

NOT TO BE PUBLISHED WITHOUT  
THE APPROVAL OF THE COMMITTEE ON OPINIONS

Minke Family Trust,

Plaintiff,

v.

Township of Long Beach,

Defendant,

New Jersey Department of  
Environmental Protection,

Defendant-Intervenor.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

OCEAN COUNTY

DOCKET NO. OCN-L-3033-14

CIVIL ACTION

**OPINION**

**Argued: January 23, 2015**  
**Decided: February 13, 2015**

**Vincent J. Grasso, A.J.S.C.**

John H. Buonocore, Jr., Esq. appearing on behalf of the plaintiff, Minke Family Trust (McKirdy & Riskin, P.A.)

David Frankel, Esq. appearing on behalf of the defendant-intervenor, New Jersey Department of Environmental Protection (New Jersey Office of the Attorney General)

Paul V. Fernicola, Esq. appearing on behalf of the defendant, Township of Long Beach (Paul V. Fernicola & Associates, LLC)

**Summary**

The matter before the court is a motion for summary judgment filed by plaintiff, Minke Family Trust, pursuant to R. 4:46-2 with respect to Count III of the Complaint, which alleges that the adoption of Resolution 14-1006.01 (Resolution) by defendant, Township of Long Beach (Township), is arbitrary, capricious, and unreasonable because the shore protection provisions of

the Disaster Control Act (DCA), N.J.S.A. App. A:9-51.5 to 51.9, do not authorize the Township to acquire a perpetual shore protection easement upon plaintiff's property without complying with the requirements of the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 to 20:4-22. Plaintiff, Minke Family Trust, owns oceanfront property in the Loveladies section of Long Beach Island (LBI) in Ocean County. The deed of perpetual easement at issue encumbers approximately 0.47 acres of plaintiff's beach frontage. The easement is needed as part of a shore protection project for the construction of flood hazard risk reduction measures following Hurricane Sandy. Plaintiff, therefore, requests the court to declare the Resolution invalid and order plaintiff's property rights restored of record to the *status quo ante*. The New Jersey Department of Environmental Protection (NJDEP), as a defendant-intervenor, filed a cross-motion for summary judgment on Count III. At issue is whether the DCA empowers the Township with the legal authority to declare a taking and record a deed of perpetual easement against plaintiff's property before instituting a complaint for condemnation under the Eminent Domain Act.

Another matter before the court is the Township's R. 4:6-2(e) motion to dismiss Counts I and II of plaintiff's Complaint, which seek to invalidate the Township's Ordinance 14-32 (Ordinance) and to enjoin and restrain the Township and the NJDEP from any action in pursuant to Ordinance 14-32. The Ordinance authorizes the Township and the NJDEP to acquire a perpendicular access easement for public access over plaintiff's property. The Township alleges that these counts are premature and are not ripe for adjudication, because the Township has not filed any condemnation to acquire the public access easement over plaintiff's property. The issue of the public access easement is a separate issue from the shore protection easement sought for dune replenishment and flood reduction measures on and across plaintiff's property.

## **Background**

The following facts are undisputed for purposes of this application. Hurricane Sandy devastated New Jersey in 2012. In the areas where the Army Corps of Engineers (Army Corps) had recently constructed an expanded beach and twenty-two(22)-foot-high dune, the dune spared landward properties from Sandy's destructive force. In other areas where Army Corps had not recently replenished beaches and constructed dunes, homes and properties suffered extensive damage. The pre-existing beach and dunes at the Loveladies section of Long Beach Island were insufficient to protect landward homeowners, because the existing dunes were too narrow and uneven with gaps that the storm exploited.

In January 2013, in response to the devastation caused by Sandy, the Federal government enacted the Disaster Relief Appropriations Act of 2013, Pub. L. No. 113-2 (Sandy Relief Act). It appropriates \$3.461 billion to the Army Corps for construction of shore protection projects in New Jersey and other states affected by Sandy. Previously, in large-scale shore protection projects, the State was required, among other tasks, to provide a percentage of the project funding. Under the Sandy Relief Act, the Federal government will cover 100% of the design, construction, and engineering costs for projects where beach replenishment had previously been constructed. In August 2005, the NJDEP signed a Project Cooperation Agreement (PCA) with the Army Corps pursuant to U.S.C.A. 426(e)(3)(B) for initial construction of the LBI Shore Protection Project and periodic beach re-nourishment. In July 2014, the NJDEP and the Army Corps signed a Project Partnership Agreement (PPA) to supplant and replace the existing PCA. The PPA references the Sandy Relief Act and the updated monetary obligations of all parties. The Army Corps intended to begin construction of the flood hazard risk reduction measures in

the Township on or about January 1, 2015. The Army Corps will not open bids to construct a project until the State certifies that the State has all of the required easements in hand.

In September 2013, Governor Christie promulgated Executive Order No. 140 (Order). The Order established the Office of Flood Hazard Risk Reduction Measures (Office) within the NJDEP to be “responsible for the rapid acquisition of property vital to (Sandy) reconstruction efforts.” The Order noted that “pursuant to N.J.S.A. App. A:9-51.5, municipalities are authorized to enter upon and take possession and control of property necessary for the construction of Flood Hazard Risk Reduction measure.”

On October 6, 2014, the Township adopted Resolution 14-1006.01. The Resolution in pertinent part states:

**WHEREAS**, the Municipality is in the process of a shore protection project in conjunction with the New Jersey Department of Environmental Protection (“DEP”), and/or other federal/state entities, *the purpose of which is the creation, improvement, and/or reconstruction of flood hazard risk reduction measures in the Municipality for the protection of the Municipality and the property and citizens thereof*; and

**WHEREAS**, as part of the design of these flood hazard risk reduction measures, governmental entities have identified all property interests that must be obtained for construction of the flood hazard risk reduction measures, and *these required property interests include a perpetual easement the form of which is included as Appendix A to this Resolution*; and

...

**WHEREAS**, using public funds, federal and/or state entities intend to begin construction of the flood hazard risk reduction measures in the Municipality in or about *January 1, 2015*; and

...

**WHEREAS**, *that project cannot proceed until the Municipality provides to federal and/or state entities perpetual easement(s) in the form of Appendix A for the easement area on each of the Properties as set forth in Appendix C to this Resolution, and thus failure to provide the necessary easement(s) before the*

construction of the flood hazard risk reduction measures would delay, increase the cost of, and potentially frustrate the project's construction; and

**WHEREAS**, the potential delay and increase in cost is a matter of urgency and importance, and would result in substantial harm to the public health, safety, and welfare; and

...

**WHEREAS**, *pursuant to N.J.S.A. App. A:9-51.5*, if the Municipality, which borders the Atlantic Ocean, finds that there exists a threat or danger to life and property by reason of the damage to or the destruction of sand barriers and other natural or manmade barriers which protect the Municipality, and that it is necessary to the health, safety, and welfare of the Municipality to repair, restore, replace, or construct such flood hazard risk reduction measures, then the Municipality may, by resolution, as an exercise of the police power of the State, designate properties required for the purpose of providing such protective barriers and authorize the appropriate municipal or governmental officials or agencies or the representatives thereof *to enter upon* such property within ten (10) days of the passage of such a resolution *to take control and possession thereof*, and to do such acts as may be required *without first paying any compensation therefor*; and

...

4. *Pursuant to N.J.S.A. App. A:9-51.5*, the Municipality hereby *declares it has taken a perpetual and assignable easement and right-of-way* for the flood hazard risk reduction measures in, on, over, and across that land of the Properties described in Appendix B in favor of itself and the State of New Jersey for purposes of construction, preservation, patrol, operation, maintenance, repair, rehabilitation [sic], and replacement of the flood hazard risk reduction measures, *pursuant to the form of easement(s) attached to this Resolution as Appendix A*.

...

7. To prevent a delay in the project and any resulting costs, entry upon and possession of the Properties may be made without first paying any compensation therefor; and

8. In accordance with N.J.S.A. App. A:9-51.7, the owners of the Properties retain the right to obtain just compensation, if any, for the possession of the Properties, subject to all appropriate setoffs for benefits conferred on the property by the flood hazard risk reduction measures; and

9. To ensure that the owners of the Properties receive the just compensation, if any, required by N.J.S.A. App. A:9-51.7 and/or any other applicable law, the Municipality *will proceed under the negotiation and valuation provisions of the*

*Eminent Domain Act of 1971, N.J.S.A. 20:3-1 et seq.* to value the impact of the flood hazard risk reduction measures on the affected property owners; and

[emphasis added.]

The Resolution explains that the Township was engaged “in the process of a shore protection project in conjunction with the New Jersey Department of Environmental Protection.”

The Resolution declares that the Township “has taken a perpetual and assignable easement and right-of-way” over plaintiff’s property, identified as Block 20.107, Lot 4, 95D Long Beach Boulevard at Appendix B to the Resolution, pursuant to the Disaster Control Act (DCA), N.J.S.A. App. A:9-51.5. The property owners, however, “retain[ed] the right to obtain just compensation,” and that the government would “proceed under the negotiation and valuation provisions of the Eminent Domain Act of 1971” to set the value of the taken property and pay any just compensation due.

On October 8, 2014, the Clerk of Ocean County recorded the Resolution, including the unsigned “Deed of Dedication and Perpetual Storm Damage Reduction Easement” (Deed). A copy of the Resolution was served by certified mail, return receipt requested, and regular mail, to the affected owners. Plaintiff received the Resolution on October 11, 2014. No action to condemn under the Eminent Domain Act had been instituted at the time of the adoption of the Resolution.

In the deed of easement attached to the Resolution, the NJDEP and the Township are grantees of the easement. The area taken from plaintiff is an area of 0.47 acres, located between the Township’s “Bulkhead Line” and the Mean High Water Line of the Atlantic Ocean. It is effectively the entire beach in front of plaintiff’s residence. The Deed conveys a “perpetual and assignable easement and right-of-way [for the Grantees] to,” among many things, “[c]onstruct, preserve, patrol, operate, maintain, repair, rehabilitate, and replace *a public beach*.”

In addition, the Army Corps requires that beaches replenished with Federal funds be open and accessible by public access points no more than one-half mile apart. Since 2006 or even earlier, Block 20.93, rather than plaintiff's property Block 20.107, was selected for a new public pedestrian access from Long Beach Boulevard to the Atlantic Ocean. Block 20.93 is midway between existing public access points at Loveladies Land and Station Avenue. It was selected because "[e]xcessive parking exists on the side streets adjacent to this tract as noted on the [Public Access Plan Maps]." On August 25, 2014, the public access maps were revised to move the access point from Block 20.93 to plaintiff's property in Block 20.107. There was no record of any discussion or basis for the switch at any minutes of municipal meetings. On September 26, 2014, the Township adopted Ordinance 14-32. It authorized the Township to acquire public access easements over plaintiff's property from Long Beach Boulevard to the Atlantic Ocean and the properties of others in the municipality.

On October 22, 2014, plaintiff filed a complaint in lieu of prerogative writs. Counts I and II challenge the Township's adoption of Ordinance 14-32 as arbitrary, capricious, and unreasonable. Count III alleges that Resolution 14-1006.01 is invalid and does not legally effect a transfer of the shore protection easement in plaintiff's property to the Township and the State.

## **Findings**

### **Motion for Summary Judgment on Count III**

#### **Summary Judgment Standard**

New Jersey Court Rule 4:46-2 sets forth the standard for summary judgment. Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a

matter of law.” R. 4:46-2. The role of the motion judge is to determine whether there is a genuine issue of material fact for trial or whether the evidence, viewed in the light most favorable to the non-moving party, is so one-sided that one party must prevail as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249–52 (1986)).

To avoid summary judgment, the non-moving party must clearly establish an issue of material fact. Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954). To do so, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. R. 4:46-5(a). It has also been noted that “[c]onclusory assertions, unsupported by specific facts, presented in affidavits opposing the motion for summary judgment are likewise insufficient to defeat a proper motion for summary judgment.” Sch. Alliance Ins. Fund v. Fama Const. Co., 353 N.J. Super. 131, 136 (Law Div. 2001) (citing Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 888 (1990)).

Summary judgment obviates futile trials by allowing courts to pierce the pleadings to see whether a genuine dispute exists. Judson, supra, 17 N.J. at 75–76 (citations omitted). Nevertheless, it must not deprive deserving litigants of their right to a trial. Judson, supra, 17 N.J. at 77. Accordingly, the court may grant a summary judgment only if: (1) no genuine issue of material fact exists; and (2) the movant is entitled to judgment as a matter of law. R. 4:46-2(c).

### Count III

Count III is a challenge against the Township’s adoption of Resolution 14-1006.01, which cites N.J.S.A. App. A:9-51.5 as the authority to declare that the Township “has taken a perpetual and assignable easement and right-of-way” over plaintiff’s property.



N.J.S.A. App. A:9-51.5 states as follows:

When the governing body of any municipality bordering on the Atlantic ocean or Delaware bay shall find that there exists a threat or danger to life and property by reason of the damage to or the destruction of sand barriers and other natural or manmade barriers which protect the municipalities, and that it is necessary to the health, safety and welfare of the municipality to repair, restore, replace or construct such protective barriers, such governing body may, by resolution, as an exercise of the police power of the State designate the properties required for the purpose of providing such protective barriers and authorize the appropriate municipal or governmental officials or agencies or the representatives thereof to *enter immediately upon such property to take control and possession thereof*, and to do such acts as may be required, including removing, destroying or otherwise disposing of any property located thereon *without first paying any compensation therefor*.

Such resolution shall provide that no entry shall be made upon such property for a period of at least 10 days following the passage of such resolution, unless the governing body shall find that the public safety and interest requires that entry be made within a shorter period of time. In such case, entry may be made after the expiration of such time period as shall be fixed by the resolution.

[N.J.S.A. App. A:9-51.5 (emphasis added).]

In other words, a municipality is authorized to “enter immediately upon” a property “to take control and possession” of it when two criteria are met: (1) “there exists a threat or danger to life and property by reason of the damage to or the destruction of sand barriers and other natural or manmade barriers which protect the municipalities;” and (2) “it is necessary to the health, safety and welfare of the municipality to repair, restore, replace or construct such protective barriers.”

Plaintiff argues that the DCA provides no authority for the Township to “declare it has taken a perpetual and assignable easement and right-of-way” over plaintiff’s property without complying with the procedural requirements of the Eminent Domain Act. Plaintiff claims that N.J.S.A. App. A:9-51.5 merely authorizes a municipality to enter property “to repair, restore, replace or construct such protective barriers.” Alternatively, plaintiff cites N.J.S.A. App. A:9-33 to argue that the Township does not have any “emergency” defined under the statute to seek

authorization under the DCA. N.J.S.A. App. A:9-33 provides the purpose of the DCA and states as follows:

The purpose of this act is to provide for the health, safety and welfare of the people of the State of New Jersey and to aid in the prevention of damage to and the destruction of property *during any emergency* as herein defined by prescribing a course of conduct for the civilian population of this State *during such emergency* and by centralizing control of all civilian activities having to do with such *emergency* under the Governor and for that purpose to give to the Governor control over such resources of the State Government and of each and every political subdivision thereof as may be necessary to *cope with any condition that shall arise out of such emergency* and to invest the Governor with all other power convenient or necessary to effectuate such purpose.

[N.J.S.A. App. A:9-33 (emphasis added).]

The DCA defines “emergency” in N.J.S.A. App. A:9-33.1 as follows:

(1) “*Disaster*” shall mean *any unusual incident resulting from natural or unnatural causes* which endangers the health, safety or resources of the residents of one or more municipalities of the State, and *which is or may become* too large in scope or unusual in type to be handled in its entirety by regular municipal operating services.

...

(4) “*Emergency*” shall mean and include “*disaster*” and “war emergency” as above in this section defined.

[N.J.S.A. App. A:9-33.1 (emphasis added).]

Additionally, plaintiff argues that the DCA does not allow for an easement that grants public access over the taken property because public access is unconnected to the DCA’s shore protection aims.

The NJDEP contends that in light of the aftermath of Hurricane Sandy, the two criteria under N.J.S.A. App. A:9-51.5 are satisfied here. The NJDEP claims that the DCA, by the term of “to take control and possession” of private property, authorizes a municipality to effectuate a taking by passing a resolution that designates the properties required to construct “protective barriers” pursuant to N.J.S.A. App. A:9-51.5. The NJDEP states that under the Resolution, an owner of the taken property is entitled to just compensation decided after the taking. In other

words, the NJDEP claims that the Township is authorized by the DCA to declare that it has taken a private property by adopting a resolution without complying with the procedural requirement of the Eminent Domain Act and then pay the just compensation later. The NJDEP relies on Klumpp v. Borough of Avalon, 202 N.J. 390 (2010) to support its argument. As to the public access requirements in the unsigned Deed attached to the Resolution, the NJDEP contends that the public access requirements are “connected” to the shore protection purpose of the easement because public access is a necessary component of the shore protection project required by the Army Corps of Engineers’ regulation ER 1165-2-130(h), which is reaffirmed in the PPA entered by the State and the Army Corps.

The core issue presented in Count III is whether the shore protection provisions of the DCA authorize a municipality to effect an immediate taking of a perpetual easement without instituting a condemnation action pursuant to the Eminent Domain Act, N.J.S.A. 20:3-1 to 20:4-22, namely the negotiation and valuation process to set the value of the taken property and pay any just compensation due.

In light of the statute and the damages caused by Sandy, the court finds that the potential of another super storm like Sandy constitutes an emergency contemplated for the purpose of the DCA and satisfies the two criteria of N.J.S.A. App. A:9-51.5: (1) future natural disaster similar to Sandy poses a threat or danger to life and property by the existing protective barriers in Long Beach damaged by Sandy; (2) it is necessary for the Township’s health, safety, and welfare to construct new protective barriers. Nevertheless, the court finds that the DCA does not authorize the Township to effectuate a taking of plaintiff’s property and filing a deed of perpetual easement with the County Clerk without instituting a condemnation proceeding pursuant to the Eminent Domain Act. If the Township wishes to acquire perpetual interests in plaintiff’s

property for shore protection measures, it must adopt an ordinance authorizing the acquisition under the DCA and comply with the procedural requirements of the Eminent Domain Act. The fact that the DCA provides the right of the property owner to receive just compensation at a later date does not militate against this finding.

“The State’s power to condemn private property is strictly limited by the constitutional rights of citizens to be free of takings without just compensation. See U.S. Const. amend. V; N.J. Const. art. IV, § 6, ¶ 3. Moreover, as a further means to protect the constitutional rights of the people, the Legislature enacted the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 to -50, to govern *the manner* in which the State may exercise its authority to condemn.” Norfolk Southern Ry. Co. v. Intermodal Properties, LLC, 215 N.J. 142, 146 (2013) (emphasis added).

The eminent domain clause of the New Jersey Constitution provides:

Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.

[N.J. Const. art. I, ¶ 20.]

The New Jersey Supreme Court has explained that this clause

imposes three significant limitations on the State’s eminent domain power. First, the State must pay “just compensation” for property taken by eminent domain. Second, no person may be deprived of property without *due process of law*. Third, . . . the State may take private property only for public use.

[Gallenthin Realty Dev. v. Borough of Paulsboro, 191 N.J. 344, 356 (2007) (emphasis added).]

“The Eminent Domain Act provides *uniform procedures* to be applied to ensure that these constitutional requisites are met and to increase protection to the citizen whose property is condemned.” City of Atl. City v. Cynwyd Invs., 148 N.J. 55, 68 (1997) (citing County of

Monmouth v. Wissell, 68 N.J. 35 (1975)); N.J.S.A. 20:3-6 to -14. R. 4:73 tracks these statutory requirements for the institution of condemnation proceedings. Ibid.

Here, the Township and the NJDEP conceded that the easement conveyed by the unsigned deed of easement attached to the Resolution constitutes a taking. The NJDEP and the Township have had at least two years to accomplish the condemnation process mandated by the Eminent Domain Act, because Sandy occurred in 2012. The Township's Resolution by effectuating a taking without complying with the procedures under the Eminent Domain Act violates the due process requirement in connection with private property interests.

Nonetheless, the court finds that the DCA authorizes the government to enter the property and take control and possession of the property to perform acts necessary during any emergency. Through condemnation proceedings, following the filing of the complaint and service of process, the government shall be permitted to take possession of the property. County of Monmouth v. Wissell, 68 N.J. 35, 38 (1975) (holding that “[a]fter the declaration of taking has been recorded and served on the condemnee and all occupants of the property, the right to the immediate and exclusive possession and title to the property vests in the condemnor”); N.J.S.A. 20:3-19.

The court also finds that the Klumpp case cited by the State is not controlling, because instead of making a finding, the New Jersey Supreme Court merely mentioned, as part of the factual background, that the Borough adopted a resolution, which, pursuant to N.J.S.A. App. A:9-51.5, “authorized the Borough to take control and possession of property immediately and to do such acts as may be required, including removing, destroying or otherwise disposing of any property located thereon without first paying any compensation therefore.” Klumpp, supra, 202 N.J. at 397. There was no interpretation of the statute in the Court's determination. The Court stated that “[t]he resolution also duly noted that the Borough could not deny a person with

interest in property the right to just compensation *if the Borough's occupation of the property amounted to a taking.*" Ibid. (emphasis added). The Court in Klumpp did not hold that N.J.S.A. App. A:9-51.5 authorizes a municipality, without a property owner's consent, to acquire title in fee simple or by a deed of perpetual easement as is the case here without instituting a condemnation action.

The Legislature did not intend, with the enactment of the Disaster Control Act, to trump the procedural due process under the Eminent Domain Act, which is guaranteed to a property owner faced with a taking of their property. The court is not unmindful of the sense of urgency on the part of State and local officials who desire to move expeditiously with the Federal funding earmarked for dune protection measures following the wrath of Hurricane Sandy. The court is also cognizant of the extensive efforts undertaken to obtain grants of easements on a voluntary basis by affected property owners. The proper course for governmental agencies dealing with property owners, who have not voluntarily granted deeds of easements, is to promptly institute condemnation actions. A taking can only occur when a municipality files and records declaration of taking under the Eminent Domain Act pursuant to N.J.S.A. 20:3-17; see Wayne v. Ricmin, Inc., 124 N.J. Super. 509, 517 (App. Div. 1973), certif. denied, 63 N.J. 538 (1973). It follows that the unilateral act by the Township in filing and recording an unsigned deed of easement with its covenants against plaintiff's property following its resolution is without any legal basis and must be set aside and removed from the County records.

In summary, the court finds that the taking under the Resolution without complying with the procedural requirements pursuant to the Eminent Domain Act is invalid as a matter of law and orders that plaintiff's property rights be restored of record to the *status quo ante*. The court hereby grants plaintiff's motion for summary judgment on Count III.

## **Motion to Dismiss Counts I and II**

### **Motion to Dismiss Standard**

New Jersey Court Rule 4:6-2(e) allows a pleader to move to dismiss a complaint for failure to state a cause of action upon which relief can be granted. R. 4:6-2(e). When a motion is made under this rule, a court must search the complaint in depth and have liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taken. Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989). Every reasonable inference is therefore accorded to the plaintiff and the motion is granted only in rare instances and ordinarily without prejudice. See Fazilat v. Feldstein, 180 N.J. 74, 78 (2004); Smith v. SBC Communications Inc., 178 N.J. 265, 282 (2004). Clearly, however, if the complaint states no basis for relief and discovery would not provide one, dismissal of the complaint is appropriate. Energy Rec. v. Dept. of Env. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999).

### **Counts I and II**

The Township files motion to dismiss Counts I and II in plaintiff's complaint in lieu of prerogative writ. At Counts I and II, plaintiff challenges the Township's adoption of Ordinance 14-32 as arbitrary, capricious, and unreasonable. Plaintiff seeks to invalidate the Township's Ordinance 14-32 and to enjoin and restrain the Township and the NJDEP from any action in pursuant to the Ordinance.

The Township argues that at Counts I and II, plaintiff challenges that the Township has no authority to acquire the perpendicular access easements over its property through taking. The Township claims that plaintiff's challenge is premature and is not ripe for adjudication by the court at this time, because the Township has not filed any condemnation action to acquire the

easement in plaintiff's property. According to the Township, plaintiff is seeking an advisory opinion from the court as to its affirmative defenses and objection to the Township's authority to condemn the property, should the Township institute such an action. As such, the Township concludes that plaintiff's Counts I and II are not justiciable controversies and should be dismissed.

Plaintiff contends that Counts I and II are a challenge to the adoption of the Ordinance 14-32 as arbitrary, capricious, and unreasonable, because the Township adopted the Ordinance at its September 26, 2014 meeting, without any public input or any record of the municipality's deliberation. According to plaintiff, based on the Township's response to plaintiff's OPRA request, there is no documentary record of any rationale or justification for the change of the public access easement from Block 20.93 to its property. Plaintiff argues that it is permitted to challenge the adoption of an ordinance regardless of whether a taking was the subject of the ordinance. Moreover, plaintiff claims that plaintiff's title is clouded by virtue of the Township's adoption of the Ordinance, which authorized the taking of plaintiff's property. If plaintiff prevails, there will be no condemnation of plaintiff's property.

In New Jersey, to determine if a case is ripe for judicial review, a court must evaluate: (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties caused by withholding court consideration. K. Hovnanian Co. of N. Central Jersey, Inc. v. N.J. Dep't of Env'tl. Prot., 379 N.J. Super. 1, 9 (App. Div. 2005), certif. denied, 185 N.J. 390 (2005). The court finds that Counts I and II are challenges to the adoption of the Ordinance that affects plaintiff's property rights, which presents a justiciable controversy that is ripe for judicial review.

A transcript of the open public meeting held by the Long Beach Township Board of Commissioners on September 26, 2014 when Ordinance 14-32 was introduced and adopted has



been provided to the court. Counsel for the Minke Family Trust did appear at that meeting and raised several issues concerning the proposed public access easement across plaintiff's property with the suggestion that another public access area would be more appropriate and in the municipality's best interest. Despite the urgings of plaintiff's counsel, Ordinance 14-32 was introduced and approved without any deliberative process or statement of reasons.

Hirth v. City of Hoboken, 337 N.J. Super. 149, 165–66 (App. Div. 2001) provides the following:

At a hearing before a governing body concerning the proposed adoption of a municipal ordinance, there is *no requirement that evidence be presented providing a factual foundation for the ordinance, and the governing body does not ordinarily make any findings of fact to justify its action.* See *Gardens v. City of Passaic*, 130 N.J. Super. 369, 377-78, 327 A.2d 250 (Law Div.1974), *aff'd o.b.*, 141 N.J. Super. 436, 358 A.2d 805 (App.Div.1976). Consequently, an action in lieu of prerogative writs challenging the validity of an ordinance is subject to different procedures than an action challenging the quasi-judicial action of a municipal agency. If quasi-judicial action is challenged, the court's decision "must be based solely on the agency record," which the court reviews to determine whether the agency's "factual findings are based on 'substantial evidence' and whether its discretionary decisions are 'arbitrary, capricious and unreasonable.'" *Willoughby, supra*, 306 N.J. Super. at 273-74, 703 A.2d 668. In contrast, if an action is brought challenging the validity of an ordinance, and resolution of the challenge turns on disputed factual issues, *the case must proceed in the same manner as other civil litigation, with an opportunity for discovery, pretrial motions and a trial.* See *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 92 N.J. 158, 292, 456 A.2d 390 (1983).

[Hirth v. City of Hoboken, *supra*, 337 N.J. Super. at 165–66 (emphasis added).]

As such, because the Township is not required to provide a factual foundation for adopting the Ordinance, in order to resolve plaintiff's challenge on the validity of the Ordinance, the court allows each party an opportunity for discovery, pretrial motions, and a trial for Counts I and II.

In summary, the court grants plaintiff's application for summary judgment on Count III and denies the Township's motion to dismiss Counts I and II without prejudice. The court will set down a pretrial conference with respect to Counts I and II and notify all parties. Mr.

Buonocore is to prepare the order that comports with the court's ruling with each party to bear its own cost in attorney fees.