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## Environmental Law Bulletin

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Now that the summer solstice has passed, many of us are thinking about enjoying New Jersey's wonderful beaches. Each year driving down the Garden State Parkway, we hope that the winter storms did not significantly erode the beaches or alter the wave break. To that end, New Jersey Department of Environmental Protection ("NJDEP") needs to be vigilant in keeping up the publicly funded restoration activities/projects to

protect against such erosion.

On June 22, 2017, in State of N.J. Dept. of Environmental Protection v. North Beach 1003, LLC, (consolidated) N.J. Super. App. Div., in a published decision consolidating 24 appeals, the New Jersey Appellate Division upheld the NJDEP's right to use privately owned properties under a perpetual easement for post-Superstorm Sandy beach restoration projects, clarifying that the government's right to purchase land outright for public projects also allows them to take and pay for perpetual easements without acquiring the lands.

The landowners objected to NJDEP's request for voluntary easements, under NJ's Eminent Domain Act ("EDA"), instead of purchasing the property outright since perpetual easements are a lesser property interest than complete ownership (Fee Simple). In looking at the language of the EDA, the Court held that although a Fee Simple is the greatest interest that one can have in land, it does not preclude the State from electing to take a lesser property interest provided the owner is compensated for that use.

The property in question is located along the southern coast of New Jersey from Berkeley Township to Point Pleasant Beach and the entirety of Long Beach Island. The NJDEP had requested voluntary easements from the property owners to assist United States Army Corps. Of Engineers with restoration projects designed to build up and strengthen the dunes after Superstorm Sandy. In the majority of the underlying cases, the NJDEP filed condemnation complaints against the property owners after they had refused to consent to the voluntary easements. In March of 2016, a trial court found that NJDEP maintained the right under the EDA

to take a perpetual easement. The remaining case involved a declaratory judgment action against the NJDEP prior to the agency filing a condemnation action. However, based on the prior cases, the trial court again sided with NJDEP.

Thus, based on the fact the EDA did not preclude the NJDEP from seeking a lesser property interest (perpetual easement) as part of a condemnation proceeding, the Appellate Division held that the NJDEP has the authority to obtain these easements that allow for publicly funded beach protection projects, which can include public access and use. It will be interesting to see the value placed on the takings that will be assigned by the appointed commissioners.

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Douglas I. Eilender is a Member in the Firm's Environmental Law Department. His practice emphasizes all aspects of environmental law, including transactional, regulatory and land use matters. Doug's practice also includes the oversight and negotiation of cost recovery and insurance coverage claims. Part of his practice focuses on the redevelopment of brownfields sites that are underutilized due to contamination.

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