

<p>Long Beach Township, Beach Haven, Ship Bottom, Barnegat Light, Surf City, Harvey Cedars, Brigantine, and Ventnor City,</p> <p style="text-align: center;">Plaintiffs/Appellants,</p> <p>v.</p> <p>New Jersey Department of Environmental Protection</p> <p style="text-align: center;">Defendant/Respondent,</p> <p>And</p> <p>Atlantic Shores Offshore Wind, LLC, Atlantic Shores Offshore Wind Project 1, LLC, and Atlantic Shores Offshore Wind Project 2, LLC,</p> <p style="text-align: center;">Intervenors/Respondents.</p>	<p>SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-2738-23</p> <p><b>ON APPEAL FROM:</b></p> <p>CHANCERY DIVISION: MERCER COUNTY DOCKET NO.: MER- 88-C-23</p> <p>Sat Below:</p> <p>Hon. Patrick J. Bartels, P.J.Ch.</p> <p style="text-align: center;"><b><u>Civil Action</u></b></p>
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**PLAINTIFFS/APPELLANTS' BRIEF AND APPENDIX**

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## **PRELIMINARY STATEMENT**

Plaintiffs, a coalition of shore municipalities along New Jersey's cherished coastline (the Shore Municipalities) – whose economies, environment, and very way of life are at stake, have been forced into a corner by a process that has stripped them of any meaningful right to challenge the Department of Environmental Protection's (DEP) approval of the world's largest and closest to shore offshore wind project. The Atlantic Shores Offshore Wind Project (ASOW) – whose wind turbines would tower over 1,000 feet tall and be obnoxiously visible from as close as nine miles from the shoreline—will have a profound and lasting visual impact on New Jersey's pristine beaches, eroding tourism, and in turn, reducing local tax revenues. ASOW's own documents confirm that the Project will devastate marine life, disrupt the seafloor, and harm the local fishing industry. Yet the DEP dismissed those threats in favor of pushing the project forward.

The DEP's disregard for the significant economic and environmental harm is symptomatic of a process tainted by political pressure, not guided by objective scientific analysis. It was evident from public comments and DEP's actions that the agency was under immense pressure to fulfill the Governor's ambitious wind energy agenda. This is a once-in-a-century project with immense and irreversible ramifications, yet it is being bulldozed through an approval process

devoid of the transparency and impartiality such a monumental decision demands.

In the proceedings below, the Shore Municipalities sought a referral to the Office of Administrative Law (OAL) for an independent fact-finding hearing before DEP issued its final decision to ensure that a neutral party, outside of the political influence, would review this matter. It was not a request to obstruct or delay, but simply an attempt to ensure that a neutral party, free from political influence, would conduct a thorough review of the project's impacts. The stakes are too high for this decision to be left in the hands of an agency that appears beholden to the Governor's agenda.

The trial court's holding that it lacked jurisdiction was erroneous. No rule or precedent prohibited the court from granting the relief sought. The Shore Municipalities were not challenging a final agency decision and thus, not invoking this Court's exclusive jurisdiction; they were raising concerns about bias within the agency before a final decision was made. By dismissing the case at this juncture, the court failed to protect the right of the Shore Municipalities to have their concerns heard before irreversible harm is done to their communities.

The Shore Municipalities sought, and should have obtained, discovery to uncover whether the DEP has acted with neutrality rather than to unconditionally

serve a political agenda. That discovery was essential to ascertain the degree of political influence exerted on the DEP and whether the agency ignored or downplayed scientific evidence and public concerns to serve a predetermined outcome.

The trial court's dismissal of the lawsuit effectively silencing the Shore Municipalities' concerns and denying them standing to challenge the DEP's actions, creates an absurd result. It leaves no party able to challenge the agency's bias or lack of impartiality until after the damage is done. The trial court should have exercised its equitable powers to ensure that decisions of this magnitude are made with transparency and care, free from bias, and that the long-term interests of New Jersey's coastal communities are protected.

This case is about ensuring that a once-in-a-century transition to green energy is vetted with the care and scrutiny it demands. The Atlantic Shores project represents an unprecedented leap forward, but one that must be balanced with the potential irreversible harm to local economies and the environment. If there is so much as even an iota of political influence—real or perceived—it must be reviewed by an independent entity not beholden to the Governor's agenda. The stakes are simply too high for a rubber-stamped process, and yet, that is precisely what occurred here.

## PROCEDURAL HISTORY

The Shore Municipalities brought this action on December 1, 2023 by way of Verified Complaint and Order to Show Cause. [Pa13-96<sup>1</sup>] The thrust of the complaint alleged that Governor Murphy’s aggressive alternative energy agenda, as outlined in various executive orders, pressured the DEP to approve offshore wind projects, including the Atlantic Shores project, thereby compromising the ability of the DEP’s Commissioner and agency staff to neutrally and impartially review Atlantic Shores’ application. The complaint, thus, sought as relief that the trial court direct that DEP refer the Atlantic Shores’ application to the Office of Administrative Law for an impartial ALJ to conduct a hearing and review it in the first instance.

The Order to Show Cause, which was entered by the trial court on December 6, 2023, sought preliminary restraints against the DEP from issuing any federal consistency certification for the Atlantic Shores project pending the completion of expedited discovery concerning the DEP’s bias and lack of impartiality, continuing through the court’s final disposition of the action. [Pa93-96]

On or about December 14, 2023, Atlantic Shores intervened in the action by consent. [Pa97-100] The DEP and Atlantic Shores both moved to dismiss the

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<sup>1</sup> “Pa” refers to Plaintiff/Appellants’ Appendix.

action on January 10, 2024, arguing the court lacked jurisdiction, that the Shore Municipalities' complaint was somehow both unripe and untimely, and that the complaint failed to state a claim upon which relief could be granted. [Pa101-106]

The trial court heard oral argument on the motions to dismiss and on the order to show cause on March 13, 2024. T4-47<sup>2</sup> It then issued an order and statement of reasons on March 28, 2024, granting the DEP and Atlantic Shores' motions to dismiss. [Pa107-113] The court determined that it lacked jurisdiction because the DEP had not yet made a final decision on the consistency determination and it did not believe that this was a contested case that gave the Shore Municipalities a right to an administrative hearing. [Pa112-13] The court held that once the DEP issues its consistency decision, the Shore Municipalities can appeal that decision directly to this Court pursuant to R. 2:2-3. [Pa112]

Immediately following the trial court's dismissal of the lawsuit, the DEP issued its consistency determination on April 1, 2024 which arbitrarily, although predictably, found that the Atlantic Shores project is in compliance with New Jersey's Coastal Zone Management rules, despite undeniable adverse impacts of the project. [Pa114-62] On May 14, 2024, the Shore Municipalities filed an appeal of that final agency decision, which is separately pending under Docket

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<sup>2</sup> "T" refers to the March 13, 2023 Transcript of Hearing.

No. A-2743-23.<sup>3</sup> The Shore Municipalities separately filed the instant appeal on May 13, 2024 of the trial court’s dismissal of its pre-decision request to refer the matter to the OAL before an impartial adjudicator and its request for pre-decision discovery on the DEP’s bias and lack of impartiality.

### **STATEMENT OF FACTS**

Governor Phil Murphy has taken an unyielding stance to make New Jersey the national leader in offshore wind projects, despite increasing evidence of their detrimental impacts. Governor Murphy pledged to decrease the impact of climate change through a commitment to reaching 100 percent clean energy by 2050. [Pa16] Within a few weeks of taking office, he signed Executive Order 8, setting “an aggressive offshore wind energy goal.” [Pa17] He directed DEP, BPU, and all other State agencies to “take all necessary actions to implement” that agenda. Id. In November 2019, Governor Murphy signed Executive Order 92, making that agenda even more aggressive, with a production goal of 7,500 MW by 2035. Id. On September 21, 2022, Governor Murphy signed Executive Order 307, which, again increased New Jersey’s offshore wind by nearly 50% by the year 2040. [Pa18]

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<sup>3</sup> The Shore Municipalities also contemporaneously filed a motion with DEP for a stay pending appeal, along with a third third-party hearing request, which the agency denied on June 14, 2024. The Shore Municipalities subsequently move before this Court for a stay pending appeal.

In addition to those executive orders, since taking office in 2018, the Murphy Administration has led a targeted effort focused on achieving clean energy, including signing the Clean Energy Act (“CEA”) into law, (P.L.2018, c.17) [Pa17], unveiling the state’s Energy Master Plan, which outlines key strategies to reach his goal of 100 percent clean energy by 2050, developing a “wind port” in Salem County along the Delaware Bay that would become a hub for construction of wind turbines, establishing a Wind Institute to coordinate workforce development and research and development in offshore wind, and authorizing a \$250 million investment in the Port of Paulsboro for turbine component manufacturing. [Pa17-18] Governor Murphy is one of the nation's strongest advocates for offshore wind as “a core strategy” to reduce reliance on fossil fuels. He repeatedly has made clear that he wants to make New Jersey the “hub” of East Coast’s offshore wind energy and “epicenter” of the wind energy industry. Governor Murphy stated, “[o]ur renewed and strengthened commitment to offshore wind development testifies to my Administration’s understanding that, regardless of our impressive successes to date, there is always more that we can do to make New Jersey more sustainable while further advancing the state’s economic vitality.” [Pa18] To be sure, this is a legacy making initiative.

Governor Murphy explicitly has charged all State agencies, including the DEP, to “take all necessary actions” to implement his aggressive goal of offshore wind energy generation in New Jersey. The Governor stated at a Climate Change Conference, “[t]his is a whole of government approach. So anyone who thinks this is just a Department of Environmental Protection initiative, *which it obviously is*, is missing the broader picture. [Pa19] The DEP, in turn, has worked to implement Governor Murphy’s agenda. DEP Commissioner Shawn M. LaTourette has echoed the Murphy Administration’s “commitment to improving our environment . . . through our pursuit of a just clean energy transition and clean water for all” and applauded the Governor’s “course for accelerating New Jersey’s green economic growth.” [Pa19]

In response to the Governor’s directives, the BPU issued multiple solicitations for qualified Offshore Wind (OSW) projects to build an OSW facility in areas leased from the Federal Bureau of Ocean Energy Management (“BOEM”) in federal waters off the coast of New Jersey. [Pa19] In June 2021, the BPU awarded a total of 2,658 megawatts of offshore wind capacity to two projects, including Atlantic Shores Offshore Wind, which is the subject of this lawsuit. Those two projects represented the largest combined offshore wind award in the nation at the time. [Pa20]

The Atlantic Shores projects would be owned and operated by Atlantic Shores Offshore Wind Project 1, LLC and Atlantic Shores Offshore Wind Project 2, LLC, (together, the Projects). The Projects involve the construction of up to 200 wind turbines, with structures reaching over 1000 feet tall and rotor blades extending more than 900 feet. [Pa20] The proposed installation covers an expansive area just off of the pristine beaches of Long Beach Island and Atlantic County and at its closest point, the wind turbine generators (as well as offshore substations and various cables) would be approximately 8.7 miles from the New Jersey shoreline. [Pa21] The proposed Projects would be the first of their kind in the United States and will be the largest, tallest, and closest-to-shore wind farm ever built.

Because the turbines are proposed to be constructed more than three miles off the shore, DEP's role in reviewing it has been limited. Nonetheless, under the federal Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451 et seq., New Jersey, through DEP, was authorized to review the project for consistency with its enforceable coastal policies.

The CZMA is a federal statute designed to promote the "effective management, beneficial use, protection, and development of the coastal zone." 16 U.S.C. § 1451(a). In the CZMA, Congress recognized that "[b]ecause of their proximity to and reliance upon the ocean and its resources, the coastal states

have substantial and significant interests in the protection, management, and development of the resources of the exclusive economic zone that can only be served by the active participation of the coastal states in all Federal programs affecting such resources and, wherever appropriate, by the development of state ocean resource plans as part of their federally approved coastal zone management programs. 16 U.S.C. § 1451(m).

In furtherance of these goals, the CZMA and its implementing regulations require that federal actions within a state's coastal zone, or which would have a reasonably foreseeable coastal effects within a state's coastal zone, be consistent with the enforceable policies of that state's federally-approved coastal management program to the maximum extent possible. 16 U.S.C. § 1456(c)(1)(A); 15 C.F.R. § 930 et seq. The CZMA thus bars federal agencies from approving proposed development affecting the coastal zone "until the state or its designated agency has concurred with the applicant's certification" that the development is consistent with the state's coastal policies. 16 U.S.C. 1456(c)(3)(A).

New Jersey has an approved coastal zone management program, contained in DEP's Coastal Zone Management ("CZM") Rules, N.J.A.C 7:7-1.1 et seq. Among other requirements, these rules contain requirements to protect scenic resources, N.J.A.C. 7:7-16.10, threatened and endangered wildlife, N.J.A.C.

7:7-9.36, critical wildlife habitat, N.J.A.C. 7:7-9.37, surf clam areas, N.J.A.C. 7:7-9.3, marine fish and fisheries, N.J.A.C. 7:7-16.2, and prime fishing areas, N.J.A.C. 7:7-9.4

Pursuant to the CZMA, Atlantic Shores submitted a request to DEP for a federal consistency certification. On May 31, 2023, the DEP and Atlantic Shores mutually agreed to stay the DEP six-month consistency review period in an effort to “provide sufficient time for discussions, meetings, and exchange of materials between Atlantic Shores and the NJDEP.” Pursuant to the stay agreement, the DEP consistency decision was originally due by January 12, 2024. [Pa22; Pa47-51] The DEP has held several rounds of public comment periods on Atlantic Shores’ application.

On June 29, 2023 and then again on October 19, 2023, the Shore Municipalities submitted comments raising serious concerns about the impacts of Projects of such size, scope, and proximity on the shore economy as well as environmental resources, noting that approval of the Projects would destroy the coastal resources upon which the Municipalities rely and the very resources New Jersey’s Coastal Zone Management regulations were designed to protect. [Pa52-85]

Among other things, the Shore Municipalities noted that constructing such large turbines so close to shore would have devastating negative visual impacts

communities that thrive from offering scenic and immaculate beach views. The New Jersey Administrative Code explicitly limits coastal development that is not visually compatible with existing scenic resources. N.J.A.C. 7:7-16.10(c) restricts “[n]ew coastal development that is not visually compatible with existing scenic resource in terms of large-scale elements of building and site design.” That regulation reflects the broader principle that development projects, particularly those of significant scale, must be carefully assessed for their potential impact on scenic resources. A project “which is of a scale and location that has significant effect on the scenic resources of a region is considered to have a regional impact and to be of State concern.” N.J.A.C. 7:7-16.10(g). Such developments are “discouraged”—meaning they are “likely to be rejected or denied” by the DEP, especially when they could have a significant adverse effect on the scenic resources of the coastal zone. N.J.A.C. 7:7-1.5; N.J.A.C. 7:7-16.10(g).

The visual impact assessments conducted as part of the Projects’ planning confirmed these concerns. For instance, the visual simulations provided by Atlantic Shores indicate that from key observation points along Long Beach Island, including popular locations like Beach Haven, the turbines would be highly visible and intrusive. The assessment rated the visual impact at several of these points as “significant,” meaning the turbines would dominate the view,

drawing immediate attention, and alter the visual experience that visitors expect from these scenic locations. [Pa25-28; Pa57-62] The economic implications of the visual disruptions are substantial. The Shore Municipalities have long been marketed and celebrated for their scenic ocean views and natural beauty. This visual appeal is integral to the tourism industry, which generates hundreds of millions of dollars annually in revenue. The Projects' proximity to shore threatens to diminish the area's attractiveness and consequent competitiveness as a tourist destination, leading to staggering losses of million of dollars in state and local tax revenue. [Pa28; Pa62-66] The visual degradation could also impact property values; studies have shown that proximity to wind turbines can reduce property values, particularly in communities where views and scenic quality are central to the appeal. Id.

The Shore Municipalities further raised concern that the Projects would negatively impact fish and fisheries. [Pa30-33; Pa69-72] The proposed wind turbines and associated infrastructure, including underwater cables and substations, pose significant risks to marine life. The physical presence of these massive structures is likely to disrupt essential habitats for fish and other marine species, leading to a decline in local populations. This is particularly concerning for commercial and recreational fisheries that depend on healthy fish populations. N.J.A.C. 7:7-16.2, which governs marine fish and fisheries, dictates

that development projects must avoid or minimize adverse impacts on fishery resources. The regulation specifically aims to protect areas critical to the lifecycle of marine species, including spawning grounds, nurseries, and feeding areas.

The Shore Municipalities also indicated the potential harm to endangered marine mammals, most notably the critically endangered North American Right Whale (NARW). [Pa33-36; Pa72-75] The relevant regulations, including N.J.A.C. 7:7-9.36, which pertains to the protection of threatened and endangered wildlife, and N.J.A.C. 7:7-9.37, which governs critical wildlife habitats, underscore the need for stringent protective measures. Those rules mandate that any development project must avoid significant adverse impacts on endangered species and their habitats. The population of the NARW has been declining for years; they are already under significant threat from ship strikes, entanglements in fishing gear, and habitat loss. The introduction of offshore wind turbines in their migratory paths and feeding grounds would exacerbate those threats, leading to increased mortality rates, further endangering this already vulnerable species that is on the brink of extinction. [Pa33-36; Pa72-75]

Last but certainly not least, the Shore Municipalities voiced grave concerns about the ability of the DEP to impartially review the Atlantic Shores project application. [Pa37-38; Pa53-54] Central to those concerns is the intense

political pressure exerted by Governor Murphy's administration, which has made offshore wind development a cornerstone of its environmental and energy policy. The Governor's executive orders have established aggressive targets for offshore wind energy production and mandated that all relevant state agencies, including the DEP, "take all necessary actions" to achieve these goals. The Shore Municipalities expressed concern that the top-down directive has effectively compromised the DEP's ability to serve as a neutral arbiter in reviewing the Atlantic Shores application. The DEP Commissioner, who serves at the pleasure of the Governor, is under significant pressure to align with the administration's priorities, which creates an inherent conflict of interest, as the Commissioner and DEP staff unquestionably have felt immense pressure to approve the Projects, despite the undeniable devastating economic and environmental impacts. Anyone who has spent time in government and understands the relationship that the Governor has with his or her cabinet members appreciates the existence of that pressure as well as the extraordinary difficulty in resisting that pressure. The DEP's role as an independent regulator is crucial in safeguarding New Jersey's coastal resources from projects that could cause significant harm. Because the DEP has become closely aligned with the Governor's agenda, the Shore Municipalities fear the DEP would prioritize the

advancement of offshore wind projects over a thorough and impartial evaluation of their potential impacts.

To address those concerns, the Shore Municipalities requested that the DEP refer the matter to the OAL for review by an impartial administrative law judge. [Pa54] An ALJ, who is not subject to the same political pressures as the DEP, would be able to objectively assess whether the Atlantic Shores Projects comply with the relevant regulations, including those designed to protect scenic resources, marine life, and coastal ecosystems.

The DEP rebuffed the Shore Municipalities' request for an independent assessment of the Projects [Pa91], causing the Shore Municipalities to file this action in the Chancery Division wherein they sought to compel DEP to refer the matter to the OAL. Significantly, as part of its request for a hearing before the OAL, the Shore Municipalities sought pre-decision discovery aimed at showing bias within the DEP decision-making process – i.e., documents and communications that would reveal any undue influence or lack of neutrality in the DEP's actions – which would support the need for an adjudicative hearing before DEP could act.

The Shore Municipalities informed the chancery court in their briefing that they “intend to seek [] targeted expedited discovery in support of their claims that DEP is incapable of acting impartially in its review of the Atlantic

Shores application.” [Pa167]. They explained that “absent an injunction against the DEP issuing a consistency determination [], the DEP can proceed to issue its determination before there has been any record created concerning its ability to do so consistent with principles of procedural due process.” [Pa170)] The Shore Municipalities emphasized the need for discovery to develop a record regarding bias at oral argument, explaining:

if this Court doesn’t intervene now, we will never get discovery or a plenary hearing on bias, and that means that there is a strong likelihood that a bias (indiscernible) appearance of bias with no record supporting his objectivity is going to make this extraordinary and irreversible decision that will affect every single citizen that lives on LBI and, frankly, the entire State.

T8:15-22 (emphasis added). The request for pre-decision discovery aimed at ascertaining bias and a hearing before a neutral adjudicator were at the core of the relief sought by the Shore Municipalities in their application to the trial court.

On March 28, 2024, the trial court denied the relief sought by the Shore Municipalities and dismissed its lawsuit on procedural grounds – because no final DEP agency decision – i.e., the consistency determination – had taken place. As such, the court never reached the merits of the Shore Municipalities’ substantive claims and, consequently, foreclosed its opportunity to develop a record concerning the DEP’s bias. Immediately thereafter, on April 1, 2024, the

DEP issued its consistency certification, predictably rubber-stamping the Project. [Pa114-168] And since the trial court denied the Shore Municipalities' application, the DEP's decision to approve the project proceeded without any record developed about the agency's bias.

### **LEGAL ARGUMENT**

This Court reviews the trial court's decision dismissing the Shore Municipalities' complaint for lack of jurisdiction under a de novo standard of review. "Whether subject matter jurisdiction exists is a purely legal issue, which [appellate courts] review de novo." Santiago v. N.Y and N.J. Port Auth., 429 N.J. Super. 150, 156 (App. Div. 2012) (citation omitted). "As a result, the motion judge's 'interpretation of the law . . . [is] not entitled to any special deference.'" Ibid. (quoting Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995) (alteration in Santiago). Applying that standard, and for the reasons set forth below, the trial court erred in finding that it lacks jurisdiction and dismissing the Shore Municipalities' lawsuit.

#### **1. The trial court erred in finding that it lacks jurisdiction to hear the merits of Plaintiffs' claims. [Pa111-12]**

The trial court erroneously concluded that it lacked jurisdiction because the DEP had not yet made a final decision on the consistency determination. In so holding, the trial court misconstrued the relief that the Shore Municipalities

sought, as well as applied an overly narrow interpretation of R. 2:2-3. The Shore Municipalities were not seeking to challenge a final agency decision; they were challenging the fairness and impartiality of the process leading up to that decision, including developing a pre-hearing record on bias. The Shore Municipalities' request for an adjudicatory hearing was not merely about obtaining a forum to review the DEP's final decisions on the consistency certification. An appeal of that decision is already pending in the parallel proceeding under Docket No. A-2743-23 where the Shore Municipalities contest the DEP's consistency certification. This lawsuit was fundamentally about ensuring that the DEP's actions are impartial and free from undue political influence.

The trial court's reliance on R. 2:2-3 – vesting this Court with exclusive jurisdiction over final agency decisions – was misplaced. R. 2:2-3 provides that appeals may be taken as of right to the Appellate Division “to review final decisions or actions of any state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer....” R. 2:2-3(a)(2) was promulgated, among other reasons, for the purpose of providing a speedy review of a proceeding conducted within the state administrative agency itself and involving parties who are given an opportunity to be heard. But what is not contemplated is that a full plenary proceeding among adversaries be held before

the Appellate Division. This can only be had in the Law Division. See Committee to Recall Robert Menendez From the Office of U.S. Senator v. Wells, 204 N.J. 79, 89 (2010) (noting, without challenging jurisdiction, that the Committee had filed a complaint in lieu of prerogative writs in the Law Division to compel agency to accept or reject notice of intention).

R. 2:2-3 has been interpreted to mean that the mode of review so provided is exclusive. Pascucci v. Vagott, 71 N.J. 40, 51–52 (1976). However, a limitation upon the applicability of that rule exists “where the proposed administrative action has not been preceded by the creation in the agency of a record which is amenable to appellate review.” Montclair Twp. v. Hughey, 222 N.J. Super. 441 (App. Div. 1987).

For example, in Pfleger v. N.J. State Highway Dept., 104 N.J. Super. 289 (App. Div. 1968), plaintiff filed a Chancery Division complaint seeking to enjoin the State Highway Department from proceeding with contemplated construction on State Highway 35 because the elevation adjacent to plaintiffs’ premises would cause severe flooding of his property. Plaintiff amended his complaint to compel the Department of Transportation (DOT) to initiate condemnation proceedings to establish the value of the property taken, and to transfer the action to the law division. Id. at 290. Rather than transfer the case to the Law Division, the Chancery Division transferred the case to the Appellate

Division under R.R. 4:88-8, the predecessor rule that governed at the time, because the lawsuit was brought against a state administrative agency.

This Court reversed, holding that the case should have been transferred to the Law Division. This Court stated that there was no administrative machinery within the DOT for itself condemning land, for hearing the arguments for and against seeking condemnation in court, for deciding whether or not a ‘taking’ has been effected; or any procedure by which a record may be made before the DOT that this Court can review. Id. at 292.

In Frapaul Constr. Co. v. Transportation Dep't of N.J., 175 N.J. Super. 84 (App. Div. 1980), plaintiff entered into a contract with the DOT for construction work in Paterson. A dispute arose over the payment for portable curbing, with plaintiff claiming payment for 6,300 linear feet based on the actual amount installed, while the DOT maintained that only 3,200 linear feet was required under the contract. Plaintiff submitted its claim to the DOT’s Claims Committee, which denied the claim. An appeal followed. Id. at 87-89.

This Court ultimately determined that the case belongs in the Law Division, as the Claims Committee’s decision was not a final agency action and did not provide a sufficient record for appellate review. In discussing the parameters of 2:2-3(a)(2), the Court noted that “the appellate review provided for is basically a substitution for the common law writ of certiorari” which was

“a form of appellate review to correct errors of law apparent on the face of the record of proceedings in a lower judicial or quasi-judicial tribunal. Id. at 90. The Court held that the conclusions of the DOT Claims Committee are not final decisions within the meaning of R. 2:2-3(a)(2) and the Claims Committee does not provide a judicial type of hearing such as is necessary to adjudicate a construction contract controversy, including the lack of provisions for discovery or presentation of evidence. Id. at 91.

In Colon v. Tedesco, 125 N.J. Super. 446, 452 (Law Div. 1973), plaintiff alleged the Department of Labor and Industry had failed to act to regulate conditions at a migrant camp. The Department moved to dismiss, alleging the Law Division lacked jurisdiction over the dispute. The court declined to do so, finding that:

In the case at bar there has been no adversary type of proceeding in the Department of Labor and Industry. There is no provision for same. This is not a quasi-judicial matter before said Department. No intramural record of any kind has been made. The Appellate Division cannot obtain a record to review, absent a plenary hearing before a judge.

Colon, 125 N.J. Super. at 452.

Last but not least, in Hughey, 222 N.J. Super. 441, this Court addressed whether consolidated actions against the DEP were properly brought in the Law and Chancery Divisions or whether they should have been filed directly in the

Appellate Division. The case arose after Governor Kean, using emergency powers, directed the DEP to remove radium-contaminated soil from residential areas in Montclair and Glen Ridge. When the DEP planned to move the contaminated soil to a site in the environmentally sensitive Pinelands, the Township of Jackson and Ocean County sought to enjoin the DEP's actions through lawsuits in the Law Division, citing threats to public health and environmental harm.

The DEP argued that the actions are under the exclusive purview of this Court pursuant to R. 2:2-3(a)(2). This Court disagreed, affirming the decision to keep the cases in the trial courts. The Court held that the “R.2:2–3(a)(2) contemplates appellate review only of administrative actions of a *quasi*-judicial or *quasi*-legislative nature based on a record.” *Id.* at 441. However, in that case, the consolidated actions were “brought to halt an alleged threatened breach of public and private rights, not to review an administrative proceeding” and involved issues that required fact-finding, the gathering of evidence, and the application of legal principles—functions appropriate for trial courts. *Id.* at 448.

The same principles apply here. The circumstances of this case warranted the exercise of jurisdiction in the trial court to establish a record concerning DEP's lack of impartiality. The Shore Municipalities' allegations of agency bias and the absence of objective fact inquiry lie at the heart of this action. The DEP

disputed those allegations and claimed it was capable of neutrally reviewing Atlantic Shores' application. There have been and will be no proceedings before the DEP concerning its impartiality, and no discovery has been or can now be obtained. By way of the below action, the Shore Municipalities sought to develop a record in the trial court over DEP's neutrality, including communications and directives from the Governor's office and DEP's Commissioner, communications and promises to Atlantic Shores, and the thoroughness of DEP's review.<sup>4</sup> Nothing in the language, purpose, history, nor application of R. 2:2-3 foreclosed the trial court from granting the Shore Municipalities the relief they were seeking.

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<sup>4</sup> Significantly, the Atlantic Shores South Project is not the only offshore wind turbine project in the works. The same applicant – Atlantic Shores –has another consistency certification application pending for a similar project immediately adjoining this one off the coast of Long Beach Island. See [https://dep.nj.gov/wp-content/uploads/bulletin/bu2024\\_0515.pdf](https://dep.nj.gov/wp-content/uploads/bulletin/bu2024_0515.pdf).

Other applications are also likely forthcoming, as Governor Murphy has pledged to achieve 100% clean energy by the next two decades and has charged every agency in the State, including the DEP, to “take all necessary actions” to implement his aggressive goal of offshore wind energy generation in New Jersey. [Pa17]

Thus, the need to determine if the DEP is acting impartially is more than about the Atlantic Shores project; it is about ensuring that the DEP carries out its function properly as to all wind energy projects with the right goals and in the best interests of New Jersey's citizens, not merely to fulfill the Governor's agenda.

This Court has held that in certain instances, it is appropriate for courts to assume jurisdiction “where the tribunal or the agent designated to conduct the hearing in the first instance is biased or prejudiced or the interest of essential justice requires the intervention of the courts.” Nero v. Bd. of Chosen Freeholders of Camden Cnty., 144 N.J. Super. 313, 320 (App. Div. 1976). In Nero, plaintiffs filed a complaint seeking to enjoin the Camden County Board of Chosen Freeholders from conducting hearings on charges of inefficiency, neglect of duty, and misconduct in office against them, among other things, alleging bias. The trial court denied plaintiffs’ motion for summary judgment, but this Court granted leave to appeal, recognizing the public importance of the issue. The Court ultimately vacated the summary judgment order and remanded the case for a plenary hearing to determine whether the board could impartially hear the charges. It stated,

[A] ‘fair trial in a fair tribunal is a basic requirement of due process.’ This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decisionmaker constitutionally unacceptable but ‘our system of law has always endeavored to prevent even the probability of unfairness.’ ... experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.

Id. at 322. The Court concluded that this was “one of those rare instances” where “justice and administrative due process mandate the granting of relief” that

plaintiffs sought and remanded the matter for a hearing on the allegations of bias, prejudice or partiality of the board. Id. at 324.

This, too, is one of those rare instances where the interests of justice and the principles of due process mandate the granting of relief sought by the Shore Municipalities. The allegations in this case regarding the DEP's impartiality, particularly given the significant political pressures, and the grave stakes involved, demand a thorough examination by an impartial arbiter. The trial court should have exercised its jurisdiction to ensure that the process leading to the DEP's consistency determination was fair, unbiased, and free from undue influence. By dismissing the Shore Municipalities' complaint without allowing the development of a full factual record, the trial court failed to safeguard the essential rights of the Shore Municipalities, who will stand on the brink of economic collapse if the Project proceeds as planned.

**2. The trial court erred in finding that Plaintiffs were not entitled to an administrative hearing. [Pa111-12]**

The trial court held that because the Shore Municipalities have no inherent right to an administrative hearing at this stage, the matter was not appropriate for judicial review. [Pa112] That conclusion is fundamentally flawed, as it fails to account for the critical fact that where significant factual disputes and substantial property interests are involved, particularly in cases with profound

economic and environmental implications, due process demands a hearing before a neutral and unbiased fact-finder.

“No principle or rule of action, is better settled at the common law, than that whenever a court or any person acting under legal authority, is to act judicially, or to exercise a discretion in a matter affecting the rights of another, the party thus to be affected . . . may be heard in defence [sic], or for the protection of those rights.” New Jersey Tpk. Co. v. Hall, 17 N.J.L. 337, 339 (1839). Entitlement to the hearing may be ascribable to the constitutional guarantees of due process or “to the indispensability of fundamental procedural fairness.” Cunningham v. Dep’t of Civ. Serv., 69 N.J. 13, 19–20 (1975); see Avant v. Clifford, 67 N.J. 496, 520 (1975) (“[I]n the exercise by New Jersey courts of their function of review (as here) of the action of administrative agencies . . . , we have not been satisfied with enforcement of naked constitutional right, but have gone further to strike down arbitrary action and administrative abuse and to insure procedural fairness in the administrative process.”).

The constitutional mandates of due process and fundamental fairness implicated in this case compelled a hearing before a neutral fact finder so that the Shore Municipalities could present evidence of the imminent and devastating impacts Atlantic Shores’ project of unprecedented scale and proximity to shore

would have. At the same time, the Shore Municipalities sought to determine whether the DEP was fulfilling its duty as an impartial and independent regulator responsible for ensuring Atlantic Shores' compliance with coastal management policies, or if the agency was instead unduly influenced by the Governor's aggressive energy agenda, thus compromising the integrity of the process.

A constitutional right to a hearing is triggered where “(1) contested factual issues [] may be presented in an evidentiary manner in proceedings which are targeted at a person, group of persons or entity, and (2) particularized property rights or other special interests” exist. Cedar Grove Tp. v. Sheridan, 209 N.J. Super. 267, 275 (App. Div. 1986). Classification of the type of proceeding is a relevant factor in determining whether a hearing is required. Where the agency must consider evidence and apply the law to the facts, or apply a discretion or judgment judicial in nature on evidentiary facts, the function is ordinarily quasi-judicial and triggers the need for procedural due process. Cunningham, 69 N.J. at 18, 24 (holding that although no statutory provision in the Civil Service Act mandates hearing where a person on special reemployment list is refused reinstatement to comparable position, a hearing was warranted given there were disputed facts underlying question of comparability of positions, and applicant’s interest); Jersey City v. Dept. of Civil Service, 57 N.J. Super. 13 (App. Div. 1959) (holding hearing was warranted where controverted factual questions

existed regarding job responsibilities); cf. Cedar Grove 209 N.J. Super at 278–79 (noting that DOT was acting in legislative capacity regarding decision on traffic-light placement, thus not warranting a hearing); In re Grant of Charter Sch. Application of Englewood on Palisades Charter Sch., 320 N.J. Super. 174, 235 (App. Div. 1999) (holding that Commissioner investigating charter-school application was acting in his legislative capacity, not in a quasi-judicial capacity because “there was no need to gather evidence or apply law to found facts).

It is undisputed that the DEP’s consistency decision amounts to a quasi-judicial determination and not a mere legislative function, as the agency must analyze and assess scientific evidence to determine if the Atlantic Shores project is consistent with the CZMA. Moreover, the Shore Municipalities have a particularized property rights or other special interests sufficient to have warranted a hearing. A “‘property’ interest contemplated by the Fourteenth Amendment may take many forms over and above the ownership of tangible property.” Nicoletta v. N.J. Dist. Water Supply Comm’n, 77 N.J. 145, 154 (1978) (citing Fuentes v. Shevin, 407 U.S. 67, 86 (1972)). The chief ingredient in determining a property interest sufficient to trigger the right to protection by procedural due process is “a legitimate claim of entitlement.” Id. at 154-55.

The Shore Municipalities have an undeniable property interest in collecting tax revenue – a right that is threatened to be severely hampered by the

construction of the proposed Projects. This is not a mere economic inconvenience, but a fundamental threat to the municipalities' ability to function and to serve their communities. The Shore Municipalities are all small towns located within Long Beach Island and just to its south along the coast of New Jersey and have one important common attribute – the pristine beaches that attract tourism from which the towns derive substantial revenue. The presence of wind turbines as close offshore as proposed by Atlantic Shores will alter the natural seascape and diminish the aesthetic appeal of the coastline – a primary draw for tourists. The economic viability of the Shore Municipalities depend heavily on their ability to maintain aesthetically pleasing environments that attract visitors.

As supported by scientific studies, construction of massive wind turbines so close to shore inevitably will lead to a decrease in tourist arrivals, affecting businesses and reducing the overall economic activity in the area. A decline in tourism necessarily will result in lower tax revenues from sales and hospitality taxes and diminish property tax revenues, impacting the towns' budgets and their ability to fund public services and infrastructure improvements. It will further depress property values in those areas. Additionally, the decline in tourism would, in turn, decrease the municipalities' revenue that is derived from beach

badges. This cascade of economic damage cannot be understated; it directly affects the Shore Municipalities' core function of governance.

The issues go beyond just mere aesthetics or environmental concerns. It is a matter of economic survival for the Shore Municipalities. This is about the effect of the visual impacts on the municipalities' tourism, revenue, and, in turn, taxes. The proposed turbines will have an unavoidable profound impact on local economies in the affected areas of coastal New Jersey and that seasonal economies like the Shore Municipalities would suffer staggering losses of its tourist revenues, including crippling the hundreds of millions of dollars they receive in state and local tax revenue. The financial impacts of the proposed Projects are devastating, and the stakes for Plaintiffs are sufficiently grave to have warranted a hearing. See, e.g., Application of John Madin/Lordland Dev. Int'l for Pinelands Dev. Approval, 201 N.J. Super. 105, 123 (App. Div. 1985) (holding that municipalities were entitled to a hearing in the context of developmental approvals within the Pinelands area because “[the municipalities’] interest mandates that they have standing to be heard or to challenge development approval, particularly where projects reach the magnitude proposed by the developers herein.”).

The Supreme Court has stated, “[i]t is difficult to foresee all eventualities. It may be that situations will arise in which despite the absence of an intrusion

upon the property or political powers of a county or municipality, it may appropriately speak with respect to some hurt experienced generally by its inhabitants. We need not and do not foreclose that possibility.” Bergen Cnty. v. Port of New York Auth., 32 N.J. 303, 315-16 (1960). This is one of those situations. The circumstances here warranted assessment before a neutral arbiter free of political influences.

The trial court having denied the Shore Municipalities’ request, this Court is now in a position to review the Atlantic Shores’ consistency determination in the separately pending appeal without the benefit of a fulsome record, including expert testimony, on the devastating impacts of the Atlantic Shores’ project. The absence of a fully developed record is detrimental to a proper appellate review. Failing to address those impacts with the requisite rigorous scrutiny given the magnitude and impacts of the Project sets a dangerous precedent by permitting politically expedient decisions to override legitimate concerns of local communities and environmental safeguards.

### **CONCLUSION**

As the Shore Municipalities explained at oral argument to the trial court, “[w]e are in the midst of a once in a lifetime kind of transformation of our world economy [from] combustion engine and one supported by clean energy” and Governor Murphy “has presented himself as a national leader on clean energy...

This is not just an initiative. We're talking about legacy-making material, perhaps the biggest priority of Governor Murphy's tenure." T7:6-19 The proposed project is the largest, tallest, closest to shore offshore wind farm ever built anywhere in the world, and as counsel noted, "the State's most treasured shoreline is going to look like an industrial park." T7:22-8:8 Without a meaningful opportunity to be heard, "this project racing forward unchecked. And the stakes [] couldn't be higher." T7:19-22

The trial court's denial of the Shore Municipalities' application resulted in a decision by the DEP to approve the biggest project this State has ever seen, with the most profound consequences, with no record from which this Court can even ascertain whether the agency's decision was based on legitimate considerations or the result of overwhelming political pressure. Jurisdiction in the trial court was proper; the trial court was not precluded from reviewing claims of procedural irregularities or bias in the agency's decision-making process before a final decision was made. Consequently, the Shore Municipalities respectfully request the Court reverse the trial court's decision and remand the matter to allow for discovery and a hearing with respect to the DEP's bias and political pressure to fulfill the Governor's aggressive energy agenda.

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Michael S. Stein

Dated: September 13, 2024

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO.: A-002738-23

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LONG BEACH TOWNSHIP, BEACH  
HAVEN, SHIP BOTTOM,  
BARNEGAT LIGHT, SURF CITY,  
HARVEY CEDARS, BRIGANTINE,  
AND VENTNOR CITY,

Plaintiffs/Appellants,

v.

NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION

Defendant/Respondent,

and

ATLANTIC SHORES OFFSHORE  
WIND, LLC, ATLANTIC SHORES  
OFFSHORE WIND PROJECT 1, LLC  
AND ATLANTIC SHORES  
OFFSHORE WIND PROJECT 2,

Intervenors/Respondents.

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:  
: CIVIL ACTION  
:  
: ON APPEAL FROM  
: SUPERIOR COURT OF NEW JERSEY  
: CHANCERY DIVISION – GENERAL EQUITY  
: PART, MERCER COUNTY, Docket No. MER-C-  
: 88-23  
:  
: SAT BELOW:  
: Hon. Patrick J. Bartels, P.J. Ch.

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BRIEF OF RESPONDENT NEW JERSEY DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

**Date Submitted:** December 16, 2024

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## **COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY**<sup>1</sup>

Eight municipalities—Long Beach Township, Beach Haven, Ship Bottom, Barnegat Light, Surf City, Harvey Cedars, Brigantine, and Ventnor City (collectively “Municipalities”)—appeal the court’s determination that it lacked jurisdiction to enjoin the New Jersey Department of Environmental Protection (DEP), a State level administrative agency, from issuing a statutorily-authorized Federal Consistency determination on Atlantic Shores, LLC’s proposed offshore wind project until after the Office of Administrative Law had first reviewed and decided the application. This court need not reach the procedural or substantive merits of the court’s determination, though, as DEP ultimately issued the contested decision after the Municipalities’ case was dismissed, rendering this appeal moot. Additionally, the chancery court correctly found the Municipalities’ claim was unripe because DEP had not yet made a final agency decision at the time the claim was filed. The court also correctly found that it lacked jurisdiction because the request involved a State agency’s action or inaction, reviewable only by the Appellate Division. Finally, the Municipalities fail to show that DEP is biased.

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<sup>1</sup> The facts and procedural history are intertwined and combined here for efficiency and the court’s convenience.

## **Regulatory Background**

Because offshore wind turbine development projects, such as the one proposed by Atlantic Shores, are constructed within federal waters, federal law governs them. Numerous federal and State statutory and regulatory layers applicable here, starting with the federal Coastal Zone Management Act (CZMA), 16 U.S.C. 1451-1464.

The CZMA authorizes the Secretary of Commerce and the National Oceanic and Atmospheric Administration (“NOAA”) to regulate the United States’ coastal zone and resources, including offshore of New Jersey. 16 U.S.C. § 1456. The CZMA’s cooperative federalism approach permits coastal States to create comprehensive coastal zone management programs, which the federal government supports through grants. 16 U.S.C. § 1452, 1454, 1455. Each participating State’s program must meet criteria such as notice, public comment, and substantive policies that States enact through their statutes and regulations. Id. § 1455(d).

Once the United States Secretary of Commerce agrees that the States’ proposed coastal program meets the CZMA requirements, those State policies become “enforceable policies,” defined under the CZMA as “State policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a

State exerts control over private and public land and water uses and natural resources in the coastal zone.” 16 USCS § 1453(6a). The approved program then provides a process to review federal actions’ impacts upon the State’s coastal zones, which must be “consistent to the maximum extent practicable with the [State’s] enforceable policies[.]” Id. § 1456(c)(1)(A). The CZMA thus bars federal agencies from approving proposed development affecting the coastal zone “until the state or its designated agency has concurred with the applicant’s certification;” if the state fails to act within six months, “the concurrence is conclusively presumed[.]” Id. § 1456(c)(3)(A). The National Oceanic and Atmospheric Administration (“NOAA”) administers the CZMA, 15 C.F.R. § 923.1(a) and promulgated CZMA consistency requirement rules to further guide federal agencies and States regarding federal activities that would authorize proposed development that may affect a State’s coastal zone, at 15 C.F.R. Part 930 (the “CZMA Rules”). Id. § 930.1(a).

Offshore wind towers are also subject to the Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. §§ 1331 to 1356, which governs submerged lands lying three miles offshore seaward of state coastal waters that are under federal jurisdiction. 43 U.S.C. § 1331, 1312. Under the OCSLA, the Bureau of Ocean Management (“BOEM”) within the United States Department of the Interior administers offshore lease areas for various activities and reviews lease

area projects, including offshore wind projects. 43 U.S.C. §§ 1332 to 1334, 1337(p); 30 C.F.R. § 585.101. BOEM must also review and approve the project design and issues a Construction and Operations Plan (“COP”) before any project may be constructed. And because BOEM’s COP approval for the Project constitutes a “major action,” BOEM must undertake an environmental review pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347 before approving the COP.

Transitioning from federal to State law, New Jersey’s own coastal management program is approved in accordance with the federal CZMA. DEP is the lead State agency that implements and coordinates the State’s federally approved coastal zone management program which is expressed in DEP’s Coastal Zone Management rules (CZM rules), N.J.A.C. 7:7-1.1 to –29.10. These rules regulate activities under three statutes: the Waterfront Development Act, N.J.S.A. 12:5-3 to -11, the Wetlands Act of 1970, N.J.S.A. 13:9A-1 to -10, and the Coastal Area Facility Review Act (“CAFRA”), N.J.S.A. 13:19-1 to -51.

Under the CZMA, DEP must review and determine whether a proposed project is consistent with New Jersey’s enforceable policies embodied in the CZM rules. 16 U.S.C. § 1456. The coastal waters over which New Jersey retains jurisdiction includes all tidal waters of the State of New Jersey extending from the mean high-water line waterward to the three-geographical-mile limit of the

New Jersey territorial sea, and elsewhere to the interstate boundaries of New York, Delaware, and Pennsylvania. Beyond the three-mile territorial limit and in federal jurisdictional waters, DEP reviews proposed development projects which require federal approval for consistency—but not strict compliance—with its own CZM rules.

### **Atlantic Shores Project**

The Atlantic Shores project would include less than 200 total wind turbine generators and up to eight transmission cables making landfall at Atlantic City and in Sea Girt, and supporting infrastructure (“Project”). See <https://www.boem.gov/renewable-energy/state-activities/atlantic-shores-south> (last visited December 16, 2024). The Project’s proposed wind turbine generators and supporting infrastructure would be located within BOEM’s lease area, outside of DEP’s territorial jurisdiction. Ibid. The offshore export cable would be buried below the seabed and cross into DEP’s jurisdiction, and then extend onshore to connect with electric power infrastructure. Ibid. That portion of the Project is subject to DEP’s direct regulation and requires separate State permits before construction begins.

Atlantic Shores sought and received a lease from BOEM to construct the Project in the Atlantic Ocean in Lease Area OCS-A 0499 (the “Lease Area”). Then, Atlantic Shores submitted its COP for the entire Project to BOEM in

March 2021, and updated the COP in May 2023. As noted, the Project's proposed wind turbine generators and supporting infrastructure would be located within BOEM's lease area outside of DEP's territorial jurisdiction. Thus, BOEM's offshore wind project review must comply with the CZMA. 16 U.S.C. § 1456(c)(1)(A); 30 C.F.R. § 585.627(a).

As part of the COP, on September 30, 2021, BOEM submitted its Consistency Certification application to DEP. Pa117.<sup>2</sup> DEP's six-month CZMA review period began on October 1, 2021, though the decision deadline was stayed multiple times to allow BOEM and DEP to obtain further Project information. Ibid. DEP solicited public comments on the Consistency Certification three times: from October 20, 2021 through December 18, 2021, June 1, 2023 to June 30, 2023, and September 20, 2023 to October 19, 2023. Ibid. Meanwhile, in May 2023, BOEM issued its Draft Environmental Impact Statement (DEIS) in accordance with NEPA, which assesses the reasonably foreseeable impacts on physical, biological, socioeconomic, and cultural resources that could result from the construction and installation, operations and maintenance, and conceptual decommissioning of the Project. BOEM also held

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<sup>2</sup> "Pb" shall refer to Plaintiff/Appellant's brief in support of their appeal of the chancery court's March 28, 2024 dismissal of their Order to Show Cause.

"Pa" shall refer to Plaintiff/Appellant's appendix.

"Ra" shall refer to Defendant/Respondent Department of Environmental Protection's appendix submitted with this brief in opposition to the appeal.

four public hearings and solicited public comments multiple times on the May 15, 2023 DEIS for the Project. See Atlantic Shores South, BOEM <https://www.boem.gov/renewable-energy/state-activities/atlantic-shores-south> (last visited December 16, 2024).

The Municipalities participated throughout the public comment periods. In addition to submitting comments to BOEM (Ra1-29), the Municipalities also submitted public comments to DEP on June 29 and October 19, 2023, concerning DEP's consistency review under the CZM Rules. (Pa53, 81). The June 2023 comment expressed the Municipalities' "plan to request that the application be referred for an adjudicatory hearing" in the OAL. (Pa54). In an August 14, 2023 letter submitted outside the public comment period, the Municipalities alleged that "DEP and its Commissioner and staff are impermissibly biased" in favor of the Project, and "suggest[ed] that DEP voluntarily refer the matter" to OAL "for an adjudicatory hearing before an administrative law judge." (Pa87). On October 12, 2023, DEP responded that it did "not believe that the pending application constitute[d] a contested case" per the APA "such that a hearing would be appropriate[.]" (Pa92).

Over two years after Atlantic Shores submitted its Consistency Certification but before DEP completed its Project review, the Municipalities filed a complaint and order to show cause in the Superior Court, Chancery

Division, Mercer County in December 2023. (Pa13). That suit sought to enjoin DEP from issuing a decision on the Project's federal consistency certification. (Pa043). The Municipalities admitted they sought the unusual relief of "referral of the determination concerning Atlantic Shores' Federal Consistency Certification to the Office of Administrative Law," and to "temporarily, preliminarily, and permanently restrain[] the NJDEP from issuing a Federal Consistency Certification until a hearing in the Office of Administrative Law has been completed and an Initial Decision issued." (Pa43). Both DEP as defendant and Atlantic Shores Offshore Wind, LLC as intervenor/defendant separately opposed the order to show cause and moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. (Pa101; Pa105). Among other things, DEP argued that the matter was not ripe as no decision had been issued by the agency, that the Municipalities had not exhausted their administrative remedies, that R. 2:2-3 provides only the Appellate Division with jurisdiction to review an agency action, and that there was no record evidence of bias.

The chancery court dismissed the complaint for lack of subject matter jurisdiction and denied the order to show cause on March 28, 2024. (Pa107-108). The court ruled that it was clear that DEP had not yet taken final action, and that the matter was not appropriate for review. (Pa112). Further, the court

observed that if DEP issued a decision on the federal consistency certification, the matter would be subject to review in the Appellate Division rather than the trial court pursuant to R. 2:2-3. Ibid.

After the Chancery court dismissed the complaint, and pursuant to the statutory deadline, 16 U.S.C. § 1456(c)(3)(A), DEP issued a final agency decision (“Concurrence”) on April 1, 2024 finding the Project, with conditions, is consistent with the State’s enforceable policies.<sup>3</sup> (Pa114). In its Response to Comments issued concurrently with the Concurrence, DEP rejected as unfounded the Municipalities’ allegation that it was conflicted from issuing the Concurrence. (Ra38-39).

The Municipalities requested an administrative adjudicatory hearing on the Concurrence (Ra71), which DEP denied on June 14, 2024.<sup>4</sup> (Ra153). On May 13, 2024, the Municipalities appealed the chancery court’s March 28, 2024 dismissal order. (Pa1). The very next day, on May 14, 2024, the Municipalities separately appealed the Concurrence, docketed as A-2743-23, (Ra81),

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<sup>3</sup> BOEM issued its Final Environmental Impact Statement on May 23, 2024. On Oct. 1, 2024, BOEM approved the Atlantic Shores South COP. <https://www.boem.gov/renewable-energy/state-activities/atlantic-shores-south>

<sup>4</sup> The Municipalities appealed the administrative hearing denial by amending their direct appeal under Docket No. A-2743-23.

challenging “[NJ]DEP’s lack of impartiality” and the Concurrence as contrary to specific CZM rules. (Ra87). On the same day, the Municipalities asked DEP to stay the Concurrence pending resolution of both of its pending appeals. (Ra92). DEP denied the stay request on July 29, 2024. (Ra130).<sup>5</sup>

On May 31, 2024, the Municipalities moved to consolidate this appeal of the chancery court dismissal with Docket A-2743-23, the direct Concurrence appeal. On June 10, 2024, DEP cross moved to dismiss the current appeal because this court could not grant effective relief to enjoin the agency’s final decision, which had already been issued, and the substantive issues were raised in the separate Concurrence appeal. This court denied without prejudice the motion to dismiss, and the Municipalities’ motion to consolidate, but ordered the matters to be scheduled back to back for oral argument.

## LEGAL ARGUMENTS

### POINT I

**THE MUNICIPALITIES’ APPEAL IS MOOT  
BECAUSE DEP ISSUED THE CONCURRENCE  
THE MUNICIPALITIES SOUGHT TO ENJOIN.**

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<sup>5</sup> The Municipalities subsequently sought a stay from the Appellate Division in A-2743-23, which was denied on September 10, 2024. (R151).

This appeal, which challenges the trial court’s denial of the Municipalities’ request to mandate that DEP send the federal consistency determination to OAL to decide, is moot now that the DEP has issued a Concurrence.

An issue is moot when the court’s decision “when rendered, can have no practical effect on the existing controversy,” Redd v. Bowman, 223 N.J. 87, 104 (2015), or if the court’s “judgment cannot grant effective relief,” Advance Elec. Co. v. Montgomery Twp. Bd. of Educ., 351 N.J. Super. 160, 166 (App. Div. 2002). New Jersey courts “do not resolve issues that have become moot due to the passage of time or intervening events.” Wisniewski v. Murphy, 454 N.J. Super. 508, 518 (App. Div. 2018) (quoting State v. Davila, 443 N.J. Super. 577, 584 (App. Div. 2016)).

Due to events that occurred before this appeal was filed, this court’s decision can have no practical effect on the lower court’s dismissal order. The Municipalities’ admittedly “unusual” request (Pa87) sought to enjoin DEP from issuing a decision on the federal consistency certification and instead send the matter to the OAL to decide. (Pa43). However, on April 1, 2024, in accordance with all applicable laws, DEP issued the Concurrence. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.60. (Pa114–16). That “intervening event[]” moots the relief the Municipalities seek as DEP made the decision the

Municipalities attempted to prevent in accordance with the statutory deadline. Wisniewski, 454 N.J. Super. at 518. Therefore, as DEP has already issued the Concurrence, this court need not reach the merits on appeal because this court “cannot grant effective relief.” Advance Elec. Co., 351 N.J. Super. at 166. Even if this Court decides to grant the requested relief—which would seemingly involve remand, potential transfer to OAL, and some form of discovery—the proper procedure is unclear, precisely because the APA does not cover the admittedly “unusual” relief. Further, it is unclear what effect such procedure would have on BOEM’s COP approval. Supra n.2.

This is not one of the rare matters the court should hear despite its mootness. Courts will “occasionally” rule on moot matters “where they are of substantial importance and are capable of repetition while evading review.” Wisniewski, 454 N.J. Super. at 519 (quoting Zirger v. Gen. Accident Ins. Co., 144 N.J. 327, 330 (1996)). Not so here. Although offshore wind issues are important,<sup>6</sup> the issues the Municipalities present are not “capable of repetition while evading review” for three reasons.

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<sup>6</sup> Indeed, as explained above, the Project is subject to numerous federal and state approval processes to ensure compliance with all applicable law and regulations, several of which are ongoing.

First, the Municipalities' impartiality concern will not evade review because they can challenge DEP's impartiality in the A-2743-23 Concurrence Appeal, as DEP addressed the bias issue the Municipalities raised in its Response to Comments accompanying the Concurrence. (Compare Pa13-46 (Municipalities' Complaint) with Ra38-39 [Conflict of Interest] (Decision's Response to Comments)). Second, to the extent the Municipalities challenge the chancery court's statements about their adjudicatory hearing rights, the Municipalities have since amended their notice of appeal in the A-2743-23 Concurrence Appeal to include the June 14, 2024 hearing request denial (Ra153-160). Third, the Municipalities could have sought emergent judicial relief as to the March 28, 2024 dismissal order before DEP issued its Concurrence on April 1, 2024, but instead chose not to "vigorously pursue[]" the matter when it could have had a practical effect. Wisniewski, 454 N.J. Super. at 521. Instead, the Municipalities waited to file this appeal on May 13, 2024, the last allowable day under Rule 2:4-1(b). Contrary to any suggestion that DEP issued its Concurrence "immediately" following the March 28, 2024 dismissal (App. Br. at 5, 17), DEP was obligated to issue the Concurrence by the April 1, 2024 deadline, which the Municipalities knew throughout the chancery court litigation. (Pa111, Pa117). As the issues raised here can readily be reviewed in other matters, and this court's decision cannot have any practical effect on the

remedy the Municipalities sought from the chancery court, the Municipalities' appeal is moot.

## POINT II

### **THE CHANCERY COURT CORRECTLY DISMISSED THE MATTER. (Responding to Point I)**

Even if this court finds the Municipalities' procedural claims are not now moot, the chancery court nonetheless properly dismissed them for lack of subject matter jurisdiction. The chancery court followed the Court Rules and well established caselaw. In addition, the Municipalities failed to state a claim upon which relief may be granted because a mere statement of policy by DEP's Commissioner does not give rise to an actionable claim of bias.

#### **A. The chancery court correctly dismissed the matter for lack of subject matter jurisdiction.**

The chancery court lacked subject matter jurisdiction for several reasons. First, when the matter was before that court, DEP was still actively reviewing the Project for consistency with the CZM rules, and thus the matter was not ripe for any court's review. Second, the Municipalities' insistence that the matter be transferred to OAL for hearing essentially amounts a mandamus claim, where a court steps in to act if an agency has failed to perform a discrete, ministerial duty. The agency review and transmittal of a contested case to OAL is not

appropriate for a mandamus claim, and not for the chancery court to command here. Finally, any agency action as to the Project, or inaction for failure to transmit the matter to OAL, are both appropriately brought before the Appellate Division, which has exclusive jurisdiction over claims against a state agency such as DEP. Rule 2:2-3(a)(2).

When this matter was before the chancery court, it was not ripe for review in either an administrative or judicial forum. Starting with the latter, DEP had not made a decision and the record for review was not yet complete. (Pa167, Pa170). DEP was, nonetheless, obligated to issue the decision. The federal CZMA requires New Jersey to review the Project for consistency with its enforceable policies to the maximum extent practicable. 15 CFR 930.34(a)(1); 16 U.S.C. § 1456(c)(3)(A); see also 30 C.F.R. § 585.627(b), .628(c) to (d) (requiring BOEM to coordinate and consult with DEP during its environmental review). In turn, CAFRA authorizes DEP as the New Jersey agency that reviews the Project for consistency with the State's CZM Rules, which include public notice and comment on proposed projects as well as the process to challenge DEP's final decisions. N.J.S.A. 13:19-2; N.J.S.A. 13:19-9, N.J.A.C. 7:7-24.1 through -24.6. Now that it has issued the Concurrence, DEP has followed all applicable law and procedure for considering this Project application. See supra

at 4–11. But the chancery court correctly recognized that process was not complete when the Municipalities filed their action.

The matter is also unripe for further action through the administrative process because there was simply no contested case to send to OAL. The Administrative Procedure Act (“APA”), N.J.S.A. 52:14B-1 to -15, directs State agencies to initially decide any matter prior to issuing final decisions and administrative or judicial review. N.J.S.A. 52:14B-12. While OAL has authority to hear “contested cases,” the agency head retains the authority to determine if a case is contested, N.J.S.A. 52:14F-7(a); the APA does not provide a substantive right to an administrative hearing. (Pa112). To sum, the agency head must decide something – even if it is that a matter is a contested case in the first place – before OAL can obtain jurisdiction. See N.J.A.C. 1:1-3.2(a) (“OAL shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the OAL . . . .”). No such decision existed here. As there was no agency decision about which a hearing could be conducted, the matter simply was not ripe for review. Even if this matter had been ripe, there is no basis to disturb the ultimate outcome because the Municipalities were not entitled to the relief they sought.

The Municipalities’ demand to send the federal consistency request to OAL is essentially an act of demand for mandamus that would not be proper

here because that act is not ministerial. Caporusso v. N.J. Dep't of Health & Senior Servs., 434 N.J. Super. 88, 100 (App. Div. 2014) (internal citations omitted). “The cognizability of such a claim at the trial level is limited to where the inaction complained of is the nonperformance of a mandated ministerial obligation.” Moss v. Shinn, 341 N.J. Super. 327, 338 (Law Div. 2000) (quoting Cohen v. Board of Trustees of the Univ. of Medicine & Dentistry of N.J., 240 N.J. Super. 188, 199 (Ch. Div. 1989)). A ministerial act or duty is one that is “absolutely certain and imperative, involving merely the execution of a set task, and the law which imposes it prescribes and defines the time, mode and occasion of its performance [with] such certainty that nothing remains for judgment or discretion.” Moss, 341 N.J. Super. at 338 (quotations omitted); see also Equitable Life Mortg. & Realty Investors v. New Jersey Div. of Taxation, 151 N.J. Super. 232, 238, (App. Div.), certif. denied, 75 N.J. 535 (1977) (same).

Here, mandamus must fail as all actions the Municipalities seek to force are discretionary, not ministerial. DEP is statutorily and regulatorily required to follow numerous procedures to gather information from the applicant and the public which in turn, generates a record for DEP’s discretionary Federal Consistency decisions. The Municipalities sought the extra-statutory relief of an undefined, pre-decisional fact-finding hearing before the OAL for the vague purpose of creating a record concerning agency bias as to a particular coastal

permitting decision. (Pb4). But both the decision as to whether to transmit a matter as a contested case to the OAL and the Project review for CZM rule consistency are discretionary, non-ministerial tasks left to DEP to undertake. N.J.S.A. 52:14F-7(a) (agency head retains right to determine if a case is contested); 15 CFR 930.34(a)(1) (federal consistency review). And both decisions provide ample opportunities for public comment, input, and hearings, N.J.S.A. 13:19-9, N.J.A.C. 7:7-24.1 to -24.6, which the Municipalities have participated in and now have a full remedy in the form of an appeal of the Concurrence pending before this court.

In Colon v. Tedesco, 125 N.J. Super. 446 (Law Div. 1973), plaintiffs filed a mandamus claim against the Department of Labor and Industry regarding unsanitary conditions at a migrant labor camp. The Law Division there found that there was no available mechanism for a proceeding before the agency or the creation of an agency record, and so the Law Division had to assume jurisdiction. Id. at 452, 454-55. Here, now that DEP has issued its Concurrence, there is ample record for the court to review.

Even if the agency inaction here were one appropriate for a writ of mandamus from the court, that action would still only be properly brought before the Appellate Division. The Appellate Division holds exclusive jurisdiction to review DEP administrative agency action or inaction. The Court Rules

contemplate that “every proceeding to review the action or inaction of a state administrative agency would be by appeal to the Appellate Division.” Pascucci v. Vagott, 71 N.J. 40, 52 (1976) (citation omitted) (emphasis in original); accord K. Hovnanian Cos., 379 N.J. Super. at 7. The Appellate Division’s exclusive jurisdiction to review any state administrative agency action or inaction “does not turn on the theory of the challenging party’s claim, or on the nature of the relief sought.” Mutschler v. Dep’t of Env’t Prot., 337 N.J. Super. 1, 9 (App. Div. 2001). Exclusive jurisdiction cannot be circumvented by filing an action in lieu of prerogative writs where the relief sought is review of quasi-judicial, ministerial, or discretionary agency action or inaction. Beaver v. Magellan Health Servs., Inc., 433 N.J. Super. 430, 442 (App. Div. 2013). The Appellate Division is the “exclusive” venue for agency inaction claims. Hospital Center at Orange v. Guhl, 331 N.J. Super. 322, 329-30 (App. Div. 2000). And, of course, once the agency rendered its final decision, appeals of agency action are also exclusively made to the Appellate Division. Prado v. State, 186 N.J. 413, 422 (2006) (affirming Rule 2:2-3(a)(2) vests exclusive Appellate Division jurisdiction). The Municipalities have now filed their substantive appeal of the Concurrence and this court will have the opportunity to review the full agency review record. The chancery court judge correctly noted the Appellate

Division's exclusive jurisdiction over agency action in his dismissal order. (Pa112).

The Municipalities argue that the court misunderstood their claim that they were really trying to pursue a bias allegation and cite to instances where the Law Division assumed jurisdiction over an agency process. (Pb18-19). But those cases are readily distinguishable.

Pfleger v. N.J. State Highway Dept., 104 N.J. Super. 289 (App. Div. 1968) concerned an inverse condemnation claim, which is an express exception to Rule 2:2-3(a)(2) and had to must be heard in the Law Division. N.J.S.A. 20:3-5; N.J.S.A. 27:7-22; Infinity Broadcasting Corp. v. N.J. Meadowlands Comm'n, 187 N.J. 212, 225 (2006) (“[C]ondemnation actions and, by extension, inverse condemnation actions resulting from state administrative action are properly cognizable in the Law Division.”)

Similarly, in Frapaul, the Appellate Division remanded a contract dispute between the State DOT and a contractor to the Law Division under the Contract Liability Act (CLA). Frapaul Constr. Co. v. State, Dep't of Transp., 175 N.J. Super. 84, 90 (App. Div. 1980) (“The drafters of the [CLA] obviously contemplated that contract actions against the State should be instituted in the trial division pursuant to the Rules of Court.”). There also, jurisdiction in the Law Division was statutorily expressed. N.J.S.A. 59:13-4. The claims here are

not based in those rare statutory regimes where the Law Division retains jurisdiction, so these cases are inapplicable.

The Municipalities' other cases are also unpersuasive. The Municipalities cite Committee to Recall Robert Menendez from the Office of U.S. Senator v. Wells, 204 N.J. 79, 89 (2010) to argue only the Law Division can build a record. (Pb19-20). But they overlook the fact that the prerogative writs action originally filed in the Law Division was withdrawn a month and a half later after the agency issued its decision – which was then reviewed in the Appellate Division. Menendez, 204 N.J. at 89-90.

In Montclair v. Hughey, where the appellate court rejected DEP's argument that consolidated chancery court actions belonged in the Appellate Division, the court found the matter fell into the second exception to the jurisdictional requirements of Rule 2:2-3(a)(2) because the proposed administrative action has not been preceded by the creation in the agency of a record which is amenable to appellate review. Montclair v. Hughey, 222 N.J. Super. 441, 446 (App. Div. 1987). That is inapplicable here.

The Concurrence and well-documented administrative record is now available and before this court and DEP was in the midst of compiling the record under established statutory and regulatory processes when the Municipalities filed their complaint. That is a classic quasi-judicial action which even

Montclair acknowledges falls under Rule 2:2-3(a)(2)'s ambit. Id. at 448. The Municipalities cannot circumvent the Appellate Division's clear jurisdiction by inventing, without evidence, a bias issue they claim requires a trial type factfinding hearing wholly separate from the court's review of the now issued final agency decision.

In sum, the chancery court appropriately dismissed the action because it was unripe and, when it became ripe, the chancery court recognized this court would have jurisdiction. This court should affirm.

**B. The Municipalities failed to state a claim upon which relief could be granted.**

Although the chancery court dismissed the complaint solely on jurisdictional grounds, the Municipalities also failed to state a claim upon which relief may be granted. The Municipalities' entire basis for seeking court intervention during the review process is that DEP was too biased in favor of the Project to objectively review the application. The Municipalities offer nothing more than allegations and speculation to support this charge.

Nowhere do the Municipalities demonstrate bias that would require a particular DEP decisionmaker, let alone the entire agency, to recuse from the federal consistency determination. The Municipalities did not claim any improper act by DEP, or failure of DEP to perform some required act. They cite to no violation of any statute or regulation. Rather, the Municipalities baldly

assert agency-wide bias. They have presented the court with no legal basis entitling them to relief. See Milford Mill 128, LLC v. Borough of Milford, 400 N.J. Super. 96, 109 (App. Div. 2008) ("a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief").

A State official's recusal from a particular matter is governed by the State Conflicts of Interest Law, N.J.S.A. 52:13D-23(e)(7), and its accompanying State Ethics Commission Rules, N.J.A.C. 19:61-7.1 to -7.5. They apply to bias allegations and require individual State officials to recuse themselves from matters in which they have a financial or personal interest, "direct or indirect, that is incompatible with the discharge of the State official's public duties." N.J.A.C. 19:61-7.4(d).

The regulations provide a non-exhaustive list of circumstances that may give rise to an incompatible interest, including such things as a fiduciary relationship; a source of income; matters involving a business associate or investment; or a leadership role in a professional or trade organization, which interest might reasonably be expected to impair a State official's objectivity and independent judgment while exercising his or her official duties or might reasonably be expected to create an impression or suspicion among the public having knowledge of these acts that the official may be engaged in conduct violative of his or her trust as a State official. N.J.A.C. 19:61-7.4(e). The

regulations further provide that an “incompatible financial or personal interest may exist in other situations . . . depending on the totality of the circumstances.” Id. 19:61-7.4(f). Recusal issues follow an established procedure that involves the State Ethics Commission. Id. 19:61-7.5.

Bias is “grounds for disqualification when the decisionmaker has a pecuniary interest in the outcome of the matter or has been the target of personal criticism from one seeking relief” so as to form a basis for ‘a personal vendetta’ against the one seeking relief.” In re Xanadu Project at Meadowlands Complex, 415 N.J. Super. 179, 192 (App. Div.) certif. denied, 205 N.J. 96 (2010) (quoting In re Carberry, 114 N.J. 574, 586 (1989)). For example, a Board of Public Utilities commissioner should have been disqualified from participating in proceedings involving a County utilities authority where an employment opportunity with the county utilities authority could reasonably be interpreted as having influenced the commissioner “to avoid a decision contrary to [the authority’s] interests.” In re Bergen Cnty. Utils. Auth., 230 N.J. Super. 411, 419–20 (App. Div. 1989) (“BCUA”). See also In re Bator, 395 N.J. Super. 120, 124 (App. Div. 2007) (Board member conflicted out of matter when sister's work product was the basis for a recommendation to the Board.)

In contrast, merely “being ‘familiar with the facts of the case through the performance of statutory or administrative duties’ does not make the agency

head biased or partial.” Xanadu, 415 N.J. Super. at 192 (quoting Carberry, 114 N.J. at 585). “Nor is disqualification automatically required merely because a decisionmaker has announced an opinion on a disputed issue.” Ibid. (quoting Carberry, 114 N.J. at 585). Notably, the Xanadu State official had issued a written advisory opinion related to the disputed matter and the court held he did not need to recuse himself. Id. at 192–93. This is because government entities, including State agencies, “would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official.” Grabowsky v. Twp. of Montclair, 221 N.J. 536, 554 (2015) (quoting Wyzykowski v. Rizas, 132 N.J. 509, 523 (1993)).

To determine whether a personal interest warrants a public official’s disqualification in judicial or quasi-judicial proceedings, courts may analyze the “potential for conflict,” ibid., but “the ‘appearance’ of impropriety must be something more than a fanciful possibility” and instead, “must have some reasonable basis.” In re Bator, 395 N.J. Super. at 128 (quoting Higgins v. Advisory Comm. on Prof’l Ethics, 73 N.J. 123, 129 (1977)). “To presume that the agency head is biased merely because he or she is applying an agency rule or regulation” in a particular instance “would severely undermine the function of administrative agencies.” Carberry, 114 N.J. at 585 (superintendent who

issued a decision dismissing police officer's employment need not recuse from hearing the case).

The Municipalities' bias claims rest entirely on Governor's Murphy's executive orders that effectuate the State's clean energy policy and a statement by the agency head, DEP Commissioner LaTourette,<sup>7</sup> expressing support for Governor Murphy's clean energy goals. (Pa16–19). The Municipalities then engraft the Governor's executive orders and the Commissioner's statement onto DEP as a whole to sustain their claim for agency-wide bias.

The Municipalities cite Executive Order language repeatedly, (Pb6, Pb8, Pb15, Pb24), and one statement from the DEP Commissioner to argue that "DEP staff unquestionably have felt immense pressure to approve the Projects[.]" (Pb15). But there has been no evidence of a pecuniary interest or personal criticism here; at worst, the Commissioner (as the agency head) stated an opinion, which is not sufficient alone to find bias. Xanadu, 415 N.J. Super. at 192. The Municipalities ignore that DEP has been following federal and State law when considering Atlantic Shores' federal consistency certification. Supra, at 4-11.

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<sup>7</sup> Appellants in their Complaint and briefs below quote DEP Commissioner Shawn M. LaTourette without citing to a source, date, time, or place. (Pa19). The comment letter from which this quote may have come, (Pa88), in turn cites a news article about the Commissioner's Legislative testimony about offshore wind, ship strikes, climate change, and whale mortality incidents.

None of the cases that the Municipalities cite require a different result. BCUA involved a BPU Commissioner's direct pecuniary interest when he reviewed an ALJ's initial decision regarding the challenged county utility authority's budget, as he had previously served as the county utility authority's commissioner and then chairman, and there was evidence of his consideration for executive director at the time of review of the county authority's budget proceeding review. Id. at 417–18. Here there is no such evidence or even suggestion of any financial or employment relationship. Rather, the Municipalities offer public policy statements of the Governor and DEP Commissioner, but there is no precedent for finding bias or the appearance of undue influence under these facts.<sup>8</sup>

Even Nero v. Board of Chosen Freeholders found that more is needed than unsupported allegations of bias. 144 N.J. Super. 313, 324 (App. Div. 1976). Nero involved a county utilities authority's members who were overseen by a municipal board that charged them of misconduct, inefficiency, and neglect, id. at 316, and the court required "proof of existing bias, prejudice, or partiality" by the board before finding a due process violation necessitating a separate hearing. Id. at 323. Indeed, the court reiterated "that courts should be

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<sup>8</sup> BCUA also supports that the appropriate court can decide an actionable bias claim on the full record after the agency decision has been made, as the court did in that matter. See Point I, above; BCUA, 230 N.J. Super. at 418.

extremely cautious in interfering with” an agency’s procedure. Ibid. (quotations omitted). However, Nero was “one of those rare instances” where the court had to “interfere with the administrative process established by statute” due to “improper influences” including “voluminous newspaper reports, accounts and editorials” regarding the authority members’ removal, the board members’ direct political connections, and the Attorney General’s calls for the plaintiffs’ removal. Id. at 318, 324. The board could thus be “incapable of affording plaintiffs a fair hearing.” Id. at 324.

Here, the Municipalities did not claim to be able to demonstrate any “improper influences.” They do not argue now that DEP somehow violated any of the federal or State statutory or regulatory procedures applicable here, nor can they. Rather, unlike the plaintiffs in Nero, the Municipalities here demand an ongoing documentation of the agency process to rout out possible instances of unspecified bias, essentially proposing an unwarranted fishing expedition. The State’s energy policy, carried out consistent with all applicable law and procedure, does not support a bias claim.

As the Municipalities fail to demonstrate either actual bias or a likelihood of bias that would require DEP to recuse itself from the federal consistency determination, they failed to make a claim upon which relief may be granted and thus their case should have been dismissed.

### POINT III

#### **THE MUNICIPALITIES DO NOT HAVE A STATUTORY OR CONSTITUTIONAL RIGHT TO A THIRD-PARTY HEARING.**

The Municipalities sought transfer to OAL for a pre-decisional administrative hearing. As discussed above, the April 1, 2024 Concurrence moots the need for a pre-decisional fact-finding hearing. The Municipalities subsequent request for an administrative hearing on the Concurrence, and DEP's denial, will be fully briefed under the direct Concurrence appeal.

In any case, it would have been nonetheless correct to find that the Municipalities had no right to an OAL hearing because they are not the applicant in this matter, there is no statutory right to a hearing, and they have no constitutionally protected property right warranting an OAL hearing.

It is well-established that third-party objectors, like the Municipalities here, have no automatic right to an adjudicatory hearing before an administrative law judge. To avoid "chaotic unpredictability and instability," the APA prohibits agencies from promulgating "any rule or regulation that would allow a third party to appeal a permit decision" unless specifically authorized to do so by federal law or State statute. N.J.S.A. 52:14B-3.1 and 3.3. The term "third-party" includes any individual other than the applicant, State agency, or other individual with a "particularized property interest sufficient to require a hearing

on constitutional or statutory grounds.” N.J.S.A. 52:14B-3.2. For parties other than the applicant or the agency to have standing, they must demonstrate: (1) a right to a hearing under the applicable statute, or (2) a “particularized property interest” of constitutional significance. Id.; see also In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. 452, 463–64 (2006). The Municipalities cannot meet that high standard.

The Municipalities sought a hearing on a Federal Consistency Determination issued in accordance with the CZM Rules. However, the statutes underlying those Rules—namely, CAFRA, the Wetlands Act of 1970, and the Waterfront Development Law, do not grant a statutory right to an adjudicatory hearing for third party objectors. See Spalt v. Dep’t of Env’t Prot., 237 N.J. Super. 206, 210-11 (App. Div. 1989), certif. denied, 122 N.J. 140 (1990); In re Freshwater Wetlands, 185 N.J. at 463--64; In re Riverview Dev., LLC, Waterfront Dev. Permit No. 0908-05-0004.3 WFD 060001 (“Riverview”), 411 N.J. Super. 409 (App Div. 2010); see also N.J.A.C. 7:7-28.1(e) (expressly limiting its procedure for granting an adjudicatory hearing request by the terms of the APA). Absent a statutory provision that expressly confers a right to a hearing, an administrative agency cannot create such a right by mere regulation. As no statutes entitle the Municipalities to a hearing, they instead must demonstrate they have a “particularized property interest” of constitutional

significance. N.J.S.A. 52:14B-2, -3.1(b) to (d), -3.2; Riverview, 411 N.J. Super. at 423.

As the Supreme Court has pointed out, “third parties generally are not able to meet . . . this rigorous review standard [for finding a particularized property interest].” In re NJPDES No. NJ0025241, 185 N.J. 474, 482 (2006); see also Freshwater Wetlands, 185 N.J. at 464. Courts have consistently held that proximity or any type of generalized property right shared with other property owners, such as recreational interests, traffic, views, quality of life, and property values, is insufficient to demonstrate a particularized property right required to establish third-party standing for a hearing. See Spalt, 237 N.J. Super. at 212 (App. Div. 1989) (close residency, fear of resultant injury to property, damage to recreational interest or shared generalized property rights are not particular property rights); Riverview, 411 N.J. Super. at 437–38 (general claims of adverse aesthetic and traffic impacts did not create sufficient property interest to entitle neighboring homeowners to hearing). As the court stated in Riverview, the “anticipated impact from [the] proposed development is similar to the impacts commonly experienced by owners of property in the vicinity of any proposed new development.” Riverview, 411 N.J. Super. at 428 (citing In re Amico/Tunnel Carwash, 371 N.J. Super 199, 211 (App. Div. 2004)); see also Musconetcong Watershed Ass’n v. N.J. Dep’t of Env’t Prot., 476 N.J. Super.

465, 484 (App. Div. 2023) (finding proximity to the permitted site and a general fear of future development are insufficient to trigger a right to an adjudicatory hearing).

The Municipalities do not address the threshold question of whether they can establish a particularized property interest. They make only generalized due process claims about an alleged right to an adjudicatory hearing before the agency issues a decision. (Pb28). However, as noted, they had the opportunity to present their concerns during the public comment period.

Moreover, the Municipalities' generalized fairness concerns are unfounded, as discussed above, and unconnected to the requisite particularized property right needed to obtain standing in an administrative claim. The Municipalities fail to cite any authority to support the position that generalized bias allegations create a particularized property interest, and DEP has not found any. And the property interests claimed by the Municipalities alleged are only speculative and generalized, indistinguishable from those shared by other neighboring municipalities and property owners, and do not provide constitutional standing to challenge DEP's determination in OAL. Anticipated adverse aesthetic impacts, for example, as discussed in Riverview, do not create sufficient particularized property interest to entitle the Municipalities to an adjudicatory hearing.

To support the notion that their hearing request should be granted, the Municipalities also point to an estimated loss of tax revenue the constructed Project may cause. (Pb29–30). However, the Municipalities do not have a constitutionally protected interest in maintaining a particular level of tax revenue or avoiding an increased tax burden on their residents to maintain a particular level of revenue.

The Due Process Clause of the Fourteenth Amendment “is no protection against inequality of tax burdens.” B & L Motor Freight, Inc. v. Heymann, 120 N.J. Super. 270, 282 (Ch. Div. 1972) (citing Gomillion v. Lightfoot, 364 U.S. 339, 343 (1960)), overruled on other grounds, Private Truck Council v. State, 221 N.J. Super. 89 (App. Div. 1989); see also Camden v. Byrne, 82 N.J. 133, 158 (1980) (“[E]ven though local government might find itself handcuffed by statutory fiscal limitations, this Court is powerless to remove these handcuffs”). Further, the fear of economic losses that might result from visual impacts of development are not a particularized property interest sufficient to create a constitutional right to an adjudicatory hearing especially where there is not a common law protected right to a view. Bubis v. Kassin, 323 N.J. Super. 601, 616 (App. Div. 1999). The Municipalities’ claims of economic harm fall squarely under the Riverview analysis:

[T]he collateral economic impacts upon surrounding properties caused by the siting of an otherwise-lawful

building are part and parcel of the social compact. They result from the unavoidable interrelatedness of living in a world surrounded by other persons and by other things.

If we were to hold that such collateral economic impacts automatically entitled neighboring property owners to a formal hearing in the [Office of Administrative Law] each time a State permit is issued for, say, a sewerage treatment plant, a group home, a new prison, or some other building that could depress surrounding property values, the construction of those and other important structures might be thwarted or unduly delayed, at great cost to the public. That surely would be contrary to the interests of the citizens as a whole. The Legislature recognized this problem by adopting strict limitations on third-party hearing rights in the APA.

[411 N.J. Super. at 435-36.]

The Riverview court held that the challengers' expert report estimating a 20% average reduction in their home values resulting from visual impacts of a proposed development that would obstruct their view of the Hudson River and New York City skyline did not create a particularized property interest sufficient to warrant an adjudicatory hearing. Id. at 429. Likewise, the Municipalities' claim they will lose tax revenue are not sufficient, particularly when provided without any context as to what their collective current tax revenues are. The Appellate Division in Riverview determined that such "collateral economic impacts" are not a particularized property interest to merit a hearing. Id. at 436.

**CONCLUSION**

For the above reasons, the chancery court order should be affirmed.

Respectfully submitted,

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December 16, 2024

LONG BEACH TOWNSHIP, BEACH  
HAVEN, SHIP BOTTOM, BARNEGAT  
LIGHT, SURF CITY, HARVEY CEDARS,  
BRIGANTINE, and VENTNOR CITY,  
Appellants/Plaintiffs,

vs.

NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,  
Respondent/Defendant,

and

ATLANTIC SHORES OFFSHORE WIND,  
LLC, ATLANTIC SHORES OFFSHORE  
WIND PROJECT 1, LLC, AND  
ATLANTIC SHORES OFFSHORE WIND  
PROJECT 2, LLC

Respondents/Intervenors.

SUPERIOR COURT OF NEW JERSEY,  
APPELLATE DIVISION

Docket No. A-002738-23

Civil Action

Appeal from the Superior Court of New  
Jersey, Chancery Division  
Docket No. MER-C-88-23

Sat Below:

Hon. Patrick J. Bartels, P.J. Ch.

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**BRIEF OF RESPONDENTS/INTERVENORS ATLANTIC SHORES**

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Dated: December 16, 2024

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## **PRELIMINARY STATEMENT**

This matter is one of several legal challenges that Appellants/Plaintiffs Long Beach Township, Beach Haven, Ship Bottom, Barnegat Light, Surf City, Harvey Cedars, Brigantine, and Ventnor City (collectively, “Plaintiffs”) have filed against the Respondent/Defendant New Jersey Department of Environmental Protection (“DEP” or the “Department”) to thwart the development of offshore wind energy in New Jersey. In this case, Plaintiffs filed a Complaint in the Chancery Division asking the court to order DEP to refer to the Office of Administrative Law (“OAL”) a permit application known as a “consistency certification” submitted to the DEP for review under the federal Coastal Zone Management Act (“CZMA”), 16 U.S.C. § 1451 et seq., that was then pending before the Department. DEP and Respondents/Intervenors Atlantic Shores Offshore Wind, LLC, Atlantic Shores Offshore Wind Project 1, LLC, and Atlantic Shores Offshore Wind Project 2, LLC (collectively, “Atlantic Shores”) successfully moved to dismiss the Complaint. The Chancery Division Order dismissing the Complaint should be affirmed, as the Complaint improperly sought to strip DEP, the agency with technical expertise, of its authority to review Atlantic Shores’ application and bypass the required procedure to review State agency action in the Appellate Division.

The Complaint challenged DEP’s interlocutory determination denying Plaintiffs’ request for an adjudicatory hearing in the OAL before the conclusion of DEP’s permitting process. Not only was this interlocutory appeal in the Chancery Division untimely under the Court Rules, but the court below also correctly concluded that, even if the appeal was timely, the Appellate Division would have exclusive jurisdiction over such challenges to State agency action. Plaintiffs fail in their attempt to fabricate an exception to the Appellate Division’s exclusive jurisdiction and to create a new procedure for review of State agency action based solely on speculative and unfounded assertions of agency bias. Plaintiffs’ misguided approach would allow and encourage any objector to a project requiring State agency approvals to turn the Chancery Division into a weapon of obstruction and delay—even before the agency completes its analysis and decides the permit application—by merely alleging agency bias.

Plaintiffs also had no right to an adjudicatory hearing in the OAL. Third parties challenging state agency action may obtain an adjudicatory hearing only if they have a particularized property interest entitling them to a hearing as a matter of due process. Plaintiffs lack a particularized property interest and provide no support for their unorthodox argument that speculative impacts on their tax revenue give them a constitutional right to an adjudicatory hearing in

the OAL. To the contrary, well-established authority holds that the purported property interest Plaintiffs assert does not give rise to a constitutional right to an adjudicatory hearing. For these reasons, Atlantic Shores respectfully requests that the Order dismissing the Complaint be affirmed.

### **COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY**

#### ***The Projects Further Important Public Policy Goals***

Atlantic Shores Offshores Wind, LLC acquired a Commercial Lease for Submerged Lands for Renewable Energy Development on the Outer Continental Shelf OCS-A 0499 (“Lease”), which vests Atlantic Shores with development and operational rights in the Lease area (“Lease Area”), subject to federal review and approval under federal law. Pa117-Pa118. On June 30, 2021, the New Jersey Board of Public Utilities (“BPU”) approved Atlantic Shores’ 1,510-megawatt (MW) project to be located within the Lease Area as a qualified offshore wind facility and awarded to Atlantic Shores an Offshore Renewable Energy Credit (“OREC”) allowance. Pa118. The BPU issued its approval pursuant to the Offshore Wind Economic Development Act of 2010 (“OWEDA”), providing a process and economic incentives for the development of offshore wind projects. See N.J.S.A. 48:3-87.1. Atlantic Shores refers to the project that will be developed on the Lease Area under this BPU OREC award as “Project 1.” Pa118. Atlantic Shores contemplates the development of another wind energy

generation facility (“Project 2”) within the Lease Area in response to future New Jersey OREC solicitations. Pa119. Project 1 and Project 2 are referred to herein collectively as the “Projects.”

The benefits of the Projects will be substantial. By displacing the generation of electricity from fossil-fueled power plants, Atlantic Shores estimates that Project 1 alone will result in the reduction of 3.9 million tons of greenhouse gas emissions annually, equivalent to the emissions of about 777,000 cars, and also will significantly reduce the emissions from power generation of air pollutants such as nitrogen oxide, sulfur dioxide, and fine particulate matter. Atlantic Shores Offshore Wind Construction and Operations Plan, Volume I: Project Information 2-4 (May 2024), [www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Atlantic%20Shores%20South\\_Volume%20I\\_Project%20Description\\_05-01-2024.pdf](http://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Atlantic%20Shores%20South_Volume%20I_Project%20Description_05-01-2024.pdf).

In denying a motion for a stay of a DEP approval for the Projects, this Court recognized these benefits and found that the construction of the Projects is in the public interest. ASa75 (noting “the public’s interest in allowing the unimpeded progression of a project intended to meet the energy consumption needs of the State”). OWEDA and the Global Warming Response Act, N.J.S.A. 26:2C-38 et seq., embody the legislative policy of this State to encourage the

development of renewable energy resources, including offshore wind, to reduce greenhouse gas emissions and mitigate the effects of climate change.

***The Coastal Zone Management Act Consistency Review Process***

Section 307(c)(3)(A) the CZMA, 16 U.S.C. § 1456(c)(3)(A), and the implementing federal regulations at 15 C.F.R. part 930 require that federal actions or federally-permitted activities within the coastal zone or within the geographic location descriptions (i.e., areas outside the coastal zone in which activity would have reasonably foreseeable coastal effects) affecting any land or water use or natural resource of the coastal zone be consistent with the enforceable policies of a state's federally approved coastal management program.

DEP is charged with conducting the consistency reviews required under the CZMA to ensure that the federally-permitted activities are consistent with the enforceable policies of the federal-state regulatory regime established by Section 307(c)(3)(A) of the CZMA. See N.J.A.C. 7:7-1.2(e) (“This chapter shall apply to decisions on the consistency or compatibility of proposed actions by Federal, State, and local agencies within or affecting the coastal zone, including, but not limited to Federal consistency determinations [and] determinations of consistency or compatibility under the [CZMA]....”); N.J.A.C. 7:7-1.5 (definition of “federal consistency determination”). Although the Lease Area

does not fall within a CZMA geographic location description designated by New Jersey, on September 30, 2021, Atlantic Shores voluntarily prepared and submitted a certification (the “Consistency Certification”) to demonstrate that the Projects are consistent with New Jersey’s enforceable policies under the CZMA, as embodied in DEP’s Coastal Zone Management Rules (the “CZM Rules”), N.J.A.C. 7:7. Pa117-Pa118.

***Plaintiffs’ Public Comments on the Consistency Certification and their First Hearing Request***

DEP held several rounds of public comment on the Consistency Certification. Taking advantage of this public comment procedure, Plaintiffs submitted an extensive 27-page comment letter to NJDEP on June 29, 2023 (the “June 29<sup>th</sup> Comment Letter”). See Pa053-Pa080. This submission made detailed arguments concerning the Projects’ alleged impacts on the views from the beaches in the Plaintiff municipalities, alleged loss of revenue from discouraged tourism, alleged impacts on the commercial fishing industry, and alleged impacts on whale and bird species. Id. In a subsequent supplemental comment letter dated October 19, 2023, Plaintiffs submitted “visual renderings” produced by their own consultant predicting the view of wind turbines from beachfront locations after the construction of the Projects. See Pa082-Pa085.

The June 29<sup>th</sup> Comment Letter also noted Plaintiffs’ “concern about DEP’s ability to impartially review” the Consistency Certification in light of the

State's significant policy encouraging offshore wind development. See Pa053-Pa054. Because of those concerns, Plaintiffs noted their "plan to request that the [Consistency Certification] be referred for an adjudicatory hearing in the OAL. Id. In a letter to DEP dated August 14, 2023 (the "First Hearing Request"), Plaintiffs wrote "to suggest that DEP should refer the application to [the OAL]." Pa087. Plaintiffs acknowledged that "this suggestion of a pre-decision adjudicatory hearing is unusual." Id. As Plaintiffs implicitly recognized, under its regulations, DEP typically entertains adjudicatory hearing requests *after* the Department makes its permitting decision, not before as the Plaintiffs insist here. See, e.g., N.J.A.C. 7:7-28.1(b).

By a letter from Paul Stofa, Chief Advisor, Legal and Regulatory Affairs, DEP, to Plaintiffs dated October 12, 2023 (the "First Hearing Denial"), DEP responded to the Plaintiffs' First Hearing Request "suggest[ing]" an OAL hearing. DEP stated in the First Hearing Denial, "*At this time*, the Department does not believe that the pending application constitutes a contested case under the Administrative Procedure Act such that a hearing [i.e., the requested adjudicatory hearing before the OAL] would be appropriate." Pa092 (emphasis added). DEP also noted that Plaintiffs could participate in the public process associated with the Department's evaluation of other permit applications that

may be submitted by Atlantic Shores for the Projects, in addition to the Consistency Certification. Id.

***Plaintiffs Filed the Complaint in the Chancery Division Seeking to Compel an Adjudicatory Hearing in the OAL***

On December 1, 2023, Plaintiffs filed their Complaint in the Chancery Division seeking an injunction ordering DEP to refer the Consistency Certification to the OAL. Pa043. The Complaint reiterated in an abbreviated form the criticisms of the Projects that Plaintiffs advanced in their June 29<sup>th</sup> Comment Letter. Pa023-Pa036. Plaintiffs further alleged that DEP “rejected [their] suggestion to refer Atlantic Shores’ application to the [OAL] ... on the grounds that DEP does not believe the application constitutes a contested case under the Administrative Procedure Act.” Pa038. Plaintiffs then contended that they were “faced with no choice but to seek court intervention to ensure that administrative due process is achieved through a fair hearing before a neutral and unbiased decisionmaker [i.e., the OAL] on Atlantic Shores’ application.” Pa038-Pa039. In other words, Plaintiffs alleged that DEP erred when it determined that the Consistency Certification does not present a contested case justifying a referral to the OAL, and Plaintiffs asked the Chancery Division to correct DEP’s purported error. Plaintiffs also sought by Order to Show Cause a preliminary injunction preventing DEP from making a determination on the

Consistency Certification during the pendency of the underlying action. Pa093-Pa096.

The Chancery Division granted Atlantic Shores' motion to intervene on December 20, 2023. Pa099-Pa100.

Both DEP and Atlantic Shores opposed the request for a preliminary injunction and moved to dismiss the Complaint. Pa101-Pa106.

*The Chancery Division Dismissed the Complaint*

The court below held oral argument on March 13, 2024, on DEP and Atlantic Shores' motions to dismiss and on Plaintiffs' order to show cause.

By Order dated March 28, 2024, the Chancery Division dismissed the Complaint and denied Plaintiffs' request for a preliminary injunction. Pa107-Pa108. The court below held that "because NJDEP has made no decision on the matter [*i.e.*, DEP had not at the time issued its decision on the Consistency Determination] and Plaintiffs do not have a right to an administrative hearing at this stage, the matter is not appropriate for review by this court." Pa112. The court further held that after DEP renders its decision on the Consistency Certification, "the matter [would be] appropriate in the Appellate Division rather than before [the Chancery Division] pursuant to R. 2:2-3." Pa112.

On May 13, 2024, Plaintiffs filed their Notice of Appeal in this matter appealing from the Chancery Division Order dismissing the Complaint. Pa001-Pa012.

Both DEP and Atlantic Shores moved to dismiss this appeal as moot. By Order dated July 15, 2024, the Appellate Division denied the motions to dismiss without prejudice. ASa48-ASa49.

***Plaintiffs Separately Have Appealed from DEP's Consistency Determination***

In accordance with its statutory charge, DEP conducted a thorough and substantive review of Atlantic Shores' Consistency Certification over a nearly two and a half year period and, on April 1, 2024, DEP issued its concurrence with Atlantic Shores' Consistency Certification (the "Consistency Determination"). Pa114-Pa116. The Consistency Determination was accompanied by a forty-six page Environmental Analysis Report thoroughly discussing the relevant CZM Rule provisions, and a forty-one page Response to Comments. Pa117-Pa162; ASa76-ASa116.

By letter to DEP dated April 26, 2024 (the "Second Hearing Request"), Plaintiffs again sought an adjudicatory hearing in the OAL regarding the Consistency Determination. ASa1-ASa9.

On May 14, 2024, Plaintiffs filed a Notice of Appeal from the Consistency Determination in this Court, which is the related case In the Matter of the Federal

Consistency Certification for Atlantic Shores Offshore Wind South Project  
(Docket No. A-002743-23). ASa10-ASa14.

By letter dated May 14, 2024 (the “Stay Request”), Plaintiffs requested that DEP stay the Consistency Determination during the pendency of their related appeal challenging the Consistency Determination under Docket No. A-002743-23. ASa15-ASa27.

On May 31, 2024, Plaintiffs moved to consolidate this matter with their appeal in Docket No. A-002743-23. ASa28-ASa30. The Court denied the motion to consolidate by Order dated July 15, 2024, which noted that the appeals will be calendared back-to-back on the same date before the same panel. ASa46-ASa47.

DEP denied the Second Hearing Request by letter dated June 14, 2024 (the “Final Hearing Denial”). ASa31-ASa37. Plaintiffs then amended their Notice of Appeal in Docket No. A-002743-23 to challenge the Final Hearing Denial. ASa38-ASa45.

DEP denied the Stay Request by order dated July 29, 2024. ASa50-ASa70. Subsequently, Plaintiffs moved in this Court for a stay in the related appeal under Docket No. A-002743-23. ASa71-ASa73. By Order dated September 10, 2024, this Court denied the motion for stay of the Consistency Determination. ASa74-ASa75.

## ARGUMENT

### **I. THE CHANCERY DIVISION LACKED SUBJECT-MATTER JURISDICTION OVER THIS INTERLOCUTORY APPEAL OF STATE AGENCY ACTION.**

#### **A. Plaintiffs' interlocutory appeal of DEP's First Hearing Denial was untimely.**

The Complaint is properly characterized as an interlocutory appeal from DEP's First Hearing Denial. That is, before the Department acted on the Consistency Certification, Plaintiffs requested that DEP refer the matter to the OAL because of the Department's alleged bias. Pa053-Pa054; Pa087-Pa090. DEP denied Plaintiffs' First Hearing Request. Pa092. Plaintiffs then brought the Complaint in the Chancery Division asking the court to determine that DEP erred in denying the hearing request and order DEP to refer the matter to the OAL based on the same allegations of bias they raised in their First Hearing Request to the Department. Pa018-Pa019; Pa039-Pa043.

Plaintiffs brought an action in a higher tribunal (the Chancery Division) asking it to find the lower tribunal (DEP) had erred and to order a different result: that review request is an appeal, which is properly the subject of review by the Appellate Division instead of the Chancery Division. *Appeal*, Black's Law Dictionary (8th ed. 2004) (an "appeal" is "a proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal");

see also N.J. Election Law Enforcement Comm’n v. DiVincenzo, 451 N.J. Super. 554, 569 (App. Div. 2016) (“The exclusivity of [Appellate Division] jurisdiction [over appeals] may not be circumvented by framing a claim as one ordinarily presented in the trial court....”). DEP’s First Hearing Denial was an interlocutory decision because it preceded the agency’s determination on Atlantic Shores’ Consistency Certification. Moon v. Warren Haven Nursing Home, 182 N.J. 507, 512 (2005) (“By definition, an order that does not finally determine a cause of action but only decides some intervening matter pertaining to the cause and which requires further steps to enable the court to adjudicate the cause on the merits is interlocutory.”).

The Court Rules provide specific procedures for judicial review of interlocutory decisions of State administrative agencies, which Plaintiffs did not follow. R. 2:2-4 (“[T]he Appellate Division may grant leave to appeal, in the interest of justice, ... from an interlocutory decision or action of a state administrative agency or officer....”); R. 2:5-6(a) (“Applications for leave to appeal ... from interlocutory decisions or actions of state administrative agencies or officers shall be made by filing and serving with ... the agency from which the appeal is taken and with the appellate court a motion for leave to appeal....”).

A motion for an interlocutory appeal from an administrative agency must be filed within 20 days of the agency decision. R. 2:5-6(a). DEP denied the Plaintiffs' First Hearing Request on October 12<sup>th</sup>. Pa092. Plaintiffs filed their Complaint on December 1<sup>st</sup>. Pa013. This is beyond the 20-day timeframe for seeking leave for an interlocutory appeal in the Appellate Division, which expired in early November.<sup>1</sup> Therefore, the Complaint was untimely and the Chancery Division's dismissal of the Complaint should be affirmed.<sup>2</sup>

**B. The Chancery Division lacked jurisdiction over Plaintiffs' interlocutory challenge to DEP's First Hearing Denial.**

Even assuming arguendo that the Complaint had been timely, the Chancery Division correctly concluded that it lacked subject-matter jurisdiction over Plaintiffs' challenge to state agency action. See Pa111-Pa112. Thus, the Chancery Division's Order dismissing the Complaint should be affirmed.

Our Supreme Court held that "save for condemnation or inverse condemnation actions, appeals from state agency actions lie in the Appellate

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<sup>1</sup> Actions improperly filed in the trial court ordinarily may be transferred to the Appellate Division. R. 1:13-4(a). However, where the appeal would have been untimely if it had been filed in the Appellate Division on the date of filing of the Complaint, transfer would be futile and dismissal is appropriate. Arsenis v. Borough of Bernardsville, 476 N.J. Super. 195, 212-13 (App. Div. 2023).

<sup>2</sup> While the Chancery Division's decision did not reach the issue of the untimeliness of Plaintiffs' Complaint and dismissed the Complaint on other grounds, it is well-settled that untimely appeals should be dismissed. In re Hill, 241 N.J. Super. 367, 372 (App. Div. 1990).

Division.” Infinity Broad. Corp. v. N.J. Meadowlands Comm’n, 187 N.J. 212, 225 (2006) (“Infinity Broadcasting”); accord In re Protest of Contract for Retail Pharmacy Design, Constr., Start-Up & Operation, 257 N.J. 425, 438 (2024) (“[A]n appeal of [a state administrative agency’s final decision or action] must lie in the Appellate Division unless the matter is a condemnation or inverse condemnation appeal arising from state agency action....”). The subject-matter jurisdiction of the Appellate Division is “exclusive.” Mutschler v. N.J. Dep’t of Env’tl. Prot., 337 N.J. Super. 1, 9 (App. Div. 2001) (citing Pascucci v. Vagott, 71 N.J. 40, 51-54 (1976)); accord Prado v. State, 186 N.J. 413, 422 (2006) (Rule 2:2-3(a)(2) “vests the Appellate Division with exclusive jurisdiction”).

As noted supra at 13, review of interlocutory agency decisions is available in the Appellate Division, which has exclusive jurisdiction over such challenges to State agency action. See, e.g., Cty. of Gloucester Bd. of Chosen Freeholders v. Pub. Employment Relations Comm’n, 55 N.J. 333, 334 (1970) (noting that state agency action under review was interlocutory and that Appellate Division appropriately exercised its jurisdiction to review interlocutory order); Sod Farm Assocs. v. Twp. of Springfield, 366 N.J. Super. 116, 131-32 (App. Div. 2004) (holding that jurisdiction of appeal from Council on Affordable Housing lies with the Appellate Division, and noting availability of interlocutory appeals).

Further, the Appellate Division regularly adjudicates claims that state agency decision-makers are biased without resort to the novel hearing procedure in the trial court that Plaintiffs demand here. E.g., In re Xanadu Project at Meadowlands Complex, 415 N.J. Super. 179, 186-93 (App. Div. 2010); In re Application of N.J. Bell Tel. Co., 291 N.J. Super. 77, 84, 95-98 (App. Div. 1996); Monmouth Med. Ctr. v. State Dep't of Health, 272 N.J. Super. 297, 317-19 (App. Div. 1994). Thus, the Appellate Division was well-suited to hear and decide the claims that the Plaintiffs improperly and prematurely presented to the Chancery Division regarding DEP's alleged bias.<sup>3</sup>

Plaintiffs cite several cases in support of their attempt to carve out an exception to the Appellate Division's jurisdiction in order to save their Complaint filed in the Chancery Division. See Pb18-Pb26. However, all but one of the cases on which Plaintiffs rely were decided before the Supreme Court's unequivocal statement of the Appellate Division's jurisdiction in Infinity Broadcasting and again recently in Retail Pharmacy. See supra at 14-15. The validity of the cases on which Plaintiffs rely is in doubt after Infinity Broadcasting. See Shim v. Rutgers, 191 N.J. 374, 383 n.4 (2007) ("Given our

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<sup>3</sup> The Department's "Response to Comments" issued with the Consistency Determination addressed commenters' claims of a "conflict of interest." ASa84. The Appellate Division will review Plaintiffs' allegations of bias and DEP's response to commenters' conflict claims in connection with the related appeal bearing Docket No. A-002743-23.

recent holding in Infinity Broadcasting ... and Rutgers's status as an instrumentality of the State ..., it is clear that an appeal from a final decision by Rutgers in respect of a student's domicile must lie in the Appellate Division pursuant to R. 2:2-3(a)(2)[,]" even though the complaint in Shim was filed in the Law Division before the Court decided Infinity Broadcasting) (citations omitted).

The sole post-Infinity Broadcasting case Plaintiffs cite—Committee to Recall Robert Menendez v. Wells, 204 N.J. 79 (2010)—is not controlling. See Pb20. In that case, the Committee brought an action for mandamus in the Law Division on December 1, 2009, to compel the New Jersey Secretary of State to respond to the Committee's notice of intention to recall Senator Menendez. Committee to Recall Robert Menendez, 204 N.J. at 89. The Secretary of State responded on January 11, 2010, thus mooting the Law Division action, which the Committee voluntarily dismissed. The Committee then brought a new action in the Appellate Division to challenge the Secretary's decision, which ultimately was appealed to the Supreme Court. Id. at 90. Plaintiffs strain to read the Court's decision which includes a recitation of the procedural history that simply acknowledges the existence of the prior Law Division action as validation that jurisdiction in the Law Division was somehow appropriate. Pb20 (citing Committee to Recall Robert Menendez, 204 N.J. at 89). The Law Division action

was a different case altogether and the Court did not make any finding on the propriety of that short-lived action that voluntarily was dismissed in favor of an action in the Appellate Division.

The other pre-Infinity Broadcasting cases on which the Plaintiffs rely are equally unavailing. Pfleger v. New Jersey State Highway Department, 104 N.J. Super. 289 (App. Div. 1968), concerned an inverse condemnation claim. See Pb20-Pb21. The Supreme Court made clear that condemnation and inverse condemnation actions involving state agencies should be brought in the Law Division, an exception to the general rule vesting exclusive jurisdiction in the Appellate Division. Infinity Broad. Corp., 187 N.J. at 225-26. Since this matter does not involve the State's condemnation authority and does not fall within this exception, Pfleger is inapposite.

Frapaul Construction Co. v. Transportation Department of New Jersey, 175 N.J. Super. 84 (App. Div. 1980) also is inapposite. Frapaul concerned a dispute under a construction contract with the State. See Pb21-Pb22. Breach of contract claims against the State are brought under the Contractual Liability Act, which provides, "Contract claims against the State shall be heard by a judge sitting without a jury." Id. at 89-90 (citing N.J.S.A. 59:13-4). Applying this jurisdictional provision, this court interpreted this statute to vest jurisdiction over such claims in the trial court and held that the statute controlled rather than

R. 2:2-3(a)(2). Id. at 90-92. Since this matter does not involve a breach of contract claim against the State and does not implicate the jurisdictional provision of the Contractual Liability Act, the limited holding of Frapaul does not support Plaintiffs' claim that the Chancery Division should have jurisdiction in this matter.

Plaintiffs further rely on Colon v. Tedesco, 125 N.J. Super. 446 (Law Div. 1973), and Township of Montclair v. Hughey, 222 N.J. Super. 441 (App. Div. 1987), to argue that the Chancery Division should have jurisdiction to make a record on the issue of DEP's alleged bias. See Pb20-24. As noted, the Supreme Court's clear holding in Infinity Broadcasting superseded these earlier lower court decisions.<sup>4</sup>

Further, even assuming Colon and Hughey remain good law, they are distinguishable because there **is** a record below in this case. See Colon, 125 N.J. Super. at 452 (holding that jurisdiction was proper in the Law Division because "[n]o intramural record of any kind has been made" before the Department of

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<sup>4</sup> Infinity Broadcasting made clear that, in those circumstances where additional fact-finding may be necessary for this Court's review, the Appellate Division, not the trial court, determines whether such fact-finding or a hearing is required. Infinity Broad. Corp., 187 N.J. at 227; accord R. 2:5-5(b). The court below correctly concluded that it lacked jurisdiction, since under the Court Rules it is for the Appellate Division to decide the issue the Plaintiffs wrongly presented to the Chancery Division, i.e., whether additional fact-finding is required before the Appellate Division can decide an appeal from a State agency.

Labor and Industry); Hughey, 222 N.J. Super. at 448 (case was “brought to halt an alleged threatened breach of public and private rights, not to review an administrative proceeding”). That is, the Plaintiffs’ submissions to DEP during the public comment period raised the issue of DEP’s alleged bias, presented facts in support of their claim, and asked that DEP remedy this alleged bias through referral of the matter to the OAL for an adjudicatory hearing. Pa053-Pa054; Pa087-Pa090; ASa1-ASa9. DEP considered those facts and submissions and denied Plaintiffs’ request for a hearing. Pa092; ASa31-ASa37. Plaintiffs have separately appealed DEP’s Consistency Determination and DEP’s denial of the Second Hearing Request in the related appeal in the Appellate Division under Docket No. A-002743-23. ASa38-ASa45. Accordingly, this Court will have the opportunity to consider that record on appeal and review whether DEP was correct to deny Plaintiffs’ hearing request. A separate collateral proceeding on this issue in the Chancery Division is not necessary.

The nature and purpose of the requested hearings in Colon and Hughey also differ from this case. In Colon, the Law Division held it was appropriate to hold a “plenary hearing” in that court to determine whether “unsanitary conditions” in migrant labor camps “constitute[d] a public nuisance.” Colon, 125 N.J. Super. at 448, 452. In Hughey, the Court held that a hearing should be held in the trial court to determine whether “the presence of 5,000 barrels of

contaminated soil [in Montclair] combined to create a police and fire hazard which resulted in a public and private nuisance” and whether the plan to move the barrels and temporarily store them in the Pinelands Area “constituted a threat to the environment and to public health, safety, and welfare.” Hughey, 222 N.J. Super. at 444-45. In these cases, then, jurisdiction was vested in the trial court so the court could conduct **fact-finding** that had not occurred before the agencies to determine whether a nuisance existed.

Here, in contrast, Plaintiffs focus on the availability of **discovery** in the trial court to obtain information about DEP’s alleged bias. See, e.g., Pb2 (“The Shore Municipalities sought, and should have obtained discovery, to uncover whether the DEP has acted with neutrality....”); Pb16 (“the Shore Municipalities sought pre-decision discovery aimed at showing bias within the DEP decision-making process”); Pb24 (analogizing this matter to Hughey and complaining that “no discovery has been and can now be obtained” here); T9-18 to T9-22 (“[DEP and Atlantic Shores] say, let the Appellate Division decide, but we all know ... the Appellate Division can’t order discovery necessary to prove the bias....”); T42-19 to T44-10 (listing extensive discovery requests contemplated by Plaintiffs). Through the Open Public Records Act (“OPRA”), N.J.S.A. 47:1A-1 et seq., the law already provides for access, with limited exceptions, to public records like those the Plaintiffs wanted to seek in this action. See T43-6

to T43-14 (expressing desire to seek “correspondence between the DEP and Atlantic Shores” and “correspondence between the Governor’s Office and Atlantic Shores”). OPRA also provides that the denial of a record request may be challenged by appeal to the Government Records Council or the Law Division. N.J.S.A. 47:1A-6. Neither Colon nor Hughey justify Plaintiffs’ attempt to circumvent the Appellate Division’s exclusive jurisdiction and the well-established procedures of OPRA to conduct a fishing expedition into DEP’s internal workings.<sup>5</sup>

Finally, Plaintiffs rely on Nero v. Board of Chosen Freeholders of Camden County, 144 N.J. Super. 313 (App. Div. 1976), to argue that the Chancery Division rather than the Appellate Division had jurisdiction over their challenge to the Hearing Denial. See Pb25-Pb26. This case, too, is inapposite. In Nero, the Camden County Board of Chosen Freeholders (“Freeholder Board” or the

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<sup>5</sup> Plaintiffs’ ability to obtain information through discovery sought in the Chancery Division would also have been limited. Plaintiffs wanted to seek copies of correspondence within DEP concerning the Projects and the Consistency Determination and indicated they would seek to depose the DEP Commissioner, without providing the predicate showings that such an intrusive inquiry is warranted here. See Larkins v. Solter, 450 N.J. Super. 519, 536-39 (App. Div. 2017) (affirming State Comptroller’s withholding of internal documents in litigation based on the deliberative process privilege that also is codified in OPRA); Hyland v. Smollok, 137 N.J. Super. 456, 460 (App. Div. 1975) (holding that “high-level government officials should not be deposed” unless official has first-hand knowledge of events or deposition is “essential to prevent injustice”).

“Board”) passed resolutions declaring that there was probable cause to believe that the plaintiffs, three members of the Camden County Municipal Utilities Authority (“CCMUA”), had committed official misconduct. Nero, 144 N.J. Super. at 316-17. The Freeholder Board scheduled hearings on the charges. Id. Plaintiff CCMUA members filed a complaint in the trial court challenging the Freeholder Board’s authority to issue the resolutions and arguing that the Board should not be permitted to hold the hearings because widespread public animus against the plaintiffs would result in political pressure on the Board members that threatened their ability to remain impartial. Id. at 317-18. The trial court granted summary judgment to the Freeholder Board because the statute authorizing the creation of the CCMUA by the Board granted the Board, rather than the courts, sole authority to remove CCMUA members. Id. at 319.

The Appellate Division reversed and held that the case presented “one of those rare instances” where the court would “interfere with the administrative process established by statute.” Id. at 324. The “sensational” publicity in “[v]oluminous newspaper reports, accounts, and editorials” “condemning” the plaintiff CCMUA members and demanding they be removed from office presented “more than a naked charge of prejudice, partiality, or bias” on the part of the Freeholder Board. Id. at 318-19, 324.

This case presents a different issue not presented in Nero. Here, the issue is whether the Chancery Division or the Appellate Division had jurisdiction over Plaintiffs' interlocutory challenge to the hearing denial by DEP, a State agency. In Nero, by contrast, there was no doubt that the trial court had jurisdiction over the CCMUA plaintiffs' challenge to the Freeholder Board, which was a prerogative writ action challenging a county-level agency. R. 4:69-1; see also R. 4:69-7 (permitting interlocutory challenges in the Law Division where that court would have jurisdiction under R. 4:69-1 over challenge to final agency action). The court in Nero did not decide whether the trial court should have jurisdiction over bias claims against a State agency even when jurisdiction otherwise would be vested in the Appellate Division. Because of this crucial procedural distinction, Plaintiffs' reliance on Nero is unavailing.

Further, the facts and claims here differ markedly from Nero. The court in Nero held that courts should take decision-making authority away from agencies on the grounds of bias in "rare instances," a decision that should not be made "lightly." Nero, 144 N.J. Super. at 324; see also Ferrari v. Melleby, 134 N.J. Super. 583, 586 (App. Div. 1975) ("[C]ourts should be extremely cautious in interfering with ... administrative procedure [because the court believes the decision-maker is biased] and, in fact, [we] rarely anticipate the necessity of doing so."). The courts in Nero and Ferrari were willing to take that

extraordinary step to ensure fairness where the respective plaintiffs were charged with official misconduct and threatened to be removed from positions of public trust. See Ferrari, 134 N.J. Super. at 586 (“The general public must be assured that nobody charged with wrongdoing, even though not criminal in nature, be deprived of his constitutional right to a fair and impartial hearing.”) (emphasis added). This is not that kind of case, and a finding by DEP that Atlantic Shores is entitled to the Consistency Determination cannot result in a finding that Plaintiffs committed any wrongdoing. DEP’s discharge of its duty to evaluate Atlantic Shores’ Consistency Certification in accordance with the CZM Rules is subject to review in the Appellate Division in the ordinary course based on the administrative record. Unlike the plaintiffs in Nero, Plaintiffs here are not subject to sanctions from the allegedly biased tribunal.

Finally, the allegations of bias were far more severe and specific in Nero. There, plaintiffs endured “sensational” newspaper publicity against them and “a public clamor” demanding their removal from the CCMUA; multiple Camden County municipalities passed resolutions “condemning plaintiffs and calling upon the Board to officially remove them from office;” and the Freeholder Board members, all Democrats, were under pressure from the local Democratic leader (the mayor of Camden) and the State Attorney General, also a Democrat, who “publicly ... called upon the Board to remove plaintiffs from office.” Nero, 144

N.J. Super. at 318-19. The allegations in the similar contemporaneous case Ferrari v. Melleby were even more extreme. There, Camden's police chief, defendant Melleby, filed disciplinary charges against Ferrari, the deputy chief of the Camden police. It was alleged that Melleby caused Ferrari to be removed from his position as operations commander; placed Ferrari on sick leave without any medical evaluation; informed Ferrari's National Guard commander that Ferrari was on leave for "psychiatric evaluation" and that Ferrari "was imminently capable of serious violent conduct;" seized Ferrari's assigned police car that contained Ferrari's personal papers and attorney correspondence about these disciplinary charges and refused to return the papers until ordered by the trial court; and caused Ferrari's salary to be suspended while he was called to serve in the National Guard, which required Ferrari to sue to recover his pay. Ferrari, 134 N.J. Super. at 587.

The allegations of bias Plaintiffs level against DEP here pale in comparison to the personal animus evident in those cases. Plaintiffs' brief contains a single public statement from the DEP Commissioner to substantiate the alleged disqualifying bias of the Department:

DEP Commissioner Shawn M. LaTourette has echoed the Murphy Administration's "commitment to improving our environment ... through our pursuit of a just clean energy transition and clean water for all" and applauded the Governor's "course for accelerating New Jersey's green economic growth."

Pb8 (citing Pa19). These statements amount to nothing more than generic policy aspirations that are standard, unobjectionable, and consistent with state law and policy. In fact, these statements are quite similar to sentiments about clean energy that the Plaintiffs themselves have expressed. Compare Pa053 (Plaintiffs stated in public comment letter that they “recognize the urgent need to transition towards clean energy sources”). This single unremarkable statement of Commissioner LaTourette is not comparable to the pervasive bias that justified the court’s extraordinary intervention in Nero.

Plaintiffs also cite several statements by Governor Murphy, as well as various executive orders issued under his administration, to substantiate further their bias argument. See Pb6-Pb8. Yet neither Governor Murphy nor Commissioner LaTourette are the decision-makers here. Rather, the Director of DEP’s Division of Land Resource Protection issued the Consistency Determination, and several staff members of that Division prepared the lengthy Environmental Analysis Report and Response to Comments supporting that decision after conducting a thorough review of the Consistency Certification in accordance with DEP’s statutory charge. Pa116; Pa161; ASa115-ASa116. The Response to Comments also correctly pointed out that DEP is required under state law to “recommend[] measures to reduce greenhouse gas emissions, including those associated with the production of energy” and to “protect[] New

Jersey’s natural and historic resources, including those within the State’s coastal area,” and these “legislatively assigned obligations are not in conflict.” ASa84. Plaintiffs have not directly questioned the integrity of the responsible public servants in DEP’s Division of Land Resource Protection in carrying out their statutory duty. It is well-settled that there is no disqualifying bias even where the *actual decision-maker* has publicly expressed a view on policy issues related to the decision. Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 280-82 (1965); Wollen v. Borough of Fort Lee, 27 N.J. 408, 421 (1958); In re Application of N.J. Bell Tel. Co., 291 N.J. Super. 77, 96-97 (App. Div. 1996). A fortiori, the policy positions advocated here by public officials who are *not the decision-maker* (i.e., Governor Murphy and Commissioner LaTourette) cannot establish a disqualifying bias. The Chancery Division correctly determined that it lacked jurisdiction over Plaintiffs’ claims.

**II. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.**

Plaintiffs’ Complaint sought the following relief from the Chancery Division: “An Order referring the determination concerning Atlantic Shores’ Federal Consistency Certification to the Office of Administrative Law,” and, related to that request, “an Order temporarily, preliminarily, and permanently restraining the DEP from issuing a Federal Consistency Certification [sic] until a hearing in the Office of Administrative Law has been completed and an Initial

Decision issued.” Pa043. Because Plaintiffs are not entitled to that relief as a matter of law, their Complaint correctly was dismissed.

First, the Complaint sought mandamus relief, and Plaintiffs failed to satisfy the high bar for that extraordinary relief. In addition, Plaintiffs have no statutory or constitutional right to the adjudicatory hearing in the OAL that they sought.

**A. Plaintiffs were not entitled to mandamus ordering DEP to refer the matter to the OAL.**

Only DEP has authority to refer a consistency determination to the OAL for decision as a contested case.

The [OAL] shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the [OAL] or as otherwise authorized by law, except as provided by N.J.A.C. 1:1-17 [relating to consolidation of matters in the OAL]. The [OAL] shall not receive, hear or consider any pleadings, motion papers, or documents of any kind relating to any matter until it has acquired jurisdiction over that matter, except as provided by N.J.A.C. 1:1-17.

N.J.A.C. 1:1-3.2(a) (emphasis added). Thus, the court below could have granted the relief Plaintiffs sought only by ordering DEP to refer the matter to the OAL.

Plaintiffs’ Complaint sought to challenge the inaction of DEP in not referring the matter to the OAL as Plaintiffs had requested. That is, Plaintiffs sought an order from the Chancery Division directing DEP to take a particular action—referring the matter to the OAL—that it had not taken. The procedural

vehicle to challenge agency inaction is the writ of mandamus. Caporusso v. N.J. Dep't of Health & Senior Servs., 434 N.J. Super. 88, 101 (App. Div. 2014).<sup>6</sup>

Plaintiffs were not entitled to the extraordinary remedy of mandamus—in any venue. Mandamus is “only appropriate where the party seeks [1] to compel a governmental agency to perform a duty [that] is ministerial and wholly free from doubt or [2] to compel the exercise of discretion, but *not* in a specific manner.” Twp. of Neptune v. State, Dep't of Env'tl. Prot., 425 N.J. Super. 422, 434 (App. Div. 2012) (citation omitted) (emphasis in original). Plaintiffs do not satisfy either requirement.

An agency determination whether to refer a matter to the OAL as a contested case is not a ministerial duty. Ministerial duties are “absolutely certain and imperative, involving merely the execution of a set task, and when the law which imposes [them] prescribes and defines the time, mode and occasion of [their] performance with such certainty that nothing remains for judgment or discretion.” Vas v. Roberts, 418 N.J. Super. 509, 522 (App. Div. 2011) (citation omitted). On the other hand, the decision whether to refer a matter to the OAL

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<sup>6</sup> The Appellate Division also has exclusive jurisdiction over claims for mandamus, so even if Plaintiffs' claim is characterized as a claim for mandamus rather than an interlocutory appeal from DEP's Hearing Denial, the Appellate Division had exclusive jurisdiction over this matter. Caporusso v. N.J. Dep't of Health & Senior Servs., 434 N.J. Super. 88, 98-101 (App. Div. 2014); Twp. of Neptune v. State, Dep't of Env'tl. Prot., 425 N.J. Super. 422, 427, 432-33 (App. Div. 2012); see also supra Part I.

as a contested case is “discretionary,” calls for the exercise of judgment by the agency, and is not an absolutely certain duty. Quad Enters. v. Paramus, 250 N.J. Super. 256, 263 (App. Div. 1991); In re Xanadu Project at Meadowlands Complex, 415 N.J. Super. 179, 187-88 (App. Div. 2010); cf. Sloan ex rel. Sloan v. Klagholtz, 342 N.J. Super. 385, 394-95 (App. Div. 2001) (reviewing agency decision not to refer matter to OAL for abuse of discretion).

The second potential basis for mandamus relief is not available here either. Mandamus may be used to compel the exercise of discretion, but not in a specific manner. Plaintiffs impermissibly sought to compel DEP to act in a specific manner—to decide the First Hearing Request in their favor and refer the matter to the OAL, not just to act on the First Hearing Request so that decision could be appealed. To the extent that the Complaint sought mandamus relief, it properly was dismissed.

**B. Plaintiffs did not have a right to an adjudicatory hearing in the OAL.**

Even assuming arguendo that the Chancery Division (1) had jurisdiction over the Complaint and (2) could have granted mandamus relief ordering DEP to refer the Consistency Certification to the OAL, the Complaint also correctly was dismissed because Plaintiffs lacked a constitutional right to the OAL adjudicatory hearing that they sought.

The OAL is not a tribunal with general jurisdiction to hear any dispute touching on administrative agencies. Rather, the OAL can hold an adjudicatory hearing upon the request of a third party only if the matter is a “contested case” as defined under the APA. In re Xanadu Project at Meadowlands Complex, 415 N.J. Super. 179, 193 (App. Div. 2010) (“an objector may receive a trial-type hearing before an ALJ if the matter is a ‘contested case’ ...”); see also N.J.A.C. 1:1-3.2(a) (“The [OAL] shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head ....”).

A “contested case” under the APA is “a proceeding ... in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency ... after opportunity for an agency hearing....” N.J.S.A. 52:14B-2 (emphasis added). Thus, contested cases are only those cases “in which the Constitution or a statute requires an adjudicatory hearing.” In re Request for Solid Waste Util. Customer Lists, 106 N.J. 508, 517 (1987) (citation omitted).

Plaintiffs have not and cannot assert that any statute gives them a right to an adjudicatory hearing; no statute requires a hearing. Plaintiffs’ arguments that they have a constitutional right to a hearing also must fail. See Pb26-Pb32.

To have a constitutional right to an adjudicatory hearing, a third-party seeking to challenge an agency permit must have a “particularized property

interest” at stake. In re Riverview Dev., LLC, 411 N.J. Super. 409, 426 (App. Div. 2010); see also Application of Rockland Elec. Co., 231 N.J. Super. 478, 490 (App. Div. 1989). Plaintiffs correctly recognize that a protected property interest must come from a “legitimate claim of entitlement” to the purported property interest. Nicoletta v. N. Jersey Dist. Water Supply Comm’n, 77 N.J. 145, 154-55 (1978); see also Pb29. Courts look to the underlying state law to determine whether a property interest exists:

Property interests are not created by the Federal Constitution. Instead, they are created by existing rules or understandings that stem from an independent source such as state law, or mutually explicit understandings [between the State and the party asserting the right to a hearing].

Thomas Makuch, LLC v. Twp. of Jackson, 476 N.J. Super. 169, 185 (App. Div. 2023) (citations omitted); see also Application of Rockland Elec. Co., 231 N.J. Super. 478, 490 (App. Div. 1989) (“In determining whether a property right exists, state law, which is controlling on whether there is a property interest, must be examined.”).

This Court’s decision in In re Riverview Development, LLC, 411 N.J. Super. 409 (App. Div. 2010), is on point and defeats Plaintiffs’ claim of entitlement to an adjudicatory hearing in the OAL. In Riverview, property owners whose scenic views of the New York City skyline would have been diminished by a proposed new building subject to DEP permit approval sought

an adjudicatory hearing to challenge that permit. Like Plaintiffs here, the appellants in Riverview argued that they were entitled to an adjudicatory hearing to contest the DEP permit because the visual impacts of the project under DEP's consideration allegedly would cause them significant economic losses. Specifically, the challengers in Riverview presented an expert report from a real estate appraiser estimating that there would be "on average, a twenty percent reduction in the values of their homes, depending upon the amount of curtailment of the scenic views from each particular unit." Id. at 429. This Court nevertheless held that these economic losses did not give rise to a constitutionally protected property interest.

[D]esire [of appellants] to maintain unimpeded scenic views of the Hudson River and the New York City skyline does not amount to a constitutionally-protected property interest entitling them ... to a formal OAL hearing to contest Riverview's permit. Absent an enforceable deed restriction or easement, the Bergen Ridge residents have no property right to prevent any party—whether it be a private or public developer—from building a zoning-compliant structure that will block their vistas of the Hudson River or of New York City.

Id. at 434-35. This Court also recognized the damaging and unwise policy consequences that would result from granting adjudicatory hearings to parties in Plaintiffs' position who assert collateral economic harms from development:

[T]he collateral economic impacts upon surrounding properties caused by the siting of an otherwise-lawful building are part and parcel of the social compact. They result from the unavoidable

interrelatedness of living in a world surrounded by other persons and by other things.

If we were to hold that such collateral economic impacts automatically entitled neighboring property owners to a formal hearing in the OAL each time a State permit is issued for, say, a sewerage treatment plant, a group home, a new prison, or some other building that could depress surrounding property values, the construction of those and other important structures might be thwarted or unduly delayed, at great cost to the public. That surely would be contrary to the interests of the citizens as a whole. The Legislature recognized this problem by adopting strict limitations on third-party hearing rights in the APA.

Id. at 435-36 (emphasis added). Indeed, the court in Riverview cautioned that such relief, if granted, “would have far-reaching consequences.” Id. at 436 (citing Normandy Beach Improvement Ass’n v. Comm’r, Dep’t of Env’tl. Prot., 193 N.J. Super. 57, 61 (App. Div. 1983)). This Court’s sound reasoning in Riverview applies to the case at hand. Here, the relief sought in Plaintiffs’ Complaint would provide a new avenue of obstruction to thwart or unduly delay the construction of important projects at great cost to the public, and contrary to the interests of the citizens as a whole.

Contrary to this controlling authority, Plaintiffs argue that they have a property right entitling them to an adjudicatory hearing because of their “interest in collecting tax revenue.” See Pb29-Pb32. Specifically, they argue that “[a] decline in tourism [caused by the Projects’ aesthetic impacts on views of the ocean] necessarily will result in lower tax revenues from sales and hospitality

taxes and diminish property tax revenues” and also would “decrease the [Plaintiffs’] revenue that is derived from beach badges.” Pb30-Pb31. Plaintiffs cite no provision of state law—no statute, regulation, or court decision—creating a constitutionally protected property right for municipalities to maintain a certain level of tax revenue. Contrary to Plaintiffs’ position, it is well established that municipalities do **not** have a constitutionally protected property right to avoid speculative potential reductions in tax revenue. Gomillion v. Lightfoot, 364 U.S. 339, 343 (1960) (“the Due Process Clause affords no immunity against mere inequalities in tax burdens, nor does it afford protection against their increase as an indirect consequence of a State's exercise of its political powers”); Camden v. Byrne, 82 N.J. 133, 158 (1980) (“even though local government might find itself handcuffed by statutory fiscal limitations, this Court is powerless to remove these handcuffs”) (citation omitted). For this reason alone, Plaintiffs were not entitled to the adjudicatory hearing in the OAL that they sought, so their Complaint correctly was dismissed.

The authority Plaintiffs cite in support of their purported property interest in avoiding potential reductions in tax revenue is readily distinguishable. In In re Application of John Madin/Lordland Development International, 201 N.J. Super. 105, 123-28, 136-37 (App. Div. 1985), the court held that municipalities had a right to a hearing regarding Pinelands Commission approvals of

development located in those municipalities. See Pb31. Here, on the other hand, the Projects are located outside the Plaintiff municipalities in an area of exclusively federal jurisdiction. And the court in Madin did not rely on the impacts of the proposed development on the municipalities' tax revenues as basis for finding a hearing right. In fact, the court in Madin incorrectly did not consider at all whether the municipalities had a particularized property interest giving them a constitutional right to an adjudicatory hearing but instead found a hearing right because the Pinelands Commission action was "generally akin to land use regulation and, specifically, to the exercise of the variance power." Id. at 134. Our Supreme Court has since rejected the notion that a challenge to agency action involving land use issues must be decided through a trial-type hearing simply because it involves land use, so Madin's holding rests on shaky ground. Infinity Broad. Corp., 187 N.J. at 226. In addition, both our Supreme Court and the U.S. Supreme Court have held before and after Madin that municipalities cannot assert the protections of procedural due process against their states, contrary to Madin's holding. Bd. of Educ. v. Cooperman, 105 N.J. 587, 598 n.5 (1987); Cty. of Camden v. Pennsauken Sewerage Auth., 15 N.J. 456, 470 (1954); Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 363 (2009). Madin not only is inapposite to Plaintiffs' claims, but its validity is questionable.

County of Bergen v. Port of New York Authority, 32 N.J. 303 (1960), provides even less support for Plaintiffs' position. In that case, the Supreme Court held that Bergen County lacked standing to sue the Port Authority for the Authority's alleged ultra vires actions even though Bergen County, like Plaintiffs here, asserted that the Authority's actions would indirectly impact the County's ability to collect tax revenue. Id. at 308. Bergen County, a case in which a local government asserting a similar interest could not even meet the standard for standing, which is more liberal than the particularized property interest required for an agency adjudicatory hearing, undermines Plaintiffs' claim of entitlement to an adjudicatory hearing.<sup>7</sup>

As noted above, each of the cases relied on by Plaintiffs are distinguishable and do not support a departure from well-settled law establishing that Plaintiffs have no right to an adjudicatory hearing in the OAL. Accordingly, this court should affirm the dismissal of the Complaint. Plaintiffs' hyperbolic claims suggesting that doing so would deny them a remedy are equally unavailing. See, e.g., Pb3 ("The trial court's dismissal of the lawsuit effectively silencing the [Plaintiffs'] concerns and denying them standing to challenge the

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<sup>7</sup> In any event, a third party's standing to challenge an agency approval in court does not establish the necessary particularized property interest that would give it a right to an adjudicatory agency hearing to challenge that approval. In re Amico/Tunnel Carwash, 371 N.J. Super. 199, 206-12 (App. Div. 2004).

DEP's actions creates an absurd result.”). To the contrary, Plaintiffs will have the opportunity to challenge DEP's Consistency Determination and DEP's Final Hearing Denial in the related appeal they filed under Docket No. A-002743-23. But they do not have right to pursue that challenge simultaneously in a different venue through an unprecedented procedure of their own invention.

### **III. THIS APPEAL IS MOOT FOLLOWING DEP'S ISSUANCE OF THE CONSISTENCY DETERMINATION.**

“It is the policy of this State to refrain from rendering advisory opinions or exercising jurisdiction in the abstract.” In re Protest of Contract Award for Project A1150-08, 466 N.J. Super. 244, 260 (App. Div. 2021); see also Marjarum v. Twp. of Hamilton, 336 N.J. Super. 85, 92 (App. Div. 2000) (“as a matter of judicial restraint, courts should not decide cases where a judgment cannot grant relief”). For this reason, courts “do not resolve issues that have become moot due to the passage of time or intervening events.” City of Camden v. Whitman, 325 N.J. Super. 236, 243 (App. Div. 1999).

Plaintiffs' Complaint has become moot due to intervening events.<sup>8</sup> The purpose of this unusual Complaint in the Chancery Division was to prevent DEP from issuing its Consistency Determination and to force DEP to send the matter

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<sup>8</sup> DEP and Atlantic Shores' motions to dismiss the appeal as moot were denied without prejudice, and the motion panel urged the panel that will hear the appeal to “consider the issue [of mootness] and related issues raised by the parties after oral arguments.” ASa49.

to the OAL before the Department rendered its decision on the Consistency Certification. Pa043; see also Pa087 (Plaintiffs asked DEP for a “pre-decision adjudicatory hearing”). As a practical matter, Plaintiffs can no longer obtain that relief after DEP issued the Consistency Determination on April 1, 2024. Pa114-Pa116. That intervening event rendered the Complaint and this appeal moot.<sup>9</sup>

This matter does not constitute one of those “limited instances” when a court may decide an otherwise moot issue that is “of substantial importance, likely to reoccur but capable of evading review.” Wisniewski v. Murphy, 454 N.J. Super. 508, 519 (App. Div. 2018). Plaintiffs’ implicitly attempt to avail themselves of this exception in a footnote in their brief. Pb24 & n.4. That is, they argue that the trial court “should develop a record ... over DEP’s neutrality” because Atlantic Shores is seeking a CZMA consistency determination from DEP for a different proposed offshore wind project, and “other applications are likely forthcoming” that may be challenged. Id. But Plaintiffs cannot grant themselves an exception to mootness by asserting that they might bring other litigation in the future, and this Court need not render an advisory opinion now

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<sup>9</sup> Further, on October 1, 2024, BOEM approved Atlantic Shores’ Construction and Operations Plan, a key step for authorizing construction of the Projects within the area of federal jurisdiction on the outer continental shelf. See [www.boem.gov/renewable-energy/state-activities/atlantic-shores-south](http://www.boem.gov/renewable-energy/state-activities/atlantic-shores-south) (links to BOEM approval documents available under tab labeled “Construction and Operations Plan”).

to assist Plaintiffs in some speculative future case. Nor are the issues raised here likely to evade review in the other possible cases to which Plaintiffs refer. Here, Atlantic Shores submitted its Consistency Certification to DEP on September 30, 2021. Pa117-Pa118. Plaintiffs waited more than two years before filing their Complaint on December 1, 2023 to ask the Chancery Division at the eleventh hour to take Atlantic Shores' pending application away from DEP and send it to the OAL. Yet, even despite Plaintiffs' lengthy delay, the Chancery Division issued its final judgment correctly dismissing the Complaint before DEP made its decision on the Consistency Certification. The Court therefore should not issue an advisory opinion in this moot appeal.

### **CONCLUSION**

For the foregoing reasons, the Chancery Division's dismissal of Plaintiffs' Complaint should be affirmed.

Respectfully submitted,

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By: s/ Steven T. Senior  
Steven T. Senior

Date: December 16, 2024

<p>Long Beach Township, Beach Haven, Ship Bottom, Barnegat Light, Surf City, Harvey Cedars, Brigantine, and Ventnor City,</p> <p style="text-align: center;">Plaintiffs/Appellants,</p> <p>v.</p> <p>New Jersey Department of Environmental Protection</p> <p style="text-align: center;">Defendant/Respondents,</p> <p>And</p> <p>Atlantic Shores Offshore Wind, LLC, Atlantic Shores Offshore Wind Project 1, LLC, and Atlantic Shores Offshore Wind Project 2, LLC,</p> <p style="text-align: center;">Intervenors/Respondents.</p>	<p>SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-2738-23</p> <p><b>ON APPEAL FROM:</b></p> <p>CHANCERY DIVISION: MERCER COUNTY DOCKET NO.: MER- 88-C-23</p> <p>Sat Below:</p> <p>Hon. Patrick J. Bartels, P.J.Ch.</p> <p style="text-align: center;"><b><u>Civil Action</u></b></p>
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**PLAINTIFFS/APPELLANTS' REPLY BRIEF**

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## **PRELIMINARY STATEMENT**

Governor Murphy has staked his legacy on advancing aggressive clean energy policies and charged the Department Environmental Protection (DEP) and other state agencies to act with unprecedented urgency to implement his ambitious offshore wind agenda. The proposed project is the largest and most visible offshore wind farm ever to be constructed; it will fundamentally reshape New Jersey's coastline and have far-reaching and irreversible impacts on communities and the environment. Yet, with the stakes that high, the DEP and Atlantic Shores argue that no one—not municipalities, not individual property owners, not businesses—has standing to challenge the DEP's impartiality or seek the discovery necessary to determine whether the agency's review process is free from political pressure and bias. That cannot be the law.

According to Defendant DEP and Intervenors Atlantic Shores Offshore Wind, LLC, Atlantic Shores Offshore Wind Project 1, LLC, and Atlantic Shores Offshore Wind Project 2, LLC (collectively, Atlantic Shores), Plaintiffs' (the Shore Municipalities) application was too early and unripe before the DEP acted; too late and untimely after the fact; moot because of the parallel pending appeal; and the hundreds of millions of dollars in lost tax revenue does not give them a cognizable interest in seeking what should – at its core – be a noncontroversial principle: that a project of this magnitude should be reviewed

by a neutral arbiter untainted by political influence. As explained below, the DEP and Atlantic Shores' arguments do not hold water. It is unsurprising that Atlantic Shores opposes the Shore Municipalities' application—they have a financial interest at stake. But why is the DEP fighting so hard against a simple referral to a neutral adjudicator, when transparency and public confidence in the fairness of the administrative process are implicated?

The trial court's ruling, and the arguments advanced by the DEP and Atlantic Shores, suggest a disturbing proposition: that there is no forum, no remedy, and no mechanism to ensure fairness of process in agency proceedings of such enormous consequence. That cannot stand. The magnitude of this project, the DEP's pivotal role in evaluating similar wind projects in the future, and the need to safeguard public trust, demand meaningful judicial oversight.

The trial court's denial of the Shore Municipalities' application resulted in a predetermined rubber-stamp decision by the DEP to approve the biggest project this State has ever seen, with the most profound consequences, with no record from which this Court can even ascertain whether the agency's decision was based on legitimate considerations or the result of mounting political pressure. The trial court had the equitable power to address those concerns. It could and should have ordered expedited discovery into the question of bias and, upon an adequate showing, referred the matter for a plenary hearing before the

OAL. Now the Shore Municipalities ask this Court to address their grave concerns. The law and principles of equity demand nothing less.

## ARGUMENT

### **I. This Appeal is Not Moot**

An issue is considered “moot when our decision ... can have no practical effect on the existing controversy.” Wisniewski v. Murphy, 454 N.J. Super. 508, 518 (App. Div. 2018) (quoting Redd v. Bowman, 223 N.J. 87, 104 (2015)). That is not the case here. The Shore Municipalities’ appeal of the DEP’s consistency certification and the agency’s post-decision denial of a hearing, docketed as A-2743-23 (the Consistency Appeal) does not moot the instant appeal, as both the DEP and Atlantic Shores argue. [Db10-14; Ib39-40]<sup>1</sup> The issues surrounding the DEP’s neutrality and independence and its taint by political pressure and bias can only be resolved in this appeal, as the relief the Shore Municipalities sought included pre-decision discovery that was aimed at uncovering such bias.

As the Shore Municipalities explained to the trial court, it is insufficient to simply appeal the consistency certification because “the Appellate Division reviews agency dispositions under [a] very deferential standard and the Appellate Division can’t order discovery necessary to prove the bias.” [Tr. 9:19-23] This Court’s general deference to the agency’s expertise inherently assumes

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<sup>1</sup> “Db” refers to DEP’s brief. “Ib” refers to Atlantic Shores’ brief.

that the agency is acting as an independent adjudicator in reviewing an off-shore wind application and exercising its expertise. Here, however, without the pre-hearing discovery that was sought and denied in this case, this Court will review DEP's findings in the Consistency Appeal appeal without the benefit of a record concerning the DEP's impartiality. For that reason alone, this case is not moot.

Moreover, the very case relied on by the DEP and Atlantic Shores confirms that courts will decline to dismiss a matter on mootness grounds in order to address an important matter of public interest ““where the underlying issue is one of substantial importance, likely to reoccur but capable of evading review.”” Wisniewski, 454 N.J. Super. at 519 (quoting Zirger v. Gen. Accident Ins. Co., 144 N.J. 327, 330 (1996)). The proposed project is the largest, tallest, closest to shore offshore wind farm ever built anywhere in the world, and would make this State's shoreline look like an industrial park. And it is not the only offshore wind turbine project in the works. Atlantic Shores has another consistency certification application pending for a similar project. See [dep.nj.gov/wp-content/uploads/bulletin/bu2024\\_0515.pdf](https://dep.nj.gov/wp-content/uploads/bulletin/bu2024_0515.pdf).

Other applications are also likely forthcoming, as Governor Murphy has pledged to achieve 100% clean energy in the next two decades and has charged every agency in the State, including the DEP, to “take all necessary actions” to implement his aggressive goal of offshore wind energy generation in New

Jersey. [Pa17] Given the unprecedented magnitude of this project, and the DEP’s critical role in analyzing similar wind projects now and in the future, the need to ensure the DEP’s impartiality is paramount and warrants this Court’s review.

## **II. The Shore Municipalities’ Action was not Untimely**

Atlantic Shores’s characterization of the Shore Municipalities’ application as an interlocutory appeal of an agency decision in order to invoke the 20-day time bar under the Court Rules [Ib11-14] misses the mark. The application was not an “appeal” – final or interlocutory – of an agency decision.

On August 14, 2023, the Shore Municipalities submitted a letter to the DEP “to discuss the LBI Municipalities’ concerns” about Atlantic Shores’ application “and to suggest that DEP should refer the application to the Office of Administrative Law for an administrative law judge to consider the application.” [Pa087] The communication simply raised a “suggestion,” supported by reasoning for that suggestion, and asked to meet with the DEP “to discuss whether the matter should be referred to an administrative law judge.” [Pa087-89] The correspondence was not a formal demand that the DEP take specific action. The Shore Municipalities merely sought a collaborative discussion regarding the handling of the consistency determination.

In its October 12, 2023 response, the DEP declined the invitation to meet with the Municipalities and further stated that the DEP “does not believe that

the pending application constitutes a contested case under the Administrative Procedures Act such that a hearing would be appropriate.” [Pa092] The Shore Municipalities did not challenge the DEP’s determination that this was not a “contested case”<sup>2</sup> in the Chancery Division. Their application was not an “appeal” from the DEP’s decision; it was a challenge to DEP’s entire tainted review process—which was ongoing—and to enjoin the DEP from completing it without appropriate safeguards. As this Court has held, “time constraints for bringing actions . . . do not apply where it is alleged that the public body has a continuing duty to perform a governmental obligation.” Toll Bros., Inc. v. State,

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<sup>2</sup> To the extent that the DEP and Atlantic Shores argues that the OAL is an unavailable forum absent a “contested case,” [Db16-17; Ib29], that overlooks the flexibility afforded by the Administrative Procedure Act (APA) and its enabling regulations. Although contested cases are the most common form of OAL referral, N.J.S.A. 52:14F-5(o) explicitly authorizes the assignment of an Administrative Law Judge (ALJ) to conduct “proceedings other than those related to contested cases” including “investigative hearings,” if requested by an agency head. N.J.S.A. 52:14F-5(p) grants a more general power to “Assign an administrative law judge not engaged in the conduct of contested cases to perform other duties vested in or required of the office.” And the OAL’s rules expressly contemplate the ALJs hearing uncontested cases. See N.J.A.C. 1:1-21.1(a) (“Any agency head may request under N.J.S.A. 52:14F-5(o) the assignment of an administrative law judge to conduct an uncontested case, including rule making and investigatory hearings.”). The OAL rules contemplate hearings where parties may present factual and legal bases for their positions, even in non-contested contexts. N.J.A.C. 1:1-21.4(a)(2). And following such hearings, the ALJ issues a report recommending a course of action, supported by factual or legal findings. N.J.A.C. 1:1-21.5(a). The DEP was not precluded from requesting an investigatory hearing to address the Shore Municipalities’ concerns regarding bias, even absent a “contested case” designation.

Dep't of Environmental Prot., 242 N.J. Super. 519, 528-29 (App. Div. 1990). “[A] plaintiff would have a continuing right to seek legal recourse so long as the agency failed to act.” Id. at 528; see also Yanuzzi v. Mayor and Counsel of Borough of Spring Lake, 22 N.J. 567 (1956) (declining to dismiss action to compel installation of water and sewer mains, noting that “plaintiffs are seeking to enforce ... a continuing right... [that] is not lost by a failure of such judicial action within 30 days from the local authority’s mere refusal to act”).

### **III. The Chancery Division had Jurisdiction**

The DEP and Atlantic Shores argue that the trial court did not have jurisdiction because “appeals” and “review of interlocutory agency decisions” lie exclusively in this Court. [Ib14-15; Db14-15] But as explained above, the Shore Municipalities’ application was neither an appeal nor a request for review of an agency’s decision. It was a distinct procedural challenge seeking equitable relief to ensure an unbiased process in reviewing the Consistency Certification that includes appropriate safeguards – i.e., a referral to the OAL.

Atlantic Shores’ endeavor to call into doubt the validity of the Shore Municipalities’ cited cases in light of the Supreme Court’s decision in Infinity Broad. Corp. v. N.J. Meadowlands Comm’n, 187 N.J. 212, 225 (2006) and in In re Protest of Contract for Retail Pharmacy Design, Constr., Start-Up & Operation, 257 N.J. 425, 438 (2024) [Ib16-17] is unavailing. Those cases stand

for nothing more than the unremarkable proposition that this Court has exclusive jurisdiction over appeals of final agency decisions. In Infinity Broadcasting, plaintiff challenged restrictions imposed by the New Jersey Meadowlands Commission regarding a landfill redevelopment agreement. The Meadowlands Commission’s decision to adopt the agreement and subsequent amendments was deemed a final agency action because the resolutions provided adequate factual and legal conclusions and “gave unmistakable notice of their finality.” 187 N.J. at 222. The Supreme Court held that such finality triggered this Court’s jurisdiction under Rule 2:2-3(a)(2).<sup>3</sup> In Retail Pharmacy, the Court held a University Hospital was not a “state administrative agency” subject to the Court Rules governing agency appeals, and otherwise reaffirmed the general principle that this Court has exclusive jurisdiction over final decisions of administrative agencies. The Shore Municipalities do not contest that general principle and the cases cited do not undermine their position.

Moreover, contrary to Atlantic Shores’ claim that Infinity Broadcasting casts doubt on the validity of and superseded the cases the Shore Municipalities cited [Ib16; 19], the Court in Infinity Broadcasting cited those same cases in

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<sup>3</sup> Notably, the Court also found that the extensive record before the Commission, including submissions and expert reports, was sufficient for meaningful appellate review, negating the need for additional fact-finding. 187 N.J. at 224-26. No record exists here (nor in the consistency appeal) that speaks to the DEP’s objectivity.

describing a judicially recognized exception to the general rule that a proceeding to review agency action lies in this Court – the exception being that “a record must be developed as a prerequisite to meaningful appellate review.” Infinity Broadcasting, 187 N.J. at 223 (citing, among others, Pfleger v. State Highway Dep’t, 104 N.J. Super. 289, 291–93 (App. Div. 1968) and Montclair Twp. v. Hughey, 222 N.J. Super. 441, 446 (App. Div. 1987)).<sup>4</sup> That exception remains valid -- a trial court may hear cases where the development of a record is necessary to ensure meaningful judicial review.

The Shore Municipalities also do not dispute that this Court could “retain jurisdiction in an appeal from the action of a state agency, but [] refer the matter to the Law Division or to the agency for such additional fact-finding,” as the Supreme Court held and as Atlantic Shores points out. [Ib19 (citing Infinity Broadcasting, 187 N.J. at 227)]; Retail Pharmacy, 257 N.J. at 438. But once again, this is not an appeal of a final agency decision like the Consistency Appeal. And if in that proceeding, this Court determines the record is

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<sup>4</sup> The DEP does not appear to share Atlantic Shores’ view that Infinity Broadcasting superseded cases like Hughey, 22. N.J. Super. 441, which recognizing an exception to this Court’s exclusive jurisdiction where “the proposed administrative action has not been preceded by the creation in the agency of a record which is amenable to appellate review.” [Db21] DEP itself cited Hughey to explain that this Court has recognizes circumstances where jurisdiction rests with a trial court due to the absence of a record but argues that such record is now available here. But as explained below, the DEP confuses a substantive record concerning the consistency determination with a record concerning the DEP’s impartiality.

insufficient – i.e., the record supporting the DEP’s consistency decision – it can remand for additional fact finding. This appeal is different. As explained in the Shore Municipalities’ moving brief, the fact-finding sought in this appeal does not concern the substance of the agency’s decision (thus triggering exclusive jurisdiction of this Court), but rather the independence of the agency in making the decision in the first place. The Shore Municipalities have raised concerns regarding the DEP’s ability to act as a neutral arbiter. Pre-decision discovery on bias is different than post-decision discovery to support the substance of the DEP’s decision. The DEP and Atlantic Shores conflate the two, and none of the case law cited addresses that critical distinction.

Even if the trial court lacked jurisdiction (and it did not), the correct result would have been to transfer the action to this Court rather than to dismiss it. See R. 1:13-4(a) (permitting the court lacking jurisdiction to transfer to the proper court). Atlantic Shores argues that transfer would be futile where the appeal would have been untimely if filed in the Appellate Division at the time the Complaint was filed, and thus dismissal is appropriate. [Ib14] Even if that were true, this Court can hear matters, even if not timely filed, where “issues of genuine public importance have been raised.” In re Christie's Appointment of Perez as Pub. Member 7 of Rutgers Univ. Bd. of Governors, 436 N.J. Super. 575, 585–86 (App. Div. 2014) (considering untimely challenge to whether Governor

may appoint member to state university board of directors without consent of the Senate given it was a matter of public importance); Jacobs v. N.J. State Highway Auth., 54 N.J. 393, 396 (1969) (hearing untimely challenge to Authority’s retirement policy for workers because of “the importance of the public question involved”). Ensuring that the decision-making process for projects with profound environmental, economic, and community impacts is conducted with objectivity undoubtedly is a matter of significant public importance, warranting this Court’s exercise of jurisdiction.

#### **IV. The Shore Municipalities’ Complaint Stated a Claim**

The DEP and Atlantic Shores’ remaining arguments against the validity of the Shore Municipalities’ complaint fail to address the fundamental importance of transparency in administrative decision-making, particularly when dealing with a project of such extraordinary magnitude and public significance. At its core, this case is about ensuring fairness and maintaining public confidence in an agency process tasked with reshaping New Jersey’s coastline and impacting entire communities and economies. The DEP’s assertion that the Shore Municipalities failed to prove bias rings hollow because they were denied the very discovery necessary to substantiate bias. The DEP erects an impossible standard: that bias must actually be proven before discovery into bias is permitted. But bias is rarely overt. The Shore Municipalities raised indicia of

potential bias, including the DEP's dual role as the regulator and proponent of offshore wind energy and the agency's mandate by the Governor's executive orders to support Governor Murphy's aggressive wind-energy agenda.<sup>5</sup> That demands heightened scrutiny, not a blanket refusal to permit inquiry.

The DEP's reliance on precedents concerning the recusal or disqualification of agency members due to personal or financial conflicts is misguided in this context, as this case is not about individual biases but an

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<sup>5</sup> It is conceivable that the trial court, and perhaps this Court, may not appreciate the magnitude of the DEP Commissioner's conflict here. Under the Constitution, the Governor appoints heads of state agencies, who serve at his discretion. N.J. Const. art. V, § 4. As a member of the Governor's administration, each commissioner regularly engages in discussions with the Governor on agency matters, including during formal cabinet meetings. The DEP commissioner was acutely aware of the Governor's steadfast commitment to offshore wind energy as a cornerstone of his policy agenda. The Governor's expectations were clear: the DEP was to use all available resources to advance that priority. That created an undeniably precarious administrative position for the Commissioner if his agency denied the consistency determination on the first and only project that would advance the Governor's agenda. The stakes were heightened by the timing of the DEP's review of Atlantic Shores' application. Shortly before, another major developer, Ørsted, announced that it was ceasing development of its Offshore Wind farms. [Pa41] Media outlets reported that Ørsted's announcement that it would not move forward with its projects "trigger[ed] an angry response from New Jersey Governor Phil Murphy." Governor Murphy stated that "[the] decision by Ørsted to abandon its commitments to New Jersey is outrageous and calls into question the company's credibility and competence" and vowed to "make sure" Ørsted would pay \$300 million in penalties to the State if it did not follow through with its commitment. [Pa42] Ørsted's withdrawal placed additional pressure on the DEP to ensure the success of the Atlantic Shores projects. Denial of the consistency determination would have directly undermined the Governor's policy objectives and the DEP Commissioner's ability to fulfill the expectations of the individual who appointed him.

institutional predisposition -- a scenario absent from the cases the DEP cites. Even under the law relied upon by the DEP, a member of an administrative agency may be disqualified even absent actual bias; “it is the potential for conflict that disqualifies. There need be no showing that the official succumbed to temptation or was even aware of it.” See In re Bergen Cnty. Utils. Auth., 230 N.J. Super. 411, 419–20 (App. Div. 1989). “The matter of conflict is fact-sensitive” and requires assessing “whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty.” Id.

If there is even a chance that the DEP’s process may be influenced by a predetermined outcome—whether intentionally or inadvertently—it demands scrutiny to preserve public confidence in the impartiality of administrative decision-making. Indeed, the OAL was established specifically “to bring impartiality and objectivity to agency hearings and ultimately to achieve higher levels of fairness in administrative adjudications.” Unemployed-Employed Council of N.J., Inc. v. Horn, 85 N.J. 646, 650 (1981). Failing to inquire into potential bias—in a matter of such immense public importance—undermines the integrity of the process.

The arguments regarding the Shore Municipalities’ alleged lack of a right to a hearing are also unconvincing. As explained in the moving brief, a “property

interest” sufficient to trigger Due Process protections “may take many forms over and above the ownership of tangible property” and focus on a “legitimate claim of entitlement.” Nicoletta v. N.J. Dist. Water Supply Comm’n, 77 N.J. 145, 154 (1978). DEP and Atlantic Shores argue that the Shore Municipalities have no constitutionally protected right against “inequality of tax burdens” [Db33] or avoid “speculative potential reductions in tax revenue” (Ib33). But the cases on which they rely for those propositions, including Gomillion v. Lightfoot, 364 U.S. 339 (1960), and Camden v. Byrne, 82 N.J. 133, 158 (1980), are distinguishable.

In Gomillion, the U.S. Supreme Court invalidated Alabama’s redistricting that disenfranchised Black voters; its mention of inequalities in tax burdens was limited to incidental effects of legitimate state action. Byrne dealt with legislative tax caps and appropriations laws, which the Supreme Court held were within the exclusive authority of the legislative branch and could not be judicially altered. Those situations are simply incomparable. This case involves direct, project-specific administrative action by the DEP that threatens the Shore Municipalities’ ability to collect tax revenues; the Shore Municipalities are not challenging legislative policy decisions on fiscal management like in Byrne.

Nor does In re Riverview Dev., LLC, 411 N.J. Super. 409, 426 (App. Div. 2010) squarely address the issue as the DEP and Atlantic Shores suggest. That

case involved individual homeowners asserting what this Court deemed an unprotected interest in scenic views that was insufficient to warrant a hearing. Here, the stakes are far greater. The Shore Municipalities represent entire municipalities facing catastrophic losses of hundreds of millions in tax revenue and the irreversible transformation of New Jersey's coastline. Unlike Riverview, this is not a case of localized, collateral impacts but a statewide issue of profound public importance.

Even in the absence of a constitutional mandate for a hearing, the Chancery Court had equitable authority to grant the relief sought under these extraordinary circumstances and should have exercised that discretion to ensure transparency and fairness in the DEP's review process given the magnitude of the implications involved. The failure to do so undermines the very principles of fairness that administrative proceedings are meant to uphold.

### **CONCLUSION**

For the reasons stated here and in the Shore Municipalities' moving brief, this Court should reverse the trial court's decision and remand this case allow for discovery and a hearing.

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