COUNSEL FOR PLAINITFF:
Scott A. Heiart, Esq. and Arthur Usvyat, Esq., Carlin, Ward, Ash & Heiart LLC for The Dunes at Shoal Harbor Condominium Association

COUNSEL FOR DEFENDANT:
Kira S. Dabby, Esq., Tyler R. Zeberla, Esq. and Samantha M. Glatz, Esq., Spiro Harrison & Nelson LLC, for Township of Middletown

TOWNSHIP OF MIDDLETOWN, Plaintiff, v. THE DUNES AT SHOAL HARBOR, A CONDOMINIUM, and JERSEY CENTRAL POWER AND LIGHT, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY DOCKET NO: MON-L-3009-22 Civil Action **ORDER**

This matter being opened to the Court by Carlin, Ward, Ash & Heiart, LLC, attorneys for The Dunes at Shoal Harbor Condominium Association, for an Order for leave to file a Counterclaim and Third-Party Complaint, and the Court having considered the pleadings submitted, having heard oral argument, and for good cause shown,

IT IS, on this 7 day of **March** 2025,

ORDERED The Dunes at Shoal Harbor motion is **DENIED**.

IT IS FURTHER ORDERED that this Order shall be deemed served upon all parties upon upload to eCourts.

HON. GREGORY L. ACQUAVIVA, J.S.C.

Statement of Reasons

This motion presents a question of first impression in New Jersey regarding the scope of condemnation proceedings. Specifically, the court must determine whether a cause of action from a contractor's negligence on previously condemned lands may be joined in the condemnation action or, alternatively, whether such tort is better considered in a separate lawsuit.

The court concludes that the post-taking property tort is beyond the limited scope of summary condemnation proceedings but may proceed in a separate litigation safe from the preclusive effect of the entire controversy doctrine. Accordingly, Defendant's motion to amend its answer and assert a third-party complaint is denied.

Middletown brought this condemnation action to acquire permanent easements and temporary easements on property owned by Dunes at Shoal Harbor Condominium Association. The public purpose: to install a flood remediation project in conjunction with the Army Corps of Engineers and the New Jersey Department of Environmental Protection. Property ownership and Middletown's taking authority are not disputed.

Dunes now alleges that in performing the project, the general contractor, Anselmi & DeCicco, Inc., damaged its property, impacting the lawn irrigation system, fire suppression system, pool, clubhouse, and other common areas, as well

as condominiums owned by individuals. Accordingly, Dunes moves for leave to file a counterclaim against Middletown and a third-party complaint against Anselmi for the property damage.

Condemnation actions are governed by the Eminent Doman Act (EDA) N.J.S.A. 20:3-1 to -50, and Rule 4:73 et seq. Relevant here, Rule 4:73-1 requires condemnation proceedings to occur "in a summary manner pursuant to R. 4:67," with limitations on parties and discovery.

Summary proceedings have "the salutary purpose of swiftly and effectively disposing of matters." Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 4:67-1 (2025). Accordingly, "[t]he inclusion of issues that require plenary consideration is inimical to the design of the rule. It is for this reason that no counterclaim or cross-claim may be asserted without leave of court." Perretti v. Ran-Dav's Cty. Kosher, Inc., 289 N.J. Super. 618, 623 (App. Div. 1996). This is chiefly because "[t]he aim of a summary proceeding is to expedite the litigation." County of Bergen v. S. Goldberg & Co., 39 N.J. 377, 380 (1963).

The EDA's goal of expedition is achieved, in part, by curtailing the scope of condemnation proceedings. Specifically, the proceeding is limited: "to fix and determine the compensation to be paid and the parties entitled thereto, and to determine title to all property affected by the action." N.J.S.A. 20:3-5. Put another way, condemnation proceedings are confined to two issues: (1) can the public

entity condemn the property (not at issue here); and (2) what sum of money justly compensates the property owner.

"Compensation" is the sum "the condemnor is required to pay and the condemnee is entitled to receive according to law as the result of the condemnation of property." N.J.S.A. 20:3-2 (emphasis added). The EDA thus plainly tethers just compensation to damages proximately caused by the condemnation – not secondary, after-the-fact impacts as Dunes seeks to join.

In Borough of Harvey Cedars v. Karan, the Court held that just compensation equals the fair market value of the property loss, defining fair market value as "the considerations that a willing buyer and a willing seller would weigh in coming to an agreement on the property's value . . . not speculative or conjectural and that are not projected into the indefinite future." 214 N.J. 384, 412 (2013) (citation omitted). "Just compensation for a taking of private property for public use must be determined at the time of the taking and must be quantifiable." Id. at 416 (emphasis added).

After eschewing complicated and antiquated concepts of general and specific benefits, the Court's opinion stands for one unremarkable proposition: the sole relevant factor in determining just compensation is fair market value. Property damages occurring after the taking are beyond the scope of summary condemnation proceedings.

Two other Court precedents shed light on the issue – Housing Authority v. Suydam Investors, L.L.C., 177 N.J. 2 (2003), and N.J. Transit Corp. v. Cat in the Hat, LLC, 177 N.J. 29 (2003). Those twin decisions demonstrate that calculating just compensation is a narrow function and that monetary disputes related to the land but distinct from the taking should be resolved in separate proceedings.

In both cases, the court needed to determine whether, and to what extent, future environmental remediation costs impacted just compensation. In both cases, the Court held the government should treat a contaminated property as fully remediated, reserving its right to bring a future remediation action.

Notably, in Cat in the Hat, the Court recognized that the entire controversy doctrine issues was not pertinent because "the condemnation action did not adjudicate the environmental issues." 177 N.J. at 41; see infra.

Pertinent in Suydam and looming large here, the Court recognized that subsequent proceedings are more appropriate for those disputes because "such a proceeding allows for third-party claims against insurers, title companies, and prior owners, none of whom have a place at the condemnation table." 177 N.J. at 24. The Court labeled consideration of "disparate issues in appropriate forums as an important weight in the balance." Id. at 23.

Indeed, that point is embodied in Rule 4:73-2, defining the parties to a condemnation action as the owner and those claiming a property interest. A

contractor is not contemplated, nor are the insurers, title companies, and prior owners alluded to in Suydam. See Evans v. Atl. City Bd. of Educ., 404 N.J. Super. 87, 92 (App. Div. 2008) (discussing canon of expression unius est exclusion alterius, i.e., inclusion of certain things suggests exclusion of others).

Permitting Dunes to add Anselmi (and, potentially, opening the door to others at fault and others who suffered damages) would be inconsistent with Suydam's admonition and Rule 4:73-2's dictates, but may open a Pandora's Box in this summary proceeding, by summoning myriad thorny issues to the surface such as Tort Claims Act and insurance coverage issues.

Moreover, both N.J.S.A. 20:3-13 and Rule 4:73-11 limit discovery in condemnation actions. To accept Dunes' invitation would be to substantially expand discovery and transform a narrow, summary proceeding into a complex property damage suit flying in the face of statute and rule.

Dunes' effort to restrict Suydam and Cat in the Hat fails. At oral argument, Dunes asserted that those precedents are limited to environmental remediation due to the "stigma" associated with contaminated sites. The court is not persuaded.

Rather, read fairly, those twin decisions demonstrate that secondary disputes that may entail compensatory damages are better reserved for a separate litigation, so as not to complicate narrow, summary condemnation proceedings and muddy the just compensation waters.

If anything, the facts here are more compelling where the property damage occurred after the taking, separating temporally the taking from the tort. State ex rel. Comm'r of Transp. v. Marlton Plaza Assocs., L.P., 426 N.J. Super. 337, 358 (App. Div. 2012) ("A party seeking severance damages pursuant to a partial condemnation may only recover for losses in value directly attributable to the taking itself.").

The foregoing is not to say that any issue beyond just compensation is improper in a condemnation action. To be sure, the EDA enumerates various matters "incidental thereto and arising therefrom" that fall within its ambit, namely determining condemning authority, compelling the exercise of condemnation, and determining title. N.J.S.A. 20:30-5. Although that statutory list is not exhaustive, adjudication of a post-taking property tort is different in kind.

Moreover, case law demonstrates condemnees may raise objections and defenses, including: challenging the public purpose, Twp. of W. Orange v. 769 Assocs., 172 N.J. 564, 576 (2002); alleging bad faith condemnation, Readington Twp. v. Solberg Aviation, 409 N.J. Super. 282, 320-25 (App. Div. 2009); and challenging the condemnor's authority, Dep't of Envtl. Prot. v. Midway Beach Condo Ass'n, 463 N.J. Super. 346, 351-52 (App. Div. 2020). But none of those cases permit a condemnee to bring affirmative actions in the condemnation proceeding – as opposed to defenses to the condemnation.

At bottom, the only monetary award to which Dunes is entitled in this condemnation action is just compensation as defined by the fair market value of the property condemned. Recovery of damages resulting from a contractor's subsequent negligence on and adjacent to condemned land must be brought is a separate litigation that is not summary in nature, may include additional parties, and is not subject to statutory and rule-based discovery limitations.

Dunes is understandably wary of the entire controversy doctrine. That concern, however, is misplaced.

Embodied in Rule 4:30A, the entire controversy doctrine provides "that the adjudication of a legal controversy should occur in one litigation in only one court." Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 15 (1989). The doctrine has three purposes: (1) avoiding of piecemeal decisions; (2) fairness to litigants and interested parties; and (3) efficiency. Ditrolio v. Antiles, 142 N.J. 253, 267 (1995).

This equitable doctrine, however, has limits.

For example, in certain instances, summary proceedings do not have a preclusive effect. In Perry v. Tuzzio, the Appellate Division held that summary probate proceedings do not preclude future plenary actions against non-parties. 288 N.J. Super. 223 (App. Div. 1996). "We doubt that the entire controversy doctrine was ever intended to go this far since its application in that situation is so basically inconsistent with the limited nature of an accounting proceeding." Id. at

229; see also Higgins v. Thurber, 205 N.J. 227 (2011) (same). The doctrine only applies where there is "equality of forum." Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 117 (2019) (noting prominence of "equality of forum" to application of doctrine).

Dunes' putative claim for property damages against Anselmi – a non-party to the condemnation action – is "inconsistent with the limited nature" of condemnation actions. See Perry, 288 N.J. Super. at 229. Because the condemnation action does not provide Dunes the opportunity to fully litigate its property damage claim, it would be inconsistent with the entire controversy doctrine's objectives to bar it from bringing a future property damages claim.

To be sure, application of the doctrine "is left to judicial discretion based on the particular circumstances inherent in a given case." Mystic Isle Dev. Corp. v. Perskie & Nehmad, 142 N.J. 310, 323 (1995). Mandatory joinder does not apply when such is unfair "or jeopardy[izes] a clear presentation of the issues and just result." Cogdell, 116 N.J. at 27 (citation omitted). "[T]he polestar for the application of the entire controversy rule is judicial fairness." K-Land Corp. No. 28 v. Landis Sewerage Auth., 173 N.J. 59, 74 (2002) (internal citation and modification omitted).

Applying those equitable principles here, it is evident that application of entire controversy doctrine would be unfair and inequitable. Although the

underlying condemnation and alleged property damage by Anselmi are related, the assertion that the claims arise under the same transaction fails under scrutiny. The first is a taking entitling Dunes to a summary proceeding awarding constitutionally mandated just compensation.

The second is Dunes' counter claim and third-party complaint for property damage occurring after the taking on and adjacent to condemned property caused by a contractor's negligence. Those claims are, in part with respect to Middletown, governed by the Tort Claims Act, will be subject to full discovery, and will inevitably require insurer and expert involvement – not to mention the individual condominium owners too may have claims. Harkening back to Suydam, such complications are better (and more equitably) resolved in a future proceeding. 177 N.J. at 23; see also R. 4:38-1 (court "may" in its discretion consolidate actions arising from same transaction or occurrence).

Further, there is no mandatory joinder of parties unless it would result in substantial prejudice to the non-party, or the litigation could not proceed without the non-party. See, C.P. v. Gov. Body of Jehovah's Witnesses, 477 N.J. Super. 129, 140 (App. Div. 2023); Hobart Bros. v. Nat'l Union Fire Ins., 354 N.J. Super. 229, 242 (App. Div.). Such is not the case here, where Anselmi is unnecessary to the condemnation action nor prejudiced by its exclusion. As such, Dunes is not barred from bringing subsequent action against Anselmi.

Relying on Perretti, 289 N.J. Super. 618, Dunes contends this court is compelled to consolidate the proposed property tort with this condemnation action. The court disagrees. True, Perretti compels a litigant to raise an entirety controversy doctrine with the court, as Dunes rightly and cautiously did here. But, fairly read, Perretti does not compel this court to grant the motion.

Rather, Perretti holds that it is a party's "entire controversy obligation to raise their [causes of action] by way of a motion for leave to file a counterclaim in the summary action." Id. at 624. But Peretti continues to note it is the court's "responsibility . . . to exercise the substantial discretion . . . to manage the entire controversy between the parties, including the entry of an order severing those claims and assigning them appropriately for plenary treatment in other divisions of the Superior Court." Ibid. Thus, Dunes has discharged its duty by way of this motion. It will not be prejudiced by this court's order denying amendment and requiring the counterclaim and third-party be filed as a separate litigation.

Indeed, as here, where a court rejects consolidating a dispute, an entire controversy doctrine safe harbor exists. A contrary result would be perverse. DiIorio v. Structural Stone & Brick Co., Inc., 368 N.J. Super. 134, 139 (App. Div. 2004); Manhattan Woods Golf Club, Inc. v. Arai, 312 N.J. Super. 573, 578 (App. Div. 1998) (entire controversy doctrine does not apply to "action which another jurisdiction has declined to hear by formal order"); Brown v. Brown, 208 N.J.

Super. 372, 382 (App. Div. 1986) (claims reserved by one court will prevent entire controversy defense in subsequent litigation).

Other jurisdictions similarly conclude that condemnation actions do not preclude future litigation of adjacent issues. Moyer v. Neb. City Airport Auth., 655 N.W.2d 855, 863 (Neb. 2003) (no res judicata for subsequent "damage that was caused by improper construction" not litigated in eminent domain proceeding); see also See McCarty v. Wood, 249 So. 3d 425, 433 (Miss. App. 2018) (no res judicata for common law claim because eminent domain has narrow jurisdiction); Barton v. City of Norwalk, 27 A.3d 513, 520 (Conn. App. Ct. 2011) (no res judicata for property damage claim because eminent domain "express goal of determining" fair market value"); Hillcrest, Ltd. v. City of Mobile, 76 So. 3d 252, 256 (Ala. Civ. App. 2010) (no preclusion of negligence, nuisance, and trespass claims because not litigated in eminent domain proceeding); Rawlings v. Bucks County Water & Sewer Auth., 702 A.2d 583 (Pa. Commw. Ct. 1997) (no res judicata for damages claim because it presented different cause of action); Cucharas Sanitation & Water Dist. v. Mounsey, 805 P.2d 1177, 1179 (Colo. App. 1990) (no mandatory joinder).

Accordingly, Dunes' motion is denied.