

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

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MARGATE CITY, NEW JERSEY,	:	
	:	
Plaintiff,	:	Civil Action No.
v.	:	
	:	_____ -cv- _____
	:	
UNITED STATES ARMY CORPS OF ENGINEERS and NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:	
	:	
Defendants.	:	

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**COMPLAINT**

**INTRODUCTION**

1. Plaintiff, the City of Margate (“**Margate**” or the “**City**”), brings this action to enjoin Defendants, the United States Army Corps of Engineers (the “**Corps**”) and the New Jersey Department of Environmental Protection (“**DEP**”) (collectively “**Defendants**”), from contracting with third parties to trespass on Margate’s property. The manner in which Defendants have proceeded violates the rights of the people of Margate under the United States Constitution, the New Jersey Constitution, New Jersey state law and common law.

2. Beginning on October 22, 2012, Hurricane (Superstorm) Sandy formed and then migrated from the western Caribbean Sea northward, hitting the shores of New Jersey on or about October 28, 2012.

3. Although the consequences of Sandy have led to nearly universal agreement that New Jersey needs to implement better storm protection strategies, identical remedies are obviously not appropriate in all communities.

4. Understanding the unique geological and topographic characteristics of Margate, such as its existing and extensive system of bulkheads--which successfully prevented catastrophic damage to the City as a result of Sandy, Margate has attempted to present and advocate for alternative storm prevention strategies that they believe are more protective and cost-effective for the city.

5. The Corps and the DEP have chosen not to consider these alternatives.

6. Prior to Hurricane Sandy, in 1996, the Defendants' conceived the Absecon Island Coastal Storm Risk Reduction Project (the "**Project**") to assess and implement ways to reduce storm damage and minimize shoreline erosion in coastal New Jersey.

7. The Defendants have periodically implemented portions of the Project throughout New Jersey, but they have not yet begun the portion of the Project that calls for the construction of sand dunes on Margate's beaches.

8. Cognizant of Margate's objection, the Defendants purported to condemn Margate's property without following any lawful procedure, and to aggressively move the Project forward without permitting Margate any opportunity to object either to the manner in which the DEP allegedly acquired an interest in the City's property or to the nature of the Project to be constructed on that property.

9. Margate expects that within one week, the Defendants will trespass onto land owned by Margate to construct a 3-mile long stretch of 12.75-foot high, 25-foot wide sand dunes on Margate's beaches despite Margate's unequivocal protestations.

10. Margate therefore brings this action to protect its beaches from this imminent and unlawful intrusion.

### **THE PARTIES**

11. Margate is a city in the State of New Jersey. Margate has filed this action following a referendum in which a majority of the city's citizens voted to initiate legal action to stop the Defendants from illegally constructing sand dunes on Margate's beaches.

12. The Corps is a federal agency under the United States Department of Defense.

13. The DEP is an administrative agency of the State of New Jersey.

### **JURISDICTION AND VENUE**

14. This Court has original jurisdiction under United States Constitution Article III, § Two, Clause One over all cases to which the United States, including federal agencies such as the Corps, is a party.

15. This Court also has jurisdiction pursuant to 28 U.S.C. § 1331 because Margate's claims arise under the Takings Clause and the Due Process Clause of the United States Constitution.

16. This Court also has jurisdiction over Margate's claim against the Corps pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 702, 706(2)(A), (B) and (D).

17. This Court has supplemental jurisdiction and/or pendant party jurisdiction over state law claims asserted by Margate against the Defendants because those claims arise from a common nucleus of operative facts as Margate's claims against the Corps and its federal question claims against the DEP.

18. Venue is proper in this District because Margate's claims arose in this District.

### **FACTUAL BACKGROUND**

19. Following Hurricane Sandy, the State of New Jersey began aggressively implementing storm protection measures that had originally been conceived nearly 20 years previously as part of the Project.

20. The State of New Jersey, however, wished to avoid the mandatory condemnation process set forth in the Eminent Domain Act of 1971 (the “Act”), N.S.J.A. 20:3-1 *et seq.*, which is intended to foster pre-condemnation negotiations between the State and the condemnee and to protect the condemnee’s rights under the United States and the New Jersey Constitutions.

21. To avoid that process, the DEP and the Corps began seeking voluntary easements from beachfront landowners along the New Jersey coast, including from individual residents and from municipalities.

22. The purpose of this process was to obtain permanent easements in favor of the DEP, which signed Project Participation Agreements with the Corps to construct sand dunes along the New Jersey coast, including in Margate.

23. Many citizens and several municipalities disputed the effectiveness and propriety of the Project, in particular its use of sand dunes, and they therefore refused to voluntarily grant permanent easements to the DEP.

24. Margate was, and remains, among those municipalities that have refused to grant the requested easements. Margate’s opposition, however, is not merely a reflection of the views of its Commissioners or its Mayor. Margate’s opposition derives directly, and overwhelmingly, from its citizens.

25. In August 2013, the citizens of Margate formed Margate Citizens Questioning the Beach Project (“MCQBP”). *See* <http://www.mcqbp.org/about.html>. The stated mission of MCQBP is to educate and inform Margate citizens of the reasons to stop the Project “and to SAVE MARGATE beaches.” *Id.*

26. As opposition to the Project grew, the State of New Jersey’s insistence that the Project be implemented increased.

27. On September 25, 2013, Governor Chris Christie issued Executed Order No. 140 (“EO 140”), a copy of which is attached as Exhibit “A.”

28. In EO 140, Governor Christie ordered the DEP to create an Office of Flood Hazard Risk Reduction Measures to “lead and coordinate the efforts of the DEP to acquire the necessary interests in real property to undertake Flood Hazard Risk Reduction Measures...”. Invoking the State’s eminent domain powers in N.J.S.A. § 20:3-1 *et seq.*, the DEP’s eminent domain powers in N.J.S.A. § 12:3-64, and the municipal condemnation authority in N.J.S.A. App. A:9-15, Governor Christie further ordered the Attorney General of the State of New Jersey to “immediately take action to coordinate those legal proceedings necessary to acquire the necessary easements or other interests in real property for the [Project].” *Id.*

29. Neither the New Jersey Office of the Attorney General (the “NJAG”) nor the DEP followed Governor Christie’s direction to implement required legal proceedings prior to condemnation.

30. Instead, the DEP continued to request voluntary easements from individuals and municipalities, including from Margate.

31. To ascertain the true will of its Citizens to guide the decision as to whether to grant easements, on November 4, 2013, Margate put to referendum the question of whether its citizens supported the Project.

32. A nearly 70% majority (1,502 to 792) of Margate’s citizens voted against the construction of dunes on Margate’s municipally-owned shorefront property.

33. Thereafter, Margate continued to decline to grant voluntary easements to the DEP. Still, the DEP and the NJAG refrained from initiating condemnation proceedings.

34. On June 23, 2014, the DEP and the Corps entered into a Project Partnership Agreement to complete construction of the Project in, among other places, Margate.

35. Project commencement appearing imminent, Margate began to solicit guidance on how it might address the differing views of the DEP and the citizens of Margate.

36. In late August and early September 2014, Margate commenced a dialogue with the DEP. Both parties appeared willing to negotiate in good faith for the purpose of trying to reach a mutually acceptable resolution without resort to litigation.

37. On September 11, 2014, the Corps issued a request for proposal for the Project component that includes the construction of sand dunes in Margate. Still, the DEP appeared willing and eager to engage in negotiations.

38. Prior to the parties having been able to hold any negotiations, on October 1, 2014, the DEP abruptly ceased seeking voluntary easements from Margate. Rather than following the mandate of EO 140 and initiating condemnation proceedings, as required by law, the DEP attempted to condemn Margate's property by simply filing in the Atlantic County Clerk's Office three "Administrative Orders."

39. Administrative Orders No. 2014-13, 2014-14 and 2014-15 (the "**Administrative Orders**") (attached as Exhibit "B") invoke EO 140 and N.J.S.A. 12:3-64 and purport to take permanent easements in Margate's coastal property for the purpose of construction sand dunes in furtherance of the Project.

40. Specifically, the Administrative Orders states that "the State [of New Jersey] is the Non-Federal Sponsor for the Project pursuant to the [Project Placement Agreement] and is responsible for obtaining necessary real estate interests." Administrative Order 2014-13 at p. 2. "...[T]he United States Army Corps of Engineers, in coordinate with the State of New Jersey, is

scheduled to begin construction of the Project in the City of Margate and the Borough of Longport in or about December, 2014” *Id.* “[P]rior to construction, the United State Army Corps of Engineers requires that the State provide the easements and/or other real property interests that are necessary to construct and maintain the Project.” *Id.* “[I]f the State does not obtain all required easements and/or other real property interests in the City of Margate, the [Corps] cannot construct the [Project] in both the City of Margate and the Borough of Longport.” *Id.*

41. Unable to acquire the necessary property interests by agreement and unwilling to follow the constitutionally required process set forth in the Act, the DEP, through the Administrative Orders, purportedly “*immediately* enters upon and takes real property interests in those parcels set forth in Exhibit A.” *Id.* at p. 3. (emphasis added). Though the Act and the constitutional rights guarded thereby require negotiations and other process prior to condemnation, the Administrative Orders state that “[a]ppraisals and good faith negotiations for any compensation due to the City of Margate for such parcels for the interests taken shall be undertaken in a manner not inconsistent with the procedures set out in the [Act] and applicable case law within a reasonable amount of time.” *Id.*

42. Thus, the DEP purported to immediately acquire portions of Margate’s beaches without negotiating with the City or giving it any opportunity to be heard for any reason.

43. When Margate learned of the Administrative Orders, it was concerned that the DEP no longer intended to engage in good faith negotiations, as the parties had seemingly been pursuing.

44. Margate voiced its objection to the Administrative Orders to the DEP, and it inquired whether the Administrative Orders were an indication that no negotiations would occur. The DEP represented that it still intended to negotiate.

45. Margate, concerned that participating in the impending negotiations without having protected its rights with respect to the Administrative Orders, requested that the parties enter into a Standstill and Tolling Agreement.

46. On October 2, 2014, the DEP and Margate entered into a Tolling and Standstill Agreement, a copy of which is attached as Exhibit "C."

47. The Tolling and Standstill Agreement formally placed the DEP on notice of Margate's objection to the Administrative Orders as valid takings and preserved all rights, causes of action and defenses that Margate might have.

48. Still not having had any opportunity to participate in any negotiations, Margate grew increasingly concerned that the Corps, despite Margate's objection to the Administrative Orders, appeared to be moving ahead with the Project.

49. On October 28, 2014, Margate, through counsel, sent a letter to Keith Watson, Project Manager, advising the Corps of Margate's objection to the Administrative Orders and of the Tolling and Standstill Agreement between Margate and the DEP. The Corps did not respond to this letter.

50. On October 30, 2014, the Corps opened bids related to the Project.

51. On November 4, 2014, Margate's citizens participated in a second Project-related referendum. Margate's citizens voted 1,067 – 988 in favor of bringing legal action to stop the construction of dunes on its beaches.



52. Margate, still hoping in earnest to avoid litigation, endeavored to determine whether the Corps would refrain from awarding the Project contract (the “**Contract**”) until the DEP and Margate had at least had the opportunity to meet and negotiate. Indeed, negotiations sessions had been initially scheduled, and the parties were in the midst of attempting to reschedule a meeting for mid-November.

53. On November 7, 2014, Margate, through counsel, sent a letter to the Corps General Counsel in its Philadelphia Office, Bill Wilcox, Esquire (“**Wilcox**”), advising the Corp that the DEP’s and Margate’s dispute had not been resolved but that the parties were in the process of scheduling negotiation sessions. Recognizing that the awarding of a Project Contract and commencement of construction would seriously undermine such sessions, Margate stated as follows: “Please advise us as soon as possible if the Corps intends to move forward with the process of awarding and, ultimately, executing a contract for the Project. Though the City remains optimistic that a settlement can be reached, these facts will necessarily impact the landscape upon which the parties have been attempting to reach an amicable resolution.”

54. The Corps did not respond to Margate’s letter.

55. On November 12, 2014, the Corps posted an Abstract comparing bids received for the Project.

56. On November 19, 2014, still not having received any response from the Corps, Margate’s counsel called Wilcox to inquire as to the reason for the Corps’ lack of a response and to determine whether the Corps intended to award a Project contract notwithstanding Margate’s dispute with the DEP concerning the effect of the Administrative Orders.

57. Wilcox informed Margate's attorney that the Corps was satisfied with the DEP's certification that it had acquired Margate's property by virtue of the Administrative Orders, and the Corps would therefore proceed to award the contract "soon. Not today, but soon."

58. Still hopeful that it could protect its rights while pursuing good faith negotiations with the DEP, Margate immediately began attempting to contact the NJAG to determine whether it would instruct the Corps to await awarding the Contract until the parties had at least had an opportunity to have an initial meeting.

59. Despite numerous attempts between November 19-24, including this morning, Margate has not been able to have any meaningful discussion with the NJAG.

60. Not having any response from the NJAG, and based upon Mr. Wilcox's representation, a Contract award and commencement of construction is imminent.

61. In fact, based on the statements of Wilcox, the silence of the NJAG and the language of the Administrative Orders themselves, the Corps will likely award the Contract and start construction within the next seven days.

## COUNT I

### *Margate v. the Corps*

#### **Declaratory Judgment that Contract Award and Commencement of Construction Constitute a Violation of Margate's Rights Under the United States and the New Jersey Constitution, a Trespass to Property and a Violation of New Jersey State Law**

62. The foregoing paragraphs are incorporated by reference.

63. The Declaratory Judgment Act, 28 U.S.C. § 2201 states: "In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

64. An actual case or controversy exists as between the Corps and Margate because the Corps intends within the next week to award the Contract and commence construction of sand dunes on Margate's beaches despite Margate's vehement objection.

65. The Corps' awarding of the Contract and construction of dunes on Margate's property violates the rights of the citizens of Margate under the Takings Clause and the Due Process Clause of the United States Constitution, as well as under corollary provisions of the New Jersey state constitution.

66. The Corps' awarding of the Contract and construction of dunes on Margate's property also constitutes an unlawful trespass upon Margate's property, as Margate objects and neither the Corps nor the DEP have utilized any lawful process to obtain title to the property to be entered.

67. Margate has an interest in protecting its real property rights.

68. All necessary parties have been joined in this action.

69. Margate will be damaged irreparably if the Corps is not enjoined from proceeding as planned.

**WHEREFORE**, Margate respectfully requests relief as follows: (a) that the Court preliminarily enjoin the Corps from awarding the Contract and from entering upon Margate's property to commence construction or for any other purpose; (b) that the Court issue a declaratory judgment that the Corps' awarding the Contract and commencement of construction upon Margate's property would violate Margate's rights under the United States and New Jersey Constitutions, would constitute an unlawful trespass and would otherwise violate New Jersey state law; and (c) that the Court order such other relief as it deems appropriate.

**COUNT II**

***Margate v. DEP***

**Declaratory Judgment that the Administrative Orders are Invalid and of No Legal Effect**

70. The foregoing paragraphs are incorporated by reference.

71. An actual case or controversy exists as between the DEP and Margate because the Corps, pursuant to its Project Participation Agreement with the DEP, intends within the next week to award the Contract and commence construction of sand dunes on Margate's beaches despite Margate's vehement objection.

72. The Eminent Domain Act of 1971 (the "Act") sets forth the requirements by which the State, or any statutorily empowered entity, may exercise its eminent domain powers to acquire property.

73. Under the Act, a condemnor must, prior to instituting condemnation proceedings, attempt to acquire the property at issue through bona fide negotiations, "which negotiations shall include an offer in writing by the condemnor to the prospective condemnee ... setting forth the property and interest therein to be acquired, the compensation offered to be paid and a reasonable disclosure of the manner in which the amount of such offered compensation has been calculated, and such other matters as may be required by the rules. Prior to such offer the taking agency shall appraise said property and the owner shall be given an opportunity to accompany the appraiser during inspection of the property." N.J.S.A. § 20:3-6.

74. Thereafter, the condemnor must give the condemnee 14 days to accept or reject the offer. N.J.S.A. § 20:3-6.

75. If the condemnee fails to respond or rejects the offer, a condemnation action "shall be instituted by filing a verified complaint in form and content specified by the rules and shall demand judgment that condemnor is duly vested with and has duly exercised its authority

to acquire the property being condemned, and for an order appointing commissioners to fix the compensation required to be paid.” N.J.S.A. § 20:3-6.

76. The DEP has failed to comply with the foregoing requirements, as well as with all other requirements contained in the Act. The DEP has failed to conduct required negotiations, failed to make any offer and has failed to file any complaint.

77. Instead, the DEP has taken the position that it may circumvent the entirety of the Act by way of the Administrative Orders.

78. The Administrative Orders, however, are invalid for at least the following reasons:

a. A taking effectuated by the Administrative Orders would violate the Takings Clause and the Due Process Clause of the United States Constitution, as well as the corollary provision of the New Jersey constitution because the DEP failed to follow the condemnation procedures required under N.J.S.A. § 20:3-1 *et seq.*

b. N.J.S.A. § 12:3-64 requires the DEP to comply with N.J.S.A. § 20:3-1 *et seq.* and prohibits the DEP from acquiring a permanent easement, on contrast to a fee simple interest, in real property.

c. Executive Order No. 140 required the DEP to comply with N.J.S.A. § 20:3-1 *et seq.* and N.J.S.A. § 12:3-64, and the Separation of Powers doctrine precludes an alternative construction.

d. The DEP’s exercise of its eminent domain authority in this instance is arbitrary and capricious because the Project fails to account for Margate’s contiguous, uninterrupted bulkhead system (which functioned well during Hurricane Sandy), it fails to consider that an identical or superior result could have been achieved by widening

and/or heightening the beach berm in lieu of constructing dunes, it fails to account for issues related to street-end drainage that will be created by the proposed dunes, it imposes upon Margate untold, unending maintenance obligations, likely to cost in excess of \$500,000 annually, concerning the dunes and, finally, because the DEP employed an illegal and bad faith means of effectuating the purported taking – the Administrative Orders.

79. Margate has an interest in protecting its real property rights.

80. All necessary parties have been joined.

81. Margate will be damaged irreparably if the Corps and the DEP are not enjoined from proceeding as planned.

**WHEREFORE**, Margate respectfully requests relief as follows: (a) that the Court preliminarily enjoin the Corps and the DEP from awarding the Contract and from entering upon Margate's property to commence construction or for any other purpose; (b) that the Court issue a declaratory judgment declaring that the Administrative Orders are void and therefore have no legal effect; and (c) that the Court order such other relief as it deems appropriate.

### **COUNT III**

#### ***Margate v. Defendants***

#### **Preliminary Injunctive Relief**

82. The foregoing paragraphs are incorporated by reference.

83. Margate is likely to succeed on the merits for the reasons set forth in Counts I and II.

84. A denial of the requested injunctive relief will result in irreparable harm because the Corps and DEP have violated, and will further violate, the rights of the citizens of Margate under the United States Constitution, the New Jersey Constitution and the Act.

85. A denial of the requested injunctive relief will also presumptively result in irreparable harm because, by virtue of the Takings Clause and the Due Process Clause of the United States Constitution, corollary provisions of the New Jersey constitution and the Act, this case is imbued with a public interest which has been codified by law and the violation of which entitles a movant, under the Act, to preliminary injunctive relief even absent irreparable harm.

86. A denial of the requested injunctive relief will also result in irreparable harm because it respects Margate's rights in unique real property, namely its coastal beaches.

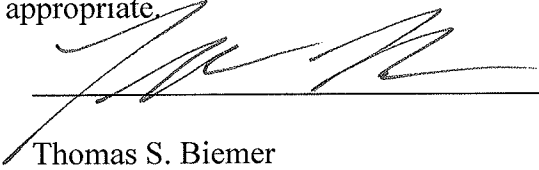
87. Granting the injunction will not harm the Defendants, as Margate asks only that the status quo be maintained pending a determination in this action. The status quo is that no contract has been awarded and construction of dunes upon Margate's beaches has not commenced.

88. The injunction sought is in the public interest. It is within the public interest to ensure that federal and state agencies act within the limits set by the United States and New Jersey Constitutions, respectively, as well as within their statutorily granted powers. Moreover, the citizens of Margate have expressly voted against the construction of dunes on Margate's beaches. The Corps' and the DEP's actions in violation of law and in violation of the will of the citizens of Margate must therefore be enjoined to protect the public interest.

89. The Court should exercise its discretion and not require the posting of any security upon the issuance of temporary restraints.

**WHEREFORE**, Margate respectfully requests a temporary restraining order and preliminary injunction enjoining enjoin the Corps and the DEP from awarding the Contract and from entering upon Margate's property to commence construction or for any other purpose, together with such other relief as the Court deems appropriate.

By: \_\_\_\_\_

  
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Date: November 24, 2014