SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

STATE OF NEW JERSEY, by the DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiff, v. 2.150-Acres Of Land In The Borough of Point Pleasant Beach, Ocean County, New Jersey; BAYHEAD POINT HOMEOWNERS ASSOCIATION, INC., fee owner; COUNTY OF OCEAN, a body corporate and politic of the State of New Jersey; JOHN ROBERT SCADUTO and DEBRA SCADUTO; ANTHONY D'AURIA and DEBORAH D'AURIA; MARK CURCIO and BARBARA CURCIO; ROBERT HARKINS; SANDBOX PROPERTIES, LLC; STEPHEN P. ROMA and MARY ROMA; RICHARD COLAVITA and ANNE COLAVITA, Defendants.	DOCKET NO. A-002438-24 CIVIL ACTION (In Condemnation) ON APPEAL FROM: THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, OCEAN COUNTY DOCKET NO. L-3574-15 SAT BELOW: HONORABLE CRAIG L. WELLERSON, P.J.Civ. Div.

BRIEF OF APPELLANT, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Date Originally Submitted: June 2, 2025

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PRELIMINARY STATEMENT

This appeal presents a basic legal condemnation question – are homeowner association members whose properties are adjacent to the association's commonly held property that was condemned, entitled to severance damages when there have been two prior adjudications that the members' individual property interests were not taken? Bedrock law says the answer should be no, as there was no taking. Yet the trial court below found just the opposite here despite two prior judicial determinations that the members' individual property interests had not been taken.

Here, Plaintiff, State of New Jersey, by the Department of Environmental Protection ("DEP"), appeals a February 28, 2025 Superior Court, Ocean County order ("Order") denying DEP's motion for summary judgment regarding severance damage claims by seven individual homeowner association members ("Upland Members"), whose properties are upland to an undeveloped beach lot the Bayhead Point Homeowners Association, Inc. ("HOA") owns in the Borough of Point Pleasant Beach ("Beach Lot"). DEP previously condemned the Beach Lot as to the HOA and the just compensation from that action has already been paid after a valuation trial limited to the HOA.

The HOA condemnation concerned a Storm Damage Reduction Easement ("SDRE") DEP acquired over a portion of the Beach Lot to construct a federal

engineered beach and dune shore protection project. The Upland Members hold access and recreation easements on the Beach Lot, including in the area subject to the already-compensated HOA SDRE. However, DEP condemned the SDRE subject to the Upland Members' easement rights and the SDRE did not extend onto the Upland Members' individual properties.

Two separate courts have agreed that the Upland Members do not have any property interests that were taken. First, on June 22, 2021, the Honorable Marlene Lynch Ford held there was no taking of the Upland Members' easements in connection with the SDRE condemnation on the Beach Lot. ("Ford Decision"). Then, this court affirmed Judge Ford's fundamental determination in John Robert Scaduto v. State of N.J., Dep't of Env't Prot., 474 N.J. Super. 427 (App. Div. 2023) ("Scaduto").

From there, basic condemnation law should have compelled these courts to find that the Upland Members were not entitled to any damages separate and apart from the HOA's. Yet, both judicial opinions found the Upland Members should nevertheless be allowed to prove severance damages at the HOA's valuation trial. These rulings created a conflict that was compounded when the valuation trial for the taking was bifurcated, and the HOA trial was held without the Upland Members' participation. This led to the current case, where the trial court scheduled a separate valuation trial for the Upland Members alone to

determine severance damages, if any, despite the previous judicial determinations that the Upland Members' property interests were not taken.

The Upland Members' claims that the trial court correctly determined they are owed severance damages all founder. First, as DEP has not taken any of the Upland Members' property interests, no compensation is due. Second, even setting aside the Ford Decision and Scaduto dicta that although there was no taking, the Upland Members could seek severance damages, the Upland Members still cannot obtain severance damages because they cannot show a unity of ownership between their properties and the HOA's Beach Lot. This is essential for a severance damages claim. Third, the Upland Members' easement rights are so intertwined with the HOA's that, for all practical purposes, they have been merged for which DEP already paid severance damages to the HOA. Finally, even if the Upland Members are entitled to severance damages, the "Unit Rule" requires an allocation hearing between the HOA and the Upland Members regarding the amount DEP already paid to the HOA. The Upland Members' damages claim should be dismissed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

A. The Eminent Domain Act of 1971 and Condemnation Procedure

The "condemnation of [] property and the compensation to be paid therefor, and to whom payable, and all matters incidental thereto and arising therefrom shall be governed, ascertained and paid by and in the manner provided by [the Eminent Domain Act of 1971 (the "EDA")]. N.J.S.A. 20:3-6. Under the EDA, the trial court has jurisdiction over "all matters" pertaining to the condemnation, including but not limited to determining the authority of the condemnor to exercise the power of eminent domain and to fix and determine just compensation. N.J.S.A. 20:3-5. The procedures in condemnation actions are governed by the Act and the Court Rules. N.J.S.A. 20:3-7; R. 4:73-1 et seq.

Condemnation actions are brought in a summary manner pursuant to R. 4:67, by filing a verified complaint in condemnation on order to show cause. R. 4:73-1. The verified complaint "shall demand judgment that [the] condemnor is duly vested with and has duly exercised its authority to acquire the property being condemned, and for an order appointing commissioners to fix the compensation required to be paid." N.J.S.A. 20:3-8. The condemnor may file a "declaration of taking" contemporaneous with or after the institution of a

[1] Because the Procedural History and Facts are intertwined, these sections are combined for efficiency and the court's convenience.

condemnation action. N.J.S.A. 20:3-17. Among other things, the declaration of taking must include for a partial taking a description and plot plan "of the entire property of the condemnee and the portion thereof being taken[.]" Id. at 17(c). Once the declaration of taking is recorded and served on the condemnee, the condemnor is entitled to immediate and exclusive possession of and title to the property. N.J.S.A. 20:3-19.

The issue of whether the condemnor is duly vested with and has duly exercised its authority to acquire the property being condemned is addressed by the court on the return of the order to show cause. If the condemnee fails to deny the condemnor's authority to condemn, then any such defense to the condemnation action is waived and the matter can proceed to a commissioners' hearing to determine just compensation for the taking. N.J.S.A. 20:3-11; see N.J.S.A. 20:3-12(b) (after the court has "determin[ed] that the condemnor is authorized to and has duly exercised its power of eminent domain, the court shall appoint three commissioners to determine the compensation to be paid by reason of the exercise of such power."). However, if the condemnee denies the condemnor's authority to condemn, the action is stayed until the court determines whether the condemnor is duly vested with the authority to condemn the interests identified in the verified complaint. N.J.S.A. 20:3-11. Any party that appears at the commissioners' hearing may appeal the commissioners'

award. N.J.S.A. 20:3-13(a). The hearing on appeal is a trial de novo. N.J.S.A. 20:3-13(b).

B. Just Compensation

When an entire property is acquired in fee through condemnation, the landowner is entitled to just compensation measured by "the fair market value of the property as of the date of the taking, determined by what a willing buyer and a willing seller would agree to, neither being under any compulsion to act." State v. Silver, 92 N.J. 507, 513 (1983) (internal citations omitted)[2]. However, there are instances when the condemnor takes an interest in property less than fee, i.e. a partial taking, that the condemnee is entitled to compensation for the property taken and for "damages, if any, to any remaining property." N.J.S.A. 20:3-29. In these circumstances, "where only a portion of the property is condemned, the measure of damages includes both the value of the portion of the land actually taken and the value by which the remaining land has been diminished" as a result of the part taken, i.e. severance damages. State by Com'r v. Weiswasser, 149 N.J. 320, 329 (1997) (quoting State v. Silver, 92 N.J. 507, 514 (1983)). It should be noted, however, that "[j]ust compensation generally does not include losses or costs that are incidental to a taking, such as

[2] This approach can be applied to partial takings(discussed herein). See, Borough of Harvey Cedars v. Karan, 214 N.J. 384, 417 (2013) (this before and after rule has been used "both in total and partial-takings cases.").

loss to or destruction of good will, loss of profits, inability to relocate or frustration of the condemnee's plans. State by Comm'r of Transp. v. Cooper Alloy Corp., 136 N.J. Super. 560, 568 (App. Div. 1975).

C. DEP Condemns for A SDRE on the Beach Lot

DEP, in collaboration with the United States Army Corps of Engineers, recently constructed the Manasquan Inlet to Barnegat Inlet Storm Damage Reduction Project ("Project"), an engineered dune and berm system specifically designed to provide essential storm damage protection to coastal communities in northern Ocean County. As part of the Project, DEP exercised its eminent domain authority pursuant to N.J.S.A. 12:3-64 et seq. to acquire a SDRE on the HOA's Beach Lot, identified as Block 179.03, Lot 9, in the Borough of Point Pleasant Beach. On December 28, 2015, DEP filed a Verified Complaint in Condemnation naming the HOA as the record owner of the Beach Lot. (Pa0577).[3]

[3] "Pa" refers to DEP's appendix attached to this brief. Within the DEP's appendix at Pa0142 and Pa0195 there are two briefs. These briefs were attached to the Certification Of Richard G. Scott, Esq. in support of the DEP's Motion For Summary Judgment. These briefs are not the summary judgment briefs associated with the underlying summary judgment motion. Rather, as per R. 2:6-1(a)(1), which states: "[i]f the appeal is from a disposition of a motion for summary judgment, the appendix shall also include a statement of all items submitted to the court on the summary judgment motion and all such items shall be included in the appendix, except the briefs in support of and opposition to the motion shall be included only as permitted by subparagraph (2) of this rule." The briefs included in the DEP's Appendix at Pa0142 and Pa0195 are not the

Relevant here, DEP condemned a SDRE on the Beach Lot, subject to the rights held by the Upland Members. (Pa0043). The HOA is comprised of twenty-two members, including the seven Upland Members. (Pa0577-Pa0583). The HOA's Declaration of Covenants and Restrictions provides for access easements across the Beach Lot in favor of the HOA members, along with a non-exclusive recreational easement in the Beach Lot. (Pa0043). DEP did not condemn any rights held directly and individually by the Upland Members. (Pa0577; Pa1031).

On August 26, 2016, at the direction of the court, the parties entered into a Consent Order in which they agreed that any member of the HOA would be entitled to present evidence relating to claims of severance damages caused by DEP's partial taking of the HOA's Beach Lot. (Pa0038). But, DEP expressly reserved its right to challenge any severance damage claims as well:

> The entry of this Order shall not be construed as an admission against any party in this matter, either in the instant litigation or in any other or future proceeding. Plaintiff reserves the right to challenge any claims for severance damages that are made in accordance with the terms of this Order.

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briefs in support of and opposition to the underlying motion for summary judgment. These briefs were included in the summary judgment papers because they are germane to a key issue herein, namely that the Upland Members' previously requested a determination in their inverse condemnation actions that there was taking. As such, these briefs are part of the summary judgment motion record and are included in the Appendix as required by R. 2:6-1(a)(1).

(Pa0040)(emphasis added).

DEP exercised this reserved right in the summary judgment motion that has led to this appeal. The Upland Members separately preserved their right in the Consent Order to make a claim at trial for severance damages by appearing at the Commissioner Hearing for the HOA and filing an appeal of that hearing with the Law Division. On February 14, 2020, the court granted the Upland Members' cross-appeal of the Commissioners' decision and allowed them to pursue their claims at trial concerning the taking of the easements on the HOA's Beach Lot. (Pa0022). Nonetheless, on or about October 2, 2020, the Upland Members filed separate inverse condemnation actions against DEP. (Pa0022-Pa0023). The Upland Members alleged that the SDRE on the Beach Lot resulted in severance damages to them individually and loss of value, use, and enjoyment of the Upland Members' easement rights on the Beach Lot. (Pa0022-Pa0023).

On November 25, 2020, DEP moved to dismiss the Upland Members' inverse condemnation complaints based on the entire controversy doctrine and on January 12, 2021, the Upland Members filed a cross-motion for partial summary judgment claiming that DEP took their property interests as a matter of law. (Pa0023, Pa0142). On January 22, 2021, Judge Ford, without reaching the Upland Members' cross motion as to whether there was a taking, granted DEP's motion and dismissed the Upland Members' complaints. (Pa0211). The

Upland Members filed a motion for reconsideration, which Judge Ford denied with a written decision. (Pa0211). That decision did address whether the Upland Members' property interests were taken by specifically holding: "[u]nlike in Orenstein, where the easement right of the property owner was actually taken, there was no such taking in this case. Simply stated, in Orenstein the easement was destroyed by the taking: in this case, the easements were preserved notwithstanding the taking." (Pa0218) (discussing State by Comm'r of Transp. v. Orenstein, 124 N.J. Super. 295, 299 (App. Div. 1973)). Judge Ford held that the taking did not "change, alter, or otherwise impact the access and recreational easements which continue to be held by the Plaintiffs" and that the Upland Members never had an exclusive right to use of the Beach Lot. (Pa0218).

On July 14, 2021, the Upland Members appealed Judge Ford's decision dismissing the inverse condemnation actions on the basis of the entire controversy doctrine and her holding that there was no taking.[4] On January 12, 2023, the Appellate Division affirmed Judge Ford's decision, holding, among other things, that "the State's partial taking, including public access and use in

[4] The Upland Members' Case Information Statement filed in Scaduto included the following issue: "Plaintiffs each had an easement appurtenant for the recreational use of the private beach which DEP has taken, without just compensation." (Pa0275-Pa0278).

the expanded beach lot, [did not] change[] the character of plaintiffs' non-exclusive recreation easement[.]" Scaduto, 474 N.J. Super. at 444.

Meanwhile, the HOA's condemnation valuation trial had been scheduled. On January 27, 2023, the Honorable Judge Craig Wellerson, P.J. Civ. Div., held a status conference and decided that the jury trial for the HOA's Beach Lot should proceed on February 6, 2023 without the participation of the Upland Members, thereby bifurcating the case into two trials.[5] (Pa0024). The jury awarded the HOA $465,000.00 in just compensation on February 9, 2023. (Pa0024). A final order for judgment was entered May 25, 2023 fixing just compensation, plus interest, for a total of $632,780.00, which DEP has already paid the HOA. (Pa0024).

Over a year after the HOA trial, on May 14, 2024, the Upland Members moved to reopen the condemnation action, seeking an order requiring DEP to amend its complaint to name the Upland Members as defendant-condemnees, which DEP opposed. (Pa0024). On June 24, 2024, the trial court granted the motion and reopened the case. (Pa0024). As directed by the trial court, on August 29, 2024, DEP amended its complaint naming the Upland Members, but

[5] This case presents an unusual procedural posture. The trial court decided to bifurcate the within matter into two trials despite there being only one taking involving the Beach Lot. Neither Scaduto nor the Ford Decision precluded DEP from arguing that there was no taking of the Upland Members' easements; further, the DEP reserved such a right in the August 2016 Consent Order. (Pa0040).

did not allege any taking of the Upland Members' easement rights. (Pa0025; Pa1031).

On December 20, 2024, DEP moved for summary judgment dismissing the August 2024 complaint and, on February 21, 2025, Judge Wellerson heard oral argument. (T4,1-9[6]). For the first time in this protracted litigation, the Upland Members claimed in their opposition to DEP's motion for summary judgment that, in addition to taking their recreation easement, DEP took their right to have dune platforms on the pre-existing dune. (Pa0347-356). At oral argument on DEP's motion, the trial court stated:

> I'm denying the application. The Court believes that the instructions from the Appellate Division are clear and precise. They have indicated that the homeowners are entitled to seek compensation from a jury based on the loss in value of their fair market -- fair market value in their homes because of a reduction based upon the severance damages as a result of no longer having that recreation easement advantage. Certainly, the value of the inverse condemnation, the loss of the property, which was already tried, is – is a motion for in limine as to whether or not the jury should be informed of the dollar amount or whether you want to proceed in the absence of that.
> (T19, 3-15).

On February 28, 2025, the trial court denied DEP's motion for summary judgment with no written opinion and on March 12, 2025 entered a stay for 20

[6] "T" refers to the Transcript Of Summary Judgment Motion dated February 21, 2025.

days. (Pa0001; Pa0003). The Honorable Valter H. Must, J.S.C. (who replaced Judge Wellerson after he transferred to the Chancery Division), entered an Amended Order For Stay on March 26, 2025, staying the trial court proceedings, including the trial set for May 5, 2025, pending a disposition of this appeal. (Pa1053). This court, on April 14, 2025, granted DEP's motion for leave to appeal. (Pa1055).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING DEP'S MOTION FOR SUMMARY JUDGMENT AS IT IGNORED THE PREVIOUS JUDICIAL DETERMINATIONS ON THE THRESHOLD CONSTITUTIONAL ISSUE THAT THERE WAS NO TAKING OF THE UPLAND MEMBERS' EASEMENT RIGHTS. (Pa0001, T19, 3-10).

This court should reverse the trial court's decision to deny DEP's summary judgment motion as there has been no taking of the Upland Members' easement rights, and therefore, they are not entitled to severance damages. As it pertains to condemnation actions, the law is clear that the question of whether there has been a "taking" is one to be answered by the court in the first instance, not a jury. See State by Comm'r of Transp. v. Orenstein, 124 N.J. Super.at 299. No court has made an affirmative finding that there was a taking of any of the Upland Members' property. To the contrary, in response to the Upland

Members' inverse condemnation complaints, Judge Ford and the Appellate Division found there was no taking.

The Appellate Division reviews summary judgment decisions de novo, applying the same standard used by the trial court. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021); Gayles v. Sky Zone Trampoline Park, 468 N.J. Super. 17, 22 (App. Div. 2021).

> In reviewing whether summary judgment was properly denied, 'we apply the same standard governing the trial court -- we view the evidence in the light most favorable to the non-moving party.' If a review of the record reveals 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,' then a court should grant summary judgment.
>
> [Nicholas v. Mynster, 213 N.J. 463, 478 (2013) (citations omitted)]

An appellate court reviews a trial court's summary judgment decision without deference to interpretative conclusions of statutes or the common law that it believes to be mistaken. Ibid.

The purpose of summary judgment, pursuant to R. 4:46-2(c), is to avoid trials that would serve no useful purpose and to afford deserving litigants immediate relief. Kopp, Inc. v. United Tech., 223 N.J. Super. 548, 555 (App. Div. 1988). The moving party must sustain the burden of showing the absence of a genuine issue of material fact, and all inferences of doubt are drawn against

the movant. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954).

Here, as there are no issues of material fact, summary judgment was appropriate to address the sole question of law, which was whether the Upland Members were entitled to severance damages when there have been two prior adjudications that the members' individual property interests were not taken. Thus, this court's review here is de novo.

A. This Court Should Reverse The Trial Court's Decision Since There Was No Taking Of The Upland Members' Easement Rights.

The critical issue before this court is whether the Upland Members are entitled to severance damages notwithstanding two prior judicial determinations that there was no taking of their property interests. The New Jersey Constitution recognizes that the government may take private property for public use and the corollary is that the landowner has the constitutional right to receive just compensation for the taking:

> In general, eminent domain springs from two separate legal doctrines. The right of the State to take private property for the public good arises out of the necessity of government, whereas the obligation to make "just" compensation stands upon the natural rights of the individual guaranteed as a constitutional imperative.
>
> [Hous. Auth. v. Suydam Inv'rs, L.L.C., 177 N.J. 2, 7 (2003)].

There is an inherent tension between these two doctrines that arises in every condemnation action, but a fundamental premise is that a taking must occur to trigger just compensation. Ibid. For decades, New Jersey law has firmly found that a determination of whether a taking has occurred in a condemnation case is one to be answered, in the first instance, by a court and not a jury. Orenstein, 124 N.J. Super. at 298; State by Adams v. N.J. Zinc Co., 40 N.J. 560, 573 (1963) ("the only issue to be determined by the commissioners and by the fact finder in event of appeal is the lump sum compensation to be paid by the condemnor for the property represented by its fair market value.").

Indeed, this court's precedent dictates that the factfinder be limited to *only* one issue: the determination of the just compensation to be paid by the condemnor, plus any damages to the remaining property of the owner in a partial taking. Orenstein, 124 N.J. Super. at 298. "Fundamental fairness and the governing statute mandate that the factfinder be limited to that one issue since the condemnor will obtain, by virtue of the condemnation, title only to the land and property rights described in the complaint." Ibid.

This makes sense, as due process and fundamental fairness require the court to determine which property interests are condemned before a jury can decide just compensation. As both the Constitution and a long line of inverse condemnation cases make clear, no just compensation is due if no taking has

occurred.[7] See Const. art. 1, ¶ 20 ("[p]rivate property shall not be taken for public use without just compensation."); Klumpp v. Borough of Avalon, 202 N.J. 390, 405 (2010) ("where a taking occurs, the Takings Clause requires the government to compensate the property owner"); Griffith v. State, Dept. of Envt. Prot., 340 N.J. Super. 596, 614 (App. Div. 2001) (reversing a judge's order of $264,850 plus counsel fees and costs because "there was no taking"). Thus, where the condemnor takes less than a full fee property interest, "the complaint or any amendment thereof shall specify a lesser title[.]" N.J.S.A. 20:3-20; see also Hous. Auth. of Atl. City v. Atl. City Exposition, Inc., 62 N.J. 322, 328 (1973) (it is a "very basic rule that the land to be condemned must be described with such certainty as to leave no room for doubt or misapprehension as to the land actually to be taken."). Authorizing only the judge to affirm the property interests that are actually being taken gives all parties notice as to what is being taken and avoids the jury awarding "a windfall from a partial taking of property." Borough of Harvey Cedars v. Karan, 214 N.J. 384, 414.

Here, however, these basic condemnation legal principles were subverted when the trial court denied DEP's motion for summary judgment, effectively

[7] The EDA applies to both regular condemnation cases (where the government institutes the action) and inverse condemnation cases (where the property owner institutes the action). N.J.S.A. 20:3-5. Though the parties' roles are reversed, the overarching procedure for both types of cases remains essentially the same.

requiring the parties to engage in a valuation trial for the Upland Members whose property was not taken. In ruling on the Upland Members' cross-motion for summary judgment in their inverse condemnation actions, Judge Ford held that when DEP condemned the SDRE on the Beach Lot, DEP did not take the Upland Members' access and recreation easements. (Pa0217). This court affirmed Judge Ford, holding that there was no separate taking of the Upland Members' easements because DEP's Beach Lot condemnation was subject to the access easement and did not change the character of the recreation easement. Scaduto, 474 N.J. Super. at 436, 444.

Even though Judge Ford and this court squarely found that the Upland Members' property was not taken, the trial court below nonetheless determined that the parties should proceed with a valuation trial solely for the Upland Members, which is contrary to well-established law. As a result, DEP filed its motion for summary judgment below to dismiss the Upland Members' claims for severance damages given Judge Ford's determination that there was no taking. However, the trial court denied DEP's motion for summary judgment, rationalizing that this court's Scaduto decision required a jury trial on the issue of severance damages. (T19, 3). The trial court failed to acknowledge Judge Ford's determination, affirmed by Scaduto, that there was no taking and likewise did not consider whether both Judge Ford and Scaduto's opinions were based on

the logical legal assumption that the Upland Members' damages, if any, would be resolved as part and parcel of the HOA trial. See Ford Decision ("For the sake of judicial economy, Plaintiffs' claims are encompassed within the Bayhead HOA claims, with the exception of incidental loss occasioned by the taking."); Scaduto at 445-46 (providing guidance to a single jury – not multiple – about how to consider valuing the Beach Lot and any damages Upland Members are able to prove). Scaduto did not prevent DEP from moving to dismiss the Upland Members' severance damages claims since Judge Ford satisfied the mandatory prerequisite finding that there was not a taking for any condemnation proceeding before proceeding to the valuation proceeding. Orenstein, 124 N.J. Super. at 298. The trial court's February 2025 motion ruling departs from this basic principle of condemnation law and should be reversed.

Like Orenstein, DEP's complaint properly identified the HOA as the owner of the Beach Lot and described the SDRE to be acquired on the Beach Lot. (Pa0577). The law requires that claims by a party that a condemnor is "taking" more property rights than described in the complaint "must be presented to and decided by the court before it enters judgment appointing condemnation commissioners." Orenstein, 124 N.J. Super. at 298; see also N.J.S.A. 20:3-11 (failing to deny condemnor's authority to condemn is "a waiver of such defense" later). Not only are the Upland Members' properties outside

the SDRE taking area, but Judge Ford determined there was no taking of the Upland Members' easements and both Judge Ford and this court in Scaduto held that the character of the Upland Members' recreation easements was unchanged. Scaduto, 474 N.J. Super. at 444. Moreover, once Judge Ford decided that there was no taking on the merits, the trial court had no choice but to respect Judge Ford's determination as to this threshold issue. See Lombardi v. Masso, 207 N.J. 517, 539 (2011) (holding that the law of the case doctrine is triggered "when one court is faced with a ruling on the merits by a different and co-equal court on an identical issue."). It did not.

This court's decision in Orenstein is directly on point. There, this court found that the trial court erred in allowing testimony from Defendant Orenstein and a surveyor as to what the taking included, in addition to what was described in the complaint. Id. at 298-299. Orenstein testified that a right of way easement appurtenant to the Orenstein property was included in the taking. Id. at 298. This court on review found the trial court erred by instructing the jurors to enter an award if they found that Orenstein suffered damages as a result of the taking of the easement. Id. at 299. It held that whether there was a taking was not a jury decision, but rather it must be decided by the court as an initial matter. Ibid. This court therefore reversed and remanded the case to the trial court to determine, before entry of a new judgment appointing commissioners, whether

any property rights of Orenstein other than those set forth in the complaint were taken by plaintiff in condemnation. Id. at 302.

The rationale and legal analysis of Orenstein are applicable here. A jury cannot consider whether the Upland Members are entitled to severance damage claims, if any, as erroneously found by the trial court. That issue was properly addressed by Judge Ford, at the request of the Upland Members, and she determined that the Upland Members' property was not taken. Absent a taking, the Upland Members are not entitled to severance damages. The trial court's decision to the contrary was error and should be reversed.

B. Unlike In Orenstein, The Upland Members' Easements In The Beach Lot Have Not Been Destroyed Or Impacted.

The trial court erred in another aspect as well by not considering whether a property owner whose individual easement over a shared property area is not impacted by a taking can be awarded just compensation. Here, again, Orenstein says the answer is no but the trial court, misunderstanding Scaduto, ruled otherwise.

In Orenstein, this court also considered whether the award made to an owner, Ramy Realty, Inc. ("Ramy"), of lands adjoining the Orenstein property was appropriate. Orenstein moved for an order compelling plaintiff to file an amended complaint adding Ramy or an order allowing Ramy to intervene. Id. at

300. Orenstein contended that the taking deprived Ramy's property of an access easement over the Orenstein property and that Ramy was entitled to just compensation due to the "destruction of its alleged easement." Ibid. The lower court allowed Ramy to intervene as a party defendant to determine whether a taking had occurred and if so, damages if any, sustained by Ramy. Ibid. The Appellate Division found that the lower court erred, holding that it was not the function of the condemnation commissioners or a jury to decide what property had been taken. Id. at 301. Rather, the court had to resolve the question of whether there had been a taking of Ramy's access easement. If the court found (1) that the access easement did exist and (2) that the taking destroyed the access easement, then the court would have to rule there had been a taking of a property right for which Ramy was entitled to be compensated. Ibid. Only after making these findings could the court order the State to institute proceedings to condemn the easement and pay compensation for the property rights taken by either filing a separate condemnation complaint or amending the complaint to add an additional count against Ramy describing the access easement taken. Ibid.

Here, Judge Ford already found that there was no taking and that the character of the Upland Members' easements remained unchanged despite the taking of the SDRE on the Beach Lot. (Pa0211). Judge Ford followed Orenstein and found that there was no destruction of the Upland Members' easements:

> Unlike in Orenstein, where the easement right of the property owner was actually taken, there was no such taking in this case. Simply stated, in Orenstein the easement was destroyed by the taking; in this case, the easements were preserved notwithstanding the taking. For the sake of judicial economy, Plaintiffs' claims are encompassed within the Bayhead HOA claims, with the exception of incidental loss occasioned by the taking. However, the taking did not change, alter, or otherwise impact the access and recreational easements which continue to be held by Plaintiffs. Plaintiffs never had an exclusive use of the beach, but rather shared that use with other members of the Bayhead HOA. Each received, in other words, a perpetual and non-exclusive easement.
>
> [Pa0218. (Emphasis added)]

This court agreed with Judge Ford's determination and

held:

> [P]laintiffs' easement rights were already subject to the public's negotiated right of access pursuant to the public trust doctrine and the Association's reserved right to provide public access to the beach lot prior to the DEP's condemnation.
> Accordingly, we cannot find the State's partial taking, including public access and use in the expanded beach lot, changed the character of plaintiffs' non-exclusive recreation easements by depriving them of "the right to recreation on a private beach restricted to members of the Association." Plaintiffs' recreation easements did not provide them the right to a private beach.
>
> [Scaduto 474 N.J. Super. at 444. (Emphasis added.)]

Given these findings, which align with Orenstein, the Upland Members are not entitled to compensation for severance damages as a matter of law.

The trial court erred in accepting the Upland Members' circular arguments in opposition to DEP's motion for summary judgement. On the one hand, the Upland Members contend that Judge Ford's decision did not constitute a determination that there was no taking. On the other hand, the Upland Members filed the Scaduto appeal specifically to challenge Judge Ford's determination that no taking had occurred. (Pa0275-Pa0278). As to the legal arguments, the Upland Members' analysis both misinterprets Judge Ford's decision and skirts around the plain meaning of Judge Ford's written opinion where she made the necessary constitutional analysis as a threshold determination and found no taking had occurred. As explained above, Judge Ford properly applied Orenstein to the extent that she recognized that while Ramy's easement may have been destroyed in Orenstein, there could be no taking of the Upland Members' easements since they were not destroyed.[8]

[8] The Upland Members have consistently relied on Orenstein for the proposition that the holder of an easement in property condemned should be a named party; however, Orenstein dictates that the easement holder shall only be named once a taking has been established. Here, Judge Ford found there to be no taking, as compared to the Ramy easement holder in Orenstein where the easement was found to be destroyed by the taking and did not require the amendment of the condemnation complaint herein. Orenstein, 124 N.J. Super. at 301.

To the extent the Upper Members argue, as they did below, that the trial court correctly determined that it must follow Scaduto's "requirement" that a jury trial be held, this is contrary to Orenstein. If Judge Ford erred anywhere, it was when she strayed from Orenstein in the final phase of her analysis. The Orenstein court specifically held that if, and only if, a taking was first found, then the State would have to file a separate condemnation complaint or amend the pre-existing complaint to add a second count that described the access easement taken. Orenstein at 301. Here, when Judge Ford decided that there was no taking, that should have ended the analysis. Clearly it did in substance, as Judge Ford did not order the State to amend its condemnation complaint. Indeed, the State's condemnation complaint has never set forth any taking of the Upland Members' easements. Respectfully, then, to the extent Judge Ford's opinion allowed the Upland Members to seek "incidental" damages, it is not founded under Orenstein or our condemnation law and appears to simply be an oversight. Scaduto, which was based on Judge Ford's decision, also diverged in allowing the Upland Members to proceed to trial on compensation despite finding there was no taking. Scaduto, 474. N.J. Super. at 436, 444.

Accordingly, this court should reverse the trial court's denial of DEP's summary judgment motion and dismiss the Upland Members' severance damage

claims because their easement rights have not been taken. Thus, they are not entitled to compensation as a matter of law.

POINT II

THE TRIAL COURT ERRED BY FAILING TO FOLLOW WELL-ESTABLISHED LAW CONCERNING SEVERANCE DAMAGES. (Pa0001, T19, 3-10).

A. There Is No Required Unity Of Ownership.

Even if this court disagrees with Judge Ford's determination that there was no taking of the Upland Members' recreation easement, the Upland Members still cannot satisfy the well-established elements of a severance damages claim. Specifically, the Upland Members cannot show unity of ownership between their upland properties and the HOA's Beach Lot.

As explained above, the New Jersey Constitution provides that property owners are entitled to be paid just compensation for land taken in condemnation. N.J. Const. art. I, ¶20. In some circumstances, where only part of a property is acquired, the remainder may be diminished in value, which is commonly referred to as severance damages. However, to recover severance damages resulting from a taking, a condemnee must demonstrate "(1) that the two parcels are functionally integrated[, i.e.,] that each is reasonably necessary to the use and enjoyment of the other (unity of use); and (2) that he substantially owns both parcels (unity of ownership)." Hous. Auth. of City of Newark v. Norfolk

Realty Co., 71 N.J. 314, 325 (1976). In other words, a condemnee must show that there is a unity of use and unity of ownership.

To establish unity of ownership, there must be at least beneficial ownership of each parcel. Strict unity of ownership is not required in New Jersey and "diverse ownership" could satisfy the requirement, "but only where the lots are used by agreement in common." Manalapan Tp. v. Genovese, 187 N.J. Super 516, 521 (App. Div. 1983) (citing 4A *Nichols, Eminent Domain,* § 14.31(2) at 424-426 (1980)). Norfolk Realty illustrates how this works. In Norfolk Realty, a corporation established a modernized meat-processing plant on one parcel with a warehouse and special equipment for maintaining refrigerated trucks across the street on another parcel. Norfolk Realty, 71 N.J. at 318-21. The trucks containing the processed meat from the plant were stored in the warehouse, which was the condemned parcel. Id. at 320-21. The corporation owned the land on which the meat processing plant was located, while a partnership owned the warehouse. Id. at 318-19. Even though there was not strict unity of ownership, the court held that because the three partners that made up the partnership were also the only three shareholders in the corporation that owned the meat processing plant, the partners were the beneficial owners of the processing plant. Ibid.

Unlike Norfolk Realty, here, there is no unity of ownership between the Beach Lot and the Upland Members' upland lots. The HOA is the record owner of the Beach Lot, not the Upland Members. (Pa0024; Pa0033). Nor are they the beneficial owners of the Beach Lot. They are simply seven out of twenty-two members of the HOA without any ownership interests in the Beach Lot. (Pa0012; Pa0021). As such, there is no unity of ownership between the Beach Lot and the Upland Members' properties.

Moreover, the Upland Members, who automatically became HOA members when they purchased their upland properties, only own an easement appurtenant that provides recreational beach access. (Pa0013). For this reason, the easement interest in the Beach Lot does not meet the test of unity of ownership either. Indeed, courts have specifically rejected a long-term leasehold interest in a noncontiguous property as being sufficient to establish unity of ownership, even where there is unity of use. Manalapan Tp., v. Genovese, 187 N.J. Super. 516, 523-24 (App. Div. 1983).

Thus, this court should reverse the trial court's denial of the DEP's motion for summary judgment and dismiss the Uplands Owners' claims for severance damages as a matter of law because the Upland Members cannot establish the requisite element of unity of ownership.

B. Precedent Involving Condemnation and Adjacent Landowners' Rights Prohibit the Upland Members' Claims.

There is well-established case law that was ignored by the trial court concerning adjacent landowner rights and condemnation. This matter is analogous to State ex rel. Com'r of Transp. v. Dikert, 319 N.J. Super. 310, 324 (App. Div. 1999), where the court held that the holders of access easements across property the New Jersey Department of Transportation ("DOT") condemned in fee were not entitled to severance damages or incidental or consequential damages. In Dikert, the DOT condemned property Wawa owned that was subject to an access easement held by defendants, Dikert and Anselmo, to provide access from Route 537, across Wawa's property, to the defendants' respective properties. DOT also proposed to construct a new service road in front of defendants' properties, which would have removed a buffer with trees between the Dikert and Anselmo properties and other properties and Route 537. Id. at 314. Dikert and Anselmo argued that the taking of Wawa's property severed their dominant estate for which they were to be compensated and that the construction of the new service road would impact their property's aesthetic value, thereby resulting in an inverse condemnation of their property. Id. at 315.

In analyzing Dikert and Anselmo's severance damages claims, the Appellate Division noted that "[s]everance damages may be awarded where the

condemned parcel is physically separated from the remaining property, provided there is a unity of ownership among the properties and there is functional unity, such that the landowner may have suffered some decrease in value of the remaining parcel." Id. at 323 (citing Norfolk Realty Co., 71 N.J. 314). The court further noted that "in severance cases, the condemned property owner is claiming that his remaining parcels suffered damages, not that his property suffered damages resulting from the taking of neighboring lands, as in this case." Id. at 324 (emphasis added). The court held that Dikert and Anselmo were not entitled to severance damages because the damage they claimed "d[id] not relate to the taking of their properties and the resulting damage to their remaining properties" but instead related to the taking of Wawa's property. Id.; State, by Comm'r of Transp. v. Weiswasser, 149 N.J. at 344 (no severance damages from the taking of neighboring lands). The Appellate Division also held that Dikert and Anselmo's claims of loss of aesthetic value due to the "change in character" of their property resulting from removal of the treed buffer were not compensable. Id.

The Dikert case is on point factually. There, the State condemned Wawa's property which included an access easement benefiting Dikert and Ansalmo's properties, but no portion of their lands were taken, so defendants could not claim damages to their properties from construction on property taken from

Wawa. Ibid. Here, the Upland Members are also claiming severance damages to their properties resulting from the taking of the SDRE easement on the separate Beach Lot. Like the easement holders in Dikert, the Upland Members argued that the taking of the SDRE changed the character of the HOA's Beach Lot from a private beach to a public beach. Consistent with Dikert, Judge Ford found that there was no taking of the recreation easement and the Appellate Division found that the character of the recreation easement was unchanged. Scaduto at 444. Just as Dikert rejected the easement holder's claims for compensation, the same should be true here.

While the Upland Members have relied on Judge Ford's statement that the Upland Members may seek "incidental damages," the court in Dikert reiterated the legal premise that "incidental detriment to nearby properties" is not compensable. Dikert, 319 N.J. Super. at 322. State, by Comm'r of Transp. v. Charles Inv. Corp., 143 N.J. Super. 541, 546 (Law Div. 1977), affirmed at 151 N.J. Super. 14 (App. Div. 1977), is also instructive, where the court held, "[a]s is the case with most other governmental action, changes in highways and their alignment result in incidental detriment or confer incidental benefit to nearby properties[]" and such economic losses must be treated as noncompensable, otherwise there would be a grave burden on State projects. Charles Inv. Corp., 143 N.J. Super. at 546. The court went on to

state that fairness would dictate a rule affording equal treatment to all who are similarly situated, which is directly applicable here. Ibid. The position of the Upland Members, if taken to its logical conclusion, would raise questions of the State's dune projects up and down the coast of New Jersey and potential claims for "damages" by property owners whose property is not condemned through the state program, yet the owner argues incidental losses from a project such as loss of visibility.

Importantly, Judge Ford did not find that the Upland Members were entitled to seek severance damages, nor could she, but instead, she refers to "incidental" damages. However, incidental or consequential damages are not compensable under our condemnation jurisprudence due to the speculative nature of these claims. State by Comm'r of Transp. v. Van Nortwick, 287 N.J. Super. 59, 71-72, (App. Div. 1995). See also, State by Comm'r of Transp. v. Cooper Alloy Corp., 136 N.J. Super. 560, 568 (App. Div. 1975) ("Just compensation generally does not include losses or costs that are incidental to a taking")(emphasis added); State ex rel. Comm'r of Transp. v. Marlton Plaza Assocs., Ltd. P'ship, 426 N.J. Super. 337, 361 (App. Div. 2012) ("the court recognized that not all damages are compensable, particularly if those damages are speculative, incidental, or 'peculiar to the owner as opposed to being directly attributable to the realty.'"). Here, Judge Ford and the Scaduto court took a step

too far. The analysis should have ended with the finding of no taking since no damages could be due as a matter of law.

The trial court below further erred by allowing the Upland Owner's belated claim that they are entitled to severance damages to their homes for the loss of the oceanfront owners' right to have a dune platform within the Beach Lot. (Pa0339-356). First, the Upland Members never raised the dune platform concern until the summary judgment briefing almost two years after the HOA valuation trial, so they have waived their right to assert it before the trial court. N.J.S.A. 20:3-11. They had the opportunity to raise the dune platforms before both Judge Ford and this court in Scaduto, but remained silent and focused instead on their general access and recreation easements. In fact, this court in Scaduto expressly acknowledged that because the SDRE was expressly made subject to the Upland Members' access easement, "all agree only the recreation easement is at issue here." Scaduto, 474 N.J. Super. At 436. Having failed to argue this ambiguous right before, they should not have been allowed to raise it in the court below. Nieder v. Royal Indem. Ins. Co., 52 N.J. 229, 234 (1973).

Nonetheless, the Upland Members alleged that the oceanfront owners' rights to have dune platforms on the pre-existing dune had been "eviscerated." (Pa0347-356). This is wrong as a matter of fact and law. The oceanfront owners' platforms are all located outside of the SDRE and were not impacted by the

SDRE taking or the Project construction. (Pa0357-363). Indeed, there is nothing in the SDRE preventing the Upland Members from placing a dune platform on the Project dune crest. (Pa0358-359). DEP did not take any lands of the Upland Members and their easement rights allowing them to access the Beach Lot through their private access walkways and beach platforms, as well as to recreate and enjoy the Beach Lot remain fully intact.

Similarly, any alleged viewshed injury suffered by the Upland Members is considered damnum absque injuria (or loss or damage without injury) and is not compensable. Dikert, 319 N.J. Super. at 324. The law is clear that an owner is not entitled to compensation for loss of view or visibility resulting from the use of lands of others. See Pub. Serv. Elec. & Gas Co. v. Oldwick Farms, Inc., 125 N.J. Super. 31 (App. Div. 1973), certif. denied, 64 N.J. 153 (1973). Similarly, here, the Upland Members do not have a right to a view under the recreation easement (Pa0043) and are not entitled to compensation for any loss of view as a result of the taking of the SDRE on the Beach Lot.

Finally, to the extent this court finds this case regarding a bifurcated trial for an HOA member's undisturbed access easement over common property presents a novel issue in New Jersey law, New York case law is instructive. In a similar matter to this, the City of New York sought to condemn a private beach

owned by a homeowner's association for the use of its members and convert it to a public beach. City of New York, 269 N.Y. 64, 67 (N.Y. 1935). The parcels within the community, whose owners automatically became association members when they purchased a parcel, each had an easement appurtenant that provided recreational beach access. Id. at 68. In deciding whether the fee owner should be compensated, rather than the dominant parcels' owners, the court examined the nature of the relationship between the upland lot owners and the owner of the condemned beach parcel. Id. at 71-75. Since every lot owner was a member of the association that owned the fee, the court determined that "the [association] is a device used by the owners of the dominant tenements to hold, and jointly manage and control, the fee in which they have a common right of enjoyment". Id. at 73. The court determined that, "[s]o long as the title remains in the [association], and the [association] continues to use the land in the manner it has heretofore used it, those who own the dominant tenements enjoy under the [association's] by-laws the same rights which they might claim under their easements, and the easements have little or no value." Id. at 73. According to the court, "the easements, for practical purposes, had become merged in the membership rights [, and] . . . the owners of the dominant tenements [were] damaged primarily through the destruction of their membership rights." Id. at 74-75. The court thus determined that "[t]he damage to the [association] by the

taking of the land is the value of the use of that land by the [association] for the benefit of those accorded membership rights therein." Id. at 75. For these reasons, the court dismissed the owners' claims.

Other New York cases have followed City of New York. See Matter of Radisson Cmty. Ass'n, Inc. v. Long, 809 N.Y.S.2d 323, 328-29 (App. Div. 2006) (homeowners association's tax appeal relied on City of New York to determine that "the value of the easements in the common parcels held by the dominant estates was reflected in the homeowners' membership rights" in the association); Murphy v. State, 787 N.Y.S.2d 120, 126-127 (App. Div. 2004) (court found that in condemnation of common elements in a condominium association, condominium association "should recover a collective reward for all direct and consequential damages" because the "land taken was owned by all, for the benefit of all owners.").

Likewise, here, the Upland Members' easements, for all practical purposes have been merged in membership rights similar to the owners of the dominant estates in City Of New York, Radisson and Murphy. Indeed, the Upland Members' recreation easements in the Beach Lot were expressly found by both Judge Ford and the Scaduto court to be subsumed within and conditioned upon HOA membership. Judge Ford specifically found on the motion for reconsideration: "the interest of Plaintiffs, as members of the Bayhead HOA,

were adequately protected by the Bayhead HOA" and "the taking did not change, alter, or otherwise impact the access and recreational easements which continue to be held by Plaintiffs." (Pa0218). Scaduto found that the Upland Members' claims for severance damages "flowing from the State's storm damage reduction easement are intertwined with the Association's just compensation claim for the same taking[.]" Scaduto at 444.

Given Judge Ford's determination that there was no taking and the relevant case law cited above, the trial court erred in denying DEP's motion for summary judgment dismissing the Upland Members severance damages claims. This court should reverse the trial court's decision as a matter of law.

POINT III

ASSUMING THIS COURT AFFIRMS THE DECISION BELOW, THE MATTER SHOULD BE REMANDED FOR AN ALLOCATION HEARING PURSUANT TO THE "UNIT RULE" (Pa0001, T19, 3-10).

Furthermore, even if this court affirms the trial court's determination that the Upland Members are entitled to damages, the claims of the Upland Members should be adjudicated via an allocation hearing to determine their share of the HOA's award of $632,780.00 under the "unit rule." The "unit rule" means that one award as a whole of just compensation is made which constitutes "a

summation of all of the values of all of the separate interests in the property." N.J. Sports & Exposition Auth. v. E. Rutherford, 137 N.J. Super. 271, 279-80 (Law Div. 1975). A lump sum verdict encompasses all interests in the land. Id. at 279-80. This rule has been consistently followed in New Jersey. Id. at 279.

As noted above, both the Ford Decision and Scaduto created a conflict in concluding that the Upland Members should be allowed to prove severance damages, while at the same time both courts found that the Upland Members' easements were not taken and their claims are intertwined with the HOA's just compensation claim for the same taking. The Scaduto court went a step beyond our constitutional parameters of eminent domain law by explaining that a jury should be charged in accordance with Karan at 384, to determine just compensation to the Upland Members by calculating the fair market value of their properties with their non-exclusive easements immediately before the taking and the fair market value of the Upland Members' easements after the SDRE was complete on the Beach Lot. Id. at 389. Simply put, Scaduto conflicts with Karan which holds "[i]n a partial-takings case, that *homeowners* [not adjacent landowners] are entitled to the fair market value of their loss, not to a windfall," id. at 389, 414, 418, which necessitates both a taking and a showing of ownership, which is not present here. The "unit rule" and an allocation hearing resolves this conflict.

A homeowners association is created by filing a "declaration of covenants, conditions and restrictions contained in deeds and association bylaws." Cape May Harbor Vill. & Yacht Club Ass'n, Inc. v. Sbraga, 421 N.J. Super. 56, 70 (App. Div. 2011). These "covenants include restrictions and conditions that run with the land and bind all current and future property owners." Ibid. The bylaws set forth rules and regulations governing the association's members. Ibid. A homeowners' association board has a fiduciary responsibility to its members. Alloco v. Ocean Beach & Bay Club, 456 N.J. Super. 124, 134 (App. Div. 2018). One purpose of a HOA is to hold property for the benefit of its members. Highland Lakes Country Club & Cmty. Ass'n v. Franzino, 186 N.J. 99, 110 (2006). There is no question that here, the HOA owned the Beach Lot for the benefit of the homeowners and that the homeowners' easements were intertwined with their respective membership.

It is well-established that condemnation procedures in New Jersey follow the "unit rule" which allows only one award to be made for all separate interests in the property. Jersey City Redevelopment Agency v. Costello, 252 N.J. Super. 247 (App. Div. 1991); State v. Jan-Mar, Inc., 236 N.J. Super. 28 (App. Div.1989); N.J. Highway Auth. v. J. & F. Holding Co., 40 N.J. Super. 309, 314-315 (App. Div. 1956). The rationale behind the unit rule is "[s]ince the one award as a whole is the equivalent of the total compensation to which all of those

having relative interests in the property are adjudged to be entitled, justice dictates that the owner of each individual interest should receive from the award a proper divisional share of indemnity for his particular deprivation and loss, if any." Id. at 315. "Only those parties who hold an interest in the property as of the date of taking may receive from that condemnation award a proper divisional share of indemnity for its particular loss." Costello, 252 N.J. Super. at 259. The actual apportionment of that interest would occur at a separate allocation proceeding. Wayne Co., Inc. v. Newo, Inc., 75 N.J. Super. 100, 107 (App. Div.1962). "The apportionment of that amount to those persons claiming an interest therein is a matter of no concern to the condemnor." Costello, 252 N.J. Super. at 259 (citing 29A C.J.S. Eminent Domain § 197, at 1103).

As applied here, this court has already agreed with Judge Ford, stating that "[the Upland Members'] claims for severance damages flowing from the State's [SDRE] are intertwined with the Association's just compensation claim for the same taking, that [the Upland Members] were already pursuing their claims in DEP's condemnation action against the Association, and thus the entire controversy doctrine barred [the Upland Members'] separate inverse condemnation claims." Scaduto, 474 N.J. Super. 444-445. Thus, even if this court determines that the Upland Members are entitled to damages for impacts to their relative interests in the property taken via the HOA, the claims of the

Upland Members should have been adjudicated via an allocation hearing under the "unit rule." The Upland Members' interest in the Beach Lot is for the same purpose for which the HOA holds the property in fee, namely recreation. As noted in the Ford Decision, the Upland Members' claims are encompassed within the HOA's claims (Pa0218), and thus an allocation hearing would be appropriate here, not a separate jury trial. For these reasons, if this court affirms the trial court's decision, this matter should be remanded for an allocation hearing pursuant to the unit rule.

CONCLUSION

For the reasons set forth above, DEP respectfully asks this court to reverse the trial court's summary judgment denial and dismiss the Upland Members' claims for severance damages; or, in the alternative, remand this matter to the trial court for an allocation hearing.

RUTTER & ROY, LLP
Attorneys for Appellant,
State Of New Jersey, by the Department of Environmental Protection

BY: /s/ Heather N. Oehlmann
HEATHER N. OEHLMANN

Dated: June 11, 2025

STATE OF NEW JERSEY, by the DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiffs, v. 2.150 ACRES OF LAND IN THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY, NEW JERSEY; BAYHEAD POINT HOMEOWNERS ASSOCIATION, INC., fee owner; COUNTY OF OCEAN, a body corporate and politic of the State of New Jersey; JOHN ROBERT SCADUTO and DEBRA SCADUTO; MARK CURCIO and BARBARA CURCIO; ROBERT HARKINS; SANDBOX PROPERTIES, LLC; STEPHEN P. ROMA and MARY ROMA; RICHARD COLAVITA and ANNE COLAVITA, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-002438-24 CIVIL ACTION On Appeal From: Superior Court of New Jersey, Law Division, Ocean County Docket No. OCN-L-3574-15 Sat Below: The Honorable Craig L. Wellerson, P.J. Civ Div.

BRIEF OF RESPONDENTS JOHN ROBERT SCADUTO AND DEBRA SCADUTO; MARK CURCIO AND BARBARA CURCIO; ROBERT HARKINS; SANDBOX PROPERTIES, LLC; STEPHEN P. ROMA AND MARY ROMA; AND RICHARD COLAVITA AND ANNE COLAVITA.

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PRELIMINARY STATEMENT

This case is before the Appellate Division for interlocutory review of the trial court's Order, dated February 28, 2025, which denied the State of New Jersey, by the Department of Environmental Protection's ("DEP") motion for summary judgment. DEP filed a motion for leave for interlocutory review, which was granted by the Appellate Division on April 14, 2025.

DEP argues that summary judgment should have been granted because there has been no taking of a property interest of the seven Defendant property owners ("Owners") in this matter. However, the trial court and Appellate Division disagreed, and on a prior appeal the Appellate Division previously and correctly determined that the Owners in this case are entitled to a jury trial to determine the separate amounts of severance damages, if any, to their homes resulting from the DEP's taking of the Storm Damage Reduction Easement ("SDRE") within the Beach Lot of the Bayhead Point Homeowners Association ("Association"), of which they are members.

In support of DEP's argument that there is no taking in this matter, DEP relies on the decision on a motion for reconsideration by the Honorable Marlene Lynch Ford, A.J.S.C., wherein she dismissed the Owners' inverse condemnation complaints. Judge Ford dismissed those claims under the entire controversy doctrine. Contrary to DEP's position, Judge Ford did not dismiss the Owners' claims based

upon a prerequisite finding that there had not been a taking. In fact, Judge Ford stated that the Owners had "a forum with which to determine the loss of value, if any, to their properties resulting from the takings related to the Project." The Appellate Division agreed and held that the Owners were **entitled** to a jury trial for severance damages and expressly stated that the trier of fact "must be permitted to consider" whether DEP's Storm Damage Reduction Easement ("SDRE") "resulted in a reduction in the fair market value of their properties entitling them to just compensation, based on all the relevant factors in accord with Karan, 214 N.J. at 416-418." [Borough of Harvey Cedars v. Karan, 214 N.J. 384 (2013)].

The Owners possessed compensable property interests in the Beach Lot. They had a recorded perpetual easement for recreational use within the private Beach Lot. The easement is non-exclusive only in the sense that it is shared with other members of the Association. A 2005 Stipulation of Settlement of prior litigation by the State against the Association defined the limits of public use within the Beach Lot near the water pursuant to the public trust doctrine and recognized the rest of the Beach Lot was a private beach for exclusive use by Association members. Six of the seven Owners' properties are oceanfront homes. They also have the recorded right to have dune platforms within the Beach Lot on the crest of the then existing dune. Before the SDRE, the dune platforms located on the crest of the then existing dune within the Beach Lot

provided unobstructed views of the ocean's edge from chairs on the platforms and unobstructed sea breezes. After the SDRE, the views from the dune platforms of the ocean's edge and the sea breezes are obstructed by the new higher dune. These recorded easement rights enhanced the use, enjoyment, and value of the Owners' homes. Although DEP refuses to acknowledge that it has done so, DEP's SDRE appropriated the Owners' property rights within the Beach Lot, shared with other members of the Association, to recreate on a private beach. The private Beach Lot is now a public beach. By converting the private Beach Lot for Association members into a public beach, the SDRE eliminated the privacy interest, resulting in damage and loss in the value to the Owners' homes.

DEP further argues that the single lump sum unit rule precludes the Owners' claims for severance damages. DEP's argument is without merit. DEP consented to the trial court's bifurcation of the jury trial on the Association's claim for just compensation and the Owners' separate and distinct claims for severance damages. DEP also argues that the Owners' claims for severance damages are barred by the unity of ownership doctrine. The unities doctrine defines a property before a taking involving non-contiguous lots in the same beneficial ownership and devoted to an integrated use. The unities doctrine is not applicable here. As such, DEP's appeal should be dismissed.

PROCEDURAL HISTORY & STATEMENT OF FACTS[1]

On August 26, 2016, the trial court entered a Consent Order between the DEP and the Association which provided that any member of the Association would be entitled to present evidence of severance damages to their homes. On March 18, 2019, prior to the then scheduled hearing before commissioners, the Association's attorney sent a letter to the Association members which enclosed and explained the Consent Order. (Pa0248; Pa0281).

The hearing before the commissioners was held on October 11, 2019, and October 22, 2019. The law firm of Bathgate, Wegener, and Wolf, P.C., appeared at the hearing on behalf of the Owners pursuant to the Consent Order. (Pa0248). DEP, the Association, and the Owners separately appealed from the award of commissioners for trial. (Pa0248; Pa0285).

Due to their concerns pertaining to the ad hoc procedure set forth in the Consent Order, and not having been named as party defendants in the Association Action, the Owners filed separate inverse condemnation complaints on October 2, 2020. DEP filed a motion to dismiss on the grounds that the Owners' complaints were barred by the entire controversy doctrine. The Owners filed opposition and cross-moved seeking partial summary judgment that there had been a taking. Judge

[1] The primary factual issues of this appeal revolve around the procedural history and relevant trial court rulings. Because the relevant facts and procedural history are intertwined, Respondent has combined the procedural history and statement of material facts for judicial economy and ease of reference.

Ford granted DEP's motion on the basis that the claims were precluded under the entire controversy doctrine and denied the Owners' cross-motion as moot. Thereafter, the Owners moved for reconsideration. On January 22, 2021, Judge Ford confirmed her prior ruling and denied the motion for reconsideration. (Pa0202-Pa0205; Pa0248).

In their motion for reconsideration, the Owners relied on State v. Orenstein, 124 N.J. Super 295 (App. Div. 1973), certif. den. 63 NJ 588 (1973) for the proposition that when property encumbered with an easement interest is taken, the taking of the easement is ***separate*** from any taking of the property which the easement encumbers. The Owners argued that they were not named party defendants, and that the ad hoc procedure set forth in the Consent Order was contrary to the Constitution, the Eminent Domain Act, N.J.S.A. 20: 3-1 et. seq., the Court Rules (R. 4:73-1 to-11), and State v. Orenstein, and that the inverse condemnation complaints were not barred by the entire controversy doctrine. (Pa0208; Pa0248).

In granting DEP's motion, Judge Ford distinguished Orenstein. In relevant part, Judge Ford held that, "[u]nlike in Orenstein, where the easement right of the property owner was actually taken, there was ***no such***[2] taking in this case. Simply stated, in Orenstein, the easement was destroyed by the taking; in this case, the

[2] Emphasis added.

easements were preserved notwithstanding the taking." (Pa0230). Judge Ford then stated that she agreed with DEP that "the entire controversy doctrine applies to this case" and that "The [Owners] have a forum within which to determine the loss in value, if any, to their properties resulting from the taking related to this Project." Ibid. Thus, Judge Ford did not make a determination that there was no taking of any easement rights; rather she simply distinguished Orenstein in making her determination that the inverse condemnation complaints were barred by the entire controversy doctrine. The Owners appealed Judge Ford's Orders. (Pa0249).

In its opinion, the Appellate Division affirmed the dismissals of the Owners' separate consolidated inverse condemnation actions on the basis of the entire controversy doctrine. (Pa0279). The Appellate Division further stated that the Owners "are free to argue in the condemnation action that they are entitled to severance damages because the State's partial taking reduced the value of their homes by impairing their appurtenant easements…" (Pa0275-Pa0276). The Appellate Division Opinion concluded that the Owners have rights to claim separate awards for any severance damages to the value of their homes in the Association Action. (Pa0277). The Appellate Division further stated that the Owners are entitled to a jury trial for separate awards of severance damages and that the trier of fact "must be permitted to consider whether public access to the Association beach as part of DEP's storm damage reduction easement resulted in a reduction in the fair market value of

their properties entitling them to just compensation, based on all the relevant factors in accord with Karan, 214 N.J. at 416-418." (Pa0279). "The 'before' values must take into account the [Owners'] easement rights were already subject to the public's right of access pursuant to the public trust doctrine and the Association's right to operate its beach commercially by selling beach badges to the public." (Pa0277). Other factors the jury may consider in determining just compensation "would include, but need not be limited to, the nonexclusive nature of the [Owners'] recreation easements, members of the public having been allowed after the taking to use portions of the beach lot not previously burdened by public access… the removal of the outfall structure, and the Association's ability to manage the number of beachgoers by the sale of beach badges." (Pa0278-Pa0279).

The Appellate Division Opinion was rendered on January 12, 2023. The jury trial in this matter was scheduled for February 6, 2023. (Pa0249). By letter dated January 25, 2023, with the agreement of all counsel, the Owners' attorney advised the trial court of the status of the matter and requested a conference. The letter provided in part: "All three counsel have conferred and agree that the Association trial, which is ready to proceed should ***be bifurcated and separate from the homeowners' trial.***"[3] (Pa0249; Pa0297-Pa0298). Judge Wellerson held a Zoom status conference call on January 27, 2023, with counsel for the State (Brian W.

[3] Emphasis added.

Keatts, Esq.), the Association (Anthony F. DellaPelle, Esq.) and the Owners (John J. Reilly, Esq.) appearing. The court determined that the jury trial, as between the State and the Association, would go forward as scheduled on February 6, 2023; and that, in light of the Appellate Division Opinion, and relying upon agreement of all parties, the trial on the Owners' claims for severance damages would be at a later time. (Pa0249). Based upon the court's decision that the Owners' claims for severance damages would be bifurcated from the scheduled trial, The Owners did not participate in the February 6, 2023, trial (Pa0249). The Owners also were not involved in the form and entry of the judgment. (Pa0249). For example, Mr. DellaPelle sent a letter to the Court, dated May 18, 2023, with respect to the form of entry of the judgment as to the Association. The letter only copied Mr. Keatts and the Association. (Pa0250; Pa0301). At the time of the February 6, 2023, trial on the Association's claim of just compensation, DEP had not yet amended its complaint naming the Owners as party-defendants in the action. (Pa0250).

Thereafter, the Owners filed a motion to re-open this matter and requested that they be named as party defendants. The court granted the Owners' motion and, on August 29, 2024, DEP filed an Amended Complaint naming the Owners. (Pa0250; Pa0303). The Owners filed an Answer on October 3, 2024. (Pa0250; Pa0321) DEP filed its motion for summary judgment on December 20, 2024. (Pa0250; Pa0019). The Owners opposed the motion. On February 21, 2025, the trial court denied the

motion. The court further ruled that the DEP could file *motions in limine* on the specific discovery issues it had raised, such as whether the jury should be permitted to know the dollar amount that was awarded to the Beach Lot property owner, the Association. (Pa0008-Pa0009). The order denying the DEP's motion for summary judgment also stayed the action for 20 days to allow the DEP to seek appellate review. DEP filed a motion for interlocutory review, which was granted by the Appellate Division on April 14, 2025.

NJDEP's SDRE provides public access to the entire beach area. Prior to the SDRE, the Association had limited public access to areas primarily eastward of the stormwater outlet. Since its formation in 1994, and up until the DEP's taking of the SDRE, the Association maintained the Beach Lot, in which DEP acquired the SDRE, as a private beach for its members, subject to the public trust doctrine as described in the 2005 Stipulation Settlement. The 2005 Stipulation of Settlement permits the Association to operate portions of the Beach Lot as a private beach for the Association members. The Association has never sold beach badges to the public. (Pa0356). The Association's Declaration of Covenants and Restrictions dated August 16, 1994, and as amended (the "Declaration") does not specifically state that the Association can sell badges to the public. (Pa0327).

The Declaration provides that each of the covenants, restrictions and easements shall "be for the benefit of the Property [the 22 lots and the Beach Lot] and each and

every owner of a Lot located in the Property… each and all of which shall run with the land." (Pa0327-Pa0328; Pa0333). The Declaration further states that "the Owners of the Lots and their assigns, . . . successors, . . . grantees, . . . shall have a perpetual, non-exclusive easement for recreational purposes in, upon and across the Beach Lot." (Pa0341). The owners of the Lots have the right of beach access to cross the dune, located between Lots 9.03 and Lots 9.04. (Pa0331) The oceanfront lot owners, their successors and assigns, also have an easement for a dune platform within the Beach Lot, along with shared walkways to cross the dune. (Pa0341-Pa0351). DEP's taking was only subject to the right to cross the dune (Pa0583). The dune platforms of the oceanfront owners are located on the remaining portion of the pre-existing dune. DEP's dune obstructs the view of the ocean and foreshore from the Owners' platforms. (Pa0355).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S ORDER DENYING SUMMARY JUDGMENT WAS APPROPRIATE AND SHOULD NOT BE DISTURBED.

DEP argues that Judge Ford's prior ruling on the motion for reconsideration serves as a bar to the Owners' claim for severance damages in this action. In relevant part, DEP argues that Judge Ford made a finding that there was no taking of a property interest of the Owners. DEP misconstrues Judge Ford's decision, as

shown by the reasons to follow and as further evidenced by a prior determination of this Appellate Court.

A. The Owners are entitled to a trial for separate awards of severance damages for the loss in value to their homes as a result of the SDRE and new dune.

DEP relies upon Judge Ford's decision wherein she distinguished Orenstein and found that: "[u]nlike in Orenstein, where the easement right of the property owner was actually taken, there was ***no such***[4] taking in this case. Simply stated, in Orenstein, the easement was destroyed by the taking; in this case, the easements were preserved notwithstanding the taking." (Pa0230). In reliance on Judge Ford's decision and Orenstein, DEP argues that that has been no taking. However, Judge Ford's observation was in connection with distinguishing Orenstein and concluding that the nature of the taking did not result in a complete destruction of the easements and that certain easement rights were preserved. Judge Ford determined that the easements did not warrant separate litigation and that the inverse condemnation complaints were barred by the entire controversy doctrine. Judge Ford explicitly stated that the Owners "could participate for the purpose of protecting their right to compensation for any incidental loss in value to their properties" and that the Owners "have a forum within which to determine the loss of value, if any, to their

[4] Emphasis added.

properties resulting from the takings related to the Project." (Pa0230). Simply put, DEP is attempting to elevate Judge Ford's decision to stand for a proposition that it never stood for; the position that there is no taking of the Owners' property interest in this matter. Judge Ford's decision to dismiss the Owners' complaints is entirely based on the entire controversy doctrine. To the extent any argument could be made that she made a finding that there was no taking, those arguments are seeking a denial of the Owners' constitutional right to just compensation based upon dicta.

Moreover, even assuming, arguendo, that there was actually a finding by the trial court that there was no taking of the Owners' property interests, the Appellate Division nonetheless acknowledged and held that the Owners were entitled to a jury trial for the loss in value of their homes as a result of the SDRE. The Owners appealed the decision of Judge Ford which dismissed the Owners' separate complaints on the basis of the entire controversy doctrine. The Appellate Division affirmed the dismissals of the separate consolidated inverse condemnation actions of the Owners on the basis of the entire controversy doctrine. (Pa0279). Contrary to the argument advanced by DEP, the Appellate Division recognized that the Owners must be permitted a trial on severance damages. The Appellate Division did not conclude, as DEP suggests, that Judge Ford's decision was equivalent to a finding that there was no compensable taking. On the contrary, the Appellate Division concluded that the Owners have a right to separate awards for any severance

damages for the loss in value of their homes. The Appellate Division stated that the trier of fact "must be permitted to consider whether public access to the Association beach as part of DEP's storm damage reduction easement resulted in a reduction in the fair market value of their properties entitling them to just compensation, based on all the relevant factors in accord with Karan, 214 N.J. at 416-418." (Pa0279). "The 'before' values must take into account the [Owners] easement rights were already subject to the public's right of access pursuant to the public trust doctrine and the Association's right to operate its beach commercially by selling beach badges to the public." (Pa0277). Other factors the jury may consider in determining just compensation "would include, but need not be limited to, the nonexclusive nature of the [Owners'] recreation easements, members of the public having been allowed after the taking to use portions of the beach lot not previously burdened by public access… the removal of the outfall structure, and the Association's ability to manage the number of beachgoers by the sale of beach badges." (Pa0278-Pa0279). The Owners "are entitled to ***separate***[5] awards for just compensation for the loss of value to their homes." (Ibid.)

In Borough of Harvey Cedars v. Karan, 214 N.J. 384 (2013), the Supreme Court held that when a public project requires the partial taking of property, "just compensation" to the owner "must be based on a consideration of all relevant,

[5] Emphasis added.

reasonably calculable, and non-conjectural factors that either decrease or increase the value of the remaining property." Id. at 389. To calculate that loss, the Court "must look to the difference between the fair market value of the property before the partial taking and after the taking." Ibid. DEP argues that the easements did not provide the Owners with the right to a private beach or a right to view the ocean or the ocean break. However, the oceanfront lot owners, their successors and assigns, have easements to cross the dunes and for dune platforms within the Beach Lot and easements for shared walkways. The platforms are located on the westerly most portion of the pre-existing dune within the Beach Lot, which area was not subject to the SDRE taking. DEP's dune, however, obstructs the view of the ocean and foreshore from the platforms. (Pa0354-Pa0355). As a result of the SDRE dune, the ocean break, including the foreshore and bathers, cannot be seen from the dune platforms.

The Appellate Division referred to the 2005 Stipulation of Settlement, which states that the Association is able to operate the Beach Lot commercially and that this factor is to be considered in determining value. Here, the Association maintains the Beach Lot as a private beach for its members, subject to the public trust doctrine as described in the 2005 Stipulation Settlement. The Declaration does not specifically state that the Association can sell badges to the public. Since its formation in 1994, and up until the DEP's taking of the SDRE, the Association has never sold beach badges to

the public. (Pa0357). The SDRE converted the private beach into a public beach. The SDRE has eviscerated the recreational easement of the Owners in the Beach Lot to a right that any member of the public has and has taken from the members the right to a private beach, exclusive to members of the association. The Owners have lost the ability to recreate on a privately owned beach exclusive to the owners. The easements were destroyed in the sense that they became meaningless when the SDRE easement provides public access and use of the entire beach, which previously had been restricted. The oceanfront lots have also lost the view of the ocean break from their dune platforms. DEP argues that the dune platforms are outside of the SDRE and were not impacted by the SDRE, and therefore, are not compensable is categorically false. These are compensable severance damages from the easement taking under Karan and this prior Appellate Division Opinion. Moreover, DEP argues that there is "nothing in preventing the Upland Members from placing a dune platform on the Project dune crest." DEP's argument lacks candor. DEP's easement does not provide the Owners with an unqualified right to build dune platforms on its new dune, there is no express right to a dune platform, and DEP's is silent on regulatory implications that approvals that would be needed from the Association and the State to obtain permission for such dune platforms. In short, DEP's argument that the Owners can build dune platforms on the new dune is

speculative and self-serving for the purpose of the appeal and its statement cannot stand in the place of a recorded property interest.

B. The Owners have a property interest in the Beach Lot.

DEP relies on Orenstein and several other cases for the proposition that the Owners are barred from seeking severance damages from the taking, in relevant part, because the Owners do not own the Beach Lot which was subject to the SDRE taking. However, DEP ignores the fact that the Owners have an actual and real property interest in the Beach Lot that was taken by virtue of the SDRE. DEP argues that, because the dune platforms are outside of the SDRE, the Owners' rights were not impaired. However, as a result of the project on the Beach Lot in which the Owners also have a property interest, their view of the ocean was impaired. In addition, the Owners had a right to recreate on the Beach Lot, privately owned by the Association. Housing Auth. of City of Newark v. Norfolk Realty, 71 N.J. 314 (1976).

An individual's rights under a grant of easement are well-settled:

> What the easement holder's rights are, vis-à-vis the landowner, depends first of all on the intent of the parties as expressed in the language of the grant, viewed in the light of the nature and reasonably necessary incidents of the permitted use…Where the language of the instrument so viewed does not settle the matter completely— and it rarely does in a litigated situation, else there would be no law suit—the question becomes a mixed one of law and

> fact to be determined within the framework of the universally accepted principle of easement law that the landowner may not, without the consent of the easement holder, unreasonably interfere with the latter's right to change the character of the easement so as to make the use thereof significantly more difficult or burdensome.
>
> Boss v. Rockland Electric Company, 95 N.J. 33, 38 (1983) citing Johnson v. Hyde, 33 N.J. Eq. 632, 648-649 (E&A 1881).

The instrument granting or reserving an easement must be read as a whole to carry out the evident intent of the parties. Hyland v. Fonda, 44 N.J. Super. 180, 187 (App. Div. 1957). "In order to ascertain that intention, the court must consider the situation as it was at the time of the execution of the conveyance." Sergi v. Carew v. Carew, 18 N.J. Super. 307, 311 (Ch. Div. 1952). When there is any ambiguity or uncertainty about an easement grant, "the surrounding circumstances, including the physical conditions and character of the servient tenement, and the requirements of the grantee, play a significant role in the determination of the controlling intent." Hyland v. Fonda, 44 N.J. Super. at 187.

Here, the express language contained in the Declaration provides that it was the intent of the parties to provide the oceanfront owners with an exclusive access easement for the purpose of accessing the beach and for the erection, use, and maintenance of timber walkways and dune platforms for the specific purpose of viewing the beach and ocean from the dune platforms. The SDRE has eliminated the express intent of the parties and has destroyed one of the primary benefits that the easement provided to the oceanfront Owners.

DEP cites State ex rel. Com'r of Transp. v. Dikert, 319 N.J. Super. 310, 324 (App. Div., certif. denied, 161 N.J. 150 (1999), for the proposition that the Owners cannot be compensated for severance damages. Dikert states that "acts done in the proper exercise of governmental powers, or pursuant to authority conferred by a valid act of the legislature, and **not directly encroaching on private property**[6]... do not constitute a taking... and do not entitle the owner of such property compensation." DEP also relies upon Public Service Elec. & Gas Co. v. Odlwick Farms, Inc., 125 N.J. Super. 31 (App. Div., certif. denied, 64 N.J. 173 (1973), for the proposition that loss of view is not compensable resulting from the use of lands of others. DEP once more ignores the fact that the Owners had vested easement rights in the Beach Lot, including the right of the oceanfront lots to have platforms within the Beach Lot, which are constitutionally protected property interests.

"Property" is defined as land, or any interest in land. N.J.S.A 20:3-2. An easement is a "'nonpossessory incorporeal interest in another's possessory estate in land, entitling the holder ... to make some use of the other's property.'" Kline v. Bernardsville Ass'n Inc., 267 N.J. Super. 473, 478 (App. Div. 1993). The loss in view from the dune platform as a result of the SDRE is compensatory. See Borough of Harvey Cedars v. Karan, 214 N.J. 384 (2013) (holding that any quantifiable decrease in the value of their property including, loss of view, as a result of the

[6] Emphasis added.

project is to be considered in a calculation of the fair market value of their property after the taking); City of Ocean City v. Maffucci, 326 N.J. Super. 1, 13 (App. Div., certif. denied, 162 N.J. 485 (2002).

The Owners have a perpetual easement for recreational purposes in, upon and across the privately owned Beach Lot. Each oceanfront lot owner also has an easement for a dune platform within the Beach Lot, along with shared walkways. These easements run with the land, and inure to the benefit of the lot owners. The platforms are located on the remaining portion of the pre-existing dune. The SDRE has converted the private beach into a public one. The SDRE dune obstructs the view of the ocean and foreshore from the platforms. (Pa0354-Pa0355). The loss of view is directly related to property rights taken from the Owners by the SDRE. See Maffucci, 326 N.J. Super. at 13.

In Dikert, the Appellate Division stated that "in severance cases, the condemned property owner is claiming that his remaining parcels suffered damages, not that his property suffered damages resulting from the taking of neighboring lands..." In Dikert, the Court concluded that the damages claimed "do not relate to the taking of [the condemnees'] properties and the resulting damage to their remaining properties, rather it relates to the taking of another's property, namely, Wawa's property." (Id. at 324) Based upon this conclusion, the Court concluded that the defendants had no claim to severance damages. However, while the facts in

Dikert involved an easement, Dikert is easily distinguishable from the matter at hand. In Dikert, the property owner was not entitled to compensation from the State's taking of the Owners' access easement because the State had provided the owners of the two dominant estates a reasonable alternative means of access to their respective properties. Under those circumstances, the Appellate Division held that when the State provides a reasonable means of alternative access, there is no taking by eminent domain, but rather the activity of the State is an exercise of the State's police power. See Dikert, 319 N.J. Super. at 319-321. The easement in Dikert was a simple access easement, not a recreation easement or an easement for permanent dune platforms within the Beach Lot wherein the taking occurred. There was no substitute private beach lot provided, whereas in Dikert, the State provided substitute access. Contrary to Dikert, the Appellate Division here decided that the trier of fact "must be permitted to consider whether public access to the Association beach as part of DEP's storm damage reduction easement resulted in a reduction in the fair market value of their properties entitling them to just compensation, based on all the relevant factors in accord with Karan, 214 N.J. at 416-418." (Pa0279).

C. Unity of ownership and unity of use are not applicable to this matter.

DEP relies on case law pertaining to unity of ownership and unity of use to argue that the Owners are not entitled to severance damages as a matter of law. The cases relied upon by the DEP deal exclusively with situations where a property

owner is claiming damages to a parcel of land that is not physically contiguous to the property taken, such as when one property is across the street or when a condemnee is seeking severance damages for the taking of "spatially separate but functionally integrated property." The issue in those cases concerns what constitutes the larger tract or relevant parcel, which require "**a unity of ownership among all the physically discrete parcels."**[7] Housing Auth. of City of Newark v. Norfolk Realty, 71 N.J. 314, 324 (1976).

"Unity of ownership" suggests that physically separate parcels are owned in their entirety by one owner or set of owners. Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 (App. Div. 2007). The unity of ownership concept was addressed by the Supreme Court in Housing Auth. of City of Newark v. Norfolk Realty, 71 N.J. 314, 324 (1976), In Norfolk, the defendant partnership owned land that was condemned that contained a warehouse and garage. Across the street from the warehouse and garage was a processing plant. The processing business and a portion of the realty where the plant operated was owned by Davis White, Inc., whose shareholders were the three partners of the defendant. The remaining portion of the processing plant realty was owned by the defendant, which leased it to Davis White. The warehouse and garage were leased by the defendant to Davis White for processing plant operations. The defendant partnership claimed an

[7] Emphasis added.

entitlement to an award of severance damages, arguing that the condemnation of the warehouse and garage was a partial taking of the ***overall*** processing plant operations and that the warehouse and garage were a functionally integrated part of the Davis White processing plant. Thus, the defendant argued the taking adversely affected the value of the remaining real estate. Id. at 320–21. In those cases, "severance damages are awarded only when there is a partial taking of a parcel of realty, the uncondemned parcel and the condemned parcel are functionally integrated, and there exists a unity of ownership." Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 (App. Div. 2007) (citing Norfolk 71 N.J. at 321–22).

DEP argues that the Owners' easement "does not meet the test of unity of ownership." It does not need to. A unity of ownership analysis simply is not required under our jurisprudence when the interest taken is a vested property interest. A unity of ownership analysis is only required when severance damages are sought for property separate and distinct from the condemned property when there is no property interest in the actual property condemned. That clearly is not the case here. The owner of an easement "is entitled to compensation for the diminution in value of property which it serves." Uniform Appraisal Standards For Federal Land Acquisitions, section 4.6.5.3, pages 172 and 173 (2016) (quoting United States v. 57.09 Acres of Land in Skamania Cty., 706 F.2d 280, 281 (9th Cir. 1983) (citing

United States v. Grizzard, 219 U.S. 180 (1911)). The cases cited by the DEP are not applicable.

The Owners do not contend that their respective lots are part of the same tract owned by the Association or that the properties are functionally integrated with the Beach Lot. Rather, the Owners are entitled to severance damages to their homes, for the loss of their vested easement interests in the Beach Lot which permitted the Owners the exclusive right to recreate on the privately owned beach and for the oceanfront owners to have their dune platforms within the Beach Lot providing ocean view.

Appellant also cites City of New York, 269 N.Y. 64, 67 (N.Y. 1935), which involved the taking of a beach area owned by the homeowner's association. This is an out-of-state opinion and not binding on this Court. Also, the case did not involve claims for severance damages. "[O]nly the owner of the fee has made any claim for damages here, and we consider, primarily, the damages which the owner of the fee has suffered." Id. at 65. In dicta, the opinion also addresses the particular common right of enjoyment of the beach area which the lot owners had as well as the particular rights of membership in the association. The court acknowledges that its decision would be different if the easement rights and the membership rights were different. Ibid.

In the present case, the easement rights of the Owners are more than just a right of enjoyment. The Owners had the right to access and to recreate on a privately owned beach, and the oceanfront owners had the right to have dune platforms on the pre-existing dune.

Moreover, the cases relied upon by DEP were cases in which the interests of the association members and the Association itself were tried in one proceeding. These cases are analogous to cases in which the unit rule is applicable.

The claims of the Association and the claims of its members were bifurcated by the agreement of the parties. As such, the rights of the members that were allegedly "subsumed with and conditioned upon the HOA membership" were not accounted for in the trial between DEP and the Association because the Owners did not participate in the trial and because the Owners' claims for severance damages was not a part of the trial. These rights are separate and distinct from the rights of the Association. The Owners are entitled to a trial on severance damages as this court has previously determined.

D. The Association's interests are not the same as the Owners and therefore are not Subject to Allocation.

DEP argues that if the Appellate Division finds there is a compensable taking, the claims of the Owners should be adjudicated through an allocation hearing under

the "unit rule." DEP's argument is disingenuous and ignores the procedural history and express agreement of the parties in this case.

The "unit rule" generally provides that only one award should be made for all the separate interests in the property. Jersey City Redevelopment Agency v. Costello, 252 N.J. Super. 247, 259 (App. Div. 1991); State v. Jan-Mar, Inc., 236 N.J. Super. 28 (App. Div. 1989); N.J. Highway Authority v. J. & F. Holding Co., 40 N.J. Super. 309, 314-315 (App. Div. 1956). The "unit rule" provides for one award when "one award as a whole is the equivalent of the total compensation to which all of those having relative interests in the property are adjudged to be entitled…" J. & F. Holding Co., 40 N.J. Super. 309, 315 (App. Div. 1956). Where all the property interests in the property have been tried at one trial, there is no dispute that there should be only one award entered against the condemning authority and that the proceeds of the interested owners are subject to an allocation proceeding. See Costello, 252 N.J. at 259–60 (stating that the "apportionment of that amount to those persons claiming an interest therein is a matter of no concern to the condemnor."). Under such circumstances, "justice dictates that the owner of each individual interest should receive from the award a proper divisional share of indemnity for his particular deprivation and loss, if any." Ibid; see also Uniform Appraisal Standards For Federal Land Acquisitions, section 4.6.5.3, pages 172 and 173 (2016) (quoting 57.09 Acres of Land, 706 F.2d at 281 (stating that departure from the unit rule may

be necessary to avoid grossly unjust results where an undivided sum would not result in just compensation.)

However, the "unit rule" contemplates a situation where "all of those having relative interest in the property are adjudged." Ibid. Where all the property interests in the property have been tried at one trial, there is no dispute that there should be only one award entered against the condemning authority and that the proceeds of the interested owners are subject to an allocation proceeding. See Costello, 252 N.J. at 259–60 However, in the present case, the Owners' interests have not been "adjudged." The Appellate Division held that the Owners are "entitled to separate awards for just compensation for the loss of value to their homes." (Pa0297-Pa0298). Moreover, by letter dated January 25, 2023, the parties, including the DEP, agreed that the Certain Owners' claims should be tried separately from the claims of the Association. Relying upon the agreement of the parties, including the DEP, the Court determined that the jury trial, as between the State and the Association, would go forward as scheduled on February 6, 2023; and that, in light of the Appellate Division Opinion, the trial of the Certain Owners for severance damages would be held at a later time. (Pa0249). Thus, the trial that occurred on February 6, 2023, only adjudicated damage related to the Association, and did not

consider the loss in value of the Owners' homes as a result of the taking. Thus, DEP seeks a windfall; DEP wants to receive the benefit of a judgment which did not permit the jury to consider severance damages in connection with the trial which only sought damages associated with the taking of the Association physical property. Such a result would deny the Owners just compensation in violation of the constitution and cannot be permitted.

CONCLUSION

For the aforesaid reasons, and based on the above cited authorities, it is respectfully submitted that the order of the trial court should be affirmed, and this matter should be remanded to the trial court for trial.

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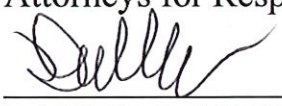

DANIEL J. CARBONE

Dated: July 22, 2025

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

STATE OF NEW JERSEY, by the DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiff, v. 2.150-Acres Of Land In The Borough of Point Pleasant Beach, Ocean County, New Jersey; BAYHEAD POINT HOMEMEMBERS ASSOCIATION, INC., fee owner; COUNTY OF OCEAN, a body corporate and politic of the State of New Jersey; JOHN ROBERT SCADUTO and DEBRA SCADUTO; ANTHONY D'AURIA and DEBORAH D'AURIA; MARK CURCIO and BARBARA CURCIO; ROBERT HARKINS; SANDBOX PROPERTIES, LLC; STEPHEN P. ROMA and MARY ROMA; RICHARD COLAVITA and ANNE COLAVITA, Defendants.	DOCKET NO. A-002438-24 CIVIL ACTION (In Condemnation) ON APPEAL FROM: THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, OCEAN COUNTY DOCKET NO. L-3574-15 SAT BELOW: HONORABLE CRAIG L. WELLERSON, P.J.Civ. Div.

REPLY BRIEF OF APPELLANT, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Submitted: August 6, 2025

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PRELIMINARY STATEMENT

Plaintiff, State of New Jersey, by the Department of Environmental Protection ("DEP"), submits this reply brief in further support of its appeal of the February 28, 2025 Order ("Order") denying DEP's motion for summary judgment seeking to dismiss claims for severance damages by seven homeowner association members ("Upland Members"). The Upland Members' properties are upland to an undeveloped beach lot ("Beach Lot") owned by the Bayhead Point Homeowners Association, Inc. ("HOA"). DEP previously condemned a Storm Damage Reduction Easement ("SDRE") over the Beach Lot and paid just compensation to the HOA.

The central question this appeal asks is whether a property owner whose property rights have not been impacted by a condemnation action is nonetheless owed a trial as to severance damages. The Upland Members' opposition brief attempts to dodge this issue entirely by minimizing the Honorable Marlene Lynch Ford's decision ("Ford Decision") and this court's decision in John Robert Scaduto v. State of N.J., Dep't of Env't Prot., 474 N.J. Super. 427 (App. Div. 2023) ("Scaduto"), that there was no taking of the Upland Members' easement rights as a result of DEP's condemnation on the Beach Lot. Both courts also held that the Upland Members did not have an exclusive easement giving them the right to exclude the public from the Beach Lot and that the

Upland Members' rights were intertwined with the rights of the HOA in the Beach Lot. It thus follows that the Upland Owners should not receive a separate trial for the Beach Lot to determine potential severance damages.

The Upland Members, on three separate occasions, directly asked Judge Ford and this court whether DEP's SDRE condemnation over the Beach Lot effectuated a taking of their easement rights. They first asked in their cross-motion for summary judgment filed with Judge Ford. Judge Ford granted DEP's motion for summary judgment based on the entire controversy doctrine only and did not reach the Upland Owners' cross-motion. The second time, in their motion for reconsideration, the Upland Members again asked Judge Ford whether their easement rights were taken, and she specifically wrote that there was no taking. The third time the Upland Members presented this issue was in their appeal to this court in their Case Information Statement. Pa0290[1]. This court affirmed Judge Ford's analysis and found the SDRE condemnation did not change the character of the Upland Members' easements. Thus, the issue of whether DEP took the Upland Members' easement rights was fully adjudicated against them.

[1] In accordance with R. 2:6-8, "Pa" refers to Plaintiff's appendix. "Db" refers to Defendants' brief.

Despite these holdings, both courts held that the Upland Members should nevertheless be allowed to prove severance damages at the HOA's valuation trial. It should be noted that the Upland Members created a procedural predicament when they filed seven individual inverse condemnation actions after they had been actively participating in the HOA valuation proceedings and had filed a notice of appeal with the trial court. This resulted in the cross-motions for summary judgment and the resulting Scaduto decision, which was issued weeks before the scheduled trial. Perhaps due to the complicated procedural history here, both Judge Ford and this Court departed from well-established constitutional and condemnation principles by allowing for a valuation trial on severance damages even after the courts held that there was no taking. Where there is no taking, no severance damages are due, and incidental damages resulting from a taking on an adjacent property are not compensable. This court should reverse the trial court's decision and grant DEP's motion for summary judgment.

LEGAL ARGUMENT

THE TRIAL COURT ERRED IN DENYING DEP'S MOTION FOR SUMMARY JUDGMENT. (Pa0001, T19, 3-10).

As DEP previously explained, there was no taking of the Upland Members' easements, so they are not entitled to severance damages. It is well established that a governmental exercise of police power which does not destroy

use and enjoyment is not compensable. State ex rel. Com'r of Transp. v. Dikert, 319 N.J. Super. 310, 324 (App. Div. 1999)(citing Cappture Realty Corp. v. Bd. of Adjustment of Borough of Elmwood Park, 126 N.J. Super. 200, 313 (Law Div. 1973), aff'd, 133 N.J. Super. 216, 336 (App. Div. 1975) ("No right to compensation arises from valid exercise of the police."). Accordingly, this court should reverse the trial court's decision finding otherwise.

A. The Upland Members' Easement Rights In the Beach Have Not Been Taken.[2]

There are three easement rights claimed by the Upland Members that DEP does not dispute: (1) the Upland Members' right to access the Beach lot; (2) the Upland Members' non-exclusive recreation easement on the Beach Lot; and (3) the beachfront Upland Members' exclusive easement to construct a timber walkway and dune platform on the Beach Lot.[3] As Scaduto recognized, DEP took the SDRE subject to the Upland Members' access easements, so there is

[2] DEP addresses the Upland Members' property interest in the Beach Lot (Point I, B of the Upland Members' brief) first as it presents an initial threshold matter.

[3] The Upland Members first claimed entitlement to severance damages to their homes for the loss of the oceanfront Members' right to have a dune platform with a specific view Lot in their February 11, 2025 opposition to DEP's summary judgment motion. Pa0337-Pa0338. As noted in DEP's initial merits brief, the Upland Members have waived their right to assert this loss of view claim before the trial court and, by extension, this court. N.J.S.A. 20:3-11. And, on appeal from the Ford decision, this court acknowledged that "all agree only the recreation easement is at issue here." Scaduto, 474 N.J. Super. at 436.

clearly no taking of the Upland Owners' access rights. See Scaduto, 474 N.J. Super. 436 (acknowledging that because the SDRE "was expressly made subject to plaintiffs' access easement, all agree only the recreation easement is at issue here."). As to the non-exclusive recreation easements, both Judge Ford and Scaduto found that the easements were not taken in connection with the SDRE on the Beach Lot. Lastly, the Upland Owners acknowledge the dune platforms are outside of the SDRE, so there was no taking of those rights.

In their opposition brief, the Upland Members overstate the extent of their easement rights by misconstruing the August 16, 1994 Declaration Of Covenants and Restrictions (the "Declaration") which created those rights. (Pa0043). Specifically, the Upland Owners claim that, as a result DEP's SDRE taking, they lost "the right to a private beach exclusive to members of the association." Db14-15. However, the Upland Owners gloss over a 2005 Stipulation of Settlement in which the HOA, as part of a settlement between the HOA, the State of New Jersey, and several environmental groups, agreed to not interfere with the public's use of a portion of the Beach Lot. Pa0241. They also ignore the language in Scaduto:

> A review of the language of the easement makes plain that plaintiffs' easements in the beach lot are "non-exclusive." Plaintiffs read that language to mean their easements in the beach lot are exclusive in common with the Members of the other lots. But if that were the intent, the drafter could have written more directly . . .

> [.] Because we accord the words of the Declaration of Covenants and Restrictions their ordinary meaning, we cannot agree with plaintiffs that use of the beach lot "was exclusive to the members of the Association" and their easements precluded the Association from permitting anyone other than the members of the Association to use the beach."
>
> [Scaduto, 474 N.J. Super. at 439.]

Accordingly, the Upland Members did not have an exclusive right to a private beach prior to the taking of the SDRE.

Further, the Upland Members claim that, because of the SDRE and physical dune that will be constructed in the SDRE, their view of the ocean, foreshore, and bathers from the dune platforms is obstructed. Db14. However, the express language of the easement within the Declaration only granted the beachfront owners the right to erect and maintain a dune platform within specific areas identified on the plan attached to the Declaration. The beachfront Upland Members' platforms were all located outside of DEP's SDRE and their right to construct and maintain the dune platforms were not impacted. (Pa0358). Consistent with Scaduto, which held that the non-exclusive recreation easement did not prevent the HOA from allowing the public on the Beach Lot by selling beach badges, the dune platform easement does not prevent the HOA from

increasing the size of the dune using sand pushes.[4] Pa0550. In addition, neither the dune platform easement nor the SDRE prevents the beachfront Upland Members from seeking permission from the HOA to relocate their platforms to a different location on the project dune within the SDRE to address their view issues, if any.

Further, the court in State by Comm'r of Transp. v. Orenstein, 124 N.J. Super. 295, 301 (App. Div. 1973) developed a two-step analysis for easement taking cases, which is directly applicable and confirms that the Upland Members are not entitled to severance damages. Specifically, the court must consider and find (1) the purposed easement exists and (2) that the taking destroyed the easement. Id. If the answers to both are affirmative, then the court would have to rule there had been a taking of a property right for which the Upland Members were entitled to be compensated. While the Upland Members do have easement rights, those rights, as defined in the Declaration, were not destroyed by the taking as previously determined by Judge Ford and Scaduto. Given the facts and judicial determinations that there was not a taking, the Upland Members are not entitled to severance damages. Accordingly, this court should reverse the

[4] The HOA's appraiser, who is also the Upland Members' appraiser, testified at his deposition prior to the HOA trial that, after Hurricane Sandy, the HOA rebuilt the dune up to approximately 22 feet and regularly performed sand pushes.

trial court's denial of DEP's summary judgment motion and dismiss the Upland Members' severance damage claims.

B. The Upland Members Are Not Entitled To Severance Damages Because Two Courts Previously Held There Was No Taking Of The Upland Members' Easement Rights.

The Upland Members argue that DEP's reading of Judge Ford's decision is inaccurate and that, at best, Judge Ford's holding that there was no taking amounted to "dicta". Db11-12. The Upland Members further argue that they should not be precluded from claiming severance damages since Judge Ford's inverse condemnation actions dismissal was based on the entire controversy doctrine. Db15. However, the Upland Members ignore the fact that they filed a cross-motion for summary judgment on the grounds that there was a taking of their recreation easement on the Beach Lot and, thereafter, a motion for reconsideration, again specifically putting this issue directly before Judge Ford. While Judge Ford relied on the entire controversy doctrine in granting DEP's motion, she expressly found that there was no taking in her written decision on their motion for reconsideration. (Pa0023; Pa0150-Pa0155). Judge Ford specifically held (as the Upland Members acknowledge) that "[u]nlike in Orenstein, where the easement right of the property owner was actually taken, there was no such taking in this case. Simply stated, in Orenstein the easement was destroyed by the taking; in this case, the easements were preserved

notwithstanding the taking." (Pa0230). The Upland Members are aware of Judge Ford's ruling on this issue and raised it on appeal. The Appellate Division found that DEP's SDRE taking did not change the character of the Upland Members' easement rights. Scaduto, 474 N.J. Super. at 444. Thus, the Upland Members' attempt to minimize these holdings must be rejected.

Despite their respective holdings that there was no taking of the Upland Members' easements, both Judge Ford and this court determined that the Upland Members were entitled to a jury trial to determine severance damages, if any. These holdings are at odds and depart from well-established law. Absent a taking, the Upland Members are not entitled to severance damages.

Both the Federal and State Constitutions require the payment of compensation when there has been a taking. U.S. Const. amend. V; N.J. Const. art. 1, para. 20. Conversely, "[i]f there has not been a taking, any loss that may have been suffered is . . . a noncompensable governmental exercise of the police power.…" Wash. Mkt. Enters., Inc. v. Trenton, 68 N.J. 107, 116 (1975) . Landowners are only entitled to just compensation damages caused by the condemnor's use of the property taken from the landowners. State ex rel. Com'r of Transp. v. Marlton Plaza Assocs., Ltd. P'ship, 426 N.J. Super. 337, 358-59 (App. Div. 2012). Incidental or consequential damages are not compensable under our condemnation jurisprudence due to the speculative nature of these

claims. State by Comm'r of Transp. v. Van Nortwick, 287 N.J. Super. 59, 71-72, (App. Div. 1995). See also, State by Comm'r of Transp. v. Cooper Alloy Corp., 136 N.J. Super. 560, 568 (App. Div. 1975)("[j]ust compensation generally does not include losses or costs that are incidental to a taking")(emphasis added); Marlton Plaza Assocs., Ltd. P'ship, 426 N.J. Super. at 361 ("the court recognized that not all damages are compensable, particularly if those damages are speculative, incidental, or 'peculiar to the owner as opposed to being directly attributable to the realty.'"); State by Comm'r of Transp. v. Dikert, 319 N.J. Super. 310, 324 (App. Div. 1999)(any alleged viewshed injury is considered damnum absque injuria (or loss or damage without injury) and is not compensable").

Further, "[n]ot every impairment of value establishes a taking. To constitute a compensable taking, the land owner must be deprived of all reasonably beneficial use of the property." Greenway Dev. Co. v. Borough of Paramus, 163 N.J. 546, 553 (2000)(internal quotations and citations omitted). And, in Borough of Harvey Cedars v. Karan, 214 NJ 384 (2013), the Court found that loss of view is compensable if the property owner's ocean view is obstructed. Id. at 391. Here, DEP condemned an SDRE, but not on the Upland Members' owned properties. Thus, the Upland Members' reliance on Karan should be rejected and no compensable taking has occurred.

The trial court relied on this court's departure from well-established constitutional principles and condemnation jurisprudence when it denied DEP's motion. Pa0013. Accordingly, this court should reverse the trial court's decision and dismiss the Upland Owners' claims.

C. Unity Of Ownership And Unity Of Use Are Essential Elements Of A Claim For Severance Damages.

The Upland Members contend that unity of ownership is not required when the "interest taken is a vested property interest" and that their access and dune platform easements constitute vested property interests. However, despite their vested property interest, the Upland Members must still establish unity of ownership and use.

New Jersey law is clear that to recover severance damages resulting from a taking, a condemnee must demonstrate (1) that the two parcels are functionally integrated; that each is reasonably necessary to the use and enjoyment of the other (unity of use); and (2) that he substantially owns both parcels (unity of ownership)." Housing Authority of City of Newark v. Norfolk Realty Co., 71 N.J. 314, 325 (1976). The Upland Members' brief argues that the case law on severance damages only applies where there are physically separate parcels. Db20-22. However, this misunderstands the law. The two-part Norfolk Realty test still applies even in the event of a taking of physically contiguous properties. See e.g., Union County Improvement Authority v. Artaki, LLC, 392 N.J. Super.

141, 150 (App. Div. 2007) (condemnation for redeveloping five contiguous properties). In other words, both unity of use and unity of ownership apply to contiguous and non-contiguous properties. Here, the Upland Members cannot show unity of ownership. Thus, the Upland Members are not entitled to damages as a matter of law.

In addition, the decision in City of New York, 269 N.Y. 64, 67 (N.Y. 1935), is instructive and persuasive, despite the Upland Members' claim to the contrary. In that case, the court stated that "the easements, for practical purposes, had become merged in the membership rights [, and] . . . the Members of the dominant tenements [were] damaged primarily through the destruction of their membership rights." Id. at 74-75. The court thus determined that "[t]he damage to the [association] by the taking of the land is the value of the use of that land by the [association] for the benefit of those accorded membership rights therein." Id. at 75. Here, similar to City of New York, the Upland Members' recreation easements were subsumed within and conditioned upon their Bayhead HOA membership. They are not separate and distinct from the Bayhead HOA membership rights. As such, only the HOA was entitled to receive compensation for the taking, not the Upland Members.

Moreover, the Upland Members cite to the Uniform Appraisal Standards for Federal Land Acquisitions for the proposition that "[t]he owner of an

easement is entitled to compensation for the diminution in value of the property which it serves." Db20 quoting Uniform Appraisal Standards For Federal Land Acquisitions, Section 4.6.5.3, pages 172 and 173 (2016). However, that section relates to "when the United States' acquisition of a servient estate also acquires or extinguishes a third party's appurtenant easement…" Id. at 143. The federal case law cited to confirms that the appurtenant easement must be taken for the easement holder to be entitled to severance damages. See United States v. 57.09 Acres of Land, 706 F.2d 280, 282 (9th Cir. 1983); United States v. Welch, 217 U.S. 333, 339 (1910). Again, there must be a taking (i.e. destroy or extinguish) of the appurtenant easement for the easement holder to be entitled to compensation. Here, however, two courts found that there was no taking of the Upland Members' rights of access to the Beach Lot or to recreate on the Beach Lot. As such, Upland Members are not entitled to compensation as a matter of law. Thus, this court should reverse the trial court's denial and dismiss the Uplands Members' claims.

D. If This Court Affirms The Trial Court's Determination That The Upland Members Are Entitled To Damages, The Upland Members Claims Should Be Adjudicated Via An Allocation Hearing.

Finally, even if this court affirms the trial court's determination that the Upland Members are entitled to a trial on damages, the claims of the Upland Members should be adjudicated via an allocation hearing to determine their

share of the HOA's award of $632,780.00 under the "unit rule." The "unit rule" means that one award as a whole of just compensation is made which constitutes "a summation of all of the values of all of the separate interests in the property." N.J. Sports & Exposition Auth. v. E. Rutherford, 137 N.J. Super. 271, 279-80 (Law Div. 1975).

As DEP explained, the Upland Members' easements, for all practical purposes, have been merged into their membership rights similar to the owners of the dominant estates in City Of New York. See Matter of Radisson Cmty. Ass'n, Inc. v. Long, 809 N.Y.S.2d 323, 328-29 (App. Div. 2006)(homeowners association's tax appeal relied on City of New York to determine that "the value of the easements in the common parcels held by the dominant estates was reflected in the homeowners' membership rights" in the association); Murphy v. State, 787 N.Y.S.2d 120, 126-127 (App. Div. 2004)(court found that in condemnation of common elements in a condominium association, condominium association "should recover a collective reward for all direct and consequential damages" because the "land taken was owned by all, for the benefit of all owners."). Indeed, the Upland Members' recreation easements were expressly found by both Judge Ford and the Scaduto court to be subsumed within and conditioned upon HOA membership. Judge Ford specifically held in deciding the Upland Members' motion for reconsideration that: "the interest of

Plaintiffs, as members of the Bayhead HOA, were adequately protected by the Bayhead HOA" and "the taking did not change, alter, or otherwise impact the access and recreational easements which continue to be held by Plaintiffs." (Pa0218). Similarly, Scaduto found that the Upland Members' claims for severance damages "flowing from the State's storm damage reduction easement are intertwined with the Association's just compensation claim for the same taking[.]" Scaduto at 444. The HOA's and the Upland Members' claims have thus always been intertwined and the Upland Members' compensation, if any, should be determined only in an allocation hearing with the HOA.

CONCLUSION

For the reasons set forth above, DEP respectfully asks this court to reverse the trial court's summary judgment denial and dismiss the Upland Members' claims for severance damages; or, in the alternative, remand this matter to the trial court for an allocation hearing.

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Dated: August 6, 2025