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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONALD L. PELLICONE, Defendant-Below, Appellant, v. NEW CASTLE COUNTY, upon the relation of the County Executive, Plaintiff-Below, Appellee.	: : : : : : : : : : : :	No. 329,2013 Lower Court: Superior Court In And For New Castle County C.A. No. N13C-03-073 EMD

APPELLANT'S OPENING BRIEF ON APPEAL (CORRECTED)

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Dated: August 12, 2013

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NATURE OF PROCEEDING

This is the appeal of Donald L. Pellicone ("Pellicone") from an Order of Possession granted by the Superior Court in a condemnation action initiated pursuant to the purported power of eminent domain by Appellee New Castle County ("County"). The Complaint was filed on March 6, 2013. The alleged Public Use for which the Taking was being made was "to begin construction of the Little Mill Flood Control Project" and "to widen and alter, and thereby maintain, Little Mill Creek such as to better improve the flow of drainage in order to abate a flooding problem… ." A-176 at para. 14.

On March 12, 2013, the County filed a Notice of Intent To Take Possession of Pellicone's property (the "Notice"). The Notice proposed a Court hearing for April 15, 2013. Over the next week or so, Pellicone submitted a flurry of filings in response to the Notice: 1) Answer and Defenses to the Complaint; 2) Motion to Dismiss; 3) Motion to Continue Order Of Possession Hearing; 4) Response In Opposition To The County's Request For Possession; 5) Emergency Motion to Stay proceedings in order to permit discovery and an evidentiary hearing; 6) Notice of Depositions regarding County agents involved with the supposed "Project"; and 7) Response In Opposition To The County's Motion For Protective Order seeking to bar all discovery.

On March 21, 2013, the Trial Court conducted a teleconference during which it scheduled: 1) a Motion hearing for April 3, 2013; and 2) a Possession Hearing for April 15, 2013. On April 3, 2013, the Court granted Pellicone's request for discovery, albeit on a limited basis: narrow document production and a 30(b)(6) deposition.

After the April 3rd teleconference, the Court below scheduled a pre-hearing teleconference for April 12, 2013. In addition, Pellicone submitted: 1) legal background and argument regarding the limited scope of 9 *Del. C.* § 1525 (the statutory delegation of eminent domain power to the County at issue); 2) a Memorandum of Law in support of Pellicone's Motion to Dismiss; and 3) a designation of hearing exhibits, which included the 30(b)(6) deposition transcript and documents tending to show the "Project" was a Federal one.

Although the County had already filed an Affidavit of Necessity as required by Superior Court Civil Rule 71.1 with the Complaint, the County filed additional, last-minute Affidavits without Court permission. Just days before the scheduled April 15th Order of Possession Hearing, the County presented new Affidavits from a County Engineer and Finance Department official. In turn, Pellicone filed a Motion to Strike the late-filed Affidavits, or in the alternative to continue the Order of Possession Hearing. In addition,

Pellicone submitted further legal argument and decisional law authority in support of his objections to the Taking.

On April 15, 2013, the Superior Court entertained oral argument regarding the County's request for Possession and Pellicone's objections thereto, but deferred decision. A week later, Pellicone submitted a written follow-up explanation of certain issues raised on April 15th.

On May 22, 2013, the Trial Court issued a Memorandum Opinion and Order granting the County possession and denying Pellicone's objections and defenses to the Taking. That was followed by a set of competing Orders submitted by counsel regarding a Final Judgment; Pellicone did not contest the amount of Just Compensation, only the County's Right To Take. Due to uncertainty as to whether the Court would enter a Final Order, Pellicone timely filed a Motion for Certification of Interlocutory Appeal. He also filed an Emergency Motion to Stay the Court's Order of Possession pending the outcome of Motions and competing Orders.

On June 3, 2013, the Court entered its own final award of Just Compensation, which was not consented to by Pellicone nor presented by any pending Motion. As a result, Pellicone filed a Motion for Reargument.

On June 21, 2013, the Trial Court conducted an emergency hearing at which it granted Pellicone's request for an amended Just Compensation Order

and denied Pellicone's Motion to Stay. That same date, an Order was entered: Amended Final Award Of Just Compensation (concluding the action). Three (3) days later, the Superior Court entered an Order denying the Motion to Stay.

On June 21, 2013, Pellicone filed a Notice of Appeal with the Supreme Court. An Amended Notice of Appeal was filed on June 24th. A Motion to Stay pending appeal was filed on July 1, 2013, which was subsequently denied by Order of this Court on July 24, 2013.

On July 12, 2013, the Clerk issued the Briefing Schedule in this Appeal. This is Pellicone's Opening Brief on Appeal.

SUMMARY OF ARGUMENT

I. The Trial Court Erred In Deciding That 9 *Del. C.* § 1525 Authorized The County To Exercise Its Power Of Eminent Domain For A Non-County Flood Control Project, Which Will Deepen The Creek Channel And Thereby Exceed Statutory Authority.

II. The Trial Court Erred In Concluding That The Federal Flood Control Project For Which Pellicone's Property Interests Were Taken Constituted A "Public Use" Under 29 *Del. C.* § 9501A Since The Exercise Of The State's Sovereign Eminent Domain Power By The County Is Only Authorized Where It Will Possess, Occupy Or Utilize The Land.

STATEMENT OF FACTS

A. 1989 Flood Response And 1995 Federal Study

In July of 1989, a flood event impacting the Little Mill Creek in Elsmere and Wilmington, Delaware occurred. A-120 and A-38 at para. 81. In response, the Delaware General Assembly proceeded in 1990 to incorporate provisions in the annual Bond Bill to: 1) appropriate $500,000 for a Little Mill flood project; 2) direct the Secretary of the Delaware Department of Natural Resources And Environmental Control ("DNREC") to obtain a cost-share agreement with non-State entities; and 3) establish a Little Mill Flood Abatement Committee "to develop and implement a plan to correct flooding in the Little Mill Creek area in New Castle County." 67 DEL. LAWS, c.285 and A-521 to 523.

In 1994, the County appropriated funding in the amount of $500,000 for a "Little Mill Creek II" Drainage line item. A-420 and A-422. As of Fiscal Year 2013, $290,000 in County funds remained obligated, of which upwards of $190,000 had been spent on real estate acquisition. A-75 and A-80.

In 1995, the United States Army Corps of Engineers ("Army Corps") completed a Flood Control Feasibility Study For Little Mill Creek (the "Study") pursuant to § 205 of the 1948 Flood Control Act. A-15 and A-25. *See also* 33 U.S.C. § 701s. The Study was performed based upon a 1990 letter request from

DNREC, and paid for pursuant to a 1992 cost-sharing agreement with the Army Corps. A-25 and A-85.

The Study's recommendation for the "Lower Portion" of the flood area, in which Pellicone's property is situated, was for "channelization" at a total estimated cost of $4,000,000+. A-16. The "channelization" referred to a deepening of Little Mill Creek by 3 feet. A-55.

B. The Project Becomes A Federal One, With A State Assist; The County Has No Formal Legal Role

In 2005, federal funding was finally secured for the Army Corps to construct the project (the "Federal Flood Control Project"). A-429 and A-431. And on June 23, 2009, the Army Corps and DNREC entered into a "Project Partnership Agreement" (the "Corps-DNREC Agreement"). A-88 to A-114. Thereunder, the Army Corps committed to prosecuting the Federal Flood Control Project, with DNREC in a secondary assistance role. A-91 to 92.

The County is not mentioned in the Corps-DNREC Agreement. Nor is the County a signatory to it. *See* A-112. Indeed, pursuant to the Corps-DNREC Agreement, DNREC (not the County) committed to "acquire all lands, easements, and rights-of-way the [Army Corps] determines [DNREC] must provide for that work... ." A-96.

In January of 2011, the Army Corps formally moved ahead with the Federal Flood Control Project. A-121. Leftover Federal funds from

construction of flood control improvements to the upper reach of Little Mill Creek, completed by the Army Corps in July of 2007, where "used to complete the plans and specs for the construction of the lower reach and award a construction contract in FY12." *Id.*

On September 27, 2011, the Army Corps issued three documents to implement the Federal Flood Control Project: 1) a notice soliciting bids from construction contractors (A-122)[1]; 2) "Construction Solicitation And Specifications" (A-128 *et seq.*); and 3) "Cover Sheet, Index Of Drawings, Vicinity And Location Maps" plans (A-115 *et seq.*). The County is not referenced in these documents.

In late 2011 through Spring of 2012, the Army Corps prepared Soil Erosion And Sediment Control Plans. A-432 *et seq.* Soil erosion and sediment control measures included "De-Watering Facilities," "Perimeter Controls," "Site Access Controls," and "Stabilization." A-446 to 448. Once more, the County is not mentioned in the documents.

The Army Corps also sought and obtained Wetlands and Subaqueous Lands Permits from DNREC in August of 2012. A-165 *et seq.* Yet again, the County's name is not contained in the documents. *Id.*

[1] Thirteen amendments were subsequently issued by the Army Corps, which ultimately extended the bid opening date until August 13, 2013. A-143 to A-158A.

C. Only The County, Not The Army Corps Or DNREC, Seeks To Take Pellicone's Property

By letter dated December 13, 2011, the County advised Pellicone that it intended to take certain easements from his property for a project involving "improvements to the stream bank and water channel along the Little Mill Creek." A-159. A follow-up letter from the County to Pellicone dated July 29, 2012 advised of the County's continued intent to take easements from Pellicone, citing 9 *Del. C.* § 1525 as the purported authority for the Taking and 9 *Del. C.* § 9501A as the basis for the asserted "public use." A-164.

On January 22, 2013, the New Castle County Council adopted a Resolution authorizing condemnation proceedings to take easements from Pellicone's land. A-191. But the County has admitted that no County Council Resolution was ever passed approving a County project to construct flood control improvements to the lower portion of Little Mill Creek. A-341. This is in contrast to prior occasions when the County Council has expressly authorized County funded and constructed drainage and stream bank stabilization improvement projects. A-342 to 343.

D. Pellicone Objects To The "Trojan Horse" Taking Attempt By The County

Immediately after the County filed the condemnation and sought to take Pellicone's property interests, he fought back. *First*, Pellicone filed an Answer

which contained Affirmative Defenses constituting legal objections to the Taking. A-198 *et seq*. *Second*, Pellicone filed a Response In Opposition To Request For Possession which set forth legal objections to the Taking, *inter alia*: 1) the Federal Flood Control Project did not constitute a "public use" by the County pursuant to 29 *Del. C.* § 9501A(c)(1); and 2) the Federal Flood Control Project fell outside of the scope of the County's delegated eminent domain power contained in 9 *Del. C.* § 1525. A-203 *et seq*. *Third*, he filed a Motion to Dismiss and a Memorandum of Law in support thereof. A-212 *et seq*. and A-472 *et seq*. The gist of Pellicone's arguments was that the County was acting as a mere "Trojan Horse" to lend its eminent domain power to the Army Corps, which lacks statutory eminent domain authority under federal law.

Undaunted by the seemingly dispositive defenses against the Taking, the County proceeded to try to "hide the ball" by filing for a Protective Order and insisting that Pellicone was not entitled to any discovery; the County contended that its Affidavit of Necessity was indisputable. Thankfully, the Trial Court disagreed, granting Pellicone's request for limited document production and a Rule 30(b)(6) deposition. This resulted in Pellicone's deposition of Assistant County Engineer Anthony Schiavi. A-235 *et seq*.

E. The County's Engineer Leading The Purported "County Project" Admits This Would Be The First County Flood Control Project

The County's 30(b)(6) deponent, Anthony C. Schiavi, P.E. ("Schiavi"), is an Assistant County Engineer who was assigned to oversee what the County purports to be partly its project. A-241 and 242. In his 8 years with the County, however, he could not recall being involved with any County flood control projects. A-252. Instead, he was aware of County projects which involved: 1) small-scale efforts to remove impediments to stream flows, like beaver dams; 2) removal of fallen trees from streams; 3) other matters within the County's general jurisdiction to keep streams and watercourses clear and free flowing; 4) routine removal of sediment under a blanket permit from DNREC; and 5) isolated drainage enhancements and stream bank erosion stabilizations. A-253 and A-325 to A-328. Next, Schiavi agreed that the County had no formal written agreement establishing it as a participant in the Federal Flood Control Project. A-271 to 272. And Schiavi conceded that the Army Corps was the sole authority involved with plan preparation, construction contract bidding, construction funding, and overall project implementation for the Federal Flood Control Project. A-301 to 302 and A-332 to 333.

F. Just Days Before The Order Of Possession Hearing, The County Submitted A Sham Affidavit; It was Desperate

Despite documentation clearly evidencing the Army Corps' lead role and DNREC's sole supporting role for the Federal Flood Control Project, Schiavi contended that it was a "multi-agency project" which included the County. A-516 at para. 3. He also alleged that the County would maintain Little Mill Creek post-construction. A-518 at para. 8. Notably, Schiavi's sandbag Affidavit did not attach any documents that established a formal legal role on the part of the County in any aspect of the Federal Flood Control Project. Indeed, his Affidavit tellingly admitted that "[t]he Army Corps is responsible for the design and construction of the Project." (emphasis added). A-518 at para. 8.

It should also be noted that Schiavi alleged in his surprise Affidavit that the County had been working at that very moment with the New Castle Conservation District on some design plans which would be provided to the Army Corps for construction of the Federal Flood Control Project. A-518 at para. 8. Schiavi never mentioned any such alleged actions by the County during the course of his deposition. In fact, he freely conceded that the Army Corps was the sole authority that had prepared the design plans for the Project. A-301 to 302.

Unfortunately, the Superior Court did not strike the unauthorized Affidavit of Schiavi, or require that Schiavi testify under oath at an evidentiary hearing in order to adjudge his credibility. Thus, Pellicone was at a decided disadvantage in responding to the bald, unsupported allegations presented by surprise near the eve of the Order of Possession hearing.

The County failed to submit any evidence to the Trial Court establishing that its involvement with the Federal Flood Control Project was anything more than a voluntary, donative undertaking. Indeed, Schiavi admitted that the only formal written agreement between agencies committed to implementing the Federal Flood Control Project was the Corps-DNREC Agreement. A-271 to 272. The "Little Mill Flood Abatement Committee" that Schiavi serves on as a County representative does not include the Army Corps. A-321 to 322 and A-516. Indeed, Schiavi's involvement has been so tangential over the years that he had no explanation whatsoever as to why the Federal Flood Control Project has not been prosecuted with more alacrity; the flood which was the impetus occurred 24 years ago. A-299 to 300.

G. Pellicone's Two Primary Objections To The Taking At Argument: No County "Public Use" & The Federal Flood Control Project Exceeded The Bounds Of Delegated Eminent Domain Power

The April 15, 2013 Order of Possession hearing effectively amounted to legal argument by counsel for the parties. Counsel for Pellicone advocated the

position that the General Assembly's eminent domain reform legislation passed in 2009, adopted in part as 29 *Del. C.* § 9501A, precluded the County's Taking since the Army Corps would actually be the one exercising "possession, occupation, or utilization" over his property (contrary to 29 *Del. C.* § 9501A(c)(1)). A-589 *et seq.*, A-630 *et seq.*, and A-673 *et seq.* In addition, Pellicone's counsel argued that precepts of statutory construction required an interpretation of 9 *Del. C.* § 1525 prohibiting a Taking for the Federal Flood Control Project's 3-foot deepening of the channel bed. A-625 *et seq.*, A-630 *et seq.*, and A-645 to 646.

H. The Superior Court Largely Disregards Pellicone's Two Main Legal Arguments

In the Trial Court's Memorandum Opinion And Order granting Possession ("Opinion"), the Court concluded that the Federal Flood Control Project constituted a public use since the property would not eventually reside with a private party. Opinion at 10. But Pellicone argued that because the Federal Flood Control Project was not being undertaken by the County, it cannot legally qualify as a "public use" under § 9501A; the County will not be possessing, occupying, or utilizing the easements it is Taking from Pellicone. Pellicone's argument was never decided.

The Trial Court then exacerbated its error by concluding that the County was part of the Federal Flood Control Project based on the County's voluntary

expenditure of funds in support thereof. Opinion at 10. But the undisputed factual record established that the Federal Flood Control Project was: 1) designed by the Army Corps; 2) to be paid for with Army Corps construction dollars; and 3) to be built by the Army Corps. Indeed, the County was a mere volunteer who provided gratuitous support for the Army Corps' Federal Flood Control Project.

The Trial Court never addressed Pellicone's Statutory Construction argument regarding 9 *Del. C.* § 1525. The Opinion is devoid of any Statutory Construction analysis or decision on that critical legal argument. No discussion is included regarding Pellicone's contention that the 3-foot deepening component of the Federal Flood Control Project fell outside of the bounds of the phrase "alter the course" in § 1525.

ARGUMENT

I. THE CHANNEL DEEPENING COMPONENT OF THE PROJECT FALLS OUTSIDE THE BOUNDS OF THE COUNTY'S DELEGATED EMINENT DOMAIN POWER

A. Question Presented

Whether the County may exercise the power of eminent domain delegated to it by the Delaware General Assembly in 9 *Del. C.* § 1525 in order to permit the Army Corps to prosecute a Federal Flood Control Project which includes a channel deepening despite the narrow scope of County creek modification projects within the purview of 9 *Del. C.* § 1525? The question was preserved below in pleadings and at oral argument. A-204 to 205; A-214; A-561 to 562; A-623 to A-641; and A-645 to 646.

B. Standard and Scope of Review

Judicial construction of a statute is a determination of law and the appropriate standard of review is *de novo*. *Banaszak v. Progressive Direct Ins. Co.*, 3 A.3d 1089, 1092-93 (Del. 2010). The appropriate standard and scope of review of the Superior Court's interpretation of a condemnation statute is *de novo*. *Cannon v. State*, 807 A.2d 556, 559 (Del. 2002). Thus, the Supreme Court determines whether the Trial Court erred in formulating or applying legal precepts. *Banaszak* at 1092-93.

C. Argument

The § 1525 Phrase "Alter The Course" Cannot Be Interpreted To Permit A Project Which Includes Deepening Of A Creek

It is undisputed that the Federal Flood Control Project includes a 3-foot deepening of Little Mill Creek. But 9 *Del. C.* § 1525 only permits lateral modifications to stream courses, not a lowering of the stream bed. The Trial Court failed to decide this issue. Consequently, the Trial Court erred and reversal is appropriate.

1. Background And History Regarding § 1525; Intended For Road & Bridge Projects, Not Flood Control

The provisions contained in current § 1525 were first enacted by the General Assembly as § 1164 of the 1915 Delaware Code on March 5, 1931. 37 Del. Laws, c.113 (the "1931 Act"). It was re-codified in the 1935 Delaware Code.

In the 1953 recodification of the Delaware Code, the initial 1931 Act was reorganized into subsections (a) through (c) and reference to the 1951 Condemnation Act (10 *Del. C.* Ch. 61) was added. The 1953 Code designated the 1931 Act as § 1526 of Title 9 of the Delaware Code.

On May 26, 1965, the Delaware General Assembly approved an Act reorganizing New Castle County government (the "1965 Reorganization Act').

55 Del. Laws, c. 85. § 7M. of the 1965 Reorganization Act made only minor amendments to 9 *Del. C.* § 1526: replacing the terms "Levy Court" and "County Engineer" with the new terms "County Council" and "Department of Public Works," respectively. The 1974 Recodification of the Delaware Code re-numbered the statute as § 1525.

On July 13, 1998, the General Assembly enacted House Bill No. 668 with various amendments, which was an omnibus legislation making numerous changes to the provisions of Title 9 of the Delaware Code regarding the New Castle County government (the "1998 Reorganization Act"). 71 Del. Laws, c. 401. At § 15 of the 1998 Reorganization Act, an additional minor amendment was made to most of Subchapter II of Title 9 of the Delaware Code, which merely replaced the term "county government" with the term "County Council."

Since no Synopsis was included in t 1931 Act, evidence of legislative intent is not available. But the current § 1525's genesis 82 years ago does certainly reveal that: 1) the law was not enacted in response to any flooding incidents; and 2) the language of the current statute should be interpreted in the context of circumstances in existence in 1931.

2. The Delaware General Assembly Did Not Intend § 1525 To Cover The Flood Control Project At Issue

(a) No Intent For County Authority To "Widen, Straighten, Or Alter The Course Of Any Part Of Any Small Run Or Creek" To Cover Federal Flood Control Projects

In 1931, the United States Army Corps was not yet authorized by Congress to conduct flood control projects. Indeed, the Army Corps concedes that the 1936 Flood Control Act (the "FCA") was the first time that "Congress declared that flood control was a proper activity of the federal government." A-480. The Army Corps also admits that the FCA "specified the obligations that would have to be assumed by local interests before the Corps could begin certain projects." *Id.* *See also* 33 U.S.C. § 701 *et seq.*

Nor would the General Assembly's passage of the 1931 Act have been for any other federal Depression-era public works agencies. The Emergency Conservation Work Act, which created the Civilian Conservation Corps, was not approved until the first 100 days of President Roosevelt's Administration in 1933. A-482. And the Works Progress Administration was not created until President Roosevelt's Executive Order issued pursuant to the Emergency Relief Appropriation Act of April 1935. A-486.

No other Federal agencies are known to have existed in 1931 which could or would have logically or legally been intended as a beneficiary of the enactment of the 1931 Act. Consequently, it is a historical certainty that the passage of the 1931 Act was not intended to be a power available to "loan" for federal government flood control projects.

(b) No Local Flood Control Purpose Was Intended By The General Assembly When It Passed The 1931 Act

The language of the 1931 Act, permitting the County to "widen, straighten, or alter the course of any part of any small run or creek," is expressly self-limiting. *First*, only work to "widen, straighten, or alter the course" was permitted. *Second*, only a "small run or creek" was covered. The terms "reconstructing," "deepening," "dredging," "damming," "filling," or other significant public works project phraseology were not included. *Third*, "rivers" and "large creeks" were not brought within the 1931 Act's purview. As a result, only very limited work in a small subset of County watercourses was encompassed by the 1931 Act.

Additionally, no mention was made in the 1931 Act regarding work to provide for "flood control," "flood abatement," "channel improvements," or any other language which would indicate an intention on the part of the

Legislature to empower the County to conduct a large scale flood control project. Instead, only small projects in small watercourses were authorized.

Moreover, the Legislature did not include language in the 1931 Act which would indicate an intent to authorize the County to undertake large-scale projects which would allow for vertical (or elevation) changes to the bed of any small creek or run. Instead, terms were utilized which permit only lateral changes in creek bed location and flow. Accordingly, it is evident that the General Assembly did not intend to delegate eminent domain authority to the County for major flood control projects that will deepen a creek bed.

(c) No Historical Basis Would Have Existed For The General Assembly To Intend The 1931 Act To Cover Flood Control Projects

Based upon historical climatological information, the entire State of Delaware suffered a severe and historic drought during the time period 1930 through 1934. A-497. The 1930 to 1934 drought period experienced in Delaware was "manifested chiefly as low stream flow and decreased crop yields." *Id.*

Logically, the General Assembly would not have been concerned about flood control projects at a time when small creeks and runs were likely

proceeding at a mere trickle. Consequently, the 1931 Act was not intended by the General Assembly to address any flooding issues.

(d) The 1931 Act Was Intended As An Adjunct To The County's Authority Over Roads And Bridges

From 1901 to 1935, New Castle County was governed by a Levy Court composed of 7 Commissioners elected from separate districts. A-506. In that 3+ decade time frame, the Levy Court was a powerful executive authority, which had full control over all roads and bridges, and the maintenance thereof, under the supervision of a County Engineer. *Id.* That is obviously why the 1931 Act amended the County Roads and Bridges chapter of the Delaware Code, Chapter 55.

Delegating the power for the County to modify small watercourses was needed in 1931 in order to accommodate road and bridge projects. Streams needed to be re-directed via concrete pipes and culverts in order to allow for installation of new roads and the pavement of dirt roads. Accordingly, the 1931 Law's micro-project focus and the related historical information lead to the inexorable conclusion that a project like the Federal Flood Control Project, which involves an extensive deepening of a large stretch of the Little Mill Creek, was not intended to fall within the purview of 9 *Del. C.* § 1525.

3. The Project Is Not Within The Scope Of The County's Eminent Domain Power Pursuant To 9 *Del. C.* § 1525

The Federal Flood Control Project seeks to deepen the channel of Little Mill Creek by 3 feet, not to simply "widen, straighten, or alter the course of [the Creek]." Widening and straightening do not authorize "deepening." Nor does the phrase "alter the course" encompass deepening.

The term "alter" is defined to mean: "to make different in course." WEBSTER'S UNABRIDGED DICTIONARY at 60. And the term "course" is defined to mean: the path, direction, or route. *Id.* at 464. Thus, the County's eminent domain authority is limited to projects which will move, widen or straighten a watercourse, not to dredge a stream or creek so as to deepen it.

This Court generally looks to the dictionary definition of undefined statutory terms in its construction analysis. *Angstadt v. Red Clay Consolidated School Dist.*, 4 A.3d 382, 390 (Del. 2010). The word "course" has also been defined to mean "the path over which something moves or the way which something extends...a direction taken or the ground traversed," or in the alternative, "a channel in which water flows: watercourse." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 522. Based on the alternative definition, the County argued that the Court should interpret "alter the course" to mean "modify the channel" – *i.e.* deepen the creek bed.

Even assuming *arguendo* that the phrase "alter the course" could be interpreted to permit a channel deepening, that would render the provision ambiguous – *i.e.* reasonably susceptible to two alternative meanings. *See Sussex Co. Dept. of Elections v. Sussex Co. Republican Comm.*, 58 A.3d 418, 422 (Del. 2013). In case of ambiguity, the meaning more favorable to Pellicone must be applied since § 1525 constitutes a legislative delegation of the sovereign power of eminent domain.

This Court has previously held that "[s]tatutes that vest the power of eminent domain in an agency must be strictly construed...because, by their operative nature, they subjugate the rights of private property owners to the greater public need." *Cannon v. State, supra.* at 559. *See also Wilmington Parking Authority v. Land With Improvements, etc.*, 521 A.2d 227, 232-33 (Del. 1986)("even when the power of eminent domain is expressly granted, the extent thereof will be construed strictly against the grantee"). Accordingly, if the phrase "alter the course" is ambiguous, it must be construed against the County based on the rule of strict construction, thereby precluding the adoption of a statutory meaning that would permit channel deepening projects such as the Federal Flood Control Project.

The County had the burden to establish that it was acting within the scope of its delegated eminent domain power contained in § 1525. "Generally,

the burden is on the condemnor to show that it is acting within the scope of its statutory power." *Wilmington Parking Authority, supra.* But the County did not meet its burden.

Because the County failed to meet its burden of establishing that the only reasonable interpretation of the statutory term "course" is "a channel through which water flows," however, an ambiguity exists which must be resolved by adopting the alternative meaning adverse to the County. Thus, the County exceeded the bounds of its delegated eminent domain power in § 1525. As a result, the Trial Court erred in failing to properly interpret § 1525, and reversal is warranted.

ARGUMENT

II. THE TRIAL COURT ERRED IN CONCLUDING THAT THE PROJECT CONSTITUTED A "PUBLIC USE" UNDER 29 *DEL. C.* § 9501A; THE COUNTY WILL NOT ENTER INTO POSSESSION, OCCUPATION, OR UTILIZATION OF PELLICONE'S LAND

A. Question Presented

Whether the State sovereign power of eminent domain, which § 9501A limits to a "public use," may be exercised by the County for a Federal Flood Control Project Taking where the County will not be the one possessing, occupying, or utilizing the land? The question was preserved in the Court Below in pleadings and written submissions, as well as at the Order of Possession hearing. A-206, A-214, A-561 to 562; A-589 to A-594, A-610 to 612; and A-673 to 674.

B. Standard and Scope of Review

The appropriate standard and scope of review of the Superior Court's interpretation of a condemnation statute is *de novo*. *Cannon v. State*, 807 A.2d 556, 559 (Del. 2002).

The standard of review regarding factual findings made by a Trial Judge is whether they are: 1) sufficiently supported by the record; and 2) the product of an orderly and logical reasoning process. *Key Properties Group, LLC v. City of Milford*, 995 A.2d 147, 150 (Del. 2010). Similarly stated, factual findings

will be reversed by this Court where they are unsupported by the record or clearly erroneous. *Lawson v. State*, __ A.3d __, 2013 WL 3793973, *3 (Del. 2013).

C. Argument

A § 9401A "Public Use" Requires The Condemnor To Actually Possess, Occupy, Or Utilize The Land, But The County Will Not

Uncontraverted record evidence established that the Army Corps had or would design, fund, and oversee all bidding, contracting, and construction regarding the Federal Flood Control Project. The only local participant recognized to have a formal legal role in the Federal Flood Control Project was DNREC. The County was nothing more than a gratuitous contributor. The County's self-proclaimed involvement in the Federal Flood Control Project does not legally or factually make it so.

1. The Taking Of Pellicone's Property Interests Does Not Constitute A "Public Use"; The Federal Flood Control Project Is Being Prosecuted By The Army Corps

The undisputed record evidence established that the Army Corps, and not the County, will be undertaking the Federal Flood Control Project on Pellicone's land. Under 29 *Del. C.* § 9501A(b):

> Notwithstanding any other provision of law, neither this State nor any political subdivision thereof nor any

> other condemning agency, including an agency as defined in Section 9501(b) of this title, shall use eminent domain other than for a public use as defined in subsection (c) of this section.[2] (emphasis added).

In turn, § 9501A(c)(1) defines "public use" to include "[t]he possession, occupation, or utilization of land by the general public or by public agencies." And the term "agency" is defined in Title 29, Chapter 95 of the Delaware Code to mean only Delaware State and local government agencies or "any person who has the authority to acquire property by eminent domain under State law." 29 *Del. C.* § 9501(b).

The Army Corps does not constitute an agency or the "general public," as it is a federal agency which is a part of the United States government. But the record evidence unequivocally establishes that the Army Corps is the sole entity that will be undertaking "possession, occupation, or utilization" of Pellicone's land. Accordingly, the Federal Flood Control Project does not constitute a "public use" as narrowly defined by § 9501A(c)(1).

Fifty years ago, this Court wrestled with a similar issue when a property owner contested the State Highway Department's authority to exercise the Delaware sovereign eminent domain power for a taking related to the

[2] Section 9501A was enacted by the General Assembly in 2009 as part of the overall eminent domain reform legislation enacted in reaction to the United States Supreme Court's decision in *Kelo v. New London* and efforts by the City of Wilmington to take private property for economic development on the Wilmington Riverfront. *See* 77 DEL. LAWS, c.12 and A-591.

construction of Interstate Route 95 in Wilmington. In *State v. George F. Lang Co.*, 191 A.2d 322, 323-24 (Del. 1963), the property owner argued that because the project was part of the national system of Interstate And Defense Highways and would be constructed with 90% federal funding, the expressway did not constitute a State public use. But this Court noted that numerous attributes of State involvement and control over the project established that it was in fact a "state highway": 1) fee simple title would be in the State; 2) all contracts for construction were in the name of the State; 3) State funds would initially be used to pay for 100% of the project, which might be reimbursed up to 90% from federal funds; 4) I-95 would be operated, controlled, maintained, and policed by the State; and 5) I-95 would provide access to and from the central business district and the local road network.

In direct contradistinction to the dispositive facts in *State v. George F. Lang, Co.*, the Army Corps will be undertaking the Federal Flood Control Project in Little Mill Creek, which constitutes a tributary of the Christina River that is within the jurisdiction of the Army Corps pursuant to § 404 of the Federal Clean Water Act, 33 U.S.C. 1344. *See* A-126 (Little Mill Creek is a tributary of Christina River) and 33 C.F.R. § 328.3(a)(5) (tributaries of the waters of United States are within Army Corps' jurisdiction). No County funds were or will be utilized for design plans, bidding and contracting, construction

or project implementation. Instead: 1) all contracts for construction will be in the name of the Army Corps; 2) Army Corps funds will be used to pay for construction; and 3) all construction implementation will be undertaken solely under the supervision of the Army Corps. Consequently, prior precedent establishes that the Federal Flood Control Project is an Army Corps endeavor which the County lacks a public use for.

2. Conflicting Assertions In Schiavi's Last-Minute Affidavit Should Be Disregarded

After being deposed on April 9, 2013, the County submitted an Affidavit from Schiavi which conflicted with certain portions of his deposition testimony. It is well settled in Delaware, however, that Courts will exclude Affidavit testimony which is directly contradicted by prior deposition testimony. *Continental Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1232 (Del. Ch., 2000). Although the Delaware Supreme Court has yet to adopt this so-called "sham affidavit doctrine," it has recognized that the Trial Courts of Delaware follow the rule (and did not express any misgivings with the doctrine in its *dictum*). *Cain v. Green Tweed & Co., Inc.*, 832 A.2d 737, 740 (Del. 2003).

Schiavi's April 11th Affidavit asserted for the first time that the County was in the process of preparing some designs for the Army Corps to incorporate in its construction plans. A-518 at para. 8. First, that is not possible since the

Army Corps completed its construction plans on September 27, 2011. A-115. Second, Schiavi testified at deposition that the Army Corps was the sole party responsible for preparing the design plans. A-301 to 302 and A-332. Thus, the belated, sham assertion should have been excluded.

Schiavi also inconsistently asserted that he had previously been involved with County flood control projects. A-516 at para. 4. But Schiavi testified at deposition that in more than 8 years as an Assistant County Engineer, he could not recall any other flood control project that he had been involved with. A-252. Instead, he testified about small projects which fell within the purview of the County's minor duty to keep streams free-flowing and clear of obstructions. A-253 and A-325 to A-328. As a result, this portion of Schiavi's "sham affidavit" should have been disregarded.

Finally, Schiavi's assertion that the Federal Flood Control Project is being jointly undertaken by the County, DNREC, the Army Corps, and the New Castle Conservation District directly conflicts with his deposition testimony. *See* A-517 at para. 5. At deposition, Schiavi conceded that the Army Corps alone had prepared construction plans, advertised for construction bids, procured federal construction funding, and intended to oversee all construction activities regarding the Federal Flood Control Project. A-301 to 302 and A-332. The fact that all legal documents of record also established that the Army

Corps was prosecuting the Federal Flood Control Project, with some minimal DNREC assistance, established beyond *peradventure* the falsity of Schiavi's assertions. *See* A-14 *et seq.*, A-88 *et seq.*, and A-115 *et seq.* As a consequence, the Schiavi "sham affidavit" assertions tying the County in to the Federal Flood Control Project should not have been considered.

3. The Federal Flood Control Project Cannot Constitute A County Project As A Matter Of Law

The County lacks legal authority to conduct an extensive, flood control project. DNREC and the New Castle County Conservation District are vested with exclusive, pre-emptive authority in the field of flood control and prevention under Title 7 of the Delaware. 7 *Del. C.* §§ 3910, 4001, 4102, and Ch. 44. DNREC has a duty to "[f]ormulate policies and general programs...for the prevention of erosion, floodwater, and sediment damages... ." 7 *Del. C.* § 3905(a)(1). And the County Conservation Districts are charged with similar duties, along with implementation of the policies and programs. 7 *Del. C.* §§ 3905(a)(3) and 3908. In contrast, the County has limited authority to address flood control or prevention; the County only has jurisdiction over stormwater "drainage" of lands, not watercourses *per se*. *See* 9 *Del. C.* § 1341(1) and County Code Chapter 12.

New Castle County Code §§ 12.06.001C. and D. and 12.06.002 establish the County's limited role: to maintain watercourses to insure that they are "open and free flowing." Only "flooding that will cause serious personal injury or significant property and/or structural damage" is within the County's bailiwick, but no County Council finding was made by Resolution establishing either prerequisite existed. And the County is expressly barred from performing watercourse improvement or maintenance projects if: 1) the Army Corps or DNREC have jurisdiction over the stream; 2) the stream is already maintained by another public agency; 3) adequate right-of-way does not already exist or cannot be voluntarily acquired; or 4) the County does not take over the watercourse. All 4 bars exist under the facts extent. Thus, the Federal Flood Control Project cannot legally constitute a County project; the County is simply acting as the stalking-horse for the Army Corps, which lacks eminent domain authority under the facts here present.[3] *See* 33 U.S.C. 591.

The record establishes that County Council never authorized the prosecution of a County flood control project for Little Mill Creek. Provisions of the County Code mandate that such approval be provided as a prerequisite to the prosecution of any such project by the County. *A fortiori*, the Federal Flood Control Project cannot legally qualify as a County project. Consequently, the

[3] Nor do DNREC or the New Castle Conservation District possess statutory eminent domain power granted by the General Assembly. *See* 7 *Del. C.* Chs. 39 and 60.

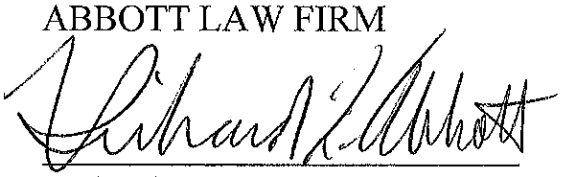
County may not utilize the State sovereign power of eminent domain to take property interests from Pellicone's land.

The record is replete with documents stating that the Federal Flood Control Project is being undertaken by the Army Corps pursuant to the 1948 Federal Flood Control Act, as amended. The County does not have authority to undertake a project involving flood control efforts in the Little Mill Creek. The County's Executive Branch, without County Council approval, only possesses authority to undertake efforts to keep streams clear and free flowing. So the Federal Flood Control Project being prosecuted by the Army Corps, with some assistance from DNREC, cannot in any way, shape, or form constitute a County project as a logical or legal matter. Accordingly, the Superior Court erred in deciding that the Federal Flood Control Project constituted a "public use" as required by the Delaware General Assembly in § 9501A.

CONCLUSION

Based upon the foregoing, Appellant Donald L. Pellicone respectfully requests that this Court reverse the Superior Court, vacate the Order of Possession, and direct that the condemnation action be dismissed with prejudice. *First*, the Trial Court erred in failing to conclude that the County exceeded the scope of its delegated eminent domain power contained in 9 *Del. C.* § 1525 on the grounds that the deepening component of the Federal Flood Control Project goes beyond the "alter the course" limit of statutory authorization. *Second*, the Trial Court erred in concluding that the Federal Flood Control Project constituted a County project so as to meet the definition of "public use" contained in 29 *Del. C.* § 9501A since the County will not actually be possessing, occupying, or utilizing the area as statutorily required. Accordingly, reversal is called for under the circumstances.

ABBOTT LAW FIRM



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