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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1915-22**

BOROUGH OF SEASIDE PARK,

Plaintiff-Respondent,

v.

SHREE JYOTI, LLC,

Defendant-Appellant.

Argued February 12, 2024 – Decided May 29, 2024

Before Judges DeAlmeida, Berdote Byrne and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-2155-22.

Peter H. Wegener argued the cause for appellant (Bathgate, Wegener & Wolf, PC, attorneys; Peter H. Wegener, on the briefs).

Robin La Bue argued the cause for respondent (Rothstein, Mandell, Strohm, Halm & Cipriani, PC, attorneys; Jean Kephart Cipriani and Robin La Bue, on the brief).

PER CURIAM

Defendant Shree Jyoti, LLC (Shree) appeals from the November 28, 2022 order of the Law Division finding that plaintiff Borough of Seaside Park properly exercised its authority to acquire Shree's real property by eminent domain, appointing commissioners, and denying Shree's motion to dismiss Seaside Park's condemnation complaint. We affirm.

I.

Shree owned real property in Seaside Park on which it operated the Desert Palm Inn, a fifty-room motel. The parcel is designated in the tax records of the municipality as Block 73, Lot 34 (the property).

On April 28, 2022, the governing body of the borough adopted an ordinance authorizing the acquisition of the property via eminent domain pursuant to the Local Lands and Buildings Law, N.J.S.A. 40A:12-1 to -12. The ordinance memorializes the governing body's finding that "the acquisition will promote and protect the health, safety and welfare of the residents of the Borough of Seaside Park, and that the acquisition of the property is in the furtherance of a public use and purpose" The ordinance does not, however, describe the public use and purpose in further detail. The ordinance authorized the municipal attorney to file a verified complaint and declaration of taking and to take all other necessary steps to effectuate a taking of the property. Shree

was given notice of the meeting of the governing body at which the ordinance was adopted but did not appear.

Also on April 28, 2022, the borough's counsel sent a letter to Shree's counsel referring to the ordinance and stating that both the borough and its appraiser had previously contacted Shree seeking an inspection of the property for the purpose of obtaining an appraisal. According to the borough's counsel, Shree had not responded to those inquiries. Counsel also included the borough's offer of what it considered to be the fair market value of the property. The borough's counsel later forwarded a copy of an appraisal of the property to Shree's counsel. Although aware of the ordinance, Shree did not file an action challenging its adoption.

On July 19, 2022, after its attempts to negotiate the purchase of the property failed, the borough filed a complaint in the Law Division seeking condemnation. Shortly thereafter, the borough filed an amended complaint. The amended complaint relied on the April 28, 2022 ordinance but did not allege the public use and purpose to which the borough intended to put the property.

Shree moved to dismiss the amended complaint, arguing, among other things, that the governing body did not identify in the ordinance the public use and purpose to which it intended to put the property. In response to the motion,

the borough filed a certification of its mayor. In the certification, the mayor stated the governing body had made a "legislative determination" to obtain the property for use as a public parking lot, including for installation of electric vehicle charging infrastructure. According to the certification, borough residents are experiencing a growing need for parking, exacerbated by development in an adjoining municipality with insufficient parking. The mayor also certified that residents and visitors have complained to the borough about the lack of electric vehicle charging infrastructure, the construction of which is encouraged by the 2019 New Jersey Energy Master Plan: Pathway to 2050 (2019), <https://www.nj.gov/emp/> (last visited 5/21/24). The certification does not refer to an ordinance adopted by the governing body endorsing a specific public use and purpose for the property.

On September 30, 2022, the trial court entered an order dismissing the amended complaint without prejudice. Although the court issued an oral opinion, the transcript of the opinion is not in the record before this court. The parties represent that the trial court dismissed the amended complaint because the municipality had not identified in the amended complaint the public use and purpose to which it intended to put the property.

Also on September 30, 2022, the borough filed a second verified complaint in the Law Division seeking to condemn the subject property. The second complaint alleged that the borough "has determined to acquire a fee simple interest in [the property] for [p]ublic [u]se, including, but not limited to, a public parking lot together with electric vehicle charging infrastructure." In support of this allegation, the borough again relied on the April 28, 2022 ordinance. In addition, the borough submitted a resolution of the governing body awarding a contract to an engineering firm for services related to the borough applying for funding for the construction of electric vehicle charging infrastructure.

Shree moved to dismiss the second complaint, arguing that the defects in the amended complaint were not cured in the second complaint. Shree argued that although the second complaint identified a specific public use and purpose to which the property would be put after condemnation, the governing body had not approved that specific public use and purpose in an ordinance. Shree argued that the borough attorney may not identify a specific public use and purpose in a complaint where the governing body had failed to do so in an ordinance. In addition, Shree argued that by alleging that the public use and purpose "include[ed], but [was] not limited to" the parking lot with electric vehicle

charging infrastructure use and purpose, the second complaint was insufficiently precise and allowed the municipality to put the property to any use and purpose it later identified. Finally, Shree argued that the borough violated its due process rights by not giving Shree notice and an opportunity to object before the governing body to the public use and purpose identified in the complaint.

On November 28, 2022, the trial court issued an oral opinion denying Shree's motion to dismiss the second complaint. The trial court found that it

had granted a motion to dismiss previously, the prior complaint, because it . . . indicated that the taking was for purposes of public use, but not specifying any particular public use. And the [c]ourt granted the motion to dismiss that complaint. The complaint was revised and the taking was now explained that it was for public use including, but not limited to, a parking lot, together with electrical vehicle charging infrastructure. . . .

[T]he [c]ourt is satisfied that this meets the specificity requirements that are required by the Constitution, by case law, and by statute that . . . it's clear that the Borough could conceivably decide based upon changed circumstances or a revision of their . . . development ideas that it would be put to some other use . . . and there's nothing that restricts that, and I think that the specification that it would be used for purpose of a parking lot with electric [vehicle] charging infrastructure is sufficient to place the owner on notice.

So the [c]ourt finds that the Borough has properly exercised its power of eminent domain . . .

A November 28, 2022 order memorializes the court's denial of Shree's motion to dismiss the second complaint, states the court's finding that the borough properly exercised its authority to acquire the property by eminent domain, and appoints commissioners to fix the compensation to be paid to Shree for the property.

This appeal followed. Shree argues the trial court erred because: (1) the borough cannot exercise its authority to condemn property with an ordinance that does not identify the specific public use and purpose to which it intends to put the property; (2) the borough's counsel cannot cure the defect in the ordinance by alleging a specific public use and purpose in its condemnation complaint; (3) even if the borough's counsel can cure the defect in the ordinance, the attempt to cure the defect here was insufficient because the second complaint alleges that the intended public use and purpose is "not limited to" any specific public use and purpose; (4) the borough violated Shree's right to due process by not providing adequate notice of the intended public use and purpose of the property before the governing body adopted the ordinance authorizing condemnation; and (5) Shree was denied due process because the actions of the governing body inhibited Shree's ability to challenge in the Law Division the public use and purpose alleged in the second complaint.

Shree subsequently moved to stay demolition of the motel pending appeal. In its opposition to the motion, the borough stated that in 2023 the Department of Environmental Protection notified the borough that it had identified concerns with public drinking water from an existing well in the municipality. The borough subsequently identified the property as an optimal site for a new well because it is sufficiently separated from existing wells. The borough engaged an engineer to design and facilitate construction of a new public drinking well on the property, a second public use and purpose to which the property will be put after condemnation. Demolition of the motel is necessary to construct the new well. On February 14, 2024, the trial court stayed demolition of the motel until March 18, 2024.

After expiration of the trial court stay and asbestos abatement at the motel, Shree moved in this court for a stay of demolition of the remaining structure pending appeal. On April 12, 2024, we stayed demolition of the structure on the property until further order of this court.¹

¹ On October 25, 2022, the borough's planning board, after an investigation, adopted a resolution recommending the governing body designate the property as being in need of redevelopment pursuant to the Local Redevelopment and Housing Law (LRHL), N.J.S.A. 40A:12A-6. The resolution was based on the planning board's finding that a January 2022 inspection by the borough code enforcement officer uncovered sixty-one code violations at the property, causing

II.

"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) (quoting State v. Lanza, 27 N.J. 516, 529 (1958) (quotation omitted)). The State Constitution gives the State the right to take private property for public use, but the State must pay "just compensation." N.J. Const. art. I, ¶ 20.

The Constitution allows the Legislature to delegate the power of eminent domain to State agencies or political subdivisions. N.J. Const. art. IV, § 6, ¶ 3. The Legislature has authorized municipalities to acquire through condemnation, N.J.S.A. 40A:12-2(a), "[a]ny real property[,]" N.J.S.A. 40A:12-4(a). To effectuate this authority, the municipality must act "by ordinance" N.J.S.A. 40A:12-5(a); Twp. of Hillsborough v. Robertson, 260 N.J. Super. 37, 42-43 (Law Div. 1992).

the inspector to determine that its poor condition put the occupants of the motel at risk. In addition, the planning board found that municipal records establish the police had responded to the motel 863 times in a five-year period for a wide variety of incidents, including drug overdoses, suicide attempts, fights, criminal mischief, domestic disputes, noise complaints, thefts, stolen vehicles, disturbances, fraud, and unattended deaths. There is no evidence in the record that the borough intends to redevelop the property pursuant to the LRHL.

Courts use a limited and deferential standard when reviewing a municipality's decision to use its eminent domain power. 769 Assocs., 172 N.J. at 571-72. "Ordinarily, when a municipality adopts an ordinance in the exercise of its power of eminent domain, that determination is presumed valid and entitled to great deference." Borough of Essex Fells v. The Kessler Inst. for Rehab., Inc., 289 N.J. Super. 329, 337 (Law Div. 1995) (citing Taxpayers Assn. of Weymouth Twp. v. Twp. of Weymouth, 71 N.J. 249, 264 (1976)). "Courts will generally not inquire into a public body's motive concerning the necessity of the taking or the amount of property to be appropriated for public use." Ibid. (citing Riggs v. Twp. of Long Beach, 109 N.J. 601, 613 (1988)). "[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.'" 769 Assocs., 172 N.J. at 571 (quoting City of Trenton v. Lenzner, 16 N.J. 465, 473 (1954)).

"New Jersey courts traditionally have granted wide latitude to condemning authorities in determining what property may be condemned for 'public use,' reasoning that it is the province of the Legislature to shape the contours of the 'public use' requirement." Id. at 572 (first citing Burnett v. Abbott, 14 N.J. 291, 294 (1954); then citing Lenzner, 16 N.J. at 473).

Accordingly, public use is "anything that 'tends to enlarge resources, increase the industrial energies, and . . . manifestly contributes to the general welfare and the prosperity of the whole community.'" Id. at 573 (quoting Julius L. Sackman, 2A Nichols' The Law of Eminent Domain, § 7.02[2] (3d ed. rev. 1990)) (alteration in original). Moreover, "[g]iven the broad definition of 'public use,' it is not essential that the entire community or even any considerable portion of the community directly enjoy or participate in the condemned property for the taking to constitute a 'public use.'" Ibid. (citing State Highway Comm'r v. Totowa Lumber & Supply Co., 96 N.J. Super. 115, 121 (App. Div. 1967)).

Shree does not argue that a parking lot including electric vehicle charging infrastructure is not a public use or purpose justifying the exercise of the borough's eminent domain authority. Instead, Shree argues that the borough did not effectively exercise its authority to condemn Shree's property because the ordinance authorizing the condemnation does not specify the public use and purpose to which the borough intends to put the property. In addition, Shree argues that the allegation in the borough's second complaint that the intended public use and purpose of the property is not limited to parking including electric vehicle charging infrastructure provided the borough with the unlawful, unfettered discretion to use the property for any purpose in the future.

We have carefully reviewed Shree's arguments in light of the authorizing statute and the relevant legal precedents and find no basis on which to reverse the trial court's order. N.J.S.A. 40A:12-5(a), the statute that established the mechanism for the borough's exercise of its eminent domain authority, does not require that the ordinance authorizing the condemnation of property specify the public use and purpose to which the municipality intends to put the property. In addition, the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 to -50, which provides the uniform procedures to be followed by all entities that have the power to condemn, Robertson, 260 N.J. Super. at 42, does not require the condemning entity to specify the public use or purpose to which the property will be put in the authorizing ordinance. Rule 4:73-1, which sets forth the requirements for a condemnation complaint, also does not require an identification of an ordinance that details the specific public use and purpose to which the property that is the subject of the complaint will be put.

We recognize that it is well established that a property owner whose property is targeted for condemnation is entitled to challenge the taking by arguing that the public use or purpose identified by the condemning authority is invalid. See 769 Assocs., 172 N.J. at 570 (property owner "contested the [condemnation] action, asserting that there was no valid public use for the taking

. . . ."); Twp. of Readington v. Solberg Aviation Co., 409 N.J. Super. 282, 289 (App. Div. 2009) ("Defendant claims the taking was pretextual in an attempt to limit the use of airport property."); Kessler Inst., 289 N.J. Super. at 331 ("Kessler has challenged the borough's authority to take the property on grounds that the stated public use is a pretext to exclude Kessler from the community."); Casino Reinvestment Dev. Auth. v. Banin, 320 N.J. Super. 342, 344 (Law Div. 1998) ("[T]he defendant property owners argue that the primary purpose of these condemnations is to achieve a private rather than a public benefit and, as such, the condemnation actions should not be permitted to proceed.").

Nothing in the record suggests that Shree was unable to challenge the validity of the public use and purpose on which the borough relies to exercise eminent domain. Shree was put on notice in the second complaint that the borough intends to use the property for public parking including electric vehicle charging infrastructure. It could have sought to dismiss the amended complaint by challenging the validity of public parking including electric vehicle charging infrastructure as a valid public use and purpose to condemn the property. It did not do so. Shree had available to it in the Law Division all of the avenues for questioning the validity of asserted public use and purpose that are available to any property owner opposing a condemnation complaint. Shree made no effort

to establish that public parking including electric vehicle charging infrastructure was not a legitimate public use and purpose for the property warranting the exercise of eminent domain.

We are not persuaded by Shree's argument that identification of the public use and purpose in the second complaint, but not in the ordinance, deprived it of the opportunity to challenge the validity of the borough's exercise of eminent domain. As noted above, Shree was notified of the meeting of the governing body at which the ordinance was adopted. Had Shree attended the meeting, it would have been apprised of the public use and purpose to which the borough intended to put the property and could have attempted to persuade the governing body not to exercise eminent domain because that public use and purpose was not valid or wise. It elected, however, not to attend the meeting.

Immediately after adoption of the ordinance, the borough's counsel contacted Shree's counsel and, pursuant to the ordinance, transmitted the municipality's offer of fair market value for the property and suggested the parties negotiate the sale of the property to the borough. At that point, Shree could have filed an action in lieu of prerogative writ challenging the ordinance as insufficient to support the exercise of eminent domain. See R. 4:69. It did not do so. Shree had a full and fair opportunity to challenge the governing

body's adoption of the ordinance and validity of the public use and purpose on which the borough relied but chose not to do so.

We see no impropriety in the borough identifying the public use and purpose to which it intended to put the property in the second complaint. To the contrary, the second complaint, which sought judicial approval of the borough's exercise of eminent domain, appropriately explained the basis for its request for relief. As noted above, this put Shree on further notice of the intended public use and purpose on which the borough relied to condemn the property. Nothing in the record suggests that the borough's counsel invented the public use and purpose identified in the second complaint or that the borough disagreed with the allegations in the second complaint.

We agree with the trial court's conclusion that the allegation in the second complaint – that the intended public use and purpose was "not limited to" public parking including electric vehicle charging infrastructure – was not fatal to the borough's exercise of eminent domain. The Supreme Court has long recognized that a "municipality, having acquired real property to satisfy a particular need, may thereafter convert it to any other public use, if it becomes unsuitable or inconvenient to continue its use for the purpose originally intended." Village of S. Orange v. Alden Corp., 71 N.J. 362, 366 (1976); accord N.J.S.A. 40A:12-

5(c). We, like the trial court, view the "not limited to" allegation in the second complaint as a recognition that the borough is not limited to the public use and purpose alleged should an additional or different public use and purpose arise for the property. Indeed, during the pendency of this appeal, the borough was informed of the need for a new public drinking water well and determined that the property was well suited for such use. This is precisely the sort of eventuality that underlies the need for flexibility in the uses and purposes to which property obtained through eminent domain can be put. We note that Shree offered no argument that the installation of a drinking water well was not a public use or purpose supporting the exercise of eminent domain by the borough.

Finally, we are not persuaded by Shree's argument that the borough is "stockpiling" the property for an unidentified future use. The record contains no evidence the borough's identification of parking including electric vehicle charging infrastructure is a pretext. To the contrary, the borough has produced evidence that it is attempting to obtain State funding to install electric vehicle charging infrastructure on the property. Shree's arguments to the contrary are mere speculation.

To the extent we have not specifically addressed any of Shree's remaining contentions, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).²

The November 28, 2022 order of the trial court is affirmed. The April 12, 2024 stay will expire twenty days from the date of this opinion. However, if either party seeks relief from the Supreme Court within twenty days from the date of this opinion, the April 12, 2024 stay will remain in place until further order of the Supreme Court.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION

² We granted Shree's motion to supplement the record with: (1) minutes of the May 22, 2023 work session of the governing body noting that in response to an inquiry from a resident to identify the public purpose to which the property will be put, the Mayor stated "there were several public purposes, including electric charging stations, which would make the Borough eligible for grants" and that the Mayor and municipal counsel stated that they were not able to discuss "the other uses" of the property while litigation regarding the property was pending; and (2) a newspaper article reporting the borough intended to use the property as part of a "green" parking initiative with State funding, but noting that the borough attorney stated that use of the property was "still up for discussion right now" because the borough's participation in the parking program and the future location of "green" parking had not been finalized. Shree argues that these documents prove the borough is stockpiling the property for future unspecified purposes. We have considered these documents, and even if we assume the hearsay statements contained therein are accurate, do not alter our decision.