

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION**

BOROUGH OF CARTERET,

Plaintiff-Respondent,

v.

CARTERET TERRACE, LLC,  
LASALLE BANK NATIONAL  
ASSOCIATION, THE BANK OF  
NEW YORK MELLON, PAR U  
HARTFORD LIFE INSURANCE  
COMFORT TRUST, COUNTY OF  
MIDDLESEX, MIDDLESEX  
WATER COMPANY, NUI  
CORPORATION D/B/A  
ELIZABETHTOWN GAS  
COMPANY, BELL ATLANTIC –  
NEW JERSEY, INC., PUBLIC  
SERVICE ELECTRIC AND GAS  
COMPANY, PIVOTAL UTILITY  
HOLDING, INC., AND ETG  
ACQUISITION CORPORATION,

Defendant-Appellant.

APPEAL NO. A-00355-23

**ON APPEAL FROM:**

SUPERIOR COURT OF NEW JERSEY  
Law Division – Middlesex County  
Docket No. MID-L-1308-23

**SAT BELOW:**

Hon. Michael A. Toto, A.J.S.C.

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**BRIEF ON BEHALF OF APPELLANTS, CARTERET TERRACE LLC  
AND BANK OF NEW YORK MELLON, PAR U HARTFORD LIFE  
INSURANCE COMFORT TRUST**

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**Of Counsel**

Anthony F. DellaPelle, Esq.  
adellapelle@mrod.law  
(I.D. No. 028511987)

**On the Brief**

Michael Realbuto, Esq.  
mrealbuto@mrod.law  
(I.D. No. 342232020)

**McKIRDY, RISKIN, OLSON  
& DELLAPELLE, P.C.**

201 Littleton Road, Suite 135  
Morris Plains, NJ 07950  
(973) 539-8900

Attorneys for Defendant-Appellants,  
Carteret Terrace LLC and  
Bank Of New York Mellon, Par U Hartford Life  
Insurance Comfort Trust

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## PRELIMINARY STATEMENT

Over a half century ago, the New Jersey Supreme Court directed all trial courts to dismiss a proposed governmental taking by eminent domain when circumstances reveal arbitrary and capricious action. City of Trenton v. Lenzner, 16 N.J. 465, 473 (1954). In close connection with that view, the High Court subsequently held that “when private property is condemned the taking must be limited to the reasonable necessities of the case.” Texas E. Transmission Corp. v. Wildlife Preserves, Inc., 48 N.J. 261, 269 (1966).

This eminent domain case involves the exact type of “arbitrary and capricious” conduct that the Supreme Court warned against because the taking by the Borough of Carteret (“Carteret”) of Defendants’-Appellants’ property (“the Property”) utterly disregards established rules and laws, and Carteret’s only response to this truth is that it suggests that it has the power to act in such an unconstrained manner. Da1363. As the record below clearly and convincingly demonstrated, the taking of the Property for Carteret’s proposed street extension (1) is unnecessary, (2) will not improve traffic or traffic safety, (3) is unsafe, (4) violates Carteret’s own ordinances and Master Plan, State roadway design standards, and industry-recognized planning and engineering practices and standards, and (5) will cause significant safety-related impacts in Carteret and upon the remaining portions of the Property.

Carteret's incredible response to the arbitrary and capricious nature of its actions is that it is above the law and is not required to comply with the various standards, because its efforts are "close enough." 2T155, 4 to 2T156, 9; See also Da1363; Da1368.

To that end, in reaching its conclusion that Carteret was authorized to take the Property, the trial court incorrectly concluded that Carteret's taking was "limited to the reasonable necessities of the case," despite the lack of necessity and numerous design and safety defects with Carteret's proposed plans. Texas E. Transmission Corp., 48 N.J. at 269. Additionally, the trial court erred when it held that Carteret's proposed taking was not arbitrary, capricious, and unreasonable because the record evidence demonstrates a myriad of unexplained safety, planning, and engineering violations. Accordingly, the trial court abused its discretion by completely ignoring critical undisputed facts and refusing to give appropriate weight to certain other material facts. These determinations by the trial court diverge from applicable law and are not supported by adequate, substantial, and credible evidence in the record.

The spirit and intent of New Jersey eminent domain law demands that this matter be reversed, and Carteret's condemnation complaints be dismissed, because a condemning agency lacks the unfettered discretion to take private property when it has been demonstrated that a taking disregards established facts, rules, and laws. Lenzner, 16 N.J. at 473.



## PROCEDURAL HISTORY<sup>1</sup>

This appeal involves two related trial court matters bearing docket numbers MID-L-1308-23 and MID-L-1313-23. Both matters are eminent domain cases filed by Carteret that seek to take portions of commonly owned and adjacent properties for the alleged purpose of building a street extension to support a local commuter ferry. Since both matters were heard together in the trial court, and they also involve precisely the same issues and challenges, this procedural history will address the matters alongside each other, noting any differences where necessary. The Appellants from docket number MID-L-1308-23 are Carteret Terrace, LLC and The Bank of New York Mellon, as trustee for Par U Hartford Life Insurance Comfort Trust. The Appellant from docket number MID-L-1313-23 is Meridian II, LLC (collectively, these parties will be referred to as “Appellants”).

On March 7, 2023, Carteret filed condemnation complaints accompanied by orders to show cause that sought to take the Property. Da1; Da21. The orders to show cause were entered by the Law Division on March 10, 2023, with an initial return date of April 14, 2023. Da39; Da43. An answer, brief, and certifications opposing the taking were filed by Appellants, Carteret Terrace, LLC and Meridian II, LLC on March 30, 2023. Da47 to Da164. An answer joining the opposition was filed by

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<sup>1</sup> Pursuant to R. 2:6-8, the transcript is comprised of two (2) volumes designated as follows: 1T – Transcript of May 5, 2023 OTSC Hearing;  
2T – Transcript of August 15, 2023 Plenary Hearing.

Appellant, Bank Of New York Mellon, Par U Hartford Life Insurance Comfort Trust on April 25, 2023. Da165. Carteret also filed a Reply Brief and certifications on April 25, 2023. Da173 to Da1021.

Following an adjournment by the trial court, the parties were heard on the order to show cause on May 5, 2023. That argument resulted in the trial court's recognition that a *prima facie* case of arbitrariness had been established, and a May 10, 2023 Order was therefore entered which scheduled limited discovery and a plenary hearing as to the specific issues raised in Appellants' opposition papers. Da1022.

Leading up to the plenary hearing, the parties submitted prehearing memos and relevant exhibits on August 10, 2023. Da1113 to Da1341. The plenary hearing took place on August 15, 2023. 2T. The parties submitted summations and supplemental certifications on August 28, 2023 and August 30, 2023 respectively. Da1342 to Da1353.<sup>2</sup> The trial court rendered its decision on September 15, 2023 ("the Trial Court Decision") and appointed condemnation commissioners shortly thereafter on September 25, 2023. Da1354 to Da1373. This Appeal followed on October 4, 2023. Da1374 to Da1384.

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<sup>2</sup> The parties' pre-hearing memos and post-hearing summations have been omitted from Appellants' Appendix pursuant to R. 2:6-1(a)(2).

## **STATEMENT OF FACTS**

The first two subsections in this section provide a brief overview of Carteret's proposed taking, as well as a description of Appellants' Property and the surrounding area. The remaining subsections (subsections #3 through #6) detail the portions of the trial court record that clearly and convincingly demonstrate Carteret's arbitrary and capricious conduct in connection with its proposed exercise of eminent domain.

### **1. The Property and Existing Local Road Network**

Prior to Carteret's proposed taking, the Property consists of Carteret Terrace, a 160-unit apartment complex built in 2001 and Meridian II, a 190-unit apartment complex built in 2009. Both residential complexes are fully occupied and fully utilize their respective land areas, including onsite parking and, in the case of Carteret Terrace, a playground for its resident families. Both properties enjoy individual access points where residents can freely enter and exit their private parking areas. Da130 to Da131.

The existing local road network, *before the taking*, provides access to the Carteret waterfront area by virtue of Sica Industrial Highway. Da1118, Figure 3. This highway borders the Property and can be easily accessed *one block* south of Carteret Avenue by traveling along Middlesex Avenue. Like Sica Industrial Highway, Middlesex Avenue borders the Property and is designed to handle heavy traffic. Id. Sica Industrial Highway can also be accessed by two roads north of

Carteret Avenue and the Property, Ivanitski Terrace and Roosevelt Avenue. 2T89, 2 to 11. Several other local streets intersecting Sica Industrial Highway also provide access to the waterfront area. Da1319; Da1329; Da1332.

## **2. Carteret's Proposed Takings**

This matter concerns the attempt of Carteret to seize, using its power of eminent domain, portions of the two fully occupied and operational multi-family apartment complexes at the Property for the ostensible extension of Carteret Avenue to serve an existing marina and *future* ferry complex in Carteret (hereafter “the taking” or “street extension”). Da1 to Da38.

Carteret has contemplated a waterfront development district including a possible marina and ferry since the 1990s and adopted a Waterfront Redevelopment Plan in 2003 that included the concepts of enhanced use of the waterfront area for a “water-based commuter village with convenient ferry service” to New York. Da1185. However, none of Carteret’s historic planning studies or efforts ever demonstrated a need, or even a desire, to extend Carteret Avenue to the Waterfront as a part of the waterfront project. *Id.* In fact, that project can be fully developed and realized without taking *any* of the Appellants’ Property, which is a few blocks away from that project.

### **3. Lack of Ferry Ridership or Traffic to Justify a Need for the Taking**

After creating a marina in the waterfront area, Carteret began efforts in earnest on a commuter ferry project which included a study performed in 2018 by the Bloustein School of Planning and Public Policy (“Rutgers Study”). Da1199. The Rutgers Study analyzed potential ferry ridership demand and, *inter alia*, concluded that – at the time of the study in 2018 – there were nearly 4000 residential dwelling units planned, under construction, or recently completed in Carteret. Of these future dwelling units, more than 75% were in the waterfront area within one half mile of the proposed ferry location, but this increased future population was planned to occur east of Sica Industrial Highway, a north-south highway which lies between the Property and the waterfront area. Da1214. Significantly, this meant that very few of the “newer” residents would be living west of the Sica Industrial Highway and, therefore, would not use a proposed Carteret Avenue street extension to get to and from the future ferry. Da1118 to Da1120. In fact, according to the Rutgers Study, less than 15% of anticipated vehicular traffic to or from the future ferry (about 320 riders daily, at most) would be likely to use the proposed street extension. Id.; See also 2T79, 7 to 2T84, 15 The undisputed evidence before the trial court established that the existing road networks would not suffer any change in the level of service due to any additional marginal traffic if the proposed street extension is not constructed. Id.

During the plenary hearing before the trial court on August 15, 2023, none of the witnesses acting as engineering consultants to Carteret provided the Court with any explanation as to how or why the Carteret Avenue street extension might be justified to improve traffic conditions associated with a future commuter ferry after considering the Rutgers Study's finding that more than 85% of the anticipated ferry traffic would not have any reason to use the proposed road extension. Id.

In 2021, a "Carteret Ferry Terminal Traffic Impact Study" was prepared for the NJDOT by McCormick Taylor Engineers ("McCormick Study"). Da415. The McCormick Study was intended to estimate the amount of traffic that the planned ferry would generate and consider how that ferry traffic would impact area traffic operations. Remarkably, the McCormick study *assumed that the proposed street extension was in place*, and did not evaluate the anticipated impacts of the ferry to the road network *without* the street extension. Da429 to Da430; see also Da1121 to Da1123. Further, in 2021, the County of Middlesex and Carteret had a "Preliminary Design and Storm Drainage Report" prepared by its consulting engineers, CME Associates<sup>3</sup> ("CME Study"), which purports to evaluate traffic operations for the area near the ferry and the Property. Da597. However, this CME Study also *assumes that the proposed street extension was in place* and did not evaluate the anticipated

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<sup>3</sup> CME has served as the engineering consultant for both Carteret and the County in connection with this project. 2T153, 8 to 11.

impacts of the ferry to the road network *without* the street extension. Da613 to Da620; see also Da1123. The blatant failure to consider anticipated traffic if the street extension was *not built* was conceded by James Watson, the engineer from CME who authored the CME Study for Middlesex County, at the trial court plenary hearing. 2T34, 3 to 17. During that hearing, Trevor Taylor from CME, who acted as Carteret's engineering consultant, also admitted that all of CME's reports and studies failed to evaluate any potential impact to the local road network *without* the proposed street extension in place. 2T174, 2 to 7.

The *only* transportation study performed which analyzed the impacts of the ferry on local roads if the proposed street extension was not constructed was performed by the Defendants' engineer, Daniel Disario, as part of his work in this litigation. Da1123 to Da1176. To model a worst-case traffic scenario, Mr. Disario's study assumed that 45% of the future ferry traffic would originate from west of the Property (consistent with the McCormick Study), despite the Rutgers Study's conclusion that, at most, 15% of the ferry traffic might originate from west of the Property. 2T86, 24 to 2T87, 24. Notwithstanding that conservative assumption, Mr. Disario's analysis concluded that there would be *no* level of service changes in the road network if the proposed street extension is not constructed or, in other words, "the street extension does nothing to improve area traffic flow." Da1125. This conclusion, that the proposed street extension does "nothing to improve area traffic

flow,” represents the *only* evidence to be presented to this Court about the justification (or the lack thereof) for the proposed street extension, from a transportation engineering standpoint. In fact, this evidence was unchallenged and undisputed by Carteret.

**4. Deviations From Applicable Planning and Engineering Laws and Standards**

In addition to the lack of any evidence that either justifies the street extension or suggests that it would improve traffic conditions in the area, the plans for the proposed extension violate virtually every applicable legal, planning, and engineering standard.

First, the proposed roadway is contrary to Carteret’s 1973 Master Plan and the most recent master plan reexamination -- an outdated 1998 Borough of Carteret Master Plan Reexamination Report -- because neither document calls for any extension of Carteret Avenue as being desired or appropriate, even though the 1998 document clearly envisioned a waterfront redevelopment project, and also provided for other street extension and road improvement projects, but not one for Carteret Avenue. Da1116 to Da1118; Da1320 to Da1325. John DuPont, Carteret’s engineer, also admitted to the trial court that Carteret has been in express violation of the Municipal Land Use Law (“MLUL”), N.J.S.A. 40:55D-89, because it has not “reexamined” its master plan in over twenty-five (25) years. 2T41, 4 to 24. Mr. DuPont’s testimony was devoid of any justification for this conundrum. Id.



Furthermore, the evidence clearly and convincingly established that any depiction of a “paper street” in the 1998 Master Plan Reexamination was referring only to a private right of way/driveway in this general area which had been used for occupants of nearby property to gain access for industrial purposes. 2T122, 19 to 2T124, 23. However, this private right of way/driveway was extinguished when the Sica Industrial Highway was constructed and also when the Property was developed in or around 2001. *Id.*; Da1116 to Da1118.

In addition to the facts concerning Carteret’s violation of its stale master plan, in 2020, Carteret submitted a municipal aid application to the NJ Department of Transportation (NJDOT) to request funding for the street extension. Da1219. In that application, Carteret *misrepresented* that the project would be completed in compliance with accepted American Association of State Highway and Transportation Officials (“AASHTO” or the “Green Book”) engineering standards. In fact, the proposed street extension *fails to comply* with AASHTO standards concerning the angles of proposed new intersections and sight triangle requirements. Da1125. Carteret also *misrepresented* to NJDOT that on-street parking would be “unrestricted” when, in fact, Carteret intended to restrict that parking, as it suggested that it could provide Defendants’ residents with certain parking rights on the new public street. Da1224 to Da1225.

Specifically, AASHTO provides that “[i]ntersecting streets should meet at approximately a 90-degree angle. The alignment design should be adjusted to avoid an angle of intersection of less than 75 degrees.” Da1350. Here, Carteret’s design for this Taking violates that standard because CME’s construction plan shows the street extension intersecting Roosevelt Avenue at approximately 58 degrees and intersecting Sica Industrial Highway at approximately 62 degrees. Da159; See also 2T154, 18 to 2T155, 1. Also concerning is the fact that each of the new proposed driveways servicing the Property from the proposed street extension have angles of approximately 60 degrees. Id.; see also 2T56, 24 to 2T57, 3. Accordingly, Carteret’s project creates four intersections which violate AASHTO safety standards. Da1350. The only response provided by Mr. Taylor to explain this blunder is that he believed the angles of the proposed new intersections were “close enough” to what he suggested was a *60-degree* minimum proscribed by AASHTO, even though the correct AASHTO minimum for street intersections is *75 degrees, and not 60 degrees*. 2T155, 4 to 2T156, 9.

Similarly, Carteret’s proposed roadway design also violates the engineering standards contained in the NJDOT Roadway Design Manual. Da159. The NJDOT’s manual provides as follows:

Regardless of the type of intersection, intersecting highways should meet at or nearly at right angles. Roads intersecting at acute angles require extensive turning roadway areas. Intersection angles less than 75 degrees

normally warrant realignment closer to 90 degrees. [(2015 NJDOT Roadway Design Manual at Section 6.2.3)].

As noted above, in the case at bar, *four* new intersections would have angles of less than 75 degrees, in violation of the NJDOT Roadway Design Manual. 2T56, 24 to 2T57, 3; Da1350.

Just as the design violates AASHTO and NJDOT Roadway Design Manual standards, it also violates the Residential Site Improvement Standards as contained in *N.J.A.C.* 5:21 (“RSIS”). Da161-162; see also 2T50,1 to 24; 2T155, 25 to 2T156, 4. Specifically, RSIS 5:21-4.19(b) provides that “street intersections shall be as close to 90 degrees as possible but *in no case* shall be less than 75 degrees.” (Emphasis supplied). To reiterate, the *four* new intersections proposed by Carteret would have angles of less than 75 degrees. 2T56, 24 to 2T57, 3; Da1350. Additionally, although the RSIS requires that there be a minimum of 150 feet between adjacent intersections, the proposed driveways at the Property in Carteret’s design plans are too close to Roosevelt Avenue and Sica Industrial Highway. *Id.* Moreover, the RSIS requires 312 parking spaces for the Property, however, Carteret’s proposed extension will result in a 20% shortfall from the required parking quota. Da162. As the trial court observed at the hearing, no justifications were provided for these deficiencies and deviations.

In addition to violating Statewide and industry standards, the taking will also violate Carteret’s own Land Development Ordinance in several different regards.

Da154; Da159 to Da160; Da162; see also 2T56, 6 to 2T56, 3. First, the proposed street extension and property configuration are contrary to §160-94 of Carteret’s Land Development Ordinance, which generally states that “local streets shall be designed to discourage through traffic.” Da154. Second, Carteret’s ordinance under “Streets” (Chapter 160-94) at paragraph I – like the RSIS standards - states that “[i]ntersecting street center lines shall be as nearly at right angles as possible and *in no case* shall they be less than 75% at the point of intersection.” Da159 (emphasis added). Once again, four new intersections in this case would have angles of less than 75 degrees. Third, Carteret’s ordinance under “Sight Triangles” (Chapter 160-92) states that “[s]ight triangles shall be required at each quadrant of an intersection of streets, and streets and driveways.” Da160. The evidence submitted by Carteret in this matter does not show *any* proper sight triangles for the new intersections created by the proposed street extension<sup>4</sup>. Id. Fourth and lastly, Carteret’s ordinance defers to the RSIS standards concerning parking requirements and, as described *supra*, the proposed street extension would result in a significant parking shortage at the Property. Da162.

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<sup>4</sup> Carteret’s apparent “solution” to its utter failure to provide required sight triangles is that two of the four new intersections will have traffic lights, but (a) the NJDOT, RSIS and local requirements do not exempt intersections with traffic lights from compliance; (b) there is no traffic control during times when the lights may not be functioning properly; and (c) the other two new proposed intersections have no traffic lights.

Viewed together, these deficiencies establish, clearly and convincingly, that Carteret's proposed street extension violates its own municipal laws and standards, statewide design standards, and industry design standards, yet Carteret suggests that it is vested with the unfettered discretion to ignore these standards merely because it believes it is entitled to act unconstrained by any other authority.

None of the witnesses or evidence offered by Carteret in any way justifies the numerous violations that the proposed street extension creates of local (*i.e.*, Carteret's Master Plan and Land Development Ordinance), State (*i.e.*, NJDOT Roadway Manual and RSIS), and industry (*i.e.*, AASHTO) standards, other than to arbitrarily concede that the proposed design of the extension is "close enough." 2T155, 4 to 2T156, 9.

##### **5. Impacts to Carteret's Road Network and Local Traffic Safety**

In addition to the unsafe design violations, the street extension will also create unsafe conditions for sanitation services, local traffic, and a school directly across the street from the Property, where unsafe conditions do not presently exist. Da154; Da162 to Da163. In particular, the street extension will cause new regional and commuter traffic to use local roads instead of the regional roads that already exist and that have been designed to handle such regional traffic. The street extension will also cause that new traffic to use four new intersections with geometric designs that are unsafe. Id.

Another significant safety impact that was evident at the trial court plenary hearing concerned the inability for large trucks to turn in and safely navigate around the subject Property without performing unsafe maneuvers. 2T169, 12 to 2T174, 1. Mr. Watson, Mr. DuPont, and Mr. Taylor – all engineering representatives for the Borough - all conceded that a WB-67 truck – the type of truck used for many types of deliveries - *cannot* navigate turns onto or off of the proposed street extension, or into or out of the Property on two new driveways along the extension. Id.; see also 2T34, 23 to 2T35, 4. In fact, there are four new intersection angles of approximately 60 degrees or less – one on Roosevelt Avenue, one on Sica Industrial Highway and two along the proposed street extension – where trucks will not be able to turn, exit, or enter. 2T56, 24 to 2T57, 3; Da1350. Specifically, this would mean that WB-67 trucks cannot enter the street extension from one direction on both Roosevelt Avenue (inability turn left from southbound) and Sica Industrial Highway (inability to turn left from northbound). 2T171, 3 to 2T172, 1. Additionally, that fact also would mean that those trucks cannot safely turn into the new driveways at the Property along the new street extension. As a result, the trucks – whether they be trucks<sup>5</sup> for local

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<sup>5</sup> Despite Carteret’s suggestions that large trucks would not be “permitted” to use the proposed street extension, and the obvious difficulty that would be experienced attempting to enforce such a restriction when large trucks are encouraged to use Roosevelt Avenue and Sica Industrial Highway, large trucks for local deliveries and moving would be *required* to use the street extension to access the Property because the proposed street extension would represent the only vehicular access to the

deliveries, moving vehicles, or otherwise - are required to “loop” around the Property and use other local roads that are not currently needed. Da1337; Da1339; Da1341. This unsafe condition does not presently exist at or around the Property.

**6. Impacts to the Property’s Safety and Operations**

In addition to the large-scale engineering, planning, and safety deficiencies that will impact the public at large, Carteret’s proposed taking for the street extension will have detrimental impacts to the Property and in the surrounding area including, but not limited to, the following issues, all of which were undisputed by Carteret in this matter:

- It will degrade vehicular and pedestrian traffic conditions and make trash service unsafe and impractical – requiring trash vehicles to make a k-turn and block the proposed Carteret Avenue extension while emptying trash receptacles in the new public roadway, where commuters will be potentially rushing to catch a ferry. Da133 to Da136; see also Da1337; Da1339; Da1341. Carteret’s suggestion that it would be willing to collect trash at the Property does not solve this problem because a large trash collection truck would still be required to block the roadway to perform routine duties.

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Property. However, these trucks would not be able to safely navigate the new intersections, thereby causing traffic safety issues which do not presently exist.

- It will create safety issues for a playground on the Carteret Terrace property. Id.
- It will degrade maintenance and other service facilities, as well as the residential components of the Carteret Terrace property. Id.
- It will create a significant parking deficiency and eliminate approximately 70 of 312 existing parking spaces, in violation of local and RSIS parking requirements, and create an unsafe parking configuration at the Property with no proffered solution or suggested mitigation. Da153; Da160; Da162. In fact, assuming that the 17 angled parking spaces proposed along the Carteret Avenue Extension cannot be restricted to “private” use effectively as anticipated, CME’s own parking study performed for Carteret established that there would be no available parking – meaning that all parking spaces that remained would be 100% utilized – based upon a single parking survey performed on a summer night when many residents were likely traveling or on vacation. Da401 to Da402.
- It will create significant operational problems for on-site parking, maneuverability, security, and other maintenance related items, not limited to the fact that large trucks, when making deliveries or performing moving activities for residents, cannot safely navigate the



new driveway intersections which violate local, State and industry design criteria. Da136 to Da141.

### **STANDARD OF REVIEW**

In New Jersey, an appellate court reviews, *de novo*, the "trial court's interpretation of the law and the legal consequences that flow from established facts." Manalapan Realty L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Moreover, when considering an appealed matter, an Appellate court should defer to the trial court's factual findings only when they are "supported by adequate, substantial and credible evidence." Zaman v. Felton, 219 N.J. 199, 215 (2014) (quoting Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002)).

Appellants respectfully submit that this matter should be reviewed *de novo* because the trial court's interpretation of the relevant condemnation law, and its conclusions that followed, unjustly authorized Carteret's taking of Appellant's private property. Moreover, the trial court committed several fact-finding errors that were not supported by adequate, substantial, and credible evidence in the record.

## LEGAL ARGUMENT

### POINT I

#### **THE TRIAL COURT ERRED WHEN IT HELD THAT CARTERET'S PROPOSED TAKING WAS NOT ARBITRARY AND CAPRICIOUS. (Da1365 to Da1369).**

This matter requires reversal because the trial court committed plain error when it held that Carteret's taking was not arbitrary and capricious, despite the lack of a reasonable justification for the street extension and the myriad of safety, planning, and engineering violations, the consequences of which will be visited upon the public at large and the Property.

A guiding tenet in this unique area of the law is that "condemnation case raises special considerations" and requires solicitousness of the rights of a property owner forced by law to involuntarily transfer property rights to the public. Borough of Rockaway v. Donofrio, 186 N.J. Super. 344, 353 (App. Div. 1982). Entrusted with such an awesome power, the government has an overarching duty of good faith and fair dealing and is obligated to deal scrupulously with property owners. W.V. Pangborne & Co. v. Dep't of Transportation, 116 N.J. 543, 562 (1989).

Our courts are required to safeguard the public against arbitrary governmental takings. When a property owner demonstrates that a taking is arbitrary and capricious by clear and convincing evidence, a trial court must dismiss the taking. Twp. Of Readington v. Solberg Aviation Co., 409 N.J. Super. 282, 311 (App. Div.

2019); City of Trenton v. Lenzner, 16 N.J. 465, 473 (1954). Although the case law does not specifically define “arbitrary and capricious” conduct in the eminent domain context, the law is clear that it is a case-by-case inquiry and the determination that “can be made only after the full development of the facts.” Texas E. Transmission Corp., 48 N.J. at 276.

In Texas Eastern, the plaintiff sought to condemn four tracts of land for its gas pipeline across property maintained by the defendant. Texas Eastern Transmission Corp., 48 N.J. at 265. The defendant alleged the condemnation was arbitrary because the condemning authority refused to consider the existence of an alternate route which will reasonably serve the intended public purpose, and which if utilized would avoid visiting a significantly disproportionate amount of damage to the condemnee’s property. Id. at 269. Accordingly, the Supreme Court held that the defendant made a *prima facie* case that the condemnation was arbitrary, remanded the matter, and directed the trial court to make a substantive determination following “full development of the facts.” Id. at 272, 275-276.

Furthermore, the Appellate Division has confirmed that New Jersey law limits the use of eminent domain to properties that are “reasonably necessary” to an identified project. Borough of Glassboro v. Grossman, 457 N.J. Super. 416 (App. Div. 2019). In Grossman, the Appellate Division reversed a municipal condemnation sought for "future public parking" because no evidence was presented that it was

necessary or reasonable. Id. at 422. In its condemnation complaint, Glassboro alleged that the taking was for “redevelopment purposes” and specifically for public parking, but there was no evidence adduced before the trial court in support of that allegation. Id. at 426. The Appellate Court reversed the judgment of the trial court, noting that a property’s inclusion in a designated redevelopment area “does not mean that the municipality may condemn and acquire that parcel at any time without restriction.” Id. at 428.

Finally, condemners have an affirmative burden to demonstrate that a taking is lawful and appropriate before a Court enters a judgment authorizing the taking. Gallenthin Realty Development, Inc. v. Borough of Paulsboro, 191 N.J. 344, 373 (2007) (holding that the government must “establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met”); see also Casino Reinvestment Development Authority v. Birnbaum, 458 N.J. Super. 173, 194 (App. Div. 2019) (holding that a taking was beyond the statutory authorization of agency which did not have a specific need for the property taken).

Here, the “full development of the facts” clearly and convincingly supported the conclusion that Carteret’s taking is arbitrary and capricious because the taking is “founded on prejudice or preference rather than on reason or fact” and involves “a determination made without consideration of or regard for facts, circumstances,

fixed rules, or procedures.” “Arbitrary,” Black's Law Dictionary, p. 125 (10th ed. 2015).

**A. The Trial Court Erred In Finding That Carteret’s Taking Is Necessary and Justified. (Da1367).**

This matter requires reversal because the trial court committed plain error when it held that Carteret’s taking of Appellants’ property was “limited to the reasonable necessities of the case.” Da1367; Texas E. Transmission Corp., *supra*, 48 N.J. at 269. Indeed, the only evidence submitted to the trial court regarding the street extension’s justification was a traffic analysis performed by Appellants’ engineer, Daniel Disario, as part of his work in this litigation. Mr. Disario’s independent analysis concluded that there would be no level of service changes in the road network if the proposed street extension is not constructed or, in other words, “the street extension does nothing to improve area traffic flow.” Da1125.

Moreover, Mr. Disario analyzed the conclusions of the Rutgers Study, the McCormick Study, and the CME study and determined that *none* of the studies demonstrated a reasonable justification for the proposed street extension. Da1123 to Da1176. Specifically, the Rutgers Study proves that less than 15% of anticipated vehicular traffic to or from the ferry (about 320 riders daily, at most) would be likely to use the proposed street extension because more than 85% of the anticipated ferry traffic would emanate from areas east of the Property or from outside the borough, and the existing road networks would not suffer any change in the level of service due to

any additional marginal traffic if the proposed street extension is not constructed. Da1118 to Da1120; see also 2T79, 7 to 2T84, 15. Likewise, the McCormick Study and the CME Study were both deficient because the reports assumed that the proposed street extension was in place, and *did not evaluate the anticipated impacts of the ferry to the road network without the street extension*. Da429 to Da430; see also Da1121 to Da1123. These shortcomings demonstrate that Carteret made its determination to take Appellants' property without consideration of all relevant facts and circumstances, and the trial court failed to place adequate weight to such a finding. See "Arbitrary," Black's Law Dictionary, p. 125 (10th ed. 2015).

Instead of rebutting Appellants' evidence, Carteret's only assertion before the trial court was that "it is not necessary to prove that the taking will improve traffic, nor do they need to show that the design complies with certain, non-mandatory, road design." Da1363. Carteret's cavalier assertion epitomizes the arbitrary and capricious character of this taking. In effect, Carteret seeks to take the Property by simply asserting a general claim for a new street extension without having any valid underlying justification for the same. That general claim falls significantly short of the level of justification pronounced by our Supreme Court and Appellate Division. Texas Eastern Transmission Corp., 48 N.J. at 269; Grossman, 457 N.J. Super. at 428; Birnbaum, 458 N.J. Super. at 194.

Furthermore, the trial court erred in placing improper weight on the finding that “the mere existence of alternative routes does not prove that Plaintiff’s desire for a new route is arbitrary.” Da1367. The trial court’s interpretation of Appellant’s necessity argument oversimplifies the evidence presented because the existence of more suitable alternative routes is just one of factors that courts can consider in deciding whether a taking is arbitrary. Texas E. Transmission Corp., 48 N.J. at 273-274. In addition to demonstrating the existence of more suitable alternative routes, Appellants’ case in chief before the trial court also proved that the taking is unnecessary from a traffic engineering and safety standpoint, and will result in unsafe conditions which do not presently exist. Da154; Da162 to Da163; See also 2T169, 12 to 2T174, 1. A roadway “improvement project” should have the primary objective of improving conditions, and this proposed project eviscerates that principle since it is not based on any apparent engineering, traffic, or safety need, and improves nothing.

In sum, the lack of a reasonable necessity for Carteret’s taking supports a finding that the taking is arbitrary, and the trial court’s decision authorizing the taking should be reversed.

**B. The Trial Court Erred in Finding That the Safety and Design issues with the Taking were Justified Under the Law. (Da1369).**

In addition to the trial court’s error regarding the lack of a valid necessity for the road, the trial court erred by placing minimal weight on the fact that the offered design of the proposed street extension is unsafe and violates Carteret’s own Master Plan and

land development ordinance, State roadway design standards, and industry-recognized planning and engineering practices and standards. These shortcomings also demonstrate the arbitrary nature of Carteret’s proposed taking. The MLUL requires municipalities to “enforce the [MLUL] and any ordinance or regulation made and adopted hereunder.” N.J.S.A. 40:55D-18. Nonetheless, Carteret has seemingly taken the position that it has unfettered discretion to violate the MLUL, its own land development ordinance, and a plethora of applicable engineering and planning standards, in pursuing an arbitrary roadway design. Da154; Da159 to Da160; Da162; see also 2T56, 6 to 2T56, 3. In sum, Carteret’s careless conduct fits the literal definition of “arbitrary,” which is “a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures.” “Arbitrary,” Black's Law Dictionary, p. 125 (10th ed. 2015).

The trial court also placed improper weight on the assumption that Carteret’s “plans were approved” by NJDOT. Da1368. The trial court’s reliance on NJDOT’s approval is incorrect because the record demonstrated that Carteret’s municipal aid application to NJDOT *misrepresented* that the project would be completed in compliance with accepted AASHTO engineering standards. In fact, the proposed street extension fails to comply with AASHTO standards concerning the angles of proposed new intersections and sight triangle requirements. Da1125; Da159; See also 2T154, 18 to 2T155, 1. Carteret also misrepresented to NJDOT that on-street parking would be



“unrestricted” when, in fact, Carteret intended to restrict that parking. Da1224 to Da1225. In sum, the trial court’s failure to consider these essential misrepresentations supports reversal because the NJDOT’s “approval” was actually based upon fallacies advocated by Carteret.

Finally, the trial court overlooked the gamut of facts regarding the numerous significant safety-related impacts in the general area and upon the remaining portions of the Property. 2T169, 12 to 2T174, 1; Da133 to Da136; Da1337; Da1339; Da1341. This matter does not involve a typical roadway taking case as the Supreme Court confronted in Twp. of West Orange v. 769 Associates, LLC, 172 N.J. 564 (2002). In that case, the Supreme Court upheld a lower court finding that a roadway taking was authorized because the condemnor’s engineering evidence and conclusions were *unchallenged* by the property owner and the record had established that the new proposed road would serve its stated purpose of *improving* traffic in the area. *Id.* at 570-576. Here, Appellants submitted engineering, planning, and fact evidence that clearly and convincingly demonstrates that the proposed taking is actually unsafe and will only serve to make conditions worse by degrading Carteret’s road network and local traffic safety. In fact, the myriad of deficiencies presented by the proposed street extension project call into question whether Carteret would have or should have been permitted to build it at all, *even if it already owned the property needed for the extension*. To that end, the trial court’s decision authorizing Carteret to take private

property in light of these circumstances must be reversed and Carteret's condemnation complaints should be dismissed. County of Monmouth v. Whispering Woods, 222 N.J. Super. 1, 10 (App. Div. 1987), certif. den. 110 N.J. 175 (1988) (“[D]ismissal of [a condemnation] complaint will have a prophylactic effect.”).

### **CONCLUSION**

For the foregoing reasons, Defendant-Appellants respectfully request that the trial court's decision authorizing Carteret's use of eminent domain be reversed, and Carteret's Complaints dismissed.

Respectfully submitted,

**McKIRDY, RISKIN, OLSON  
& DELLAPELLE, P.C.**

Attorneys for Defendant-Appellants,



By: \_\_\_\_\_  
ANTHONY F. DELLA PELLE

Dated: January 18, 2023

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION**

BOROUGH OF CARTERET, a  
municipal corporation,

Plaintiff - Respondent,

v.

CARTERET TERRACE, LLC,  
LASALLE BANK NATIONAL  
ASSOCIATION, THE BANK OF NEW  
YORK MELLON, PAR U  
HARTFORD LIFE INSURANCE  
COMFORT TRUST, COUNTY OF  
MIDDLESEX, MIDDLESEX WATER  
COMPANY, NUI CORPORATION  
D/B/A ELIZABETHTOWN GAS  
COMPANY, BELL ATLANTIC –  
NEW JERSEY, INC., PUBLIC  
SERVICE ELECTRIC AND GAS  
COMPANY, PIVOTAL UTILITY  
HOLDING, INC., AND ETG  
ACQUISITION CORPORATION,

Defendant-Appellant.

APPEAL NO. A-000355-23

**ON APPEAL FROM:**

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: MIDDLESEX  
COUNTY

DOCKET NO. MID-L-1308-23

**SAT BELOW:**

Hon. Michael A. Toto, A.J.S.C.

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**BRIEF ON BEHALF OF RESPONDENT  
BOROUGH OF CARTERET**

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**On the Brief:**

Kevin P. McManimon, Esq.

[kmcmanimon@msbnj.com](mailto:kmcmanimon@msbnj.com)

(I.D. No. 023351996)

Malcolm X. Thorpe, Esq.

[mthorpe@msbnj.com](mailto:mthorpe@msbnj.com)

(I.D. No. 202372018)

**McManimon, Scotland & Baumann, LLC**

75 Livingston Avenue, 2<sup>nd</sup> Floor

Roseland, NJ 07068

(973) 622-1800

Attorneys for Plaintiff-Respondent

Borough of Carteret

Date of Submission: February 20, 2024

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## PRELIMINARY STATEMENT

This appeal involves the use, by the Borough of Carteret (the “Borough”), of eminent domain power to acquire property necessary to facilitate the construction of a road – a quintessential public use. The Borough determined, in its judgment, that the extension of Carteret Avenue from the downtown area of the Borough to the Borough’s waterfront area (the “Carteret Avenue Extension”) is a desirable improvement. In order to facilitate the roadway extension, the Borough must acquire certain easement interests in property owned by the Appellants (defined below).

The road extension was thoughtfully engineered and thoroughly reviewed by multiple public bodies. The New Jersey Department of Transportation (“NJDOT”) reviewed the plans for the proposed Carteret Avenue Extension, and committed to fund almost all costs associated with its construction. The County of Middlesex (the “County”) also agreed to design and fund two (2) new signalized intersections that will bookend the Carteret Avenue Extension.

The Appellants own two (2) rental apartment complexes adjacent to the parking area on which the Borough seeks to construct most of the Carteret Avenue Extension. The Appellants, through their opposition to the property acquisitions, seek to create a new standard to judge the validity of property acquisition for a road. In particular, the Appellants argue that the trial court erred by not requiring the Borough to demonstrate that the roadway extension is necessary, even though

applicable law does not require such a finding. Appellants also ignore the evidence in the record, including from their own witnesses, that hundreds of vehicles per day will use the Carteret Avenue Extension. Thus, the Borough's decision to undertake this project, and to acquire easements therefor, was not arbitrary.

Appellants also argue that the trial court erred in rejecting their claim that the Borough's determination to undertake the Carteret Avenue Extension was arbitrary because the road's design is flawed. Appellants, however, ignore the fact that they cite road design standards that do not apply to the proposed Carteret Avenue Extension because traffic in this area will be controlled by traffic lights, rather than STOP signs. Moreover, other issues Appellants raise with respect to the impact of the Carteret Avenue Extension on their properties are, at most, issues that affect the amount of just compensation they may be due. Such issues, however, do not render the property acquisitions here arbitrary.

The trial court conducted two hearings, including one with live witness testimony, permitted the Appellants to depose the Borough's expert witnesses, and called for multiple rounds of legal briefs and numerous certifications. That is an extraordinary amount of discovery, argument and consideration for a proceeding that typically proceeds on a summary basis. After all that, the trial court properly rejected the Appellants' request to create a new legal standard in condemnation matters, and so should this Court.

## PROCEDURAL HISTORY

This appeal involves two related trial court matters bearing docket numbers MID-L-1308-23 and MID-L-1313-23. Both matters are eminent domain cases filed by the Borough that seek to acquire portions of commonly owned and adjacent properties for the purpose of building a street extension to directly connect the Borough's downtown and waterfront areas. Both matters were heard together in the trial court since they involve related parties and similar issues.

The Appellants from docket number MID-L-1308-23 are Carteret Terrace, LLC and The Bank of New York Mellon, as trustee for Par U Hartford Life Insurance Comfort Trust. The Appellant from docket number MID-L-1313-23 is Meridian II, LLC (collectively, these parties will be referred to as "Appellants"). On March 7, 2023, the Borough filed condemnation complaints accompanied by orders to show cause that sought to take the property that is the subject of these actions. Da1; Da21. The orders to show cause were entered by the Law Division on March 10, 2023, with an initial return date of April 14, 2023. Da39; Da43. An answer, brief, and certifications opposing the taking were filed by Appellants, Carteret Terrace, LLC and Meridian II, LLC on March 30, 2023. Da47 to Da164. An answer joining the opposition was filed by Appellant, Bank Of New York Mellon, Par U Hartford Life Insurance Comfort Trust on April 25, 2023. Da165. The Borough also filed a Reply Brief and certifications on April 25, 2023. Da173 to Da1021. Following an

adjournment by the trial court, the parties were heard on the orders to show cause on May 5, 2023.

On May 10, 2023, the Court entered an Order finding that the proposed takings are reasonable and serve a public purpose but permitting limited discovery and a plenary hearing regarding whether the takings are necessary or arbitrary. Da1022-1034. Pursuant to that Order, the Appellants deposed two representatives of CME Associates the Borough's Engineer, on June 22, 2023. Da1035; Da1077. Leading up to the plenary hearing, the parties submitted prehearing memos and relevant exhibits on August 10, 2023. Da1113 to Da1341; Pa024-Pa180. The plenary hearing took place on August 15, 2023. 2T.

Thereafter, the parties submitted written summations and supplemental certifications on August 28, 2023, and August 30, 2023, respectively. Da1342 to Da1353.<sup>1</sup> On September 15, 2023, the trial court rendered its decision (the "Trial Court Decision") authorizing the Borough's taking of the property interests by eminent domain, finding same are not arbitrary, and appointed condemnation commissioners shortly thereafter on September 25, 2023. Da1354 to Da1373. This Appeal followed on October 4, 2023. Da1374 to Da1384. Appellants filed their appellate brief on January 18, 2024.

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<sup>1</sup> The Borough's post-hearing submission was a letter brief and, thus, is not included in either party's Appendix.

On November 15, 2023, the Appellants filed a Notice of Motion for Stay in the trial court. On December 29, 2023, the trial court entered an Order denying the Stay request but requiring the Borough to provide a detailed phasing plan for the construction of the Carteret Avenue Extension within 30 days. Pa181-204.

## **STATEMENT OF FACTS**

### **A. The Property – Carteret Terrace**

Carteret Terrace, LLC owns property in the Borough, known as 150 Roosevelt Avenue and designated as Block 7401, Lot 1 on the Borough’s tax maps (the “Carteret Terrace Property”). Da191. The Carteret Terrace Property is developed with an existing, multi-family apartment complex (“Carteret Terrace”) consisting of 160 units and 311 parking spaces.<sup>2</sup> Da191. It is located at the intersection of Roosevelt Avenue, Carteret Avenue and Abbi Road (an internal roadway into the Carteret Terrace Property). Da219-Da220.

### **B. The Property – Meridian II**

Meridian II, LLC owns property in the Borough, designated as Block 302, Lots 2, 3 and 4 on the Borough’s tax maps (the “Meridian II Property”). Da337. The Meridian II Property is developed with an existing, multi-family apartment complex (“Meridian II” and, together with Carteret Terrace, the “Complexes”)

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<sup>2</sup> 312 parking spaces were proposed as part of the initial site plan for Carteret Terrace, but the site contains 311 spaces.

consisting of 190 units. Da337. Meridian II is located along Industrial Highway, adjacent to the point where it will intersect with the Carteret Avenue Extension. Da352.

### **C. Carteret Avenue Extension**

In anticipation of the construction of a ferry terminal on the Borough's waterfront, with ferry service to and from New York City (the "Ferry"), the Borough commissioned a study of potential ferry ridership. *Proposed Carteret Passenger Ferry Expanded Ridership Demand Study*, last revised October 23, 2018, prepared by Rutgers University and Stump/Hausman Partnership (the "Rutgers Study"). Da1200 – Da1217<sup>3</sup>. The Rutgers Study shows that Ferry ridership is anticipated to range from 739 weekday boardings to 2,100 weekday boardings. Da1201. In anticipation of Ferry ridership, and traffic associated with the Ferry terminal, other waterfront attractions and the Borough's redeveloped downtown area, the Borough is planning to extend Carteret Avenue (i.e., the Carteret Avenue Extension) from its current terminus at Roosevelt Avenue, to Peter J. Sica Highway (Industrial Road), linking the Borough's downtown area to its waterfront area attractions, including the Ferry Terminal. Da178.

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<sup>3</sup> Da1200 – Da1217 refers to Appellants' Exhibits admitted by the Parties' consent at the August 15<sup>th</sup> OTSC hearing.

Moreover, McCormick Taylor (“McCormick”) prepared a study (the “McCormick Study”), on behalf of the New Jersey Department of Transportation (“NJDOT”), of anticipated traffic flow related to the Ferry. Da415-Da595<sup>4</sup>. The purpose of the McCormick Study was to “identify the traffic impacts of the proposed terminal on the adjacent roadway network and to provide recommendations, where applicable, for roadway improvements to accommodate the future traffic demands.” Da417. Among other things, McCormick considered that the Borough is planning to extend existing Carteret Avenue from Roosevelt Avenue to Industrial Highway (i.e., the Carteret Avenue Extension). Da422. New traffic signals are also proposed at the intersections of Roosevelt Avenue/Carteret Avenue and Industrial Highway/Memorial Boulevard/Carteret Avenue Extension. Da422.

Furthermore, CME Associates (“CME”) reviewed proposed improvements, including installation, by Middlesex County (the “County”), of new traffic signals at the intersections of Roosevelt Avenue/Carteret Avenue and Industrial Highway/Memorial Boulevard/Carteret Avenue Extension. Da597-Da826. Among other features, the Carteret Avenue eastbound and westbound approaches are each proposed to have an exclusive left-turn lane and a shared through/right-turn lane. Da603. CME determined that, with the construction of the Ferry terminal and the

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<sup>4</sup> Da415-Da595 refers to Respondent’s Exhibits admitted by the Parties’ consent at the August 15<sup>th</sup> OTSC hearing.



Carteret Avenue Extension, installation of the new traffic signals, and replacement of existing traffic signal in the area, is warranted. Da609.

CME also caused traffic counts to be performed to evaluate existing and proposed operations for new traffic signals at the intersections of Carteret Avenue Extension with Roosevelt Avenue and Industrial Highway. Da610. Such counts showed that hundreds of trips per day are anticipated along Carteret Avenue Extension to and from the Borough's waterfront. Da615-Da620.

McCormick prepared the McCormick Study to "evaluate future traffic operating conditions resulting from the construction of a proposed ferry terminal along Peter J. Sica Industrial Highway in the Borough. . . ." Da417. In the McCormick Study, Carteret Avenue is described as "a two lane, median divided municipal roadway extending westward from its intersection with Roosevelt Avenue. Carteret Avenue is classified as an urban local roadway, primarily provided access to residential uses, churches, schools and parks/ballfields." Da419. Moreover,

The four-legged Roosevelt Avenue & Carteret Avenue intersection is stop-controlled along the eastbound Carteret Avenue and westbound private driveway (Abbi Road) approaches. Abbi Road is a private access to an existing apartment complex. The eastbound Carteret Avenue and westbound driveway approaches to the intersection each consist of a single shared left/through/right-turn lane. The northbound and southbound Roosevelt Avenue approaches are also comprised of a single lane for all possible movements.

Da420.

The McCormick Study provides, among other things, “[i]n order to determine the amount of traffic along the roadways within the study area, manual turning movement traffic counts were conducted at each of the study intersections.” Da420. Toward that end, McCormick collected data in September 2020. Da421.

McCormick noted that “a separate ongoing project to extend Carteret Avenue, from its current terminus at Roosevelt Avenue to Industrial Highway, is currently in the design phase by the Borough. . . .” Da422. It also noted that “[t]he Carteret Avenue Extension is proposed to intersect Industrial Highway opposite Memorial Boulevard. In conjunction with this project, new traffic signals are proposed at the intersections of Roosevelt Avenue/Carteret Avenue and Industrial Highway/Memorial Boulevard/Carteret Avenue Extension.” Da422.

McCormick made certain assumptions about how people will travel to and from the Ferry Terminal, including the following travel modes: “(Drove Alone – 73%; Carpool – 11%; Drop-off – 11%; Walk/Bus/Transit – 5%)”. Da423. Moreover, in the McCormick Study,

The trips generated by the terminal were distributed to the adjacent roadways in which the ferry commuters would be expected to travel. A 5-mile mathematical gravity model was prepared by the Borough of Carteret Engineer, [CME], projecting travel patterns of the waterfront

and ferry terminal users and accounting for other mass transit options servicing New York City.

Da423, Da467-Da468.

#### **D. The Easements**

In order to facilitate the construction of the Carteret Avenue Extension, the Borough needs to acquire a series of easements over the Complexes (the “Easements”, including:

##### **1. Carteret Terrace (collectively, the “Carteret Terrace Easements”)**

- Parcel 5 – Sidewalk Easement: approximately 815 square feet (0.019 acres) of land to expand the existing sidewalk to fenceline;
- Parcel TSE – 5 – Traffic Signal Easement: an easement over 3,119 sf (0.072 acres) of land to allow for the redesign of the entrance to Carteret Terrace and install traffic signal equipment;
- Parcel PCE – 5 – ROW Easement (the “Parcel 5 ROW Easement”): an easement over 20,825 sf (0.478 acres) of land to allow for the extension of Carteret Avenue from Roosevelt Avenue to Industrial Road, including 17 new angled parking spaces along the south side of Carteret Avenue Extension; this will eliminate the single entrance point along Roosevelt Avenue and create two points of ingress/egress and realign the current interior roadway (Abbi Road);
- Parcel TCE – 5A – Temporary Construction Easement: an easement over 25,326 sf (0.579 acres) of land south of the Parcel 5 ROW Easement, used to redesign the affected parking areas and create necessary sidewalks; this easement is expected to be in place for 12 months; and

- Parcel TCE – 5A – Temporary Construction Easement: an easement over 7,709 sf (0.177 acres) of land north of the Parcel 5 ROW Easement, used to redesign the affected parking areas; this easement is expected to be in place for 12 months.

Da265, Da270.

## **2. Meridian II (the “Meridian II Easements” and, together with the Carteret Terrace Easements, the “Easements”)**

- Parcel PCE – 6 ROW Easement (the “Parcel 6 ROW Easement”): an easement over 3,226 sf (0.074 acres) of land to allow for the Carteret Avenue Extension; this area is part of an existing detention basin that will be redesigned by the Borough to maintain functionality;
- Parcel TCE – 6 – Temporary Construction Easement: an easement over 4,688 sf (0.108 acres) of land north of the Parcel 6 ROW Easement, used to redesign the affected detention basin and create necessary retaining wall; this easement is expected to be in place for 12 months; and
- Parcel TCE – 18 – Temporary Construction Easement: an easement over 258 sf (0.006 acres) of land along the eastern border of the site, used to improve Industrial Road; this easement is expected to be in place for 12 months.

Da354-Da355. The Meridian II Easements only impact the portion of the Meridian II Property consisting of Lot 4, on which a detention basin serving the Meridian II complex is located. Da174 at ¶ 5.

### **E. NJDOT Application, Review and Award**

In connection with the Carteret Avenue Extension, CME, on behalf of the Borough submitted an application to the NJDOT, dated July 18, 2019 (“NJDOT

Application”), for funding through the NJDOT’s Fiscal Year 2020 Municipal Aid program. Da1219-Da1242. The NJDOT Application contained a narrative description of the Carteret Avenue Extension project, as well as photographs of the existing parking lot and Abbi Road, both adjacent to the Complexes, and an aerial map depicting the Carteret Avenue Extension project limits. *Ibid.* The NJDOT Application provided, among other things, that:

The Borough is proposing the extension of Carteret Avenue from its existing “T” intersection with Roosevelt Avenue (CR604) through to Peter J. Sica Industrial Highway (approximately 650 feet) partially along the alignment of an existing parking lot. At its future intersection with Industrial Highway, Carteret Avenue will connect to Waterfront Access Road, which leads to the Waterfront Park, boat ramp, fishing pier, municipal marina, NJ State Police Marina Barracks, and future ferry terminal with service to New York City. The road and sidewalk extensions will provide a critical connection to the Borough’s two (2) mile long Arthur Kill Riverwalk, including walking paths and observation piers stretching the length of the Borough’s waterfront along the Arthur Kill.

...

The extension of Carteret Avenue will also serves [sic] an entrance feature connecting the Borough’s Waterfront and the developing Downtown Arts District, which stretches from Washington Avenue to Carteret Avenue. . . .

Da1222. The NJDOT ultimately awarded the Borough \$700,000 in funding for the Carteret Avenue Extension in its Fiscal Year 2020 Municipal Aid program. Pa107.

On May 3, 2022, CME submitted plans for the Carteret Avenue Extension, including Specifications, a Cost Estimate and a Design Certification to the NJDOT.

Pa001-Pa023. The Construction Drawings were highly detailed and showed, among other things: (i) where and how the proposed Carteret Avenue Extension will intersect Roosevelt Avenue to the west and Industrial Highway to the east; (ii) where and how it will intersect two new, internal driveways to the Carteret Terrace apartment complex; and (iii) angled parking along the new road extension. Pa004.

On or about May 4, 2022, CME received comments from the NJDOT regarding the Construction Drawings and related submissions. Pa129-Pa140. The NJDOT comments were highly detailed, including the following:

3. Item 7, Traffic director, flaggers has been listed at \$83.98/hr. Please note that the current maximum prevailing wage rate is \$80.78. Anything awarded in excess will be state non-sharing.

4. Item 17, Dense-Graded aggregate should be calculated in SY, not CY.

...

Pa131.

On or about May 11, 2022, CME submitted revised Construction Drawings to the NJDOT. Pa130. Finally, on May 12, 2022, the NJDOT's Local Aid section approved the "resubmitted" design for the Carteret Avenue Extension and authorized bidding for the project ("NJDOT Bid Approval"). Pa142-Pa143. Accordingly, the NJDOT was deeply involved in reviewing and approving the Carteret Avenue Extension design and is funding almost all project costs. Notably, the funds the NJDOT allocated toward this project in Fiscal Year 2020 (\$700,000) was the **highest**

**amount** awarded for any project in **Middlesex County** (out of 25 projects) and the **19<sup>th</sup> highest amount** awarded for any project in the **State** (out of 545 projects).

Pa111-Pa128.

#### **F. County Agreement**

The Borough and County entered into an agreement, dated August 19, 2020 (the “County Agreement”), apportioning responsibility for work and funding toward the installation of traffic signals that will bookend the Carteret Avenue Extension. Da946-Da952. The County agreed, among other things, to perform all necessary engineering and design work related to the traffic signals, bear 100% of design engineering services, and pay a portion of costs associated with constructing the traffic signals. Da946.

#### **G. Prior Plans for Carteret Avenue Extension**

Historical Borough planning documents and prior project plans, including those involving the Appellants, contemplated a roadway configuration like the Carteret Avenue Extension.

##### **1. Borough Master Plan**

The Borough’s Master Plan and Master Plan Reexamination Report depicted an extension of Carteret Avenue like the proposed Carteret Avenue Extension. The Borough’s May 1973 Master Plan included a Circulation Plan and plan for Proposed

Street Improvements. Pa028-Pa029. Both such plans show a road connecting Roosevelt Avenue with the area to its east, where Peter J. Sica Industrial Highway is now located, through the property now owned by the Appellants.

Moreover, the Borough's June 1998 Master Plan Reexamination Report includes, among other things, a map entitled "PROPOSED GREENWAY (County Open Space Plan)" (Map No. 3) and a map entitled "TAX ABATEMENT AREA BOROUGH OF CARTERET" (Map No. 6). Pa031-Pa032. Both such maps depict a road connecting Roosevelt Avenue, eastward, to Peter J. Sica Industrial Highway, through the Appellants' properties.

## **2. Proposed Redevelopment by Appellants**

In the early 2000's, an affiliate of Appellants Carteret Terrace, LLC and Meridian II, LLC proposed an extension of Carteret Avenue, like the one planned by the Borough here, as part of a redevelopment project. On May 12, 2004, the Borough and Carteret Landing, L.L.C. ("Carteret Landing") entered into a Redevelopment Agreement (the "Carteret Landing Redevelopment Agreement"). Pa033-Pa067. Carteret Landing was a joint venture consisting of Roseland Property Co., BNE Real Estate Group and Atlantic Realty Development Corporation ("Atlantic Realty"); Atlantic Realty is the parent company (or otherwise an affiliate) of the Appellants Carteret Terrace, LLC and Meridian II, LLC. Pa025, ¶ 5.



In the Carteret Landing Redevelopment Agreement, Carteret Landing agreed to redevelop the Borough's waterfront area with residential units, retail/commercial and office space, a ferry landing, and certain recreational facilities. Pa119-Pa121. Moreover, Carteret Landing agreed to construct site and infrastructure improvements in the area, including an extension of Carteret Avenue like the Carteret Avenue Extension. Pa065. In particular, the Carteret Landing Redevelopment Agreement provided:

**The project also will include the extension of Carteret Avenue, from Roosevelt Avenue extending eastward to the ferry landing, the construction of Landings Boulevard, a major cross street running parallel with the waterfront and the extension of Middlesex Avenue from Industrial Road extending eastward to the marina. The extension of Carteret Avenue will occur as a component of Phase I.**

Pa065.

Appellant Carteret Terrace, LLC constructed the Carteret Terrace apartment complex on Block 7401, Lot 1 in or about 2001 and Appellants Meridian II, LLC constructed the Meridian II apartment complex on Block 302, Lots 2, 3 & 4 in or about 2009. Da130-Da131. The Carteret Landing Redevelopment Agreement was terminated by agreement of the parties on August 11, 2010. Pa068-Pa076. Accordingly, at the time Atlantic Realty (as part of Carteret Landing) agreed to extend Carteret Avenue to connect Roosevelt Avenue with the ferry landing, the Appellants' apartment complexes existed. While that roadway was never ultimately

developed, it would have had to at least follow similar alignment of the proposed Carteret Avenue Extension.

#### **H. Condemnation Complaint and Appellants' Response**

On March 7, 2023, the Borough filed condemnation complaints accompanied by orders to show cause that sought to take the Property. Da1; Da21. The orders to show cause were entered by the Law Division on March 10, 2023, with an initial return date of April 14, 2023. Da39; Da43. An answer, brief, and certifications opposing the taking were filed by Appellants, Carteret Terrace, LLC and Meridian II, LLC on March 30, 2023. Da47 to Da164. An answer joining the opposition was filed by Appellant, Bank Of New York Mellon, Par U Hartford Life Insurance Comfort Trust on April 25, 2023. Da165. The Borough also filed a Reply Brief and certifications on April 25, 2023. Da173 to Da1021.

In an Order dated May 10, 2023, the trial court determined that the Borough had the authority to acquire the Easements and that such acquisitions were not unreasonable as they served a public purpose. Da1022-Da1034. The trial court, however, deferred as to the issues of whether the acquisitions were unnecessary, arbitrary or capricious to a plenary hearing. Da1033-Da1034. In the meantime, the trial court permitted the parties to conduct limited discovery prior such plenary hearing. Da1034.

A plenary hearing took place on August 15, 2023. 2T. The trial court rendered its decision authorizing the Borough's acquisition of the Easements by eminent domain on September 15, 2023 (the "Trial Court Decision") and appointed condemnation commissioners shortly thereafter on September 25, 2023. Da1354 to Da1373. This Appeal followed on October 4, 2023. Da1374 to Da1384. Appellants filed their appellate brief on January 18, 2024.

### **I. Traffic/Design Issues**

Appellants criticize the proposed Carteret Avenue Extension because, they argue, traffic conditions do not justify the road and the road's design allegedly violates certain design standards, thus creating dangerous conditions. Many of the design issues Appellants criticize were the subject of discussion between the parties prior to the Borough's commencement of these condemnation actions, including several revised concepts for the road extension. DaDa72–Da79; Da974-Da1021; Da962-Da973.

#### **1. Traffic Issues**

Appellants argued below that anticipated traffic flow does not justify the construction of the Carteret Avenue Extension. For example, in a memorandum dated August 2, 2023 (the "August Langan Memo"), Daniel D. Disario, P.E., PTOE, of Langan, criticized the Carteret Avenue Extension. Da1116-Da1176. Among

other things, Mr. Disario reviewed the Rutgers Study. Da1118. Mr. Disario wrote that “most of the future borough residents that will ride the ferry will walk to the ferry terminal” and “of those future borough residents that will drive to and from the ferry terminal, **most** will not use the street extension.” Da1120. (emphasis added). Mr. Disario concluded from the study that “less than **15% of ferry traffic (less than 321 ferry riders each weekday)** would use the street extension.” Da1120. (emphasis added). Accordingly, even by Appellants’ own analysis, some members of the travelling public will use the Carteret Avenue Extension.

Langan also performed its own traffic analysis. Da1124. Among other things, Mr. Disario concluded that “most of the intersections have no level of service changes by removing the street extension. And all the study intersections operate efficiently without the street extension.” Da1125. Mr. Disario wrote “the street extension does nothing to improve area traffic flow” and concluded by saying “the street extension is therefore unjustified, unnecessary, extremely detrimental to Carteret Terrace residents, and a waste of public funding.” Da1125.

In a memorandum dated August 8, 2023 (the “August 2023 CME Memo”), Trevor Taylor, PE, PP, CME, CFM, of CME Associates, responded to the August Langan Memo. Pa168-Pa180. Among other things, Mr. Taylor wrote that “[f]igure 5 in Langan’s letter includes the following developments that have been constructed since the 2018 study which are within close proximity to, or whose most direct route

to the Ferry Terminal **and Waterfront in general** would be through, the Carteret Avenue extension.” Pa171 (emphasis added). Mr. Taylor analyzed residential developments that Langan considered, in addition to 2 other residential projects, under construction or expected, that support the level of residential development contemplated in the 2018 Rutgers Study. Pa171-Pa172.

Mr. Taylor also wrote that:

In the event the ferry ridership numbers are consistent with those in the Rutgers Study, Langan’s calculations substantiate that the road extension would be used as the preferred route for commuters to the ferry terminal, not to mention pedestrians and trips attracted to the Waterfront from central Carteret independent of the ferry.

Pa172.

Thus, the record shows that the development of the Borough’s waterfront area, including but not limited to the Ferry, will unquestionably attract people to the waterfront, some of those people will drive, and some of those drivers will use the Carteret Avenue Extension to access the waterfront. Moreover, pedestrians will be able to cross Industrial Highway at a traffic signal-controlled intersection proposed in conjunction with the Carteret Avenue Extension. Da607.

## 2. **Design Issues**

Appellants criticize some of the road’s design features in support of their argument that the Carteret Avenue Extension is unsafe and, thus, arbitrary. Mr.

Disario testified at the August 15, 2023 hearing that his main concerns were intersection angles and sight triangles. 2T92-11 to 94-17. Mr. Disario claims the design fails to meet certain standards promulgated by the American Association of State Highway and Transportation Officials (“AASHTO”), the Borough’s Land Development Ordinance and Residential Site Improvement Standards (“RSIS”).

On August 15, 2023, Mr. Taylor testified that, in designing the Carteret Avenue Extension, the Borough was guided by AASHTO standards because the NJDOT is funding most of the project costs and the NJDOT is guided by AASHTO standards, rather than RSIS or local municipal standards. 2T144-9 to 145-8. Mr. Taylor also testified that the design complies with all AASHTO standards, except for a *de minimis* exception with respect to two angles. 2T141-24 to 142-19; 2T142-20 to 144-8.

a. **Intersection Angles**

In a memorandum by Mr. Disario and Sean Moronski, P.P, AICP of Langan, dated March 26, 2023 (the “March Langan Memo”), Mr. Disario wrote that intersection angles should be 90 degrees. Da159. In support of this claim, he cited the NJDOT Roadway Design Manual, which provides that “intersecting highways **should** meet at or nearly at right angles” and that “[i]ntersection angles less than 60

degrees **normally** warrant realignment closer to 90 degrees.” Da159. (*emphasis added*).

In a memorandum dated April 24, 2023 (the “April CME Memo”), Mr. Taylor responded to this criticism with a comprehensive explanation of why the intersection angles are satisfactory here. He wrote that, among other things, “[t]hrough the design process, our office has reviewed the sight lines, turning movements, and pedestrian movements and has taken these items into consideration in the design of the intersections and corresponding traffic signal designs.” Da408. Moreover, he wrote that “[t]he alignments of the adjacent intersections are adequate given the restricted truck access along Carteret Avenue Extension and Roosevelt Avenue (CR 604). These truck restrictions will eliminate the need for excessive turning spaces in the intersections.” Da408. He also noted that “the intersection of Abbi Road and the internal Access Drive is at approximately 60 degrees, the same skew that is propose din the Carteret Avenue Extension project.” Da408.

Moreover, in the August 2023 CME Memo, Mr. Taylor wrote that “**signalized intersections** aligned at acute angles are not uncommon and can be designed to ensure safety for motorists and pedestrians.” Pa178 (*emphasis added*). Toward that end, Mr. Taylor wrote that, for example, trucks over 4 tons will be prohibited from Roosevelt Avenue and Carteret Avenue, so the proposed

intersection alignments are adequate. Moreover, appropriate striping and lighting will be installed at this intersection. Pa178.

In his testimony on August 15<sup>th</sup>, Mr. Disario conceded that “there are intersections in our State, maybe even in the Borough, that have those kind of skewed intersections. . . .” 2T92-19 to 92-21. He expressed his opinion, however, that “you should strive for better design rather than lesser design.” 2T92-21 to 92-23.

On August 15, 2023, James C. Watson, of CME, testified that the road design complies with NJDOT road design guidelines, except that one angle each at the Carteret Avenue Extension intersections with Roosevelt Avenue and Industrial Highway is 58 degrees. 2T28-20 to 28-22. Moreover, Mr. Taylor testified that the angle of the intersections of Carteret Avenue Extension and the proposed two new internal driveways to Carteret Terrace are 90 degrees (eastern driveway) and 83 degrees (western driveway) and, thus, they both comply with AASHTO. 2T140-7 to 141-5.

**b. Sight Triangles/Sight Distances**

In the March Langan Memo, Mr. Disario wrote that the new intersections will require proper sight triangles, sight lines and sight distances. In support of this



criticism, Mr. Disario referenced the Borough's Land Development Ordinance and Figure 9-17 from the AASHTO Green Book. Da160-Da161.

In Mr. Disario's August 15 testimony, however, he conceded that AASHTO standards for intersections controlled by a STOP sign are different from standards for intersections controlled by a traffic signal. 2T113-3 to 113-7. He testified that designs for new roads should nevertheless strive to meet standards for STOP sign-controlled intersections, even when a traffic signal is planned because, in his opinion, that is a better design. 2T93-24 to 94-10.

As Mr. Taylor noted, the road design was guided by AASHTO standards, rather than the Borough's Land Development Ordinance. 2T144-10 to 145-8. Also, in the April CME Memo, he noted that "[t]he provided Figure 9-17 from the Green Book is for Stop Controlled Intersections. The proposed intersections of the Carteret Avenue Extension and Roosevelt Avenue and Industrial Highway are signalized intersections." Da409. Thus, the standards Mr. Disario cited do not even apply to the proposed intersection here.

In the August 2023 CME Memo, Mr. Taylor also wrote that Mr. Disario "cites the NJDOT Roadway Design Manual and AASHTO Green Book related to purported deficiencies with the proposed signalized intersections concerning alignment and sight triangles. . . ." Pa177. Mr. Taylor noted, however, that "**Isight**

distance parameters are generally less restrictive at signalized intersections due to the presence of the traffic control devices and the law by which motorists must abide.” Pa179 (citing *AASHTO Green Book*, Chapter 9.5) (emphasis added). Moreover, “less sight distance may be needed at signalized intersections compared to intersections where only the minor road is uncontrolled or controlled with only stop or yield signs.” Pa179 (citing *AASHTO Green Book*, Section 9.5.1).

Mr. Taylor also wrote that “approach sight triangles are not needed for intersection approaches controlled by traffic signals.” Pa179 (citing *AASHTO Green Book*, Section 9.5.2.1) (emphasis added). Instead, under those circumstances, “the need for approaching vehicles to stop at the intersection is determined by the traffic control devices and not by the presence or absence of vehicles on the intersecting approaches.” Pa179 (citing *AASHTO Green Book*, Section 9.5.2.1).

Mr. Disario testified that he is concerned about the sight triangles at the proposed Carteret Avenue Extension/Roosevelt Avenue intersection because, if the proposed traffic signal there loses power, a vehicle travelling westbound toward the intersection could enter the roadway head-on toward an eastbound vehicle. 2T94-4 to 94-8. Accordingly, in his opinion, “[y]ou should strive to provide adequate site triangles as if these intersections were stop controlled intersections.” 2T94-8 to 94-10.

Mr. Taylor responded to Mr. Disario's concern about the potential danger created by loss of power for the traffic signal at the intersection of Carteret Avenue Extension and Roosevelt Avenue. Mr. Taylor testified that the traffic signals are designed with battery power back up for 24 hours and they include ports for generator hookups in case power is out for more than 24 hours. 2T174-12 to 174-21. This will mitigate risk associated with power outages in the traffic signal equipment.

**c. Reduced Parking Spaces**

In the March Langan Memo, Mr. Disario wrote that the parking requirement for Carteret Terrace is 312 parking spaces, that the site currently provides 311 spaces, and that the proposed street extension will cause the loss of at least 64 parking spaces. Da162. In the April CME Memo, however, Mr. Taylor noted that CME conducted a review of available parking on the site and determined the maximum observed parking ranged from 236 to 247 spaces, and that, after the project is completed, 264 spaces will be available for Carteret Terrace Residents. Da410. This ratio of 1.7 spaces per unit is consistent with parking supply ratio guidelines promulgated by the Institute of Traffic Engineers for multifamily housing. Da410. Moreover, the Borough's appraiser analyzed the reduced parking, determined it is consistent with the parking ratio trend for multifamily housing in the Borough, and determined it would have no financial impact on Appellants' property. Da266-Da277.

**d. Angled Parking**

Mr. Disario criticized proposed angled parking along Carteret Avenue Extension. He wrote in the March Langan Memo that “[t]he angle parking also requires motorists to back out onto the proposed street extension, which is also bad design and undesirable.” Da161. During his August 15<sup>th</sup> testimony, Mr. Disario testified that “angled parking shouldn’t be provided along local roadways.” 2T95-13 to 95-14. During such testimony, however, he also conceded that angled parking exists along Washington Avenue, around the corner from the property at issue here. 2T113-23 to 114-15.

Also, Mr. Taylor wrote in the April CME Memo that “[a]ngled parking is not prohibited along public roadways. Many of the roadways within the Borough contain angled parking similar to the Carteret Avenue Extension design.” Da410. Accordingly, angled parking is permitted and common in the Borough.

**STANDARD OF REVIEW FOR APPEAL**

In New Jersey, an appellate court reviews, *de novo*, the "trial court's interpretation of the law and the legal consequences that flow from established facts." *Manalapan Realty L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995). Moreover, when considering an appealed matter, an Appellate court should defer to the trial court's factual findings when they are "supported by adequate,

substantial and credible evidence.” *Zaman v. Felton*, 219 N.J. 199, 215 (2014) (quoting *Toll Bros., Inc. v. Twp. of W. Windsor*, 173 N.J. 502, 549 (2002)). Here, the Trial Court Decision, including factual findings and legal conclusions, was based on adequate, substantial, and credible evidence and should be sustained.

## LEGAL ARGUMENT

### POINT I

#### **THE TRIAL COURT CORRECTLY DETERMINED THAT THE BOROUGH’S TAKING WAS NOT ARBITRARY AND CAPRICIOUS**

The Appellants argue that the trial court erroneously determined that the Borough’s taking was not arbitrary. The Appellants argue that there was insufficient traffic flow data to justify the proposed road and anticipated traffic can use the existing road network. Thus, they argue, the determination to construct the road was arbitrary. Moreover, they argue that the road was designed in ways that fail to comply with certain road design standards and that will have negative impacts on the existing Complexes. Appellants argue these flaws mean the determination to construct the road was arbitrary. The trial court properly rejected these arguments. This Court should also reject these arguments because the proposed takings are reasonable and are not arbitrary or capricious.

**A. The Trial Court Properly Determined that the Borough's Taking Is Reasonable and Necessary, and, thus, Not Arbitrary.**

Appellants argue that it is not necessary to construct the Carteret Avenue Extension and, thus, the determination to construct it and acquire the Easements is arbitrary. The New Jersey Supreme Court addressed the ability of a municipality to condemn a property interest for purposes of a public road in *Twp. of West Orange v. 769 Assocs., L.L.C.*, 172 N.J. 564 (2002). There, 769 Associates owned property on Northfield Avenue in West Orange. Nordan Realty Corp. owed a tract of land behind 769 Associates' property, set back about 2,000 feet from Northfield Avenue. Nordan intended to construct a neighborhood of 95 homes on its property. This property abutted another proposed residential development and other uses. 172 N.J. at 568. The Township of West Orange (the "Township") sought to condemn a 30-foot wide strip of land along the edge of 769 Associates' property to facilitate the construction of a street connecting Nordan's property with Northfield Avenue. *Ibid.* 769 Associates objected.

The trial court rejected 769 Associates' challenge to the Township's right to take the subject property. The Appellate Division reversed, holding that the Township's taking served only Nordan's private interest and, thus, was not for a public use. *Id.* at 570 (citing *Twp. of West Orange v. 769 Assocs., L.L.C.*, 341 N.J. Super. 580, 594 (App. Div. 2001)).

The New Jersey Supreme Court noted that “a reviewing court will not upset a municipality’s decision to use its eminent domain power ‘in the absence of an affirmative showing of fraud, bad faith or manifest abuse.’” 172 *N.J.* at 571 (quoting *City of Trenton v. Lenzner*, 16 *N.J.* 465, 473 (1954)). Moreover, the Court observed that “the United States Supreme Court has held that ‘it will not substitute its judgment for a legislature’s judgment as to what constitutes a public use’ **unless the use be palpably without reasonable foundation.**” *Ibid.* (quoting *Hawaii Housing Auth. v. Midkiff*, 467 *U.S.* 229, 241 (1984) (further citations omitted) (emphasis in original)).

The Court stated that “New Jersey courts traditionally have granted wide latitude to condemning authorities in determining what property may be condemned for ‘public use’, reasoning that it is the province of the Legislature to shape the contours of the ‘public use’ requirement. *Id.* at 572 (quoting *Burnett v. Abbott*, 14 *N.J.* 291, 294 (1954) (further citation omitted)). Wide latitude is granted because a “public use” is “anything that ‘tends to enlarge resources, increase the industrial energies, and ... manifestly contributes to the general welfare and the prosperity of the whole community.’” *Id.* at 573 (citation omitted). Thus, “‘public use’ is synonymous with ‘public benefit,’ ‘public advantage’ or ‘public utility.’” *Ibid.* (quoting *State v. Totowa Lumber & Supply Co.*, 96 *N.J. Super.* 115, 119 (App. Div. 1967) (further citation omitted)).

The Court found that “[g]iven the broad definition of ‘public use,’ it is not essential that the entire community or even any considerable portion of the community directly enjoy or participate in the condemned property for the taking to constitute a ‘public use.’” *Ibid.* (citing *Totowa Lumber*, 96 *N.J. Super.* at 121 (holding there that “[t]he number of people who will participate in or benefit by the use for which the property is condemned is not determinant of whether the use is or is not a public one.”) (further citation omitted).

The Court held that “the condemnation of private property for use as a public road fulfills the public use requirement.” 172 *N.J.* at 573 (further citation omitted). Accordingly, the Court held that the Township may condemn the subject property for use as a public road. *Id.* at 576.

The purpose of acquiring the Easements here is to facilitate the construction of the Carteret Avenue Extension, which will connect the Borough’s downtown area directly to its waterfront area. Even the Appellants’ evidence showed that some people will use the Carteret Avenue Extension to travel between the Borough’s downtown and waterfront areas.

Moreover, the DOT evidenced its support for the Carteret Avenue Extension through the DOT Bid Approval. Da954-Da955. Furthermore, Middlesex County is participating in this regional improvement by agreeing to facilitate the



construction of traffic signals at intersections in the area around the Ferry Terminal, including the proposed intersections of Roosevelt Avenue and Carteret Avenue, and Peter J. Sica Industrial Highway and Carteret Avenue Extension. Da946-Da952. The Carteret Avenue Extension is clearly the kind of “public use” that enlarges resources and “contributes to the general welfare and prosperity of the **whole community**”, to which the New Jersey Supreme Court recognized “[w]ide latitude is granted.” 769 *Assoc.*, 172 *N.J.* at 573.

On May 10, 2023, the trial court properly found that “there is a reasonable purpose for the acquisition of the property.” Da1032. The court found that the purpose is to facilitate the construction of the Carteret Avenue Extension, which will connect the Borough’s downtown and waterfront areas, and that the NJDOT and Middlesex County support the project. Da1032. Accordingly, the court found that “the construction serves a public purpose that will contribute to the general welfare and prosperity of the community” and that, therefore, “the taking is not unreasonable.” Da1032. On September 15, 2023, the trial court then authorized the acquisition of the Easements and held that “the availability of alternative routes does not, by itself, demonstrate an arbitrary taking.” Da1367.

Appellants argue here that proposed takings are not justified because “there would be no level of service changes in the road network if the proposed street extension is not constructed. . . .” Db23. Like the trial court, however, this Court

should reject Appellants' request to establish a new standard for a public road based on the number of people who will use it.

Despite the wide latitude afforded to public bodies, Appellants argue that it is not necessary to construct the Carteret Avenue Extension and, thus, the Borough's determination to construct it is arbitrary. Appellants' arguments singularly focus on whether the Ferry itself will generate enough traffic and whether that traffic must use the Carteret Avenue Extension to travel between the Ferry Terminal and the Borough's downtown area. As set forth in the NJDOT Application, however, it is clear that the Borough's vision is a direct connection between the waterfront, beyond just the Ferry Terminal, and the revitalized downtown area, with its residential, commercial, arts and recreation opportunities.

The two main cases Appellants rely on in support of their necessity and arbitrariness claims are *Borough of Glassboro v. Grossman*, 457 N.J. Super. 416 (App. Div. 2019) and *Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc.*, 48 N.J. 261 (1966). Both cases are distinguishable, however, and the trial court properly rejected Appellants' arguments below. This Court should also reject Appellants' argument to create a new legal standard for public roadways.

## 1. Arbitrariness

In *Texas Eastern*, the Plaintiff sought to acquire by condemnation a right of way across four tracts of land through Troy Meadows Wildlife Preserve in Morris County, New Jersey. *Id.* at 265. The proposed right of way was to be used for installation of an underground gas transmission pipeline. *Id.* The land sought to be acquired was owned by a private, nonprofit charitable corporation named Wildlife Preserves, a non-profit corporation engaged in the acquisition of lands for the purposes of conservation and the preservation of wildlife. *Id.* at 266. Wildlife Preserves argued that the land sought to be condemned was already used for a public purpose and an alternative route was available for Texas Eastern to accomplish its objectives. *Id.* at 265-267.

The New Jersey Supreme Court determined that Wildlife Preserves' "voluntary consecration of its land as a wildlife preserve" provided it a "**special and unique status.**" *Id.* at 268 (emphasis added). The Court held that such status was "higher than that of an ordinary owner who puts his land to conventional use." *Ibid.*

The Court held that "[o]rdinarily where the power to condemn exists the quantity of land to be taken as well as the location is a matter within the discretion of the condemnor." *Id.* at 269. The Court also held that, "[t]he exercise of that discretion will not be interfered with by the courts in the absence of fraud, bad faith

or circumstances revealing arbitrary or capricious action. *Ibid.* (citations omitted). Wildlife Preserves argued that “the proposed route of the right of way will have a devastating and irreparable effect upon its preserve” and that “plaintiff’s refusal to consider or accept an adequate and serviceable alternative route on the preserve, which would ‘either greatly reduce or largely eliminate’ the apprehended damage, is arbitrary and capricious.” *Ibid.*

The Court determined that Wildlife Preserves’ “devotion of its land to a purpose which is encouraged and often engaged in by government itself gives it a **somewhat more potent claim to judicial protection against taking of its preserve or a portion of it by arbitrary action of a condemnor.**” *Id.* at 274 (emphasis added). The Court also noted that “[i]n such unique cases courts realize that more than a dollar valuation is involved. The public service being rendered must be considered and it cannot be evaluated adequately only in dollars and cents.” *Ibid.* Therefore, the Court concluded that “the Quantum of proof required of this defendant to show arbitrariness . . . should not be as **substantial** as that to be assumed by the **ordinary property owner who devotes his land to conventional uses.**” *Ibid.* (emphasis added).

In their reliance on *Texas Eastern*, Appellants ignore critical differences. First, the property at issue there was dedicated to a uniquely special use - a wildlife preserve – by a non-profit entity. 48 *N.J.* at 273 (the Court holding that “defendant’s

devotion of its land to a purpose which is encouraged and often engaged in by government itself gives it a somewhat more potent claim to judicial protection against taking of its preserve . . . by arbitrary action of a condemnor.”). In contrast, Appellants are for-profit entities, devoting property to a normal, conventional use (rental apartments). Thus, the extra protection the Court found important in *Texas Eastern* would be inappropriate here. *Ibid.*

Second, the Court’s analysis of potential alternate routes in *Texas Eastern* was in the context of provision of a utility service - a natural gas pipeline. 48 *N.J.* at 265. The Court’s choice of language in referencing the need to analyze whether an alternate route could serve the utility’s purpose is instructive – “[e]xistence of an **alternate route for a pipeline** which will reasonably serve the **utility’s** purpose. . . .” *Id.* at 273 (emphasis added). The Court then cited two cases – *City of Pittsburgh v. Federal Power Comm’n*, 237 *F.2d* 741 (D.C.Cir. 1956) and *Scenic Hudson Preservation Conf. v. Federal Power Comm’n*, 354 *F.2d* 608 (2<sup>nd</sup> Cir. 1965), *cert. den. Consolidated Edison Co. v. Scenic Hudson Preservation Conf.* 384 *U.S.* 941 (1966). 48 *N.J.* at 273. In contrast to the road here, those cases dealt with utility services.

In *Scenic Hudson*, the Federal Power Commissioner granted a license to Consolidated Edison Company to construct a pumped storage hydroelectric project, including a powerhouse and transmission lines, on the west side of the Hudson River

in Cornwall, New York. 354 *F.2d* at 611. The Second Circuit found that “[t]o be licensed by the Commission, a prospective project must meet the **statutory test** of being ‘best adapted to a comprehensive plan for improving or developing a waterway.’” *Id.* at 612 (emphasis added) (citing *Federal Power Act* § 10(a), 16 *U.S.C.* 803(a)). The court held that

In framing the issue before it, the Federal Power Commission properly noted: ‘We must compare the Cornwall project with any alternatives that are available. If on this record Con Edison has available an alternative source for meeting its power needs which is better adapted to the development of the Hudson River for all beneficial uses, including scenic beauty, this application should be denied.’

*Id.* at 612.

The Court in *Texas Eastern* analyzed the *Scenic Hudson* case then held “[e]xistence of a more desirable alternative is one of the factors which courts have recognized as entering into the determination of whether a particular proposal would serve the **public convenience and necessity.**” 48 *N.J.* at 273-74 (*emphasis added*). Accordingly, the Court’s conclusion in *Texas Eastern* that a review of alternatives is necessary to determine whether a proposed utility route is arbitrary was driven by the requirement in the underlying statutory authority for such an analysis. *Also see* *Bridgewater v. Yarnell*, 64 *N.J.* 211 (1974) (taking for sanitary sewer line easement); *Twp. of Washington v. Village of Ridgewood*, 26 *N.J.* 578 (1958) (water supply

system); and *Cty. of Ocean v. Stockhold*, 129 N.J. 286 (1974), *rev'd and remanded*, 67 N.J. 104 (1974) (taking for drainage easement).

There is no such statutory requirement for a public road in New Jersey. The path of transmission of a utility from one place to another cannot be particularly important. All that matters is that the utility – gas, electricity, etc – gets to its destination for users. For the Carteret Avenue Extension, however, the route selected for the road, in the judgment of the Borough's officials and blessed by the NJDOT and County, is the goal.

Third, in *Texas Eastern*, the Federal Power Commission issued a Certificate of Public Convenience and Necessity for the utility project, including a pipeline between two points. The Certificate, however, did NOT approve a particular route for the pipeline. After the Certificate was issued, the utility selected the route. 48 N.J. at 266.

In contrast, the NJDOT's approval of funding for the Carteret Avenue Extension and of the Construction Drawings necessarily means the NJDOT considered the route for the Carteret Avenue Extension. The initial NJDOT Application included a map of the road's route and photos of the impacted area. Da1232-Da1238. Moreover, the Construction Drawings the Borough subsequently submitted included detailed plans illustrating the location and pathway of the

Carteret Avenue Extension and angled parking along its route. Pa001-Pa023. Appellants criticize the way the Borough characterized certain road features in its initial application. The various, detailed plans the Borough submitted, however, show how the proposed road will intersect Roosevelt Avenue to the west, Peter J. Sica Highway to the east, and two new, internal driveways into the Carteret Terrace apartment complex. *Ibid.* Thus, in contrast to *Texas Eastern*, the route of the proposed road extension and design features Appellants criticize here were evident to the NJDOT before it approved the Construction Drawings.

Finally, the Court in *Texas Eastern* found that there was evidence the pipeline there would destroy an important, but fragile, ecosystem. *48 N.J. at 273* (the Court holding “[e]xistence of an alternate route for a pipeline which will reasonably serve the utility’s purpose, and which if utilized will avoid visiting on the condemnee’s land the **significantly disproportionate damage** which the originally intended route would cause, is a matter which rationally relates to the issue of arbitrariness.” (emphasis added)). There is no doubt the Carteret Avenue Extension will impact Appellants’ apartment complexes, but the impacts will be more conventional than those the Court described in *Texas Eastern*.

Such impacts are like the loss of parking spaces in *City of Linden v. Benedict Motel Corp.*, *370 N.J. Super. 372* (App. Div. 2004). There, the City of Linden undertook a partial taking of a 15-foot-wide strip of Routes 1 & 9 fronting the



Benedict Motel, which taking eliminated 15 parking spaces along the Motel's frontage on Route 1. *Id.* at 378. The issue there was the legal status of the parking spaces and whether the Motel was entitled to monetary damages due to the loss of such spaces. *Ibid.*

Here, the Borough's appraiser analyzed the impact of the takings on the apartment complexes and assigned a monetary value to such impacts. Da182-Da391. Of course, Appellants may disagree with the scope of the impacts on the properties' values. To the extent the Court's analysis of the arbitrariness issue in *Texas Eastern* was driven by the nature of the impacts there, however, Appellants' reliance on that case is misplaced.

For those reasons, the arbitrariness analysis encouraged by Appellants does not even apply to the Carteret Avenue Extension.

**2. Even If The Court Concludes The Arbitrariness Analysis Applies To The Carteret Avenue Extension, The Borough Has Demonstrated That It Is Not Arbitrary.**

Even if the Court applies the *Texas Eastern* arbitrariness analysis here, the Court cannot conclude that the proposed Carteret Avenue Extension is being undertaken arbitrarily. Among other things, the Court should consider the nature of the commitment from other public entities toward the implementation of the Carteret

Avenue Extension. Such commitment shows this project was not undertaken merely according to the Borough's whim.

As described above, CME applied to the NJDOT for funding in connection with this project. The record demonstrates that the NJDOT reviewed the plans, specifications, cost estimate, and other documents relating to the proposed road, and offered highly detailed comments on the project plans. Pa130-Pa133. After CME submitted revised plans, the NJDOT ultimately approved them. Da954-Da955. The NJDOT then awarded the Borough a substantial amount of funds toward the project's costs. Pa107-Pa110; Pa111-Pa128. Moreover, the County is funding part of the costs, and performing some of the work associated with the traffic signal installation that will bookend the Carteret Avenue Extension. Da945-Da952. This substantial commitment of services and financial support from the County and the NJDOT shows the Carteret Avenue Extension is not arbitrary.

Moreover, this proposed roadway was not chosen randomly. Historically, there has either been an unpaved road in this area, and/or the Borough has considered the possibility of extending Carteret Avenue eastward from Roosevelt Avenue to the Borough's waterfront area. That unpaved road was recognized in the Borough's

1973 Master Plan, Pa028-P029<sup>5</sup>, and 1998 Master Plan Reexamination. Pa031-Pa032<sup>6</sup>.

Also, in 2004, Atlantic Realty, Appellants' parent company (or, at least, affiliate), was part of joint venture redeveloper that proposed to extend "Carteret Avenue, from Roosevelt Avenue . . . eastward to the ferry landing." Pa025, ¶5; Pa065. That project did not materialize. Pa068-Pa076. Nevertheless, Atlantic Realty obviously signed onto the concept of extending Carteret Avenue through this area, adjacent to the Carteret Terrace and Meridian II apartment complexes, which were constructed before the parties terminated the Redevelopment Agreement. It is disingenuous for them to argue now that it would so dramatically impact their apartment complexes that this Court must make an extremely rare finding of arbitrariness.

Appellants criticize the Rutgers Study, McCormick Study and Design and Storm Drainage Report because such reports did not analyze the impact of anticipated, additional traffic on the road network in the event the Ferry is developed but the Carteret Avenue Extension is not built. Appellants set up a false choice for the Court, suggesting the Carteret Avenue Extension can only be justified with such

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<sup>5</sup>These particular excerpts show the path of the proposed Carteret Avenue Extension in highlight in comparison to the 1973 Master Plan excerpts at Da1322 and 1327.

<sup>6</sup> These particular excerpts show the path of the proposed Carteret Avenue Extension in highlight in comparison to the 1998 Master Plan Reexamination excerpts at Da1275 and 1288.

evidence. There is no such legal standard in New Jersey for a road. Establishing a standard that requires a municipality to justify a road by demonstrating it improves traffic flow in a particular way, for example by changing expected levels of service from one level to another, would eviscerate the “wide latitude” courts traditionally grant to municipalities in determining an appropriate public use. *769 Assocs.*, 172 *N.J.* at 572 (the Court holding that “New Jersey courts traditionally have granted wide latitude to condemning authorities in determining what property may be condemned for ‘public use,’ reasoning that it is the province of the Legislature to shape the contours of the ‘public use’ requirement.”) (citations omitted).

For the foregoing reasons, the Carteret Avenue Extension, as proposed and approved by Borough Officials, the County and NJDOT, is not arbitrary.

### **3. Necessity**

Appellants’ engineer suggests that, in his opinion, the Borough must demonstrate that construction of the road is necessary, measured by changes in traffic levels of service. As described in the foregoing section, there is no such requirement. Moreover, in *Grossman*, “necessity” was an issue because the statutory basis articulated by the Borough of Glassboro in support of the taking was the Local Redevelopment and Housing Law, *N.J.S.A.* 40A:12A-1 *et seq.* That statute, specifically *N.J.S.A.* 40A:12A-8(c), permits condemnation of a property, but only if

such property is “necessary for the redevelopment project.” 457 *N.J. Super.* at 427 (emphasis added) (quoting *N.J.S.A.* 40A:12-8(c)). At that time in Glassboro, however, there was no particular redevelopment project planned for the subject property. *Id.* at 425. Accordingly, the Court questioned whether the taking was “necessary” under the cited statute. *Id.* at 422.

Here, the Borough identified a particular project – the Carteret Avenue Extension. The argument Appellants make here is like arguing in *Grossman* that the town there would have had to show that the redevelopment project, once identified by the town, was itself “necessary.” The *Grossman* holding does not command such a demonstration. Thus, the trial court correctly found that Appellants’ reliance on *Grossman* was misplaced, and this Court should likewise reject that argument.

**B. The Trial Court Properly Rejected Appellants’ Criticisms of the Carteret Avenue Extension’s Design.**

Appellants also criticize some of the road’s design features in support of their argument that the Carteret Avenue Extension is unsafe and, thus, arbitrary. The trial court properly rejected Appellants’ claim that the road’s design was flawed, or that the design is arbitrary or unsafe.

Appellants’ principal criticisms of the design are based on standards applicable to intersections controlled by STOP signs, not traffic signals. Moreover, in the August Langan Memo, Mr. Disario wrote that the proposed street extension violates

standards applicable to angles of intersections and sight approaches for intersections. Da1125. Mr. Taylor responded in the August 2023 CME Memo, however, that “provided sufficient space and freedom from physical constraints, all intersections would be aligned at or near right angles, but this is not always the case.” Pa178. He also wrote that the applicable standard provides that intersection angles less than 60 degrees normally warrant realignment, and the intersections here are angled at 58 and 62 degrees. Pa178. Thus, the applicable standard is not mandatory and, in any event, the deviation from it is extremely small and cannot support a finding of arbitrariness, even by Appellants’ definition.

Furthermore, Mr. Disario criticized the proposed lane configuration because westbound and eastbound traffic head toward each other, and that could be dangerous if the traffic signal controlling the intersection loses power. Mr. Taylor responded, however, that the traffic signals will have battery and generator backups, thus eliminating or at least reducing this risk.

Also, Appellant Carteret Terrace, LLC’s claim it will lose parking spaces at the Carteret Terrace complex is a quintessential damages/valuation issue and does not make the proposed takings arbitrary. *See Benedict Motel Corp., 370 N.J. Super. 372.* Furthermore, Mr. Disario criticized proposed angled parking along the Carteret Avenue Extension because, in his opinion, that is an inferior design. Mr. Taylor testified, however, and Mr. Disario conceded, that there is angled parking around the

corner from this site. Therefore, Appellants' criticisms of the road's design are dramatically overstated and do not undermine the validity of the takings here.

Finally, the design features Appellants criticize were evident in the NJDOT Application and the Construction Drawings that the NJDOT reviewed. The NJDOT's comments on the Borough's Construction Drawings in May 2022 show that the NJDOT comprehensively reviewed the project details and nevertheless approved the road's design. Da952-Da955. The Court cannot find the proposed takings in connection with the Carteret Avenue Extension are arbitrary when the Borough, the County and the NJDOT all approved the project and committed substantial resources toward its completion.

Appellants suggest the Borough cavalierly concluded it need not demonstrate improvement of traffic conditions or compliance with non-mandatory design standards. Db24. The Borough, however, worked with the geography and geometry available on the property and the road was designed in accordance with AASHTO standards. It is irrelevant that some aspects of the road design may not comply with other sets of standards since there is **no authority** that requires a road to comply with all possible design standards. In fact, requiring the Borough to comply with non-mandatory standards would, in and of itself, but arbitrary.

The Borough, the County and the State have wide latitude in determining what, in their individual and collective judgments, serve residents' best interests.

The New Jersey Supreme Court observed that “the United States Supreme Court has held that ‘it will not substitute its judgment for a legislature’s judgment as to what constitutes a public use’ **unless the use be palpably without reasonable foundation.**” *769 Assocs.*, 172 *N.J.* at 571 (emphasis in original) (further citations omitted)). Likewise, the trial court properly found the Carteret Avenue Extension is not “arbitrary” for purposes of determining the validity of the proposed takings here.

In short, Appellants’ criticisms of the design of the extension are based on standards that do not apply to the proposed extension because traffic flow will be governed by traffic signals, rather than merely STOP signs. Moreover, the standards Appellants cite are not mandatory. Accordingly, the trial court correctly determined that Appellants’ alleged safety issues does not render the takings arbitrary.

### **CONCLUSION**

For the foregoing reasons, the Trial Court Decision should be affirmed.

Respectfully submitted,

**MCMANIMON, SCOTLAND &  
BAUMANN, LLC**  
*Attorneys for Plaintiff-Respondent,  
Borough of Carteret*

By: /s/ Kevin P. McManimon  
Kevin P. McManimon

Date: February 20, 2024





McKIRDY  
RISKIN  
OLSON  
DELLAPELLE  
ATTORNEYS AT LAW

201 LITTLETON ROAD, SUITE 135  
MORRIS PLAINS, N.J. 07950  
TELEPHONE (973) 539-8900  
FAX (973) 984-5529  
[www.mrod.law](http://www.mrod.law)

Anthony F. DellaPelle  
[adellapelle@mrod.law](mailto:adellapelle@mrod.law)

March 5, 2024

**By eCourts Appellate**

Appellate Division Clerk's Office  
P.O. Box 006  
Trenton, NJ 08625

**Re: Borough of Carteret v. Carteret Terrace, et als.**  
**Borough of Carteret v. Meridian II, LLC, et als.**  
**Appellate Docket Nos. A-355-23 and A-357-23**  
**Trial Court Docket Nos. MID-L-1308-23 and MID-L-1313-23**  
**Sat Below: Hon. Michael A. Toto, A.J.S.C.**

Dear Sir or Madam:

This office represents appellants, Carteret Terrace, LLC; The Bank of New York Mellon, as trustee for Par U Hartford Life Insurance Comfort Trust (under docket no. A-355-23); and Meridian II, LLC (under docket no. A-357-23) (collectively "Appellants"). Pursuant to R. 2:6-5, please accept this letter brief on behalf of Appellants in reply to the brief submitted by respondent, Borough of Carteret ("Carteret"). Oral argument is requested.

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**PROCEDURAL HISTORY**

Appellants hereby adopt the procedural history as set forth in its original merits brief filed on January 18, 2024, Trans ID. E1607931-01182024 (Docket No. A-355-23) and Trans ID. E1607941-01182024 (Docket No. A-357-23).

Additionally, on February 28, 2024, Appellants filed a motion in the Appellate Division requesting to stay the trial court’s September 15, 2023 Order authorizing Carteret’s taking, and all subsequent orders, pending this appeal. Appellants also adopt the supplemental procedural history as set forth in the February 28<sup>th</sup> moving papers, Trans ID. E1615086-02282024 (Docket No. A-355-23) and Trans ID. E1615092-02282024 (Docket No. A-357-23).

**STATEMENT OF FACTS**

Appellants hereby adopt the statement of facts as set forth in its original merits brief filed on January 18, 2024, Trans ID. E1607931-01182024 (Docket No. A-355-23) and Trans ID. E1607941-01182024 (Docket No. A-357-23).

Appellants also adopt the supplemental facts set forth in the February 28, 2024 motion to stay, Trans ID. E1615086-02282024 (Docket No. A-355-23) and Trans ID. E1615092-02282024 (Docket No. A-357-23).

### **LEGAL ARGUMENT**

**I. A CONDEMNOR LACKS THE UNFETTERED DISCRETION TO TAKE PRIVATE PROPERTY FOR ANY ALLEGED PUBLIC PURPOSE WHEN THE TAKING IS SHOWN TO BE ARBITRARY AND CAPRICIOUS. (Da154; Da162 to Da163; Da1116 to Da1176; 2T79, 7 to 2T84, 15).**

Carteret's entire argument is grounded upon the belief that it can operate above the law simply because it alleges to take Appellant's property for a public roadway. As anticipated in Appellants' merits brief, Carteret relies heavily on the decision in Twp. of West Orange v. 769 Associates, LLC, 172 N.J. 564 (2002) to suggest that it can take private property in *any* manner, and based upon *any* design, simply because condemnors are typically afforded "wide latitude." Pb29-Pb31. Carteret claims that this Court should avoid scrutinizing the arbitrary and unnecessary nature of its proposed taking, merely because Carteret proposes to build a public road extension. The law provides no such automatic deference because all proposed takings are subject to judicial review. In sum, Carteret's proposed taking is subject to a factual review on the basis of "manifest abuse of power" and the

undisputed facts and expert testimony in this case clearly and convincingly satisfy that standard. 769 Associates, LLC, 172 N.J. at 571; see also Casino Reinvestment Dev. Auth. v. Birnbaum, 458 N.J. Super. 173, 190 (App. Div. 2019) (holding that takings are subject to review on the basis of manifest abuse of power, and such review is a factual determination).

Significantly, 769 Associates, LLC presented drastically different facts and arguments compared to the case at bar. In 769 Associates, LLC, the Supreme Court rejected a challenge that a roadway taking was invalid on the grounds that it would allegedly serve a *private*, rather than public, purpose. Id. at 570. In addressing that claim, the Supreme Court found that the property owners failed to demonstrate “persuasively how the proposed condemnation, even if it serves principally the [private] development, constitutes an improper private use.” Id. at 577. Moreover, the Supreme Court found that the taking was authorized because the condemnor’s engineering evidence and conclusions **were unchallenged** by the property owner and the record had established that the new proposed road would serve its stated purpose of **improving traffic** conditions in the area. Id. at 579 (“the Township engineer's unchallenged certification... declared that the proposed road through defendant's property would serve as a ‘secondary means of ingress and egress for

the Bel-Aire project’ and would be ‘critical in an emergency situation when the primary access from Mt. Pleasant Avenue [to Bel-Aire] is blocked.’”).

Unlike the facts 769 Associates, LLC, Appellants in the matter at bar submitted extensive engineering, planning, and fact evidence that clearly and convincingly demonstrates that Carteret’s proposed taking is actually *unsafe*, and will only serve to *degrade* the Borough’s road network and local traffic safety. 2T169, 12 to 2T174, 1; Da133 to Da136; Da1337; Da1339; Da1341. Appellants’ evidence and conclusions also demonstrate that the roadway itself is *unnecessary* from a traffic engineering standpoint. Da1118 to Da1176. Carteret has offered no persuasive evidence to rebut the conclusions of Appellants’ expert and fact testimony. Rather, Carteret broadly suggests that “some people will use the Carteret Avenue Extension” and that fact alone justifies the taking. Pb31. This Court should not be persuaded by such a vague and misleading distraction because the undisputed facts at bar ultimately demonstrate that Carteret’s taking *fails to* “enlarge resources, increase the industrial energies, [or] . . . manifestly contributes to the general welfare and the prosperity of the whole community.” 769 Associates, LLC, 172 N.J. at 573.

In addition to Carteret’s improper reliance on 769 Associates, LLC that misleads or distracts the Court away from the facts at bar, Carteret implies that Texas

E. Transmission Corp. v. Wildlife Preserves, Inc., 48 N.J. 261 (1966) also precludes this Court from reviewing the arbitrary facts concerning this taking. Pb34-Pb40. Once again, a long-winded recitation of the facts from prior cases does not alter the facts presently before this Court; Carteret's taking is not based on any reasonable necessity, nor did it undertake any analysis to determine whether there were any reasonable alternatives. Necessity, and the availability of reasonable alternatives, have long been factors courts have looked to in reviewing the government's authority to condemn private property and determining whether a proposed taking is arbitrary. For example, in City of Trenton v. Lenzner, 16 N.J. 465 (1954), the Court found that the condemnor set forth clear and convincing testimony demonstrating a necessity for the taking (for public parking). Id. at 473-474 (finding no abuse of the condemnor's power because, among other findings, the condemnor "considered [the subject property] more suitable for the purpose proposed than other properties on Academy Street and elsewhere."). Recently, in Birnbaum, supra, 458 N.J. Super. 173, the Appellate Division struck down a taking by the Casino Reinvestment Development Authority because "the proposed stockpiling of land for future redevelopment does not suffice to establish a taking is reasonably necessary." Id. at

191. To that end, no single public purpose or condemnor is afforded impunity from review when facts demonstrate that a condemnor has manifestly abused its power.

Further demonstrating the arbitrariness of Carteret's conduct here, the taking maps appended to the complaints in these matters show that it is taking an easement over Appellants' *entire property*, which runs contrary to Carteret's longstanding contention that it is merely taking a throughfare easement to build a public road. Da15-Da17; Da33-Da35. In its answering papers, Appellants raised the required defense enunciated by this Court in State v. Orenstein, 124 N.J. Super. 295, 297-298 (App. Div. 1973), certif. den., 63 N.J. 588 (1973), which held that the description of the property and rights to be acquired embodied in the complaint and declaration of taking is of "controlling significance" as the condemnor *will obtain title only to the land and property rights therein described*. (Emphasis added). Therefore, the trial court's authorization of the taking essentially leads to the unfortunate reality that Carteret has acquired easement rights over *the entire property* due to its arbitrary inclusion of an overly broad and illegible taking map. This blunder further demonstrates reversible error because any and all questions regarding the scope of the taking "must be presented to and decided by the court before it enters judgment appointing condemnation commissioners." Id. at 298; see also Ridgewood v. Sreel



Investment Corp., 28 N.J. 121, 130-131 (1958) (holding that a property owner is entitled to have damages assessed on the basis that the condemnor will use the property taken to the full extent described in the taking instrument, and not on the basis of “promissory representations” by the condemnor suggesting limitations on the condemnor’s use).

Of similar import is Carteret’s misleading and distracting reference to the terminated 2004 Carteret Landing Redevelopment Agreement. Pb15-Pb17; Pb42. Carteret argues that Appellants “signed onto the concept of extending Carteret Avenue through this area” when that redevelopment agreement was entered into twenty years ago. Pb42. Carteret again attempts to mislead this Court, because (i) the roadway conceptualized in the 2004 agreement is clearly not the same roadway that Carteret proposes to take at the present time in this condemnation matter, (ii) the agreement was envisioned before Appellants’ two apartment complexes were completed, and (iii) the agreement proposed a road network for a different development project which did not occur. Indeed, Carteret’s reference to the 2004 agreement actually supports Appellants’ case because that twenty-year-old agreement expressly required any roadway to “meet the standards and required of the Carteret Land Development Ordinance,” Pa63, and the design of Carteret’s

proposed taking from 2023 violates that very Ordinance in several different regards. Da154; Da159 to Da160; Da162; see also 2T56, 6 to 2T56, 3.

Our Supreme Court has stated that “the condemnation process involves the exercise of one of the most awesome powers of government.” City of Atlantic City v. Cynwyd Investments, 148 N.J. 55, 73 (1997). Carteret should not be permitted to manifestly abuse that power and evade the principles of fairness woven throughout our statutes and caselaw.

**II. CARTERET SUBMITTED DELIBERATE MISREPRESENTATIONS ON ITS APPLICATION FOR FUNDING TO THE NEW JERSEY, DEPARTMENT OF TRANSPORTATION. (Da159; Da1125; Da1224-Da1225; 2T154, 18 to 2T155, 1).**

Carteret submits that this taking is not arbitrary simply because it was “proposed and approved by Borough Officials, the County and NJDOT.” Pb43. However, any reliance on another governmental entity’s approval is incorrect and misleading because the record demonstrates that Carteret’s municipal aid application to NJDOT contained several significant misrepresentations of fact. First, the application misrepresented that the project would be completed in compliance with accepted AASHTO engineering standards. In fact, the proposed street extension fails to comply with AASHTO standards concerning the angles of proposed new intersections and sight triangle requirements. Da1125; Da159; See also 2T154, 18

to 2T155, 1. Next, Carteret also misrepresented to NJDOT that on-street parking would be “unrestricted” when, in fact, Carteret intended to restrict that parking. Da1224 to Da1225. Finally, any approvals that may have been obtained under these false pretenses actually concerned a different “preliminary” road design that was offered at that time, and the present design that Carteret has relied upon to take Appellants’ Property has never been approved by anyone, except perhaps by Carteret itself. 2T74, 9 to 2T76, 9.

An “arbitrary” decision is “a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures.” “Arbitrary,” Black's Law Dictionary, p. 125 (10th ed. 2015). Since NJDOT was provided inaccurate and misleading information by Carteret in order to receive the required public funding for this project, then it logically follows that the ensuing approval of the funding itself was also arbitrary because it was made without regard to the actual facts of this taking.

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**CONCLUSION**

For the foregoing reasons, and the reasons set forth in Appellant's initial briefing, Appellants respectfully request that the trial court's decision authorizing Carteret's use of eminent domain be reversed, and Carteret's Complaints dismissed.

Respectfully submitted,

**McKIRDY, RISKIN, OLSON  
& DELLA PELLE, P.C.**



By: \_\_\_\_\_  
ANTHONY F. DELLAPELLE

Dated: March 5, 2024