

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

MARGATE CITY, NEW JERSEY,
et al.,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF
ENGINEERS, et al.,

Defendants.

Civil Action No.
14-7303 (RMB/JS)

OPINION

Appearances:

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Bumb, United States District Judge:

This matter comes before the Court upon plaintiffs' Margate City, New Jersey ("Margate") and Morton and Roberta Shiekman (the "Shiekmans") (collectively "Plaintiffs"), motion for a preliminary injunction. Plaintiffs seek an order preliminarily enjoining the Defendants, New Jersey Department of Environmental Protection ("NJDEP"), the United States Army Corps of Engineers (the "Corps"), and Bob Martin in his official capacity as Commissioner of NJDEP¹ (collectively "Defendants"), from constructing dunes on Margate's beach.

On November 24, 2014, the Court temporarily restrained Defendants from taking any action to construct the dunes, including the Corps' award of a construction contract. Docket No. 5. On December 4, 2014, the Court conducted a hearing, which pursuant to the parties' agreement, was continued until January 15, 2015. On that day, the Court heard testimony relating to irreparable injury. For the reasons set forth below, the motion is denied without prejudice.

I. BACKGROUND

Immediately following Hurricane Sandy, in October 2012, the United States enacted the Disaster Relief Appropriations Act appropriating the sum of \$3.461 billion to the Corps for construction of shore protection projects in states impacted by

¹ For ease of reference, the Court will refer throughout this Opinion to the Commissioner and NJDEP collectively as NJDEP.

the storm, including New Jersey. For such projects in New Jersey, NJDEP serves as the non-federal sponsor. One of NJDEP's key responsibilities is to acquire any necessary property interests, such as easements. The easements name the State of New Jersey and the municipality, as grantees, with the power to assign their rights to the Corps. In the event a municipality, like Margate, does not wish to voluntarily provide easements, NJDEP would have to "take" easements by condemnation.

Absecon Island, a barrier island in Atlantic County, stretches approximately eight miles along the Atlantic Ocean and is made up of four coastal municipalities: Atlantic City, Ventnor, Margate, and Longport. According to NJDEP, Absecon Island has been one of the hardest hit of all the barrier islands in New Jersey during coastal storms. Although the Corps had begun construction of what was known as the Absecon Island Shore Protection Project in 2003 (the "Project"), only the Atlantic City and Ventnor City portions of the project had been completed by the time Hurricane Sandy ravaged parts of the New Jersey shore in 2012. Margate objected to the Project as early as 2000.

NJDEP claims that in those areas of Absecon Island where the Corps had previously constructed an engineered beach and dune system, such as Atlantic City and Ventnor, the dunes effectively protected upland property from the worst of Sandy's destructive force. In other areas of Absecon Island where the protection

Project had not been constructed, such as Margate and Longport, NJDEP alleges that significant property damage occurred as a result of failures in the municipally-maintained bulkhead systems.

In connection with the Sandy Relief Act, Defendants have indicated their intention to continue to implement the Project in various coastal municipalities, including Margate. The Project calls for the construction of 12.75-foot high, 25-foot wide sand dunes on the beaches of all four Absecon Island municipalities - Atlantic City, Ventnor, Margate, and Longport. Though the Defendants have already constructed dunes in Atlantic City and Ventnor, they have yet to award a contract or commence construction in Margate or Longport.

Initially, NJDEP attempted to acquire, by agreement, permanent easements upon Margate's beach so that the Corps could proceed with construction. Margate, however, declined to grant the requested easements. Plaintiffs dispute NJDEP's assessment of how Margate's beach fared during Hurricane Sandy. According to Plaintiffs, Margate has unique geologic and topographic characteristics, such as its extensive system of bulkheads, which Margate claims successfully prevented catastrophic damage to the city and its beach by Hurricane Sandy. Margate argues that it has attempted to present and advocate for storm prevention strategies that it believes are more protective and cost-

effective for the city and its citizens, but the Corps and NJDEP have refused to even consider these alternatives. On November 4, 2013, Margate put to a referendum the question of whether its citizens supported the Project. An overwhelming majority of Margate's citizens voted against it. As a consequence, Margate persisted in its decision to deny the grant of voluntary easements.²

Shortly before Margate's first referendum, on September 25, 2013, New Jersey Governor Chris Christie issued Executive Order 140. Executive Order 140 ordered NJDEP to create an Office of Flood Hazard Risk Reduction Measures to "lead and coordinate the efforts of the DEP to acquire the necessary interests in real property" from "recalcitrant property owners" who have not already granted voluntary easements. Executive Order 140 ordered the Attorney General of the State of New Jersey ("NJAG") to "immediately take action to coordinate those legal proceedings necessary to acquire the necessary easements or other interests in real property for the [Project]."³ (emphasis added).

² One year later, on November 4, 2014, Margate held a second referendum, and its citizens voted in favor of bringing legal action to stop the construction of the dunes.

³ Executive Order 140 states in relevant part:

WHEREAS, employing the procedures set out in [the Act] N.J.S.A. 20:3-1 et seq., public entities are empowered to condemn private property for public purposes, including the creation of Flood Hazard Risk Reduction Measures; and

Yet, one year later, aware of Margate's referendum, the NJAG had still not commenced legal proceedings against Margate. Rather, NJDEP and the Corps entered into a Project Partnership Agreement to commence construction in Margate. In response,

WHEREAS, pursuant to N.J.S.A. 12:3-64, the [DEP] is authorized to acquire any lands in the State that it deems advisable, and may enter upon and take property in advance of making compensation therefore where for any reason it cannot acquire the property by agreement with the owner . . .; and

WHEREAS, all of the aforementioned authority is necessary to protect the public health, safety, and welfare from future natural disasters; and

. . .

NOW, THEREFORE, I, CHRIS CHRISTIE, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and the statutes of this State, do hereby ORDER and DIRECT:

1. The Commissioner of Environmental Protection shall create in the DEP the Office of Flood Hazard Risk Reduction Measures (the "Office"). The Office shall be headed by a Director appointed by the Commissioner to serve at the Commissioner's pleasure and who shall report to the Commissioner on the work of the Office. The Office shall lead and coordinate the efforts of the DEP to acquire the necessary interests in real property to undertake Flood Hazard Risk Reduction Measures and shall perform such other duties as the Commissioner may from time to time prescribe.

2. The Attorney General of the State of New Jersey, in conjunction with the Office, shall immediately take action to coordinate those legal proceedings necessary to acquire the necessary easements or other interests in real property for the system of Flood Hazard Risk Reduction Measures.

Margate engaged an expert engineer to analyze the Project and additionally began to solicit guidance on how it might address the differing views of NJDEP and the citizens of Margate.

In late August and early September 2014, the parties engaged in a dialogue to work out their differences. Unfortunately, efforts at resolving their dispute ended on October 1, 2014, when the Commissioner of NJDEP abruptly filed in the Atlantic County Clerk's Office Administrative Order Nos. 2014-13, 2014-14, and 2014-15 (the "Administrative Orders").

The Administrative Orders similarly provided, in relevant part:

WHEREAS, the United States Army Corps of Engineers, in coordination with the State of New Jersey, is scheduled to begin construction of the Project in the City of Margate and the Borough of Longport in or about December, 2014; and

WHEREAS, prior to construction, the United States Army Corps of Engineers requires that the State provide the easements and/or other real property interests that are necessary to construct and maintain the Project; and

WHEREAS, if the State does not obtain all required easements and/or other real property interests in the City of Margate, the United States Army Corps of Engineers cannot construct the flood hazard reduction measures in both the City of Margate and the Borough of Longport; and

WHEREAS, to date, the City of Margate has not transferred to the State the real property interests owned or controlled by the City of Margate . . . thereby jeopardizing construction of the Project in not only the City of Margate but also the Borough of Longport, and threatening the public health, safety, and welfare of both communities; and

WHEREAS, such real estate property interests owned or controlled by the City of Margate that are required for the Project include both municipal property and public right-of-ways. . . ; and

WHEREAS, public officials of the City of Margate, in defiance of Executive Order No. 140, have refused to cooperate with the New Jersey Department of Environmental Protection Office of Flood Hazard Risk Reduction Measures in its efforts to obtain the necessary real property interests; and

WHEREAS, there is an immediate need for flood hazard risk reduction measures and the State has not been able to obtain the necessary municipal real property interests or the public right of ways from the City of Margate;

NOW THEREFORE, I Bob Martin, Commissioner of the New Jersey Department of Environmental Protection, by virtue of the powers vested in me by the Constitution and statutes of this State, as well as the authority conferred on me by Executive Order No. 140, do hereby declare and order as follows:

1. The New Jersey Department of Environmental Protection Office of Floor Hazard Risk Reduction Measures hereby immediately enters upon and takes real property interest(s)

. . . .

4. Appraisals and good faith negotiations for any compensation due to the City of Margate for such parcels for the interest(s) taken shall be undertaken in a manner not inconsistent with the procedures set out in the New Jersey Eminent Domain Act, N.J.S.A. 20:3-1 et seq. and applicable case law within a reasonable amount of time.

See, e.g., AO 2014-13, Ex. E to Pls.' Mot. For a Prelim. Inj., Docket No. 10 (emphasis added). Thus, the Administrative Orders

made especially clear that NJDEP was "taking" Plaintiffs' property.⁴

Even prior to NJDEP's "taking" through operation of the Administrative Orders, however, on September 15, 2014, the Corps solicited bids from contractors for construction of the Project. Boddie Declaration, Docket No. 27, ¶ 1. The Corps received two bids, and on October 28, 2014, announced both bids. Id. at ¶ 4.

Believing that Defendants would not agree to a halt of the Project and that bulldozers were about to enter Margate's beach, Plaintiffs filed the within action. Plaintiffs seek a declaratory judgment that the imminent contract award by the Corps and commencement of construction constitute a violation of (1) the Due Process Clause of the United States Constitution, (2) the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ("URA"), and (3) the New Jersey common law of trespass. Plaintiffs seek an injunction preliminarily enjoining the dune construction and any award of a construction

⁴ Here, there is no dispute between the parties that there was a "taking" when it issued the Administrative Orders. As for the Corps, it argues that it did not take Plaintiffs' property because it has not yet awarded a contract. Plaintiffs initially disputed this. Nonetheless, the Court need not address this argument as Plaintiffs conceded during oral argument that they do not object to an award of the contract, only to construction of the dunes.

contract until they are afforded the process that is due under the Constitution.⁵

II. LEGAL ANALYSIS

A preliminary injunction is an "extraordinary remedy" that should be granted only if the moving party demonstrates: "(1) a likelihood of success on the merits; (2) that [he] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." Kos Pharm., Inc. v. Andrx Corp., 369 F.3d 700, 708 (3d Cir. 2004). To establish irreparable injury, a plaintiff must show an impending harm that "cannot be redressed by a legal or an equitable remedy following a trial." Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801 (3d Cir. 1989). The irreparable harm alleged must be actual and imminent, not merely speculative. "[A] showing of irreparable harm is insufficient if

⁵ Because this Court finds that Plaintiffs are likely to succeed on the merits as to the first ground - procedural due process - it does not address the parties' arguments related to the remaining claims. Defendants have also argued that Margate has no standing to assert constitutional claims against New Jersey pursuant to Ysura v. Pocatello Educ. Assn'n., 555 U.S. 353, 363 (2009). Plaintiffs respond that this argument is not relevant for two reasons: (1) the Shiekman's are individuals who may assert constitutional claims against both the Corps and the State Defendants; and (2) Margate is not prohibited from asserting constitutional claims against the Corps to vindicate the City's own property rights. Because the Shiekman's are individuals whom the parties agree may assert constitutional claims against both the Corps and state Defendants, the Court need not reach this issue now.

the harm will occur only in the indefinite future. Rather, the moving party must make a clear showing of immediate irreparable harm." Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86, 91 (3d Cir. 1992) (internal quotations omitted) (emphasis in original). Moreover, the party seeking an injunction must meet all four preliminary injunction factors and "failure to establish any element in [a plaintiff's] favor renders a preliminary injunction inappropriate." NutraSweet Co. v. Vit-Mar Enters., Inc., 176 F.3d 151, 153 (3d Cir. 1999); see also Maximum Quality Foods, Inc. v. DiMaria, No. 14-6546, 2014 WL 6991967, at *2 (D.N.J. Dec. 10, 2014) ("A party must produce sufficient evidence of all four factors—and a district court should weigh all four—prior to granting injunctive relief." (citation omitted)). The Court addresses each factor below.

A. Likelihood of Success on the Merits

The issue presented is whether Plaintiffs are likely to succeed on their claim that Defendants have violated the Due Process Clause of the Constitution's Fourteenth Amendment by failing to provide them with an opportunity to be heard before NJDEP made a final determination of a "public use" taking.⁶ In this case, the notice and opportunity to be heard required by the

⁶ The Due Process Clause of the Fourteenth Amendment, provides "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

Federal Constitution is contained in New Jersey's Eminent Domain Act, N.J.S.A. § 20:3-1 et seq.

The power of eminent domain inheres in every state. See Boom Co. v. Patterson, 98 U.S. 403, 406 (1879); United States v. Jones, 109 U.S. 513, 518 (1883); Shoemaker v. United States, 147 U.S. 282, 300 (1893); Cincinnati v. Louisville & R. Co., 223 U.S. 390, 404 (1912). Indeed, "[t]he taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the state." Georgia v. Chattanooga, 264 U.S. 472, 481 (1924). Hence, states have "broad latitude in determining what public needs justify the use of the takings power." Kelo v. City of New Linden, 545 U.S. 469, 483 (2005).

Despite the great deference given to states, courts still play a role in eminent domain cases. The Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, see Chicago, B & Q. R. Co. V. Chicago, 166 U.S. 226 (1897), imposes two limitations on the state's right to exercise eminent domain: first, the property taken must be for a public use, and second, the owner must receive just compensation. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"). As its language makes plain, the Takings Clause "does not prohibit the taking of

private property, but instead places a condition on the exercise of that power.” First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314 (1997). It must be for a public purpose. In other words, it “is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.” Id. at 315 (emphasis in original).

The role of a court is to decide whether, and to what extent, the public use and just compensation limitations of the Takings Clause trigger procedural due process rights. As the Third Circuit, interpreting established Supreme Court precedent, held, “in the eminent domain context, the federal constitution’s due process clause is satisfied so long as property owners [have] reasonable notice and [the] opportunity to be heard before the *final* determination of judicial questions that may be involved in the condemnation proceedings- e.g., . . . whether the taking is for a public purpose [as well as the issue of just compensation].” RLR Investments LLC v. Town of Kearny, 386 F. App’x 84, 89 (3d cir. 2010) (emphasis in original) (quoting Chattanooga, 264 U.S. at 483).

Plaintiffs’ federal constitutional claim - which has heretofore undergone some refinement - relates to the “public

use" prong of the Takings Clause, not the compensation prong.⁷ That is, Plaintiffs allege that Defendants have unconstitutionally denied them the opportunity to challenge Defendants' final determination of a public use taking, i.e., when NJDEP declared the "taking" by Administrative Orders, failing to comply with the procedures set forth in the Eminent Domain Act.⁸ See Docket No. 26. ("Plaintiffs have a Constitutional right to prove that the State Defendants do not have the authority to take their property because the Project is arbitrary and capricious and therefore does not serve a public purpose. Stated simply, the 20-year old Project design will [cause great damage in Margate and will] not serve the stated public purpose of storm damage protection.").⁹ Defendants sidestep Plaintiffs' due process claim and focus instead on compensation, repeating the mantra that Plaintiffs will be fully compensated in a later condemnation proceeding. As discussed

⁷ Although Plaintiffs appeared to have agreed that the Project constituted a proper "public use," they have clearly backed away from such a position in the Amended Complaint.

⁸ Plaintiffs also appear to argue that because the Administrative Orders were unlawfully issued, there was no taking, see infra, and any entry by Defendants would constitute an unlawful trespass. As set forth above, this Court does not reach the state law claims.

⁹ Plaintiffs claim that "because flooding occurs from the bay-side of the City, and because the City is graded to drain toward the ocean, the presence of dunes will detrimentally impact the current flood-drainage system by trapping water landward." Docket No. 26 at 2 n.2.

below, Defendants' reliance on the compensation prong of the Takings Clause is misplaced.

The Takings Clause presupposes that the government has acted in pursuit of a valid public purpose, Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 543 (2005). A property owner nonetheless has a due process right to challenge such purpose; the fact that the owner may receive compensation is irrelevant. As the Supreme Court explained, "if a government action is found to be impermissible - for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process - that is the end of the inquiry. No amount of compensation can authorize such action." Id. at 543. Hence, despite the broad deference given to a state's decision to exercise its power of eminent domain, there are prescribed constitutional limitations of which a state may run afoul. Relevant here, a state must afford a property owner an opportunity to be heard before the final determination of public use. "Defendant must be provided with 'an opportunity be heard at a meaningful time and in a meaningful manner.' That is, he must be given the opportunity to challenge the City's authority to condemn as well as its authority to set just compensation." City of Passaic v. Shennett, 390 N.J. Super. 475, 485 (App. Div. 2007) (citations omitted) "To say [then] that no right to notice or a hearing attaches to the public use requirement would be to render meaningless the court's

role as an arbiter of a constitutional limitation on the sovereign's power to seize private property." Brody v. Village of Port Chester, 434 F.3d 121, 129 (2d Cir. 2005).

The Second Circuit's decision in Brody is instructive. Much like Defendants here, the municipality in Brody argued that the adjudicative nature of a just compensation determination triggered the full panoply of due process rights. The public use determination, the municipality argued, was essentially a legislative decision not subject to the requirements of due process. The Second Circuit disagreed, explaining that the issue is whether due process attaches to a proceeding established to allow aggrieved persons to assert a constitutionally prescribed limitation on a legislative action, i.e., the review procedure for challenging a public use determination made pursuant to New York's Eminent Domain Procedure Law. Although the municipality argued that its almost unfettered ability to make a public use determination rendered the procedures for challenging such determination immune from due process constraints, the Second Circuit disagreed. Such argument, it held, is contrary to the long-settled rule that "at a minimum, . . . persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Id. (quoting Boddie v. Connecticut, 401 U.S. 371 (1971)). That right "has little reality or worth unless one is informed that the

matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Id. (quoting Mullane v. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

Here, the Eminent Domain Act provides the procedure for challenging a public use determination. Before a taking can occur, a condemnation proceeding must be initiated. This triggers a property owner's ability to challenge the authority to condemn. See N.J.S.A. §§ 20:3-8; 20:3-11 ("Denial of Authority to Condemn"). Yet, NJDEP has avoided such procedure by having its Commissioner "take" the property for a "public use" by Administrative Orders.¹⁰ In so doing, NJDEP has denied Plaintiffs any opportunity to challenge NJDEP's final public use determination. The Constitution, however, requires such opportunity. RLR Investments, 386 F. App'x at 89.

¹⁰ The following hypothetical is useful: If the Commissioner's order had provided that he was taking Margate's beach for the "public purpose" of ensuring exclusive private enjoyment of the beach, there would be no question that such a taking violated the United States Constitution. Indeed, public unrest would ensue. Simply because the Commissioner asserts that it is a public use taking does not make it so. Yet, because the property owner is not afforded any mechanism for challenging that taking, the owner's only recourse would be to file in federal court. Plaintiffs are in the same predicament here. Because the Commissioner issued Administrative Orders declaring the taking to be a public use taking instead of following the procedures set forth in the Eminent Domain Act, Plaintiffs are deprived of their constitutional right to due process.

Both NJDEP and the Corps persistently argue that Plaintiffs will have an opportunity to be fully compensated through a later condemnation proceeding. Defendants miss the constitutional point. By issuing the Administrative Orders and waiting, in effect, until after the dunes are constructed to commence eminent domain proceedings, Plaintiffs will have in essence been deprived of their opportunity to challenge NJDEP's public use determination. Putting it another way, although the Eminent Domain Act provides the procedure to challenge the State's public use authority, N.J.S.A. § 20:3-11, such procedure, in effect, is rendered meaningless by the Administrative Orders.¹¹

Why NJDEP failed - and continues to fail - to follow the procedures set forth in the Eminent Domain Act is baffling.¹²

¹¹ At oral argument, NJDEP argued that Plaintiffs are afforded a process - Plaintiffs, like any property owner, can sue the State. This argument turns the concept of due process on its head.

¹² The Eminent Domain Act sets forth the procedures NJDEP must follow. Pursuant to N.J.S.A. § 20:3-17, a taking occurs when the agency files and records a "declaration of taking" after it or when it commences a condemnation proceeding. Hoagland v. City of Long Branch, 428 N.J. Super. 321, 327 (App. Div. 2012). The agency may, but need not, file a declaration of taking. Id.; N.J.S.A. § 20:3-17. The agency may withhold the filing of the "declaration of taking," thereby preserving its right to dismiss the action at a future time. Id.; Wayne v. Ricmin, Inc., 124 N.J. Super. 509, 517 (App. Div. 1973); N.J.S.A. § 20:3-35. The filing of a condemnation proceeding, however, entitles the condemnee to challenge the authority of the agency to condemn through eminent domain. N.J.S.A. § 20:3-11. As mentioned, there is no dispute between the parties that there was a "taking" by NJDEP when it issued the Administrative Orders.

Plaintiffs concede that the filing of a condemnation proceeding would moot their federal constitutional claims, i.e., this lawsuit. Moreover, Executive Order 140, issued almost 1 ½ years ago, directed the commencement of such legal proceedings. Yet, in disregard of not just the Executive Order, but the minimal requirements of constitutional due process, NJDEP has chosen to “take” through the issuance of the Administrative Orders. In response to the Court’s question, NJDEP informed the Court at oral argument that it has not filed the condemnation proceeding because “[i]t was simply our view [] that we had to have an appraisal in hand in order to start the proceeding.” Plaintiffs agreed to waive the appraisal requirement at oral argument. Yet, more than one month later, NJDEP still has failed to commence the proceeding despite Plaintiffs’ waiver of any appraisal requirement.

Furthermore, NJDEP acknowledges that Plaintiffs have a legitimate procedural argument. NJDEP Mem., Docket No. 13, at 41 n.15. Citing to New Jersey precedent,¹³ however, NJDEP contends that Plaintiffs “cannot seriously contest the State’s ultimate authority to take its property for an Army Corps shore protection project.” Id. NJDEP may be right and in the end prevail, but as it recognizes, the United States Constitution permits property

¹³ See, e.g., State v. Archer, 107 N.J. Super. 77, 78 (App. Div. 1969) (hurricane and shore protection is for a public purpose).

owners to exercise their procedural due process rights, even when such exercise may turn out to be an exercise in futility as Defendants believe. The Constitution is that sacred.

This is not the first time the NJDEP has refused to follow the procedures set forth in the Eminent Domain Act. In Milgram v. Ginaldi, the NJDEP similarly attempted to circumvent the Act to acquire easements in Long Beach Island, New Jersey. 2008 WL 2726727 (App. Div. 2008). There, as here, NJDEP, in conjunction with the Corps, intended to construct dunes on private and municipally-owned beaches. Id. at *1. In fact, NJDEP sought to first obtain voluntary "Storm Damage Reduction Easements," precisely as it has done in this case. Id. at *2. When it was not successful, rather than following the procedures required under the Act, NJDEP filed a complaint and order to show cause seeking a preliminary injunction requiring property owners to grant easements for shore protection purposes and enjoining property owners from interfering with construction. Id.

The trial court dismissed NJDEP's complaint, and the Appellate Division affirmed because NJDEP had failed to follow the procedures required under the Eminent Domain Act. Id. at *3. In particular, the Appellate Division held: "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, [the NJDEP] was required to

comply with the procedural requirements of [the Act]." Id. at *4.¹⁴

The Administrative Orders, and their expressed justification, contravene the plain language of the Eminent Domain Act:

Whenever any condemnor shall have determined to acquire property pursuant to law . . . 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, the compensation and all matters incidental thereto and arising therefrom shall be governed . . . in the manner provided by this act[.]

N.J.S.A. § 20:3-6.

The Commissioner declares in the Administrative Order that all appraisals and compensation negotiations shall be done in accordance with the Eminent Domain Act. But why the Commissioner excised other matters, such as the ability to challenge the public use determination provided for in the Eminent Domain Act, is inexplicable.

Defendants make much of the argument that Margate has acted in defiance of the Executive Order. Defendants doth protest too much. As discussed above, the Executive Order, issued almost 1 ½ years ago, directed NJDEP to "coordinate those legal proceeding necessary to acquire the necessary easements or other interests

¹⁴ Tellingly, Defendants have not addressed this case.

in real property." Yet, to date, NJDEP has failed to commence/coordinate any legal proceeding with respect to Margate, instead forcing Plaintiffs to seek refuge and protection of their due process rights in federal court. Had NJDEP timely complied with Executive Order 140 and filed the condemnation proceeding, Plaintiffs would have long had the constitutional process that was due.

Defendants argue that N.J.S.A. § 12:3-64 permits them to rely on the Administrative Orders rather than file a condemnation proceeding. That statute states: "The [NJDEP] 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 reparation lands, of such area and extent which, in the discretion of the department, may be necessary and advisable." (emphasis added). It further provides that "[t]he department may enter upon and take property in advance of making compensation therefor where for any reason it cannot acquire the property by agreement with the owner." Defendants contend that this language permits them to bypass the condemnation procedures set forth in the Eminent Domain Act.

Contrary to Defendants' bare argument, the plain language clearly requires NJDEP to follow those procedures. The Court agrees with Plaintiffs that if this language meant that NJDEP did

not have to comply with the Act at all, N.J.S.A. § 12:3-64's first sentence, which requires compliance with the Act, would be superfluous. A statute "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." Clark v. Rameker, 134 S. Ct. 2242, 2248 (2014). (internal quotations omitted) NJDEP's interpretation renders the first sentence of N.J.S.A. § 12:3-64 meaningless, and it is therefore untenable.

This interpretation is supported by the Report of the Eminent Domain Revision Commission. In that Report, the Commission noted that "Chief among these [suggestions] is the requirement that no condemning agency, including the state, shall be permitted to take possession of property unless reasonable compensation is made available to the property owner, simultaneously with the taking of such possession." However, it suggested that entities be permitted to possess property prior to final determination of compensation. Significantly, the Commission stated "[e]xcept in the rather rare cases in which the right to condemn is questioned, it is essential that the condemning body be permitted to take possession of property promptly following the filing of the complaint and service of process." Id. at 17 (emphasis added). The Commission thus contemplated that condemnation proceedings be commenced prior to

taking possession - but not, as Defendants suggest, "prior to institution of suit." See id. at 18.

For the foregoing reasons, the Court finds that Plaintiffs have shown a likelihood of success on the merits as to NJDEP.¹⁵ The Court emphasizes, however, that its role here is limited to the narrow issue of whether Plaintiffs were unconstitutionally denied an opportunity to challenge NJDEP's public use determination.

B. Irreparable Injury

Plaintiffs argue that the construction of dunes upon Margate's beaches constitutes irreparable harm. More specifically, they argue monetary damages would be extremely difficult to ascertain in this case, where Plaintiffs stand to lose a considerable portion of their usable beaches, beaches that attract tourism, protect property values and the City's rental market and which ensure the vitality of local businesses, all of which will suffer if Defendants proceed as intended. Docket No. 26, p. 12 n.8. Mr. Maury Blumberg, Margate's Commissioner of Revenue and Finance, testified that Margate's reputation will suffer, and the damage to the city is immeasurable. Moreover, Charles Rooney, a licensed civil engineer, testified that the dunes, once constructed, may not be capable of being removed due

¹⁵ Plaintiffs appeared to have abandoned their contention that the Corps has violated their constitutional rights. See infra.

to the existence of vegetation and habitation, some involving endangered species.

Defendants argue that Plaintiffs' fear of irreparable injury is either premature or reparable. First, the Corps argues that construction of the dunes is not imminent because construction cannot take place for at least 90 days after the award of the contract. Corps Mem., Docket No. 15, at 14. This is so because there are preliminary matters, i.e., bonding information and submittals on every facet of construction that will have to be provided by the successful bidder. The Corps received two bids. The low bidder extended its bid for a period of 30 days, which will expire on January 26, 2015. The second low bidder granted a 60-day extension, and thus, the bid will expire on February 26, 2015. Boddie Declaration, Docket No. 27, ¶ 5.

The Corps argues that it will sustain irreparable injury if the contract is not awarded and the bids expire. In such instance, the Corps would have to re-solicit the project. The Corps estimates that it would take an additional ten weeks to redo all the solicitation documents and comply with the requirements of the review process for a new solicitation, costing the Corps approximately \$50,000. In addition, it argues that not only will there be costs associated with re-soliciting bids, but any re-execution of the bid process itself will be undermined because the bids have already been unsealed. The

competitive, sealed bid process is used to minimize the possibility that the bidding parties could coordinate a submission of inflated prices. Now that the bids have already been exposed, the Corps contends it will be less able to ensure that it will receive the best price for the Project should re-solicitation be required.

NJDEP contends that any injury to Plaintiffs is addressed by a monetary award. It relies on the legion of cases that hold that an adequate remedy at law exists in the form of money damages to compensate for an unlawful taking.

Addressing the foregoing concerns, the Court finds that no irreparable injury will issue to any party as a result of the Corps' award of a construction contract. Indeed, at oral argument, counsel for Plaintiffs voiced no objection to such award. Once the contract is awarded, construction would not commence until, at the earliest, April 26, 2015, if the lowest bidder prevails, or May 26, 2015, if the second lowest bidder prevails. By then, NJDEP will have already commenced its condemnation proceeding. As counsel for NJDEP represented at oral argument, it would be prepared to file such proceeding by April 2015. Such proceeding could be expedited.¹⁶

¹⁶ It seems NJDEP could obtain a prompt resolution of the public use issue. N.J.S.A. § 20:3-11 provides that "[w]hen the authority to condemn is denied, all further steps in the action shall be stayed until that issue has been finally determined." Cf. Twp. Of Bridgewater v. Yarnell, 64 N.J. 211 (1974).

As for the commencement of construction, all Defendants are in agreement that construction could not realistically be expected to start until the end of April 2015. By that time, NJDEP will have filed its condemnation proceeding. Thus, because construction is not imminent, based on Defendants' representations, and Plaintiffs will be afforded the opportunity to redress their constitutional injury in a condemnation proceeding, this factor does not weigh in favor of an injunction at this time. However, in the event the Corps is prepared to proceed with construction and the condemnation proceeding has not been filed, Defendants shall provide Plaintiffs with ten days' notice of such construction so that Plaintiffs, if they choose, may seek this Court's reconsideration of this factor.

C. Balance of the Harms

The Corps initially contended that it would suffer significant financial harm if it were unable to award the contract to one of the current bidders. NJDEP contends that failure to construct the dunes leaves the shore vulnerable to the detrimental impact of future storms. Plaintiffs argue, however, that these are self-inflicted harms that are the result of Defendants' choice to proceed with the Project and the bidding process without first ensuring lawful title to the affected properties. The Court tends to agree. Moreover, while the Court recognizes the shore's vulnerability, it is at a loss to explain

why this fact has not motivated NJDEP to proceed with condemnation proceedings over the last three years. In any event, although Plaintiffs have a significant constitutional right at issue, Defendants have represented to the Court that the condemnation proceedings will be filed by the end of April 2015, which will likely occur before construction could even commence. Accordingly, this factor does not weigh in favor of an injunction at this time. However, in the event the Corps is prepared to proceed with construction and the condemnation proceeding has not been filed, Defendants shall provide Plaintiffs with ten days notice of such construction so that Plaintiffs, if they choose, may seek this Court's reconsideration of this factor.

D. Public Interest

This case is not about whether the Project serves a public purpose. That dispute will occur in state court. This case is about a more narrow, but vitally important, issue: have Plaintiffs been denied their rights to procedural due process under the Constitution. As discussed at length above, a state's power to take property from a private person is not without constitutional limitations. A property owner must have an opportunity to be heard before the final determination of whether the taking was for a public purpose. NJDEP has agreed that it will afford Plaintiffs such opportunity by filing a condemnation proceeding. Before then, the parties do not anticipate that any

construction will occur. Hence, Plaintiffs will be afforded their due process rights without the fear of imminent construction. Accordingly, this factor does not weigh in favor of an injunction at this time. However, in the event the Corps is prepared to proceed with construction and the condemnation proceeding has not been filed, Defendants shall provide Plaintiffs with ten days notice of such construction so that Plaintiffs, if they choose, may seek this Court's reconsideration of this factor.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' motion is denied without prejudice.

s/Renée Marie Bumb
RENÉE MARIE BUMB
UNITED STATES DISTRICT JUDGE

Dated: January 15, 2015