavits submitted by the defendant raised a factual issue as to whether the plaintiff's insistence upon the location of the right of way constituted an arbitrary action. Id at 272. The Supreme Court held that the defendant introduced sufficient proof to make a *prima facie* case of arbitrariness, and remanded the matter to the trial court. Id. at 276.

In Yarnell, the plaintiff, the Township of Bridgewater, sought to acquire an easement across the defendant's property in order to install a sewer line. Yarnell, 64 N.J. at 213. The defendant argued that the plaintiff's selection of the route for the sewer line was arbitrary because it would prevent future development of the property and a different route would cause much less damage, was technically feasible, and would not substantially add to the cost of the project. Id. The defendant presented proofs, including expert engineering testimony, in support of their position. Id. at 214. Without making detailed findings of fact, the trial court concluded that the defendant had not made out a case of arbitrariness sufficient to require the plaintiff to present evidence to support the proprietary of their selected route. Id. The Supreme Court held that the defendant made out a sufficient case of arbitrariness to require the plaintiff to present

proofs on the issue feasibility of the alternative route and remanded the case to the Law Division for a further hearing. Id. at 215.

Margate contends that under Texas Eastern and Yarnell they have made a *prima facie* showing that the State's excise of its eminent domain power in this instant is arbitrary and capricious because the condemnation will cause great harm to Margate and there exists a viable alternative with less harmful consequences and therefore Margate is entitled to a hearing challenging the State's authority to condemn. Margate has submitted affidavits from two experts: (1) Charles Rooney, P.E., P.P., C.M.E., a former Army Corps engineer with forty (40) years of shore protection experience[7]; and (2) Dr. Robert Young, a Professor at Western Carolina University and scholar in the field of coastal engineering.[8] Both of Margate's experts opine that the Army Corps' formulation of the Project was flawed.

Mr. Rooney points out that the Army Corps did not conduct a fully detailed analysis of Margate's preferred alternative: the "beachfill with bulkheads" option[9], the study failed to evaluate the costs of acquiring privately owned bulkheads and instead only stated that the cost would be prohibitive, the study treats Margate, Ventnor and Longport as one for the purposes of the project, and the computer model used by the Army Corps, SBEACH, was methodologically flawed.[10]

Dr. Young asserts that the Department has not shown that removing the Margate dune will harm neighboring communities, that the Army Corps' computer modeling run in 1993 does not account for twenty-two (22) years of coastal change, that SBEACH was not calibrated with

---

[7] Margate Exhibit-C
[8] Margate Exhibit-D
[9] The Army Corps' report analyzed the options for Margate in three cycles with each subsequent cycle being a more detailed analysis. The Army Corps only analyzed the beachfill and bulkhead option in cycles one and two but never analyzed it in the most detailed third cycle.
[10] In ¶20 to ¶25 of Mr. Rooney's certification he argues that the Army Corp's SBEACH modeling of the beach and bulkhead system used false assumptions that likely minimized the protection provided by the beach and bulkhead.

reliable data, and that the Army Corps' analysis is unreliable because Margate's bulkhead system has worked so far. Margate claims that the opinions of Dr. Young and Mr. Rooney demonstrate that "there is no reliable basis for the Project's alleged protective value."

Margate also argues that the loss of any portion of Margate's usable beach poses a serious threat to their economy. According to Margate, the reduction of usable beach area will dissuade people from purchasing vacation properties in the City. Commissioner Maury Blumberg certifies that many beach-block homeowners will file property tax assessment appeals based on a claimed diminution in the value of their property as a result of the Project. The costs of dune maintenance, including replenishing and managing the dunes, fencing, and more difficult trash removal will substantially add to the City's tax burden.

According to Margate, the Project's negative consequences extend beyond its economic harm. The Project would reduce the number of handicapped accessible beach access ramps from sixteen (16) to four (4). Mr. Rooney opined that the Project fails to adequately consider the City's drainage plan, which directs water east through outflow pipes in the bulkheads, onto the beach and into the ocean. According to Mr. Rooney, dunes in the path of this drainage flow poses the possibility of ponding between the bulkheads and dunes, a condition that gives rise to public health and safety concerns, including mosquito breeding, and restricted emergency access between the bulkhead and dune.

Margate asserts that in the face of the Project's "dubious protective value and its multitude of negative consequences, a less harmful, cost-effective and equally or more protective alternative exists"– that alternative being beach berm enhancement and fortification of Margate's existing system of bulkheads – and therefore Margate argues that it has made a prima *facie* case

of arbitrariness, and it has raised sufficient factual issues regarding the Project that a hearing is warranted.

Margate also argues that N.J.S.A. 20:3-11 requires a stay because Margate has denied the State's condemnation authority. N.J.S.A. 20:3-11 states that "when the authority to condemn is denied, all further steps in the action shall be stayed until that issue has been finally determined." Margate again cites Yarnell, arguing that because they have challenged the State's authority to condemn, the Court must stay the proceedings until a final determination on that issue has been made. N.J.S.A. 20:3-11 does not give a property owner the unilateral ability to trigger a stay for the duration of the proceeding and all subsequent appeals by denying the State's condemnation authority. This issue was addressed by Judge Stanton in County of Sussex v. Merrill Lynch Pierce Fenner & Smith, 351 N.J. Super. 66, 71-72 (Law Div. 2001), which states in relevant part as follows:

> Under the defendant's interpretation of N.J.S.A. 20:3-11, the defendant would have an automatic stay with respect to the effect of that final judgment which could not be altered by any court until the Appellate Division makes a final ruling on any appeal which might conceivably be taken from my judgment, and, beyond that, there would also be an automatic stay until the Supreme Court had either denied certification, or, having granted certification, made a final ruling on any appeal before the Supreme Court. If that interpretation were correct, any defendant could delay the taking of possession of real estate by a condemnor for an indefinitely long period simply by denying that the condemnor had the authority to condemn.

A stay for further proceedings is only necessary if the Court finds that Margate has made a *prima facie* case of arbitrariness sufficient to require a hearing. If the Court determines that Margate has not met that burden, then a stay pending a full hearing is not necessary because the Court would have already decided the issue of whether the State has the authority to condemn.

The State argues that Texas Eastern and Yarnell are both outdated and inapplicable to the case at hand. The State, relying on West Orange v. 769 Associates, 172 N.J. 564 (2002), argues that main issue is not whether Margate has made a *prima facie* showing of arbitrariness, but whether the taking of the subject easements constitutes a "public use." The State points out that a court may not upset the State's decision to use its eminent domain power "in the absence of an affirmative showing of fraud, bad faith or manifest abuse" by clear and convincing evidence. West Orange, 172 N.J. at 571. The State argues that Margate is not entitled to a hearing because even if the Court accepts Margate's argument as to the relative merits of dune construction and bulkhead improvement, Margate's proofs would not be sufficient to show that the State's taking constitutes "fraud, bad faith or manifest abuse" by clear and convincing evidence. Id. at 571.

In West Orange, a municipality sought to acquire a thirty (30) foot wide strip of land along the edge of the defendant's property for a street that would serve a small residential development. The trial court denied the defendant's challenge to the plaintiff's right to condemn. The Appellate Division reversed, holding that the plaintiff's proposed taking was not for a public use. The Supreme Court reversed the decision of the Appellate Division and held that the proposed taking was for "a valid public use and [did] not constitute "a manifest abuse of discretion of the power of eminent domain."" Id. at 579. In reversing the decision of the Appellate Division, the Supreme Court stated that the existence of a viable alternative route for the road was "of no moment," because the plaintiff's decision was entitled to deference. Id. at 579. The State argues that there is "no possible dispute that the purpose for which the easements are sought is a public purpose."[11] During oral argument on November 20, 2015 Margate agreed

[11] State's "Brief in Support of Plaintiff's Order to Show Cause and In Opposition to Defendant's Motion for a Stay and Leave to Conduct Discovery" p.27.

that the taking was for a public purpose, but that they are entitled to a hearing to determine whether the Project is arbitrary and capricious or a manifest abuse of the eminent domain power.

The State also cites Mount Laurel Tp. v. Mipro Homes, L.L.C., 379 N.J. Super. 358 (App.Div. 2005) in support of their position. In Mipro, the plaintiff, Mount Laurel Township, sought to acquire properties for open space acquisition. Mipro, 379 N.J. Super. at 362. The defendant, Mipro Homes, challenged the condemnation on the basis that the true purpose of the condemnation was to stop residential development. Id. at 367. The trial court entered summary judgment and dismissed Mount Laurel's condemnation action stating that "the abuse of discretion and arbitrary, capricious and unreasonable action by the Township occurred when it abused the awesome power of eminent domain for a purpose not contemplated by, and indeed proscribed by, our Eminent Domain Law." Id. at 368. The Appellate Division reversed the trial court and stated that "even if the primary goal of Mount Laurel's open space acquisition program in general...is to slow down residential development in the municipality, this does not provide a foundation for finding that the municipality's use of eminent domain for this purpose constitutes fraud, bad faith or manifest abuse." Id. at 375-76.

West Orange is inapplicable to the question of whether Margate should be afforded a hearing. The defendant in West Orange opposed the plaintiff's taking on the ground that the taking was not for a public use because it would benefit a private third-party. West Orange, 172 N.J. at 567. Here, however, Margate does not argue that the taking is for a non-public use. Margate argues that they have made a sufficient showing of arbitrariness to warrant a hearing on the issue of whether the taking constitutes a manifest abuse of the State's eminent domain power.

Similar to West Orange, Mipro did not address the question of whether the condemnee made a sufficient showing of arbitrariness in order to warrant a plenary hearing on whether the

condemnor had the authority to condemn. The court in Mipro held that condemning property in order to prevent residential development was a permissible public purpose. See Mipro, 379 N.J. Super. at 375-76. Unlike the case at hand, the defendant in Mipro did not argue that the plaintiff's proposed condemnation would cause great harm and that there was a less harmful alternative.

The Court is of the opinion that Margate has made a sufficient showing of arbitrariness to warrant a limited hearing on the issue of whether the State's taking constitutes a manifest abuse of its eminent domain power or is arbitrary and capricious. Similar to both Texas Eastern and Yarnell, Margate has come forward through expert affidavits indicating that there is an alternative to the State's proposed plan. The affidavits of Margate's experts point out a number of methodological flaws in the Army Corps initial study for the Project. Both of Margate's experts have also indicated that Margate's preferred alternative, beachfill and bulkhead fortification, would offer the same or more protection as dunes while avoiding the various negative consequences of dune construction. The court is persuaded that under Texas Eastern and Yarnell Margate has made a sufficient prima facie showing of arbitrariness, and that Margate at a minimum should be given the chance to make their case and have a hearing.

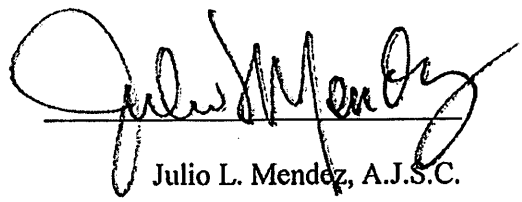
In this Court's view Margate has submitted more compelling evidence to justify this Court to provide Margate with a hearing than the evidence that was before the Supreme Court and that eventually persuaded the Supreme Court to remand for a hearing in Texas Eastern and Yarnell. This Court has carefully reviewed the two submitted affidavits from two experts: (1) Charles Rooney, P.E., P.P., C.M.E., a former Army Corps engineer with forty (40) years of shore protection experience; and (2) Dr. Robert Young, a Professor at Western Carolina University and

scholar in the field of coastal engineering. Both of Margate's experts opine that the Army Corps' formulation of the Project was flawed. Both experts have solid qualifications. Mr. Rooney points out that the Army Corps did not conduct a fully detailed analysis of Margate's preferred alternative: the "beachfill with bulkheads" option, he also highlights that the computer model used by the Army Corps, SBEACH, was methodologically flawed. The second expert Dr. Young asserts that the Department has not shown that removing the Margate dune will harm neighboring communities, that the Army Corps' computer modeling run in 1993 does not account for twenty-two (22) years of coastal change, that SBEACH was not calibrated with reliable data, and that the Army Corps' analysis is unreliable because Margate's bulkhead system has worked so far.

This Court is satisfied that the expert affidavits submitted by Margate raised a sufficient factual issue as to whether the State's insistence upon the proposed project without any flexibility, as permitted by the federal legislation, constitutes an arbitrary action or is a manifest abuse of discretion. The Court is aware of the very high standard Margate must meet at the hearing to prevent the State's proposed taking, but consistent with the Supreme Court decisions Texas Eastern and Yarnell, at a minimum Margate has raised a genuine factual issue to warrant a hearing. In the Court's view even under the higher standard set forth in the West Orange case, Margate should have the opportunity to show whether the State's taking constitutes a manifest abuse of discretion.

The Court recognizes that a condemnation action is a summary proceeding and therefore will hear the matter on an accelerated basis and set a return date within sixty (60) days of this Order. The Court also understands the importance of resolving this issue as it has been pending

for almost twenty years. The Court will schedule a hearings on February 3, 2016 at 9:30am and February 4, 2016 at 9:30am in Courtroom 3A at the Atlantic City Civil Courthouse. Prior to the hearing the Court will conduct a case management conference on January 19, 2016 at 1:30pm to discuss the proposed list of witnesses and other case management issues. Both parties shall exchange a proposed list of witnesses and engage in limited and accelerated discovery over the next sixty (60) days.



Julio L. Mendez, A.J.S.C.