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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5152-15T1

NEW JERSEY SPORTS AND
EXPOSITION AUTHORITY,

Plaintiff-Respondent,

v.

TOWN OF KEARNY,

Defendant-Appellant,

and

STATE OF NEW JERSEY, by and through
the TIDELANDS RESOURCE COUNCIL,
THEODORE C. WILDMAN, and all of
his heirs, successors and assigns,
MIMI DEVELOPMENT CORPORATION, its
successor HUDSON MEADOWS URBAN
RENEWAL DEVELOPMENT CORPORATION,
and its further successor, SONEE
URBAN RENEWAL CORPORATION,

Defendants.

Submitted October 11, 2017 – Decided November 20, 2017

Before Judges Fuentes, Koblitz, and Manahan.

On appeal from the Superior Court of New
Jersey, Law Division, Hudson County, Docket
No. L-2039-16.

Castano Quigley LLC, attorneys for appellant
(Gregory J. Castano Jr., on the brief).

Lowenstein Sandler LLP, attorneys for
respondent (James Stewart and Rachel Warren,
on the brief).

PER CURIAM

Appellant Town of Kearny (Kearny) appeals from an order denying its motion for summary judgment and from an order granting a final judgment authorizing the New Jersey Sports and Exposition Authority (NJSEA) to exercise its power of eminent domain relating to the Keegan Landfill.

Kearny raises the following points on appeal:

POINT I

WHETHER THE CONDEMNATION VIOLATES THE
CONTRACTS CLAUSE OF THE UNITED STATES
CONSTITUTION.

POINT II

WHETHER NJSEA'S CONDEMNATION OF THE KEEGAN
LANDFILL WAS BROUGHT IN BAD FAITH.

POINT III

WHETHER NJSEA DID NOT "TURN SQUARE CORNERS"
WHEN IT CONDEMNED THE KEEGAN LANDFILL.

POINT IV

WHETHER THE NJSEA IS ESTOPPED FROM USING
EMINENT DOMAIN TO AVOID ITS CONTRACTUAL
OBLIGATIONS BECAUSE OF ALLEGED INDUCEMENTS
MADE BY NJMC PRIOR TO THE EXECUTION OF THE
LEASE AGREEMENT.

Having considered these arguments in light of the record and controlling law, we affirm substantially for the reasons set forth in the comprehensive, well-reasoned thirty-three page written opinion of Judge Peter F. Bariso, Jr. We add the following.

NJSEA is the zoning and planning agency for the Hackensack region. In February 2015, NJSEA and the New Jersey Meadowlands Commission (NJMC) merged and became collectively known as NJSEA. N.J.S.A. 5:10A-1 to -68. NJSEA is authorized to acquire any real property within its jurisdiction if the commission finds it necessary or convenient to do so for any of its authorized purposes, including temporary purposes, in accordance with the Eminent Domain Act of 1971. N.J.S.A. 20:3-1 to -50. One of NJSEA'S authorized purposes is to "provide solid waste disposal and recycling facilities for the treatment of solid waste." N.J.S.A. 5:10A-7(k).

The Keegan Landfill consists of approximately 110 acres located northeast of Bergen Avenue in Kearny. The majority of the disposal activity occurred at this site during the 1960s and 70s. The landfill was not properly remediated, and contaminated leachate regularly discharged into the adjacent fresh water marsh, resulting in underground fires.

According to the appraisal report dated March 16, 2016, the estimated market value of the fee simple interest in the Keegan

Landfill is \$1,880,000. By letter dated May 3, 2016, NJSEA offered to purchase the landfill from Kearny for the market value.

On January 11, 2005, a special public meeting was held in Kearny Town Hall Council Chambers to discuss the future of the Keegan Landfill. The meeting included Kearny's mayor and council, and representatives of the NJMC. The NJMC representatives outlined their plan to temporarily re-open and remediate the landfill. NJMC also declared its intention to return the landfill property at the end of the lease term to Kearny for use as a potential recreational area. Additionally, NJMC would provide a funded escrow account for Kearny to use post-closure.

Following the meeting, NJMC and Kearny jointly drafted and mailed to all Kearny residents a promotional piece entitled "The Kearny-NJMC Green Space Initiative." The goal of the initiative was described as "a comprehensive plan to remediate the contaminated Keegan Landfill in Kearny, repair flood-control waterways east of Schuyler Avenue, restore the Kearny Marsh and construct additional parks and recreation sites for residents."

On June 14, 2005, Kearny and NJMC executed a lease agreement to implement the Green Space Initiative.¹ The lease, in pertinent part, recited:

WHEREAS, [NJSEA] intends to fund the landfill closure (and the remediation of the adjacent Kearny Marsh owned by [NJSEA]) through revenues generated by disposal of Type 13 construction and demolition waste and Type 27 industrial waste (but not including asbestos or chemical waste) at the Keegan Landfill; and

. . . .

WHEREAS, as part of this project the [NJSEA] will assume sole responsibility, without financial assistance or contribution from Kearny, for the design and implementation of a closure plan approved by the Department of Environmental Protection [NJDEP]; and

WHEREAS, upon completion of operations and closure of the Keegan Landfill, [Kearny] shall undertake the installation of recreational facilities on the demised premises, which shall incorporate, to the extent practicable, the requirements of N.J.A.C. 7:2A-9 for grading and final cover; and

WHEREAS, the [NJSEA] shall, upon the completion of operations and closure of the Keegan Landfill, convey to [Kearny] the closure escrow account it has established in accordance with N.J.A.C. 7:26-2A.9, at which time [Kearny] shall assume sole responsibility for all post-closure requirements for the Keegan Landfill pursuant to that rule;

. . . .

¹ The lease was amended on June 15, 2005, to revise the schedule for the payment of fixed rent in favor of Kearny, in exchange for which Kearny agreed to a six-month extension of the lease term.

After the cessation of Disposal Operations at the Keegan Landfill, the [NJSEA] shall pay to [Kearny] the funds described in Section 7B, on the condition that [Kearny] shall use this money to fund the installation of recreational facilities at the Demised Premises and the Retained Premises.

. . . .

No Costs to Town. It is the intention of the parties that [Kearny] shall have no expenses whatsoever with respect to the Demised Premises or the Retained Premises during the Lease term and the [NJSEA] agrees that it will provide, at its sole cost and expense, for the closure of the Keegan Landfill.

. . . .

At the end of Disposal Operations and the completion of closure, the [NJSEA] shall transfer to [Kearny] the post-closure escrow account created in accordance with the requirements of N.J.S.A. 13:1E-109 and N.J.A.C. 7:26-2A.9(g), and [Kearny] shall accept the account and assume sole responsibility to perform the required post-closure activities at both the Demised Premises and the Retained Properties.

. . . .

The [NJSEA] shall on the last day of the Term, peaceably and quietly surrender the Demised Premises to [Kearny].

In December 2006, NJMC published a comprehensive action plan containing statements related to the re-opening of the property. The plan stated that "[a]fter the full closure of [the Keegan Landfill] in 2013, the [NJSEA] will have completed its shift from

operating and closing landfills to reusing them." The plan also stated that it "include[s] closure costs of the landfill and post-closure costs to convert the landfill to a nature park or a golf course in 2013."

One year later, NJMC authored a "Closure/Post[-]Closure Financial Plan" for the Keegan Landfill that stated, "[t]he purpose of reopening this former landfill is to allow the collection of tipping fees to obtain the necessary funding to properly remediate (close) the site in accordance with NJDEP regulations." In July 2008, NJMC authored a "Closure and Post-Closure Care Plan" for the Keegan Landfill that stated, "[a]fter closure, the Keegan site will be returned to [Kearny]. It is anticipated that the site will remain as passive open space." The plan further stated that "[u]ltimately, as the site will return to [Kearny], the final long term end use will be determined by [Kearny]." Five months later, NJMC reopened the Keegan Landfill under a Temporary Certificate of Authority to Operate issued by NJDEP.

According to the certification of Thomas Marturano, the Director of Solid Waste and Natural Resources at NJSEA, beginning in 2014, NJSEA determined that it was in the public interest to extend the operating life of the Keegan Landfill and commenced negotiations to extend the lease agreement with Kearny. In a letter dated June 9, 2015, NJSEA requested that Kearny complete

negotiations for the continued operation of the Keegan Landfill. Additionally, NJSEA addressed Kearny's alleged obligation to fund post-closure activities.

The parties continued negotiations and exchanged correspondence on July 24 and July 30, 2015, without reaching an accord. By letter dated September 18, 2015, NJDEP advised the parties that absent a new lease or extension that allows continued operation of the landfill, NJSEA and Kearny would be required to begin preparations for termination of operations and implementation of closure of the landfill in the near future. Further, the parties were advised that without a complete application for renewal at least ninety days prior to the expiration date, NJSEA must terminate the receipt of waste on or prior to June 20, 2016.

In February 2016, the Kearny Town Council adopted a resolution authorizing the issuance of a Notice to Quit/Demand for Possession and Compliance Lease Obligations. Kearny's counsel subsequently sent the notice via email and overnight mail to NJSEA.

On March 17, 2016, NJSEA adopted Resolution 2016-10, which authorized the use of eminent domain to acquire the underlying property. By letter dated May 3, 2016, NJSEA made Kearny a pre-condemnation offer to acquire the Keegan Landfill for \$1,880,000.

Two weeks later, Kearny responded to NJSEA's pre-condemnation offer by urging NJSEA to reconsider its use of eminent domain.

On May 19, 2016, NJSEA filed a verified condemnation complaint with the trial court. Five days later, the court entered an order to show cause and an order for deposit. In lieu of an answer, Kearny filed a motion for summary judgment on June 10, 2016, which NJSEA opposed. Oral argument was heard on June 24 and July 15, 2016. Two weeks after the conclusion of oral argument, the court entered an order denying Kearny's motion for summary judgment and entering a final judgment approving the taking and appointing condemnation commissioners.

Two days later, Kearny filed a notice of appeal with this court followed by a motion for a stay pending appeal, which the court denied by order dated August 19, 2016. Kearny then filed a motion for a stay pending appeal to this court, which we denied on September 23, 2016. Kearny moved to the Supreme Court for a stay pending appeal two weeks later. The Court denied the stay on December 6, 2016.

An appellate court reviews a grant of summary judgment de novo, using the same standard as the trial court. Turner v. Wong, 363 N.J. Super. 186, 198-99 (App. Div. 2003). Thus, the appellate court must determine whether a genuine issue of material fact is present and, if not, evaluate whether the court's ruling on the

law was correct. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998).

I.

We first address the argument that the condemnation action violated the Contract Clause of the United States Constitution. Under the United States and New Jersey Constitutions, a government body is permitted to take private property for public use in exchange for just compensation. U.S. Const. amend. XIV § 2; N.J. Const., art. I, ¶ 20. "Eminent domain is the power of the State to take private property for public use. . . . It is a right founded on the law of necessity which is inherent in sovereignty and essential to the existence of government[.]" Twp. of W. Orange v. 769 Assocs., LLC, 172 N.J. 564, 571 (2002). Although the power of eminent domain is held exclusively in the legislative branch of the government, various state agencies have been given the authority by the State Legislature to condemn private property for just compensation because it is not feasible for the Legislature to directly oversee all condemnation actions. Wes Outdoor Advertising Co. v. Goldberg, 55 N.J. 347, 351 (1970).

Here, Kearny argues that NJSEA's exercise of eminent domain to condemn the Keegan Landfill violated the Contract Clause of the United States Constitution. Kearny states that "the state

government does not have free reign to simply disregard its pre-existing contractual obligation, even if needed to satisfy an 'important public interest.'"

In United States Trust Company v. New Jersey, a case that both Kearny and NJSEA cite in support of their respective arguments, the Court held that the Contract Clause "limits otherwise legitimate exercises of state legislative authority, and the existence of an important public interest is not always sufficient to overcome that limitation." 431 U.S. 1, 21, 97 S. Ct. 1505, 1517, 52 L. Ed. 2d 92, 109 (1977). The Court also held that "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." Id. at 23. The Court further held that a state's police power and a state's eminent domain power are examples of these essential attributes of sovereignty that cannot be "contracted away." Id. at 24.

NJSEA is authorized to acquire by eminent domain any real property within its jurisdiction if NJSEA determines it necessary or convenient to do so for any of its authorized purposes. N.J.S.A. 5:10-29; N.J.S.A. 5:10-5(m); N.J.S.A. 13:17-6(g). One of NJSEA's authorized purposes is to provide solid waste disposal and recycling facilities for the treatment of solid waste. N.J.S.A. 5:10A-7(k).

In 2014, NJSEA determined that NJSEA'S continued operation of the Keegan Landfill served as a vital public function that was in the public interest. After failing to negotiate an extension of the lease agreement with Kearny, and after Kearny sent NJSEA a "Notice to Quit/Demand for Possession and Compliance with Lease Obligations," NJSEA decided that it needed to use its eminent domain power to ensure continued operation of the landfill.

In reaching this decision, Judge Bariso held, and we agree, NJSEA did not violate the Contract Clause as it was duly authorized to use eminent domain to condemn the landfill; it exercised that authority in furtherance of one of its stated purposes; and eminent domain is an essential attribute of state sovereignty that cannot be contracted away.

II.

We next address the bad faith argument. A reviewing court "will not upset a municipality's decision to use its eminent domain power 'in the absence of an affirmative showing of fraud, bad faith or manifest abuse.'" Twp. of W. Orange, supra, 172 N.J. at 571 (quoting City of Trenton v. Lenzner, 16 N.J. 465, 473, cert. denied, 348 U.S. 972, 75 S. Ct. 534, 99 L. Ed. 757 (1955)). Great discretion usually is afforded to condemning authorities in determining what property may be taken for public purposes. See Texas E. Transmission Corp. v. Wildlife Preserves, Inc., 48 N.J.

261, 269 (1966) (stating "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"). Our courts recognize that it is the responsibility of the Legislature to determine what constitutes a public use. State v. Lanza, 27 N.J. 516, 530 (1958).

Bad faith refers to "the doing of an act for a dishonest purpose" and "contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will." Twp. of Readington v. Solberg Aviation Co., 409 N.J. Super. 282, 310-11 (App. Div. 2009). "When considering a claim of bad faith in the context of an eminent domain action, courts traditionally distinguish between the motives of the individuals who adopted the legislation and the purposes of the condemnation itself." Id. at 311. "Courts will generally not inquire into a public body's motive concerning the necessity of the taking. . . ." Mount Laurel Twp. v. Mipro Homes, L.L.C., 379 N.J. Super. 358, 375 (App. Div. 2005). Whether a taking is for a public use "is largely a legislative question beyond the reach of judicial review except in the most egregious circumstances." Ibid. The burden rests with the party claiming bad faith to prove the alleged impropriety by clear and convincing evidence. Twp. of Readington, supra, 409 N.J. Super. at 311.

Kearny argues that NJSEA's condemnation action was instituted in bad faith because "it used eminent domain to avoid its pre-existing contractual obligations." Kearny submits as an example of bad faith, NJSEA's "gross under-valuation of the property that disregards its contractual obligation to have paid [Kearny] \$3 million for recreational facilities at the end of the lease. Instead, the NJSEA seeks to pay [Kearny] a mere \$1.8 million." This offer was tendered by the NJSEA predicated upon an appraisal of the landfill conducted at its behest. The Appraisal Report, dated March 16, 2016, stated the estimated market value of the fee simple interest in the Keegan Landfill as \$1,880,000.

NJSEA's stated reason for institution of condemnation proceedings was to continue the operation of the landfill in accordance with its statutorily authorized purpose of providing solid waste disposal. NJSEA determined that it would be in the public interest to continue its operation of the landfill and, consistent therewith, commenced negotiations with Kearny to extend the lease agreement. NJSEA also took the requisite steps to amend its Solid Waste Management Plan, which included notice to the public and a public hearing to receive comments. NJSEA further engaged in the process of amending its Solid Waste Permit to allow for the continued operation of the landfill.

In support of its assertion of bad faith, Kearny has failed to present any evidence that NJSEA sought to use the landfill for any purpose other than its continued operation. Nor has Kearny offered any evidence that NJSEA's enunciated purpose was pre-textual. As the burden rested with Kearny to prove bad faith by clear and convincing evidence of NJSEA's dishonest or ulterior purpose, its claim of bad faith failed and Judge Bariso's rejection of that claim was proper.

III.

Kearny next argues that the judgment authorizing NJSEA's exercise of eminent domain must be reversed because NJSEA failed to "turn square corners" when it condemned the Keegan Landfill. Kearny argues that NJSEA did not "turn square corners" by choosing to use its powers of eminent domain instead of honoring its pre-existing contractual obligations. Kearny further argues NJSEA's exercise of eminent domain was calculated as a method to seek a "bargaining and litigation advantage" over Kearny. We disagree.

In dealing with the public, public bodies must "turn square corners." F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426 (1985). Regarding condemnation, a public body "has an overriding obligation to deal forthrightly and fairly with property owners." Ibid. A public body "may not conduct itself so as to achieve or preserve any kind of bargaining or [litigation]

advantage over the property owner" and "[i]ts primary obligation is to comport itself with compunction and integrity" Id. at 427.

As noted by Judge Bariso, in condemnation actions, the "turn square corners" doctrine applies primarily where a public body seeks to avoid a procedural or pre-litigation requirement, giving itself a litigation advantage. See Klumpp v. Borough of Avalon, 202 N.J. 390, 413 (2010) (noting that government should provide additional notice, other than the physical invasion of real property, to affected property owners before and after a physical taking); see also Rockaway v. Donofrio, 186 N.J. Super. 344, 354 (App. Div. 1982) (dismissing plaintiff's condemnation of property for failure to comply with its statutory obligations under N.J.S.A. 20:3-6).

Kearny does not challenge NJSEA's compliance with any procedural or pre-litigation requirements of its eminent domain powers as it is without dispute that NJSEA meticulously complied with those requirements. As such, Kearny's "square corners" argument fails.

IV.

Finally, we address the estoppel argument. "Equitable estoppel is 'rarely invoked against a governmental entity.'" Middletown Twp. Policemen's Benevolent Ass'n v. Twp. of

Middletown, 162 N.J. 361, 367 (2000) (quoting Wood v. Borough of Wildwood Crest, 319 N.J. Super. 650, 656 (App. Div. 1999)). Principles of equitable estoppel "'are relevant in assessing governmental conduct' and impose a duty on the court to invoke estoppel when the occasion arises." Middletown, supra, 162 N.J. at 367. "The essential elements of equitable estoppel are a knowing and intentional misrepresentation by the party sought to be estopped under circumstances in which the misrepresentation would probably induce reliance, and reliance by the party seeking estoppel to his or her detriment." O'Malley v. Dep't of Energy, 109 N.J. 309, 317 (1987).

"Equitable estoppel may be invoked against a [public body] 'where interests of justice, morality and common fairness clearly dictate that course.'" Middletown, supra, 162 N.J. at 367 (quoting Gruber v. Mayor and Twp. Comm. of Raritan, 39 N.J. 1 (19622)). Doctrines of estoppel may be applied against the State, but are not applied "to the same extent as they are against individuals and private corporations." See Bayonne v. Murphy, 7 N.J. 298, 311 (1951) (the government may not be bound or estopped by unauthorized acts of its officers when performing certain government functions).

Kearny argues that NJSEA is estopped from using its eminent domain powers because of the statements and publications of NJMC,

NJSEA's predecessor, which were made and published prior to the execution of the lease agreement. As noted above, these representations included NJMC's intention to return the property to Kearny at the end of the lease term for potential recreational use, and its intention to provide a funded post-closure escrow account for Kearny's use.

Kearny also argues that NJSEA's statements during the January 2005 public hearing and the subsequent promotional piece demonstrate "a deliberate and explicit course of conduct to bait [Kearny's] elected official and residents into an agreement that apparently generated substantial revenues that may have been mismanaged by [NJSEA]. Kearny asserts that common fairness and equity "dictate that the NJMC and NJSEA be bound by their prior representations and contract." Again, we disagree.

Although the condemnation action may be inconsistent with the goal of the landfill's takeover as stated by the NJMC in 2005, we discern no basis to employ estoppel. There is no proof that the NJMC knowingly or intentionally misrepresented the purpose for re-opening the landfill, i.e., its remediation. Nor has Kearny demonstrated reliance on the public statements and the promotional piece to its detriment. To the contrary, Kearny clearly benefitted both from the landfill's remediation and from the substantial lease payments it received.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION