FILED, Clerk of the Appellate Division, January 17, 2024, **A-000356-23**, **AMENDED**

BOROUGH OF MONMOUTH BEACH, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY Plaintiff	: : : : : :	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: DOCKET NO: A-000356-23
vs.	: :	CIVIL ACTION
LOUIS P. TSAKIRIS, PROVIDENT BANK, FRANK MARX ADMINISTRATOR OF THE SMALL BUSINESS ADMINISTRATION AND BOROUGH OF MONMOUTH BEACH Defendants	: : : : : : :	On Appeal from a Final Judgment of the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. MON-L-3205-18 **Sat Below:** **Hon. Henry P. Butehorn, J.S.C.** **Hon. Owen C. McCarthy, J.S.C.**

AMENDED BRIEF ON BEHALF OF DEFENDANT/APPELLANT LOUIS P. TSAKIRIS

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FILED, Clerk of the Appellate Division, January 17, 2024, **A-000356-23**, **AMENDED**

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 2

STATEMENT OF FACTS 5

LEGAL ARGUMENT

POINT ONE

PLAINTIFF'S MOTION TO AMEND THE COMPLAINT RESULTED IN UNDUE PREJUDICE TO THE PROPERTY OWNER AND SHOULD HAVE BEEN DENIED (Da80-85)..... 19

POINT TWO

THE OWNER'S MOTION FOR REIMBURSEMENT OF HIS EXPERT FEES SHOULD HAVE BEEN GRANTED BASED ON FUNDAMENTAL PRINCIPLES OF FAIRNESS, EQUITY, AND FULL INDEMNITY (Da154-155;160). 22

POINT THREE

THE LAW DIVISION ERRED IN EXCLUDING EVIDENCE OF AND DAMAGES FOR THE INCREASED VULNERABILITY OF THE PROPERTY TO WAVE OVERTOPPING AS A RESULT OF THE SEAWALL PROJECT (Da505; 6T23:1-24:8)............. 25

POINT FOUR

THE LAW DIVISION IMPROPERLY EXCLUDED THE CONCLUSIONS OF THE OWNER'S COASTAL ENGINEERING EXPERT AS NET OPINION (Da505; 6T 23:1-24:8)................ 34

POINT FIVE

THE LAW DIVISION ERRED IN EXCLUDING DAMAGES TO THE OWNER'S HOUSE AS A RESULT OF THE BOULDER VIBRATIONS FROM THE SEAWALL PROJECT CONSTRUCTION (Da390-400).. 39

POINT SIX

THE COURT IMPROPERLY EXCLUDED DAMAGES FOR LOSS OF OCEAN VIEW FROM THE PROPERTY AND PRIVACY (Da446-447; 5T 36:19-38:10) 43

CONCLUSION 45

Orders Subject to this Appeal:

Order and Statement of Reasons Permitting the Filing of Amended Complaint Filed 03/27/20 .... Da80

Order In Part Denying Defendant's Expert Fees and Statement of Reasons Filed 01/08/21 .... Da154

Order Barring Damages to Property Sustained from Vibrations and Statement of Reasons Filed 08/06/21 .... Da391

Order Granting Plaintiff's Motion to Exclude Loss of Ocean View and Privacy Filed 01/28/22 .... Da446

Order Barring Defendant's Appraiser from Relying at Trial on the Raichle Engineering Report [as to enhanced wave overtopping] Filed 10/07/22 .... Da505

TABLE OF AUTHORITIES

Cases

Albahary v. City of Bristol, 886 A. 2d 802 Conn. (2005) 42

Armstrong v. United States, 364 U.S. 40, 49 (1960) 22

Borough of Merch. v. Malik & Son, 218 N.J. 556, 572 (2014) ... 23

City of Ocean City v. Maffucci, 326 N.J. Super. 1,19 (App Div.) certif. denied, 162 N.J. 485 (1999) 40,44,45

County of Monmouth v. Kohl, 242 N.J. Super. 210, 216 (App. Div.), certif. denied 122 N.J. 405 (1990) 22

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 35,36

F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426-427 (1985) 23

General Electric Co. v. Joiner, 522 U.S. 136 (1997) 35

Glen Wall Associates v. Wall Tp., 99 N,J, 265, 277 (N.J. 1985) 37

Borough of Harvey Cedars v. Karan, 214 N.J. 384 (2013) ....passim

Housing Authority v. Suydam Investors, 177 N.J. 2, (2003) 19,22

In re Accutane Litigation, 234 N.J. 340 (2018) 35,36

Jersey City Redevelopment Agency v. Kugler, 58 N.J. 374, 383-84 (1971) 22,39

Keinz v. State of New York, 2 A.D. 2d 45, 156 N.Y.S. 2d 505 (1956) app. denied, 2 App. Div. 2d 815, 161 N.Y.S. 2d 604 (1957) 45

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) 35,36

Los Angeles Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809, 812 (1997) 28

Plunske v. Wood, 370, A. 2d 920 (Conn. 1976) 41

Pomerantz Paper Corp. v. New Comm. Corp., 207 N.J. 344, 372 (2011) 34

Public Service Elec. & Gas v. Oldwick, 125 N.J. Super. 31 (App. Div.) certif. denied, 64 N.J. 153 (1973) 28,32,33,44

Rockaway v. Donofrio, 186 N.J. Super. 344, 352-353 (App. Div. 1982) 23

Saddle River v. 66 East Allendale, 216 N.J. 115, 142-143 (2013) 38

State, Com'r of Transp. v. Dikert, 319 N.J. Super. 310 (App. Div.) certif. denied, 161 N.J. 150 (1999) 29

State by Com'r v. Weiswasser, 149 N.J. 320 (1997) 28,41,45

State by Dept. v. 1 Howe Street, 463 N.J. Super. 312 (App. Div. 2020) 31

State v. Applegate, et. al., 107 N.J. Super. 159,163 (App. Div. 1969) 21

State v. Jenewicz, 193 N.J. 440, 454 (2008) 38

State v. Kelly, 97 N.J. 178, 208 (1984) 38

State v. Nordstrom, et. als., 54 N.J. 50, 53 (1969) 22

State v. Schmidt, 867 S.W. 2d 769, 781 (Tex 1993) 28

State v. Stulman, 136 N.J. Super. 148 (App. Div. 1975) 29,45

State v. Sun Oil Company, 160 N.J. Super. 513 (Law Div. 1978) 41

State v. William G. Rohrer, Inc., 80 N.J. 462 (1979) 18,23,40,41

State v. Silver, 92 N.J. 507, 515 (1983) 39,44

State v. Townsend, 186 N.J. 473, 494 (2006) 34

Townsend v. Pierre, 221 N.J. 36, 54 (2015) 34

Constitution

U.S. Const. amend. v; xiv 22

N.J. Const. art. 1, par. 20 22

Statutes

N.J.S.A. 20:3-19 19

N.J.S.A. 20:3-35 8,24

N.J.S.A. 20:3-26 (b)...8,24

Court Rules

Rule 4:9-1 7,24

R. 4:50-1 19,20

R. 4:50-2 8,19,20

Rule 4:50-1 (a) 20

Rule 4:50-1(f)..8,20

Rule 1:1-2.. 24

N.J.R.E. 104 35,38

INDEX TO THE AMENDED APPENDIX

VOLUME I (Da1 to Da189)

Verified Complaint Filed 09/05/18 .... Da1
Exhibit A (legal description/map) Da11/13
Exhibit B (value "recapitulation) Da15

Declaration of Taking Filed 09/05/18 .... Da16
Exhibit A (legal description) Da11
Exhibit B (map) Da13

Order For Payment Into Court and Possession
Filed 09/24/18 .... Da19

Answer, Separate Defenses, Jury Demand,
Designation of Trial Counsel Filed 10/17/18 .... Da21

Certification of Paul V. Fernicola, Esq. in Reply
and Further Support of Order to Show Cause
Filed 11/09/18 .... Da26
Exhibit A (legal description) Da11
Exhibit B (map) Da13
Exhibit C (unreported opinion of
Minke Family Trust v. Tp. of Long Beach, etc.
App. Div. decided 08/20/18
Docket Nos. A-2660-15 T3; A-4036-15T3)
Not provided.

Peter H. Wegener's Letter Withdrawing Defendant's Opposition to
Order for Judgment and Appointing Commissioners
Filed 11/13/18 .... Da28

Order for Judgment and Appointing Commissioners
Filed 11/21/18 .... Da29

Report of Commissioners Filed 06/21/19 .... Da31

Defendant Tsakiris' Notice of Appeal From Award of
Commissioners and Jury Demand Filed 06/26/19 .... Da35

Peter H. Wegener E-mail Transmitting Defendant's Original Appraisal Report (with planning report) Dated 01/30/20 .... Da37

e-Courts Notice of 02/18/20 Trial Date (adjourned from 11/12/19) Dated 11/07/19 .... Da38

Peter H. Wegener Letter Requesting 2/18/20 Trial be adjourned due to unavailability of Plaintiff's counsel Filed 02/12/2020 .... Da39

<u>Motion to Amend</u>

Plaintiff's Notice of Motion to Amend Complaint Filed 02/26/20 .... Da40

Certification of Robert Moore, Esq. In Support of Plaintiff's Motion to Amend Complaint Filed 02/26/20 .... Da43
- Exhibit 1 Verified Complaint Da1
- Exhibit 2 Proposed Amended Verified Complaint Da46
  - Exhibit 1 (legal description) Da56
  - (map) Da58
  - Exhibit 2 (recapitulation) Da15
- Exhibit 3 Proposed Amended Declaration of Taking) Da60
  - Exhibit 1 (legal description) Da56
  - Exhibit 2 (map) Da58
- Exhibit 4 (R. Moore's 02/24/20 e-mail .... Da64 with draft consent order to amend attached)
- Exhibit 5 Peter H. Wegener's Letter Dated 02/25/20 declining consent Da68

Plaintiff's Certification of Julie Nastasi In Further Support of Motion to Amend Filed 03/24/20 .... Da69

Order and Statement of Reasons Permitting the Filing of Amended Complaint Filed 03/27/20 .... Da80

Amended Verified Complaint Filed 04/20/20 .... Da86
Exhibit A (legal description) Da56
Exhibit B (map) Da96
Amended Declaration of Taking Filed 04/20/20 .... Da97
Exhibit A (legal description) Da100
Exhibit B (map) Da101

Motion for Expert Fees

Defendant's Notice of Motion For Extension of Time to Serve Expert Reports and For Other Relief [reimbursement of expert fees]Filed 12/03/20 .... Da102

Peter H. Wegener, Esq. Certification in Support of Motion and For Other Relief [Re: reimbursement of expert fees] (without exhibits) Filed 12/03/20 .... Da104

Louis Tsakiris Certification in Support of Motion (without exhibits) Filed 12/03/20 .... Da107

Defendant's Letter Brief Excerpts in Support of Motion for Expert Fees Filed 12/03/20 .... Da112

Plaintiff's Notice of Cross-Motion to Bar Defendant From Providing Appraisal Report and Testimony at Trial Filed 12/10/20 .... Da115

Certification of Paul V. Fernicola, Esq. in Support of Plaintiff's Motion to Bar and In Opposition to Defendant's Motion Filed 12/10/20 .... Da118
Exhibit G (excerpts from plaintiff's appraisal report) Da133
Exhibit H (photographs/map) Da139

Certification of Peter H. Wegener, Esq. (in Opposition to Plaintiff's Cross-Motion) Filed 12/30/20 .... Da144
Exhibit A (preliminary review by A. Raichle, P.E. Dated 12/29/20) Da148,332

Defendant's Letter Brief Excerpts in Further Support of Expert Fees Filed 12/30/20 .... Da149

Order (In Part Denying Defendant Expert Fees) and
Statement of Reasons Filed 01/08/21 .... Da154,160
Order Denying Plaintiff's Cross-Motion to Bar Defendant's
Appraisal Report and Testimony Filed 01/08/21 .... Da164

Motion to Exclude Vibrations Damage

Plaintiff's Notice of Motion to Bar Defendant's Expert Reports
Related to Physical Damage to the Property Filed 07/07/21 . Da166

Certification of Robert Moore, Esq. In Support of
Plaintiff's Motion to Bar Filed 07/07/21 .... Da169
Exhibit 1 (Verified Complaint) Da1
Exhibit 2 (excerpts from Plaintiff's
Appraisal Report)............................... Da177
Exhibit 3 (Vibrations Monitoring Data from locations
in Sea Bright) (not provided)
Exhibit 4 (Report of Andrew Raichle, P.E.
Dated 04/07/21) Da183,311
Exhibit 5 (Excerpts from Defendant's Appraisal
Report by Gary Wade, M.A.I.
Dated 09/05/18) Da185

VOLUME II (Da190 to Da389)

Exhibit 6 (Vibration Monitoring Data report generated
09/21/18) Da191
Exhibit 7 (Post Construction Interior Inspections
05/13/19; 06/14/19)............................ Da211
Exhibit 8 (Plaintiff Counsel Cover Letter filing
Defendant's Appraisal Report by Gary
Wade Dated 05/06/21(includes A. Raichle of
Watermen, LLC dated 04/07/21)
(Filed 07/28/21) Da233;Da235

Defendant's Objection to Plaintiff's Motion to Bar
Evidence and Cross-Motion for Discovery Filed 07/28/21 ... Da323

FILED, Clerk of the Appellate Division, January 17, 2024, **A-000356-23**, AMENDED

Certification of Peter H. Wegener, Esq. In Opposition to Motion to Bar and In Support of Cross-Motion Filed 07/28/21 .... Da325

Certification of John J. Reilly, Esq. In Opposition to Motion to Bar and In Support of Cross-Motion Filed 07/28/21 .... Da327

- Exhibit A Raichle preliminary review 12/29/20.... Da331
- Exhibit B Raichle Cost to Cure Estimate 04/21/21 Da336
- Exhibit C Defendant's Appraiser's Supplemental Report Dated 07/28/21 .... Da340
- Exhibit D Vibrations Monitoring Pre-Construction Inspection 09/07/18.......... Da344
- Exhibit E Wolfe Cost Proposal Dated 07/24/20 .... Da321

* * *

Supplemental Certification of Robert Moore, Esq. In Further Support of Motion to Bar Filed 08/02/21 .... Da363

- Exhibit 1 Verified Complaint Da1
  - (form of) Order to Show Cause Filed 9/24/18.......... Da370
  - Case Information Statement Dated 09/05/18.......... Da373
- Exhibit 2 Order to Show Cause Filed 09/24/18. Da375
- Exhibit 3 Order for Payment into Court and For Possession Filed 9/24/18 .... Da379
- Exhibit 4 Order for Judgment and Appointing Commissioners Filed 11/21/18 .... Da29
- Exhibit 7 Amended Verified Complaint Filed 08/02/21.......... Da86
- Exhibit 8 Plaintiff's Certification of Paul Fernicola, Esq. Filed 07/08/20 .... Da382
- Exhibit 13 Defendant's Notice of Motion for Extension of Time and For Other Relief Filed 12/03/20 .... Da102
- Exhibit 14 Plaintiff's Notice of [Cross] Motion to Bar Defendant from Providing Experts at Trial And Certification Filed 12/10/20...... Da115
- Exhibit 15 Order (inter alia, Denying Expert Fees) Filed on 01/08/21 .... Da154

VOLUME III (Da390 to Da521)

Order Barring Portions of Defendant's Appraisal Report And Engineering Evaluation [Vibrations Damage] and Statement of Reasons Filed 08/06/21 .... Da390

Motion to Exclude Damages for Loss of Ocean View and Increased Vulnerability to Wave Overtopping

Plaintiff's Notice of Motion to Bar Defendant's Engineering Report Filed 12/01/21 .... Da401

Certification of Robert Moore, Esq. In Support of Motion to Bar Filed 12/01/21 .... Da404
- Exhibit 1 Amended Verified Complaint Da86
- Exhibit 2 Excerpts from Plaintiff's Appraisal Report Da411
- Exhibit 3 Raichle 04/07/21 Engineering Report... Da310
- Exhibit 4 Wade Appraisal Report Dated 05/06/21 Da235
- Exhibit 5 Review of Engineering Evaluation Impacts of Seawall Construction prepared by Watermen, LLC (A. Raichle) by Jon K. Miller, PhD, Dated 10/21/21........... Da418

Certification of John J. Reilly, Esq. In Opposition of Motion to Bar Raichle Filed 01/13/22 .... Da433
- Exhibit A 12/29/20 Raichle Report Da331
- Exhibit B 04/07/21 Raichle Report.................... Da310
- Exhibit C Andrew Raichle, P.E. Curriculum Vitae.. Da436

Order Granting Plaintiff's Motion to Exclude Loss of Ocean View and Privacy and Denying, without Prejudice, Plaintiff's Motion to Preclude Owner's Engineer as Net Opinion Filed 1/28/22... Da444

FILED, Clerk of the Appellate Division, January 17, 2024, **A-000356-23**, AMENDED

Motion to Exclude Increased Wave Overtopping Vulnerability

Plaintiff's Notice of Motion to Bar Defendant's Motion to Exclude Increased Wave Overtopping Vulnerability Engineering Report Filed 8/10/22 .... Da446

Certification of Paul Fernicola, Esq. In Support of Plaintiff's Motion to Bar Raichle's Engineering Report Filed 8/10/22 .. Da448

Exhibit 1 Raichle 04/07/21 report Da310

Exhibit 2 Miller 10/21/21 report Da418

Exhibit 3 03/01/22 Deposition Transcript of A. Raichle .. Da456

Defendant's Certification of John J. Reilly, Esq. In Opposition to Plaintiff's Motion Filed 09/01/22........ Da499

Exhibit A Curriculum Vitae of A. Raichle........ Da436

Exhibit B 12/29/20 Preliminary Report of A. Raichle........ Da331

Exhibit C 04/07/21 Report of A. Raichle........ Da310

Exhibit D Email of John Reilly Dated 04/09/21 Providing Plaintiff's Counsel Via Drop Box eight attachments to Mr. Raichle 04/07/21 Engineering Evaluation........ Da502

Order Barring Defendant's Appraiser from Relying at Trial on the Raichle Engineering Report (wave overtopping) Filed 10/07/22........ Da503

Consent Order Final Judgment Filed 08/22/23 .... Da505

Defendant's Notice of Appeal Filed 10/04/23 .... Da508

Defendant's Amended Notice of Appeal Filed 10/10/23........ Da513

Certification of Transcripts Completion and Delivery Filed 11/02/23 .... Da519

Preliminary Statement

This is a partial taking condemnation action. Defendant-property owner, Louis Tsakiris, owns oceanfront property at 35 Ocean Avenue at the corner of the Valentine Street right of way in the Borough of Monmouth Beach. The property had its own existing seawall.

The Borough of Monmouth Beach took a permanent easement within the owner's property as part of a project to construct a seawall to protect the adjacent municipal Valentine Street right of way and municipal beach pavilion. The project tied the new seawall into Tsakiris' existing seawall within the easement area taken.

Over the owner's objection, the court below granted plaintiff's motion on the eve of trial to amend its complaint. The court subsequently denied the owner's motion for reimbursement of the costs of his expert reports which the amendment had negated.

The property owner obtained new expert engineering and appraisal reports which addressed the damages to the value of his property as a result of the taking and the seawall project. These included:

- Physical damage to the owner's house from the boulder vibrations during the seawall project construction;

- Damages or loss in value as a result of the property's increased vulnerability to wave overtopping; and
- Damages or loss in value for impaired ocean view and privacy.

In motion practice prior to trial, the trial court excluded each of these damages.

Prior to trial, the matter was finalized by a consent judgment, with the owner's reserving his right to appeal the prior orders excluding the damages.

In a partial taking, just compensation requires consideration of all relevant, reasonably calculable and non-conjectural factors that either decrease or increase the value of the remaining property as a result of the project for which the taking is necessary. The Law Division's rulings improperly denied Mr. Tsakiris having the jury decide the just compensation for the damages to which he was entitled.

Procedural History

Plaintiff filed its complaint on September 5, 2018. (Da1) On even date, Plaintiff filed and recorded a declaration of taking and deposited into court its estimate of just compensation in the amount of $16,500.00 and acquired title to and possession of the easement, as described therein. (Da16) The owner filed an answer on October 17, 2018 challenging the taking. (Da21) Plaintiff replied on November 9, 2018. (Da26) The owner withdrew his objection on November

13, 2018. (Da28) An order for final judgment of proper exercise of eminent domain and appointing commissioners was entered on November 21, 2018 for the taking as described in the complaint. (Da29) The appointed commissioners held a hearing and filed their report on June 21, 2019. (Da31) The owner filed a notice of appeal for a jury trial on June 26, 2019. (Da35) The owner served his then planning and appraisal reports on January 30, 2020 in anticipation of the then February 18, 2020 trial date. (Da37; Da38) The trial was subsequently adjourned due to the unavailability of plaintiff's counsel. (Da39)

Shortly thereafter, by motion dated February 26, 2020, plaintiff moved to amend its complaint with a revised metes and bounds description of the taking. (Da40) The owner opposed the motion by letter brief. By order and written statement of reasons filed on March 27, 2020 the court granted plaintiff's motion. (Da80) Plaintiff filed the amended complaint and amended declaration of taking on April 20, 2020. (Da86; Da97)

By motion dated December 3, 2020, the owner sought various relief, including reimbursement of his expert fees incurred prior to the amendment. (Da102) Plaintiff opposed the motion and cross moved to bar the owner's appraiser at trial, whose report had not yet been completed. (Da115) The owner replied by certification. (Da144) By order entered on January 8, 2021, the court

denied, without prejudice, the owner's motion for the expert fees. (Da154) The court also denied plaintiff's cross-motion. (Da164)

By motion dated July 7, 2021, plaintiff sought to exclude from trial evidence related to the physical damage to the owner's residence from the seawall project construction vibrations. (Da166) The owner opposed the motion and cross-moved for discovery. (Da323) By order entered on August 6, 2021, the court granted plaintiff's motion and denied the owner's cross-motion as moot. (Da390)

By motion dated December 1, 2021, plaintiff sought to exclude the owner's engineering and appraisal reports. (Da401) The owner opposed the motion. (Da433) By order entered on January, 28, 2022, the court excluded the owner's claims for loss of ocean view and privacy, and denied plaintiff's motion, without prejudice, to exclude evidence of the property's enhanced vulnerability to wave overtopping. (Da444)

By motion dated August 10, 2022, plaintiff sought to exclude as net opinion the engineering report and testimony of the owner's engineer as to the enhanced vulnerability of the property to wave overtopping. (Da446) The owner opposed the motion. (Da499) By order entered on October 7, 2022, the court granted plaintiff's motion. (Da503)

On August 17, 2023, a consent final judgment was entered in the amount of $16,500.00, with the owner expressly retaining the right to file a timely notice of appeal of the prior orders striking certain of the owner's expert reports and damage claims. (Da505)

The owner filed the within notice of appeal on October 4, 2023 (Da508) and an amended notice of appeal on October 10, 2023. (Da513) [1]

Statement of Facts

Louis Tsakiris is the owner of a 1.36 ± acre oceanfront property improved with a two and a half story, 6,756 square feet, single family home located at 35 Ocean Avenue at the corner of the Valentine Street right of way in the Borough of Monmouth Beach. (Da2, ¶4,7; Da70, ¶7; Da119, ¶5) The property had its own seawall prior to the within taking and seawall project. (Da255, 311, 314) No easements encumbered the property. (Da98-99)

[1] 1T – Motion Transcript 03/27/20 (to amend complaint)
2T – Motion Transcript 01/08/21 (to extend discovery and for expert fees, etc.)
3T – Motion Transcript 08/06/21 (to bar vibrations damage)
4T – Motion Transcript 01/21/22 (to bar ocean view and enhanced wave overtopping vulnerability damage)
5T – Motion Transcript 01/25/22 (continuation of 01/21/22 motion)
6T – Motion Transcript 10/07/22 (to bar wave overtopping)

Plaintiff took a permanent 3,334 square feet easement within the property which easement included the right to maintain and replace the proposed seawall. (Da56-58)

Amendment to Complaint

Plaintiff filed its complaint on September 15, 2018. (Da1) The metes and bounds description of the easement taking in the complaint identified the starting point of the taking as 117.65 feet from the intersection of Ocean Avenue and the Valentine Street right of way along the owner's south property line. (Da11) The map attached to the complaint depicted the easement. (Da13) The map was not based on a boundary survey. (Da13, Note 3)

Plaintiff's professional land surveyor, its business administrator and its attorney reviewed and approved the complaint. (Da8-12) Plaintiff obtained title to and possession of the easement by the declaration of taking and deposit of its estimate of compensation into court. (Da16;19) Plaintiff obtained entry of final judgment of proper exercise of eminent domain for the easement as described. (Da29) The owner served his expert planning and appraisal reports for the then imminent trial based on the taking as described. (Da37-38) The planning report relied on the description and identified a difference between the legal description and the map. (Da121, ¶29)

Subsequent to the owner having served his expert reports, and on the eve of the then scheduled trial, plaintiff moved to amend its complaint on the basis of an error in the description. (e.g., Da43, ¶3; Da70, ¶11) Plaintiff sought to change the starting point of its metes and bounds description of the easement taken from 117.65 feet to 177.65 feet, a distance eastward of 60 feet. (Da40; Compare Da11 to Da56)

The owner opposed the amendment. The purported purpose of the easement taking was to repair a portion of the owner's existing seawall in the area of the property's south property line. (Da70, ¶8) Rather than repair the existing seawall, a new seawall was constructed 50-60 feet east of the end of the southwesterly curved portion of the owner's existing wall. (Da108, ¶7-10; 145, ¶4-7; 364, ¶3) In preparing their reports, the owner's experts relied on the metes and bounds description in the complaint. (Da106, ¶3; 110, ¶26)

Over the owner's objection, the court granted plaintiff's motion to amend the complaint. (Da80) The court indicated the map remained essentially unchanged and sufficiently identified the taking, and that amendments are to be freely granted in the interest of justice, citing Rule 4:9-1. The court concluded there was no undue prejudice, that the amendment would not be futile, and that a final judgment can be amended under Rule 4:5-1 (f) within a reasonable time for any other reason justifying relief. (Da82-85) The court so concluded

notwithstanding that final judgment imposing the permanent easement on defendant's property had been entered in accordance with the metes and bounds description more than one year earlier in violation of R.4:50-2.

Owner's Expert Fees

The owner subsequently moved for reimbursement of the expert fees he had incurred in the amount of $14,737.50. (Da102; 106, ¶30; 111, ¶28) The owner relied on the principles of fairness and equity and, by analogy, N.J.S.A. 20:3-26(b) and -35. (Da112-114; 149-153) By order entered on January 8, 2021, the court denied the owner's motion for his expert fees, without prejudice, on the incorrect basis that the owner had not cited a Court Rule, case law or legal basis for the relief requested. (Da154-155; 160)

Increased Vulnerability To Wave Overtopping

The owner retained Andrew Raichle, P.E. of Watermen, LLC. Raichle is a marine and coastal engineer. He earned a bachelor's degree (1990) in civil engineering from the University of Delaware. He holds a master's degree (1992) in ocean engineering as a Davis Fellow of the prestigious University of Delaware Center for Applied Coastal Research. He is a licensed professional engineer in New Jersey and other states. He led emergency response, recovery and resiliency teams post-Superstorm Sandy, including for the three major New

FILED, Clerk of the Appellate Division, January 17, 2024, **A-000356-23**, **AMENDED**

York City area airports. He provided resiliency engineering counseling services to several municipalities and private property owners in Monmouth and Ocean Counties and elsewhere. He has co-authored multiple peer-reviewed journal articles related to predicting the performance of coastal revetment structures, with particular emphasis on the dynamics of wave overtopping. (Da436)

Raichle prepared three reports in this matter:

- "Preliminary review" dated December 29, 2020. (Da331)
- "Engineering Evaluation of Impacts of Seawall Construction" dated April 7, 2021 (Da310); and
- "Mitigation of Settlement/Vibration Damage" dated July 21, 2021. (Da336)

These reports analyzed and assessed the impacts of the easement and the new seawall project on the Tsakiris property. Raichle's study included the review of substantial data. (Da333, 334, 502)

Raichle inspected the property and vicinity. He examined aerial photographs of the property and vicinity pre and post project construction. He reviewed the project construction plans, typical cross-section plans, and as-built drawings. He examined pre-construction and post-construction geometry. He

reviewed contour mapping of the beach and near shore elevations, including the existing rock groin in the shore break at Valentine Street. (Da310-315, Da484: 4-12) He prepared mark-ups of aerial photographs to illustrate the differences in wave action before and after the project. (Da332-334; 310-314)

Prior to the project, the owner's existing seawall was configured with a gradual, curved return as its southerly limit. This configuration served to gradually direct northerly-incident waves and associated water flow toward the south and off the property via the adjacent Valentine Street right of way, as a "relief-valve." It also served to protect the property's southerly flank against waves and associated water flow from southerly incident waves. The existing groin, which is perpendicular to the shore at the Valentine Street right of way, impacts incident waves and wave-induced currents and serves to focus wave induced energy toward the southern end of the Tsakiris property. Before the project, such impacts would be intercepted by the Tsakiris seawall and directed toward the Valentine Street right of way. (Da313)

The project filled an approximately 630 feet long gap in existing seawall between the subject property and the southerly end of the municipal beach pavilion to the south. (Da310) The new seawall at Valentine Street is

approximately 18 feet high (NAVD 88)[2]; and the existing Tsakiris seawall is approximately 15 feet high (NAVD 88) – a difference in the seawall elevation of three feet. (Da314) The new seawall was constructed further eastward onto the beach that the adjoining Tsakiris seawall. (Da310) The new seawall transitions down in elevation and angles back in a northwesterly direction in order to tie into the existing Tsakiris seawall. (Da314) This configuration created a "pocket" discontinuity which Raichle concluded would direct and enhance wave overtopping onto the Tsakiris property. (Da310-314) (Da462: 6-19; Da475: 1-15)

Raichle found it unnecessary to make calculations to reach his conclusions related to the increased vulnerability from a low frequency (50 year) storm. (Da460: 6-461:9; Da464: 1-21) Plaintiff's expert referred to the Owen Method but did not provide any calculations and assumed the waves hit the revetment at an exact perpendicular angle. (Da484: 19-22; Da490: 3-9) To quantify when overtopping would occur at the subject property depends on the accuracy required and could be a multi-months, very intense investigation. (Da491:13-492: 17) Raichle's opinion would not be more reliable had he done specific calculations. (Da482: 1-24) Overtopping rates as low as 0.003 cubic feet per

[2] North American Vertical Datum of 1988

second are enough to generate damage to structures subject to wave overtopping. (Da467: 4-7; Da492: 23-493:1) He stated that off-shore contours change daily and are impacted by the existing groin at Valentine Street. (Da484:4-12)

In support of his opinions, Raichle identified and relied upon the physical conditions constructed, including the "pocket" discontinuity in the transition area; the elimination of the relief valve at the southwest curved portion of the Tsakiris existing seawall, and that the new seawall would channel overtopping onto the property. (Da313-314) He indicated that storms that cause overtopping are periodic and random and that, although overtopping has not yet occurred, it does not mean that it will not happen and which could be soon. (Da476:2-14) There had been wave overtopping of the existing seawall before the new seawall was constructed. This happened during Superstorm Sandy. (Da470:17-20) Raichle stated another Superstorm Sandy would overtop all the seawalls in Monmouth County again. (Da471: 6-12)

Shore protection projects have to end somewhere. This project ended at the Tsakiris property as it transitions from the higher to lower elevation and created the pocket condition which increased wave overtopping vulnerability. (Da472: 17-22; Da473:3-5) The pocket straddles the Tsakiris property and adjacent right of way with roughly one half of the pocket on each side. (Da462:13-19; Da496:12-497:3) The impact of the portion of the pocket within

the subject property cannot be separated from the portion within Valentine Street right of way. As Raichle stated, "There is no pocket without both sides. So it just doesn't exist without both, considering both pieces of it." (Da497: 1-3)

The project shifted the flooding risk from the Valentine Street right of way to the Tsakiris property. While the design and configuration of the seawall project within the taking area and the adjoining right of way may protect Valentine Street, Raichle reliably concluded that, for the reasons stated, it has increased the vulnerability of the Tsakiris property to low-frequency (50 year) storm flooding in the pocket area. (Da461:15-21; Da472: 11-22)

Very telling, with respect to the elevation differential between the new seawall and the owner's existing seawall, plaintiff admitted the following:

> "FEMA [Federal Emergency Management Agency] met with BCE [N.J. Dept of Environmental Protection, Bureau of Construction Engineering] and evaluated the seawall damage and created Project Worksheet (PW) 4720, Monmouth Beach-Sea Bright Seawall for the repairs necessary to restore the damage elements and bolster the structure.
>
> It was determined that <u>the majority of damages to municipalities' infrastructure from the storm surge and sand inundation at</u> several locations where gaps existed in the seawall and other <u>sections where the existing seawall was constructed at a lower crest elevation than +15 feet NAVD88) as compared to adjacent portions of the seawall that were constructed to +18 feet NAVD88.</u> [Emphasis added.) [Da120; 128; 384)

Plaintiff acknowledged that damage from storm surge results where a seawall is at least three feet lower than the adjacent portion of the seawall. This is the condition that the new project seawall created and imposed on the owner's property, and is one of the several facts and data which Raichle identified and on which he relied in concluding that the seawall project as constructed increased the property's vulnerability to wave overtopping.

Net Opinion

Notwithstanding his qualifications and having provided the why and wherefore of his analysis, by order dated October 7, 2022, the court granted plaintiff's motion to exclude as net opinion the entirety of Raichle's report and testimony at trial as to the increased vulnerability of the subject property to wave overtopping. (Da503) The court referred to Raichle's not having done calculations for estimating overtopping discharge rates and not having addressed the physical damage to the property that would result from the increase in wave overtopping. (6T23:1-24:8) Although having previously indicated there would be a Rule 104 hearing (5T38:14-39:1), the court decided the motion on the papers with reference to Raichle's deposition. (Da456)

FILED, Clerk of the Appellate Division, January 17, 2024, **A-000356-23**, **AMENDED**

Seawall Construction Boulder Vibrations

The Tsakiris house is well over 100 years old. (Da107, ¶3) It was in close proximity to the project's delivery dumping and then placement of innumerable boulders each weighing several tons over a period of approximately six months including within the easement area. (Da312, 317, 333) A large boulder can weigh more than seven tons. (Da317; 137) The project itself recognized the reasonable risk of and anticipated possible structural damages from the boulder vibrations. The project included monitoring of the vibrations during the seawall construction. (Da333-334) The project included placing a seismograph at the owner's seawall at the rear east façade of the house. (Da197; 315) The project vibrations monitoring used the high threshold standards of the United States Bureau of Mines (U.S.M.B) for blasting, rather than lower threshold standards which have been recognized as more appropriate for construction projects. (Da315-316) Nonetheless, the monitoring thresholds used were exceeded, and the project actually damaged the Tsakiris house, the risk of which the project itself had recognized. (Da315-317; 333-334)

Mr. Tsakiris who has lived in the house on the property for many years, was there during project construction. He personally experienced the house shaking during the project. (Da107-108) The floor shifted, ceiling plaster separated, and doors went out of plumb. (Da317, 333)

The project included pre-construction and post-construction inspections and vibrations monitoring during construction. When the ground vibrations from the project exceeded even the high U.S.B.M. threshold limits, (Da316) the monitoring report simply says: "Not Believed to be Construction related, due to Waveform Analysis". (Da197) The post-construction monitoring report acknowledged the owner's contemporaneous reports of damage to the house from the project (Da220), but nonetheless stated that the post construction conditions were consistent with pre-construction conditions. (Da317, 218-220) The post-construction report of the property (Da211) is virtually verbatim with the pre-construction report. (Da344) The pre-construction report provided no information as to the condition of the second floor interior of the home, yet reported that the post-conditions of the second floor were consistent with the before conditions, and this despite the owner's contemporaneous, contradictory report of damages. (Da220)

Based on his inspection, conversations with the property owner and review of the reported project vibrations, Raichle concluded that it was reasonably likely that the project construction damaged the house as reported by the owner. (Da317) The owner's real estate appraiser considered the reported physical damages and the engineer's proposed cost-to-cure to be an appropriate

measure of the reduction in the fair market value of the house. (Da288, 336-338; 340-341)

Over the owner's objection, the court granted plaintiff's motion to bar the owner's claims for the physical damages to the house from the project as outside the scope of damages recoverable in a condemnation action. (Da390) The court concluded that the vibration damages were not compensable in a condemnation case and were not a consequence of the taking. The court found that damages are limited to the impact of the property lost in itself and any impacts on the remainder caused by the "completed" or "finished" project for which the property was taken. The court construed Harvey Cedars v. Karan, 214 N.J. 384 (2013) to limit just compensation to positive and negative impacts at the time of the taking and that "anything that might take place as part of constructing the project would not have been known at the time of the taking." The court concluded that just compensation does not include physical damage to structures that may have been caused by work performed during the public project. The court reasoned that any physical damage to the house by the project was not a consequence of the actual taking or the property itself having been taken. The court distinguished State v. William G. Rohrer, Inc., 80 N.J. 462 (1979) on the basis that the partial taking therein actually included part of the owner's building. The court indicated consideration of the claimed damages was

inconsistent with the summary nature of a condemnation action. The court also concluded that making the condemnor responsible for its contractors would impose strict liability on a condemnor. Overall, the court concluded that damages to the house on the remainder for vibrations during construction of the seawall were not damages as a consequence of the taking. (Da390-400)

Loss of Ocean View and Privacy

Before the taking, the property had unobstructed panoramic ocean views. (Da255; 310) The project included the higher 18 feet high seawall as well as a pedestrian and vehicular access ramp over the wall. (Da311; 314) The new wall and ramp of the project obstruct the southerly view of the ocean from the property and allow users to see into the house. (Da287) The owner's appraiser considered that these negative project impacts reduced the value of the property. (Id.) The court concluded that the loss of ocean view and loss of privacy resulted from off-site project conditions and were non-compensable under existing law. (Da444) (5T 36:19-38:10)

LEGAL ARGUMENT

POINT I

PLAINTIFF'S MOTION TO AMEND THE COMPLAINT RESULTED IN UNDUE PREJUDICE TO THE PROPERTY OWNER AND SHOULD HAVE BEEN DENIED. (Da80-85)

Plaintiff's motion to amend the complaint was really seeking relief from the final judgment of proper exercise of eminent domain entered November 21, 2018. Such relief is properly sought under R. 4:50-1 providing for relief from a judgment on ground of: (a) "mistake, inadequacy, surprise or excusable neglect". Plaintiff admitted its mistake. R. 4:50-2 provides that such a motion shall be made. . . "not more than a year after the judgment. . . was entered. . ." The final judgment entered on November 21, 2018 declared that the condemnor had duly exercised its authority to utilize its power of eminent domain as to the described property and is a final adjudication of all facts and law. Housing Authority v. Suydam Investors, 177 N.J. 2 (2003). The only remaining issue within the jurisdiction of the court was the amount of compensation to be paid for the "property" taken. The time within which to apply for relief from the final judgment under R. 4:50-2 expired in November of 2019. Plaintiff conceded that its motion was based on a "mistake." Relief under Rule 4:50-1 (a) is specifically subject to the one-year time limitation of Rule 4:50-2. The court, however, granted the motion based on the reasonable time limit contained in Rule 4:50-

1(f) expressly, "for any other reason. . ." Rule 4:50-1(f) was unavailable because plaintiff's motion was admittedly based on a "mistake" under -1(a). R.4:50-2 applies to all parties including the plaintiff here. Plaintiff's motion to amend its complaint should have been denied.

Plaintiff argued that its description of the taking had a typographical error. However, plaintiff's description was a specific metes and bounds description. Plaintiff also relied on the complaint map; however, Note 3 thereon states that it is "not based on a survey." (It also turns out that the map attached in plaintiff's filed amended complaint (Da96) is different from the map provided in its motion to amend.) (Da58)

Allowing the amendment was improper. The owner's expert reports were based on the plaintiff's own metes and bounds description of the easement taken. The amendment was tantamount to a motion to amend the final judgment and beyond the time for relief from the final judgment of proper exercise of eminent domain. The court erroneously allowed relief despite that the applicable time limits had passed. The court indicated that the owner had sufficient time to obtain an amended report. Title to the easement, as described, had already transferred to plaintiff, and the owner suffered undue prejudice as the permitted amendment also negated the expert reports he obtained in anticipation of the scheduled trial.

In State v. Applegate, et. al., 107 N.J. Super. 159,163 (App. Div. 1969) the defendant property owner contested an amendment to the description of an easement taking. The owner argued that the taking had been consummated as title passed with the filing of the declaration of taking. Defendant pointed to the Eminent Domain Revision Commission Report, paragraph 7, recommending that title pass with the filing of the declaration of taking. Judge Goldman, P.J.A.D., observed that the only defect in this reasoning was that the statute in 1969 contained no such provision.

Such is no longer the case. The Eminent Domain Act of 1971 provides in N.J.S.A. 20:3-19 in pertinent part:

> A copy of the declaration of taking and notice of the filing thereof and of the making of the aforesaid deposit, shall be served upon the condemnee and all occupants of the property in accordance with the rules, and proof of such service shall be filed in the action. Thereupon, the right to the immediate and exclusive possession and title to the property described in the declaration of taking shall vest in the condemnor, free and discharged of all right, title, interest and liens of all condemnees without the necessity of further process. (Emphasis added.)

Plaintiff's motion to amend should have been denied. Title to the permanent easement in the recorded description had in fact passed to the plaintiff in accordance with this operative statutory provision.

It is also settled that an ambiguity in the description of the taking will vitiate the trial court proceedings if the description "leaves the condemnee justifiably uncertain about the boundaries and extent of the property to be acquired." County of Monmouth v. Kohl, 242 N.J. Super. 210, 216 (App. Div.), certif. denied 122 N.J. 405 (1990)

Based on the foregoing, it is respectfully submitted that the court below erred in granting plaintiff's motion to amend.

POINT II

THE OWNER'S MOTION FOR REIMBURSEMENT OF HIS EXPERT FEES SHOULD HAVE BEEN GRANTED BASED ON FUNDAMENTAL PRINCIPLES OF FAIRNESS, EQUITY, AND FULL INDEMNITY. (Da154-155;160)

The exercise of eminent domain is one of the most awesome powers of government. It is subject to the constitutional imperative of just compensation. Housing Auth. v. Suydam Investors, 177 N.J. 2, 6 (2003); U.S. Const. amend. v; xiv; N.J. Const. art. 1, par. 20.

Just compensation is grounded on fundamental notions of fairness and justice. State v. Nordstrom, et. al., 54 N.J. 50, 53 (1969); Jersey City Redevelopment Agency v. Kugler, 58 N.J. 374, 383-84 (1971); Armstrong v.

United States, 364 U.S. 40, 49 (1960). Just compensation is to make the property owner whole. It implies full indemnity and it to be regarded from the point of view of the owner and not the condemnor. State v. William G. Rohrer, Inc., 80 N.J. 462,467 (1979). It is to be determined from the perspective of what the property owner will lose, and not what the condemnor may gain. Borough of Merch. v. Malik & Son, 218 N.J. 556, 572 (2014). A property owner does not ask to have his property taken nor does he seek to be confronted with unwanted litigation by government over the taking of his private property. See e.g. Rockaway v. Donofrio, 186 N.J. Super. 344, 352-353 (App. Div. 1982) A condemnation case "raises special considerations" as a result of which courts have been "solicitous of the rights of a condemnee." Id. Government "may not conduct itself so as to achieve or preserve any kind of bargaining or litigational advantage over the property owner." F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426-427 (1985).

Subsequent to the court having allowed the plaintiff to amend its complaint, the owner moved for reimbursement of his expert fees. Granting plaintiff's motion to amend the complaint had negated the owner's reports. The owner incurred the cost and expense in the amount of $14,737.50 for expert reports in preparation for the then imminent trial based on what the plaintiff subsequently admitted was its mistaken and inaccurate description of the taking.

These circumstances warranted the condemnor's reimbursement of the condemnee's reasonable costs for the expert reports, particularly when plaintiff had been allowed to correct its own mistake. Principles of equity, fairness, and full indemnity, which underlie the constitutional mandate of just compensation, require that the owner be made financially whole as a consequence of plaintiff's mistake and plaintiff having been allowed to amend its description of the taking. Rule 1:1-2 provides that the rules are to be construed to secure a just determination and to eliminate unjustifiable expense.

Plaintiff's motion to amend the complaint had been granted "in the interest of justice." R. 4:9-1. The interest of justice, however, should have been balanced with reimbursement of the owner's costs of his expert reports. Making the property owner pay for the "mistake" made by the government is clearly wrong and violates the constitutional principle that a property owner is entitled to indemnity and to be made financially whole as a result of the taking.

By order entered on January 8, 2021, the court denied the owner's motion for his expert fees, without prejudice, on the basis that the owner had not cited a Court Rule, case law or legal basis for the relief requested.

In addition to principles of fairness and equity, the owner had cited N.J.S.A. 20:3-35, which provides for expert fees upon a condemnor's

abandonment of a taking, and N.J.S.A. 20:3-26 (b) which provides for expert fees when a condemnor does not have the right to condemn. (Da112-114; Da149-153) By way of analogy, plaintiff's amendment corresponds to an abandonment of the description in the declaration of taking as well as to the position that plaintiff did not have the right to condemn the taking as originally described. The owner did provide sufficient legal basis for reimbursement of his expert costs.

Based on the foregoing, it is respectfully submitted that the court below erred in denying the owner's motion for reimbursement of his expert fees incurred prior to the plaintiff's amendment.

POINT III

THE LAW DIVISION ERRED IN EXCLUDING EVIDENCE OF AND DAMAGES FOR THE INCREASED VULNERABILITY OF THE PROPERTY TO WAVE OVERTOPPING AS A RESULT OF THE SEAWALL PROJECT. (Da505; 6T23:1-24:8)

In Borough of Harvey Cedars v. Karan, 214 N.J. 384 (2013), the New Jersey Supreme Court stated:

> We now conclude that when a public project requires the partial taking of property, "just compensation" to the owner must be based on consideration of all relevant, reasonably calculable, and non-conjectural factors that

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> either decrease or increase the value of the remaining property. In a partial-takings case, homeowners are entitled to the fair market value of their loss, not to a windfall, not to a pay out that disregards the home's enhanced value resulting from the public project. To calculate that loss, we must look to the difference between the fair market value of the property before the partial taking and after the taking. In determining damages, the trial court did not permit the jury to consider that the dune would likely spare the Karans' home from total destruction in certain fierce storms and from other damage in lesser storms. A formula — as used by the trial court and Appellate Division —that does not permit consideration of the quantifiable benefits of a public project that increase the value of the remaining property in a partial-takings case will lead to a compensation award that does not reflect the owner's true loss. [214 N.J. at 389] (Emphasis added.)

Pursuant to Karan, the determination of just compensation is no longer limited to the taking, but is to consider impacts of the overall public project, whether positive or negative, provided such impacts on value are reasonably calculable and non-conjectural.

In Karan, the Court determined that "just compensation" for the partial taking of a permanent beach dune easement on private property must consider the quantifiable increase in property value from the storm protection benefits of the overall dune barrier project itself as an off-set to any diminution in the value of the remaining property from loss of ocean view. In addition to considering loss of ocean view, the Court indicated that a rational buyer would likely place a value on the

protection that the dune barrier project provides to the remainder from storm damage. The Court determined that the quantifiable project benefit of the dune barrier project must be considered, regardless of whether others in the community enjoy the same benefit to a lesser or greater degree. The Karan Court discarded the often misunderstood and misapplied terminology of special benefits and general benefits and instead refocused the benchmark of just compensation on the concept of fair market value, taking into account the positive and negative impacts of the overall public project.[3] Karan no longer limits damages in a partial taking to the taking and instead instructed that just compensation is to consider project impacts.

The Karan Court quoted from the Attorney General who, on behalf of the State as amicus, had argued "that a condemnation award should not be decoupled from the ascertainable change to fair market value' resulting from a public project". [214 N.J. at 400]

In Karan, the Court later stated:

> In weighing the impact of a public project on the remainder property in a partial-takings case, a willing

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[3] In Karan, the Appellate Division, as had the trial court, concluded that the dunes project was a general benefit ("those produced by the improvement which a property owner may enjoy in the future in common with all other property owners in the area"). [425 N.J. Super. 155,165 (App. Div. 2012), reversed, 214 N.J. 419 (2013)] and not a special benefit (those that "differ in kind, rather than in degree from the benefits which are shared by the public at large"). [425 N.J. Super. at 166] The Supreme Court rejected the distinction, reversed and remanded.

> buyer and willing seller would likely consider the benefits to the remainder that are not speculative or conjectural and that are not projected into the indefinite future. [214 N.J. at 412]

The Karan Court quoted approvingly from Los Angeles Cnty. Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809, 812 (1997) in part, as follows:

> [I]n determining a landowner's entitlement to severance damages, the fact finder henceforth shall consider competent evidence relevant to any conditions caused by the project that affect the remainder property's fair market value insofar as such evidence is neither conjectural nor speculative. [214 N.J. at 413] (Emphasis added.)

In Public Service Elec. & Gas v. Oldwick, 125 N.J. Super. 31 (App. Div. 1973), certif. denied, 64 N.J. 153 (1973), the Appellate Division disallowed consideration of three towers erected as part of the project on the lands of others near the owner's property. The court concluded the taking did not constitute an integral and inseparable part of the whole project and therefore limited damages to the aerial transmission lines easement taken. Under Karan, the three towers on the property of others as part of the project would be considered in determining the fair market value of the remainder. In State by Com'r v. Weiswasser, 149 N.J. 320 (1997), the Court allowed the owner's claim for loss of visibility damages resulting from the taking, and distinguished impaired visibility by virtue of project construction on the property of others, which "did not affect the remainder in a special, unique way, different from the effect on the surrounding area" which

would be non-compensable. (quoting State v. Schmidt, 867 S.W. 2d 769, 781 (Tex 1993) Under Karan, just compensation would consider loss of visibility from the overall project. In State v. Stulman, 136 N.J. Super. 148 (App. Div. 1975), the court rejected the owner's claim for loss of visibility damages resulting from project construction on the property of others. Under Karan, such loss is to be considered in the measure of just compensation. In State Com'r of Transp. v. Dikert, 319 N.J. Super. 310 (App. Div.) certif. denied, 161 N.J. 150 (1999), the court denied the owners' claim for damages for the change in the character of their land from a tranquil rural area to a noisy semi-urban commercial environment. The court concluded such damages were not related to the taking of the owners' access easement, but instead resulted from the taking of the property of others. Under Karan, such damages in a partial taking are to be considered in the determination of just compensation.

In Karan, the Court determined that the value-enhancing storm protection benefits of the beach dune barrier project must be considered to off-set the compensation for the easement taken. Just compensation is no longer limited to the impact of the taking and special benefits and special damages, but rather is to consider the impact of the entire public project on the properties of others as well. The Court described the dunes construction project as requiring "the securing of easements on properties bordering the ocean". [214 N.J. at 390] The Court also

specifically contemplated consideration not only of value-enhancing impacts but of value-reducing impacts of the public project.

Karan requires not only consideration of the value-enhancing aspects of the public project (rejecting the dichotomy between special and general benefits), but also the value-reducing aspects of the project (which implicate the converse dichotomy between special and general damages), provided the impacts are reasonably quantifiable and not conjectural.

Based on Karan, evidence of and damages to the Tsakiris property for increased vulnerability to storm surge flooding from the seawall project should have been allowed.

Any suggestion that the Supreme Court in Karan was limiting consideration of the public beach dune project to just the portion of the dune constructed on the property taken does not make sense. One of the purposes of a dune project is to fill in open end gaps and create a continuous dune. It is the continuous dune, including on the property of others, that provides the benefits of storm protection. Otherwise, the property subject to the taking would have to be imagined as open and vulnerable to storm surge from either side. Karan does not limit consideration to only the portion of the dune constructed within the easement taken.

Further in this regard, in State by Dept. v. 1 Howe Street, 463 N.J. Super. 312 (App. Div. 2020), this Court stated:

> The [existing] revetment protected the property that abutted it during Sandy. However, significant damage occurred at the street ends and where there were gaps in the revetment. [Id., at 330]
>
> . . .
>
> significant damage occurred at the street ends and where there were gaps in the revetment. [Id., at 331]
>
> . . .
>
> The [beach dune] Project anticipated preventing the end and gap effects. If excluded from the Project, these gaps would impair shore protection north and south of defendants' property. [Id., at 332]

Karan instructs that damages in a partial taking are to consider the impacts of the project, both positive and negative. There is no practical difference between assessing the impacts of the beach dune project at issue in Karan and the seawall project at issue in the matter at hand.

As indicated, even prior to Karan, a property owner was entitled to damages due to the use of the property of others, where the damage from the partial taking is not readily separable from damage due to use of land of others. See, e.g., Public Service Elec. & Gas v. Oldwick, 125 N.J. Super. 31 (App. Div. 1973).

In Oldwick, the trial court found damages to the property not only from the easements taken but from the project. On appeal, the Appellate Division eliminated the damages from the project, concluding that the aerial transmission lines over a corner of the property had little effect on the value of the owner's remaining property, whereas the transmission towers could have made the entire remainder less desirable for purchase by an interested developer. The Appellate Division in Oldwick distinguished the cases relied upon by the property owner:

> In those cases, unlike here, the damages to the remaining lands resulting from the taking of a portion of the tract were inseparable from the damages to the remaining land attributable to the whole improvement. Since it is here practicable to separate the use of the land taken from that of the adjoining land, defendant is entitled to compensation only for the land taken and the use to which it will be put, and not for the use which will be made of the adjoining lands. [125 N.J. Super. at 38]

It is apparent that Karan has overruled Oldwick. Even were Oldwick still applicable, it is distinguishable from the matter at hand.

The seawall constructed within the easement taken from Tsakiris is physically the same seawall constructed within the Valentine Street right of way. The "pocket" discontinuity straddles the property line between the subject property and Valentine Street. The two sides are inseparable and created the "pocket" which results in the increased vulnerability of the subject property to

flooding during low frequency storms events. The roughly north half of the pocket is located on the subject property and the south half is on the adjoining property. The impact of the pocket on the portion of the subject property cannot be separated from the portion of the pocket on the Valentine Street right of way. As Raichle testified, "There is no pocket without both sides." So it just doesn't exist without both, considering both pieces of it. (Da497:1-3)

Even under Oldwick, the use of and damages from the easement taken are integral and inseparable from the same pocket wall on the adjacent Valentine Street right of way; and the property owner was entitled to be compensated for the damages therefrom. At the very least, it was a question for the fact finder. Just compensation is to consider not only the positive but the negative impacts of the project as well.

Based on the foregoing, it is respectfully submitted that the court erred in granting plaintiff's motion to exclude damages for the property's increased vulnerability to wave overtopping.

POINT IV

THE LAW DIVISION IMPROPERLY EXCLUDED THE CONCLUSIONS OF THE OWNER'S COASTAL ENGINEERING EXPERT AS NET OPINION. (Da505; 6T 23:1-24:8)

The net opinion rule provides that "an expert's bare opinion that has no support in factual evidence or similar data is a mere net opinion which is not admissible and may not be considered." Pomerantz Paper Corp. v. New Comm. Corp., 207 N.J. 344, 372 (2011). Accordingly, "the net opinion rule 'requires an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion.' " State v. Townsend, 186 N.J. 473, 494 (2006) (citation omitted.) The net opinion rule is not a standard of perfection. The rule does not mandate that an expert organize or support an opinion in a particular manner that opposing counsel deems preferable." Townsend v. Pierre, 221 N.J. 36, 54 (2015) (citation omitted.) "An expert's conclusions should not be excluded merely 'because it fails to account for some particular condition or fact which the adversary considers relevant.' " (citation omitted.) Id. "The expert's failure 'to give weight to a factor thought important by an adverse party does not reduce his testimony to an inadmissible net opinion if he otherwise offers sufficient reasons which logically support his opinion.' " Id. (citation omitted.)

In In re Accutane Litigation, 234 N.J. 340 (2018), over 2,000 plaintiffs alleged that the prescription acne medication, Accutane, caused Crohn's disease, a gastrointestinal illness. The Supreme Court concluded that the scientific testimony of the plaintiffs' experts as to medical cause and effect had been properly excluded after the trial court had conducted a N.J.R.E. 104 gate-keeping evidentiary hearing. The plaintiffs' experts ignored a number of published epidemiological studies, the most relevant and reliable data in the hierarchy of medical evidence, all of which had concluded that there was no causal relationship. Plaintiffs' experts instead relied on animal and case studies, and were inconsistent and contradictory in their reasoning.

The Court in Accutane approvingly discussed the "Daubert trilogy": Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric Co. v. Joiner, 522 U.S. 136 (1997); and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

In Daubert, supra, the United States Supreme Court adopted several factors to be considered with respect to the admissibility of new or evolving scientific expert opinion. These Daubert factors are: can the scientific theory or issue be tested; has the scientific theory been published and subjected to peer review; has any known or potential rate of error been considered; as well as general acceptance. In Joiner, supra, the Court reiterated that the task of the trial

court is one of flexible inquiry to assure that the expert's conclusions are sufficiently tethered to the facts or drawn from applicable data. In Kumho, supra, the Court concluded that the task of the trial court is to ensure that scientific testimony is relevant and reliable. The Kumho Court re-emphasized that the Daubert standard is a flexible one. Kumho indicated that the Daubert factors do not necessarily apply to all experts or in every case; the trial court has broad latitude; the factors are not a definitive checklist or test; and gatekeeping must be tied to the facts of each particular case. The Accutane Court acknowledged that the Daubert factors are a helpful and useful guide; but are not necessary or definite; and the Court declined to unqualifiedly describe New Jersey as a Daubert jurisdiction.

This is a condemnation case. This is not a medical cause-effect case with over 2000 plaintiffs with uncontradicted pre-existing epidemiological studies as in Accutane. Raichle relied on site-specific facts and information and employed sound reasoning, observations and methodology to conclude the project as constructed has increased the risk of wave overtopping onto the property. Moreover, the plaintiff agrees with Raichle's reasoning when it admitted that a seawall having a three feet difference in elevation with an adjacent portion (which elevation differential the subject seawall project created in fact) is causally related to flooding.

An expert should support his opinion with as much documentation as necessary, but within realistic and practical limits. Glen Wall Associates v. Wall Tp., 99 N,J, 265, 277 (N.J. 1985) "In considering an expert's evidence, a court should also be cognizant of the expense incurred by litigants in engaging an expert. Therefore, the volume of information that is required to support an expert opinion must be kept with practical and realistic limits. We do not support that a court should accept an expert's opinion that is unsubstantiated." [Id.] Raichle indicated that the study about which plaintiff complains should have been done would entail a multi-months endeavor and that any such calculations were not necessary for him to reach his conclusions.

Raichle is a qualified and experienced coastal engineer with an emphasis on the performance of coastal revetment structures and the dynamics of wave overtopping. He provided the facts, observations and rationale and data on which he relied. He provided the why and wherefore of his opinion. He did not ignore relevant and reliable facts or data. His reasoning and methodology are sound, consistent and reliable. Quite simply, plaintiff seeks to deny this property owner the just compensation to which he is constitutionally entitled, as a result of the remainder's increased vulnerability to flooding from the seawall project, which shifted the risk of the flooding from the adjacent right of way to the Tsakiris property.

Raichle's report and testimony are substantiated, and would have assisted the trier of fact. The subject matter of his opinion is beyond the ken of the average juror; he has sufficient expertise and specialized knowledge to offer his opinion; and it was sufficiently reliable. See, e.g. State v. Kelly, 97 N.J. 178, 208 (1984). These three requirements for expert opinion should "be construed liberally in light of N.J.R.E. 702's tilt in favor of admissibility of expert testimony." State v. Jenewicz, 193 N.J. 440, 454 (2008). Raichle's opinion was not net opinion. The issue goes to weight and not admissibility. Raichle's opinion passes muster under the proper exercise of the court's gatekeeping rule. By excluding Raichle's opinions as "net opinion," the court substituted itself as the fact finder and deprived the owner of his right to have a jury decide the just compensation to which he was entitled. The court had indicated that a Rule 104 hearing would be held and one should have been held. Saddle River v. 66 East Allendale, 216 N.J. 115, 142-143 (2013)

Based on the foregoing, it is respectfully submitted that the court below erred in excluding Mr. Raichle's opinion as net opinion.

POINT V

THE LAW DIVISION ERRED IN EXCLUDING DAMAGES TO THE OWNER'S HOUSE AS A RESULT OF THE BOULDER VIBRATIONS FROM THE SEAWALL PROJECT CONSTRUCTION. (Da390-400)

In State v. Silver, 92 N.J. 507,515 (1983), cited approvingly in Karan, the Supreme Court stated:

> Because there is property remaining subsequent to the taking that must be valued, an examination of all of the characteristics of such remaining property after the time of the taking, as opposed solely to facts in existence at or immediately before condemnation, is inescapable. Therefore, in the case of a partial taking, the market value of property remaining after a taking should be ascertained by a wide factual inquiry into all material facts and circumstances - both past and prospective - that would influence a buyer or seller interested in consummating a sale of the property. (Citations omitted.)
> [92 N.J. at 515]

In Jersey City Redevelopment Agency v. Kugler, 58 N.J. 374, (1971), the New Jersey Supreme Court stated:

> There is no precise measure and inflexible rule for the assignment of just compensation. The Constitution does not contain any fixed standards of fairness by which it must be measured. Courts have been careful not to reduce the concept to a formula. The effort has been to find working rules and practical standards that

> will accomplish substantial justice such as, but not limited to, market value. [58 N.J. at 384-385]

In City of Ocean City v. Maffucci, 326 N.J. Super. 1,19 (App Div.) certif. denied, 162 N.J. 485 (1999), the Court recognized that damages may not be evident until sometime after the taking. The city took an easement for its beach dune project as of January 27, 1993, the date of valuation. The owner's appraiser did not value the taking as of the specific date of taking. He testified to the continuous increase in the height and width of the dune from the time of taking to trial, such that the amount of severance damages could not be calculated as of the date of taking. The city moved to bar the testimony as it did not value the taking as of the date of valuation which the trial court denied. In affirming, former Justice (then Appellate Division Judge) Long stated: "Use of the statutory date of taking as the date of valuation must yield to constitutional imperative" [of just compensation]. Here, as in Maffucci, the date of valuation must yield to the constitutional obligation to pay just compensation with respect to the vibrations damage to the house during project construction.

Physical damages to the improvements on the property are cognizable in the determination of just compensation. In State v. William G. Rohrer, Inc., 80 N.J. 462 (1979), the State acquired a portion of the owner's property including about ten percent of the building, leaving the owner with the physically exposed and unoccupied remnant of the building. The cost to repair would exceed the

value of the remainder after restoration. The Supreme Court observed that it would have been better had the State taken the entire property in the first place, but the State had not done so. The Rohrer Court crafted a remedy to assure that the owner was made whole.

It is also well recognized that diminution in fair market value can be measured by a cost to cure provided the cost to cure is less than the damages that would otherwise result. State v. Sun Oil Company, 160 N.J. 513 (Law Div. 1978); State by Com'r v. Weiswasser, 140 N.J. 320 (1987).

In Plunske v. Wood, 370, A. 2d 920 (Conn. 1976) the partial taking was for road purposes. During the pendency of the action and construction of the road project, the condemnor's contractor physically damaged the owner's dam pipe and pond on the remaining property. The trial court's award of just compensation included the cost to repair those damages. The condemnor appealed claiming that such damages were the result of the contractor's negligence and not recoverable in the condemnation action. The Connecticut Supreme Court concluded that, in determining damages in a condemnation action:

> The court should consider any and all damages which will foreseeably follow from the proper construction of the project, including any damage to the remainder which is a necessary, natural and proximate result of the

> taking. (citations omitted.) The use to be made of the land taken is to be considered with regard to its effect on the remaining land, and the fact that injuries are caused by the construction activities of the contractor is not a bar to recovery so long as the damages foreseeably follow such construction activities and are a necessary, natural and proximate result of the taking. (citations omitted.) Expenses required to cure injuries caused to the remaining land are not recoverable as such, but are merely evidence of elements in the decrease in market value, of which they may be accurate measure." (citations omitted; emphasis added; internal quotation marks omitted.) [370 A. 2d at 284.]

The court remanded for a new trial because the trial court did not expressly conclude the damages were a necessary, natural and proximate result of the taking and a reasonably foreseeable result of the taking. See also Albahary v. City of Bristol, 886 A. 2d 802 Conn. (2005).

Here, the vibrations from the delivery dumping and placement of the innumerable multi-ton boulders to construct the new seawall physically damaged the Tsakiris house. The project reasonably foresaw the possibility of the actual damages and implemented vibrations monitoring during the seawall construction activities. There is no claim here that the project contractor was somehow negligent in any way. The damages which resulted were a necessary, natural, and proximate result of the taking and the project.

Mr. Tsakiris is entitled to just compensation for the physical damages to his house from the project construction. An owner should not be forced to

defend the condemnation action and also separately have to sue for project damages that the public project foresaw and actually occurred. The physical damages to the house were identifiable and the cost-to-cure provided a reasonable basis to calculate the reduced fair market value of the remainder.

Mr. Tsakiris was not seeking incidental losses difficult, remote, or uncertain to measure. The damages from the seawall project construction were anticipated, monitored and actually happened, and reduced the market value of his house.

To deny the owner the full just compensation to which he is constitutionally entitled provided a windfall to the condemnor.

For the foregoing reasons, it is respectfully submitted that the court below erred in excluding just compensation for the physical damages to the house during construction of the seawall.

POINT VI

THE COURT IMPROPERLY EXCLUDED DAMAGES FOR LOSS OF OCEAN VIEW FROM THE PROPERTY AND PRIVACY. (Da446-447; 5T 36:19-38:10)

The owner's appraiser included damages for the impaired southerly view of the ocean from the property and loss of privacy as a result of the project.

As discussed, Harvey Cedars v. Karan, supra., 214 N.J. at 414 requires consideration of the negative and positive impacts of the project in the determination of just compensation, without restriction to the taking. As Karan provides, in a partial taking, just compensation is to consider all relevant, reasonably calculable, and non-conjectural factors, of the public project that either decrease or increase the value of the remaining property, including loss of ocean view.

Severance damages may be awarded for the loss of ocean view. In City of Ocean City v. Maffucci, supra, the Court stated:

> If a 'wide factual inquiry into all material facts and circumstances – both past and prospective – that would influence a buyer or seller interested in consummating a sale of the property' [quoting State, by Comm'r of Transp. v. Silver, 92 N.J. 507, 515 (1983) is standard, ocean view [is a] fundamental consideration in valuing beachfront property. (Emphasis added.)
>
> Indeed, every other jurisdiction which has considered this issue has held that loss of view. . . [is] compensable. [326 N.J. Super. at 19] (Emphasis added.)

Moreover, pre-Karan case law recognized that damages are compensable when not readily separable from damages from the project's use of the land of others. See e.g., Public Service Elec & Gas v. Oldwick, 125 N.J. Super. 31 (App. Div.) certif. denied, 65 N.J. 153 (1973)

Additionally, courts in the past have distinguished the compensability of the loss of view from the property and the non-compensability of loss of visibility of the property. Maffucci supra, is an example of the former. See also, Keinz v. State of New York, 2 A.D. 2d 45, 156 N.Y.S. 2d 505 (1956) app. denied, 2 App. Div. 2d 815, 161 N.Y.S. 2d 604 (1957). On the other hand, State v. Stulman, 136 N.J. Super 148 (App. Div. 1975) is an example of the latter. See also State by Com'r of Transp. v. Weiswasser, 149 N.J. 320, 341 (1997).

For the foregoing reasons, it is respectfully submitted that the court below erred in excluding just compensation for the loss of ocean view from the property and loss of privacy as a result of the taking and the project.

Conclusion

For these reasons, it is respectfully submitted that the foregoing interlocutory orders entered by the Law Division excluding owner's evidence at trial be reversed and that the matter be remanded for trial on the damages claims.

Dated: January 17, 2024

Respectfully submitted,

John J. Reilly

FILED, Clerk of the Appellate Division, March 22, 2024, **A-000356-23**

BOROUGH OF MONMOUTH BEACH, a Municipal Corporation of the State of New Jersey, Plaintiff/Respondent, v. LOUIS P. TSAKIRIS, PROVIDENT BANK, FRANK MARX, ADMINSRATOR of the SMALL BUSINESS ADMINISTRATION and BOROUGH OF MONMOUTH BEACH, Defendants/Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000356-23 ON APPEAL FROM: LAW DIVISION MONMOUTH COUNTY DOCKET NO. MON-L-3205-18 CIVIL ACTION SAT BELOW: HON. HENRY P. BUTEHORN, J.S.C. HON. OWEN C. MCCARTHY, J.S.C.

BRIEF ON BEHALF OF RESPONDENT BOROUGH OF MONMOUTH BEACH IN OPPOSITION TO THE APPEAL FILED ON BEHALF OF APPELLANT LOUIS P. TSAKIRIS

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TABLE OF CONTENTS

TABLE OF JUDGMENTS ………………………………………………….. iii

TABLE OF APPENDIX …………………………………………………….. iii

TABLE OF AUTHORITIES …………………………………………….... vi

PRELIMINARY STATEMENT …………………………………………... 1

PROCEDURAL HISTORY …………………………………………….. 2

STATEMENT OF FACTS ……………………………………………….. 10

LEGAL ARGUMENT ……………………………..……………….. 12

POINT I – APPELLANT SEEKS A WINDFALL BASED UPON A TYPOGRAPHICAL ERROR (DA40;1T7:3-10) ………………… 12

POINT II – APPELLANT FAILED TO DEMONSTRATE ANY ENTITLEMENT TO REIMBURSEMENT FOR ITS EXPERT FEES (2T11:3-10) …………………………………………………... 17

POINT III – THE TRIAL COURT PROPERLY BARRED DAMAGES FROM OFF-SITE CONDITIONS (4T & 5T) ………. 19

POINT IV – THE TRIAL COURT PROPERLY BARRED THE NET OPINIONS CONTAINED IN THE WATERMEN REPORT (6T) ………………………………………………………………… 24

POINT V – ALLEGED DAMAGES DUE TO CONSTRUCTION ACTIVITIES ARE NOT COMPENSABLE IN CONDEMNATION MATTERS (3T) …………………………………………………… 36

POINT VI – APPELLANT CANNOT BE COMPENSATION FOR OFF-SITE CONDITIONS (4T & 5T) …………………………….. 48

CONCLUSION ……………………………………………………... 50

TABLE OF JUDGMENTS

Order and Statement of Reasons Permitting the Filing of Amended Complaint filed March 27, 2020 …………………….. Da80

Order Denying In Part Defendant's Motion Seeking Expert Fees and Statement of Reasons filed January 8, 2021 …………………………………………………… Da154

Order Barring Damages to Property Sustained from Vibrations and Statement of Reasons filed August 6, 2021 ………………………………………………. Da391

Order Granting Plaintiff's Motion to Exclude Loss of Ocean View and Privacy filed January 28, 2022 ………………………………………………………… Da446

Order Barring Defendant's Appraiser From Relying at Trial on the Raichle Engineering Report [as to enhanced wave overtopping] filed October 7, 2022 ……………………………………………………………………………….. Da154

TABLE OF RESPONDENT'S APPENDIX

Certification of Paul V. Fernicola, Esq. in Further Support of Plaintiff's Motion Seeking Leave to File An Amended Complaint and Amended Declaration of Taking filed March 24, 2020 …………………………… Pa1

Exhibit A – Borough's Offer Letter dated August 13, 2018 …… Pa15

Exhibit B – Metes and Bounds Easement Description attached to initial Verified Complaint ………………………………………. Pa17

Exhibit C – Relevant Portions of Respondent's Appraisal Report ……………………………………………………………… Pa20

Exhibit D – Commissions' Hearing Exhibits Nos. 1 – 3 ……… Pa27

Exhibit E – Page 5 of Respondent's Planning Report by Beacon Planning and Consulting Services, LLC ………………………... Pa30

Exhibit F – Relevant portions of Appellant's Appraisal Report .. Pa32

Certification of Paul V. Fernicola, Esq. in Support of Plaintiff's Motion for Summary Judgment …………………………………………………… Pa35

Exhibit 1 – Verified Complaint [omitted as Duplicative]

Exhibit 2 – Declaration of Taking [omitted as Duplicative]

Exhibit 3 – Executed Order to Show Cause dated September 24, 2018 [omitted as Duplicative]

Exhibit 4 – Defendant's Answer [omitted as Duplicative]

Exhibit 5 – Order of Final Judgment dated November 31, 2018 [omitted as Duplicative]

Exhibit 6 – Commissioners' Award [omitted as Duplicative]

Exhibit 7 – Case Management Order dated November 6, 2019 …………………………………………………………………… Pa50

Exhibit 8 – E-mail from R. Moore to P. Wegener dated February 24, 2020 [omitted as Duplicative]

Exhibit 9 – Letter from P. Wegener dated February 25, 2020 [omitted as Duplicative]

Exhibit 10 – Certification of Julie Nastasi dated March 24, 2020 [omitted as Duplicative]

Exhibit 11 – Order Granting Respondent's Motion seeking leave to file an Amended Complaint [omitted as Duplicative]

Exhibit 12 – Respondent's Filed Amended Complaint [omitted as Duplicative]

Exhibit 13 – Respondent's Notice of Motion for A Date Certain for Production of Appellant's Appraisal Report dated July 10, 2020 … …………………………………………………………………… Pa52

Exhibit 14 – Order Granting Respondent's Motion for Date Certain dated August 7, 2020 …………………………………………… Pa54

Exhibit 15 – Case Management Order dated August 13, 2020 …. Pa58

Exhibit 16 – Letter from P. Wegener dated October 16, 2020 …. Pa59

Exhibit 17 – Case Management Order dated October 21, 2020 . Pa60

Exhibit 18 – Certification of Paul V. Fernicola, Esq. filed in support of Respondent's Cross Motion to Bar Appellant from Producing An Appraisal Report dated December 10, 2020 (without exhibits) … Pa61

Exhibit 19 – Order denying Respondent's cross motion and partially granting Appellant's Motion to Extend Deadline dated January 8, 2021 ………………………………………………………… Pa77

Exhibit 20 – Respondent's response to Appellant's Notice of Motion to Compel Discovery dated March 4, 2021 …………………….. Pa89

Exhibit 21 – Order dated March 10, 2021 setting a date certain for production of Appellant's Appraisal Report …………………… Pa90

Exhibit 22 – Case Management Order dated March 18, 2021 … Pa91

Exhibit 23 – Case Management Order dated May 18, 2021 ……. Pa93

Exhibit 24 – Order barring portions of Appellant's Appraisal Report dated August 6, 2021 [omitted as Duplicative]

Exhibit 25 – Appellant's Notice of Motion Seeking Leave to File Interlocutory Appeal dated August 26, 2021 …………………… Pa95

Exhibit 26 – Order Denying Appellant's Motion Seeking Leave to File Interlocutory Appeal dated September 14, 2021 ………… Pa96

Exhibit 27 – Order granting In Part Respondent's Motion to bar Appellant's Appraisal Report dated January 28, 2022 [omitted as Duplicative]

Exhibit 28 – Order granting Respondent's Motion to Bar dated October 7, 2022 [omitted as Duplicative]

Exhibit 29 – Order Allowing Appellant to Withdraw Funds on Deposit ……………………………………………………… Pa97

<u>State v. Mountain Creek Resort, Inc.</u>, A-3105-12T3 (unpub.) (App. Div. February 10, 2014) …………………………………………………… Pa100

TABLE OF AUTHORITIES

Federal Cases

Bauman v. Ross, 167 U.S. 548 (1897) …………………………………………….. 42

State Cases

Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezecwo, 345 N.J. Super. 1 (App. Div. 2001) …………………………………… 27

Borough of Harvey Cedars v. Karan, 214 N.J. 384 (2103) …. 22, 23, 38, 41, 42, 49

Buckelew v. Grossbard, 87 N.J. 512 (1981) ………………………………… 26, 27

Castroll v. Franklin Tp., 161 N.J. Super. 190 (App. Div. 1978) ………………... 26

City of Linden v. Benedict Motel Corp., 370 N.J. Super. 372 (App. Div. 2004) …. ……………………………………………………………………….39, 40, 41

City of Ocean City v. Maffucci, 326 N.J. Super. 1, (App. Div. 1999) ……… 23, 24

Comm't of Transportation v. Faps Realty, Corp., 197 N.J. Super. 44 (App. Div. 1984) ……………………………………………………………….. 39, 40, 41

County of Monmouth v. Hilton, 334 N.J. Super. 582 (App. Div.), *cert. denied*, 167 N.J. 633 (2001) ……………………………………………………………….. 37

Creanga v. Jardal, 185 N.J. 345 (2005) ………………………………………… 27

Dawson v. Bunker Hill Plaza Assoc., 289 N.J. Super. 309 (App. Div. 1996) ….. 27

F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418 (1985) …………. 18

Greenblatt v. City of 280 Englewood, 26 N.J. Tax 41 (Tax 2011) ……………... 26

Grzanka v. Pfiefer, 301 N.J. Super. 563 (App. Div. 1990) ……………………... 26

Housing Authority of New Brunswick v. Suydam Investors, LLC, 177 N.J. 2 (2003) ……………………………………………………………… 42, 43, 44

In re Accutane Litigation, 234 N.J. 340 (2018) ………………………… 28, 30, 35

Landrigan v. Celotex Corp., 127 N.J. 404 (1992) ……………………………… 46

Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344 (2011) …….. 27, 28, 36

Rockaway v. Donofrio, 186 N.J. Super. 344 (App. Div. 1982) ………………… 18

Rubanick v. Witco Chem. Corp., 125 N.J. 421 (1992) ……………………..... 28

State v. Caoili, 135 N.J. 252 (1994) …………………………………………….. 38

State v. Gallant, 42 N.J. 583 (1964) …………………………………………….. 38

State v. Gorga, 26 N.J. 113 (1958) ……………………………………………… 37

State v. Kelly, 97 N.J. 178 (1984) ……………………………………………… 26

State v. Mountain Creek Resort, Inc., A-3105-12T3 (unpub.) (App. Div. February 10, 2014) …………………………………………………………………………… 22

State v. Rohrer, 80 N.J. 462 (1979) …………………………………... 44, 45, 46

State v. Stulman, 136 N.J. Super. 148 (App. Div. 1975) …………………… 20, 21

State v. Torres, 183 N.J. 554 (2005) …………………………………………….. 25

State v. Townsend, 186 N.J. 473 (2006) ………………………………………... 30

State by Commissioner of Transportation v. Weiswasser, 149 N.J. 320 (1997) ………………………………………………………………………….. 21, 49

Townsend v. Pierre, 221 N.J. 36 (2015) …………………………………….. 27, 30

Village of South Orange v. Alden Corp., 71 N.J. 362 (1976) ……………… 37, 38

Statutes

N.J.S.A. 20:3-6 …………………………………………………………….. 2, 13

N.J. S.A. 20:3-12 ………………………………………………………………… 3

New Jersey Court Rules

R. 4:17-4(e) ………………………………………………………….. 25, 45

R. 4:73-11 …………………………………………………………… 2, 4

New Jersey Rules of Evidence

NJRE 702 ………………………………………………………….... 26

NJRE 703 ………………………………………………………….... 27

PRELIMINARY STATEMENT

In an effort to achieve a windfall in this matter, Defendant/Appellant Louis P. Tsakiris ("Appellant") had produced an appraisal report relying on an obvious typographical error contained in an exhibit attached to the Verified Complaint initiating this matter. Appellant also sought damages for several non-compensable items, to include alleged damages to the home located upon the Property due to construction activities, as well as alleged loss of view and privacy from the construction of improvements on the Borough's property; its municipal beach. As a result, the trial court entered numerous orders paring down Appellant's appraisal report to bar presentation of such inappropriate opinions to the fact finder.

Throughout the course of this litigation, Appellant has: (1) produced an appraisal report based upon an obvious typographical error; (2) produced an engineering report that argued the repairs to the seawall actually increased the potential for flooding or wave damage to the subject property devoid of any objective support or analysis; (3) the engineering report also sought non-compensable damages from vibrations during the construction activities which were correctly barred as a matter of law from this condemnation action; (4) the engineering report sought non-compensable damages for the loss of view and privacy from improvements constructed on the Borough's property were also barred as a matter

of law; (5) produced an appraisal report which sought damages for the above-listed non-compensable issues.

In filing its appeal, Appellant requests this court to ignore established condemnation law and reverse the trial court's multiple rulings barring Appellant from presenting such evidence to the jury. For the reasons stated herein, this Appellate Division should affirm all trial court rulings subject to this appeal.

PROCEDURAL HISTORY

This condemnation action was instituted by the filing the Verified Complaint and Order to Show Cause on September 5, 2018 on behalf of Plaintiff/Respondent, Borough of Monmouth Beach ("Respondent" or "Borough"). Da1. On that same date, Respondent filed the Declaration of Taking and Notice of Lis Pendens with the Court. Da16. On September 24, 2018, the trial court executed the Borough's Order to Show Cause as well as the Order for Payment into Court. Da19. Appellant filed an Answer on October 17, 2018, which contained an Affirmative Defense that the Borough had not satisfied the requirement to engage in *bona fide* negotiations pursuant to N.J.S.A. 20:3-6 and demanded dismissal of the Verified Complaint. Da21.

On November 21, 2018, Final Judgment was entered that the Borough had duly exercised its power of eminent domain to acquire the perpetual easement in Appellant's Property to repair a damaged seawall and appointed three (3)

Commissioners conduct a Commissioners Hearing to determine the amount of just compensation for the taking of said easement in the Property. Da29.

The Commissioners' Hearing was held on May 3, 2019, pursuant to N.J. S.A. 20:3-12 (Pa7), when the repairs to the seawall had already been completed (Pa39). Respondent presented the testimony of its appraiser, Donald M. Moliver, PhD, MAI and various exhibits, including a series of *"before"* and *"after"* photographs depicting the damaged and restored seawall. Pa7; Pa27. Ibid. Through Dr. Moliver, the Borough presented a copy of T&M Associates' map, which had been included as part of the initial easement description dated July 13, 2018 as exhibit P#2 at the Commissioners Hearing. Pa27. At the Commissioners Hearing, Appellant failed to produce an appraisal report, nor did Appellant offer any evidence as to the amount of just compensation for the acquisition of the 3,334-sf easement in his Property. Ibid. Dr. Moliver testified that "the sum of $7,000 represented total compensation for the taking of the 3,334-sf easement for seawall repair at the subject property". Da15; Pa8. On May 14, 2019, the Commissioners issued an award of $7,000 as total compensation for the taking of the 3,334-sf easement in the Property. Da31. On June 21, 2019, Appellant filed a Notice of Appeal to the Report of Commissioners. Da35.

On August 21, 2019, the Court scheduled the trial of this matter for November 12, 2019. Pa8. R. 4:73-11 required Appellant to serve his appraisal report a

minimum of forty (40) days prior to the trial, or no later than October 3, 2019. Pa8. Appellant was unable to comply with the deadline imposed by R. 4:73-11, therefore Appellant requested an adjournment of the trial and the scheduling of a Case Management Conference. Pa8. Respondent consented to an adjournment of the trial November 12, 2019 trial date. Pa8. On October 30, 2019, the trial court conducted a Case Management Conference, setting December 20, 2019 as the deadline for production of Appellant's appraisal report and rescheduling the trial February 18, 2020. Pa50.

On December 16, 2019, Appellant's attorney contacted the Borough's attorney stating he was unable to produce Appellant's appraisal report by the December 20, 2019 deadline. Pa9. Appellant requested an extension of time to complete Appellant's appraisal report and an adjournment of the February 18, 2020 trial date. Ibid. Respondent again consented to the requested extension and adjournment of the February 2020 trial date. Ibid.

Subsequently, Appellant produced an **appraisal report and planner's report based upon an obvious typographical error** contained in **one** of the easement descriptions identifying the perpetual seawall repair easement at **117**.65 and not at the correct location, or **177**.65 feet from Ocean Avenue. Pa40. This was despite several other documents, the taking map attached to the Verified Complaint and Declaration of Taking, the extensive testimony and photographs from Dr.

Moliver at the Commissioners' Hearing, all of which correctly identified the easement at 177.65 feet from Ocean Avenue. Pa40-41. Appellant was certainly aware his damaged seawall was not located in the middle of his Property, 117.65 feet from Ocean Avenue. Based on the information Appellant knew to be inaccurate, Appellant's appraiser opined the just compensation due to Appellant for the easement was **$1,550,000**. Pa00034.

Appellant had no reasonable belief that the easement to repair his seawall was in the middle of the Property. Appellant had actual knowledge where the damaged seawall was located and observed the repairs made in 2019; he had actual knowledge the repair work was limited to the area adjacent to the beach and no work have been performed sixty (60) feet to the west. Pa41; Pa10. Appellant's planning report describes the typographical error in the initial easement description as follows:

> The Exhibit Map is not consistent with the written description prepared by T& M Associates. The T&M description identifies the easement commencing at a point **117.65 feet** (emphasis added) from the intersection of the northerly R.O.W. line of Valentine Street and the easterly R.O.W. line of Ocean Avenue. The T&M Exhibit Map identifies the easement commencing at a point **177.65 feet** (emphasis added) from the intersection of the northerly R.O.W. line of Valentine Street and the easterly R.O.W. line of Ocean Avenue.
>
> Pa12.

Relying on a known single typographical error, Appellant's appraiser concluded subdivision of the Property was no longer possible due to the "taking"

and opined the loss of this second buildable lot should result in Appellant receiving just compensation of **$1,550,000** for the taking of the 3,334 sf the perpetual seawall repair easement in his Property. Pa41.

The Borough filed a motion seeking leave to file an amended complaint on February 26, 2020 which Appellant opposed. Da40. The Borough provided the Certification of Julie Nastasi, Project Engineer of T&M Associates, engineers for the Borough, to both explain the nature of the typographical error, how the correct information had been attached to the Verified Complaint and Declaration of Taking, and to refute Appellant's factually-erroneous opposition. Da69. Ms. Nastasi's certification confirmed:

> . . . I inspected the Property and confirmed the seawall repairs on Defendant's Property were performed in accordance with the original map and at the correct distance of 177.65 from Ocean Avenue. **There was no construction or disturbance at the area of the Defendant's Property** located at "a distance of 117.65 feet from the intersection of the northerly R.O.W. line . . .".
>
> Ibid. [emphasis added].

On March 27, 2020, the trial court granted Respondent's Motion (Da80) and Respondent filed the Amended Complaint. Da86. Appellant had to produce an updated appraisal report estimating just compensation for the proper location of the easement. Pa43.

As Appellant had not produced an amended appraisal report by July 2020, on July 10, 2020, Respondent filed a motion seeking a date certain by which Appellant would be required to produce his amended appraisal report. Pa52. The trial court granted Respondent's motion ordering that Appellant "shall produce any written appraisal report within 40 days of this order estimating the amount of just compensation for the taking of the perpetual seawall easement at a distance of 177.65 ft. from Ocean Avenue in Defendant's Property" and ordering that should Appellant fail to produce such a report he "may" be barred from producing such a report. Pa54.

On August 13, 2020, a Case Management Order required Appellant to produce an appraisal report by October 16, 2020. Pa58. On October 16, 2020, Appellant wrote to the Court, stating his appraiser would be unable to meet the deadline and requested further extension to produce an appraisal report. Pa59. On October 21, 2020 the Court issued a Case Management Order extending the deadline for Appellant's production of his appraisal report to December 7, 2020. Pa60.

On December 3, 2020 Appellant filed a Motion seeking an extension for the deadline to produce his appraisal report as well as seeking an Order "directing that Plaintiff reimburse Defendant for expert fees and costs." Da102. In response, the Borough filed a cross motion to bar Appellant from producing an appraisal report or relying upon appraiser's testimony at trial. Pa61.

On January 8, 2021, the trial court executed an Order denying Respondent's cross motion and partially granting Appellant's motion, extending the time for Appellant to produce his appraisal report within 60 days. Pa77. On March 10, 2021 the trial court ordered Appellant to produce his expert reports no later than April 9, 2021. Pa90. The trial court warned Appellant that no more extensions would be granted and no further amendments to Appellant's appraisal report would be allowed, based upon the initial erroneous appraisal report produced by Appellant, along with the multiple extensions Appellant was granted by the trial court to produce an amended appraisal report. Pa45. The trial court cautioned Appellant that should the amended appraisal report be barred from evidence, then Appellant would not be permitted to produce a third appraise report. Ibid.

On March 18, 2021, a Case Management Order set the date for production of Appellant's engineering expert report no later than April 9, 2021 and Appellant's appraisal expert report no later than May 7, 2021. Pa91. On April 9, 2021, Appellant produced his engineering expert report by Andrew Raichle, P.E. of the Watermen, LLC engineering firm ("Watermen Report"). Da183. On May 12, 2021, Appellant produced his appraisal report by Gary M. Wade, MAI of Wade Appraisal, LLC ("Wade Appraisal") estimating just compensation for the easement at $1,175,000. Da133.

On July 7, 2021, the Borough filed a motion to bar portions of Appellant's expert reports. Da166. On August 6, 2021, the trial court entered an Order and written Statement of Reasons partially granting the Borough's motion to bar Appellant's reliance upon its appraisal report and engineering report. Da390. The trial court granted Respondent's motion, holding, "The court grants plaintiff's motion as it finds that claimed [sic] through those expert reports **is not a compensable form of damage** in this condemnation case." Ibid. [emphasis added]. The trial court further held:

> **The claimed damage to the house on defendant's remaining property from vibrations during construction of the seawall is not damages as a consequence of the taking**. Rather, defendant seeks damages as a consequence of the manner in which a project was performed or carried out by third parties. Such issues may be the subject of a separate litigation that may include other necessary parties and full discovery.
>
> Ibid. [emphasis added].

Thereafter, Appellant filed a motion seeking leave to file an interlocutory appeal regarding the Court's August 6, 2021 Order (Pa95) which was denied on September 14, 2021. Pa96.

On December 1, 2021 the Borough filed a second motion to bar the remaining portions of Appellant's engineering report as net opinion, as well as those portions of the Wade appraisal relying thereon. Da401. On January 28, 2022, the trial court

issued an Order partially granting the Borough's motion, stating "any claims for loss of view and privacy due to off-site conditions are precluded." Da444.

On March 1, 2022 Appellant produced his engineering expert, Andrew Raichle, P.E., author of the Watermen Report, for deposition. Da456. Thereafter, the Borough again moved to bar Appellant's engineering report and portions of Appellant's appraisal report. Pa446. The Borough re-filed the motion as Mr. Raichle failed to set forth any scientific of technical data or objective analysis in support of his opinion that the newly-repaired seawall actually increases the likelihood of wave action causing flooding upon Appellant's property. Pa48. On October 7, 2022 the trial court granted the Borough's motion. Da503.

On August 17, 2023, a consent final judgment was entered in the amount of $16,500, with Appellant expressly retaining the rights to file a timely notice of appeal of the prior orders striking certain of the owner's expert reports and damage claims. Da505. Appellant filed the notice of appeal on October 4, 2023 (Da508) and an amended notice of appeal on October 10, 2023 (Da513).

STATEMENT OF FACTS

As a result of damage from Super Storm Sandy, Plaintiff/Respondent Borough of Monmouth Beach ("Borough") participated in the Seawall Repair and Construction Project (the 'Project") undertaken by the New Jersey Department of Environmental Protection ("NJDEP") which included the repair of a damaged

seawall located on Appellant's Property. Pa2. In order to prevent future storm damages to adjacent infrastructure, the NJDEP, Bureau of Coastal Engineering ("BCE") designed a continuous seawall to be constructed, incorporating the repair of the damaged portion of the Appellant's existing seawall to produce a contiguous, resilient, engineered shore protection feature. Pa2. Appellant's Property, identified as Block 48.01, Lot 10, and commonly known as 35 Ocean Avenue, Monmouth Beach New Jersey 07750 (the "Property") consists of an existing two-and-one half story single family home on a lot of approximately 1.36 acres. Pa36. As part of the Project, the Borough needed to acquire a perpetual 3,334 sf easement at a distance of 177.65 feet from Ocean Avenue in order to repair the existing damaged seawall located on the Appellant's Property. Pa36.

On August 13, 2018, the Borough served the official Offer Letter, pursuant to N.J.S.A. 20:3-6, on Appellant. Pa15. Based upon an appraisal report prepared by Dr. Donald Moliver, Ph.D., MAI, the Borough offered the sum of $16,500 as total compensation for the taking of the 3,334-sf perpetual easement in said Appellant's Property. Ibid.

The easement states that, "(s)aid Proposed Easement shall include the permanent right to maintain and replace the proposed seawall located within the above-described easement area including therewith the right to pump, place,

transport and spread sand beach fill within the limits of the Proposed Easement herein described." Da11.

The Borough's appraisal report described the scope of the Project as follows:

> **The Project will entail utilizing a construction and maintenance easement on a portion of the subject property so the seawall inefficiencies can be addressed. The taking of the easement and any consequential damages to the remainder of the subject property is primary reason is being prepared**."
>
> Pa21 [emphasis added].

The Borough's appraiser listed the various benefits from the repair of the seawall to the Appellant's Property, including life-safety and protective benefits. Ibid.

LEGAL ARGUMENT

POINT I

APPELLANT SEEKS A WINDFALL BASED UPON A TYPOGRAPHICAL ERROR (DA40; 1T7:3-10)

Respondent Borough had sought leave from the trial court to correct a typographical error contained in the metes and bounds description of an exhibit attached to the Borough's Verified Complaint, depicting the perpetual seawall easement which the Borough acquired in the Appellant's property to repair the existing damaged seawall. Da40. The trial court properly allowed the amendment, which was sought by the Borough out of an abundance of caution. Da80. Arguing that the amendment was tantamount to a relief from judgment pursuant to R. 4:50-

1, Appellant's opposition to the motion to amend as well as his subsequent request for attorneys and expert fees from the Borough were an attempt to gain a financial windfall by exploiting a single typographical error contained in the Metes & Bounds description attached as an exhibit to the Verified Complaint, despite the correct distance of 177.65 feet being reflected in several other documents, to provide an inflated appraisal report seeking **$1,550,000.00** in compensation. Pa00034.

The initial easement description dated July 13, 2018 was prepared by Respondent's engineer, Bonnie Hurd of T&M Associates. Pa4. Unfortunately, Ms. Hurd was subsequently diagnosed with a brain tumor and had since passed away. Ibid. The initial easement description contained a metes and bounds description and a map showing the location of the proposed easement on Appellant's Property. Pa17-19. The metes and bound description stated, the easement begins at "a distance of **117.65** feet from the intersection of the northerly R.O.W. line of Valentine Street with the easterly R.O.W. line of Ocean Avenue." Pa17 [emphasis added]. However, the metes and bounds distance of "117.65" was a typographical error as the existing seawall on Appellant's Property is actually located an additional sixty (60) feet to the east; the correct distance should have been identified at **177.65** feet in the metes and bound description. Pa4. The correct distance of **177.65** feet *was* reflected in other supporting documentation provided to Appellant at the inception of this matter; specially, the map attached to the initial easement description was **correct**. This

map depicted the **correct** location of the proposed easement at the northeast corner of Appellant's Property at a distance of 177.65 feet from Valentine Street and Ocean Avenue. Ibid. This map was also attached as Exhibit "A" to the filed Verified Compliant and as Exhibit "B" to the recorded Declaration of Taking. Da11; Da13.

Prior to the commencement of this condemnation action, Appellant was specifically advised that the purpose of the Project was to repair the existing damaged seawall located on his Property. The proposed easement language (Da11); the map attached to the Verified Complaint and Declaration of Taking (Da13); and the project description contained in the Borough's appraisal report (Pa21-24) all contained the correct information that the easement was located 177.65 feet from the intersection of the northerly R.O.W. line of Valentine Street with the easterly R.O.W. line of Ocean Avenue. Most importantly, photos and testimony presented by the Borough's appraisal expert during the commissioners' hearing reflected the correct distance of 177.65 feet. Appellant had actual knowledge of the location of the easement; he knew where the damaged seawall was located on his Property and observed the repairs being undertaken in 2019 to the seawall; he had actual knowledge the repair work was limited to the damaged seawall and no work have been performed sixty (60) feet to the west. Pa41; Pa10.

The distance of 177.65 feet was always the correct distance and the project plans were prepared in accordance with that distance, and it consistent with the

statement contained in the original easement description that, "(s)aid Proposed Easement shall include **the permanent right to maintain and replace the proposed seawall located within the above-described easement area** including therewith the **right to pump, place, transport and spread sand beach fill** within the limits of the Proposed Easement herein described." Da18 [emphasis added].

Based thereon, Appellant had no reasonable belief that the easement was located in the middle of the Property. Therefore, the trial court was correct to allow the amendment to the exhibit to the Verified Complaint[1] and to deny Appellant's request that the Borough be held liable for Appellant's fees incurred (addressed in greater detail in Point II) when attempting to gain a windfall by basing his initial appraisal upon the sole typographical error contained in the metes & bounds easement description attached as an exhibit to the Verified Complaint.

Further, Appellant lay in wait to ambush the Borough with its exorbitant appraisal, failing to take any one of the multiple opportunities to discuss any perceived discrepancies with the Borough's Verified Complaint with Respondent's counsel. This was confirmed during oral argument on the Borough's motion to amend. 1T10:8-21. Indeed, Appellant admitted to the trial court the fact that the project was to repair the existing seawall and not construct a brand new one in a different location. 1T25:7-13. Appellant never communicated with the Borough

[1] The language of the Verified Complaint itself was not affected by the amendment.

regarding any discrepancies in the exhibits attached to the Verified Complaint prior to the production of Appellant's $1,550,000 appraisal report, despite having communicated with the Borough's counsel on multiple occasions when Appellant needed numerous extensions to produce Appellant's appraisal report.

On December 16, 2019, Appellant's counsel called the Borough's counsel, stating he was unable to complete Appellant's appraisal report by the December 20, 2019 deadline and requested additional time; the Borough's counsel consented. Pa9. At no time did Appellant's counsel suggest there was any inconsistency or discrepancy between the metes & bounds description and the map attached to the Verified Complaint. Pa9. To be clear, the Borough consented to several adjournments of the trial to accommodate Appellant's inability to timely produce an appraisal report. 2T28:21-23. The trial court properly granted Respondent's motion to amend, holding:

> [T]he proposed amendment makes no change to the size of the area that is the subject of this action. It makes no substantive change to the scope of the area subject of the taking whatsoever. The area taken is not changed in size nor interest.
>
> Da83.

The trial court specifically recognized the map attached to the Verified Complaint contained the correct information. Da84.

It is for these reasons that Appellant's argument; "Allowing the amendment was improper. The owner's expert reports were based on plaintiff's own metes and

bounds description of the easement taken" (Db20); is a gross misrepresentation of the factual circumstances presented to the trial court. So, too, is Appellant's attempt to cast Respondent's actions as tantamount to abandonment of the condemnation action a desperate attempt to provide any basis for Appellant's demand for reimbursement of its expert fees. As described *supra*, Respondent provided sufficient, accurate information to Appellant prior to the production of Appellant's $1,550,00 appraisal report which allowed Appellant's experts to prepare an accurate report. Therefore, the trial court's Order of March 27, 2020 should be affirmed.

POINT II

APPELLANT FAILED TO DEMONSTRATE ANY ENTITLEMENT TO REIMBURSEMENT FOR ITS EXPERT FEES (2T11:3-10)

Appellant's position that he must "pay for the mistake made by the government" (Db24) is contradicted by his actual knowledge of the easement location as discussed in detail *supra*. There were multiple opportunities for Appellant to avoid any alleged wasted expert fees, yet Appellant chose to exploit information *he knew to be incorrect* and relied exclusively on that incorrect information; in the face of contradictory information in his possession/knowledge; as a basis for the inflated $1,550,000 estimate of just compensation for the easement acquisition.

At the outset, it is important to note that when granting the Borough's motion to amend, the trial court specifically held that Appellant would not "be prejudiced in any way" by the amendment. Da83. Based on the facts set forth *supra*; including the information provided to Appellant prior to the condemnation action even being filed; the trial court denied Appellant's motion seeking reimbursement of its expert fees. Da154.

While Appellant provided zero legal support to the trial court in support of its request, Appellant now provides the Appellate Division with generalized condemnation law related to notions of fairness and justice, which fails to establish any legal basis for his request. Nothing in the cases now cited by Appellant provides for any fee shifting to the condemning authority. For instance, Appellant now relies upon <u>F.M.C. Stores Co. v. Borough of Morris Plains</u>, 100 <u>N.J.</u> 418 (1985) for the established maxim that a condemning authority "may not conduct itself so as to achieve or preserve any kind of bargaining or litigational advantage over the property owner" however, the record indicates that at no point did the Borough act to Appellant's detriment; rather, the Borough provided information and numerous courtesies to allow Appellant to produce an accurate appraisal report. The trial court confirmed the amendment sought was "simply a clarification" and was "consistent" with the initial Verified Complaint. Da84.

Ironically, Appellant argues that a property owner does not "seek to be confronted with unwarranted litigation **by government** over the taking of his private property" (see, Db23 citing, Rockaway v. Donofrio, 186 N.J. Super. 344 (App. Div. 1982) [emphasis added]) yet this matter has required near constant intervention by the trial court as a direct result of Appellant's attempts to gain windfalls by misconstruing the easement location and seeking damages for non-compensable items, discussed in greater detail *infra*. Therefore, Appellant had failed to provide the trial court with any legal or factual basis upon which to shift Appellant's expert fees to the Borough. Based thereon, the trial court's Order of January 8, 2021 should be affirmed.

POINT III

THE TRIAL COURT PROPERLY BARRED DAMAGES FROM OFF-SITE CONDITIONS (4T & 5T)[2]

The Watermen Report states, "The [NJDEP] constructed a seawall modification project (the "Seawall Project") on **and adjacent to** the above-referenced property (the "Subject Property") in 2018 and 2019." Da310 [emphasis added]. The Watermen Report also states, "The Seawall Project included

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[2] To clarify, the Watermen Report was the subject of two (2) separate orders: the January 28th, 2022 Order barred those aspects of the Watermen Report which relied upon off-site conditions, i.e. the "pocket" (Da446); and the October 7, 2022 Order barring the remainder of the Watermen Report as a net opinion (Da505). The trial court's October 7, 2022 Order related to the "increased overtopping" analysis is addressed in Point IV.

construction of a new rock and concrete seawall and vehicular access ramp on **and immediately south** of the Subject Property . . ." Ibid. [emphasis added]. From the outset, it is clear the Watermen Report it is based on conditions outside of the subject Property on land not owned by Appellant, but by Respondent.

The Watermen Report first notes the "Pre-Construction Seawall Geometry" as being a "gradual, curved return at the southern limit of the Subject Property . . ." (Da313) then compares the "Post-Construction Seawall Geometry" as having "eliminated the Seawall's gradual, curved southern return and its relief-valve functionality in favor of a continuous Seawall to the south" which created a "pocket in the seawall geometry." Da314. The Watermen Report concludes this results in "increased vulnerability of the Subject Property to wave-induced storm damage." Da315. However, established New Jersey law prevents a condemnee in a partial-takings matter from claiming damages to the remainder of the property arising from the condition of adjoining property which the condemnee does not own. Here, the Borough owns the land "adjacent to" and "immediately south" of Appellant's Property serving as the Borough's public beach club.

The Superior Court of New Jersey Appellate Division rejected a similar argument in State v. Stulman, 136 N.J. Super. 148 (App. Div. 1975). The defendant's property was the subject of a partial taking which resulted in a relocation of his ingress and egress to the public roadways. Stulman, *supra* at 161. The

Appellate Division rejected the defendant's argument that he should be compensated for the loss of the view of his property due to construction activities which took place not on the defendant's property, but on an adjacent property. See, Stulman, *supra* at 162.

The Supreme Court of New Jersey relied upon the Stulman court's reasoning when allowing damages for the loss of visibility of the property resulting from alterations to the portion of the property belonging to the condemnee. In State by Commissioner of Transportation v. Weiswasser, 149 N.J. 320 (1997), the Supreme Court ruled:

> Loss of visibility as an element of severance damages may be related to a loss of access and the basis for the compensability for such damages would be whether the **loss is attributable to the taking of the Property itself or off-site conditions**. In State v. Stulman, the court specifically considered a damages claim based on the loss of visibility. **The court rejected the owner's argument that he was entitled to compensation for the loss of visibility of his property because the loss resulted, not from the partial taking in the case, but from the construction of a new highway on property belonging to others**.
>
> Weiswasser, *supra* at 341 [internal citations omitted] [emphasis added].

The New Jersey Supreme Court recognized Alaska's Supreme Court's reasoning in a similar matter, holding, "When visibility is impaired by virtue of construction that occurs **off the landowners property**, no right has been taken and therefore compensation is not due." Weiswasser, *supra* at 343 [emphasis added].

In an unpublished opinion, the Appellate Division relied upon the Weiswasser court's reasoning when holding: "The Court held the defendant's [l]oss of visibility as an element of severance damages may be related to a loss of access; however, the basis of compensation would be **whether the loss is attributable to the taking of the property itself or off-site conditions**." State v. Mountain Creek Resort, Inc., A-3105-12T3 (unpub.) (App. Div. February 10, 2014). Pa00100; Pa00105 [internal citations omitted].

These concepts apply to the current matter, contradicting Appellant's arguments he is entitled to damages resulting from an alleged loss of view, privacy and wave activity from the construction of the new seawall and ramp on the Borough's adjacent property; outside of the easement acquired in the Property. As the portion of the seawall referenced in Appellant's appraisal is **not** located upon the Property, the trial court properly barred Appellant from seeking damages stemming therefrom in the form of loss of view, privacy or increased storm risk.

Appellant requests this Appellate Division greatly expand the New Jersey Supreme Court's decision in Borough of Harvey Cedars v. Karan, 214 N.J. 384 (2103). Neither the Karan decision, nor any reported or unreported subsequent court decisions, have interpreted Karan as authorizing just compensation for damages from project activities on "the properties of others" or "to consider project impacts on the property of others" as argued by Appellant. The trial court's refusal to expand

the Karan decision to include off-site alleged damages should be affirmed. The Court held in Karan that the storm protection provided by a dune project should be considered in determining the just compensation due to a property owner **whose land was taken to construct the dune**.

The Karans owned oceanfront property in the Borough of Harvey Cedars with panoramic ocean views. A governmental beach protection project raised the existing dune on Karan's property from 16 feet to 22 feet, thus blocking Karan's ocean views. Prior to the trial, the Karans' sought to prevent the borough from presenting evidence that the property received a benefit from the construction of the dune (storm protection) that would partially offset the loss in value due to loss of the view from the dune constructed on the Karans' property. The New Jersey Supreme Court held:

> That the Karans are entitled to "just compensation" for **the taking of a portion of their property** for this public project is not in question. Instead, the focus here is on how to calculate "just compensation" when **the taking of a portion of the property** for a public project may lessen in part and enhance in part the value of the remaining property.
>
> See, Karan, *supra* at 388 [emphasis added].

The ruling in City of Ocean City v. Maffucci, 326 N.J. Super. 1, (App. Div. 1999) supports the Borough's arguments. In Maffucci, the view of the ocean from the defendants' condominium had been completely obstructed and direct access to the beach has been eliminated by nine-foot-high dune grasses as a direct result of the taking. Maffucci, *supra* at 3. The Appellate Division cited with approval to

numerous cases throughout the country which allowed severance damages for loss of view and/or access as a result of a partial taking for construction activities which occurred **on the property subject to the condemnation action** and not neighboring or adjacent properties. Id. at 12.

As Appellant is not entitled to damages as a result of alleged loss of view, privacy and wave activity from the construction of the new seawall and ramp on the Borough's adjacent property as it is outside of the 3,334 SF easement acquired in Appellant's Property, the trial court's January 28, 2022 Order should be affirmed.

POINT IV

THE TRIAL COURT PROPERLY BARRED APPELLANT'S NET OPINIONS (6T)

The Wade Appraisal concluded that the value of the Property was reduced due to increased flooding risk, relying upon the Watermen Report to do so. Da288. Appellant's appraisal described "External/Locational Depreciation" as "Due to the project, the subject has a higher risk of flooding during a weather event." Da303. Based thereon, Appellant's appraisal assigned a 16% "External Obsolescence Building" to the fair market value opinion under the Cost Approach. Ibid. Appellant's appraisal also stated, "the new seawall has increased the risk of flooding on the site. All of the Sale are do not [sic] have an enhanced risk of flooding during a weather event. Therefore, all Sales are adjusted downward." Da300. The trial

court properly barred this -15% adjustment as it was based upon the impermissible net opinions contained in the Watermen Report.

In response to the Watermen Report, the Borough produced the Miller Report. Da418. Unlike the Watermen Report, the Miller Report provides a thorough background of "Coastal Processes" to include "Nearshore Wave Processes" and "Wave Overtopping" thus providing the background information necessary to evaluate the validity of the Raichel Engineering Report's methodology. Da422-425. The Miller Report discusses the "Owen Method" for estimating the overtopping discharge rate, providing the mathematical formula to calculate same. Da424. The Miller Report confirms the Watermen Report, "**doesn't contain any data or calculations** that substantiate the report's conclusion that the new seawall increases the flooding potential on the subject property." Da425 [emphasis added]. The Miller Report concludes:

> The newly constructed seawall reduces overtopping significantly from waves of all directions compared to the pre-existing lower elevation seawall . . . the new seawall constructed at the property **results in a measurable benefit** in the form of enhanced storm protection due to the significant reduction in the amount of overtopping.
>
> Da431-432 [emphasis added].

Rule 4:17-4(e) sets forth the mandatory components of an expert report, to include a complete statement of the expert's opinions and the basis thereof; the facts and data considered in forming the opinions; and the qualifications of the expert.

An expert's opinion is only as good as the data upon which the expert relied. Greenblatt v. City of 280 Englewood, 26 N.J. Tax 41, 54 (Tax 2011). New Jersey Rule of Evidence 702 is the starting point for determining the admissibility of expert testimony. State v. Torres, 183 N.J. 554, 567 (2005). It states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
>
> N.J.R.E. 702.

The three (3) basic requirements that an expert's testimony must meet before it can be presented to the jury are: (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony. State v. Kelly, 97 N.J. 178, 223 (1984). An expert's opinion must be based on facts and data established by evidence; an expert opinion lacking factual foundation is utterly worthless. Castroll v. Franklin Tp., 161 N.J. Super. 190 (App. Div. 1978), see also, N.J.R.E. 703.

The net opinion rule bars expert opinions based on mere speculation or possibilities. Grzanka v. Pfiefer, 301 N.J. Super. 563, 580 (App. Div. 1990). Expert opinions, in order to be admissible, must be based "primarily on the facts, data or other expert opinion established by evidence at the trial." Buckelew v. Grossbard,

87 N.J. 512, 524-25 (1981). "Conjecture and speculation cannot be used as basis for damages." Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezecwo, 345 N.J. Super. 1, 11 (App. Div. 2001). "An expert must 'give the why and wherefore' of his or her opinion, rather than a mere conclusion." Buckelew, *supra* at 524.

An expert may not provide mere net opinion. Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011). An opinion is an inadmissible net opinion if the witness cannot offer objective support for it, but instead offers an opinion about a standard that is personal. Id. The net opinion rule renders inadmissible any opinions that are unsupported by factual evidence. Buckelew, *supra* at 524; Creanga v. Jardal, 185 N.J. 345, 360 (2005). An expert's opinion must be based upon a proper factual foundation; it cannot be based upon mere unfounded speculation and unquantified possibilities. Dawson v. Bunker Hill Plaza Assoc., 289 N.J. Super. 309, 323 (App. Div. 1996).

N.J.R.E. 703 states that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." See also, Townsend v. Pierre, 221 N.J. 36, 53 (2015). The expert witness must "give the why and wherefore" that supports

the opinion, rather than a "mere conclusion." Pomerantz, *supra* at 372. Furthermore, "if an expert cannot offer objective support for his or her opinions, but testifies only to a view about a standard that is "personal", it fails because it is a mere net opinion." Id. at 373.

The Supreme Court stated, "[w]e have repeatedly stressed that the gatekeeper's critical determination is whether comparable experts accept the soundness of the methodology, including the reasonableness of relying on [the] type of underlying data and information. In re Accutane Litigation, 234 N.J. 340, 390 (2018), *citing*, Rubanick v. Witco Chem. Corp., 125 N.J. 421, 451 (1992). The Supreme Court stressed the importance of the trial court's gatekeeping role:

> Difficult as it may be, **the gatekeeping role must be rigorous**. In resolving issues of reliability of an expert's methodology in a new and evolving area of medical causation . . . **[t]he court's function is to distinguish scientifically sound reasoning from that of the self-validating expert, who uses scientific terminology to present unsubstantiated personal beliefs**.
>
> In re Accutane, *supra* at 390 [emphasis added].

In order to achieve that goal, the New Jersey Supreme Court gave direction to New Jersey's lower courts:

> When a proponent does not demonstrate the soundness of a methodology, both in terms of its approach to reasoning and to its use of data, from the perspective of others within the relevant scientific community, **the gatekeeper should exclude the proposed expert testimony on the basis that it is unreliable**.
>
> In re Accutane, *supra* at 399-400 [emphasis added].

In support of its his appeal, Appellant makes a series of conclusory statements without citing to any specific language from the Watermen Report itself. Db at 36-37. A review of the Watermen Report confirms it failed to meet the threshold standard of scientifically reliable methodology.

The Watermen Report first notes the "Pre-Construction Seawall Geometry" as being a "gradual, curved return at the southern limit of the Subject Property . . ." (Da313) then compares the "Post-Construction Seawall Geometry" as having "eliminated the Seawall's gradual, curved southern return and its relief-valve functionality in favor of a continuous Seawall to the south" which created a "pocket in the seawall geometry." Da314. The Watermen Report concludes this results in "increased vulnerability of the Subject Property to wave-induced storm damage." Da315. The Watermen Report makes the following unsupported conclusion:

> The result of these changes is a condition where wave energy from the north can no longer be released via the Valentine Street ROW and waves from the south are directed toward the lower Seawall elevations on the Subject Property. **These conditions increase the likelihood of wave overtopping onto the Subject Property**.
>
> Waves that do overtop the Seawall onto the Subject Property will be prevented from flowing south by the vertical wall that forms the limits of the Vehicle Crossover . . . In addition, waves with a higher southerly angle of incidence now have the opportunity to travel up the vehicle ramp, over the new vertical wall, and onto the Subject property.
>
> Da315 [emphasis added].

The Watermen Report includes the statement, "waves with a high southerly angle of incidence now have the opportunity to travel up the vehicle ramp, over the new vertical wall, and onto the Subject Property." Da315. However, the Watermen Report fails to provide an opinion that such overtopping would not have occurred prior to the taking of the easement; no opinion is given as to whether such overtopping (even if accepted as true) has occurred based upon the pre-existing damaged seawall or in the after condition; or whether such overtopping would result in damage to the Property. The Watermen Report concludes, "The Seawall construction has increased the vulnerability of the Subject Property to wave-induced storm damage." Da315. The Watermen Report is nothing more than a collection of unsupported, conclusory statements, failing to provide any specificity whatsoever as to what conditions would lead to wave overtopping onto the Property. No source whatsoever is provided by the Watermen Report in support of the generalized and vague statements contained therein.

Appellant criticizes the Borough's reliance upon the Accutane cases, however, the trial court did not exclusively rely upon the Accutane cases when barring Appellant's reliance upon the Watermen Report. See, 6T22:8-25 (citing to State v. Townsend, 186 N.J. 473 (2006), and Townsend v. Pierre, *supra*). The trial court relied upon the very cases Appellant urges this Appellate Division to consider

to *reverse* the trial court's decision. Db at 34. Based on those established cases the trial court held:

> [T]he Court does agree with the . . . Borough of Monmouth Beach that **this opinion certainly lacks the foundation and the explanation as to the why and wherefores of this opinion**.
>
> 6T23:47 [emphasis added].

The trial court specifically cited to portions of Mr. Raichle's deposition, discussed in greater detail *infra*, in support of its decision. See, 6T23:1-24:22.

The Watermen Report failed to address critical facts including: (1) the Property suffered substantial damage during Super Storm Sandy (Da419-421); (2) the likelihood of such damage being reduced by the repaired seawall; (3) what storm events would cause the Property to experience overtopping (i.e., 2-year storm, 10-year storm, 50-year storm, 500-year storm); (4) the anticipated occurrence or frequency of such overtopping; (5) the anticipated duration of such overtopping during the various storm events; (6) whether the overtopping would result in actual physical damage to the Property; and (7) whether the overtopping would have occurred during the "before" condition (the pre-existing damaged seawall. These failings confirm the trial court properly barred Appellant from relying upon the Watermen Report.

Mr. Raichle's deposition testimony demonstrates the conclusions contained in the Watermen Report were arrived at first; Mr. Raichle then did his best to support

those conclusions without performing any calculations whatsoever. During his sworn deposition testimony Mr. Raichle confirmed he performed no calculations to support the conclusions contained in the Watermen Report:

> Q: Did you perform any calculations when arriving at your conclusion that the sea wall constructed has increased the vulnerability of the subject property to wave-induced storm damage?
>
> A: **No**.
>
> Q: Did you rely upon any approaches for estimating over-topping discharge rates when reaching your conclusion?
>
> A: **No**.
>
> Da460 at 5:6-14 [emphasis added].

Mr. Raichle testified that while he was aware of the Owen Method (and other methods) for computing over-topping discharge, Mr. Raichle testified that it was "unnecessary" for him to utilize the Owen Method to reach "the conclusion I made." Da461:3-5. Mr. Raichle testified that he had no knowledge of any actual over-topping onto the Property since construction on the new seawall was completed in early 2019. Da 463:2-12. Mr. Raichle was unable to equate his opinion with any of the commonly-used terms of "two-year storm, a ten-year storm, 50-year storm, 100-year storm, 500-year storm":

> Q: How do you define a low frequency storm?
>
> A: Less than – let me get my numbers here. Well, you know what? Without the benefit of calculation analysis, I would say, infrequent.
>
> Q: So as a lay person and not an engineer, I commonly hear the terms used a two-year storm, a ten-year storm, 50-

> year storm, 100-year storm, 500-year storm. Could you equate, when you say "infrequent," could you equate that to a type of storm event, such as two-year, 50-year, 100-year storm event, please?
>
> A: Well, certainly, a 50-year storm would be infrequent.
>
> Q: But, specifically, I'm asking you, equate your opinion about that, that the conditions of the new sea wall will increase the likelihood of wave overtopping to a specific storm event.
>
> A: **I cannot, without further investigation, could not pin it down to a specific storm event**.
>
> Q: Why are you not able to pin it down at this time?
>
> A: **It would require further investigation, calculation**.
>
> Da464:9-465:6 [emphasis added].

Mr. Raichle also confirmed that he had formed no opinion, nor conducted any further investigation, into whether the alleged increase in wave over-topping would cause damage to the Property:

> Q: . . . In your April of 2021 report, when you wrote that these conditions will increase the likelihood of an increase in wave over-topping onto the subject property, did you form the opinion that the likelihood of an increase in wave over-topping would result in actual physical damage to the subject property?
>
> A: I just want to be accurate. So if you could give me a minute here. **No, I didn't**.
>
> Q: Have you performed any further investigation or analysis since you authored the report on April 7th, 2021, which would allow you to offer the opinion today that physical damages would occur to the subject property from the increase in over-topping?
>
> A: **I have not conducted any further investigation on that matter**.
>
> Da468:2-18 [emphasis added].

Mr. Raichle also described the contents of his report as "arguments" and not data or calculations:

> Q: Please, describe for me the factors that you rely upon in support of your conclusion that the new sea wall construction has increased the vulnerability of the subject property to wave-induced storm?
>
> A: Sure. So there are several bits of – or, let's say, **several arguments I've made in that to make that conclusion** . . .
>
> Da474:19-20:1 [emphasis added].

Despite opining that the newly constructed seawall would increase the risk of wave over-topping, Mr. Raichle was unable to quantify that increased risk:

> Q: So, as we sit here today, you are **unable to quantify when the wave over-topping** onto the subject property, which you contend is a result of the post-construction conditions, **would occur**, correct?
>
> A: That is **correct**.
>
> Da492:12-17 [emphasis added].

The Borough's appraisal report reflects the damage caused to the area by Super Storm Sandy, which the Project alleviated; pictures included in the Borough's appraisal report reflect said storm damage. Pa00021-24. So, too, does the Miller Report contain photos of the storm damage to the Property. Da419-421. However, the Watermen Report and the Wade Appraisal failed to provide any comparison between pre- and post- construction flooding and damage to the subject property; such an analysis is essential in order to opine that the newly constructed seawall, which was designed to provide "a continuous wall to be completed and the damaged

elements rebuilt to a more robust design . . .," (Pa00021) is inferior to the pre-existing damaged seawall upon the Property prior to the construction of the Project. As Mr. Raichle testified during his deposition:

> Q. Are you able to tell us the rate of over-topping in the subject property's pre and post sea wall condition?
>
> A. **No, I'm not**. Not at this time
>
> [Da488:7-10 emphasis added]

The lack of such a comparison reveals the unduly speculative nature of the Watermen Report. Ironically, Appellant's appraisal reflects that the damaged seawall provided added storm protection to the Property, stating, "The subject is protected by a seawall. Sale No. 2 is not protected by a seawall. **An upward adjustment is required.**" Da277 [emphasis added]. Hence, Appellant's appraiser increased the value of the Property due to the seawall when he adjusted Comparable Sale #2 because the sale property lacked a protective seawall. Based thereon, Mr. Raichle's deposition testimony supports the trial court's conclusion that the Watermen Report constitutes a net opinion where Mr. Raichle's conclusions were arrived at first, unsupported by any calculations.

Based upon the findings of the Miller Report, the methodology contained in the Watermen Report is not sound "from the perspective of others within the relevant scientific community" as required by established case law. See, In re Accutane, *supra* at 399-400. Under New Jersey's established law, the Watermen Report

constitutes an impermissible net opinion and was properly barred. See, Pomerantz Paper Corp., *supra* at 372.

The lack of any objective or scientific methodology demonstrates that the Watermen Report is not based upon "scientifically sound" reasoning and, based upon the opinions contained in the Miller Report, "comparable experts" do not "accept the soundness" of the Watermen Report due to its total lack of any foundation or objective methodology. Based thereon, the trial court properly performed its gatekeeping function by barring Appellant from relying upon the Watermen Report and those portions of the Wade Appraisal which rely thereon. Therefore, the trial court's order of October 7, 2022 should be affirmed.

POINT V

ALLEGED DAMAGES DUE TO CONSTRUCTION ACTIVITIES ARE NOT COMPENSABLE IN CONDEMNATION MATTERS (3T)

Appellant ignores basic condemnation law for determining the just compensation due to a property owner from a partial taking of their property via eminent domain: that the fair market value of the property acquired is the measure by which just compensation is determined. Under condemnation law, Appellant is not entitled to recover any compensatory damages for any alleged damage to Appellant's residence from the Borough's construction activities within the confines of a condemnation proceeding. Therefore, the trial court properly barred any

references to or inclusion of said damages to the foundation, or repair costs thereof, of Appellant's residence contained in both Appellant's expert reports. In addition, even assuming vibration damage to the foundation of Appellant's home were compensable in the condemnation action, Appellant failed to provide any evidence, let alone credible evidenced, that said damage was proximately caused by the contractor's negligent construction activities during the seawall repair project.

Condemnation Proceedings Are Only Concerned with Fair Market Value

The aim of any condemnation action is the determination of the property owner's right to receive just compensation for the taking of their property. U.S. Const. Amend. V; N.J. Const. art 1, § 20. The fair market value of the property taken is the general measure of the award of just compensation. State v. Gorga, 26 N.J. 113 (1958). "Just compensation in its most general terms means fair market value as of the date of taking determined by what a willing buyer and a willing seller, neither being under any compulsion to act, would agree to." County of Monmouth v. Hilton, 334 N.J. Super. 582, 587 (App. Div.), *cert. denied*, 167 N.J. 633 (2001).

The sole issue in this matter is the amount of "just compensation" for the taking of the easement upon Appellant's Property. The usual measure of just compensation is the market value of the acquired property on the date of taking. In Village of South Orange v. Alden Corp., 71 N.J. 362 (1976) the court repeated that the test of compensation was the probable sales price between willing parties.

> When we speak of "value" as a measure of just compensation, we are referring to market value; and when we speak of market value **we mean the price which would be mutually agreeable to a willing buyer and a willing seller, neither being under compulsion to act.**
>
> Id. at 367-368 [emphasis added].

In State v. Caoili, 135 N.J. 252 (1994), the Supreme Court reiterated:

> Just compensation is "the fair market value of the property as of the date of the taking, determined by what a willing buyer and a willing seller would agree to, neither being under any compulsion to act." *State v. Silver*, 92 N.J. 607, 513, 457 A.2d 463 (1983). It is the "value that would be assigned to the acquired property by knowledgeable parties freely negotiating for its sale under normal market **conditions based on all surrounding circumstances at the time of the taking**."
>
> Id. at 515 [emphasis added].

Here, just compensation should be measured as the fair market value of the perpetual easement upon the Property based on a consideration of all relevant, reasonably calculable, and non-conjectural factors that either decrease or increase the value of the remaining property. Borough of Harvey Cedars v. Karan, *supra* at 389. A property owner is generally **unable** to be compensated for damages incidental to the taking, such as loss to or destruction of good will, expense of moving to a new location, profits lost because of business interruption, or inability to relocate. State v. Gallant, 42 N.J. 583, 587 (1964).

New Jersey courts have repeatedly confirmed that a property owner is only entitled to compensation for property rights lost as a result of the taking. When

drawing a distinction between a permanent taking of a property and a temporary taking of a property (in the form of the closure of road access of an operating car wash), the Superior Court of New Jersey Appellate Division provided an analysis of what a property owner is to be compensated for in a condemnation action. In the current matter, the Borough's acquisition of a permanent easement upon the Property in order to rebuild and maintain the seawall in no way impacted the property rights of Appellant's residence. Therefore, any alleged damage to the residence is non-compensable within the confines of a condemnation matter.

The Appellate Division's opinion in City of Linden v. Benedict Motel Corp., 370 N.J. Super. 372 (App. Div. 2004) illustrates what constitutes a compensable taking in a condemnation action. In Benedict, in connection to the project to widen Routes 1 and 9, the City of Linden sought to acquire a 15-foot easement upon the frontage of defendant's property, upon which defendants owned and operated a motel. "The most dramatic impact of the [partial] taking is the elimination of fifteen parking spaces that had existed on the Motel's property fronting on Route 1." Benedict, *supra* at 74. Over the City's objection, the trial judge determined as a matter of law that the fifteen spaces had been lawfully created and properly utilized, and the motel was entitled to compensation for remainder damage. Ibid.

In affirming the trial court's ruling, the Appellate Division analyzed and distinguished the Appellate ruling in Comm't of Transportation v. Faps Realty,

Corp., 197 N.J. Super. 44 (App. Div. 1984); the distinctions drawn by the Appellate Division are informative to the Court in its consideration of the current matter. In Faps, the State acquired a "narrow" strip of land to widen Route 9; prior to the taking, access to defendant's property was "uncontrolled and drivers could use some 20-odd feet of State-owned property between the traveled way and the easterly line of the right-of-way to back out and maneuver from the area immediately in front of the commercial buildings . . . because no defined driveway existed, customers were able to use the unimproved part of the State's right-of-way, giving them ample parking and maneuvering room." See, Benedict, *supra* at 379, *quoting*, Faps, *supra* at 46 [internal quotations omitted] [internal citations omitted].

However, in addition to the acquisition of the narrow strip of land, the State "planned to construct a grassy berm along the front of defendant's property and three access driveways, thereby modifying access to defendant's property . . . [t]he combined effect of the taking and the change in access was to reduce the distance available to park cars in front of the building such that front parking was no longer feasible." Benedict, *supra* at 380, *quoting*, Faps, *supra* at 48-49 [internal quotations omitted][internal citations omitted]. The berm and driveways were to be constructed on land which the State owned prior to the taking. Ibid. The Court focused on an important distinction in the Faps fact pattern: "The taking alone would have left

sufficient maneuvering room; rather, **the loss of parking resulted from the access change which prevent[ed] use of the State-owned land**." Ibid. [emphasis added].

The Appellate Division held that the defendant in Faps, "was not entitled to continue to use State-owned property for private purposes nor to demand continued unlimited access." Benedict, *supra* at 381, *citing* Faps, *supra* at 48. This distinguished the fact pattern in Faps from that in Benedict, "the new right-of-way line is within the parking spaces [which effectively] renders all of the parking spaces on that side of the building unusable . . . Defendants did not simply lose maneuvering space for parking; they lost the parking itself." Ibid.

The Appellate Division's ruling in Benedict supports Respondent's position that alleged physical damage to the residence during the repair of the seawall is non-compensable in a condemnation matter. The Borough's acquisition of the permanent easement in no way affects Appellant's property rights in the residential dwelling located upon the Property. The alleged damage to the foundation is alleged as a proximate result of negligent construction activities and not a result of the taking; an easement acquired far from the home's foundation.

This position is further bolstered by the Supreme Court of New Jersey's reasoning in Borough of Harvey Cedars v. Karan, *supra*. In addressing the question of "how to calculate just compensation when the taking of a portion of the property for a public project" the Supreme Court of New Jersey relied upon the United States

Supreme Court's ruling in Bauman v. Ross, 167 U.S. 548 (1897), stating, "Thus, **just compensation is measured by the loss caused by the taking**: He is entitled to receive the value of what he has been deprived of, and no more." Karan, *supra* at 408, *quoting* Bauman, *supra* at 574 (1897) [internal quotations omitted] [emphasis added].

The reasoning set forth by the Supreme Court of New Jersey in Housing Authority of New Brunswick v. Suydam Investors, LLC, 177 N.J. 2 (2003) further supports the Borough's arguments that alleged physical damage to the Property resulting from construction activities is not compensable in a condemnation action. Again, Plaintiff does not argue that the Defendant is barred from commencing a separate action for property damage allegedly caused by negligent construction activity, but the condemnation action is not the property forum for such a negligence cause of action.

The Supreme Court was faced with the issue of valuing environmentally contaminated property in a condemnation matter and ruled:

> Valuation is a relatively straightforward notion with which condemnation commissioners are familiar and experienced. **Omitting the complications of contamination from the valuation process thus advances the speed and efficiency that are the hallmark of eminent domain proceedings** . . . Indeed, the difficulty of estimating the value of contaminated property has been noted by other courts and commentators that have recognized that finding a comparable parcel on

> which to base an estimate of value is problematic because all contamination is different.
>
> Suydam, *supra* at 12 [emphasis added]

The Supreme Court recognized that R. 4:73-1 requires the proceedings to be brought "in a summary manner" and does not allow for counterclaims. Therefore, the Supreme Court concluded that the proceedings as to the valuation of the Property and the cost of environmental remediation should be bifurcated and those costs be determined in a separate "cost recovery" action:

> [D]ealing with environmental issues in the cost-recovery proceeding makes sense. **Such a proceeding allows for third party claims against insurers, titles companies, and prior owners, none of whom have a place at the condemnation table**. More importantly, the cost-recovery proceeding makes available to the condemnee Spill Act defenses . . . **that are not relevant to an Eminent Domain proceeding**. Admission of environmental issues into a condemnation trial circumvents those statutory defenses as well as the possible joinder of third parties . . . All of these reasons underscore the propriety of reserving the contamination issue for the cost-recovery action.
>
> See, Suydam, *supra* at 13 [emphasis added].

This procedure confirms that Appellant's attempt to seek compensation for alleged physical damage to the Property is improper in a condemnation action as it injects issues into this matter which are not relevant to the fair market value inquiry. Here, the Borough did not hire the contractor that repaired the seawall within the easement acquired in the Property; rather, the State of New Jersey hired the contractor. 3T19:9-10. A separate negligence action would allow the State or the

Borough to bring a third-part complaint against the contractor and allow the parties to tender any claims to their respective insurance carriers.

Appellant's arguments that, "An owner should not be forced to defend the condemnation action and also separately have to sue for project damages that the public project foresaw and actually occurred" (Db at p. 43) contradicts the procedural structure the New Jersey Supreme Court set up in Suydam: a bifurcated trial wherein just compensation is the sole determination to be made by the factfinder. Any extraneous issues, i.e. costs of environmental remediation or, as in the present matter, alleged damages to the property's owner's home from construction activities must be addressed in an action separate from the condemnation.

Appellant's reliance upon State v. Rohrer, 80 N.J. 462 (1979) is misplaced, as that matter involved a taking that, while it had proceeded as a partial taking; the whole property should have been acquired. See, Rohrer, 80 N.J. at 465. The taking in Rohrer, "included a strip of land **and about 10% (31') of the front of a building that faced the highway**." Id. at 464 [emphasis added]. The Supreme Court of New Jersey attempted to craft an equitable result from an inequitable situation where a total acquisition would have been preferable to a partial taking to avoid such results in the future:

> Where such a result can be reasonably foreseen as was probably the case here it would normally be the better

> practice for the public condemnor to undertake to condemn the whole property in the first place. To have done so would have avoided the creation of an "uneconomic remnant" with its accompanying problems.
>
> Rohrer, *supra* at 464-465.

The factual circumstances in Rohrer, in which the Supreme Court attempted to craft an equitable remedy, is a far cry from the allegations made by Appellant in the current matter; even if those allegations are to be believed (Respondent does not concede this). There is no such allegation that Appellant's house is unlivable; Rohrer was a unique situation and the Supreme Court of New Jersey's ruling is inapplicable to the current matter. Further, there was no question as to liability in Rohrer unlike the present matter.

Appellant Failed to Produce Evidence as to Causation

Appellant has failed to demonstrate any causation on the part of the Borough for any alleged physical damage to the residence. The Engineering Evaluation relied upon by Appellant fails to meet the criteria set forth by R. 4:17-4(e) as it fails to draw any causal relationship between Respondent's construction activities and alleged damage to Appellant's residence; only attempting to call into question the conclusions reached by Respondent's inspection reports without providing any conclusions or opinions of its own. As the New Jersey Supreme Court has held, the court's function is to distinguish scientifically sound reasoning from that of the self-

validating expert, who uses scientific terminology to present unsubstantiated personal beliefs. Landrigan v. Celotex Corp., 127 N.J. 404, 414 (1992).

The Supreme Court states, "those factual determinations [of the trial court] are amply supported by substantial credible evidence in the record." Rohrer, *supra* at 464. Appellant produced no such credible evidence that any physical damage to the residence was caused by vibrations from the construction activities near the residence.

The Watermen Report only states, "The Owner of the Subject Property has reported that damage occurred to the existing dwelling on the property during construction due to vibration impacts of the work." Da315. No further information or analysis is provided by the Watermen Report as to the vibration thresholds; no data is provided to support the speculative statement that the vibrations which exceed the maximum levels set forth in the USBM Report were connected to the start of the construction project; e.g., the delivery of the "large stones up to 7 tons in weight" but rather uses vague, generalize terms as "**typical** activities" and "this activity is **typically** among the most vibration-inducing activities . . ." Da316 [emphasis added]. The Watermen Report provides no data as to the delivery schedule of the construction materials (which the Watermen Report vaguely associates with increased vibrations) to provide the necessary correlation between any increased vibrations and the delivery of construction materials.

The Watermen Report also alleges that statements by Appellant as to the condition of the home pre-construction were not taken into account during the post-construction inspection. Da315. This argument is contradicted by the language of the Post-Construction Inspection Report itself which clearly reflects and considers the complaints of the homeowner. Da211. For the interior post-construction inspection of the Living Room, the Post-Construction Inspection Report includes Defendant's complaints yet found the conditions to be consistent with those pre-construction; "Homeowner stated the door to the kitchen does not open all the way due to a shift in the floor. **Documented conditions of the post-inspection are consistent with the pre-inspection** conducted on September 5, 2018 by Dayton Inspection Services." Da317 [emphasis added].

The Post-Construction Inspection Report also reflects that Appellants did not allow the inspectors access to the second floor during the Pre-construction Inspection:

> **The 2nd floor had no access and was not permitted to enter or be documented during the pre-construction inspection as the homeowner stated it was being cleaned due to guests arriving for an AirBnb stay**.
>
> The post-inspection documented the homeowners concerns and photographs were taken to support those areas.
>
> Upon entering the bedrooms and hallway areas, the homeowner stated that separations had developed within the plaster, a bedroom door was stuck when closed, and floor shifted at the north end of the home.

Da220 [emphasis added].

Obviously, the homeowner's complaints cannot be validated by the inspectors as they were not allowed to inspect the complained-of areas during the pre-construction inspection. The trial court issued a detailed Statement of Reasons in support of its rulings, holding:

> **The court finds those damages claimed here, for damage to the structure on the remainder from (in)actions from third parties performing work during the public project, is beyond the line of what is compensable as just compensation**. The claimed damage to the house on defendant's remaining property from vibration during construction of the seawall is not damages as a consequence of the taking. Rather, **defendant seeks damages as a consequence of the manner in which a project was performed or carried out by third parties**. Such issues may be the subject of a separate litigation that may include other necessary parties and full discovery.

Da400 [emphasis added].

For the foregoing reasons, the trial court's order barring Appellant from seeking damages related to construction activities dated August 6, 2021 should be affirmed.

POINT VI

APPELLANT CANNOT BE COMPENSATED FOR OFF-SITE CONDITIONS (4T & 5T)

The law relied upon in Point III applies equally here; the issue of increased storm vulnerability, loss of view and privacy were all dealt with by the court in a single motion. 4T & 5T. While Appellant has chosen to divide these subjects into

separate point headings, the same reasoning applies: Appellant cannot be compensated for conditions not located upon his own Property. See, Karan, *supra*.

The portion of the seawall complained of in Appellant's appraisal is not located upon the subject Property; the trial court therefore properly barred Appellant from seeking damages stemming therefrom in the form of loss of view or privacy and was properly barred from relying upon that appraisal. The Wade Appraisal cited to an "elevated ramp" constructed upon the Borough's property as the reason Appellant lost views and privacy. Da287. However, as discussed in Point III, Appellant cannot be compensated for off-site conditions.

The "elevated ramp" referred to is located upon the Borough's property. This statement is directly on point with the Weiswasser court's reasoning cited in Point III – Appellant is barred from seeking damages to his remainder property resulting from activities on the Borough's property which was never owned by Appellant and thus outside of the 3,334 sf easement acquired in Appellant's property. Hence, Appellant is not entitled to damages as a result of alleged loss of view, privacy and wave activity from the construction of the new seawall and ramp on the Borough's adjacent property as it is outside of the 3,334 SF easement acquired in Appellant's property.

Therefore, the trial court properly concluded Appellant was barred from seeking compensation for loss of view and privacy due to conditions not located upon Appellant's Property.

CONCLUSION

For the foregoing reasons, this Appellate Division should affirm the trial court's rulings and deny all relief sought by Appellant.

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Dated: March 18, 2024

FILED, Clerk of the Appellate Division, April 15, 2024, **A-000356-23**

BOROUGH OF MONMOUTH BEACH, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY Plaintiff	: : : : : :	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: DOCKET NO: A-000356-23
vs.	: :	CIVIL ACTION
LOUIS P. TSAKIRIS, PROVIDENT BANK, FRANK MARX ADMINISTRATOR OF THE SMALL BUSINESS ADMINISTRATION AND BOROUGH OF MONMOUTH BEACH Defendants	: : : : : : :	On Appeal from a Final Judgment of the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. MON-L-3205-18 **Sat Below:** **Hon. Henry P. Butehorn, J.S.C.** **Hon. Owen C. McCarthy, J.S.C.**

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

LEGAL ARGUMENT

POINT I

PLAINTIFF IMPROPERLY ATTEMPTS TO SHIFT BLAME ONTO THE DEFENDANT FOR PLAINTIFF'S OWN CARELESSNESS (Da80-85). 3

POINT II

DESPITE THE FACT THAT PLAINTIFF IS UNDER A LEGAL DUTY TO PROVIDE AN ACCURATE AND UNAMBIGUOUS DESCRIPTION OF THE EASEMENT, THE TRIAL COURT RULING REQUIRES THAT DEFENDANT PAY FOR PLAINTIFF'S "MISTAKE", A RESULT THAT IS CONTRARY TO THE BODY OF JURISPRUDENCE RELATED TO "JUST COMPENSATION".(Da154-155;160). 5

POINT III

THE DEFENDANT'S EXPERT SHOULD HAVE BEEN PERMITTED TO TESTIFY AS TO THE INCREASED VULNERABILITY OF WAVE OVERTOPPING AND LOSS IN VIEW (Da505; 6T23:1-24:8; Da446-447; 5T 36:19-38:10) 7

POINT IV

THE OPINION OF DEFENDANT'S COASTAL ENGINEERING EXPERT WAS NOT NET OPINION (Da505; 6T 23:1-24:8). 9

POINT V

VIBRATIONS FROM THE SEAWALL PROJECT CONSTRUCTION ARE COMPENSABLE DAMAGES IN CONDEMNATION (Da390-400). 13

CONCLUSION 15

FILED, Clerk of the Appellate Division, April 15, 2024, **A-000356-23**

Orders Subject to this Appeal:

Order and Statement of Reasons Permitting the Filing of Amended Complaint Filed 03/27/20 .... Da80

Order In Part Denying Defendant's Expert Fees and Statement of Reasons Filed 01/08/21 .... Da154

Order Barring Damages to Property Sustained from Vibrations and Statement of Reasons Filed 08/06/21 .... Da391

Order Granting Plaintiff's Motion to Exclude Loss of Ocean View and Privacy Filed 01/28/22 .... Da446

Order Barring Defendant's Appraiser from Relying at Trial on the Raichle Engineering Report [as to enhanced wave overtopping] Filed 10/07/22 .... Da505

TABLE OF AUTHORITIES

Cases

Baumann v. Marinaro,
95 N.J. 380 (1984) 5

Bellardini v. Krikorian,
222 N.J. Super. 457 (App. Div. 1988) 10

Borough of Harvey Cedars v. Karan,
214 N.J. 384 (2013) 7,8

City of Ocean City v. Maffucci,
326 N.J. Super. 1, (App Div.1999) 8

Creanga v. Jardal,
185 N.J. 345 (2005) 9

Graziano v. Grant,
326 N.J. Super. 328(App. Div. 1999) 7

Johnson v. Salem Corp.,
92 N.J. 78 (1984) 10

Manning Eng'g.v. Hudson Cty. Park Comm'n,
74 N.J. 113 (1977) 5

Rosenberg v. Tavorath,
352 N.J. Super. 385 (App. Div. 2002) 10

Rubanik v. Witco Chem. Corp.,
242 N.J. Super. 36 (App. Div. 1990) 10

State v. Freeman,
223 N.J. Super. 92 (App. Div. 1988) 9

State, by Com'r Of Transp. v. Carroll,
123 N.J. 308 (1991) 13,14

State. v. Silver,
92 N.J. 507 (1983) 13

State v. William G. Rohrer,Inc.
80 N.J. 462 (1979 14

Constitution

U.S. Const. amend. v; xiv 6

N.J. Const. art. 1, par. 20 6

Court Rules

R. 4:50-2 5

R. 4:50-1(f) 5

INDEX TO THE AMENDED APPENDIX

VOLUME I (Da1 to Da189)

Verified Complaint Filed 09/05/18 .... Da1

Exhibit A (legal description/map) Da11/13
Exhibit B (value “recapitulation) Da15

Declaration of Taking Filed 09/05/18.................................... Da16
Exhibit A (legal description).. Da11
Exhibit B (map) Da13

Order For Payment Into Court and Possession
Filed 09/24/18 .... Da19

Answer, Separate Defenses, Jury Demand,
Designation of Trial Counsel Filed 10/17/18.......................... Da21

Certification of Paul V. Fernicola, Esq. in Reply
and Further Support of Order to Show Cause
Filed 11/09/18 .... Da26
Exhibit A (legal description).. Da11
Exhibit B (map) Da13
Exhibit C (unreported opinion of
Minke Family Trust v. Tp. of Long Beach, etc.
App. Div. decided 08/20/18
Docket Nos. A-2660-15 T3; A-4036-15T3)
Not provided.

Peter H. Wegener’s Letter Withdrawing Defendant’s Opposition to
Order for Judgment and Appointing Commissioners
Filed 11/13/18 .... Da28

Order for Judgment and Appointing Commissioners
Filed 11/21/18 .... Da29

Report of Commissioners Filed 06/21/19 .... Da31

Defendant Tsakiris’ Notice of Appeal From Award of
Commissioners and Jury Demand Filed 06/26/19.................. Da35

Peter H. Wegener E-mail Transmitting Defendant’s Original
Appraisal Report (with planning report) Dated 01/30/20 .... Da37

e-Courts Notice of 02/18/20 Trial Date

FILED, Clerk of the Appellate Division, April 15, 2024, **A-000356-23**

(adjourned from 11/12/19) Dated 11/07/19 .... Da38

Peter H. Wegener Letter Requesting 2/18/20 Trial be adjourned due to unavailability of Plaintiff's counsel Filed 02/12/2020 .... Da39

Motion to Amend

Plaintiff's Notice of Motion to Amend Complaint Filed 02/26/20 .... Da40

Certification of Robert Moore, Esq. In Support of Plaintiff's Motion to Amend Complaint Filed 02/26/20 .... Da43
Exhibit 1 Verified Complaint Da1
Exhibit 2 Proposed Amended Verified Complaint Da46
Exhibit 1 (legal description) Da56
(map) Da58
Exhibit 2 (recapitulation) Da15
Exhibit 3 Proposed Amended Declaration of Taking) Da60
Exhibit 1 (legal description) Da56
Exhibit 2 (map) Da58
Exhibit 4 (R. Moore's 02/24/20 e-mail Da64
with draft consent order to amend attached)
Exhibit 5 Peter H. Wegener's Letter Dated 02/25/20 declining consent Da68

Plaintiff's Certification of Julie Nastasi In Further Support of Motion to Amend Filed 03/24/20 .... Da69

Order and Statement of Reasons Permitting the Filing of Amended Complaint Filed 03/27/20 .... Da80

Amended Verified Complaint Filed 04/20/20 .... Da86
Exhibit A (legal description) Da56
Exhibit B (map) Da96
Amended Declaration of Taking Filed 04/20/20 .... Da97
Exhibit A (legal description) Da100
Exhibit B (map) Da101

Motion for Expert Fees

Defendant's Notice of Motion For Extension of Time to Serve Expert Reports and For Other Relief [reimbursement of expert fees]Filed 12/03/20 .... Da102

Peter H. Wegener, Esq. Certification in Support of Motion and For Other Relief [Re: reimbursement of expert fees] (without exhibits) Filed 12/03/20................................ Da104

Louis Tsakiris Certification in Support of Motion (without exhibits) Filed 12/03/20 .... Da107

Defendant's Letter Brief Excerpts in Support of Motion for Expert Fees Filed 12/03/20 .... Da112

Plaintiff's Notice of Cross-Motion to Bar Defendant From Providing Appraisal Report and Testimony at Trial Filed 12/10/20 .... Da115

Certification of Paul V. Fernicola, Esq. in Support of Plaintiff's Motion to Bar and In Opposition to Defendant's Motion Filed 12/10/20 .... Da118
  Exhibit G (excerpts from plaintiff's appraisal report)...... Da133
  Exhibit H (photographs/map)... Da139

Certification of Peter H. Wegener, Esq. (in Opposition to Plaintiff's Cross-Motion) Filed 12/30/20............................. Da144
  Exhibit A (preliminary review by A. Raichle, P.E. Dated 12/29/20) Da148,332

Defendant's Letter Brief Excerpts in Further Support of Expert Fees Filed 12/30/20 .... Da149
Order (In Part Denying Defendant Expert Fees) and Statement of Reasons Filed 01/08/21 .... Da154,160
Order Denying Plaintiff's Cross-Motion to Bar Defendant's Appraisal Report and Testimony Filed 01/08/21 .... Da164

Motion to Exclude Vibrations Damage

Plaintiff's Notice of Motion to Bar Defendant's Expert Reports Related to Physical Damage to the Property Filed 07/07/21 . Da166

Certification of Robert Moore, Esq. In Support of Plaintiff's Motion to Bar Filed 07/07/21 .... Da169

Exhibit 1 (Verified Complaint) Da1

Exhibit 2 (excerpts from Plaintiff's Appraisal Report)................................ Da177

Exhibit 3 (Vibrations Monitoring Data from locations in Sea Bright) (not provided)

Exhibit 4 (Report of Andrew Raichle, P.E. Dated 04/07/21) Da183,311

Exhibit 5 (Excerpts from Defendant's Appraisal Report by Gary Wade, M.A.I. Dated 09/05/18) Da185

VOLUME II (Da190 to Da389)

Exhibit 6 (Vibration Monitoring Data report generated 09/21/18) Da191

Exhibit 7 (Post Construction Interior Inspections 05/13/19; 06/14/19)............................ Da211

Exhibit 8 (Plaintiff Counsel Cover Letter filing Defendant's Appraisal Report by Gary Wade Dated 05/06/21(includes A. Raichle of Watermen, LLC dated 04/07/21) (Filed 07/28/21) Da233;Da235

Defendant's Objection to Plaintiff's Motion to Bar Evidence and Cross-Motion for Discovery Filed 07/28/21 ... Da323

Certification of Peter H. Wegener, Esq. In Opposition to Motion to Bar and In Support of Cross-Motion Filed 07/28/21 .... Da325

Certification of John J. Reilly, Esq. In Opposition to Motion to Bar and In Support of Cross-Motion Filed 07/28/21 .... Da327

FILED, Clerk of the Appellate Division, April 15, 2024, **A-000356-23**

Exhibit A Raichle preliminary review 12/29/20.... Da331
Exhibit B Raichle Cost to Cure Estimate 04/21/21 Da336
Exhibit C Defendant's Appraiser's Supplemental Report Dated 07/28/21 .... Da340
Exhibit D Vibrations Monitoring Pre-Construction Inspection 09/07/18............................ Da344
Exhibit E Wolfe Cost Proposal Dated 07/24/20 .... Da321
* * *

Supplemental Certification of Robert Moore, Esq. In Further Support of Motion to Bar Filed 08/02/21 .... Da363
Exhibit 1 Verified Complaint Da1
(form of) Order to Show Cause Filed 9/24/18.................................. Da370
Case Information Statement Dated 09/05/18................................ Da373
Exhibit 2 Order to Show Cause Filed 09/24/18. Da375
Exhibit 3 Order for Payment into Court and For Possession Filed 9/24/18 .... Da379
Exhibit 4 Order for Judgment and Appointing Commissioners Filed 11/21/18 .... Da29
Exhibit 7 Amended Verified Complaint Filed 08/02/21 .... Da86
Exhibit 8 Plaintiff's Certification of Paul Fernicola, Esq. Filed 07/08/20 .... Da382
Exhibit 13 Defendant's Notice of Motion for Extension of Time and For Other Relief Filed 12/03/20 .... Da102
Exhibit 14 Plaintiff's Notice of [Cross] Motion to Bar Defendant from Providing Experts at Trial And Certification Filed 12/10/20...... Da115
Exhibit 15 Order (inter alia, Denying Expert Fees) Filed on 01/08/21 .... Da154

VOLUME III (Da390 to Da521)

Order Barring Portions of Defendant's Appraisal Report And Engineering Evaluation [Vibrations Damage] and Statement of Reasons Filed 08/06/21 .... Da390

Motion to Exclude Damages for Loss of Ocean View and Increased Vulnerability to Wave Overtopping

Plaintiff's Notice of Motion to Bar Defendant's Engineering Report Filed 12/01/21 .... Da401

Certification of Robert Moore, Esq. In Support of Motion to Bar Filed 12/01/21 .... Da404
Exhibit 1 Amended Verified Complaint Da86
Exhibit 2 Excerpts from Plaintiff's Appraisal Report Da411
Exhibit 3 Raichle 04/07/21 Engineering Report... Da310
Exhibit 4 Wade Appraisal Report Dated 05/06/21 Da235
Exhibit 5 Review of Engineering Evaluation Impacts of Seawall Construction prepared by Watermen, LLC (A. Raichle) by Jon K. Miller, PhD, Dated 10/21/21 .... Da418

Certification of John J. Reilly, Esq. In Opposition of Motion to Bar Raichle Filed 01/13/22 .... Da433
Exhibit A 12/29/20 Raichle Report Da331
Exhibit B 04/07/21 Raichle Report Da310
Exhibit C Andrew Raichle, P.E. Curriculum Vitae Da436

Order Granting Plaintiff's Motion to Exclude Loss of Ocean View and Privacy and Denying, without Prejudice, Plaintiff's Motion to Preclude Owner's Engineer as Net Opinion Filed 1/28/22 .... Da444

Motion to Exclude Increased Wave Overtopping Vulnerability

Plaintiff's Notice of Motion to Bar Defendant's Motion to Exclude Increased Wave Overtopping Vulnerability Engineering Report Filed 8/10/22 .... Da446

Certification of Paul Fernicola, Esq. In Support of Plaintiff's Motion to Bar Raichle's Engineering Report Filed 8/10/22 .. Da448
Exhibit 1 Raichle 04/07/21 report Da310
Exhibit 2 Miller 10/21/21 report Da418
Exhibit 3 03/01/22 Deposition Transcript of A. Raichle .. Da456

Defendant's Certification of John J. Reilly, Esq. In Opposition to Plaintiff's Motion Filed 09/01/22 .... Da499
Exhibit A Curriculum Vitae of A. Raichle Da436
Exhibit B 12/29/20 Preliminary Report of A. Raichle Da331
Exhibit C 04/07/21 Report of A. Raichle Da310
Exhibit D Email of John Reilly Dated 04/09/21 Providing Plaintiff's Counsel Via Drop Box eight attachments to Mr. Raichle 04/07/21 Engineering Evaluation Da502

Order Barring Defendant's Appraiser from Relying at Trial on the Raichle Engineering Report (wave overtopping) Filed 10/07/22 .... Da503

Consent Order Final Judgment Filed 08/22/23 .... Da505

Defendant's Notice of Appeal Filed 10/04/23 .... Da508

Defendant's Amended Notice of Appeal Filed 10/10/23 .... Da513

Certification of Transcripts Completion and Delivery Filed 11/02/23 .... Da519

Preliminary Statement

Plaintiff Borough of Monmouth Beach's ("Plaintiff") opposition to Defendant-property owner, Louis Tsakiris' ("Defendant") appeal is rife with misstatements and mischaracterizations of the matter before the Appellate Division.

Throughout its opposition brief, Plaintiff attempts to improperly shift blame for its own carelessness onto Defendant, claiming that Defendant improperly and, in an effort to gain a windfall, served expert planning and appraisal reports based on an "obvious typographical error" of which the Defendant had "actual knowledge." There is no support for the claim that the Defendant had actual knowledge or even an inkling of the error in the description of the taking. The error contained within the metes and bounds description affixed to the Plaintiff's Verified Complaint and Declaration of Taking was not obvious, on paper or on the site, nor is the error properly categorized as a simple "typographical" error. It was the Plaintiff's burden to ensure its filing was correct to adequately put the Defendant on notice of the taking. The Defendant is not a land surveyor and is not able to assess a 60-foot difference simply based upon a map or observation of the construction area without the benefit of a survey or expert review. The 117.65-foot distance was included in the description of the taking set forth in the recorded Declaration of Taking and in the Plaintiff's initial Verified Complaint. (Da001, Da016, Da145). During the

litigation, representatives of the Plaintiff made numerous statements that the project was a "repair and replacement" of the Defendant's then pre-existing seawall. (Da145). Defendant's existing seawall extended to, at, or near the taking area as shown on the map. After construction was completed, there was a site inspection that was performed by Defendant's counsel without the benefit of a survey, which was confusing to Defendant's counsel, and appeared to be inconsistent with the taking. (Da145).

Defendant's planner realized the inconsistency between the metes and bounds description and the taking map after going through the process of preparing his report and reviewing Plaintiff's documentation, but that determination was one of inconsistency, not that the metes and bounds description was wrong. (Pa31). Defendant's expert was not tasked with determining if the metes and bounds description was correct. That was the obligation of the Plaintiff.

Defendant sought damages, including damages to Defendant's home due to construction vibrations and loss of view and privacy, from the project construction, which the Law Division improperly excluded. Project impacts are relevant in calculating just compensation, and the loss of view and the vibrations damage to the house, reasonably calculable and actually foreseeable, should have been permitted to ensure the Defendant his constitutional right to just compensation.

The Law Division's exclusion of the engineering report of Defendant's expert, Andrew Raichle, P.E., as to the increased vulnerability to wave overtopping onto the subject property because Mr. Raichle did not perform the complex calculations, which Plaintiff would have preferred, was also error. Such technical scientific data was not required to support Defendant's expert opinion in this case.

In this matter, the Law Division's rulings improperly denied Mr. Tsakiris from having the jury decide just compensation for the damages to which he was entitled. As such, this matter should be remanded for further consideration by the Law Division.

LEGAL ARGUMENT

POINT I

PLAINTIFF IMPROPERLY ATTEMPTS TO SHIFT BLAME ONTO THE DEFENDANT FOR PLAINTIFF'S OWN CARELESSNESS (Da80-85).

Plaintiff's professional land surveyor, its business administrator and its attorney reviewed and approved the complaint in this matter. (Da8-12). Plaintiff obtained title to and possession of the easement by the declaration of taking and deposit of its estimate of compensation into court. (Da16;19). Plaintiff obtained entry of final judgment of proper exercise of eminent domain for the easement as described. (Da29). Plaintiff has submitted no authority or reasonable

argument for the proposition that the Defendant, as opposed to Plaintiff, should be held responsible for Plaintiff's own mistake and carelessness.

Defendant is not a land surveyor and is not qualified or able to assess a 60-foot difference simply based upon a map or observation of the construction area without the benefit of a survey, deed description, or expert analysis. The Defendant cannot assume that the easement only includes the visible site improvement of the seawall, as argued by the Plaintiff. The description in the complaint provides for an area to maintain and replace the seawall.(Da012) [1]This disparity was only recognized when Defendant's planner prepared his report acknowledging the inconsistency. Nonetheless, it was not the Defendant's legal duty to ensure the taking was accurately described; it was the duty of the Plaintiff.

As a result of the carelessness of the Plaintiff, the parties engaged in an excess of a year of litigation. Not until receipt of Defendant's expert report and not before did Plaintiff seek to amend the Complaint to correct its inaccurate description. Plaintiff argues that its error was "obvious," and that the owner had "actual knowledge" of the true and correct description of the taking. Plaintiff itself should have recognized the error. Nonetheless, despite the prejudice and

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[1] Note, that the provisions for maintenance and replacement was left off the amended description. Hardly an obvious error.

unwarranted costs to the Defendant, the Law Division granted Plaintiff's motion to amend.

In granting Plaintiff's motion to amend, the trial court improperly considered the Plaintiff's motion as an amendment to a pleading under R. 4:9-1 (Da083). Since Plaintiff was seeking to modify the final judgment of proper exercise of eminent domain due to a mistake, Plaintiff was only properly able to obtain relief within a year under R. 4:50-2. Relief from judgment as contemplated by R. 4:50-1(f), which the Court relied on, requires exceptional circumstances which would warrant relief from judgment. "Because of the importance that we attach to the finality of judgments, relief under Rule 4:50-1(f) is available only when 'truly exceptional circumstances are present'" and only available "when the court is presented with a reason **not included**[2] among any of the reasons subject to the one year limitation." Baumann v. Marinaro, 95 N.J. 380, 395 (1984) (quoting Manning Eng'g, Inc. v. Hudson Cty. Park Comm'n., 74 N.J. 113, 120 (1977). Exceptional circumstances did not exist in the matter at hand. The Law Division granted relief from judgment under R. 4:50-1(f) even though Plaintiff's amendment was solely based upon a "mistake." This was improper. As a result of Plaintiff's error, the Defendant property owner was penalized by having incurred significant additional and unnecessary expert fees.

[2] Emphasis added.

POINT II

DESPITE THE FACT THAT PLAINTIFF IS UNDER A LEGAL DUTY TO PROVIDE AN ACCURATE AND UNAMBIGUOUS DESCRIPTION OF THE EASEMENT, THE TRIAL COURT RULING REQUIRES THAT DEFENDANT PAY FOR PLAINTIFF'S "MISTAKE", A RESULT THAT IS CONTRARY TO THE BODY OF JURISPRUDENCE RELATED TO "JUST COMPENSATION".(Da154-155;160)

An award of reimbursement for expert witness fees related to Plaintiff's error should be permitted in this case. Pursuant to the Federal Constitution and the Constitution of the State of New Jersey the landowner must be made whole as a matter of equity. See U.S. Const. amend. v; xiv; N.J. Const. art. 1, par. 20. While the constitutional mandate of just compensation generally does not include a property's owners litigation expenses, an exception should be made where, as here, an error of condemnor, who stands in a superior position to that of the property owner, engages in flawed litigation which results in the property owner incurring unnecessary expenses. There has been a manifest injustice by the failure to have awarded the Defendant his expert fees as a result of Plaintiff's mistake.

Plaintiff's carelessness in commencing this action based on its erroneous metes and bounds description caused the Defendant to incur unnecessary and significant expert expenses and imposed an inequitable and an unfair burden upon the Defendant. "Applying principles of fairness and justice, a judge sitting in a court

of equity has a broad range of discretion to fashion the appropriate remedy in order to vindicate a wrong consistent with principles of fairness, justice, and the law." Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999).

Under all of the facts and circumstances of this case, substantial justice will prevail only if Defendant is awarded reimbursement for expert fees necessitated by the Plaintiff's carelessness in this case.

POINT III

THE DEFENDANT'S EXPERT SHOULD HAVE BEEN PERMITTED TO TESTIFY AS TO THE INCREASED VULNERABILITY OF WAVE OVERTOPPING AND LOSS IN VIEW (Da505; 6T23:1-24:8; Da446-447; 5T 36:19-38:10)

Plaintiff's opposition to Defendant's appeal largely ignores the applicability of Borough of Harvey Cedars v. Karan, 214 N.J. 384 (2013), and attempts to classify Defendant's position as seeking to greatly expand upon the parameters of Karan. This is simply not true. Defendant does not seek expansion of Karan; Defendant only seeks its application. In the context of partial takings, Karan held that a calculation of just compensation "must be based on consideration of all relevant, reasonably calculable, and non-conjectural factors that either decrease or increase the value of the remaining property." Pursuant to Karan, the determination of just compensation is no longer limited to the taking but is to consider impacts of the overall public project, whether positive or negative, provided such impacts are reasonably calculable and non-conjectural. All

competent evidence of value "relevant to any conditions caused by the project" must be considered.

When a condemning authority takes a portion of a landowner's property, it is obligated to pay compensation not only for the part taken, but also for any loss in value to the property not being taken in connection with the project. Contrary to Plaintiff's argument, this position is supported by City of Ocean City v. Maffucci, 326 N.J. Super. 1 (App. Div. 1999). In Maffucci, the Court held that the property owner is entitled to recover "the difference in the fair market value of his property in its 'before' condition and the fair market value of the remaining portion thereof after the construction of the improvement on the portion taken." (Id. at 10). Relevant factors include, but are not limited to, "view, access to beach property, freedom from noise, etc." Ibid. Thus, Maffucci supports consideration of project factors such as increased wave overtopping onto the property and loss in ocean view from the property when determining just compensation. Since the new seawall will likely result in an increased vulnerability of wave overtopping onto Defendant's property, this is a factor that should have gone to the jury for consideration in calculating just compensation. The Karan case was decided after Maffucci and allows consideration of the Maffucci damages from project impacts beyond the subject property. Thus, applying Karan to Maffucci, loss in view is compensable even where the project impact is from offsite, since consideration of the project

impacts requires consideration of both the negative and positives effects to the property owner.

Based on the foregoing, it is respectfully submitted that the court erred in granting plaintiff's motion to exclude damages for the property's increased vulnerability to wave overtopping and loss in view.

POINT IV

THE OPINION OF DEFENDANT'S COASTAL ENGINEERING EXPERT WAS NOT NET OPINION (Da505; 6T 23:1-24:8).

The trial court improperly excluded the engineering report of Defendant's expert, primarily on the basis that Defendant's expert did not perform complex calculations in concluding that Defendant's property had an increased risk of wave overtopping after the completion of the project. Plaintiff argued that Defendant's expert report "doesn't contain any data or calculations." (Plaintiff's Brief at 25). However, technical data and complex calculations are not required to support Defendant's expert opinion in this case.

An expert's testimony should not be excluded merely "'because it fails to account for some particular condition or fact which the adversary considers relevant.'" Creanga v. Jardal, 185 N.J. 345, 360 (2005) (quoting State v. Freeman, 223 N.J. Super. 92, 116 (App. Div. 1988). The expert's failure "to give weight to a factor thought important by an adverse party does not reduce his testimony to an inadmissible net opinion if he otherwise offers sufficient reasons which logically

support his opinion." Rosenberg v. Tavorath, 352 N.J. Super. 385, 402 (App. Div. 2002). Such omissions may be "a proper 'subject of exploration and cross-examination at a trial.'" Ibid. (quoting Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 55 (App. Div. 1990). "Evidential support for an expert opinion is not limited to treatises or any type of documentary support but may include what the witness has learned from personal experience." Rosenberg v. Tavorath, 352 N.J. Super. 385, 403 (App. Div. 2002). The requisite knowledge can be based on either "knowledge, training or experience." Bellardini v. Krikorian, 222 N.J. Super. 457, 463 (App. Div. 1988). N.J.R.E. 703 further provides that expert opinion may be grounded in "facts or data derived from (1) the expert's **personal observations**, **or** (2) evidence admitted at the trial, **or** (3) data relied upon by the expert which is not necessarily admissible in evidence, but which is the type of data normally relied upon by experts." The appropriate limiting factor in cases where an expert relies on experience or observation is the weight of evidence and not exclusion of the evidence. Bellardini, 222 N.J. Super. at 463 (citing Johnson v. Salem Corp., 97 N.J. 78, 91 (1984)).

Andrew Raichle's report and opinions are supported by facts and data. Raichle reported that new configuration of the Seawall Project created a condition that would likely lead to increased flooding and wave overtopping. In pertinent part, he opined that prior to construction, the Defendant's seawall was configured with a gradual, curved return at its southern limit which served to

> a) gradually direct northerly-incident waves and associated water flow towards the south and off the Subject Property (acting as a 'relief valve"), and b) protect the Subject Property's northern "flank" against waves and associated water flow from southerly-incident waves.
>
> (Da331).

Raichle opined that the elimination of the curve by the project reduced the natural relief valve functionality. Raichle also rendered an opinion that new beach access configuration projects further east onto the beach than the adjoining seawalls, creating a "pocket" discontinuity in the seawall, and that this pocket would likely result in waves and water flow to be directed onto Defendant's property. He supported his report during his deposition, stating that the beach access point created a conduit for wave and current energy to travel up the revetment and onto Defendant's property. (Da475). In his physical observations of the site, Raichle addressed the elevation difference between the Defendant's property's seawall and the crest of the project and opined that the height difference further exposed the Defendant's property to additional water flows and overtopping. (Da331). Raichle testified that the elevation of the access area was 18 feet, whereas the height of the seawall on the Defendant's property after the project was only 15 feet, leading to the likely increase in overtopping. (Da473). Thus, Raichle's opinions were based upon his physical observation of the difference between the before condition and the after condition. He provided the whys and wherefores of his opinion.

Plaintiff argues that Defendant's expert did not provide detailed calculations, charts, and technical scientific data to provide additional support for his conclusion that the project will increase the likelihood of wave overtopping on Defendant's property. Defendant's expert was not required to do so. Raichle's opinion was based upon his experience, expertise, and personal observations of the subject property and project, and he is qualified and able to render an opinion, which he sufficiently supported in detail, that the project will cause an increase in the likelihood of overtopping. Raichle found it unnecessary to make calculations to reach his conclusions related to the increased vulnerability from a low frequency (50 year) storm. (Da460: 6-461:9; Da464: 1-21). Plaintiff retained its own expert in rebuttal of the conclusions of the Defendant's expert, about which Plaintiff is able to cross-examine Defendant's expert at trial. The proper limiting factor here should have been the weight of evidence and not the exclusion of the evidence entirely. See Bellardini, 222 N.J. Super. at 463.

Based on the foregoing, it is respectfully submitted that the court below erred in excluding Mr. Raichle's opinion as a net opinion.

POINT V

VIBRATIONS FROM THE SEAWALL PROJECT CONSTRUCTION ARE COMPENSABLE DAMAGES IN CONDEMNATION (Da390-400).

The structural damage to the owner's home from the project vibrations are recoverable in this condemnation action.

In Maffucci, the Court held that the owner is entitled to recover "the difference in the fair market value of his property in its 'before' condition and the fair market value of the remaining portion thereof after the construction of the improvement on the portion taken." (Id. at 10). Relevant factors include, but are not limited to, "view, access to beach property, freedom from noise, etc." Ibid.

Maffucci acknowledges that property damage as a result of the project is relevant when determining just compensation. Defendant's damages should have gone to the jury for consideration in calculating just compensation. Damages are not limited to the property that was taken, and consists of offsite project construction activities. In State by Com'r of Transp. v. Carroll, 123 N.J. 308, 327 (1991), the Supreme Court held that "*all* material facts and circumstances" that could influence potential buyers of the remaining parcel should be considered in valuing that property for purposes of determining severance damages. 123 N.J. 308, 327 (1991) (citing Commissioner of Transp. v. Silver, 92 N.J. 507, 515 (1983). The Court also noted that a compensation award should indemnify a landowner as fully as possible,

and that just compensation should be regarded "'from the point of view of the owner and not the condemnor.'" (Ibid.) (quoting Commissioner of Transp. v. William G. Rohrer, Inc., 80 N.J. 462, 467 (1979). The Court has also held that in appropriate cases, "damage from increased traffic noise may be a factor that at the time of the taking demonstrably affects the market value of land." Carroll, 123 N.J. at 327. Thus, property construction vibration damages are similarly compensable as just compensation in a condemnation proceeding.

Here, the vibrations from the delivery, dumping, and placement of tons of boulders to construct the new seawall physically damaged the nearby Tsakiris house. Moreover, the project reasonably foresaw the possibility of actual damage and implemented vibrations monitoring on the Tsakiris property itself during the seawall construction activities. The damage was a necessary, natural, and proximate result of the project.

Mr. Tsakiris is entitled to just compensation for the physical damage to his house from the project construction. Defendant has provided a sufficient basis for causation via the Defendant's reports to the Defendant's expert and the Defendant's own certification. (Da109). Mr. Tsakiris, who has lived in the house on the property for many years, was there during project construction. He personally experienced the house shaking during the project and is prepared to testify as such. (Da107-108) The floor shifted, ceiling plaster separated, and doors went out of plumb. (Da317, 333). Whether or not a jury believes that the

damages were caused by the project or were pre-existing is a matter of weight, not admissibility.

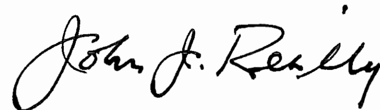
For the foregoing reasons, it is respectfully submitted that the court below erred in excluding just compensation for the physical damage to the house during construction of the seawall.

Conclusion

For these reasons, it is respectfully submitted that the interlocutory orders entered by the Law Division excluding the property owner's evidence at trial be reversed and that the matter be remanded for trial.

Dated: April 15, 2024

Respectfully submitted,



John J. Reilly