

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

MARGATE CITY, NEW JERSEY,	:	
MORTON AND ROBERTA SHIEKMAN	:	
Plaintiffs,	:	
	:	
v.	:	C.A. No: 14-7303-RMB-AMD
	:	
UNITED STATES ARMY CORPS OF ENGINEERS,	:	
	:	
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:	
	:	
AND	:	
	:	
BOB MARTIN IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	
Defendants.	:	

AMENDED COMPLAINT

Introduction

1. Plaintiffs, the City of Margate (“**Margate**” or the “**City**”) and Morton and Roberta Shiekman (the “**Shiekmans**”) (collectively, “**Plaintiffs**”), bring this action to enjoin the United States Army Corps of Engineers (the “**Corps**”) from immediately contracting with third parties to construct a 2-mile long stretch of 12.75-foot high, 25-foot wide sand dunes on their beachfront property in the City.

2. Though the New Jersey Department of Environmental Protection (“**DEP**”) and its Commissioner, Bob Martin (“**Commissioner Martin**”), have represented to the Corps that the DEP has acquired the property upon which the Corps intends to start construction this month, those representations are, and have been, false.

3. Rather than following any lawful process to acquire the subject property by way of eminent domain, the DEP and Commissioner Martin simply filed “Administrative Orders” which purport to immediately take permanent easements on Plaintiffs’ property, without having provided Plaintiffs any notice or opportunity to be heard.

4. The Defendants’ conduct, which includes an unlawful taking of, imminent trespass upon and complete alteration of Plaintiffs’ real property, violates Plaintiffs’ rights under the United States Constitution, federal and state statutes and New Jersey common law.

THE PARTIES

5. Margate is a city in the State of New Jersey.

6. The Shiekman’s own real property, including riparian rights, at 117 S. Mansfield Ave., Bl. 13, lot 18, in Margate.

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

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

9. Commissioner Martin, in his official capacity, is the commissioner of the DEP.

JURISDICTION AND VENUE

10. This Court has original jurisdiction over all claims against the Corps under United States Constitution Article III, § Two, Clause One.

11. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiffs’ claims arise under the United States Constitution and the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (“URA”).

12. This Court has jurisdiction over Plaintiffs’ claims against the Corps pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 702, 706(2)(A), (B) and (D).

13. This Court has supplemental jurisdiction and/or pendant party jurisdiction over state law claims asserted by Plaintiffs against the Defendants because those claims arise from a common nucleus of operative facts as those claims arising under federal law.

14. Venue is proper in this District because Plaintiffs' claims arose in this District.

FACTUAL BACKGROUND

15. In October, 2012, Hurricane Sandy made landfall along the shores of New Jersey.

16. Although the consequences of Sandy have led to nearly universal agreement that New Jersey needs to implement better storm protection strategies, a one-size-fits-all solution is not rational.

17. 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 storm prevention strategies that it believes are more protective and cost-effective for the City and its citizens.

18. The Defendants have chosen not to even consider these alternatives and have adopted the one-size-fits-all approach.

19. Immediately following Sandy, the Defendants indicated their intention to implement in various coastal municipalities, including Margate, the Absecon Island Coastal Storm Risk Reduction Project (the "**Project**"), a storm damage reduction and coastal erosion plan conceived nearly 20 years ago.

20. The relevant portion of the Project calls for the construction of 12.75-foot high, 25-foot wide sand dunes on the beaches of all four Absecon Island municipalities - Atlantic City, Ventnor, Margate and Longport.

21. Though the Defendants have already constructed dunes in Atlantic City and Ventnor, they have yet to award a contract or commence construction in Margate or Longport.

22. Initially, the DEP attempted to acquire, by agreement, permanent easements upon Plaintiffs' property so that the Corps could proceed with construction.

23. Margate, uncertain that the Project would be effective or that it accounted for the City's distinct characteristics vis-à-vis other shore municipalities, declined to grant the requested easements.

24. The Shiekman's likewise declined to grant voluntary easements.

25. Margate instead endeavored to do two things: (1) ascertain the will of its citizens; and (2) determine, based on expert analysis, and in light of the relative success of the City's existing storm damage reduction measures during Sandy, whether the Project was in the City's best interests.

26. The will of Margate's citizens quickly became clear.

27. In August 2013, the citizens of Margate formed Margate Citizens Questioning the Beach Project ("MCQBP"). See <http://www.mcqbp.org/about.html>.

28. The stated mission of MCQBP is to educate and inform Margate citizens about the Project "and to SAVE MARGATE beaches." *Id.*

29. As opposition to the Project grew in Margate, the State of New Jersey's insistence that the Project be immediately implemented increased.

30. On September 25, 2013, Governor Chris Christie issued Executed Order No. 140 ("EO 140").

31. Recognizing that the land upon which the Corps intends to build the Project is privately owned, EO 140 orders 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” from “recalcitrant property owners” who have not already granted voluntary easements.

32. EO 140 invokes two relevant sources of eminent domain authority: (1) The Eminent Domain Act of 1971, N.J.S.A. § 20:3-1 *et seq.* (the “Act”); and (2) N.J.S.A. § 12:3-64, the New Jersey statute granting eminent domain powers to the DEP.

33. Pursuant to the Act and N.J.S.A. § 12:3-64, EO 140 orders the Attorney General of the State of New Jersey (“NJAG”) to “immediately take action to coordinate those legal proceedings necessary to acquire the necessary easements or other interests in real property for the [Project].”

34. The Act requires certain procedures before condemnation, which include, but are not limited to, pre-condemnation appraisal, negotiations, the provision of a written offer followed by a two-week response period, the initiation of legal proceedings in New Jersey Superior Court and, critically, the condemnee’s opportunity during those proceedings to object to the condemnor’s authority to take its property. *See* §§ N.J.S.A. 20:3-6, 20:3-8, 20:3-11 and 20:3-19.

35. After Governor Christie issued EO 140, the NJAG and DEP nevertheless did not initiate any aspect of the process mandated by the Act. Instead, the DEP continued to request voluntary easements from Plaintiffs.

36. To further ascertain the will of its citizens and guide the decision as to whether to grant the requested easements, on November 4, 2013, Margate put to referendum the question of whether its citizens supported the Project.

37. An overwhelming majority of Margate’s citizens voted against the Project.

38. As a consequence, Margate again declined to grant voluntary easements.

39. The Shiekmans likewise continued to refuse to grant voluntary easements.

40. Still, the DEP and the NJAG refrained from initiating any condemnation proceedings.

41. Despite Margate's voter-expressed opposition to the Project and the continued failure of the DEP to acquire the necessary property interests, the Defendants continued to move the Project forward.

42. On June 23, 2014, the DEP and the Corps entered into a Project Partnership Agreement ("PPA") to complete construction in Margate. A true and correct copy of the PPA is attached as Exhibit "A." The PPA, in conjunction with a previously executed Project Cooperation Agreement ("PCA") governs the Project. A true and correct copy of the PCA is attached as Exhibit "B."

43. Both the PCA and PPA require the DEP, as the non-federal sponsor of the Project, to comply with the URA, 42 U.S.C. §§ 4601-4655 to acquire real property interests for construction, operation, maintenance, and periodic re-nourishment of the Project. PPA at Article III(C); PCA at Article III(E).

44. The URA, even independent of the PPA and PCA, governs the Defendants' administration of the Project, and, in particular, the DEP's acquisition of real property for the Project and its representations to the Corps concerning the manner in which it does so.

45. Project commencement appearing imminent, Margate engaged an expert engineer to analyze the Project and additionally began to solicit guidance on how it might address the differing views of the DEP and the citizens of Margate.

46. 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.

47. In or around September of 2014, Margate also engaged Charles J. Rooney, P.E., P.P. of T&M Associates to analyze the Project plans and specifications so that the City could assess, from a technical perspective, whether the Project was in the City's best interests.

48. On September 11, 2014, notwithstanding the parties' intentions to conduct negotiations with respect to the Project and the DEP's continued failure to acquire the necessary property interests, the Corps issued a request for proposal for the Project.

49. On September 22, 2014, Mr. Rooney issued his report, which raises serious questions concerning the Corps' failure to consider Margate's contiguous bulkhead system, the Corps premature elimination of a bulkhead fortification effort, the Corps' apparent failure to consider a no dune alternative in light of the bulkhead system, the Corps' underestimation of ongoing maintenance and operations costs to be borne by all affected property owners and taxpayers, the Corps' failure to adequately address street-end draining issues created by the proposed dunes, and the Corps' failure to consider an elevated beach berm across the entire beach in lieu of dunes toward the back of the beach.

50. Also on September 22, 2014, the Commissioner Martin sent a letter to Margate Mayor Michael Becker specifically stating that the DEP would follow the condemnation procedures required under the Act and that it would begin the process within 30-60 days by conducting an appraisal. The DEP sent similar letters to the Shiekman and other affected property owners.

51. The DEP never conducted an appraisal or took any steps towards complying with the Act.

52. Instead, on October 1, 2014, the DEP abruptly filed in the Atlantic County Clerk's Office three "Administrative Orders" signed by Commissioner Martin.

53. Administrative Orders No. 2014-13, 2014-14 and 2014-15 (the "**Administrative Orders**") purport to take immediate permanent easements in Plaintiffs' property for the purpose of constructing sand dunes in furtherance of the Project.

54. The interests purportedly acquired by the DEP were not titles in fee simple, but "Perpetual Storm Damage Reduction Easement[s]."

55. The DEP provided Plaintiffs with no notice or opportunity to be heard prior to filing the Administrative Orders.

56. It provided Plaintiffs with no opportunity to object thereafter.

57. Because the Corps could not and would not commence construction until the DEP certified, pursuant to the URA, the PPA and the PCA, that it had acquired the easements, the DEP proceeded to so certify to the Corps.

58. When Margate learned of the Administrative Orders, it was concerned that the DEP no longer intended to engage in negotiations and that construction would soon begin.

59. Still preferring negotiations to litigation, but mindful of the need to preserve its right to dispute the legality of the Administrative Orders, Margate requested that the parties enter into a Standstill and Tolling Agreement. On October 2, 2014, the DEP and Margate entered into a Tolling and Standstill Agreement.

60. The Tolling and Standstill Agreement 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.

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

62. 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.

63. The Corps did not respond to this letter.

64. On October 30, 2014, the Corps opened bids for the Project.

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

66. 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, negotiation sessions had been initially scheduled, and the parties were in the midst of attempting to reschedule a meeting for mid-November.

67. On November 7, 2014, Margate, through counsel, sent a letter to the Corps General Counsel in its Philadelphia Office, Bill Wilcox, Esquire, 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 negotiations. Recognizing that the awarding of the Contract and commencement of

construction would seriously undermine negotiations and irreparably harm the City, 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.”

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

69. On November 12, 2014, the Corps posted an Abstract comparing bids received for the Project. It therefore appeared that, despite Margate’s correspondence with the Corps and its unresolved dispute with the DEP, the Defendants had no intention of slowing, let alone halting, the Project.

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

71. Mr. Wilcox informed Margate’s attorney that the Corps was satisfied with the DEP’s certification that it had acquired easements upon Plaintiffs’ property by virtue of the Administrative Orders, and that the Corps would therefore proceed, in reliance on the DEP’s certification, to award the Contract “soon. Not today, but soon.”

72. On November 24, 2014, Margate’s counsel spoke to Assistant Attorney General of New Jersey, David Apy. Mr. Apy confirmed that the Defendants would not agree to halt the Project for any reason.

73. The Corps intends to award a contract and commence construction any day.

COUNT I

Plaintiffs v. the Corps

**Declaratory Judgment that Contract Award and Commencement of Construction
Constitute a Violation of the Due Process Clause of the United States Constitution, the
URA and the New Jersey Common Law of Trespass**

74. The foregoing paragraphs are incorporated by reference.

75. 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.”

76. An actual case or controversy exists as between the Corps and Plaintiffs because the Corps intends to immediately award the Contract and commence construction of sand dunes on Plaintiffs’ beachfront property despite Plaintiffs’ vehement objections.

77. The Corps’ awarding of the Contract and construction of dunes on the Shiekmans’ property violates the Shiekmans’ rights under the Due Process Clause of the United States Constitution because the Corps’ conduct amounts to a taking of the Shiekmans’ property without due process (or any process) of law.

78. The Corps’ awarding of the Contract and construction of dunes on Plaintiffs’ property violates the URA because the subject property interests were not lawfully acquired and because the Corps is relying in the DEP’s misrepresentation to the contrary.

79. The Corps’ awarding of the Contract and construction of dunes on Plaintiffs’ property also constitutes an unlawful trespass upon Plaintiffs’ property, as Plaintiffs object to the entry.

80. Plaintiffs have a clear in interest in protecting their legal and real property rights.

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

82. Plaintiffs will be damaged irreparably if the Corps is not enjoined from proceeding as planned.

WHEREFORE, Plaintiffs respectfully requests relief as follows: (a) a declaratory judgment that the Corps' awarding the Contract and commencement of construction upon Plaintiffs' property will violate Plaintiffs' rights under the United States Constitution, the URA and the New Jersey common law of trespass; (b) awarding Plaintiffs' reasonable costs, including attorneys' fees, in prosecuting this action, pursuant to 42 U.S.C. § 4654; and (c) such other relief as it deems appropriate.

COUNT II

Plaintiffs v. DEP and Commissioner Martin

Declaratory Judgment that the Administrative Orders Have No Legal Effect

83. The foregoing paragraphs are incorporated by reference.

84. An actual case or controversy exists as between the DEP and Plaintiffs because the Corps, in reliance on the misrepresentations of the DEP, intends to immediately award the Contract and commence construction of sand dunes on Plaintiffs' property.

85. The Act sets forth the requirements by which the State, or any statutorily empowered entity, may exercise its eminent domain powers to acquire property.

86. The URA, moreover, sets forth the requirements to which the DEP, as a non-federal sponsor of the Project, must adhere to acquire interests in real property necessary for the Project. The Due Process Clause of the United States Constitution (through the Fourteenth Amendment), moreover, requires notice and an opportunity to be heard prior to a deprivation of property.

87. The DEP and Commissioner Martin have not complied with any aspect of the Act, the URA or the Due Process Clause.

88. Instead, the DEP and Commissioner Martin simply filed the Administrative Orders without providing Plaintiffs any notice or any process prior to declaring a completed taking of easements upon their real property.

89. The Administrative Orders are therefore invalid for at least the following reasons:

a. The DEP and Commissioner Martin failed to follow the condemnation procedures required by the Act.

b. The DEP and Commissioner Martin failed to comply with the URA in purporting to acquire the property at issue, including but not limited to 42 U.S.C. § 4655.

c. The DEP and Commissioner Martin violated the Due Process Clause by failing to provide Plaintiffs with notice or process prior to the purported taking of easements upon Plaintiffs' real property.

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

e. Executive Order No. 140 required the DEP to comply with the Act and N.J.S.A. § 12:3-64, and the Separation of Powers doctrine precludes an alternative construction.

f. 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.

90. Plaintiffs have an interest in protecting their legal and real property rights.

91. All necessary parties have been joined.

WHEREFORE, Plaintiffs respectfully requests a declaratory judgment declaring that the Administrative Orders are void and therefore have no legal effect and ordering such other relief as it deems appropriate.

COUNT III

Plaintiffs v. Corps

Preliminary Injunctive Relief

92. The foregoing paragraphs are incorporated by reference.

93. Plaintiffs are likely to succeed on the merits for the reasons set forth in Count I.

94. A denial of the requested injunctive relief will result in irreparable harm because the Corps will violate the Due Process Clause and the URA if not enjoined.

95. A denial of the requested injunctive relief will also presumptively result in irreparable harm because this case is imbued with a public interest which has been codified by law (including the URA and the Act) and the violation of which entitles a movant, under the Act, to preliminary injunctive relief even absent irreparable harm.

96. A denial of the requested injunctive relief will also result in irreparable harm because it respects Plaintiffs' rights in unique real property.

97. Granting the injunction will not harm the Corps, as Plaintiffs ask only that the status quo be maintained pending a final determination in this action. The status quo is that no

contract has been awarded and construction of dunes upon Plaintiffs' property has not commenced.

98. 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 Constitution, as well as under federal and state law. Moreover, the citizens of Margate have expressly voted against the Project.

WHEREFORE, Plaintiffs respectfully request a preliminary injunction enjoining the Corps from awarding the Contract and from entering upon Plaintiffs' property to commence construction or for any other purpose pending a final determination in this case, together with such other relief as the Court deems appropriate.

By: /s/ Thomas S. Biemer

Thomas S. Biemer
Robert E. Andrews
Jordan M. Rand
DILWORTH PAXSON LLP
457 Haddonfield Road
Cherry Hill, NJ 08002
Telephone: (856) 675-1900
Email: tbiemer@dilworthlaw.com

Attorney for Plaintiffs

Date: December 2, 2014

CERTIFICATE OF SERVICE

I, Thomas S. Biemer, hereby certify that on December 2, 2014, I caused a true and correct copy of the foregoing Amended Complaint to be served via electronic mail and/or by the Court's ECF System as follows:

Bill Wilcox, Esquire
United States Army Corps of Engineers
Office of Counsel
The Wanamaker Building
100 Penn Square East
Philadelphia, PA 19107
Tel: 215-656-6529

David C. Apy
Assistant Attorney General
Division of Law, Director's Complex
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, N.J. 08625
Tel: 609-292-8567
David.Apy@dol.lps.state.nj.us

/s/ Thomas S. Biemer
Thomas S. Biemer