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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - HUDSON COUNTY
DOCKET NO. L-2039-16

NEW JERSEY SPORTS AND EXPOSITION AUTHORITY,

Plaintiff,

v.

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

Defendants.

Civil Action

OPINION

DECIDED: July 27, 2016

James Stewart, for plaintiff (Lowenstein Sandler, LLP, attorneys).

Gregory J. Castano, Jr., for defendant Town of Kearny (Castano Quigley, LLC, attorneys).

BARISO, A.J.S.C.

Before the court is the question of whether plaintiff New Jersey Sports and Exposition Authority (hereinafter "NJSEA") properly exercised its right to eminent domain for the purpose

of continuing its operation of the Keegan Landfill. For the reasons that follow, the answer to that question is "yes."

Procedurally, this matter arises by way of NJSEA's order to show cause and verified complaint, which seeks to condemn Tax Block 205, Lots 24, 27, 29, 30, and 19.02 ("the Property") located in the defendant Town of Kearny ("Kearny"). NJSEA also seeks all rights to cross the railroad tracks located in Block 286. The Property commonly is known as the Keegan Landfill. Pursuant to a June 14, 2005 lease that expired on June 30, 2016, Kearny owns the land where the Keegan Landfill is located, on which NJSEA operates a solid waste disposal facility. Kearny moved for summary judgment motion seeking to dismiss NJSEA's condemnation action with prejudice.

For the reasons that follow, Kearny's motion for summary judgment is **DENIED**, and an order for final judgment authorizing NJSEA to exercise its power of eminent domain and appointing commissioners is **GRANTED.**

I.

A.

NJSEA is the zoning and planning agency for the 30.4 square-mile area along the Hackensack River that covers fourteen municipalities in Bergen and Hudson Counties. In February 2015, NJSEA and the New Jersey Meadowlands Commission ("NJMC") merged

and are now collectively referred to as NJSEA. See N.J.S.A. 5:10A-1, et seq.

Pursuant to N.J.S.A. 5:10A-29, N.J.S.A. 5:10-5(m), and N.J.S.A. 13:17-6(g), NJSEA is authorized to acquire any real property within its jurisdiction if "the commission shall find it necessary or convenient" to do so for any of its authorized purposes, including temporary purposes, in accordance with the Eminent Domain Act of 1971. See N.J.S.A. 20:3-1 et seq. One of NJSEA's authorized purposes is "[t]o provide solid waste disposal and recycling facilities for the treatment of solid waste." N.J.S.A. § 5:10A-7(k). NJSEA has determined that it is necessary to acquire a fee simple interest in the Property for public use.

According to the comprehensive Appraisal Report dated March 16, 2016 by Lasser Sussman Associates, LLC, the estimated market value of the fee simple interest in the Property is $1,880,000. See Exhibit D of the verified complaint.

By a letter dated May 3, 2016, NJSEA extended to Kearny a written offer to purchase the Property for $1,880,000. See Exhibit C of verified complaint. In its verified complaint, filed on May 19, 2016, NJSEA stated that it had been unable to acquire fee title in the Property through bona fide negotiations.

On May 25, 2016, NJSEA deposited $1,880,000 with the Superior Court Clerk's Office, Trust Fund Unit and, the next day, filed a Declaration of Taking.

Several parties interested in the Property have been named as defendants in this matter; they are:

1. Town of Kearny, as the record owner of the Property;
2. State of New Jersey, by and through the Tidelands Resource Council, by reason of its riparian rights, title, and interest to lands now or formerly flowed by the mean high tide, as disclosed by Tidelands Search Nos. 81-1202, 1203, 1204, and 1205, dated March 21, 2016, revealing watercourse claims of varying percentage;
3. Theodore C. Wildman, and all of his heirs, successors, and assigns, by virtue of his potential interest in Lot 29, formerly known as Lot 14, in Block 205. The last deed of record for this lot is from the Town of Kearny to Wildman, dated November 13, 1905 and recorded on December 11, 1906 in Deed Book 965, page 341. The tax maps in or around 1929 show the premises to be owned by Kearny; and,
4. Mimi Development Corporation, its successor Hudson Meadows Urban Renewal Development Corporation, and its further successor Sonee Urban Renewal Corporation, by

reason of their potential interest in Block 205, Lot 19.06. The rights of Mimi Development Corp. are set forth in a Master Lease and Option Agreement contained in Deed Book 3283, page 633, as modified by the Order of Dismissal with Prejudice entered October 11, 1983 and recorded August 31, 2015 in Deed Book 9060, page 864, and the Stipulation of Settlement annexed thereto as Exhibit A. These rights were modified further by the Quitclaim Deed from the Hudson Meadowlands Development Commission dated December 20, 1999, and recorded January 26, 2000 in Deed Book 5560, page 235. The Quitclaim Deed specifically excludes a cross-hatched area on Exhibit A to the deed, which appears to include Lot 19.02 and possibly other lots, meaning that the Master Lease and Option Agreement may still be operational.

B.

The Keegan Landfill consists of approximately 110 acres located northeast of Bergen Avenue in Kearny. The majority of the disposal activity occurred at this site during the 1960s and 1970s. (Ex. 2)[1]. The Property never was properly remediated, and contaminated leachate regularly discharged into the adjacent

[1] Save as otherwise noted, references to exhibits are to those appended to Kearny's summary judgment motion.

fresh water marsh, resulting in several underground fires. (Ibid.).

On January 11, 2005, a special public meeting was held in Kearny Town Hall Council Chambers to discuss the future of the Property at issue. (Ex. 1). This meeting included the mayor and council, as well as representatives of the former New Jersey Meadowlands Commission. Shortly thereafter, the NJMC and Kearny jointly created and mailed to all Kearny residents a promotional piece entitled "The Kearny-NJMC Green Space Initiative." (Ex. 2).

On June 14, 2005, Kearny and NJMC executed a Lease Agreement to implement the Green Space Initiative. (Ex. 3). In December 2006, the NJMC published a Comprehensive Action Plan containing statements related to the re-opening of the Keegan Landfill. (Ex. 4). In December 2007, the NJMC's "Closure/Post Closure Financial Plan" stated that "the purpose of reopening this former landfill is to allow the collection of tipping fees to obtain the necessary funding to properly remediate (close) the site in accordance with NJDEP regulations." (Ex. 5).

On December 18, 2008, NJMC reopened the Keegan Landfill under a Temporary Certificate of Authority to Operate issued by the New Jersey Department of Environmental Protection ("NJDEP"). (Ex. 10). The NJMC's July 2008 "Closure and Post-Closure Care Plan" also provided that

> [a]fter closure, the Keegan site will be returned to the Town of Kearny. It is anticipated that the site will remain as passive open space. As the site is surrounded by a freshwater marsh and the relocated Frank Creek, the use of the site for passive open space conforms to the surrounding area. Ultimately, as the site will return to the Town of Kearny, the final long term use will be determined by the Town of Kearny.
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> [(Ex. 6).]

Beginning in 2014, NJSEA commenced negotiations to extend the Lease Agreement with Kearny. In a letter dated June 9, 2015, NJSEA requested that Kearny complete negotiations for the continued operation of the Keegan Landfill. Additionally, NJSEA addressed Kearny's obligation to fund post-closure activities. (Ex. 12). In its reply, dated June 23, 2015, Kearny detailed several reasons for declining to extend the Lease Agreement with NJSEA. (Ex. 13). The parties continued negotiations and exchanged correspondence on July 24, 2015 and July 30, 2015, but to no effect.

By a letter dated September 18, 2015 sent to Kearny and NJSEA, NJDEP advised that "[a]bsent a new lease or extension that allows continued operation of the Landfill, NJSEA and the Town of Kearny will be required to begin preparing for termination of operations and implementation of closure of the Landfill in the near future." (Ex. 16). The letter also stated that, without a complete application for renewal at least 90

days prior to the expiration date, NJSEA must terminate the receipt of waste on or prior to June 20, 2016.

On February 26, 2016, Kearny sent NJSEA a "Notice to Quit/Demand for Possession and Compliance with Lease Obligations." On March 17, 2016, NJSEA adopted Resolution 2016-10, which authorized the use of eminent domain to acquire the underlying property. (Ex. 19). On May 3, 2016, NJSEA served Kearny with a pre-condemnation offer to acquire the Property for $1,880,000. (Ex. 21). On May 17, 2016, Kearny responded by urging NJSEA to reconsider its threatened use of eminent domain. (Ex. 22).

II.

A.

Kearny argues that, as set forth in the original Lease Agreement, the sole purpose of re-opening the landfill was to generate sufficient revenue to fund its proper closure, the remediation of the Kearny Marsh, and provide escrows for post-closure activities. It states that, pursuant to the Lease Agreement, the Property was to be timely surrendered to Kearny together with a payment of $3 million for the development of extensive recreational facilities and a fully funded post-closure escrow. In Kearny's view, the primary issue to be resolved is whether NJSEA should be permitted to use its powers of eminent domain to avoid its previously established

contractual obligations. Kearny asserts that NJSEA's Complaint should be dismissed with prejudice because it was "brought in bad faith as an expedient means to do away with prior representations and agreements." In advancing that claim, Kearny principally relies on Borough of Essex Fells v. Kessler Institute for Rehabilitation, Inc., 289 N.J. Super. 329, 337-38 (Law Div. 1995) (holding that "the decision to condemn shall not be enforced where there has been a showing of 'improper motives, bad faith, or some other consideration amounting to a manifest abuse of power of eminent domain. . . . In other words, public bodies may condemn for an authorized purpose but may not condemn to disguise an ulterior motive").

Kearny does not dispute NJSEA's statutory authority "to provide solid waste disposal facilities," pursuant to N.J.S.A. 13:17-6(w) and N.J.S.A. 5:10A-7k. Similarly, it does not dispute NJSEA's authority to exercise eminent domain. Kearny asserts, however, that NJSEA is condemning the Keegan Landfill in "bad faith" as an attempt to avoid its pre-existing contractual obligations, prior inducements and representations. It states that the "public purpose" for re-opening the landfill in 2008 was established in the Kearny Green Space Initiative, on which the Lease Agreement was based: to fund its remediation, proper closure, and the development of an extensive public recreation facility. Kearny argues that, if NJSEA/NJMC

underfunded the post-closure escrow account, whether intentionally or not, that is not sufficient reason to permit the use of eminent domain in an effort to cover up the shortfall. Specifically, Kearny highlights NJSEA's intent to deprive the town of the promised $3 million payment for recreational facilities through its valuation of the Property at only $1,880,000.

Kearny maintains that the Lease Agreement between the parties does not impose any financial obligations concerning post-closure activities on the town. Further, Kearny urges, even if some form of financial obligations are to be found, it is still unclear why NJSEA seeks to condemn a full fee simple interest in the Property, an outcome that deprives the town and its residents of the promises and benefits originally conferred in the Lease Agreement. In Kearny's view, NJSEA continues to ignore evidence that the stated public purpose for re-opening the landfill in 2005 was to fund its closure, not to operate it indefinitely to fund other projects.

Further, Kearny argues that NJSEA repeatedly has expanded on or violated the provisions of the Lease Agreement. For example, it claims that NJSEA permitted the dumping of other waste products, like sewage sludge from the Passaic Valley Sewerage Commission. Kearny claims that, pursuant to the Lease Agreement, disposal was to be limited to solid materials

suitable for landfill cap, and that Kearny never consented to the dumping of sewer waste. Kearny also claims that, near the end of 2014, NJMC (now NJSEA) sought to nearly double the maximum height of the landfill, in contravention of paragraph 2C of the Lease Agreement and prior representations by NJMC. By a letter dated January 20, 2015, NJDEP acknowledged receipt of NJMC's proposed plan to extend the 60-foot height limit by 40 additional feet, and noted that it had "serious concerns" that it needed to discuss with NJMC representatives "as soon as possible" because increasing the height limit would negatively impact the ability to develop post-closure recreational facilities. (Ex. 11; June 10, 2016 Certification of Vatsal A. Shah). Kearny states it never agreed to this height expansion and it never was approved by the NJDEP.[2]

Finally, in a letter dated June 9, 2015, NJSEA requested that Kearny complete negotiations to extend the Lease Agreement until 2020. (Ex. 12). According to Kearny, it was here that -- for the first time since the Lease Agreement was executed -- NJSEA maintained that Kearny had the obligation to fund post-closure activities, a notion contrary to the lease terms and NJDEP findings. Kearny also says that it learned during the lease extension discussions that the Keegan Landfill revenues

[2] As a practical matter, to date, it appears that no height expansion in fact has occurred.

were being used by NJMC/NJSEA for other solid waste agency operations.

Kearny argues that the complaint must be dismissed with prejudice because NJSEA is not "turning square corners." F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426-27 (1985) ("In dealing with the public, government must 'turn square corners.' . . . . Also, in the condemnation field, government has an overriding obligation to deal forthrightly and fairly with property owners. See Rockaway v. Donofrio, 186 N.J. Super. 344 (App. Div. 1982)."). Kearny emphasizes that NJSEA may not seek an unfair "litigational" or "bargaining" advantage. CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd./Bd. of Adjustment, 414 N.J. Super. 563, 586-87 (App. Div. 2010). Kearny asserts that, by choosing to exercise eminent domain rather than honoring its pre-existing contractual obligations, NJSEA seeks to achieve a bargaining and litigational advantage over Kearny and its residents, rendering the Lease Agreement "a mere fiction."

Kearny also urges that the doctrine of estoppel applies against NJSEA. Dambro v. Union County Park Commission, 130 N.J. Super. 450, 457 (Law Div. 1974) (citing Bayonne v. Murphy, 7 N.J. 298, 311 (1951)). "Estoppel is conduct, either express or implied, which reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in the eyes

of the law." Ibid. Kearny says that the central issue before the court is whether Kearny and its citizens possess the right to reasonably rely on the oral and written inducements and representations made by NJSEA officials. Kearny asserts that its reliance on these prior written and oral inducements or representations made by NJMC/NJSEA officials is submitted not for "parol evidence" purposes, but rather as clear and convincing evidence of bad faith. Citing Middletown Township Policemen's Benevolent Association Local No. 124 v. Township of Middletown, 162 N.J. 361, 367 (2000), Kearny argues that "common fairness" dictates that NJSEA be bound by these written and oral representations and inducements.

Finally, Kearny argues that United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977), relied on by NJSEA in its opposition, actually supports the town's position. Kearny argues that United States Trust Co. which reversed a ruling affirmed by the New Jersey Supreme Court on direct appeal that permitted the State to act in contravention of its pre-existing contractual obligations. Id. at 3. Specifically, Kearny relies on one passage in particular: "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment when an evident and more

moderate course would serve its purposes equally well." Id. at 30-31.

B.

In response, NJSEA asserts that it is charged with protecting the environment and providing for solid waste management in the Hackensack Meadowlands District. It reasons that, in the performance of its duties, NJSEA has determined that continuing the operation of the Keegan Landfill is in the public interest, and Kearny has no basis to allege bad faith. NJSEA underscores that, in order to establish bad faith, Kearny must demonstrate that NJSEA's "real purpose of the condemnation is other than the stated public purpose." Casino Reinvestment Dev. Auth. V. Banin, 320 N.J. Super. 342, 346 (Law Div. 1998). NJSEA notes that the burden rests with the party claiming bad faith to prove the alleged impropriety by clear and convincing evidence. Twp. of Readington v. Solberg Aviation Co., 409 N.J. Super. 282, 311 (App. Div. 2009).

NJSEA argues that all of the evidence demonstrates that its stated purpose -- the continuation of operations at the landfill -- in fact is its actual purpose. NJSEA points to the various administrative steps it has taken to ensure continued operation of the landfill, including the amendment of its Solid Waste Management Plan and its Solid Waste Permit. It notes that this process was completed when NJSEA provided public notice on June

10, 2014, and adopted the Amendment to extend the operation of the landfill to an authorized height of 100 feet on July 23, 2014. NJSEA highlights that it received no adverse comments to the Amendment from the public and, more to the point, that it received no objections from Kearny either before, during, or after the public hearing; NJDEP then certified the Solid Waste Management Amendment on May 4, 2015. NJSEA explains that, when it submitted its initial application to amend the Solid Waste Permit, NJDEP requested additional information and that NJSEA responded and addressed NJDEP's concerns. On June 14, 2016, NJDEP determined that NJSEA's application was administratively complete, and that, while NJDEP processes the application, the existing permit remained in effect past its June 20, 2016 termination date.

Additionally, NJSEA states that it advised Kearny in 2014 of its determination that it was in the public interest to extend the operating life of the landfill. NJSEA argues that it is empowered to exercise the power of eminent domain to meet its legislative mandates, which includes providing for the disposal of solid wastes. It notes that, on March 17, 2016, the Board of Commissioners ("the Board") of NJSEA authorized NJSEA's president and chief executive officer to take all actions, including condemnation, to assure the continued operation of the landfill; the Board concluded that (1) among NJSEA's authorized

purposes is the power to provide solid waste disposal facilities, and (2) the continued operation of the Keegan Landfill serves as a vital public function and is wholly within the public interest.

Finally, NJSEA claims that the existence of a Lease Agreement between the parties does not foreclose NJSEA from exercising its right to eminent domain. In support, it too relies on United States Trust Co., supra, 431 U.S. at 24 (holding that "the power of eminent domain [is] among those that could not be 'contracted away'").

III.

The legal standards applicable to the issues presented are as follows:

Bad Faith.

"[A] reviewing court will not upset a municipality's decision to use its eminent domain power 'in absence of an affirmative showing of fraud, bad faith or manifest abuse.'" Twp. of W. Orange v. 769 Assoc., L.L.C., 172 N.J. 564, 571 (2002) (quoting City of Trenton v. Lenzner, 16 N.J. 465, 473 (1954)), cert. denied, 348 U.S. 972 (1955)); Casino Reinvestment Dev. Auth., supra, 320 N.J. Super. at 346 (noting that "where the real purpose of the condemnation is other than the stated public purpose, the condemnation may be set aside") (citing Atlantic City v. Cynwyd Invs., 148 N.J. 55, 73 (1997) and

Wilmington Parking Auth. v. Land With Improvements, 521 A.2d 227, 231 (Del. 1986)). "Bad faith is referred to as the doing of an act for a dishonest purpose. The term also 'contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will.'" Essex County Improvement Auth. v. RAR Dev. Assocs., 323 N.J. Super. 505, 515 (Law Div. 1999) (quoting Borough of Essex Fells v. Kessler Inst. for Rehab., 289 N.J. Super. 329, 338 (Law Div. 1985)). The party claiming that a municipality acted in bad faith has the burden of proving that improper action by clear and convincing evidence. Id. at 516.

Summary Judgment.

Pursuant to R. 4:46-1, et seq., summary judgment should issue when

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.
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> [R. 4:46-2(c).]

This Rule requires that the court "deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates 'a genuine issue as to any material fact challenged.'" Brill v. The Guardian Life Ins. Co. of America, 142 N.J. 520, 542 (1995) (quoting R. 4:46-2). A non-moving party will see its opposition fail if it merely relies on any fact in dispute which is in the totality immaterial or of an insubstantial nature. Id. at 529. In this analysis, the motion judge is required to view the facts in a light most favorable to the non-moving party. Parks v. Rogers, 176 N.J. 491, 494 (2003).

IV.

Although NJSEA's statutory authority to exercise the power of eminent domain is not challenged, a brief background is both necessary and appropriate. The former New Jersey Meadowlands Commission ("NJMC") merged into NJSEA in February 2015. N.J.S.A. 5:10A-1, et seq. As a result, pursuant to N.J.S.A. 13:17-1, et seq., NJSEA is vested with all the property, funds, and assets of the former NJMC, as well as all of its functions, powers, and duties. Specifically, NJSEA is empowered, in its discretion, to exercise the power of eminent domain to meet its legislative mandates. N.J.S.A. 5:10A-29; N.J.S.A. 5:10-5(m); N.J.S.A. 13:17-6(g). Pursuant to N.J.S.A. 5:10-5(m), NJSEA may acquire property through condemnation where it is necessary for

any of its projects. Additionally, under N.J.S.A. 5:10A-29, NJSEA assumed the ability to condemn property where it determined it necessary or convenient for any of its authorized purposes. One of those authorized purposes is providing for solid waste disposal. N.J.S.A. 5:10A-7(k); N.J.S.A. § 5:10-5(m); N.J.S.A. § 13:17-6(g). NJSEA's authority to use eminent domain to operate a sanitary landfill is consistent with the general rule that public entities may use eminent domain to establish or operate a landfill. See, e.g., Twp. of Dover in Cnty. of Ocean v. Kassenoff, 37 N.J. Super. 582 (App. Div. 1955) (upholding municipal condemnation of land for purpose of establishing landfill). Great discretion usually is afforded to condemning authorities in determining what property may be taken for public purposes. Burnett v. Abbott, 14 N.J. 291, 294 (1954); Texas E. Trans. Corp. v. Wildlife Preserves, 48 N.J. 261, 269 (1966). This is so because our courts recognize that it is for the Legislature to determine what constitutes a "public use." State v. Lanza, 27 N.J. 516, 530 (1958), appeal dismissed, 358 U.S. 333 (1959).

Ordinarily, when a municipality adopts an ordinance in the exercise of its power of eminent domain, that determination is presumed valid and entitled to great deference. Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp., 71 N.J. 249, 264 (1976); City of Trenton v. Lenzner, 16 N.J. 465, 475 (1954), cert. denied,

348 U.S. 972 (1955). Courts generally will not inquire into a public body's motive concerning the necessity of the taking or the amount of property to be appropriated for public use. Riggs v. Long Beach Twp., 109 N.J. 601, 613 (1988). However, the decision to condemn will not be enforced where there is a showing of "improper motives, bad faith, or some other consideration amounting to a manifest abuse of the power of eminent domain." In re E. Windsor Mun. Util. Auth v. Shapiro, 57 N.J. 168, 169 (1970), cert. denied, 401 U.S. 1010 (1971); Wes Outdoor Adver. Co. v. Goldberg, 55 N.J. 347, 353 (1970); Tennessee Gas Transmission Co. v. Hirschfield, 39 N.J. Super. 286, 288 (App.Div.1956).

A reviewing court "will not upset a municipality's decision to use its eminent domain power 'in the absence of an affirmative showing of fraud, bad faith or manifest abuse.'" Twp. of W. Orange v. 769 Assoc., L.L.C., 172 N.J. 564, 571 (2002) (quoting City of Trenton, supra, 16 N.J. at 473). Bad faith in this context refers to "the doing of an act for a dishonest purpose" and "contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will." Twp. of Readington, supra, 409 N.J. Super. at 310-11. When considering a claim of bad faith in the context of eminent domain, courts traditionally distinguish between the motives of the individuals who adopted the

legislation and the purposes of the condemnation itself. Id. at 311 (citing Lynda J. Oswald, Public Uses and Non-Uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law, 35 B.C. Envtl. Aff. L. Rev. 45, 57-58 (2008)). Unfortunately, "the distinction between motive and purpose often blurs because of the difficulty of categorizing legislative actions." Oswald, supra, at 60. Moreover, some courts further confuse the issue by analyzing purpose in terms of motivation. Id. at 58 n.50 (citing Wilmington Parking Auth. v. Ranken, 105 A.2d 614 (Del. Ch. 1954)).

Riggs, supra, expressed equal concern over the "fuzzy line between motive and purpose." 109 N.J. at 618. Riggs considered whether a municipality had enacted a challenged zoning ordinance for a valid purpose. It acknowledged that "the distinction between motive and purpose can be fuzzy," but explained that "motive" ordinarily concerns the mental processes and subjective considerations that induce a legislator's action, while "'purpose' speaks to the goals to be achieved. . . . The determination of 'purpose' depends on objective factors, such as the terms of the ordinance and its operation and effect, as well as the context in which the ordinance was adopted." Id. at 613. It held that, when a party asserts that an ordinance was adopted for an improper purpose, the judicial "inquiry should be limited to an evaluation of the objective facts surrounding the adoption

of the ordinance." Id. at 614. In respect of condemnation and eminent domain actions, "where the real purpose of the condemnation is other than the stated public purpose, the condemnation may be set aside." Casino Reinvestment Dev. Auth., supra, 320 N.J. Super. at 346. The governing principle is straightforward: although the public purpose for taking land may be valid, if the true reason is beyond the power conferred by law, the condemnation may be set aside. In other words, public bodies may condemn for an authorized purpose but may not condemn for a disguised ulterior motive. Borough of Essex Fells, supra, 289 N.J. Super. at 338. The burden rests with the party claiming bad faith to prove the alleged impropriety by clear and convincing evidence. Twp. of Readington, supra, 409 N.J. Super. at 311.

Applying the Riggs test, the Appellate Division concluded that the objective factors surrounding the adoption of the condemnation ordinance may impugn its validity. Twp. of Readington, supra, 409 N.J. Super. at 311. It noted that, although the municipality and the defendants had been at odds for years concerning airport expansion, serious consideration of condemnation only occurred after 1999, when the defendant received conditional approval of its Airport Layout Plan ("expansion plan") from the Federal Aviation Administration and the New Jersey Department of Transportation. Id. at 314. The

municipality already possessed large tracts of public open space and recreational land, and it had not identified the defendants' property for possible acquisition until 2001. Ibid. Additionally, although the municipality claimed that its purposes in taking the defendant's property in fee simple were open space preservation and natural resource conservation, it was not clear that the condemnation would accomplish those goals. Id. at 315-16.

Likewise, Borough of Essex Fells, supra, dismissed a municipality's condemnation complaint based on a finding of improper pretext. 289 N.J. Super. at 343. In formulating its conclusion, Borough of Essex Fells reasoned that the extensive record in the case compelled the inference that Essex Fells undertook the condemnation action for the sole purpose of preventing the defendant's development of a rehabilitation facility in the community. It further noted that the credible evidence demonstrated that the public purpose articulated for taking defendant's property -- a public park -- was selected not based on a true public need, but in response to community opposition to defendant's proposed use of the property. Id. at 339. It highlighted that, for the nearly two years the property in question was listed for sale, no consideration was given at any meeting of the Borough Council to any plan or proposal to purchase or condemn the balance of the property for public use.

In fact, borough officials had stated that the borough's need for any additional recreational space was fully met by the prior acquisition of a neighboring soccer field.

Nothing in Kearny's submissions establishes by clear and convincing evidence that NJSEA intends to use the Keegan Landfill property for anything other than its stated public purpose: as a landfill. On the contrary, the credible evidence strongly suggests that NJSEA needs to continue operation of the landfill, and has placed Kearny on notice of this need for several years. The proofs demonstrate conclusively that the Keegan Landfill is an extremely vital landfill in Northern New Jersey, and its closure at this time would have drastic and deleterious effects on the surrounding communities and their taxpayers for at least four separate reasons:

First, the Keegan Landfill is the only landfill for Type 13 waste (construction and demolition debris) in the northern portion of the State. The operation of the Keegan Landfill eliminates the need for an estimated 35,000 truck trips per year as well as the pollution, road wear and tear, and traffic hazards associated with those trips;

Second, the landfill is vital during natural disasters, such as Superstorm Sandy and Hurricane Irene;

Third, the Passaic Valley Sewage Commission ("PVSC") relies on the landfill as the disposal site for grit and screening

materials, biosolids, and river trash. The PVSC provides wastewater treatment and biosolids management for approximately 1.5 million residents, over 5,000 commercial entities, and 200 significant industrial users within its sewer district. The financial impact of the closure of the Keegan Landfill on PVSC is estimated at $8.1 million from July 1, 2016 through December 2019. This cost ultimately would be borne by PVSC's ratepayers, including residents of the State of New Jersey and the remaining public and private entities that utilize PVSC's services. See Tramontozzi Cert; and

Fourth, NJSEA is responsible for the post-closure obligations at other large landfills in the district, and the revenue generated from the Keegan Landfill is used to cover those expenses.

A powerful need and reasonable public interest exist for maintaining the landfill's continued operation. Further evidence plainly demonstrates NJSEA's intention and commitment to the landfill's operation. Beginning in at least 2014, NJSEA determined it was necessary to continue operation of the landfill. Marturano Cert. ¶15. At that time, it undertook the process of both amending its Solid Waste Management Plan and its Solid Waste Permit to allow for continued operation. Marturano Cert. ¶14. The amendment of the Solid Waste Management Plan required public notice and a public hearing to receive comments,

followed by the adoption of the Amendment by NJSEA and Certification by NJDEP. Ibid. NJSEA completed this process; on May 4, 2015, NJDEP certified the amendment, and, on June 14, 2016, NJDEP determined that NJSEA's application was "administratively complete." Also in 2014, NJSEA attempted to engage in negotiations with Kearny to extend the Lease Agreement through 2020. Warren Cert., Ex. A. This begs the question: why would NJSEA even attempt a lease extension if it had some sort of ulterior motive or bad faith for exercising its right to eminent domain? NJSEA's statutory right to pursue eminent domain is not contested, and certainly this right was available well before any negotiations were attempted. Only one reasonable conclusion remains: NJSEA was forced to exercise its eminent domain authority only after these negotiations ended and Kearny served on NJSEA a "Notice to Quit/Demand for Possession and Compliance with Lease Obligations" on February 24, 2016.

Kearny similarly has failed to present clear and convincing evidence that NJSEA's true purpose for condemnation is an attempt to avoid its contractual obligations pursuant to the Lease Agreement. The proofs adduced show that NJSEA spent approximately $25 million to, among other things, construct a leachate collection system and containment wall around the entire landfill, acquire adjacent land, and build two sewage pump stations to move the leachate to the PVSC facility.

Marturano Cert. ¶9. During oral argument, counsel for NJSEA represented that the post-closure escrow account, created in accordance with the requirements of N.J.S.A. 13:1E-109 and N.J.A.C. 7:26-2A.9(g), has been funded in accordance with the Lease Agreement. Further, during the joint negotiations for an extended Lease Agreement, the two sides evaluated the effect of raising the elevation from 60 to 100 feet (which would reduce the recreational space from 34 to 28 acres) and, according to NJSEA, Kearny's Mayor indicated that an extension was acceptable so long as Kearny received adequate financial compensation. See Warren Cert., Ex. A.

Kearny also requested additional changes to the Lease Agreement, including (a) an increase in the host community benefit fee; (b) a limit on the types of solid waste to be received; (c) money to pave or improve Bergen Avenue; (d) the ability for Kearny to use the $3 million escrow for construction of recreational facilities at any time and for any purpose; and (e) a provision allowing the landfill, when closed, to be used for solar energy use. Marturano Cert. ¶15. NJSEA accepted all of those changes; they were included in the proposed Second Lease Amendment provided on December 15, 2014. Ibid. Negotiations ceased when a different parcel of land adjacent to the Property was suggested as an alternative for its recreation project, and Kearny took the position that it did not have an

obligation to fund post-closure activities of the Property. Marturano Cert. ¶16, 17.

Kearny's assertion that the disagreement between the parties on the obligation to pay for post-closure activities demonstrates bad faith is contrary to the Lease Agreement for several reasons. At the outset, Kearny's reliance on statements and other oral representations made before the Lease Agreement was entered is immaterial. The Lease Agreement specifically provides that it "contains the entire agreement between the parties and can only be modified by an agreement in writing." Castano Cert. Ex. 3. This is a quintessential integration clause and, as Kearny acknowledges, any prior oral statements cannot be relied on to alter the written agreement. Filmlife, Inc. v. Mal "Z" Ena, Inc., 251 N.J. Super. 570, 573 (App. Div. 1991).

Further, a reading of the Lease Agreement shows several distinct provisions related to post-closure. Paragraph 13B is the post-closure funding provision. It states that NJSEA shall transfer to Kearny an escrow account created in accordance with the requirements of N.J.S.A. 13:1E-109 and N.J.A.C. 7:26-2A.9(g), and that Kearny shall assume sole responsibility to perform the required post-closure activities. NJSEA has funded the post-closure escrow with the statutory amount. NJSEA represents that, if the post-closure fund is not sufficient to

pay for all post-closure costs, the obligation to make up the remainder falls to Kearny. This provision is not, as Kearny asserts, contrary to Paragraph 11 of the Lease Agreement, which provides that "the Town shall have no expenses whatsoever with respect to the Demised Premises or the Retained Premises during the Lease term and the Commission agrees that it will provide, at its sole cost and expense, for the closure of the Keegan Landfill." Common sense and reason dictate that post-closure activities arise only after the Lease Agreement terminates.

Kearny did raise a facially compelling question: whether NJSEA truly needed to take title to the Property in fee simple if NJSEA's intention is limited to generating enough money for the proper closure of the landfill. But, NJSEA provided a compelling and overriding rebuttal. At oral argument, Ralph J. Marra, Jr., the Senior Vice President for Legal and Governmental Affairs for NJSEA, highlighted Kearny's position: that, after the exercise of eminent domain, Kearny would not be responsible for any post-closure activities, an obligation the parties contend amounts to approximately $30 million over the course of several decades. It is NJSEA's position that the original Lease Agreement between the parties stipulates that Kearny would assume sole responsibility for all post-closure activities and their associated costs upon completion of the closure process. NJSEA reasonably asserts that, if it is to be responsible for

nearly $30 million of post-closure activities -- in addition to the nearly $25 million in remediation costs already borne by NJSEA -- it should at least receive the benefit of fee simple ownership. NJSEA also represented during a supplemental hearing on July 15, 2016 that it will take the primary lead on the post-closure activities and costs, and in all likelihood will bear the brunt of those financial obligations in the future. In order to approve NJSEA's Solid Waste Management Plan Amendment, NJDEP demands certainty in respect of the post-closure responsibilities and, given the tensions between the parties concerning the original Lease Agreement's section on post-closure obligations, NJDEP would not approve a lease extension under the same terms.

Kearny's arguments for dismissal of the condemnation complaint based on the "turn square corners" doctrine and the doctrine of estoppel are equally ineffective. In condemnation actions, the "turn square corners" doctrine has only been invoked where the condemning authority seeks to avoid a procedural or pre-litigation requirement that gives the condemnor an unfair litigational advantage. See, e.g., Klumpp v. Borough of Avalon, 202 N.J. 390, 413 (2010); Rockaway v. Donofrio, 186 N.J. Super. 344 (App. Div. 1982); State v. Siris, 191 N.J. Super. 261 (Law Div. 1983). Here, no litigational advantage has been established by Kearny. Kearny is not

challenging NJSEA's compliance with any procedural or pre-litigation requirements of its eminent domain powers. As noted earlier, NJSEA did not even contemplate condemnation until it was served a copy of a Notice to Quit/Demand for Possession and Compliance with Lease Obligations by Kearny.

Kearny's argument on estoppel is equally unavailing. Kearny argues that it and its citizens should have the right to reasonably rely on the oral and written inducements and representations made by NJSEA officials. Specifically, Kearny cites statements made in the "Kearny-NJMC Green Space Initiative" disseminated to all town residents prior to the Lease Agreement's inception. The representations made by the NJMC/NJSEA at a special meeting of the Kearny Town Council on January 11, 2005, as well as in the Green Space Initiative (Ex. 2 Castano Cert.) of course must be acknowledged. That said, that acknowledgement falls far short of the necessary conclusion that those representations constitute "clear and convincing" evidence that this condemnation action was initiated in bad faith.

The parties plainly disagree as to the post-closure responsibilities set forth in the Lease Agreement. In that context, "it is the effect of the Agreement that is determinative, regardless of whatever subjective motivation might be ascribed to one or another of the participants." Apfel

v. Budd, 324 N.J. Super. 133, 144 (App. Div.), certif. denied, 162 N.J. 485 (1999). NJSEA has attempted to negotiate a lease extension since 2014, and it was only when it was served with a Notice to Quit that this condemnation action was filed. NJSEA has determined that ownership in fee simple -- along with absorbing most, if not all, post-closure costs and obligations as the lead in remediation efforts -- is a far more sensible approach than seeking only a leasehold interest in condemnation and litigating the post-closure costs and obligations. That choice rightly belongs to NJSEA; in these circumstances, this court cannot substitute its judgment for that of NJSEA.

Finally, Kearny's argument made under the Contract Clause of the United States Constitution also is unavailing, and its reliance on United States Trust Co. of New York, supra, 431 U.S. at 21-22, is misplaced. United States Trust Co. held that "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty[,]" such as "the police power and the power of eminent domain" which cannot be "'contracted away.'" Id. at 23-24. Therefore, NJSEA's contractual relationship with Kearny does not limit NJSEA's ability to exercise the power of eminent domain.

During the supplemental hearing on July 15, 2016, NJSEA represented that, upon closure of the landfill, the Property will be used for public recreation or solar energy, in

accordance with current zoning regulations. NJSEA also represented that it will not seek a variance for any other use. Additionally, any financial obligations set forth in the Lease Agreement -- specifically the $3 million escrow payment due to Kearny -- will be the subject of the valuation determination in the condemnation proceeding. Those representations weigh heavily in NJSEA's favor; a material change in those representations would affect the outcome of this matter.

Finally, any criticism directed at NJSEA for using money generated by the Keegan Landfill to fund the closure of other landfills also is misplaced: two of NJSEA's established powers are "to provide solid waste disposal and recycling facilities for the treatment of solid waste" and "to undertake any development or other project or improvement as it finds necessary to redevelop and improve the land within the district." N.J.S.A. 5:10A-7. NJSEA certainly is permitted to utilize fees generated at the Keegan Landfill to fund the proper closure of other landfills under its jurisdiction, particularly and ironically where, as here, at least one, or maybe two, of those landfills are located in Kearny.

V.

Kearny failed to satisfy its burden of proof, by clear and convincing evidence, that NJSEA's stated purpose for exercising eminent domain, that is, the continued operation of the Keegan

Landfill, is contrary to the actual purpose of NJSEA or has been initiated in bad faith. As a result, this court concludes as it must: that Kearny is not entitled to judgment as a matter of law. R. 4:46-2; Brill, supra, 142 N.J. at 540.

Based on the forgoing, Kearny's motion for summary judgment is **DENIED**, and an order for final judgment authorizing NJSEA to exercise its power of eminent domain and appointing commissioners is **GRANTED**.

The appropriate orders follow.