NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2354-08T1

NJ CAPITAL PARTNERS, LLC,

Plaintiff-Appellant,

v.

OAKLAND PLANNING BOARD,
MAYOR JOHN SZABO, COUNCILWOMAN
KAREN MARCALUS, DOUGLAS GILBERT,
DONNA KURDOCK and THOMAS BUONOCORE,

Defendants,

and

BOROUGH OF OAKLAND,

Defendant-Respondent.

Argued January 20, 2010 - Decided July 2, 2010

Before Judges Wefing, Grall and Messano.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-9429-06.

Joseph W. Voytus argued the cause for appellant (Durkin & Boggia, attorneys; Philip N. Boggia and Mr. Voytus, on the brief).

Brian M. Chewcaskie argued the cause for respondent (Gittleman, Muhlstock & Chewcaskie, LLP, attorneys; Steven Muhlstock, of counsel and on the brief).

PER CURIAM

Plaintiff NJ Capital Partners, LLC, appeals from a series of orders entered by the Law Division that limited its recovery of attorneys' fees and costs in this inverse condemnation action against defendant Borough of Oakland (Oakland) to $50,000. We have considered the arguments raised on appeal in light of the record and applicable legal standards. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I.

The matter presents a complicated procedural history. Plaintiff owned approximately 50.47 acres of land in Oakland designated as Block 3105, Lot 3 (the property). The property was located in the RA-1 Zone that permitted single-family residences on a minimum lot size of one acre. The topography of the property included numerous rock outcroppings, heavily wooded areas, and some wetlands.

On August 21, 2003, plaintiff submitted a subdivision application to the Oakland Planning Board (the Board) seeking to create fourteen residential lots. The application also sought variances from Oakland's steep slope ordinance, as well as a soil moving permit. Plaintiff asserted that the variances were necessary for access to the property and, if not granted, plaintiff contended that the property was inutile.

Hearings on the application took place before the Board on various dates from November 13, 2003 through June 24, 2004. In the interim, on February 11, 2004, Oakland resolved by formal resolution, Resolution No. 04-08, to apply for grant funds to acquire various parcels of land as part of the borough's open space plan. Oakland's officials subsequently took the necessary steps to apply for the grant, and included plaintiff's property as one of nineteen parcels "considered for . . . purchase" if the funds were received.

By a 5-2 vote, the Board denied plaintiff's development application; on August 12, it approved a memorializing resolution. Among other things, the Board concluded that "strict application of [Oakland]'s steep slope ordinance would not result in any peculiar and exceptional practical difficulties to or exceptional and undue hardship upon [plaintiff]." The Board further concluded "that the granting of the steep slope variances would be detrimental to the public good in that the integrity of the slopes would be substantially compromised thereby creating undue risks and hazards to the public." At the first public meeting of Oakland's municipal council after the Board's denial, at least one councilperson reiterated the borough's continued interest in acquiring the property through grant funding.

On September 20, plaintiff filed a three-count complaint in the Law Division against Oakland, its mayor and one of its councilpersons, and the Board (the first action). Plaintiff alleged that the denial of its application was arbitrary and capricious; that the denial resulted in an inverse condemnation of the property; and that the Board violated the Open Public Meetings Act ("the OPMA"), N.J.S.A. 10:4-6 to -21, during the hearing process.[1] Trial on the complaint was bifurcated, with the prerogative writ action proceeding first.

During trial, plaintiff stipulated to the Board's finding that plaintiff had failed to establish the so-called "negative criteria." See N.J.S.A. 40:55D-70(d) ("No variance . . . may be granted . . . without a showing that such variance . . . will not substantially impair the intent and the purpose of the zone plan and zoning ordinance."). On February 7, 2005, the judge issued his letter opinion, affirming the Board's denial of plaintiff's development application and entering judgment in favor of the Board on count one of the complaint.[2] The matter proceeded to trial on plaintiff's inverse condemnation claim.

William Lothian, a professional engineer retained by Oakland, testified that there was an alternative access route to

[1] Plaintiff subsequently abandoned its OPMA claim.

[2] The record does not include a copy of the order.

the property (the Lothian Plan) that did not require any steep slope variances. Plaintiff's engineer, David Hals, opined that the Lothian Plan was already considered and rejected by the Planning Board; that it was unsafe and unacceptable to the Bergen County Planning Board, whose approval was necessary; and that it deviated from municipal standards. It was undisputed that if the Lothian Plan was not viable, the property was inutile because of a lack of access.

The trial judge issued a letter opinion on January 18, 2006, and concluded that the Board had never formally rejected the Lothian Plan. He reasoned:

> What the [c]ourt does determine is simply that it has not been proven -- by clear and convincing evidence nor by a preponderance -- that the . . . Board['s] refusal to permit the requested access has had the effect of rendering the site inaccessible or inutile. Until the [Lothian Plan] is eliminated as an approvable alternative, no such finding can be made.

The judge dismissed plaintiff's complaint without prejudice, and remanded the matter to the Board. Plaintiff did not seek review of the decision.

The Board held hearings on remand on September 14, 2006 and October 5, 2006, and considered the testimony of Hals and Louis J. Luglio, another expert retained by plaintiff, both of whom opined that the Lothian Plan was unacceptable for a variety of

reasons. Lothian also testified, acknowledging that Hals's plan requiring steep slope variances was preferable, and that his plan had significant limitations. He further admitted that in formulating his opinion, he did not make any measurements of the site and could not state whether his proposed access route permitted safe sight lines for vehicular traffic. Nevertheless, by resolution dated November 2, the Board accepted the Lothian Plan as a viable alternative.

On December 19, plaintiff filed another complaint against Oakland, its mayor and council, and the Board (the second action). Plaintiff alleged that the Board's decision adopting the Lothian Plan as a viable access route was arbitrary and capricious; it sought a reversal of the Board's decision, and a "finding that [its] property had been inversely condemned . . . ." The complaint included additional claims for alleged violations of plaintiff's constitutional and civil rights.

The matter was tried before a different Law Division judge. On May 4, 2007, the judge issued an oral opinion on the record as to plaintiff's prerogative writ claim. Essentially, the judge concluded that Lothian's opinion lacked any credibility in light of the engineer's admission that he had not made adequate measurements. He concluded that the Board acted in an arbitrary and capricious manner in approving the Lothian Plan as a viable

access alternative. We have not been provided with the order that resulted from the hearing, however, the judge indicated that he would proceed to consider plaintiff's inverse condemnation claim.

Thereafter, the parties engaged in settlement discussions and on September 12 Oakland's counsel sent plaintiff's counsel the following letter:

> As a followup [sic] to our telephone conversation . . . I indicated . . . that the settlement offer . . . set forth in my correspondence of August 8 . . . remains in effect. You have requested . . . whether the Borough will stipulate to a condemnation of the property.
>
> I advised that the Borough will stipulate that a condemnation of the property has occurred and [plaintiff] may petition the [c]ourt for fees and expenses pursuant to N.J.S.A. 20:3-26C [sic (hereafter cited as N.J.S.A. 20:30-26(c))].

Plaintiff's counsel responded on September 17:

> I have discussed your settlement offer . . . with my client which is set forth in your correspondence dated August 8, 2007 and September 12, 2007.
>
> I am pleased to inform you that my client has accepted your offer subject of course to prompt payment of the land valuation amount of $5.1 million dollars. We are scheduled for a conference with [the judge] today . . . at which time we can discuss the remaining claim of fees, costs and expenses pursuant to N.J.S.A. 20:3-26.

Later that day, the parties appeared in open court before the judge. Plaintiff's counsel told the judge, "The matter has been resolved. We have left open the one issue of plaintiff's right to fees, costs and expenses under that statute." Oakland's counsel further advised the judge that pursuant to the settlement, the borough

> would purchase the property for [$]5,100,000 stipulate as to the inverse condemnation in order to provide plaintiff the ability to seek costs and [c]ounsel fees in accordance with the . . . Eminent Domain Act.

The parties agreed that if they could not "resolve the issues with costs or attorney's fees" plaintiff retained the "right to make the appropriate application."[3]

When the parties could not "resolve the issues," motion practice ensued. Oakland moved to "amend the terms of settlement placed on the record . . . ." Its counsel claimed that plaintiff now sought "to expand the breadth of the settlement in order to deem that [Oakland] be considered as a 'condemnor' for all purposes pursuant to the condemnation statute . . . ." Oakland contended that it stipulated to a finding that the property had been inversely condemned "for the

[3] The parties further advised the judge that this was a global settlement that included litigation in a "companion case" in federal district court.

sole purpose of allowing the plaintiff to submit an application for fees pursuant to N.J.S.A. 20:3-26(c)." Counsel attached copies of the correspondence that had been exchanged.

On November 29, plaintiff responded with a motion to enforce the terms of the settlement noting that two issues remained unresolved: "(i) the effective date of possession of the property by . . . Oakland; and (ii) the extent to which plaintiff [wa]s entitled to recover fees, costs, and expenses under N.J.S.A. 20:3-26."

After oral argument, the judge reviewed the parties' settlement negotiations in which he had directly participated. He found Oakland's counsel's September 12 letter to be "the most important piece of evidence." The judge concluded that the terms of the settlement included plaintiff's "knowing waiver of . . . condemnee status for purposes of [N.J.S.A. 20:3-26(a)]." On January 10, 2008, the judge entered an order that denied plaintiff's motion, and granted Oakland's motion (the January order). The order provided that "[p]laintiff [could] . . . bring a motion for reasonable fees and costs pursuant to N.J.S.A. 20:3-26(c) with respect to the inverse condemnation count only." The order additionally permitted plaintiff "to include in its application a request for putative delay interest for the period January 1, 2008 until the date of closing."

On July 18, plaintiff moved for attorney's fees, reasonable litigation costs, engineering fees, expenses and putative delay interest in the amount of $490,257.61. Plaintiff contended that it was entitled to recover the fees and expenses incurred from February 7, 2005, the date on which the Board's denial of the steep slope variances was upheld in the first action. Oakland opposed the motion, contending that plaintiff's recovery should be limited only to expenses incurred during the second action and only from the point that the property was effectively condemned.

On September 29, the judge delivered an oral opinion in which he concluded that May 4, 2007, the date that he ruled the Board's approval of the Lothian Plan was arbitrary and capricious, should be the effective date of recovery. The judge reasoned that at that point, all "ancillary matters" were clarified, and the issues were ripe for determination. The judge further noted that in an inverse condemnation case, plaintiff must prove "that the regulation destroyed all economic use of the property, [and] that there [wa]s no reasonable use of the property . . . ." He reasoned that this was not certain until he ruled on May 4. The judge also rejected plaintiff's request for "putative delay interest" finding that any delay in closing title "was not the result of willful, malicious, or

intentional conduct, and was not interposed by the municipality for purposes of delay." Rather, the judge concluded that both parties "shared in contributing to the delays of implementing the settlement[,]" and it would be inequitable to hold Oakland responsible.

On October 8, the judge entered an order (the October order) awarding plaintiff "reasonable costs, disbursements and expenses, including reasonable attorney's fees as set forth in N.J.S.A. 20:3-26[(c)], for the period commencing May 4, 2007 . . . ." The order further permitted plaintiff to file and serve a supplemental affidavit of services pursuant to R.P.C. 1.5 and Rule 4:42-9 to permit "review [of] the actual defined time and work expenditures and costs of plaintiff's attorneys."

In accordance with that order, plaintiff filed a supplemental affidavit and sought recovery of $64,688.43 in fees, costs, and expenses incurred since May 4. Oakland filed opposition. On December 15, the judge entered an order awarding plaintiff $50,000, accompanied by a short written opinion detailing his findings (the December order). This appeal followed.

II.

Plaintiff contends that the settlement agreement "never limited . . . its potential recovery to subsection (c) of

N.J.S.A. 2C:3-26," and that the judge's conclusion otherwise "was not supported by substantial and credible evidence"; that contrary to the October order, "the commencement date for reimbursement of fees, costs, and expenses incurred in connection with [plaintiff's] inverse condemnation claim is February 7, 2005"; and that the judge erred "as a matter of law" by awarding plaintiff only $50,000 as per the December order.

We begin our review with some basic principles. "[E]minent domain is informed by two separate legal doctrines: the right of the State to take private property for the public good, which arises out of the necessity of government, and the obligation to make just compensation, which stands upon the natural rights of the individual, guaranteed as a constitutional imperative." Twp. of W. Orange v. 769 Assocs., LLC, (769 Assocs. IV), 198 N.J. 529, 537 (2009) (citing Hous. Auth. of New Brunswick v. Suydam Investors, LLC, 177 N.J. 2, 7 (2003) (citations omitted)). "The Eminent Domain Act [N.J.S.A. 20:3-1 to -50 (the EDA)] sets forth the procedural framework within which the competing interests in a condemnation case are to be resolved." 769 Assocs. IV, supra, 198 N.J. at 537.

At issue in this case are the provisions of section 26 of the EDA which provide in pertinent part:

Owner reimbursement by condemnor

a. The condemnor, as soon as practicable after the date of payment of the acquisition price or the date of deposit in court of funds to satisfy the award of compensation, whichever is earlier, shall reimburse the owner for actual expenses he necessarily incurred for

(1) recording fees, transfer taxes and similar expenses incidental to conveying such real property to the condemnor; and

(2) the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the condemnor, or the effective date of possession of such real property by the condemnor, whichever is earlier; and

(3) Penalty costs for prepayment of any mortgage entered into in good faith encumbering real property if the mortgage is on record or has been filed for record as provided by law on the date of approval by the taking agency of the location of the project. . . .

b. . . . .

c. When a plaintiff shall have brought an action to compel condemnation against a defendant having the power to condemn, the court or representative of the defendant in case of settlement shall, in its discretion, award such plaintiff his reasonable costs, disbursements, and expenses, including reasonable appraisal, attorney and engineering fees actually incurred regardless of whether the action is terminated by judgment or amicable agreement of the parties.

[N.J.S.A. 20:3-26.]

Construing subsection (c), we have said "that the legislative intent . . ., as in the case of other fee-shifting statutes, [was] to permit an award of costs and expenses only to those plaintiffs who prevail, at least in part." Griffith v. State, Dep't of Envt'l Prot., 340 N.J. Super. 596, 612 (App. Div.), certif. denied, 170 N.J. 85 (2001), cert. denied, 534 U.S. 1161, 122 S. Ct. 1171, 152 L. Ed. 2d 115 (2002).

(a)

We first turn to plaintiff's argument that the judge erred by entering the January order enforcing the terms of the parties' settlement to the extent that it limited plaintiff's claim to only those expenses recoverable under subsection (c).

"Settlement of litigation ranks high in our public policy . . . ." Jannarone v. W.T. Co., 65 N.J. Super. 472, 476 (App. Div.) (citations omitted), certif. denied, sub nom., Jannarone v. Calamoneri, 35 N.J. 61 (1961). "In furtherance of this policy, our courts 'strain to give effect to the terms of a settlement wherever possible.'" Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008) (quoting Dep't of Pub. Advocate v. N.J. Bd. of Pub. Util., 206 N.J. Super. 523, 528 (App. Div. 1985)). "A settlement agreement between parties to a lawsuit is a contract[,]" Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (citations omitted), to which we apply general rules of contract

interpretation. Grow Co. v. Chokshi, 403 N.J. Super. 443, 464 (App. Div. 2008). Thus, an unambiguous settlement agreement will be enforced as written. Ibid. However, unless there is "an agreement to the essential terms" by the parties, there is no settlement in the first instance. Mosley v. Femina Fashions, Inc., 356 N.J. Super. 118, 126 (App. Div. 2002), certif. denied, 176 N.J. 279 (2003).

In deciding to enforce the settlement, the judge deemed the September 12, 2007 letter to plaintiff's counsel to be critical. In it, Oakland's attorney "advised [that] the Borough will stipulate that a condemnation of the property has occurred and [plaintiff] . . . may petition the Court for fees and expenses pursuant to N.J.S.A. 20:3-26[(c)]." Plaintiff's counsel's response accepting the settlement on behalf of his client specifically mentioned that letter, and acknowledged that plaintiff agreed to its terms. When the parties placed the settlement on the record before the judge, both counsel generically recognized plaintiff's ability, as part of the settlement, to seek reimbursement under the EDA. The judge, eschewing any need to hold a plenary hearing, concluded that the documentary evidence was clear and that plaintiff "waived" any claim to compensation under subsection a.

We agree with the judge that given the correspondence and the statements of both attorneys, it was clear that Oakland was stipulating that a "condemnation ha[d] occurred" so that plaintiff could apply for "costs and counsel fees" under subsection c. Such compensation was dependent upon plaintiff "hav[ing] brought an action to compel condemnation against a defendant having the power to condemn," N.J.S.A. 20:3-26(c), and Oakland's stipulation. The confluence of those two factors made plaintiff a prevailing party entitled to compensation under the EDA. See Griffith, supra, 340 N.J. Super. at 612.

Given Oakland's counsel's specific reference to the potential reimbursement of "costs and counsel fees," as opposed to any of the other specific types of reimbursable expenses set forth in subsection (a), the specific reference to only subsection (c) in his September 12, 2007 letter, and the failure by plaintiff to object to the terms or otherwise contemporaneously seek clarification, the judge properly gave effect to the parties' settlement agreement and limited recovery to only those items delineated in subsection (c). We therefore affirm the January order.

(b)

Plaintiff next contends that the judge erred in fixing May 4, 2007 as the date from which it was entitled to reimbursement

under subsection (c). Plaintiff argues that it should be able to recoup its expenses and fees commencing from February 7, 2005, because on that date, during the first action, the judge upheld the Board's denial of plaintiff's variance application, effectively rendering the property inutile. We disagree.

Under the EDA, plaintiff was entitled to pursue an award of fees and costs because it prevailed in "an action [brought] to compel condemnation . . . ." N.J.S.A. 20:3-26(c); see also Griffith, supra, 340 N.J. Super. at 612. Under the EDA,

> Action means the legal proceeding in which (1) property is being condemned or required to be condemned; (2) the amount of compensation to be paid for such condemnation is being fixed; (3) the persons entitled to such compensation and their interests therein are being determined; and (4) all other matters incidental to or arising therefrom are being adjudicated.
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> [N.J.S.A. 20:3-2(g).]

As to any claim for fees and costs incurred prior to the second "action," we believe resolution of the issue is simple. Although plaintiff argues that the eventual settlement resulted from one seamless series of actions commencing in 2004 and necessitated by the borough's desire to prohibit development of the property, the essential fact is that plaintiff did not

prevail in the first action. Its complaint was dismissed without prejudice and it sought no review of that order.

In Griffith, supra, the plaintiff chose to forego continued regulatory review of his development application and pursue an inverse condemnation claim. 340 N.J. Super. at 610. We ultimately concluded that the plaintiff had not proven a taking, id. at 611, and reversed the award of counsel fees made under N.J.S.A. 20:3-26(c). Id. at 614. We held:

> [I]t would make . . . little sense to require a defendant condemning authority which is held not to have inversely condemned, to be nevertheless subject to an award of professional fees in favor of a plaintiff who has failed to prove a taking, and, obviously, any such award against a governmental body would be contrary to public policy.
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> [Id. at 612.]

Simply put, plaintiff did not prevail in the first action and is not entitled to any recovery under the EDA as a result.

Plaintiff attempts to avoid this reality in a number of ways. First, it relies on our holding in Moroney v. Mayor of Old Tappan, 268 N.J. Super. 458 (App. Div. 1993), certif. denied, 136 N.J. (1994), and argues that the judge in the first action upheld the Board's denial of plaintiff's variance application before the suit was dismissed. Thus, plaintiff contends, from that point in time, February 2005, the property

was inversely condemned. However, plaintiff's reliance on Moroney is misplaced.

There, the "[p]laintiffs were denied a hardship variance to construct a single family house" on their "undersized, isolated lot . . . ." Id. at 461. The plaintiffs "filed a complaint in lieu of prerogative writs seeking to reverse the denial of the variance application . . . or, in the alternative, to compel the Borough to commence condemnation proceedings . . . ." Ibid. The judge entered an order affirming the denial of the hardship variance, and determined that an inverse condemnation occurred as of that date. Ibid.

We reasoned that in order to demonstrate a taking through application of a restrictive zoning ordinance, the landowner must show "that the regulations have destroyed all economically viable use of the property." Id. at 463 (citing Klein v. N.J. Dep't. of Transp., 264 N.J. Super. 285, 294 (App. Div. 1993)). "Until the owner has exhausted all remedial measures, . . . [he] cannot meet the burden of proving that the ordinance deprived [him] of all economically viable use of the land." Moroney, supra, 268 N.J. Super. at 465 (citations omitted). "[T]he issue of whether inverse condemnation had occurred was not ripe for determination prior" to the judge affirming the denial of the variance. Ibid.

In our view, Moroney actually supports Oakland's position and the trial judge's decision that plaintiff's inverse condemnation claim did not ripen until May 2007. Contrary to plaintiff's assertion, it had not exhausted its administrative remedies or demonstrated that a taking had occurred during the first action. The judge at that time could not determine whether the steep slope ordinance rendered the property inutile because the Board had not yet considered the viability of the Lothian Plan. The judge specifically concluded that he could "not grant the relief sought by plaintiff . . . because the evidence does not prove that a taking occurred." He dismissed the complaint without prejudice, and plaintiff never sought review, instead, proceeding with the remand hearings before the Board.

Plaintiff's complaint ripened when the judge in the second action reviewed the Board's decision approving the Lothian Plan and concluded it was arbitrary and capricious. It was only then, with no viable access to the property, that plaintiff "me[]t the burden of proving that the [steep slope] ordinance deprived [it] of all economically viable use of the land." Ibid.

Plaintiff takes a slightly different tack and argues that it was entitled to recover its fees and expenses incurred prior

to May 2007 because "in an inverse condemnation action, [a plaintiff] must prove . . . an additional element: that the government has effectively condemned where it has not expressly condemned." Thus, plaintiff contends, the issue is not just an "additional ripeness predicate, but rather [is] the essence of an inverse condemnation claim." It contends that it is entitled to recoup the costs, fees and expenses "incurred in pursuit of a determination of inverse condemnation."[4]

As we see it, the issue is whether plaintiff's costs and fees incurred in pursuit of it prerogative writ claims in the first or second actions are reimbursable under the EDA because plaintiff ultimately prevailed by way of settlement. For the reasons already stated, we reject the claim regarding any fees and expenses incurred in the first action since plaintiff did not prevail. It is a much closer question whether plaintiff is entitled to fees and costs incurred in the second action prior to the judge's May 2007 ruling setting aside the Board's adoption of the Lothian Plan.

We agree with plaintiff that 1) when the taking occurred, i.e., when the claim ripened via a judicial determination that

[4] Plaintiff does not argue, however, that it is entitled to reimbursement for fees and costs incurred prior to February 7, 2005, though it filed its complaint in the first action five months earlier in September 2004.

Oakland's zoning restrictions rendered the property inutile; and 2) what fees it was entitled to as a result of prevailing on that claim, are two separate matters. Under the particular facts of this case, we conclude that plaintiff was entitled to recoup its subsection (c) fees and expenses in the second action from the date of the filing of its second complaint, subject to the standard of reasonableness determined by the exercise of the court's sound discretion.

We note that when plaintiff filed its second action, it was no longer seeking reversal of the Board's action denying a steep slope variance. Instead, plaintiff was put in the unusual position of having to overturn the Board's approval of the Lothian Plan as a viable access route to the property. This was unlike the typical cause of action pled in a restrictive zoning/inverse condemnation case, like Moroney, where the plaintiff seeks approval of a variance, and, only alternatively, a declaration of condemnation if the variance is denied. Here, plaintiff's second complaint sought a declaration that the "property had been inversely condemned" because the Board had arbitrarily and capriciously adopted an access plan that was not viable or safe. In short, plaintiff's prerogative writ claim in the second action was not, as Oakland contends, "ancillary" to its inverse condemnation claim.

By filing its second complaint in December 2006, plaintiff "ha[d] brought an action to compel condemnation." N.J.S.A. 20:3-26(c). "[T]he action [wa]s terminated by . . . amicable agreement of the parties." Ibid. As a result, the trial court was required, "in its discretion, [to] award . . . plaintiff [its] reasonable costs, disbursements, and expenses, including reasonable appraisal, attorney and engineering fees actually incurred . . . ." Ibid. (emphasis added). Application of the unambiguous terms of the statute lead us to conclude that plaintiff was not limited to seeking reimbursement of subsection (c) costs and fees commencing May 2007, but rather was entitled to have its application for reimbursement reviewed from the inception of the second action in December 2006. We therefore are compelled to reverse the October and December orders and remand the matter for further proceedings.

For the sake of completeness, we address plaintiff's reliance upon the Supreme Court's recent holding in 769 Assocs. IV, supra, to further expand the timeframe for reimbursement. As we discern its argument, plaintiff contends that it is entitled to reimbursement for costs incurred prior to the date it initiated the second action because the property had been "targeted" for acquisition by Oakland. Although the precise date plaintiff contends this occurred is unclear, it is

suggested that Oakland's passage of Resolution No. 04-08 in February 2004 signaled the borough's intention to condemn the property.[5]

In 769 Assocs. IV, in order to facilitate a designated developer's plan to construct a number of residential homes, the township adopted an ordinance "to condemn and acquire an easement across [defendant's] property . . . ." 198 N.J. at 583. After protracted litigation, including a prerogative writ challenge by defendant contesting the local planning board's approval of the development application, "the parties entered in[]to a [c]onsent [o]rder[,] dismissing the condemnation proceeding." Id. at 535. For purposes of calculating fees under N.J.S.A. 20:3-26(b), "the [trial] judge determined that the condemnation action began on . . . the date . . . the ordinance identified [defendant's] property as a target for condemnation . . . ."[6] Ibid. We disagreed:

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[5] We note again that plaintiff did not assert below, and does not assert now, that it was entitled to reimbursement for costs incurred prior to February 2005 when the judge affirmed the denial of its variance request in the first action.

[6] N.J.S.A. 20:3-26(b) provides:

> If the court renders final judgment that the condemnor cannot acquire the real property by condemnation or, if the condemnation action is abandoned by the condemnor, then the court shall award the owner . . ., such

(continued)

> We therefore hold that to qualify for reimbursement under N.J.S.A. 20:3-26(b), the costs incurred by the property owner must have been in direct response to being named a defendant in a legal proceeding initiated under N.J.S.A. 20:3-8. Collateral matters, including here an action in lieu of prerogative writs challenging the grant of a developer's subdivision application by the Planning Board, are outside the purview of the statute's reimbursement provision. Similarly, fees and costs incurred in any pre-condemnation action activities, such as attendance at municipal governing body sessions, are not reimbursable, because they are outside the "four corners" of the condemnation action.
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> [Township of West Orange v. 769 Assocs., LLC, (769 Assocs. III), 397 N.J. Super. 244, 252-53 (App. Div. 2007).]

The Supreme Court affirmed in part and reversed in part. In interpreting the statutory language of subsection (b), the Court found "that . . . the Legislature intended to expand the category of awardable fees to include those reasonably incurred in the mandatory negotiation period that led up to the filing of a complaint." 769 Assocs. IV, supra, 198 N.J. at 541 (emphasis added). "By not restricting fees to those incurred 'in the

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(continued)

> sum as will reimburse such owner for his reasonable costs, disbursements and expenses actually incurred, including reasonable attorney, appraisal, and engineering fees.

action[]'" but rather those "actually incurred[,]" "the Legislature signaled its intention to include the precomplaint fees it mandated within the potentially awardable category." Ibid. Thus, the Court held "that reasonable fees actually incurred as a direct result of the [township's] formal action targeting [the defendant's] property . . . were reimbursable once the condemnation complaint was filed and later abandoned." Ibid. (emphasis added).

To the extent plaintiff relies upon 769 Assocs. IV to contend that it is entitled to reimbursement from a much earlier date because its property was "targeted" by Oakland, we believe the factual distinctions between that case and this make the argument unpersuasive. Unlike the municipality in 769 Assocs. IV, Oakland never passed an ordinance authorizing the condemnation of the property and never initiated any complaint in condemnation. The fact that Oakland sought grant funding to acquire a number of parcels, plaintiff's property being one, is simply not equivalent to "targeting" the property so as to trigger the right to reimbursement.

Secondly, to the extent plaintiff argues that 769 Assocs. IV permits the recovery of fees and costs incurred before it filed its second complaint because they were incurred "in pursuit of a determination of inverse condemnation," we simply

do not read the Court's opinion so expansively. The 769 Assocs. IV Court concluded that under subsection (b), certain pre-litigation fees and expenses were subject to reimbursement because "the Legislature intended to expand the category of awardable fees to include those reasonably incurred in the mandatory negotiation period that led up to the actual filing of a complaint." Id. at 541 (emphasis added). Because in the typical condemnation situation the condemnee is forced to bear the financial burden of preparing for the condemnor's mandatory pre-litigation negotiations, see N.J.S.A. 20:3-6 (obligating the condemnor to engage in "bona fide negotiations" before filing the complaint), that "category of awardable fees" is "actually incurred [by the property owner] as a direct result of the public entity's exercise of its condemnation power[,]" and thus reimbursable under the EDA. 769 Assocs. IV, supra, 198 N.J. at 541, 544. The Court agreed with our conclusion that fees the defendant had incurred in "the prerogative writs action regarding the . . . development and those related to planning board meetings were not recoverable as they were collateral and not directly related to West Orange's efforts to condemn [the defendant's] property." Id. at 544-45.

Any pre-litigation expenses incurred prior to the filing of the second action in this case are fundamentally different from

the kind of pre-litigation expenses recognized by the 769 Assocs. IV Court as eligible for reimbursement under subsection (b). Here, plaintiff, not the condemning authority, initiated the action seeking to compel condemnation. The gamut of procedural predicates plaintiff needed to run in order to be in a position to file the second action was, to say the least, idiosyncratic to this case. Nevertheless, even in the more typical situation, a plaintiff seeking approval of variances or, alternatively, inverse condemnation, will have to vault similar procedural hurdles before presenting its claim. In all cases, the nature and scope of any predicate administrative proceedings will vary; and in every case, those proceedings are not mandated by the EDA. Expenses incurred as a result are therefore not recoverable under subsection (c).

In short, for the reasons stated, we conclude that 769 Assocs. IV is distinguishable and provides no support for plaintiff's claim that pre-litigation expenses incurred prior to the filing of its second action are recoverable under subsection (c).

(c)

Although our reversal of the October and December orders necessitates a remand so that plaintiff may seek reimbursement for costs and fees incurred from the inception of the second

action, we need to address plaintiff's challenge to the judge's calculation of the fees and expenses subject to reimbursement. Plaintiff sought reimbursement of $64,688.43 from defendant, including legal fees totaling $58,353.43 and appraisal fees totaling $6,335.00.

The judge awarded plaintiff $50,000. He found plaintiff's attorneys' hourly rates to be "eminently reasonable," but concluded that "approximately $8000 [in fees] was allocated" for the "settlement dispute" that the judge believed was "a contract-based grievance that falls outside the . . . [EDA]." He disallowed those amounts. He also disallowed two specific bills for a total of $475, finding one to be "not reallocable" to Oakland, and the other unrelated to work done on "the inverse condemnation matter." The judge also disallowed the appraisal fees in total, because they "predated the inverse condemnation . . . by several years."

In light of our holding, we agree with the judge that the appraisal fees, incurred between December 2004 and October 2005, were not recoverable under N.J.S.A. 20:3-26(c). We disagree, however, with the conclusion that the $8000 in fees was not recoverable because it was generated as a result of the breakdown in settlement discussions. These services, like those rendered during negotiations leading up to the filing of the

condemnation complaint at issue in Assocs. IV, were actually and reasonably incurred in connection with the condemnation. With regard to the disallowance of the $475 in fees, we are unable to discern the judge's reasoning.

On remand, in addition to considering additional fees and expenses for which plaintiff may seek reimbursement in light of our expansion of the eligible time frame back to December 2006, the judge shall consider the reasonableness of the services reflected in the "approximately $8000" previously disallowed because they were incurred in the "settlement dispute," as well as the $475 disallowed for reasons that we cannot discern.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.