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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1906-06T2

ANNE MILGRAM, ATTORNEY GENERAL
OF THE STATE OF NEW JERSEY, and
THE STATE OF NEW JERSEY, DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Plaintiffs-Appellants,

v.

MICHAEL GINALDI, MARTIN W.
CAULFIELD, MARGARET C. CAULFIELD,
CAROLE J. McCANN and 10 SURF CITY, LLC,

Defendants-Respondents,

and

DEBRA WRIGHT,

Defendant.

LONG BEACH ISLAND OCEANFRONT
PROPERTY OWNERS,

Intervenors-Respondents.

Argued February 5, 2008 - Decided July 15, 2008

Before Judges Fuentes, Grall and Chambers.

On appeal from Superior Court of New Jersey, Chancery Division, Ocean County, Docket No. C-264-06.

Dean Jablonski and Timothy M. Mulvaney, Deputy Attorneys General, argued

the cause for appellants (Anne Milgram, Attorney General, attorney; Stephanie Brand, Gerard Burke and Patrick DeAlmeida, Assistant Attorneys General, of counsel; Mr. Jablonski, and Mr. Mulvaney, on the brief).

Edmund V. McCann argued the cause for respondents Carole J. McCann (McCann & McCann, attorneys; Mr. McCann, on the brief).

Paul H. Schneider argued the cause for respondent Michael Ginaldi and 10 Surf City, LLC (Giordano, Halleran & Ciesla, attorneys; Mr. Schneider and Afiyfa H. Ellington, on the brief).

Martin W. Caulfied and Margaret C. Caulfield, respondents pro se.

Kenneth A. Porro argued the cause for intervenors Long Beach Island Oceanfront Property Owners (Wells, Jaworski, Liebman & Paton, attorneys; Mr. Porro, Darrell M. Felsenstein and Anthony S. Bocchi, on the brief).

PER CURIAM

The New Jersey Division of Environmental Protection (NJDEP) appeals from the order of the Chancery Division, General Equity Part, denying its application to obtain a preliminary injunction directing defendants, owners of oceanfront property, to grant a public right of access to a sand dune located on the owners' properties. The trial court denied the relief and dismissed the complaint, finding that NJDEP had to file an action at law in accordance with the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 to -50, if it wanted to obtain a public right of access to the property. We affirm.

I

Before addressing the legal issues involved, we will summarize the environmental and governmental forces that have converged to create the current cause of action. Long Beach Island (LBI) is an eighteen-mile barrier island in Ocean County. As such, it is periodically subject to severe storms, causing constant erosion on the average of one foot per year. It is not disputed that these storms and erosion destroy natural resources and property and threaten public safety.

To restore the eroded beaches and to protect against storms, LBI decided to take part in a beach nourishment project called the Barnegat Inlet to Little Egg Inlet, New Jersey Shore Protection Project. The project represented a fifty-year undertaking in which the United States Army Corps of Engineers would: (1) repair and reconstruct beaches and dunes that had been eroded and damaged by storms; and (2) maintain the beach and dunes for the life of the project.

The plan for carrying out this project entailed constructing on privately and municipally owned property a dune and a berm that would be slightly larger than the dune and berm already in existence. This newly constructed dune would be twenty-two feet high and thirty feet wide; the new berm would be

125-feet wide. The plan recommended a fifty-year period of nourishment in order to maintain the dune and berm.

To accomplish this, the Army Corps reported that it would need a standard restrictive dune easement, a perpetual beach nourishment easement, and a temporary work area easement. The dune and beach nourishment easements would grant a perpetual right to construct and maintain a dune system and a beach berm, including the right to plant vegetation along the dune or remove vegetation or any other structures. The grantor (property owner) would retain the right to construct a "walkover structure" over the dune. The temporary work area easement would authorize the Army Corps and its contractors to enter the land to construct the dune and beach berm and would be limited to two years.

In 2000, Congress authorized work for the project. On August 17, 2005, NJDEP signed a Project Cooperation Agreement with the Army Corps, obligating the Army Corps to place "suitable beach fill to form a dune at an elevation of +22.0 feet . . . extending from Barnegat Inlet to Little Egg Inlet, generally referred to as Long Beach Island." The length of the dune was roughly 89,000 feet. Along the dune, the Army Corps would plant 347 acres of dune grass and place 194,000 linear

feet of sand fencing. The agreement described that work as the "initial construction."

For a period of fifty years after beginning the initial construction, the Army Corps would periodically (at least twice a year and after storms) survey the initial construction for erosion and damage, replenishing any part as needed. In exchange, the NJDEP agreed to: (1) "provide all lands, easements, rights-of-way, and suitable borrow and dredge or excavated material disposal areas" that the Army Corps determines are necessary; (2) "ensure continued conditions of public ownership and use of the shore upon which the amount of Federal participation is based;" (3) "prescribe and enforce regulations to prevent obstruction of or encroachment on the Project that would reduce the level of protection it affords or that would hinder operation or maintenance of the Project;" (4) "provide and maintain necessary access roads, parking areas, and other public use facilities open and available to all on equal terms;" and (5) pay its share of the expenses in accordance with the policy set out in the Department of Army regulation. The Army Corps agreed to give the State a credit for costs incurred in the event that NJDEP had to pay owners for land or easements.

The project began in Surf City. Municipal officials sent a proposed easement to affected property owners entitled: "Deed of

Dedication and Perpetual Storm Damage Reduction Easement." Surf City officials stated that the easement was "Army Corps-approved." The form of easement document recited that in exchange for one dollar[1] and the protections afforded by the project, the owner was granting the State, Surf City and its assigns "[a] perpetual and assignable easement and right-of-way in, on, over and across . . . the area east of the established bulkhead line" for the purposes of constructing and maintaining "a public beach, a dune system, and other erosion control and storm damage reduction measures together with appurtenances thereto."

The proposed easement further included a "right of public access and use," which could be limited by the grantee to preserve the dune area. The grantor reserved the right to construct a dune walkover, so long as it did not violate the integrity of the dune.

Defendants, property owners of five oceanfront properties, refused to sign the easement, claiming that it would amount to a taking without just compensation.

II

NJDEP filed a verified complaint and order to show cause against the named defendants. Count one of the complaint

[1] The one dollar consideration provision was later deleted.

alleged that defendants had "refused to permit the [NJDEP], its representatives, contractors, agents and assigns to enter [d]efendants' property for the purpose of constructing [ ] shore protection measures." The second court alleged that defendants' actions equated to maintaining their property in an unsafe manner and failing to abate a nuisance.

NJDEP sought a preliminary injunction: (1) requiring defendants to permit it and its assigns access to defendants' property for purposes of constructing shore-protection measures; (2) prohibiting defendants from interfering with NJDEP's and its assigns' work; (3) requiring defendants to provide unrestricted public access to and use of all land benefiting from the work; and (4) declaring defendants' property subject to the public's right of access.

Defendant Carole J. McCann filed an answer and a motion to dismiss the complaint, claiming that while she questioned the safety of the proposed shore protection project, she never denied NJDEP, or any one associated with it, access to her property for purposes of erecting these safety measures. McCann made clear, however, that she had refused to sign any document granting NJDEP an easement through her property without just compensation. The other defendants opposed NJDEP's request for

a preliminary injunction, but McCann was the only defendant to file a motion to dismiss.

After considering the arguments of counsel and the pro se litigants, the trial court denied NJDEP's request for a preliminary injunction, and dismissed the complaint, finding that: (1) NJDEP failed to establish that it would suffer irreparable harm if the court denied the injunction; (2) defendants did not deny the NJDEP or the public access to their properties; and (3) the State had to follow the procedures in the Eminent Domain Act if it intended to force defendants to grant the easement. NJDEP appeals that decision.

III

We begin our analysis by reaffirming that, in deciding whether to grant preliminary injunctive relief,

> a trial court must consider (1) whether an injunction is "necessary to prevent irreparable harm"; (2) whether "the legal right underlying [the applicant's] claim is unsettled"; (3) whether the applicant has made "a preliminary showing of a reasonable probability of ultimate success on the merits"; and (4) "the relative hardship to the parties in granting or denying [injunctive] relief."
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> [Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 395 (App. Div. 2006) (quoting Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982)) (alterations made by Rinaldo court)].

We review a trial court's decision to grant or deny a preliminary injunction under an abuse of discretion standard. Ibid. The core issue here, is whether the State can force a private property owner, by way of preliminary injunction, to grant a perpetual public access easement without first following the procedures in the Eminent Domain Act. We are satisfied that the answer to this question is "no." Further, NJDEP's reliance on the provisions of N.J.S.A. 12:6A-1 is misplaced, and any argument predicated on this statute is unavailing, because defendants have never denied it access to the property for the purpose of correcting an emergency situation.

The Eminent Domain Act is based on the fundamental principle that "just compensation must be paid for property taken by public authority." N.J. Sports & Expo. Auth. v. Boro. of E. Rutherford, 137 N.J. Super. 271, 279 (Law Div. 1975) (citing U.S. Const. amends. V, XIV, §1; N.J. Const. art. 1, ¶ 20; State v. Gallant, 42 N.J. 583, 587 (1964)). An easement granting the public access to private property is a taking. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831, 107 S. Ct. 3141, 3145, 97 L. Ed. 2d 677, 685 (1987); State v. Twp. of S. Hackensack, 65 N.J. 377, 383 (1974).

N.J.S.A. 20:3-6 provides the exclusive procedure for taking private property for public use:

> Whenever any condemnor shall have determined to acquire property pursuant to law, including public property already devoted to public purpose, but cannot acquire title thereto or possession thereof by agreement with a prospective condemnee, whether by reason of disagreement concerning the compensation to be paid or for any other cause, the condemnation of such property and the compensation to be paid therefor, and to whom payable, and all matters incidental thereto and arising therefrom shall be governed, ascertained and paid by and in the manner provided by this act.

Thus, the trial court correctly dismissed NJDEP's cause of action, because, under these circumstances, a demand for a perpetual easement from these defendants amounted to a taking of private property without just compensation. To accomplish this apparently legitimate public purpose, NJDEP was required to comply with the procedural requirements of the Eminent Domain Act.

Affirmed.