NOT TO BE PUBLISHED WITHOUT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

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. HUD-L-1183-20

STATE OF NEW JERSEY, BY
THE COMMISSIONER OF
TRANSPORTATION,

Plaintiff,

v.

550B DUNCAN AVENUE, L.L.C,
A NEW JERSEY LIMITED
LIABILITY; NIJA LEASING CORP.,
A NEW JERSEY CORPORATION;
RETAIL LEASING SERVICES, L.L.C.,
A NEW JERSEY LIMITED LIABILITY
COMPANY; CENTER CITY
CONSOLIDATORS CORP., A NEW
JERSEY CORPORATION; CENTER
CITY COURIERS, INC., A NEW
JERSEY CORPORATION; RETAIL
DISTRIBUTION AND LOGISTICS,
L.L.C., A NEW JERSEY LIMITED
LIABLITY COMPANY; JAY DEE
FAST DELIVERY; MALL DELIVERY
SERVICE, INC.; A NEW JERSEY
CORPORATION; STATE OF NEW
JERSEY, DEPARTMENT OF
ENVIRONMENTAL PROTECTION;
CITY OF JERSEY CITY, IN THE

COUNTY OF HUDSON, A MUNICIPAL CORPORATION OF NEW JERSEY,

Defendants.

Decided: March 3, 2021

Rebecca J. Karol, Deputy Attorney General, attorney for plaintiff (New Jersey Office of the Attorney General).

Kevin J. Coakley, attorney for defendants 550B Duncan Avenue, L.L.C.; NIJA Leasing Corp.; Retail Leasing Services, L.L.C.; Center City Consolidators Corp.; Center City Couriers, Inc.; Retail Distribution and Logistics, L.L.C.; Jay Dee Fast Delivery; and Mall Delivery Services, Inc. (Connell Foley LLP).

PETER F. BARISO, JR., A.J.S.C.

Preamble

This matter comes before the Court by way of the motion of defendants 550B Duncan Avenue, L.L.C.; NIJA Leasing Corp.; Retail Leasing Services, L.L.C.; Center City Consolidators Corp.; Center City Couriers, Inc.; Retail Distribution and Logistics, L.L.C.; Jay Dee Fast Delivery; and Mall Delivery Services, Inc. (collectively, "defendants") to compel plaintiff the State of New Jersey, by the Commissioner of Transportation (the "New Jersey Department of Transportation" or "NJDOT") to amend the declaration of taking. The central issue presented in this motion is whether the condemnation is a partial or complete taking of defendants' property. For the reasons that follow, this Court holds that

the declaration of taking properly encompasses all property held by defendants and, as a result, defendants' motion to amend the declaration of taking must be denied.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On March 19, 2020, NJDOT filed a verified complaint and order to show cause, seeking to exercise eminent domain over the entirety of defendants' property. Specifically, NJDOT sought to condemn certain realty -- known as Parcel 16A, also known as Block 11707 -- located on the north side of the Pulaski Skyway and owned by defendants. Parcel 16A is triangular in shape and bordered by the Skyway on the southern side of the triangle. The eastern side of the triangle is bordered by the adjacent property owner's land.

The issue before the Court centers on the ownership of the remaining land adjacent to the Hackensack River, commonly known as Lot 4. The declaration of taking was filed on March 26, 2020. On May 8, 2020, NJDOT filed an amended order to show cause. On May 22, 2020, an order for final judgment and appointing commissioners was entered. A commissioners' hearing was held on January 15, 2021 to determine the fair market value of the condemned property. The report of the commissioners was filed on January 20, 2021. NJDOT timely filed its appeal of the report of commissioners on January 22, 2021. On February 3, 2021, defendants filed the instant motion to amend the declaration of taking and,

following opposition by NJDOT and a reply thereto by defendants, oral argument was conducted on February 22, 2021.

DEFENDANTS'/MOVANTS' ARGUMENTS

The Eminent Domain Act, N.J.S.A. 20:30-1, *et seq.*, states that "[i]f as a result of a partial taking of property, the property remaining consists of a parcel or parcels of land having little or no economic value, the condemnor, in its own discretion or at the request of the condemnee, shall acquire the entire parcel." N.J.S.A. 20:3-37; *see State by Comm'r of Transp. v. William G. Rohrer, Inc*., 80 N.J. 462 (1979).

In defendants' view, the facts of *Rohrer, Inc., supra*, are instructive. There, in order to widen a highway, NJDOT condemned a portion of the condemnee's property, including the front part (and only the front part) of a building that faced the highway. *Id.* at 464. The trial court applied the so-called "before and after rule," concluding that (a) the value of the entire property before the taking was $159,000, (b) the value of the remnant after the taking (with only part of the building) was $0, and (c) NJDOT should pay the difference: $159,000, plus the cost of demolition ($29,912), less the value of the remnant post-demolition ($11,400), for a net award of ($177,512). *Ibid.* NJDOT appealed, and the Appellate Division affirmed. *Ibid.*

NJDOT sought certification, and the Supreme Court remanded the matter to the trial court, but -- tellingly -- not in favor of NJDOT. *Id.* at 467-68. Rather, the Court held that "the action of the condemnor resulted, in monetary or economic terms, in a complete taking" as the "remnant was economically valueless," and that the condemnee should be given the option of receiving the full value of its entire parcel, *i.e.*, $159,000, in exchange for conveyance of the entire parcel to NJDOT, or, in the alternative, of receiving the full value of the entire parcel and still keeping the remnant. *Ibid*. It reasoned that the remnant, "with its exposed and unoccupied building," was more trouble than it was worth because it could be the cause of property damage or personal injury for which the landowner might be liable. *Id*. at 467. The condemnee thus was entitled to make its own election: whether it would prefer to keep the remnant despite the trouble, or to be rid of it. In either case, however, the condemnee was entitled to compensation for the whole parcel. The Court also held that the trial court should determine what incidental elements of expense, if any, should be added to the award, and fix interest in accordance with N.J.S.A. 20:3-31 and 32. *Id.* at 468.

Here, as in *Rohrer, Inc*., the not-taken part -- a portion of Lot 4 -- has become an uneconomic remnant. Specifically, the remainder of Lot 4 is inaccessible and useless without the portion that NJDOT has taken: the only access to the non-taken property is through the previously-taken portion,

defendants no longer own any land connected to the property, and the property is not connected to a public road. Defendants, therefore, have the option of requiring that NJDOT take all of Lot 4 because the not-taken remainder clearly is inaccessible and now more trouble than it is worth.

NJDOT'S OPPOSITION

NJDOT properly determined the property it needed to take under its power of eminent domain. According to NJDOT, "[i]n condemnation proceedings, the quantity of land to be taken, its location and the time of taking are within the discretion of the body endowed by the Legislature with the right of eminent domain." *Burnett v. Abbott*, 14 N.J. 291, 294 (1954); *see also State v. Buck*, 94 N.J. Super. 84 (App. Div. 1967).

NJDOT's acquisition of Parcel 16A -- including Lot 4 -- is an entire taking. The land and interests acquired are described aptly in the legal description which was attached to the verified complaint and on the tax map. Specifically, Parcel 16A is triangular in shape and bordered by the Skyway on the southern side of the triangle.

The eastern side of the triangle is bordered by the adjacent property owner's land. Neither of the southern nor the eastern boundaries are at issue here. The west side of the triangle is bordered by the Mean High Water Line (MHWL) of the Hackensack River. The MHWL was determined by a licensed land surveyor prior

to the filing of NJDOT's verified complaint. NJDOT did not extend its taking past the MHWL into the tidal waters of the Hackensack River for a simple reason: under long-standing and well-settled New Jersey law, defendants' ownership of the property ends at the MHWL.

"The State owns in fee simple all lands that are flowed by the tide up to the high-water line or mark." *O'Neill v. State Highway Dep't,* 50 N.J. 307, 323 (1967). This principle is well-established:

> All navigable waters within this state, together with the soil under them, belong, in actual proprietorship, to the state. A person acquiring title to land abutting on a navigable stream takes title only to the high-water line, and that line is limited by the outflow of the medium high tide between the spring and neap tides.
>
> [*New Jersey Zinc & Iron Co. v. Morris Canal & Banking Co.*, 44 N.J. Eq. 398, 400–01 (Ch. 1888), aff'd sub nom. *Morris Canal & Banking Co. v. New Jersey Zinc & Iron Co.*, 47 N.J. Eq. 598 (1890).]

As a matter of law, the State owns up to the MHWL. After a taking of the land up to the MHWL, there is no remaining property owned by defendant on the north side of the Skyway.

The statute addressing partial takings does not apply. In this matter, NJDOT's acquisition of Parcel 16A is an entire taking of Lot 4, not a partial taking. *Rohrer, Inc*., *supra,* 80 N.J. at 642, applies only to partial takings and has no impact on the issue for determination.

Further, it is procedurally improper for defendants belatedly to attempt to revise NJDOT's taking and compel an amendment of the declaration of taking. Under *State by Commissioner of Transportation v. Orenstein*, 124 N.J. Super. 295, 298 (App. Div. 1973), a challenge to the rights sought to be condemned must be raised before the order for final judgment -- declaring that the condemnor has duly exercised its eminent domain power -- is entered. *Orenstein* explains:

> [i]f there are any issues to be decided other than that of value and damages -- be they a challenge to the plaintiff's right to exercise the power of eminent domain or a claim that the condemnor is in fact taking more property and rights than those described in the complaint -- those issues must be presented to and decided by the court before it enters judgment appointing condemnation commissioners.
>
> [*Orenstein*, *supra*, 124 N.J. Super. at 298 (citations omitted).]

In this case, that time already has passed. The order for final judgment and appointing commissioners was entered on May 22, 2020. Having received no objection to the proposed taking at the return date of the order to show cause, the Court properly determined that NJDOT duly exercised its power of eminent domain as to the property and rights described in the verified complaint. In fact, the parties already have held a hearing before the court-appointed commissioners, and a report of commissioners has been filed. Nonetheless, defendants seek to revisit an order that already is final and to compel the NJDOT to "take" more

property defendants do not own. Defendants should be barred from attempting to change the description of the taking.

Defendants' reliance on a Charles Jones Tidelands Search Certificate indicating that a tidelands claim exists on Lot 4 is misplaced. The MHWL as depicted on the map is the boundary of ownership by defendants, and not the tidelands claim line. The tidelands claim line is further towards the water than the MHWL -- as shown on the map -- and has no effect in determining any boundary. "While an upland property owner may obtain title to dry land added by accretion, it also loses to the State of New Jersey land that becomes tidally-flowed as a result of erosion." *Wildwood Crest v. Masciarella*, 51 N.J. 352, 357 (1968). "Although the mean high water mark may shift as a result of accretion and erosion, it remains the dividing point between the upland owner's property and that of the State." *City of Long Branch v. Liu*, 203 N.J. 464, 478 (2010). In other words, it is the MHWL, and not the tidelands claim line, that determines the boundaries of the realty held by a property owner.

Defendants do not own any of the property flowed by the tide because it did not obtain a riparian grant on Lot 4. NJDOT's title search and review of tidelands conveyance maps, which identify all grants and licenses conveyed by the Tidelands Resource Council/New Jersey Department of Environmental Bureau of Tidelands Management revealed no riparian grant on Lot 4, and defendants have

not provided any evidence that they own a riparian grant on Lot 4. "A riparian grant, in turn, is the method by which the State conveys riparian lands to its citizens." *Panetta v. Equity One, Inc*., 190 N.J. 307, 318 (2007). As N.J.S.A. 12:3-10 specifically provides:

> Any riparian owner on tidewaters in this State who is desirous to obtain a lease, grant or conveyance from the State of New Jersey of any lands under water in front of his lands, may apply to the board, which may make such . . . grant . . . upon such compensation therefor, to be paid to the State of New Jersey . . . and shall vest all the rights of the State in said lands in said . . . grantee.

NJDOT's declaration of taking encompassed the entirety of Lot 4 and did not leave any uneconomic remnant as a result of that taking. NJDOT acted properly in determining what property to take under eminent domain, including properly determining the legal boundary between defendants' property and the tidal waters already owned by the State. There is no legal authority to support an amendment of the declaration of taking under the facts presented here, and, even if there was, any such request is untimely as the proper time to challenge the scope of the declaration of taking has passed. Accordingly, defendants' motion to compel amendment of the declaration of taking should be denied.

DEFENDANTS' REPLY

According to defendants, NJDOT now asserts that, because the State has authority to claim tidelands up to the MWHL, and because NJDOT's surveyor says

the uneconomic remnant is below the MHWL, defendants do not own the untaken portion of Lot 4.

The description of Lot 4 states that defendants' record title to the lands on Lot 4 extends to the "bulkhead line of the Hackensack River as approved May 11, 1921." Further, the takings map filed by the State (the "takings map") recognizes that defendants' deed "claims ownership to Pierhead & Bulkhead Line," which the takings map shows as farther waterward than even the State's tidelands claim line. Similarly, NJDOT's appraiser recognized at the January 15, 2021 condemnation commissioners' hearing that Lot 4 "extend[s] to the pierhead and bulkhead line of the Hackensack River."

When asked about the remainder of Lot 4 being inaccessible post-taking, NJDOT's appraiser responded not that defendants' had no remaining right to Lot 4, but rather that the balance of Lot 4 was indeed inaccessible to defendants post-taking. Second, the appraiser admitted that NJDOT's taking was a "partial taking," and not the complete taking now claimed by NJDOT. Third, he described Lot 4 as being 1.22 acres, or 53,143.2 square feet, even though NJDOT's takings map describes the taking on Lot 4 as only 6,930 square feet.

Further, NJDOT admits in note 3 to its own takings map that defendants' deed "claims ownership to pierhead & bulkhead line." The tax map and the tax record also show Lot 4 as being 1.22 acres/53,143.2 square feet, and NJDOT's

own takings map lists the tax map first among the "References" used for the takings map.[1]

Now, NJDOT -- in order to avoid the simple taking of the uneconomic remnant as required by N.J.S.A. 20:3-37 -- claims that it unilaterally set the waterward boundary of its taking of Lot 4 as the MHWL, which NJDOT states was "determined by a licensed land surveyor prior to the filing of the NJDOT's Verified Complaint." It additionally claims that despite defendants' complete ownership of Lot 4 as argued above, the land identified by defendants as an uneconomic remnant is below the MHWL and is not owned by defendants.

That said, the above-described evidence clearly demonstrates that defendants are the record owner of the entirety of Lot 4. If a condemnor can contort property descriptions to avoid claims of uneconomic remnants, N.J.S.A. 20:3-37 will be rendered meaningless, and property owners will never be protected as the statute intended. NJDOT should not be permitted to avoid its obligations by redefining the property owned by defendants.

Historically, the State "owned all land below the mean high water mark on tidally flowed property." *Dickinson v. Fund for Support of Free Public Schools*, 95 N.J. 65, 73 (1983). Because waterlines are shifted by both natural and artificial

[1] A copy of the State's takings map is attached as Exhibit D to defendants' reply.

causes, the State has been required to map its tideland claims to provide certainty in respect of property rights. *See id.* at 73-74, 76. For example, a 1981 amendment to the New Jersey Constitution prohibited the State from claiming title in certain lands that had been tidally flowed if the State did not "define and asserted such a claim pursuant to law" by a date certain. *N.J. Const.* art. VIII, § V, ¶ 1. Following this amendment, the State prepared extensive mapping "delineating the lands it claimed." *Dickinson, supra*, 95 N.J. at 81; *see also Lisowski v. Boro. of Avalon*, 442 N.J. Super. 304, 314-15 (App. Div. 2015) ("The Office of Environmental Analysis (OEA) of the Department of Environmental Protection (DEP) was responsible for preparing the tidelands claims maps.").

NJDOT's own takings map shows that the State, after extensive mapping of its tidelands claims, did not claim ownership of the land now identified by defendants as not owned by defendants. Thus, the State's own tideland claims maps contradict the theory relied on by NJDOT to defeat application of N.J.S.A. 20:3-37. Specifically, the takings map shows that the State "Tidelands Claim Line" is well waterward of the portion of Lot 4 being taken by NJDOT. Therefore, apart from NJDOT's failure to recognize Lot 4 as defendants' "property" under N.J.S.A. 20:3-37, NJDOT also has ignored the State's own tidelands claim line to avoid the clear obligations of N.J.S.A. 20:3-37.

Finally, NJDOT is wrong that it is procedurally improper for defendants to move now to revise the declaration of taking. Although NJDOT relies on *Orenstein, supra*, that case does not stand for the proposition NJDOT claims. In *Orenstein*, the Appellate Division held that, once the the condemnation commissioners' hearing had occurred, it was error for the trial court to permit the condemnee to offer evidence that the condemnor's taking included a right of way easement in addition to the property identified in the declaration of taking. *See id.* at 298. It reasoned that "the only issue to be determined by the commissioners and by the fact finder in event of appeal is the lump sum compensation to be paid by the condemnor, plus any damages to the remaining property of the owner if the taking is only a part thereof." *Ibid*. (citation and internal quotation marks omitted). Here, unlike in *Orenstein*, defendants are not attempting to offer new evidence. Nor are defendants arguing that NJDOT took more than it claims to have taken. Rather, defendants argue that NJDOT's partial taking of Lot 4 left an uneconomic remnant: something that was not at issue in *Orenstein*. An uneconomic remnant refers "to the remaining property of the owner," which issue was expressly recognized by the court in *Orenstein* as properly "determined by the commissioners and by the fact finder in the event of appeal." Indeed, in *Rohrer, Inc., supra*, a trial court already had determined valuation (considering the value of the remainder post-taking as well as the value of the land taken) when the Supreme

Court remanded the case to address an uneconomic remnant. *Id.* at 464. Nor does N.J.S.A. 20:3-37 impose limitations on timing. For those reasons, defendants' motion is timely.

ANALYSIS

The issues before the Court are two-fold: (1) is this motion procedurally proper, and (2) does NJDOT's taking of Lot 4 constitute a full or partial taking? For the reasons that follow, the motion as argued by defendants is procedurally proper, the net effect of NJDOT's condemnation action is a total taking, and, hence, as a substantive matter, defendants' motion must be denied.

A. Defendants' motion is procedurally proper.

At its core, defendants' motion alleges damages to the remainder of property purportedly owned by defendants. As such, the motion is procedurally proper. New Jersey courts consistently have held that "the only issue to be determined by the commissioners and by the fact finder in event of appeal is the lump sum compensation to be paid by the condemnor, plus any damages to the remaining property of the owner if the taking is only a part thereof." *Orenstein, supra*, 124 N.J. Super. at 298 (emphasis in original; citation and internal editing marks omitted). The fact that the Court's ultimate determination is that the condemnation action constitutes a total taking does not otherwise bar defendant's application.

B. Defendants' motion is substantively unavailing and must be denied.

The pertinent issue in respect of ownership of the lot is the location of the boundary line between defendants' property and the Hackensack River. In an unbroken line of cases, New Jersey courts consistently have held that tidally flowed lands up to the MHWL are owned in fee simple by the State. As recently as 2010, our Supreme Court reaffirmed this view, holding that

> [g]enerally, the State of New Jersey owns in fee simple all lands that are flowed by the tide up to the high-water line or mark, and the owner of oceanfront property holds title to the property upland of the high water mark. . . . .
>
> . . . .
>
> The mean high water mark, generally, is the boundary line that divides private ownership of the dry beach and public ownership of tidally flowed lands. That boundary is not fized, but fluctuates over time through the process of accretion, erosion, and avulsion.
>
> [*City of Long Branch v. Jui Yung Liu*, 203 N.J. 464, 467 (2010) (citations and internal quotation marks omitted).]

The State rightfully has claimed the land up to the MHWL, leaving no property owned by defendants. That is, in this action, NJDOT has exercised the power of eminent domain to seize all realty up to the MHWL, and the State already owns all realty below the MHWL. There simply is no more realty to be parceled out. Nevertheless, defendants assert that the deed description and tax lot extend its property out to the Pier Head or Bulkhead line. Although defendants' claims may warrant additional review, this is not the proper action within which those claims

are cognizable.[2] Further, to follow the path outlined by defendants would require that the Court rule against a century of established New Jersey jurisprudence which sets the MHWL as the dividing line between property owned by private parties such as defendants, on the one hand, and navigable or tidal waters owned by the State, on the other.

Defendant argues that a 1981 amendment to the New Jersey Constitution prohibited the State from claiming title in certain lands that had been tidally flowed if the State had not "defined and asserted such a claim pursuant to law" by a date certain. *N.J. Const.* art. VIII, § V, ¶ 1. However that amendment relates only to properties that are not now tidally flowed but at one point had been naturally tidally flowed, *Dickinson v. Fund for Support of Free Public Schools*, 95 N.J. 65, 77 (1983), and does not apply here as the Hackensack River has tidally flowed since the amendment was instituted and therefore does not run the risk of having a time-barred claim without the proper mapping. In short, the State need not have delineated the lands claimed in order to assert ownership.

In order to substantiate that this is a partial taking in more than just name, defendants must provide proof of a riparian grant on the property; defendants have failed to do so. Riparian grants are the sole method by which the State of New

---

[2] No judgment is made, and none should be implied, in respect of defendants' other possible claims save to underscore that this is a condemnation action, one entirely unsuited to any such claims or their concomitant remedies.

Jersey controls claims on the tidelands and navigable waters. *See* N.J.S.A. 12:3-10 ("Any riparian owner on tidewaters in this State who is desirous to obtain a lease, grant or conveyance from the State of New Jersey of any lands under water in front of his lands, may apply to the board, which may make such lease, grant or conveyance with due regard to the interests of navigation, upon such compensation therefor, to be paid to the State of New Jersey, as shall be determined by the board, which lease, conveyance or grant shall be executed as directed in sections 12:3-2 to 12:3-9 of this Title, and shall vest all the rights of the State in said lands in said lessee or grantee."). It cannot be gainsaid: defendants have provided no showing of a riparian grant and therefore, cannot claim title to the below-MHWL property.

CONCLUSION

Because, as a threshold matter, the question raised by defendants addresses the quantum of compensation they seek, their motion to compel an amendment to the declaration of taking is timely. In the end, however, defendants' motion is substantively unavailing: because the condemnation of Lot 4 in effect is a total taking -- the declaration of taking addresses defendants' property up to the MHWL and the State already owns all property below the MHWL -- defendants motion to compel the amendment of the declaration of taking must be denied.

An appropriate order follows.