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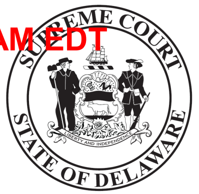

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE NEW CASTLE COUNTY'S ANSWERING BRIEF

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Dated: September 11, 2013

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NATURE OF PROCEEDINGS

This is an appeal taken by Appellant (Defendant below) Donald L. Pellicone ("Pellicone") from an Order of Possession entered by the Superior Court of the State of Delaware in and for New Castle County ("Superior Court" or "trial court") in a condemnation action initiated by Appellee (Plaintiff below) New Castle County ("NCC").[1] In this action, NCC seeks to take one permanent easement and two temporary construction easements located on Pellicone's land for a public use: the widening and altering of Little Mill Creek as part of the Little Mill Creek Flood Control Project ("Flood Control Project"). NCC's right to take Pellicone's land for purposes of the Flood Control Project derives from 9 *Del. C.* § 1525 ("Section 1525").

A. NCC's Initial Pleadings and Pellicone's Objections

NCC filed its Complaint for condemnation in the Superior Court on March 6, 2013. On March 8, 2013, NCC deposited with the Superior Court the sum of $15,529.33, which is NCC's good faith estimate of just compensation for the property interests at issue. On March 12, 2013, NCC filed its Notice of Intent To Take Possession of Pellicone's property.

[1] Although Pellicone's Amended Notice of Appeal (dated June 24, 2013) indicates that Pellicone is appealing from three different Orders of the Superior Court (i.e., (1) the Memorandum Opinion And Order Granting Possession dated May 22, 2013; (2) the Amended Final Award of Just Compensation dated June 21, 2013; and (3) Order Denying Stay dated June 24, 2013), the substance of Pellicone's appeal is focused solely on the Memorandum Opinion and Order Granting Possession. (*See* Appellant's Opening Brief on Appeal ("Opening Brief" or "Op. Br.") at 1.)

As the Superior Court noted, there were an "inordinate number of filings" in this case. (Mem. Op. at 2.) Pellicone initially responded to NCC's Complaint by filing a barrage of documents on March 20 and 21, 2013, including, *inter alia*, an Answer and Affirmative Defenses and a Response to NCC's Complaint, a Motion to Continue the Order of Possession Hearing, and a Motion to Dismiss NCC's Complaint.

Pellicone also filed three unsolicited letters with the Superior Court regarding his belief as to the proper interpretation and legislative history of Section 1525. *See* A-220; A-561; A-690. In addition, without leave of the court, Pellicone filed a Memorandum of Law in support of his Motion to Dismiss (*see* A-472) and NCC responded in opposition to Pellicone's Motion to Dismiss. *See* B-31.

B. The Deposition of Anthony Schiavi and Supporting Affidavits

During the hearing on April 3, 2012, the Superior Court granted Pellicone document discovery and a Rule 30(b)(6) deposition. Pellicone took the Rule 30(b)(6) deposition of Mr. Anthony G. Schiavi, P.E., Assistant County Engineer for NCC and Project Manager for the Flood Control Project, on April 9, 2013.

Also, on April 9, 2013 and without leave of court, Pellicone filed a Memorandum of Law in support of his Motion to Dismiss. *See* A-472. Pellicone's Memorandum of Law contained several false or inaccurate statements. NCC filed its Response in Opposition to Pellicone's Motion to Dismiss later that day. *See* B-

31. On April 10, 2013, Pellicone filed a document that he called "Defendants Order of Possession Hearing Exhibits" and purported to include the Transcript of the Deposition of Anthony Schiavi. *See* B-65. On April 11 and 12, 2013, NCC submitted the Affidavits of Anthony Schiavi and Catherine DiCristofaro in support of its Motion for Order of Possession. *See* A-515-47; A-548-60. Thereafter, in yet another attempt to delay the proceedings, Pellicone filed an Emergency Motion to Strike the Affidavit of Catherine DiCristofaro or to Continue the Order of Possession Hearing scheduled for April 15, 2013. *See* B-141.

C. The April 15, 2013 Hearing and the May 22, 2013 Memorandum Opinion and Order Granting Possession

On April 15, 2013, the Superior Court conducted a hearing on NCC's Motion for Order of Possession and Pellicone's Motion to Dismiss (the "April 15th Hearing"). The Superior Court gave both parties a full and fair opportunity to present their positions during the April 15th Hearing.

On May 22, 2013, the Superior Court issued a Memorandum Opinion and Order Granting Possession to NCC (the "Memorandum Opinion"). In the Memorandum Opinion, the Superior Court correctly held, *inter alia*, that "NCC has met its obligations under Delaware law," that "NCC has the power under 9 *Del. C.* § 1525 to condemn property for the purposes of widening, straightening, or otherwise altering the course of . . . Little [Mill] Creek," and that "the proposed use of this taking/condemnation is a public use." (Mem. Op. at 9-10).

D. **The Superior Court Enters A Final Order**

Following the Court's entry of the Memorandum Opinion, Pellicone filed a letter with the Superior Court advising NCC and the Court that he wished to stipulate to the amount of just compensation in the amount of $15,529.33, which was the same amount as NCC's good faith estimate of just compensation and the condemnation deposit made with the Court. *See* B-161. Pellicone attached to his letter a draft Proposed Order. *See* B-162-63. Although NCC did not oppose the entry of an award of just compensation in Pellicone's favor in the amount of $15,529.33, NCC did not agree with some of the language contained in Pellicone's draft Proposed Order. After being unable to resolve the differences with Pellicone, NCC submitted its competing draft Proposed Order on May 29, 2013. *See* B-164. The Superior Court entered a Final Award of Just Compensation on June 3, 2013. *See* B-168. During the course of the following week, Pellicone filed an Emergency Motion to Stay, an Application for Certification of Interlocutory Appeal, and a Motion for Reargument. *See* B-170, B-174, and B-177. NCC opposed Pellicone's Motion to Stay and Motion for Reargument.

On June 21, 2013, the Superior Court held a hearing on Pellicone's Application for Certification of Interlocutory Appeal, Emergency Motion to Stay and Motion for Reargument. *See* B-213. Ultimately, the Superior Court denied

Pellicone's Emergency Motion to Stay and entered an Amended Final Award of Just Compensation ("Amended Final Award"). *See* B-211.

E. Pellicone Appeals the Superior Court's Rulings

On June 21, 2013, Pellicone filed a Notice of Appeal of: (1) the Memorandum Opinion; and (2) the Amended Final Award. On June 24, 2013, Pellicone amended his Notice of Appeal to include the Superior Court's denial of his Emergency Motion to Stay.

In an attempt at a second bite at the apple following the Superior Court's denial of his Emergency Motion to Stay, Pellicone filed a Motion for Stay Pending Appeal in this Court on July 1, 2013. This Court denied Pellicone's Motion on July 24, 2013.

On August 12, 2013, Pellicone filed Appellant's Opening Brief on Appeal ("Opening Brief"), and on August 21 and 27, 2013, he filed corrected versions of his Opening Brief in response to deficiency letters from the Clerk of this Court.

This is NCC's Answering Brief.

SUMMARY OF ARGUMENT

I. NCC denies that the trial court erred in allowing it to take possession of Pellicone's land, and further denies that it is not authorized under 9 *Del. C.* § 1525 ("Section 1525") to condemn Pellicone's land for the purpose of completing Phase II of the Flood Control Project. Pellicone's strained arguments regarding Section 1525's legislative history, and his overly narrow reading of the plain words of the statute, should be rejected. Under Section 1525, NCC is clearly authorized to condemn the subject property for purposes of widening and altering Little Mill Creek as part of a flood abatement project.

II. NCC denies that the condemnation of Pellicone's land for the purpose of the Flood Control Project is not a proper "public use" under 29 *Del. C.* § 9501A. The trial court firmly rejected Pellicone's "Trojan Horse" argument, calling it "unpersuasive" and further noting that it "was unsure how the project could be anything other than a public project, for public use, for a public purpose." (Mem. Op. at 11.) The evidence of record establishes that NCC will be utilizing the condemned land once the project has concluded. Moreover, the trial court did not abuse its discretion in considering evidence regarding NCC's active role in the Flood Control Project, including the Affidavit of Anthony Schiavi.

STATEMENT OF FACTS

A. The Parties

Appellee NCC is a political subdivision of the State of Delaware. A-174; Mem. Op. at 4. The General Assembly has delegated statutory powers of eminent domain to NCC. *See* 9 *Del. C.* § 1525. Section 1525 provides, in part, as follows:

> (a) In case the [New Castle] County Council, upon the advice of the Department of Public Works deems it advisable to widen, straighten or alter the course of any part of any small run or creek in the County, such as…Little Mill Creek…[NCC] may enter upon any land for the purpose of surveying and locating the changes necessary to widen, straighten or alter the course of any part of such run or creek. . . . [and] (c) In case the County Council cannot agree with the owner or owners of such lands, the County Council may acquire the same by condemnation in accordance with Chapter 61 of Title 10.

9 *Del. C.* § 1525 (emphasis added).

Appellant Donald L. Pellicone is the record owner of parcels of real property located at 80 and 82 Germay Drive, New Castle, New Castle County, Delaware. A-175-76; A-198-99. NCC commenced this action pursuant to its eminent domain authority in order to obtain three easements on Pellicone's land — one permanent easement totaling 0.061 acres and two temporary construction easements of 0.107 acres and 0.148 acres ("the subject property"). A-469. These takings are absolutely necessary for a critically important public use — the widening and

altering of Little Mill Creek so as to improve the flow of drainage in order to abate a flooding problem.

B. The Flood Control Project

1. History of Little Mill Creek Flooding and Creation of Project

Little Mill Creek has suffered recurring flood problems over the past 100 years. A-120; A-517. In 1995, in an effort to abate the flooding, the United States Army Corps of Engineers ("Army Corps"), pursuant to section 205 of the 1948 Flood Control Act, completed a Flood Control Feasibility Study. A-517. The study proposed a two-phase improvement plan for two separate portions of Little Mill Creek. Phase I was successfully completed in 2007. A-160. Phase II is ongoing and will be the final step of implementing the goals proposed by the 1995 study. A-166. In Phase II, portions of Little Mill Creek will be realigned, deepened, and widened in order to reduce the risk of flooding. *Id.*

Specifically, Phase II will be accomplished by:

> (1) Installing 3200 cubic yards of riprap and 1,100 cubic yards of fill material to stabilize the channel banks and removing 30,000 cubic yards of material for a net excavation of 25,700 cubic yards
> (2) Eliminating a channel bottleneck upstream by widening 500 linear feet of the channel's right bank (looking downstream)
> (3) Creating more floodwater storage in the tidal sections downstream by <u>deepening</u> and <u>widening</u> 1,700 linear feet of the channel (both banks).

A-465, A-518 (emphasis added).

In order to complete the Flood Control Project, it is necessary for NCC to obtain a permanent easement and two temporary construction easements from Pellicone. A-469; A-518. Pellicone is the last property owner from whom NCC needs to obtain easements before the Project can move forward. A-519; B-187. Without these easements, the project simply cannot move forward. A-177; A-194; A-518.

2. The Flood Control Project Is A Multi-Agency Project That Includes New Castle County.

The Flood Control Project is a joint effort between NCC, Delaware Department of Natural Resources and Environmental Control ("DNREC"), and the Army Corps. A-516. This joint effort was publicly acknowledged, and as then Senator Joe Biden said, "[f]or years, the state of Delaware, New Castle County and the federal government have worked to get the [Little Mill Creek Flood Control Project] constructed. . . ." A-517; A-525. Although the Army Corps is handling the design and construction of the Flood Control Project, NCC has an active and significant role in the Flood Control Project as well. *See* A-517-18; *see also* Mem. Op. at 10.

First, NCC is preparing some designs that will be given to the Army Corps to be incorporated into the Army Corps design plans for the Flood Control Project. A-271; A-518. Second, along with DNREC and New Castle Conservation District, NCC is a voting member of the Little Mill Creek Flood Abatement Committee,

"which was created by the 135th General Assembly of the State of Delaware in 1989-90 to develop and implement a plan to correct flooding in the Little Mill Creek area." A-515-16. Anthony Schiavi, NCC's Assistant County Engineer, serves as Project Manager for the Flood Control Project and as NCC's representative on the Little Mill Creek Flood Abatement Committee. A-515-16. Mr. Schiavi's responsibilities include "coordinating all aspects of the Project with other New Castle County departments, State agencies (i.e., State of Delaware Department of Natural Resources and Environmental Control), and federal entities (i.e., United States Army Corps of Engineers)." A-515.

Third, NCC is responsible for acquiring the easements and other property interests necessary for the Flood Control Project. A-518. The Flood Control Project requires NCC to obtain easements on various parcels of land owned by thirty-nine (39) different property owners. The property owners in and around Little Mill Creek are overwhelmingly supportive of the Flood Control Project and, all but one (Pellicone), have consented to NCC's use of their property for the Flood Control Project. A-467; A-517; A-519; A-584.

Fourth, NCC is contributing significant funds to the Flood Control Project. (Mem. Op. at 10.); *See* A-548-49. "Beginning in 1995 and continuing through the 2013 Capital Budget, NCC has designated funding for the Project for every fiscal year." A-517. To date, NCC has already contributed more than $400,000 towards

Phase II of the Flood Control Project. A-549. In fact, "[a]lthough the Project has also received federal funding, the Project received enough State and County funding that it could have begun with or without federal aid." A-517; A-528.

Fifth, "[o]nce the Project is completed, it will be NCC's continued responsibility to maintain the infrastructure of the Project, including the banks of the Creek, and to keep Little Mill Creek free flowing." A-518.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT NCC IS AUTHORIZED UNDER 9 *DEL. C.* § 1525 TO CONDEMN PELLICONE'S LAND FOR PURPOSES OF WIDENING AND ALTERING LITTLE MILL CREEK IN CONNECTION WITH THE FLOOD CONTROL PROJECT.

A. Question Presented

Whether the trial court correctly concluded that NCC has statutory authority under 9 *Del. C.* § 1525 to exercise its power of eminent domain to condemn the subject property in order to accomplish the widening and deepening of the creek bed of Little Mill Creek in connection with the Flood Control Project? Answer: Yes.

B. Standard and Scope of Review

This Court reviews *de novo* the trial court's legal interpretation of a condemnation statute. *Cannon v. State*, 807 A.2d 556 (Del. 1999).

C. Argument

Pursuant to Section 1525, NCC is authorized to exercise its eminent domain powers in order to "widen, straighten or alter the course of any part of any small run or creek in the County, such as…Little Mill Creek." 9 *Del. C.* § 1525(a). NCC's taking of the subject property for the purpose of the Flood Control Project, which will involve the widening and deepening of the creek bed of Little Mill Creek, falls squarely within the parameters of the statute.

Pellicone has adopted the misguided position that the phrase "alter the course" in Section 1525(a) does not encompass the "deepening" of a creek bed and, as a result, NCC is not authorized to condemn the subject property for purposes of the Flood Control Project. As explained below, Pellicone's position cannot withstand the scrutiny of common sense, logic, and a plain English reading of the statute.

At this juncture, it is important to note that, contrary to Pellicone's assertions, the trial court did not "largely disregard" Pellicone's statutory construction and legislative history arguments. (Op. Br. at 14-15.) Although the Memorandum Opinion does not explicitly address those arguments *per se*, the trial court thoroughly explored those issues during the April 15, 2013 hearing. *See* A-623; A-625-30; A-636-42; A-645-46; A-674. In addition, the trial court made clear in its Memorandum Opinion that, in deciding this matter, it considered Pellicone's April 2013 correspondence regarding the legislative history and purported legislative intent behind Section 1525. (*See* Mem. Op. at pp. 2-4.) Thus, all of the arguments that Pellicone now raises on appeal regarding the purported boundaries of NCC's authority under Section 1525 were carefully considered by the trial court before it rendered its decision.

Ultimately, the trial court correctly ruled that "NCC has the power under 9 *Del. C.* § 1525 to condemn property for the purposes of widening, straightening, or otherwise altering the course of . . . Little [Mill] Creek." (Mem. Op. at 9 n.36.)

1. 9 Del. C. § 1525 Is Unambiguous, And The Court Must Apply The Literal Meaning Of The Statutory Language As Written.

In his Opening Brief, Pellicone asserts the strained argument that NCC has exceeded its statutory authority under Section 1525 because, while the statute permits widening, straightening or "alter[ing] the course of any part of" of Little Mill Creek, it allegedly does not permit the "deepening" of Little Mill Creek. Notably, in asserting this argument, Pellicone starts with the premise that the Court must determine the intent of the General Assembly before it can begin to interpret and apply the plain words of a statute. However, adopting this backwards approach would contravene well-settled principles of statutory construction under Delaware law.

Indeed, "the first step in any statutory construction requires [the Court] to examine the text of the statute to determine if it is ambiguous." *Leatherbury v. Greenspun*, 939 A.2d 1284, 1288 (Del. 2007). "If the statute as a whole is unambiguous and there is no reasonable doubt as to the meaning of the words used, the court's role is limited to an application of the literal meaning of those words." *Id.* (internal citation omitted); *see also Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1287 (Del. 1994) ("[C]ourt should not resort to legislative history in

interpreting a statute where statutory language provides unambiguously an answer to question at hand."); *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 68 (Del. 1993) ("In the absence of any ambiguity, the language of the statute must be regarded as conclusive of the legislative intent.").

On its face, Section 1525 is clear and unambiguous. Under Delaware law, "[a] statute is ambiguous if: 1) it is reasonably susceptible to different conclusions or interpretations; or 2) a literal interpretation of the words of the statute would lead to an absurd or unreasonable result that could not have been intended by the legislature." *Grand Ventures, Inc.*, 636 A.2d at 68. Importantly, "[a] statute is not rendered ambiguous . . . simply because the parties disagree about the meaning of the statutory language." *Ross v. State*, 990 A.2d 424, 429 (Del. 2010). Here, the phrase "alter the course of any part of . . . Little Mill Creek" contained in Section 1525(a) is not "reasonably susceptible to different conclusions or interpretations." *Grand Ventures, Inc.*, 636 A.2d at 68. Nor would a literal interpretation of this language "lead to an absurd or unreasonable result." *Id.*

It is axiomatic that, when construing a statute, the "words and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language." *Delaware Bay Surgical Servs. P.A. v. Swier*, 900 A.2d 646, 652 (Del. 2006) (citing 1 *Del. C.* § 303). Based on the plain meaning of the phrase "alter the course of any part of," the deepening of a creek

bed is clearly permissible under the statute. To understand the meaning of the phrase "alter the course," one need look no further than an everyday English dictionary. According to the American Heritage Dictionary, a common and approved use of the word "alter" is "change." AMERICAN HERITAGE DICTIONARY, *available at* http://www.ahdictionary.com/word/search .html?q=alter. In the everyday use of the word, neither "alter" nor "change" denotes any restrictions on the method of accomplishing the "change."

Moreover, a common and approved use of the term "course," when applied to waterways is "path." AMERICAN HERITAGE DICTIONARY, *available at* http://www.ahdictionary.com/word/search.html?q=course. The usage of "alter" and "course" in the context of Section 1525(a) is not reasonably susceptible to the unduly limited application espoused by Pellicone—i.e., that the term "alter the course" precludes the making of vertical changes to the elevation of the creek bed, such as by deepening the creek bed.

Further, the fact that Section 1525(a) permits NCC to alter the course of ***<u>any</u> part of*** Little Mill Creek clearly indicates that the statute should not be construed as narrowly as Pellicone is suggesting. It would not make sense to read the term "**<u>any</u>** part of" to exclude "creek bed" for instance. Thus, under the plain meaning of the phrase "alter the course of any part of," NCC is clearly authorized to condemn private property for the purpose of changing the path of ***any part of*** Little

Mill Creek (i.e., including the creek bed) in a number of ways, including by deepening the creek bed.

NCC's "plain and ordinary meaning" interpretation would not "lead to an absurd or unreasonable result." *Grand Ventures, Inc.*, 632 A.2d at 68. Rather, it is Pellicone's overly narrow interpretation of the statute that would lead to unreasonable and absurd results — the crippling of a multi-million dollar flood control project that could save lives and millions of dollars in property damage. Accordingly, as the language of Section 1525(a) is unambiguous, "the language of the statute must be viewed as conclusive of the legislative intent" and the Court "must apply the words as written." *Id.*; *see also Leatherbury*, 939 A.2d at 1289.

Finally, Pellicone's reliance on *Wilmington Parking Authority v. Land With Improvements, etc.*, 521 A.2d 227 (Del. 1986) for the proposition that "[t]he County has the burden to establish that it was acting within the scope of its delegated eminent domain power contained in § 1525" (Op. Br. at 24-25) is misplaced. In that case, the Wilmington Parking Authority was seeking to take property in condemnation for The News Journal, clearly a private party, so that The News Journal could expand its facilities. As the Court in *Wilmington Parking Authority* explained, "a court must inspect with heightened scrutiny a claim that the public interest is the predominant interest being advanced" where "the exercise of eminent domain results in a substantial benefit to specific and identifiable private

parties." *Wilmington Parking Authority*, 521 A.2d at 231. No such heightened burden applies in this case since it is uncontested that the subject property is not being taken for the benefit of a private party in this case.[2]

2. Pellicone's Proffered Arguments Regarding Legislative Intent Are Misguided And Would Lead To An Unreasonable and Unworkable Result.

Pellicone is also incorrect in asserting that the Court must look to the legislative history of Section 1525 in order to determine the General Assembly's intent. Even if the Court were to look beyond the plain meaning of the statute and endeavor to determine the General Assembly's intent (which it should not do), the proper place to begin is with the plain language of the statute. *See Williams v. State*, 756 A.2d 349, 351 (Del. 2000) ("Courts must first look to the statutory language when determining legislative intent."). The analysis should be based upon words that actually appear in the statute as opposed to words that are not present. *See, e.g., State v. Fowler*, 194 A.2d 558, 562 (Del. Super. 1963) ("The Court must adopt a [statutory] construction . . . which will best give effect to the intent of the General Assembly expressed in the words [which are] actually used [in the statute]."). Moreover, "[t]o determine the significance of clauses in a

[2] Also, in granting the Order of Possession, the Superior Court found that "[n]o private party is going to own, occupy or develop the Permanent Easement and the Temporary Construction Easements. NCC is the condemning [party]. While the Army Corps of Engineers and others will be involved in completing the Flood Control Project, these parties are not private parties and certainly are not owning, occupying or developing these easements for private use. . . . [I]n the end, . . . the Permanent Easement and the Temporary Easements will be in favor of NCC and not the Army Corps of Engineers or any other third party." (Mem. Op. at 10.)

statute, the court must look into the purpose and intention of the Legislature and ascertain its meaning from an examination of every section of the statute which in any way deals with the question raised." *Application of Penny Hill Corp.*, 154 A.2d 888, 891-92 (Del. 1959).

In the matter at hand, the plain language of Section 1525 as a whole does not support the narrow construction advanced by Pellicone — i.e., that because the statute does not include certain words and phrases ("deepening," "dredging," "flood control," or "channel improvements"), the General Assembly intended for the statute to apply only to "limited work in a small subset of County watercourses" and did not intend for it to be invoked for "a large scale flood control project." (Op. Br. at 20-21.) Pellicone bases his assertions solely on subsection (a) of Section 1525, while failing to consider other subsections. Thus, Pellicone's proffered legislative intent arguments do not take the entirety of Section 1525 into account and should be rejected.

Indeed, Section 1525 does not specify the types and scope of projects that are covered. On the other hand, Section 1525(a) does clearly permit NCC to widen, straighten or alter the course of any part of Little Mill Creek if, upon the advice of the Department of Public Works, NCC "deems it advisable" to do so. A common and approved use of the word "advisable" is "prudent." *See* AMERICAN HERITAGE DICTIONARY, *available at*

http://www.ahdictionary.com/word/search.html?q=advisable. Both terms — "advisable" and "prudent" — connote discretion and freedom of choice. The General Assembly's decision to endow NCC with the freedom to act when "advisable" indicates that the Legislature meant to give NCC the discretion to act to widen, straighten or alter the course of any part of Little Mill Creek when NCC deemed it advisable and not to be restricted as Pellicone suggests. Here, NCC deems it advisable to widen and deepen Little Mill Creek for the purpose of flood control.

Furthermore, Pellicone's proffered legislative intent arguments do not comport with the overall scheme of Section 1525(c). As it stands, Section 1525(c) permits NCC to acquire private land "by condemnation in accordance with Chapter 61 of Title 10." 9 *Del. C.* § 1525(c). Logic dictates that such a broad grant of eminent domain authority would not be necessary if NCC's jurisdiction under Section 1525 truly were limited to "only small projects," as Pellicone contends. In other words, if the General Assembly had intended for Section 1525 to be limited to "only small projects" such as simple, basic clearing of Little Mill Creek to keep it "free-flowing" (*see* Op. Br. at 21; A-205; A-624-25; A-626), the General Assembly likely would not have granted NCC such broad eminent domain powers under subsection (c) to implement subsection (a). Such simple, basic clearing of Little Mill Creek, as is suggested by Pellicone, likely would not require NCC to

obtain easements along the banks of the Creek through condemnation. Thus, the General Assembly's inclusion of subsection (c) reasonably suggests that the General Assembly intended for Section 1525 to extend to larger projects, including a large-scale flood control project for which easements along the creek banks would be required. *See* A-672 (trial court noting "the plain language [of Section 1525] is a broad grant" of condemnation authority); *see also* Mem. Op. at 9 ("[NCC] has the power to negotiate the purchase of **any** land necessary to widen, straighten, or alter the course of any small run or creek in NCC.") (emphasis added).

3. *Pellicone's Historical Climatological Data Does Not Support the Notion that The General Assembly Did Not Care About Flood Control in the 1930s.*

Pellicone's assertion that "the General Assembly would not have been concerned about flood control projects" when it enacted Section 1525 because Delaware was suffering from a severe drought in 1931 is misguided. (Op. Br. at 21.) Laws are generally enacted to survive the passage of time, or else they are repealed. Although Delaware was suffering from a drought from 1930 to 1934, it would be reasonable to assume that the General Assembly at the time would have also been aware that Delaware could be susceptible to severe floods. *See* A-487; A-536. In fact, the "Great Hurricane of 1846" caused severe storm-surge flooding

near New Castle, and such severe, natural disasters would be difficult to forget, much like the recent Hurricane Sandy. *Id.*

Thus, despite Delaware's drought in the early 1930s, it would be unreasonable to speculate, as Pellicone has, that the General Assembly would not have been mindful that Delaware could also suffer from severe flooding in the future and that the General Assembly would not intend for Section 1525 to be applied to prevent flood damage. Accordingly, Pellicone's short-sighted reliance on the weather patterns of 1930-34, for the proposition that the General Assembly did not intend for the statute to cover flood control projects, should be rejected.

4. Pellicone's Position That Section 1525 Is An Adjunct To The County's Authority Over Roads And Bridges Is Irrelevant, Incorrect, and Should Be Rejected.

Pellicone's additional argument — that in determining the proper scope of Section 1525, this Court should consider that the General Assembly purportedly intended for Section 1525 to be an adjunct to the County's authority over roads and bridges — relies on an analysis that deviates sharply from applicable statutory construction principles. (Op. Br. at 22.) As explained *supra*, under Delaware law, statutory interpretation first begins with the plain language of the statute, and legislative intent must then be determined from analyzing the words of the statute. If the language is ambiguous, then the courts may look to legislative history to determine legislative intent. No principle of statutory interpretation (and Pellicone

cites to none) would permit Pellicone to rely on the history of the Levy Courts and the development of the Town of Elsmere — in lieu of analyzing the plain meaning of the words in the statute — to support his statutory construction arguments. (Op. Br. at 22.) Pellicone's historical discourse on the powers and duties of the Levy Courts, and the industrial development of Elsmere, is simply not germane to the analysis at hand, and provides no support for Pellicone's ultimate conclusion that Section 1525 was not intended to apply to projects such as the Flood Control Project. (Op. Br. at 22.); A-476. More importantly, the history does not support the conclusion, as Pellicone asserts, that the General Assembly's use of the word "alter" was meant to be restricted to lateral changes to the watercourse. (Op. Br. at 23.); A-626.

Moreover, Pellicone's assertion that the statute was intended solely to supplement the County's authority over roads and bridges undermines his position that Section 1525 does not allow "vertical (or elevation) changes." A-690; A-474-76. The "widening and altering" of waterways to accommodate new roads and bridges would necessarily require one to make vertical changes to the banks of the waterways, by digging and removing earth. Similarly, Little Mill Creek will be deepened by removing earth from the creek bed. *See* A-476.

In light of the foregoing, this Court should affirm the Superior Court's ruling that NCC is authorized under Section 1525 to condemn the subject property for the

purpose of deepening and thus altering Little Mill Creek as part of the Flood Control Project.

ARGUMENT

II. THE ACQUISITION OF PELLICONE'S LAND IN CONNECTION WITH THE FLOOD CONTROL PROJECT IS A PROPER "PUBLIC USE" UNDER 29 *DEL. C.* § 9501A

A. Question Presented

Whether the trial court correctly concluded that NCC's acquisition of Pellicone's property for purposes of the Flood Control Project is for a "public use" within the meaning of 29 *Del. C.* § 9501A? Answer: Yes.

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 the trial court is whether they are: 1) sufficiently supported by the record; and 2) the product of an orderly and logical reasoning process. *Key Props. Group, LLC v. City of Milford*, 995 A.2d 147, 150 (Del. 2010). In other words, this Court "will uphold the Superior Court Judge's factual findings unless they are clearly erroneous and the record does not support them." *Lawson v. State*, 2013 WL 3793973, at *3 (Del. Jul. 22, 2013).

C. **Argument**

The trial court correctly found that "NCC is the proper party in this proceeding" and that "the proposed use of this taking/condemnation is a public use." (Mem. Op. at 9, 10.)

Again, the trial court gave Pellicone a full and fair opportunity to present his so-called "Trojan Horse" arguments during the April 15, 2013 hearing; it certainly did not "largely disregard" any of Pellicone's points. *See* A-589; A-590-92; A-610-15; A-630; A-673.

Based on the facts and evidence of record, the trial court firmly and correctly rejected Pellicone's "Trojan Horse" argument, noting that it "was unsure how the project could be anything other than a public project, for public use, for a public purpose." (Mem. Op. at 11.) In doing so, the trial court correctly found, based on "the pleadings, the deposition, and the affidavits presented by the parties," that "[w]hile the Army Corps of Engineers and others will be involved in completing the Flood Control Project . . . in the end, however, the Permanent Easement and the Temporary Easement will be in favor of NCC and not the Army Corps of Engineers or any other third party," and "NCC is providing significant funds for the Flood Control Project." (Mem. Op. at 10.) These factual findings alone completely undermine Pellicone's bald assertion that NCC is "nothing more than a

gratuitous contributor" that has nothing more than a "self-proclaimed involvement" in the project. (Op. Br. at 27.)

In addition, the trial court did not abuse its discretion in considering the Affidavit of Anthony Schiavi, as the Affidavit does not directly conflict with Mr. Schiavi's prior deposition testimony and, hence, is not a "sham affidavit" as claimed by Pellicone. Rather, the Affidavit clarifies and expands upon Mr. Schiavi's earlier testimony.

Thus, for the reasons stated below, the trial court's ruling should be affirmed.

1. NCC is the appropriate condemning authority and is not acting as a "Trojan Horse" for the Army Corps.

The trial court correctly found that the subject property is being taken pursuant to NCC's eminent domain authority for a "public use." Pellicone's contrary assertions are not consistent with the application of the pertinent statutes and should be rejected.

First, given that NCC is a county of the State of Delaware, it is clearly a political subdivision of Delaware and, thus, meets the statutory definition of "agency" under Section 9501(b). *See* 29 *Del. C.* § 9501(b) ("The term 'agency' means any department, agency or instrumentality of the State or of a ***political subdivision of the State***, any department, agency or instrumentality of 2 or more states, or 2 or more political subdivisions of the State, or states, and any person

who has the authority to acquire property by eminent domain under state law.") (emphasis added).

Second, contrary to Pellicone's assertions, NCC is significantly involved in the Flood Control Project. Indeed, NCC has contributed significant funds to the project since its inception — more than $400,000 to date. A-407; A-549. The trial court's factual findings in this regard should not be disturbed, as they are well supported by the record and are the product of an orderly and logical reasoning process. (*See* Mem. Op. at 10.) Additionally, NCC played a critical role in the decision on whether the Flood Control Project would move forward with solely local sponsors, or whether it would partner with the Army Corps. *See* A-454; A-456; A-517. Further, as Mr. Schiavi explained in his April 11th Affidavit, "NCC and New Castle Conversation [sic] District are preparing some designs that will be given to the Army Corps to be incorporated into the Army Corps design plans for the Project." A-518.

In addition, "[o]nce the Project is constructed, it will be NCC's continued responsibility to maintain the infrastructure of Project, including the banks of the Creek, and to keep Little Mill Creek free flowing." *Id.* Thus, NCC clearly will be "utilizing" the property after the project is complete. In this same vein, because the Flood Control Project will ultimately benefit NCC's citizens, it cannot reasonably be asserted that NCC will not be "utilizing" the subject property. Thus,

NCC's use of the subject property is unquestionably a "public use" within the meaning of Section 9501A. *See* Section 9501A(c) ("The term 'public use' shall only mean: (1) The possession, occupation, or utilization of land by the general public or by public agencies…").

Pellicone's assertions to the contrary are logically flawed and have no basis in law or fact. Pellicone contends that, because the Army Corps is responsible for the design and construction of the Flood Control Project, the Army Corps is the "sole entity that will be undertaking 'possession, occupation, or utilization' of Pellicone's land." (Op. Br. at 28.) According to Pellicone, there is no State agency that will be possessing, occupying, or utilizing Pellicone's land because the Army Corps is already doing so; hence, there can be no "public use" under the statute. Following Pellicone's logic, any time the State condemns property for the construction of a state highway and hires a private contractor to do the roadwork, the private contractor would become the end user and, thus, the project would not be for a "public use." Clearly, that cannot be the case. The fact that the Army Corps is responsible for the design and construction of the project, as well as some of the financing, does not automatically transform the Army Corps into the "sole entity that will be undertaking possession, occupation, or utilization" of Pellicone's land. Pellicone's argument is inherently flawed.

Also, Pellicone's position is not supported by Delaware law. Indeed, Pellicone's reliance on *State v. George F. Lang Co.*, 191 A.2d 322 (Del. 1963) in support of his argument that the Flood Control Project essentially "belongs" to the Army Corps and not to any State agency (and thus cannot be for a "public use") is misplaced. In *George F. Lang Co.*, this Court acknowledged that "Interstate Route 95 serves a local as well as an interstate or Federal purpose," and concluded that "[t]he fact that such a dual purpose is served should not and does not preclude the highway from being at the same time a 'State Highway' as well as a link in an interstate system of highways." *George F. Lang Co.*, 191 A.2d at 324-25. Similarly, in the subject matter, the fact that both the Army Corps and NCC will be utilizing the subject property does not mean that the project is somehow not for "public use." Likewise, the fact that the federal government has contributed significant funds to the project does not somehow take the project outside of the "public use." Indeed, the Real Property Acquisition Act makes no distinction between projects that are funded by the State versus those that are funded by the federal government. *See* 29 *Del. C.* § 9501(a) ("This chapter shall be applicable to the acquisition of real property by state and local land acquisition programs or projects in which federal, state or local funds are used."). In other words, even a project that is completely funded by the federal government can meet the definition of "public use" under Section 9501A(c).

2. The Flood Control Project constitutes a County project under Delaware law.

Pellicone's contentions that NCC lacks authority under the Delaware Code to conduct an extensive flood control project, and that the County Council has failed to satisfy Articles 6 and 7 of Chapter 12 of the County Code, also lack merit. (Op. Br. at 32-34.) As an initial matter, Pellicone's statement that "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" (Op. Br. at 9) is a mischaracterization of the record and is simply wrong. As the following excerpt from Mr. Schiavi's deposition reveals, NCC never made such an admission:

> Q. Are you aware of any County Council resolution or ordinance which specifically approved the Little Mill I Project and/or the Little Mill II Project?
>
> A. I guess the keyword is specific. I know that they get approved by Council through the capital budget process year to year, but an ordinance just specific for these one projects, I know of no specific ordinance.
>
> Q. Okay.
>
> A. They are approved — as the capital budget gets approved for all the capital projects, that requires an action by Council and that's the process.

A-341. Indeed, the record is also clear that NCC County Council authorized the project and approved by resolution the County to proceed with the condemnation

action to acquire the Pellicone property interests for the Flood Control Project. A-177; A-191-92; A-194-95.

Additionally, it should be noted that Pellicone's contentions are premised upon general, non-condemnation statutes and code sections, and for that reason should be rejected. It is well established that "specific [statutes] must prevail over the general." *Turnbull v. Fink*, 668 A.2d 1370, 1377 (Del. 1995) (citing *Hamilton v. State*, 285 A.2d 807, 809 (Del. 1971)). Similarly, state statutes must prevail over municipal codes. *See Cantinca v. Fontana*, 884 A.2d 468, 473 (Del. 2005). Accordingly, as Section 1525 specifically authorizes NCC to condemn property for purposes of widening, straightening or altering the course of any part of Little Mill Creek, Section 1525 must prevail over the general, non-condemnation statutes and code sections referenced by Pellicone.

Likewise, Chapter 2, Article 1, Section 2.01.004 of the New Castle County Code specifically sets forth additional condemnation procedures that complement Section 1525. Thus, Section 2.01.004 is a specific provision which must also prevail over Articles 6 and 7 of the County Code.

Moreover, NCC already has certain maintenance responsibilities for Little Mill Creek and will continue to have them after the Project is complete. The Army Corps, however, does not now nor will it have any maintenance responsibilities after the Project.

Further, Pellicone's claim that "only 'flooding that will cause serious personal injury or significant property damage' is within the County's bailiwick" (Op. Br. at 33) supports NCC's position that the Flood Control Project is within its purview. As the trial court acknowledged during the June 21, 2013 hearing, there is certainly a risk of thousands of dollars in property damage due to flooding in New Castle County. (*See* B-220-21.) This risk of significant property damage due to flooding would clearly fall "within the County's bailiwick."

For all of the above reasons, the record plainly establishes that NCC is properly exercising its statutory authority to condemn property necessary for a public use. Pellicone has failed to raise a single challenge that would satisfy his burden to "show good cause why [an] order of possession should not be entered forthwith." Super. Ct. Civ. R. 71.1.

3. Pellicone's attempt to discredit Mr. Schiavi's April 11th Affidavit as being a "sham" should be rejected.

Finally, Pellicone's assertion that Mr. Schiavi's Affidavit is a "sham" and should be disregarded because it differs in certain respects from his deposition testimony should be rejected.

First, the "sham affidavit rule" that Pellicone attempts to invoke applies in the context of motions for summary judgment. In *Cont'l Ins. Co. v. Rutledge & Co., Inc.* (cited by Pellicone on page 30 of his Opening Brief), the Court of Chancery noted, in the context of a summary judgment motion, that "[a] party

cannot raise a genuine issue of material fact by submitting affidavits that directly contradict his earlier testimony." 750 A.2d 1219, 1232 (Del. Ch. 2000). Mr. Schiavi's Affidavit, by contrast, was not introduced for purposes of creating a genuine issue of material fact in order to defeat a summary judgment motion. Thus, NCC submits that the "sham affidavit rule" does not apply in the procedural context of this case.

Second, Mr. Schiavi's Affidavit does not directly contradict his deposition testimony. Pellicone's assertion that "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" is just wrong. (Op. Br. at 31). On the contrary, Mr. Schiavi ***did*** explain during his deposition that, "once we get the design approved by land use, we are going to give that design to the Corps to include in their contract drawings." A-271. Also, with respect to the point made by Mr. Schiavi in his Affidavit regarding NCC's continuing maintenance duties following completion of the project (A-518), it cannot be disputed that Pellicone's counsel never asked a question during Mr. Schiavi's deposition that would have solicited such a response. *See* A-685-86. Certainly, there was nothing wrong with Mr. Schiavi clarifying or supplementing his deposition testimony under such circumstances. Accordingly, Pellicone's "sham affidavit" arguments have no merit and should be disregarded.

CONCLUSION

For the foregoing reasons, NCC respectfully requests that this Court affirm the Order of Possession entered by the Superior Court.

Respectfully submitted,

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