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NEW JERSEY DEPT. OF : SUPERIOR COURT OF NEW JERSEY
ENVIRONMENTAL PROTECTION, : LAW DIVISION: CIVIL PART
OFFICE OF FLOOD HAZARD : OCEAN COUNTY
RISK REDUCTION MEASURES, :
Plaintiff, : DOCKET No. OCN L-3290-15
v. : Civil Action
RICHARD TAVASO AND LEANNE :
TAVASO :
Defendants and Intervenor- :
Defendants. :

NEW JERSEY DEPT. OF : SUPERIOR COURT OF NEW JERSEY
ENVIRONMENTAL PROTECTION, : LAW DIVISION: CIVIL PART
OFFICE OF FLOOD HAZARD : OCEAN COUNTY
RISK REDUCTION MEASURES, :
Plaintiff, : DOCKET No. OCN L-3296-15
v. : Civil Action
11 FALLS, L.P. and J.P. :
MORGAN CHASE BANK, N.A. :
Defendants and Intervenor- :
Defendants. :

Decided: August 16, 2017

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Ford, A.J.S.C.

This matter came before the Court on the complaint of the Plaintiff, New Jersey Department of Environmental Protection, Office of Flood Hazard Risk Reduction Measures (hereinafter referred to as the NJDEP) which complaint sought final judgment confirming the exercise of eminent domain and appointing three disinterested condemnation commissioners for the purpose of fixing fair and just compensation for the taking. NJDEP sought to obtain easements to and across property owned by the Defendants for the purpose of constructing a berm and dune project for shore protection purposes, and to allow for public access in and across property owned by the Defendants.

The Defendants are property owners in the Bay Head and Mantoloking area who are opposed to the shore protection project because there exists on or adjacent to their properties a rock revetment which they maintain provides adequate shore protection to their properties and that of other property owners in their communities.

On the return date of the initial order to show cause, this Court considered the arguments raised in opposition to that application by the Defendants and other similarly situated property owners. On March 28, 2016 this Court issued its written opinion, *N.J. Department of Environmental Protection v. 11 Falls LP*, N.J. Super. Ct., Docket NO. OCN-L-3296-15, (Law

Div. Mar. 28, 2016) in which the Court concluded that the NJDEP properly exercised the power of eminent domain to acquire shore protection related easements, in conjunction with the construction and maintenance of 14 mile long dune and berm project along the Atlantic coast of NJ. This decision of the Court was affirmed in State of New Jersey, Dept. of Environ. Prot. V. North Beach 1003, LLC, et als. ___ N.J. Super. ___ (App. Div. 2017) which opinion was approved for publication on June 22, 2017.

The Court however carved out an exception relative to these property owners, in that the preexisting revetment, hereinafter referred to as the Tri Boro Revetment, posed a unique question for resolution by the Court.¹ This Court found that the property owners along the Tri Boro Revetment had raised sufficient indicia of "arbitrariness" to warrant a plenary hearing. These property owners argued that the Tri Boro Revetment, which was privately built and maintained, provided equal if not superior shore protection to the adjacent properties, and therefore the exercise of eminent domain by the NJDEP, including the effort to establish public access easements in conjunction with the shore

¹ After the filing of this litigation and the scheduling of a plenary hearing, the defendant Tavoso settled with the NJDEP. However, that settlement does not render moot the issues presented to the Court by the other defendants, including the intervening defendants.

protection dune and berm project, was an unreasonable, capricious and arbitrary exercise of eminent domain by the governmental entity. The Court found these property owners met a threshold showing of "arbitrariness" which warranted a plenary hearing and opportunity to present evidence of unreasonable, arbitrary and capricious action by the NJDEP. The Court agreed that the Defendants and the subsequent interveners were entitled to a hearing on the issue of whether the actions of the NJDEP were arbitrary, capricious and unreasonable and that the attempted exercise of the power of eminent domain should be denied.

Stated otherwise, the question before the Court is whether or not the NJDEP's taking of private property rights as set forth in the declaration of taking is necessary in the area of the 1.8 mile long Tri Boro Revetment.

The Court established a period for discovery and set a plenary hearing to allow the Defendants and interveners to challenge the right of the NJDEP to take permanent easement interests in their property through condemnation. The issue before the Court, as framed by the Defendants/interveners, was whether "...the proposed taking is unnecessary and superfluous when the existing rock revetment offers shore protection at least equal to if not superior to the dune and berm plan advanced by the DEP, without compromising the efficacy of the

entire project." Slip Op. at 23.

FACTUAL AND PROCEDURAL HISTORY

Defendants, Richard and Leanne Tavoso and 11 Falls, L.P. are the owners of beachfront homes in the Borough of Mantoloking. This Court granted the right to intervene by approximately 50 other property owners in the Point Pleasant Beach, Bay Head and Mantoloking area adjacent to the existing rock revetment. These property owners are all similarly situated.

The facts surrounding the destruction caused by Hurricane Sandy² are well known to all parties, and the Court will not reiterate those circumstances set forth in other rulings by this Court. The nature and extent of the destruction caused to the Jersey Shore, particularly in Ocean County, naturally was a matter of great concern to the public and to government officials. In September 2013 Governor Chris Christie issued an Executive Order No. 140 which established the Office of Flood Hazard Risk Reduction Measures within the NJDEP. The purpose of this Executive Order was to greatly expand the authority of the NJDEP to address the consequences of Hurricane Sandy. The Executive Order also gave the NJDEP responsibility to acquire

² The Court recognizes there is a dispute as to whether or not this storm was a hurricane when it touched land, or was a 'super storm' but for purposes of this decision the Court will reference the storm as Hurricane Sandy.

through eminent domain property "...vital to [Sandy] reconstruction efforts."

The United States Army Corps of Engineers (hereinafter referred to as "USACE") has for many years studied and constructed various shore protection structures throughout the country, including along the coast of New Jersey. For many years prior to Sandy the USACE had designed and obtained authorization for a comprehensive shore protection project along the Ocean County coast. These projects, however, were not fully funded, and this presented an impediment to commencement and completion of the project. After Sandy, Congress appropriated emergency funds which could be used for shore rehabilitation and protection. Congress also revised the local contribution so that the USACE would fund the project, and the local partner, in this case the NJDEP, would pay back its share over the lifetime of the project. This change made it very advantageous to proceed with the shore protection project in partnership with the USACE.

In 2013, the NJDEP entered into a partnership agreement with the USACE to construct and maintain a shore protection project designed by the USACE. Among other things, it was the responsibility of the local partner, in this case the NJDEP, to acquire all interests in property necessary to complete the project. It was under that mandate that the NJDEP commenced to

acquire through eminent domain or through direct negotiation interests in private properties that were necessary to complete the project in question.

Many property owners voluntarily gave the DEP easements over their property to construct and maintain dunes and berms (i.e. beaches) with public access easements. However, the property owners in this matter, consistent with their constitutional rights, declined to voluntarily execute easement agreements. In November 2015 the NJDEP filed this complaint under the authority of the Eminent Domain Act, N.J.S.A. 20:3-1, in order to acquire by permanent easement the right to construct and maintain, under the direction of the United States Army Corps of Engineers (USACE), a berm and dune system on the properties of the Defendants as part of a comprehensive shore protection project.

The genesis of this project dates back to 1987 when Congress adopted the Water Resources Development Act P.L. 99-662 Sec. 103. This law directed the USACE to conduct a feasibility study for a shore protection project that would provide hurricane and storm damage reduction and would protect the communities and the recreational facilities along the Atlantic Coast of New Jersey. One of the six studies authorized by Congress applied to that portion of the Jersey shore located in Ocean County from the Manasquan Inlet in Point Pleasant Beach to

the Barnegat Inlet, at the tip of Island Beach State Park. This is a 24 mile length of shoreline. This area was divided into two "reaches" or sections. The southern reach extended from the Barnegat Inlet to the entrance to Island Beach State Park (ten miles) in Berkeley Township (also known as South Seaside Park). The northern reach extended from the entrance to Island Beach State Park north to the Manasquan Inlet in Point Pleasant Beach (14 miles). The 14 mile northern reach included Point Pleasant Beach, Bay Head, Mantoloking, Brick, Toms River, Lavallette, Seaside Heights, Seaside Park and Berkeley Township.

The USACE recommended no action with regard to the ten mile Island Beach State Park section of the study area. This state park is substantially in its natural state, and has limited structures which predated its establishment as a state park, e.g. the Governor's Beach House. The study cited minimal storm damage reduction benefits as well as New Jersey's decision to preserve this area in its natural state. The proposed dunes are designed to taper off at the northern end of Island Beach State Park.

With regard to the northern reach of the study, the USACE took into account existing storm protection structures. Since 1962, and before the October 29-30, 2012 Hurricane Sandy, there existed a 4275 foot +/- "revetment" along ocean front homes mostly located in Bay Head. This structure was and still is

privately constructed and maintained by the property owners it protects, by private contributions and by the Bay Head Improvement Association. A "revetment" is a type of storm protection structure composed of rocks, boulders, anchored structures and sand that is designed to dissipate wave energy. It is designed to break up the force of the wave actions so as to protect homes, structures, infrastructure and people who are located landward of the revetment.

After Sandy, local residents and property owners obtained approvals from the NJDEP to expand and improve the revetment. As a result, the revetment was improved and extended after Sandy. These improvements included a 1500 foot section built in 2015 from Delaware Avenue in Point Pleasant Beach to Karge Street in Bay Head; a 175-foot section built in 2013 between Egbert Street in Bay Head to Chafey Street in Mantoloking; a 250 foot section south of Chafey street in Mantoloking that preexisted Sandy; and an 1800 foot section built in 2014 between Williams Street and Lyman Street in Mantoloking. The Tri Boro Revetment in its current form is a continuous structure approximately 1.8 miles in length. This construction and improvements were paid for entirely with private funds from the oceanfront property owners or from contributions from private citizens. There is no factual dispute that the cost of this expansion, improvement and construction of the revetment was

between 7 to 8 million dollars.

Hurricane Sandy struck the New Jersey coast on October 29-30, 2012. As previously stated, this storm caused extensive damage to homes, commercial and recreational structures, infrastructure and public utilities. Mantoloking was particularly hard hit, since the power of the storm completely destroyed certain historic beachfront homes, destroyed part of the bridge accessing Mantoloking from the Brick Township mainland, and lifted homes and deposited them in the Barnegat Bay. The storm created a new inlet in Mantoloking that connected the Atlantic Ocean with the Barnegat Bay. It also damaged utility lines including gas and electric, causing extended loss of these utilities in the area.

In response to the devastation caused by Sandy, Congress passed the Disaster Relief Appropriation Act, 2013, P.L. 113-2. This measure appropriated \$3.4 billion for the construction of approved shore protection projects in New Jersey, New York and other states impacted by Sandy, including the Manasquan Inlet to Barnegat Inlet Project. After a review of the status of the project in question, which had been in the design stage for some period of time, the USACE reaffirmed that the project was still " ... technically sound, economically cost effective ... and socially and environmentally acceptable." *USACE Hurricane Sandy Limited Reevaluation Report (June 2014) at page 46. (Exhibit p-*

8).

The NJDEP conducted an independent evaluation of the merits of the project. The NJDEP concluded the proposed shore protection project, consisting of a unified dune and berm project to extend the full 14 miles of the northern reach, was beneficial to the public. The NJDEP found that it was the policy of the state to preserve and protect the beaches along the coast, not only because the tourism industry is an important component of the economy of the state, but also because these beaches represented a natural, cultural and historic resource of the State of New Jersey. In addition, the NJDEP found the project would protect public and private properties; public and private infrastructure, and would mitigate the exposure of the public to a risk of harm caused by flooding and storm damage. The NJDEP thus concluded that the public interest was promoted by the State's participation in this project.

Unlike the USACE, the NJDEP did not conduct a cost benefit analysis of the project. The NJDEP argued that certain benefits of the project were clearly intangible and were not quantified in an economic benefit. However, these benefits, which included greater confidence in the Jersey Shore as a travel destination, were nonetheless positive factors that militated in favor of this project.

The Defendants have criticized the economic model used by

the USACE as well as the NJDEP as being outdated and not based upon verified factual data. While the Court finds that their critique has some merit, the Court also agrees that the NJDEP, in concluding that the merits of the project outweighed the investment, including the intangible benefits of a comprehensive shore protection project, certainly established a reasonable foundation for the decision to move forward with the project.

The traditional cost sharing for USACE projects has always been that the federal partner contributes 65% of the cost and the local partner contributes 35% of the cost. After Sandy, and as an inducement to local government entities to undertake the projects, Congress authorized the USACE to frontload the cost, that is the USACE pays 100% of the cost of the project, and the local entity payback over the lifetime of the project is a 35% contribution. As part of its decision making process, the State of New Jersey clearly evaluated the "once in a lifetime" opportunity to take advantage of this new revised cost sharing formula. This presented a substantial inducement for the State of New Jersey to undertake this particular shore protection project. In addition, the immediacy of the action by the State was underscored by the fact that other states that were impacted by Sandy were competing for their share of federal dollars. This project was ready to move forward for several years, but for the resolution of the issue of funding for the project.

Before this change in the funding formula, the State was not in a financial position to fund through an appropriation its full 35% share of the project. The revised rules for funding created an attractive financial incentive for the NJDEP to commit to the Manasquan to Barnegat Inlet project.

All of these factors certainly combined for the State to conclude that the proposed project was beneficial to the State of New Jersey and was economically viable. The Court cannot conclude that this analysis, even if the position of the Defendants is accepted, that the cost outweighed the benefits, and that the project was in part unnecessary given the existing revetment, rendered that decision arbitrary or unreasonable.

The State and the USACE thus entered into a Project Partnership Agreement dated July 18, 2014. (Exhibit p-9). As part of its cost sharing responsibility, the State was obliged to obtain all property interests needed to complete the project including the proposed easements over the properties owned by the Defendant property owners in this case.

In the meantime, the property owners in Bay Head, Mantoloking and Point Pleasant Beach acted to further ensure the protection of their properties from any Atlantic storms. During 2014 and 2015 various property owners in Bay Head, Mantoloking and Point Pleasant Beach sought and were granted emergency permits to expand and improve the existing 1962 Bay Head

revetment. One of the weaknesses of the existing revetment was that it had been overrun by waves during Sandy. The applicants proposed to the DEP that the height be raised to 21 feet, although ultimately, the design height was compromised at 18 foot NAVD, with 2 feet of sand. In addition, the property owners recognized that there was a need to expand the revetment to the north and south. Therefore, part of the emergency application to the NJDEP included an application to extend the revetment into the southern end of Point Pleasant Beach, north of the existing end of the structure (1200 feet) and to the south, to Mantoloking (3790 feet inclusive of the pre-Sandy 267 foot revetment). After the completion of this work, the revetment or seawall was higher, wider and longer than what existed before Sandy. According to the Defendants, the overall cost of obtaining the emergency authorization for this construction and enhancement together with the cost of these improvements to the 1962 revetment was between \$7 million and \$8 million. The Court accepts that as the amount invested in this project. This was entirely paid for by the oceanfront property owners and by about 900 private contributions.

The Defendants maintain that the improved Tri Boro Rock Revetment provides adequate shore protection to property owners throughout Bay Head and that the proposed dune and berm system advocated by the State and the USACE is unnecessary and

superfluous. The Defendants maintain that the actions of the condemning authority, the NJDEP on behalf of the State of New Jersey, is arbitrary and capricious, and the right to seek a final judgment confirming the proper exercise of eminent domain should be denied by the Court.

STANDARD OF REVIEW

There is a dispute between the parties as to the proper standard of review by the Court.

Defendants maintain that inquiry of the Court should be limited to whether the NJDEP's exercise of eminent domain is arbitrary and capricious because it is not limited to the reasonable necessities of the case. Texas Eastern Transmission Corp. v. Wildlife Preserve, Inc., 48 N.J. 261 (1966). The Supreme Court found that although the Plaintiff in that case had an unquestioned right to acquire property by condemnation, that the Defendant Wildlife Preserve had a right to a plenary hearing on its claim "...that a satisfactory alternate route is available to plaintiff which will not result in such irreparable damage to the preserve." Id. at 269. "Ordinarily where the power to condemn exists the quantity of land to be taken as well as the location is a matter within the discretion of the condemnor. The exercise of that discretion will not be interfered with by the courts in the absence of fraud, bad faith or circumstances revealing arbitrary or capricious action. [citations omitted]

In this connection we hold the view that when private property is condemned the taking must be limited to the reasonable necessities of the case, so far as the owners of the property taken are concerned." Texas Eastern at 269.

This Court found that the submissions of the Defendant property owners established a threshold showing of "arbitrariness" which triggered the right to a plenary hearing to permit the Defendants to fully present proof of its claims, and the right of the NJDEP to rebut that proof. Slip Opinion at 23, March 28, 2016.

The NJDEP allege that the Defendants must prove by clear and convincing evidence that the Department engaged in fraud, bad faith or manifest abuse of the power of eminent domain in order to defeat the right of the NJDEP to acquire easements and interests in property to complete the Manasquan Inlet to Barnegat Inlet Project. The State further maintains that the burden of proof remains with the contesting property owners.

The power to acquire an interest in property by eminent domain is an inherent sovereign power of the State of New Jersey and its political subdivision. The NJ Constitution imposes limits on the authority of the government to exercise eminent domain: first, the State must pay fair and just compensation for the value of the taking; second, the property owner is entitled to the protections afforded by due process of law, and third,

the taking of private property must be for "public use". N.J. Const. Art I, Para. 20. West Orange v. 760 Associates 172 N.J. 564 at 572.

Defendants maintain that once they have offered sufficient evidence of arbitrary and capricious conduct by the State, the burden shifts to the State to rebut that prima facie case of arbitrariness.

In evaluating initially whether or not the party seeking to contest the exercise of eminent domain has met a threshold showing of arbitrariness, the property owner must show by a reasonable preponderance of the evidence that there are facts alleged if proven true would establish their claim. This Court finds the burden however remains with the property owners to prove that the actions of the condemning authority constitute fraud, are unreasonable, constitute manifest abuse or other wrongful conduct. This Court agrees and finds that the burden of proof remains with the party contesting the government's actions and that the burden does not shift to the government to disprove allegations of wrongful conduct that would invalidate the exercise of eminent domain.

Whether the standard is "arbitrary, capricious or unreasonable"; "fraud, bad faith or manifest abuse of power", or that the taking exceeds the "reasonable necessities" is of no consequence when challenging the actions of the condemning

authority. This Court finds that the action of the condemning authority can be found to be arbitrary, capricious or unreasonable if the decision to condemn is the result of fraud, bad faith or manifest abuse of power on the part of the condemnor. This standard, which is grounding in fraud or manifest abuse, is met by clear and convincing evidence, the highest standard used in a civil case burden of proof.

In Bridgewater v. Yarnell, 64 N.J. 211 (1974) and Texas Eastern Transmission corp. v. Wildlife Preserve, 48 N.J. 261 (1966), the court found that upon a prima facie showing of arbitrariness, the contesting property owners have a right to a plenary hearing. Neither case specifically addressed, once the plenary hearing was conducted, what the burden of proof would be. However, in general, a reviewing court is powerless to reverse the exercise of eminent domain unless there is a finding of fraud, bad faith or manifest abuse. West Orange 769 Associates, 172 N.J. 564 at 571. The burden remains with the property owners opposing condemnation to prove fraud, bad faith or manifest abuse of the power of eminent domain.

This Court finds, consistent with the holding in West Orange 769 Associates, the property owners opposing the exercise of eminent domain have the burden of proving by clear and convincing evidence that the NJDEP's exercise of eminent domain was tainted by fraud, bad faith or a manifest abuse of power.

It is not the role of the court, in reviewing the eminent domain decisions of a government entity, to substitute its judgment for that of the condemning authority. In this case, the Defendant property owners have made a very compelling argument that in their opinion the project is superfluous. In this case there is an alternative option to the berm and dune project. This improved private storm protection structure the defendants infer raises concerns about the bona fide intentions of the NJDEP in the exercise of eminent domain. However, even if this Court questions the wisdom of the policy decision to proceed, the Court is obligated to defer to the expertise of the administrative agency and the decision of the government where there is evidence, as presented in this case, that reasonable opinions may differ as to the proper and most advantageous course to solve the problem presented. The expertise of the administrative agency in this area is a factor that the Court must attach great weight. This is the case even if the option chosen by the NJDEP is fairly debatable, or if there exists as in this case a reasonable alternative to the proposed taking.

Evidence Presented on behalf of the Defendants:

A plenary hearing on the claim of the Defendants was conducted before the Court on eight days: February 6, 7, 8, 10, 13, 14, 15 and 16, 2017.

Thomas Gage testified that he was the President of the Bay

Head Improvement Association (BHIA). Mr. Gage testified that an association of residents of Bay Head was first formed around 1898, and that it became more organized in 1910, and was incorporated as a Sec. 501(c) nonprofit corporation around 1932. The Borough of Bay Head does not assume responsibility for the beaches or staff associated with the use of the beaches by the public (e.g. lifeguards) and has delegated that responsibility to the BHIA. This private association is primarily responsible for the beaches that are located along the Atlantic Ocean, and it provides lifeguards; beach cleaning; beach patrol; general maintenance of access points, and provision of equipment as necessary. Funds for these projects is primarily raised through the sale of beach badges to the public. The Bay Head beaches are open to the public. There are no residency or other restrictions on who can buy a badge and use the beaches. The BHIA also engages in a "sand push" every couple of years to replenish and reposition the sand near the revetment. The Borough of Bay Head does not assume any responsibility for the beaches or for maintenance of the revetment.

Robert Hein testified that he is a long term resident of Bay Head and that he is an elected member of the Town Council. He confirmed that the Borough of Bay Head does not spend any money to staff, service, maintain or supply the beaches. Bay Head has adopted a "dune ordinance" which places responsibility

for enforcing maintenance of the dunes on a Dune Enforcement Officer. Mr. Hein testified that when Hurricane Sandy struck, the rock revetment did not extend to the beach in front of his home, which was located across East Avenue and not directly fronting on the beach. As a result, his home he believed suffered more damage than if it had been protected. The home is now located behind the recently constructed northern extension of the 1962 revetment.

Thatcher Brown testified that he is a seasonal resident of Bay Head, and that he has been summering in Bay Head for 69 years, his entire life. His property is located seven houses north of the Mantoloking boundary and is situated directly on the beach. He confirmed that he owns in fee simple the beach in front of his home extending to the mean high water mark, together with a riparian grant that extends the rights of the property owner to the area of the public domain. Before Sandy the rock revetment did not extend to his home, but the southern extension of the revetment after Sandy did include an extension in front of his home. Mr. Brown further testified that after Sandy he had the opportunity to walk the beach and the town to observe what damage was caused to homes and structures within the town of Bay Head.

Mr. Brown described the damages suffered by ocean front homes. He described the storm as "very significant" but the

damage to most of the homes protected by the old revetment was cosmetic. He contrasted this with damage to homes north of Karge Street, which did not have the protection of the revetment, and characterized that damage as there was caused to homes by loss of dunes and over-wash of ocean water. Damage to homes along the ocean in Mantoloking, where there was no revetment before the storm, was "quite massive". T1: 81-82.

Mr. Brown observed that the street ends, where the walkovers to the beach were smaller and therefore did not accommodate the collection of sand under those structures, were weak points and structures close to these areas were damaged to a greater degree than those structures located further away from the street ends.

Mr. Brown further testified that his own home was undamaged from Sandy, although it was located directly oceanfront. He attributed that to the robust sand dunes that were protective of his property from wave action. He did lose 2/3 of the dunes, and desired to rebuild the dunes as soon as possible. He determined that a rock revetment covered by sand was the best way to restore as much as possible the condition of his property before the storm. Mr. Brown ultimately collaborated with other oceanfront residents to construct a revetment of 18 feet height, and covered by 2 feet of sand, as a shore protection structure. He indicated that his first proposal which was rejected by the NJDEP was to construct a 21 foot high revetment with 2 feet of

sand, which he believed would withstand a 500 year storm. The ultimate decision to build the revetment to 18 feet was the product of compromise with representatives of the NJDEP. Ultimately, other homeowners and residents agreed to participate in the project and the result was the Tri Boro Revetment which was built with privately raised funds at a cost of about \$7 million. T1 page 96. In contrasting the conditions along the shore before Sandy and after Sandy (and after the work to extend and enhance the revetment was completed) Mr. Brown testified that most of the damage to property in Bay Head was caused by flooding from the Barnegat Bay, but that the waters did not reach the ocean front properties along East Avenue. Since Sandy, the gaps in the revetment (at the street ends) have been addressed; the height of the revetment was made uniform at about 18 feet; the sand pushes continued; the walkovers were elevated and many ocean front or near ocean front homes have been put on pilings or elevated.

This Court found as credible Mr. Brown's description of the nature and extent of damage caused by Sandy, as well as the efforts of the private community to upgrade the efficacy of the rock revetment.

Lawrence Bathgate testified that he also is a long term year round resident of Bay Head, having lived in an oceanfront home on East Avenue for about 45 years. He testified that he

studied the history of the historic homes in Bay Head, and discovered that Bay Head has more historic oceanfront homes than any other town on the East Coast of the United States. He testified that the Department of the Interior has designated Bay Head as a national historic district. He joined in the efforts to extend and improve the pre-Sandy revetment.

Mr. Bathgate testified that the wave action resulted in carving out or "scouring" behind the revetment. However, his testimony was not consistent with the testimony of other eyewitnesses to the post Sandy conditions. The Court assumes this condition was not evident in the aftermath of Sandy.

Mr. Bathgate testified he opposes the taking of his property to establish a public beach and to construct a dune and berm system for shore protection. Mr. Bathgate testified that the berm and dune project is designed to be "sacrificial", i.e. designed to be destroyed as opposed to structures. It is dependent upon a commitment by the State and by the federal government to fund beach re-nourishment projects in the future. Members of the community do not believe Congress or the State of New Jersey will commit to provide funding for this purpose in times of fiscal crisis. He further expressed the opinion that the right should be reserved to private property owners to protect their own private properties, in the event that the state and federal governments do not meet its financial

obligations to maintain the dune and berm structures. Mr. Bathgate testified that efforts to negotiate such language into the taking documents was unsuccessful. To the extent that the government entities default on their commitment to future beach re-nourishment, he argued that the property owners along the beach would be worse off than they are now in terms of the risk posed by Atlantic storm systems.

The Defendants also relied upon the testimony of several expert witnesses.

Andrew Raichele is a professional engineer who holds licenses in the states of New Jersey, New York and Florida. He has worked in this field for 24 years, and earned his undergraduate degree in civil engineering, as well as his Master's degree in ocean engineering from the University of Delaware. He did his master's thesis on wave overtopping and run up to revetments. His qualifications as an expert in the field of coastal engineering and coastal science was accepted by the Court.

In the aftermath of Hurricane Sandy, Mr. Raichele was retained by the Defendants to perform consulting services to handle an emergency application to the NJDEP to expand and improve the existing 1962 rock revetment in Bay Head. He testified that the height of the revetment is expressed in the North American Vertical Datum, or NAVD, and that elevation 0

NAVD is essentially sea level. The historic section of the 1962 revetment was at NAVD 16. Shortly after Sandy, the NJDEP issued an emergency authorization for the Borough of Bay Head to build the revetment along the Bay Head shoreline. He was originally contacted by Thatcher Brown. He proposed raising the 1962 revetment above NAVD 16, potentially up to 23 feet and included a redesign of the face of the revetment to make it more effective in dissipating wave energy. The emergency authorization permitted the extension of the existing revetment and the NJDEP issued approvals and permits to build, enhance and expand the 1962 revetment to the 1.8 mile continuous structure that now exists on site. Mr. Raichele was involved as the consulting engineer on the design and then was responsible for the project management of the project. The final design was for an 18 foot high rock wall, which was embedded in the sand to elevation 0, with sand also placed on top of the structure. Mr. Raichele testified that he was present at various stages of the construction, and issued his approvals for each stage of construction. The end result was a uniform rock revetment extending from the northern part of Mantoloking through Bay Head and into the southern end of Point Pleasant Beach. This construction received all necessary approvals, including CAFRA approvals from the NJDEP.

Mr. Reichele opined that the rock revetment as it presently

is constructed would withstand a 200 year storm. T-1 at 237.

To that extent, the expert disagreed with the opinions expressed by the USACE that the 1962 revetment would fail in a 100 year storm. However, the witness underscored that the assumption of failure was based upon factors that predated Sandy, and that the 2014 USACE re-evaluation report issued in 2014 did not take into consideration the post-Sandy improvements to the revetment. T 1 at page 241. In addition, Mr. Raichele testified that the Sandy storm was a storm event of between 200 year and 500 year. He further expressed the opinion that the 1962 rock revetment did not fail as a result of Sandy. It survived with little or no reported damage. T-1 at page 251. He also testified that he was aware of several studies which concluded that the revetment provided a substantial amount of protection, particularly when compared to the neighboring properties that did not have the benefit of the revetment. T-1 at page 252. On cross examination Mr. Raichele was confronted with a stream of emails that he sent to the NJDEP, Coleen Keller, which represented that Sandy overtopped the 1962 revetment and caused "...substantial damage to the public infrastructure and private homes that it was intended to protect." T-2 page 17. Mr. Raichele then proposed: "...in recognition of this fact, the applicants proposed to construct a higher and more robust structure that conforms to recognize[d][sic] coastal engineering design principles and is

more resilient to future storms and sea level rise." T-2 page 17. In addition, in his communication to the NJDEP, Mr. Raichele also conceded that the 1962 revetment, although providing partial storm damage protection, there was sever impacts on some of the homes. T-2 page 18.

While there were some inconsistencies with the testimony of Mr. Raichele, in particular with the characterization of damage post-Sandy, the Court concludes from the testimony presented that the storm protection afforded by the 1962 revetment, although imperfect, was greatly enhanced by the design modifications that produced the revetment in its current condition. While the parties dispute that the existing structure would fail or succeed in a 100 year storm, the Court is satisfied based upon the evidence presented that the current revetment would provide storm protection for the immediate adjoining homes even in a 200 year storm event.

On cross examination Mr. Raichele admitted that while the revetment provided storm damage protection to structures and infrastructure behind the revetment, it did not provide protection to the berm or beach portion of the project. T-2 at page 39. The purpose of the revetment is not to protect the beach area that is seaward of the revetment. The revetment admittedly does not protect the beach from washing out. He also admittedly did not factor in the recreational uses of the beach,

and beach preservation, as part of a shore protection project.
T-2 at page 43.

While the Court found Mr. Raichele's testimony credible, the Court also noted the limited (although important) function of the revetment to protect structures landward of the revetment, and did not address if at all the loss of beach during periods of severe storm.

The defendants also called as an expert witness Robert S. Young, the Director of the Program for the Study of Developed Shorelines ("PSDS") at Western Carolina University and a professor of coastal geology. Has a B.S. with a major in geology from College of William and Mary, Virginia, and a M.S. in geology from the University of Maine, and Ph.D. in coastal geology from Duke University. Dr. Young serves as a professor of Geology at Western Carolina University and is an Adjunct faculty member at Duke University. He is a licensed professional geologist in the states of Florida, South Carolina and North Carolina. Dr. Young's credentials were accepted by the Court as an expert in the field of coastal science.

Dr. Young testified that in his opinion, hard structures were superior to soft structures in designing and constructing shore protection projects. The rock revetment is a hard structure, whereas the berm and dune system is a soft structure. He further opined that engineered beaches on shorelines that

have been experiencing long-term erosion will disappear faster than natural beaches. He did not rule out the use of soft structures, which he opined would be best on a beach upon which there were no engineered structures. In that case, a project that was dependent upon periodic beach nourishment would be acceptable. However, where there is already a hard structure for shore protection, like the rock revetment, then he felt it was best to rely upon or enhance that hard structure. In this case, the existence of the rock revetment, which was already approved and issued permits by the NJDEP, was a deciding factor in choosing a system of shoreline protection.

Dr. Young further cited a 2014 National Research Council report that evaluated the activities of the USACE post Sandy. This study concluded there was no comprehensive plan for the spending of federal dollars to carry out coastal protection projects. The USACE in evaluating the merit of a project, and in allocating scarce resources, conducts a benefit cost ratio analysis (BCR). If federal dollars are going to be spent on the project, the USACE must assess whether the benefit of the project exceeds its cost. This ratio in other words must be more than a ratio of 1:1.

Dr. Young discussed, depending upon the features of the property in question, one could opt for a soft structure shore protection project, like the dune and berm project proposed. If

a shoreline is without any hard structures, a dune and berm system with periodic re-nourishment would be acceptable. But, with regard to the Bay Head area, "the horse has already left the barn", and that the preference for a developed area would be for a hard structure, like the rock revetment, in place.

One of the arguments in favor of the comprehensive and continuous 14 mile project in the northern reach of the study area is that it would afford protection, not just for oceanfront property owners, but for those property owners located landward of these properties. Dr. Young opined that the NJDEP had failed to conduct an adequate study to determine whether the failure to construct a dune and berm system in front of the 1.8 mile revetment would be detrimental to the surrounding properties. It was the opinion of Dr. Young that the area where the 1.8 mile long Tri Boro Revetment is located could be excluded from the project without substantial detriment to other property owners, including those located farther from the oceanfront homes. In addition, Dr. Young opined that the efficacy of the dune and berm project would not be compromised by allowing a "gap" in the area of the Tri Boro Revetment.

Defendants also relied upon the testimony of expert witness John Woodley, Jr. Mr. Woodley is a principal with the firm of Advantiz Strategies, LLC, a government management consulting firm located in Richmond, VA. From 2003 until 2009 Mr. Woodley

was the Assistant Secretary of the Army for Civil Works, was appointed by President George W. Bush and, in that capacity, was responsible for supervising and providing policy and management oversight of the Civil Works function of the Army Corps of Engineers. He served in this capacity when the Manasquan Inlet to Barnegat Inlet Project received congressional approval in 2007, and is familiar with this project. Secretary Woodley's qualifications as an expert in the field of statutory regulatory policy matters that involve the USACOE, shore protection and flood control projects was accepted by the Court. T3, page 23.

Secretary Woodley explained that the USACOE is obliged to conduct among other things a cost benefit review (CBR) of any particular project, to determine that the benefits to the community exceed the cost in taxpayer dollars, a ratio of the benefit to cost must exceed a threshold of 1.0. In this case, the USACOE determined that the benefit to cost was 1.2, in excess of the 1.0 threshold. Although many other factors go into the determination of whether or not the USACOE would recommend to congress for authorization and funding, the CBR is a basic factor for prioritization.

Secretary Woodley noted that the process of approving a shore protection project is a protracted bureaucratic process. However, the USACOE maintains some discretion to take into consideration site-specific conditions and changes in

technology, so long as the project remains within the parameters of the congressional authorization. It is the position of the property owners that in supporting the design of this project, the USACOE did not properly weigh or account for the post Sandy improvements to the revetment and the changes to structures after Sandy, for example, the elevation of homes that improved the overall protection of the community from storm damage.

Secretary Woodley described the dune and berm system of shore protection as a "sacrificial" system designed to protect the dune (a pile of sand with a core material of clay or other similar substance) with a length of engineered beach or "berm". The berm and dune structure protects people, structures and infrastructure from the power and erosive effects of wave actions. Because the structure is sacrificial, in other words designed to be diminished by wave action, it requires periodic maintenance or "re-nourishment". The process of re-nourishment by the USACOE is dependent upon federal funds being allocated to that project. If the legislative and executive branches of government do not provide funding, the re-nourishment will not take place. Periodic re-nourishment is an essential component to the viability of this plan. (D-26 the Chief's Report for this project dated December 30, 2003.)

The original Project Partnership Agreement (D-27) allocated the cost consistent with the 65% federal/35% local formula. In

addition, the local entity, in this case the NJDEP, is obligated to acquire sufficient real estate rights for construction of the project. Secretary Woodley explained: "...[G]enerally, they're required to obtain no more than is required to accomplish the construction of the project..." T3 at page 55.

Secretary Woodley testified that the source of this limitation is found in 33 U.S.Code Sec. 2213, 1(B) the non-federal interest will provide the land's easements, rights of way, dredge materials, disposal areas required only for flood control and perform all necessary relocations. T3 at 57.

In order to prevent the use of federal funds to protect purely private interests, the regulations require the project to provide a reasonable degree of public use of private lands that benefit from the federally funded project. However, what constitutes appropriate public use and access varies from one place to another. He further explained that each project under the demonstration program may be carried out at 1. A privately owned site with substantial public access or 2. A publicly owned site on open coast or in tidal waters. The regulations also require reasonable public access, defined as access approximately every one half mile or less. Therefore, the USACOE project can be done on private property provided there is provision for substantial public access.

Secretary Woodley's testimony for the most part was found

to be reasonable and credible to the Court.

Plaintiff produced several experts and relied upon the testimony to counter the opinions of the Defendant's experts.

Keith Watson is the project manager for the USACOE Philadelphia office and is in charge of the Manasquan to Barnegat project. He earned a civil engineering degree and Bachelor's degree from the University of Delaware, and a Master's degree in civil engineering from the Center for Applied Coastal Research at the University of Delaware. He started with the USACOE as a coastal and hydraulic engineer and worked on planning and engineering and design of coastal projects like seawalls, beach fills, jetties, groins and other construction projects out of the Philadelphia office. He later became a design engineer, he worked for five years out of the New York office of the USACOE and worked on projects along northern New Jersey and New York, including Long Island. In his current capacity as a project manager he supervises all aspects of an Army Corps project.

Mr. Watson's qualifications as an expert in coastal engineering was accepted by the Court.

Mr. Watson explained that there are three ways that upland structures (i.e. homes, boardwalks, dune walkovers, and so forth) can be damaged by ocean storms: The first is erosion, the second is wave attack and the third is inundation from the

surge. Wave attack is damage caused by the power and velocity of the surge, whereas inundation occurs from static flooding. Erosion will undermine the stability of a structure.

Robert Lowinski is a hydraulic and structural engineer employed by the USACOE. He has a BS degree in civil engineering from West Virginia University and a MS degree in civil engineering from Drexel University. Mr. Lowinski's qualifications as an expert in the field of coastal engineering was accepted by the Court.

He was the assigned coastal engineer on the project.

He discussed a computer model plan calls SBEACH which is used to predict shoreline changes based upon historical data and scientific analysis.

He testified that when waves overrun a structure, for example the revetment, the structure has not failed if it is still there after the storm event. While the structure may remain undamaged, the waves overrunning the structure can cause damage to infrastructure and structures that are located landward behind the structure. "Run up" occurs when the waves hit the dune, and "scour" occurs when there is erosion around the structure caused by the impact of the waves. This is the type of information that is in-put in the SBEACH modeling.

In this case, the modeling produced 14 different solutions. These options are subjected to a screening process by the team.

Some are impractical. For example, abandonment of the community is a solution, although rejected outright as completely impractical. The initial review by the team resulted in a rejection of 8 of the 14 options for this reason. The six remaining options are then carried into the second cycle of analysis. In the second cycle the only option eliminated was the bulkhead seawalls based upon cost and other environmental factors.

In the cycle three review the team considered 5 of the 14 remaining options. The existing shore protection revetment was included as one of those five options, along with various types of dune and berm structures.

The team assumed an annual erosion rate in the Bay Head beach of 2 feet per year. However, the Defendants successfully challenged this when the witness admitted the Bay Head shoreline had actually advanced or accreted 50 feet from where it was in 1986. T 2/10/17 at page 100. The purpose of re-nourishment is to protect the dune and berm structure, and the witness also admitted that if the re-nourishment does not occur, the design has been compromised.

The NJDEP also called upon Colleen Keller, the Assistant Director of the NJDEP Division of Land Use regulation. She testified that she initially was contacted after Sandy by Bay Head Councilwoman Darcy Greene, who was concerned about the

impact of Hurricane Sandy in her community and who wanted to expedite the request of certain residents to improve and reinforce the 1962 revetment. Ms. Keller was responsible for the initial emergency application to reinforce the 1962 revetment. There was a second emergency authorization application to improve and expand upon the revetment. She discussed with Andrew Raichel a design for a larger more robust revetment with a change in the slope that moved the toe of the structure closer to the water line. The applicants proposed an increased height of 21 feet. Ms. Keller indicated that the proposed expansion of the revetment caused departmental concerns that other regulations would be impacted, and that the proposal had morphed into something from only a repair to repair and expand the structure. In any event, the parties compromised the design to that which was ultimately constructed. Their concern was also related to the impact of the design upon the pending berm and dune project of the USACE. T. 2/10/17 at page 124. At this point the federal project was authorized but not yet funded. The ultimate understanding of the NJDEP was that the revetment would be on the landward side of the beach dune and the USACE would be built over that. T 2/10/17 at page 126.

There later was another emergency authorization application to extend the revetment into the northern end of Bay Head and into Point Pleasant Beach. They considered whether the proposal

would conflict with the USACOE berm and dune project, and determined by an overlay that it did not, and granted the authorization. P.128. She testified that she had conversations with several Bay Head residents on these applications and conveyed to them that the revetment would not be a replacement for the USACE project. P. 129

Plaintiff also called upon Robert Selsor as an expert and fact witness. Mr. Selsor is the Team Leader supervisor with the Economic and Social Analysis Branch within the planning division of the Philadelphia District of the USACE. He earned his undergraduate degree in Economics from Gettysburg College and a M.B.A. from Temple University. The expert's qualifications as an expert in the field of coastal economics was accepted by the Court. He served as the supervisor of the project during the feasibility report phase, and as a member of the PDT for the development of the expedited Limited Revaluation Report.

He explained that the role of economic analysis in this type of project is to develop the benefits for the plan and for the alternatives that were considered. Potential benefits of the dune and berm project included reduction in damage to infrastructure, roads, utilities and benefits such as creation of recreational beach uses and reduction of maintenance costs. Average annual benefits are compared to average annual costs to come up with a benefit to cost ration, CBR, which is used in

part for obtaining Congressional authorization for a project. This information is then in-put into the SBEACH modeling as well as an economic model called COSTDAM, which stands for Coastal Storm Damage Assessment Model. He is attributed with providing the economic foundation in support of the dune and berm project, and his testimony was found credible by the Court.

Stewart Farrell was called as a witness on behalf of the NJDEP. Dr. Farrell is the Director of the Richard Stockton University Coastal Research Center. The institute performs environmental, coastal and geologic studies of primarily the New Jersey coastal beaches and Bayshore. He has served in this position for thirty years. He has extensively studied the susceptibility of New Jersey's beaches to storm damage. This included a study immediately after Sandy to assess the impact and effects of that storm on the coastal beaches.

Dr. Farrell earned a B.S. in chemistry from Lafayette College, and his M.S. and Ph.D. in geology from the University of Massachusetts. His qualifications as an expert in the field of coastal science was accepted by the Court.

Dr. Farrell testified that he studied the long-term effects of "longshore transport" or shifting of sand from one area of the coast to the other. He noted there is both daily as well as seasonal transport of sand along the shore. He further testified that if the project were not constructed where the Tri

Boro Revetment is located, along the southern end of Point Pleasant Beach, all of Bay Head and the northern section of Mantoloking, there would be a shift of sand into Bay Head at the expense of the beaches in Mantoloking and Point Pleasant Beach. "[I]f they build the project in Point Pleasant Beach and they build it in Mantoloking and don't build it in Bay Head, they're getting a beach fill anyway at the other two communities' expense. The sand will migrate into the pocket and fill it in gradually over time." 5T 103

Dr. Farrell explained that the design of the project accommodates in some areas different specifications where there are preexisting structures or conditions. For example, in Seaside Heights, where there are existing amusement rides, businesses and recreational activities on the boardwalk and on one pier extending into the Ocean. The continuity of the berm and dune design is modified in these areas. In northern Point Pleasant Beach the existing berm is higher than the proposed 8.5 NAVD height of the project berm. Therefore even in the design proposed and designed by the USACE, there are gaps in the dune and berm system in Seaside Heights and in the northern end of Point Pleasant Beach. Dr. Farrell nonetheless testified that because the beach in Northern Point Pleasant Beach is at the northern end of the project, there is no risk of "gap effects". Report of the Chief Engineer, Exhibit P-6. He further testified

that it was impractical to continue the dune and berm system in Seaside Heights where there are preexisting structures like the amusement pier. He did not think this variation would affect the overall efficacy of the project.

Dr. Farrell testified that he studied the effect of storms in the area of Mantoloking's beach, and concluded that it was very susceptible to harm from storms. Dr. Farrell testified that "gap effect" or "end effects" impairs the efficacy of the berm and dune project in providing storm protection.

The Defendant homeowners pointed out that the project has gaps and end effects as designed. That there are reduced or eliminated dunes in Seaside Heights and Northern Point Pleasant Beach and that the project's southern end is tapered at the northern part of Island Beach State Park. Defendants argue the State's insistence that the project must be one unbroken continuum of dunes and berms is not believable, since the State has accommodated other local conditions and modified the project in these areas. The Court found this to be a very compelling concern on the part of the property owners, since it underscored the willingness of the USACOE and the NJDEP to make accommodations in some parts of the project that are being denied in the area of the properties owned by the defendant property owners.

The Court finds that the proposed project indeed has gaps

and end effects that are incorporated into the project where the State determined the local conditions required a deviation from the plan. However, the fact that the State could have designed an alternative storm protection project, that took into account the preexisting Tri Boro Rock Revetment as an alternative storm protection structure, is not an indicia of arbitrary, capricious or unreasonable action by the NJDEP in exercising its power of eminent domain. While the Court is concerned about this apparent inconsistency, the decision to make this accommodation without substantial impact upon the efficacy of the entire project is supported by credible expert evidence, and there is no evidence that the decision was motivated by any wrongful objective. In addition, the comprehensive and fairly continuous dune and berm system provides other benefits to the public, including public access and recreational beach protection, that are not addressed solely with the revetment. There exists substantial credible evidence to support the project as designed by the USACE, even if there are equally effective alternatives available.

Defendants finally asked this Court to suppress the expert testimony of witnesses Watson, Lowinsky and Selsor. The Plaintiff relied upon the testimony of Keith Watson, Robert Lowinsky and Robert Selsor who at all times relevant to this project were employed by the USACOE. Each had a role in the

development of the ultimate USACOE endorsed plan for the berm and dune project which is the subject of this litigation. The Defendants moved to suppress their opinions as net opinions, and to ask the Court to ignore the testimony of these witnesses.

Keith Watson is a coastal engineer with more than 29 years experience in the analysis, planning, design management of shore protection projects with the USACOE. He is the project manager for this project.

Robert Lowinsky is a coastal engineer with more than 22 years experience in the analysis, planning and design of shore protection projects with the USACOE. He has been the coastal engineer for this project since 1998.

Robert Selsor is an economist with more than 25 years experience in conducting economic studies of shore protection projects with the USACOE. He is the chief of the Economics Branch of the Philadelphia district Office of the USACE.

These witnesses were offered as both factual and expert witnesses. Their testimony was offered to show that the decision making process was factual and scientific based, and not the product of unreasonable, arbitrary or capricious actions by the USACE, which was relied upon by the NJDEP. Clearly, there is a sufficient scientific and factual basis for their opinions, and their testimony is not objectionable as "net opinions".

The net opinion rule requires that the testimony of an expert be excluded if it is based upon unfounded speculation or unquantified possibilities. The opinion of the expert must be based upon facts or data derived from personal observations, evidence admitted at trial or data relied upon by the expert with general acceptance within the field of study. The purpose of this rule is to exclude opinions that are not adequately founded upon scientific or other objective criteria, and that reflect recognized conclusions within the experts' field of expertise, rather than unsubstantiated supposition or speculation. The rule is intended to preclude opinion testimony that is "junk science" or similar opinion testimony.

This Court is satisfied that the opinions of these three experts are supported by adequate facts in the record, and are based upon their observations and professional experience and expertise. The application to suppress their opinions as net opinion" is denied.

It is appropriate for the Court to consider the weight and the credibility to be rendered to the opinion of an expert, but not to exclude the offer of otherwise admissible opinion testimony.

The Defendants maintained that the State failed to conduct an independent analysis, including a cost benefit analysis of the proposed project. Defendants argue this lack of independent

analysis constitutes evidence of arbitrariness. The Court is not persuaded by this argument. The State of New Jersey, through the NJDEP, can rely upon the expertise of the USACOE in evaluating whether or not to commit to the project, as well as in this case its own evaluation of both the tangible and intangible benefits of the dune and berm project. The Court finds that the NJDEP drew upon its own well of experience in evaluating the effects of storm damage and erosion on the coast, the developing understanding of coastal engineering, as well as the direct and indirect benefits of the project. The State thus concluded that the state's coastal communities as a whole would benefit from the development and construction of the dune and berm project designed by the NJACOE. In addition, the State considered the advantageous financial arrangement that was offered to the states post Sandy, as an added inducement. The function of this Court is not to interfere with that decision making process even if some property owners suffer a loss as a result of the project. The response is to compensate the property owners for their loss through the process of fair and just compensation. This Court cannot and finds that there was not any arbitrary, capricious and unreasonable conduct by the condemning authority in endorsing the shore protection proposal developed by the USACE.

In addition, the decision of the NJDEP to grant emergency

permits to expand and enhance the existing rock revetment as a storm protection measure did not preclude the State from later supporting the implementation and construction of the dune and berm project. The NJDEP and USACOE could reasonably conclude, as it did here, that additional protections in the area of the Tri Boro Revetment would be necessary to make the entire project more effective, and to protect the interests of property owners who may be damaged by end or gap effects. In addition, the project is designed to have a sacrificial berm that would provide additional beach recreational opportunities, together with the many intangible benefits, including confidence in the Jersey Shore as a travel destination.

The Court is also satisfied that the evidence does not support a finding that the State engaged in fraud, bad faith or manifest abuse in exercising the power of eminent domain to acquire easement interests in the properties owned by the Defendants. The Court, likewise, cannot conclude that the State exercised the power of eminent domain in willful disregard to the particular circumstances of the properties in question.

Based upon the analysis conducted by the experts associated with the USACOE as well as its own staff, the NJDEP concluded that the failure to construct a continuous dune and berm system in Bay Head would significantly impair the projects effectiveness and would impact surrounding property owners, if

not the property owners immediately protected by the revetment. Reasonable experts have and do disagree as to this conclusion. It is not the obligation of the Court, however, to substitute its judgment for that of the state agency or the USACE. There is legitimate concern by the property owners about the impact of public easements on the use and enjoyment of their properties. There is a reasonable difference of professional opinion about whether "soft structures" or "hard structures" provide the most effective shore protection. There is substantial concern by the ocean front homeowners about the invasion of their privacy by permitting public access. By the same token, there is a legitimate state interest in assuring that if public funds are used to enhance the beaches and to provide additional shore protection, the people who fund through their own tax dollars that effort are not blocked by access to the beach. The property owners have likewise raised an important issue relative to the will of Congress and the State to fund beach nourishment projects, or the obligations of the property owners to assume any liability for members of the public who now use the heretofore private beaches. To the extent these concerns have an impact upon the valuation of the taking, that is an issue of fair and just compensation, or damages caused by the taking, as opposed to the issue of the reasonableness of the decision to effectuate a taking.

The Defendants have also raised a legitimate issue as to the decision of the NJDEP to modify the project in Cell 3 (Seaside Heights) and Cell 11 (north end of Point Pleasant beach. As evidence of arbitrariness, the NJACE and the NJDEP have declined to modify the project in cell 3 (Bay Head) and take into considering the existing shore protection in the form of the rock revetment. Plaintiff justifies the differential treatment because in both Seaside Heights and part of Point Pleasant Beach, the USACE concluded that the existing berm height in these two areas and the presence of recreational structures justified deviation from the uniform design standards of the project. There was no equivalent justification in Bay Head. It is significant however that the experts with the USACOE found that the base elevation in the northern part of Point Pleasant Beach together with the width of the beach permitted a deviation from the project plan. The existing structures in Seaside Heights including the Pier did not permit the construction of dunes and berms consistent with the rest of the project. None of the experts for the state felt these changes would result in any gap or end effects to the project that would compromise the project effectiveness or that would endanger property owners landward of the project. In addition these experts concluded that the failure to include the 1.8 mile revetment area in the project with a continuous dune and berm

plan would cause detriment to other property owners, create undesirable sand movements, and would create end effects that would be detrimental to properties. One may differ with these conclusions, as do the experts relied upon by the Defendants. However, a difference in professional opinion that is otherwise supported by facts and analyzed in the context of the professional expertise of the USACOE does not render the decision not to make an exception for the area of the Tri Boro Revetment arbitrary, capricious and unreasonable, or a manifest abuse of the power of eminent domain.

Defendants have also argued that the actions of the local citizens in creating and maintaining the beach and the rock revetment constitutes a public service that warrants a reduced burden of proof in challenging the decision to exercise eminent domain. This argument is without merit since the primary beneficiaries of the dune reconstruction are the property owners located immediately adjacent to the structure. Unlike the Wildlife Preserve case, the Defendants in this case have functioned both out of a sense of community altruism, but also in the interest of protecting their own valuable properties. No one could fault them for their efforts, and should commend them for same, but their efforts do not rise to the level of the interests recognized as unique in the Wildlife Preserve case.

The Court must also consider that there is judicial

deference afforded to legislative determinations to effectuate a taking of private property for a public use. It is clear to the Court that there is a range of opinions as to the appropriate mechanism for shore protection. It is also obvious that the USACOE in this area have taken a position that soft structures that are sacrificial are more desirable than hard structures like the revetment. Although this position was accepted by the NJDEP, this Court cannot conclude that the state agency merely "rubber stamped" the project designed and proposed by the USACOE.

There have been substantial changes in the area of the revetment since Hurricane Sandy. As Defendants claim, gaps in the revetment have been closed; homes that were vulnerable have been elevated; and the revetment is higher, wider and extends farther north and farther south. However, the NJDEP has not proposed any changes to the revetment which provide additional benefits to the property owners when coupled with the dune and berm project. Again, this decision by the NJDEP cannot be found by the Court to constitute unreasonable or bad faith behavior, even if another design, without the project is equally effective.

Much of the data relied upon by the USACOE and NJDEP dates back to 1997 and is not influenced by the revisions to the revetment discussed above. But, these changes do not alter the

professional analysis and conclusion of the USACOE as supported by the NJDEP that the dune and berm system is preferable.

Conclusion:

For the reasons set forth in this opinion, the Court finds:

1. That the Defendants have failed to prove by clear and convincing evidence that the decision of the NJDEP as supported by the USACE to proceed with the proposed continuous dune and berm project in the northern reach area currently protected by the Tri Boro Revetment is not arbitrary, capricious and unreasonable or the product of fraud, bad faith or manifest abuse of the power of eminent domain.
2. That Final Judgment shall be entered in favor of the Plaintiffs, confirming the proper exercise of eminent domain.
3. That three disinterested condemnation commissioners shall be appointed by the Court for the purpose of establishing fair and just compensation, including any damages, for the taking by eminent domain.
4. That a hearing to enter final judgment and to appoint condemnation commissioners shall be scheduled before the Court on September 15, 2017 at 10:00 AM.