

<p>Long Beach Township, Beach Haven, Ship Bottom, Barnegat Light, Surf City, Harvey Cedars, Brigantine, and Ventnor City,</p> <p style="text-align: center;">Plaintiffs/Appellants,</p> <p>v.</p> <p>New Jersey Department of Environmental Protection</p> <p style="text-align: center;">Defendant/Respondent,</p> <p>And</p> <p>Atlantic Shores Offshore Wind, LLC, Atlantic Shores Offshore Wind Project 1, LLC, and Atlantic Shores Offshore Wind Project 2, LLC,</p> <p style="text-align: center;">Intervenors/Respondents.</p>	<p>SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-2738-23</p> <p>ON APPEAL FROM:</p> <p>CHANCERY DIVISION: MERCER COUNTY DOCKET NO.: MER- 88-C-23</p> <p>Sat Below:</p> <p>Hon. Patrick J. Bartels, P.J.Ch.</p> <p style="text-align: center;"><u>Civil Action</u></p>
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PLAINTIFFS/APPELLANTS' BRIEF AND APPENDIX

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PRELIMINARY STATEMENT

Plaintiffs, a coalition of shore municipalities along New Jersey's cherished coastline (the Shore Municipalities) – whose economies, environment, and very way of life are at stake, have been forced into a corner by a process that has stripped them of any meaningful right to challenge the Department of Environmental Protection's (DEP) approval of the world's largest and closest to shore offshore wind project. The Atlantic Shores Offshore Wind Project (ASOW) – whose wind turbines would tower over 1,000 feet tall and be obnoxiously visible from as close as nine miles from the shoreline—will have a profound and lasting visual impact on New Jersey's pristine beaches, eroding tourism, and in turn, reducing local tax revenues. ASOW's own documents confirm that the Project will devastate marine life, disrupt the seafloor, and harm the local fishing industry. Yet the DEP dismissed those threats in favor of pushing the project forward.

The DEP's disregard for the significant economic and environmental harm is symptomatic of a process tainted by political pressure, not guided by objective scientific analysis. It was evident from public comments and DEP's actions that the agency was under immense pressure to fulfill the Governor's ambitious wind energy agenda. This is a once-in-a-century project with immense and irreversible ramifications, yet it is being bulldozed through an approval process

devoid of the transparency and impartiality such a monumental decision demands.

In the proceedings below, the Shore Municipalities sought a referral to the Office of Administrative Law (OAL) for an independent fact-finding hearing before DEP issued its final decision to ensure that a neutral party, outside of the political influence, would review this matter. It was not a request to obstruct or delay, but simply an attempt to ensure that a neutral party, free from political influence, would conduct a thorough review of the project's impacts. The stakes are too high for this decision to be left in the hands of an agency that appears beholden to the Governor's agenda.

The trial court's holding that it lacked jurisdiction was erroneous. No rule or precedent prohibited the court from granting the relief sought. The Shore Municipalities were not challenging a final agency decision and thus, not invoking this Court's exclusive jurisdiction; they were raising concerns about bias within the agency before a final decision was made. By dismissing the case at this juncture, the court failed to protect the right of the Shore Municipalities to have their concerns heard before irreversible harm is done to their communities.

The Shore Municipalities sought, and should have obtained, discovery to uncover whether the DEP has acted with neutrality rather than to unconditionally

serve a political agenda. That discovery was essential to ascertain the degree of political influence exerted on the DEP and whether the agency ignored or downplayed scientific evidence and public concerns to serve a predetermined outcome.

The trial court's dismissal of the lawsuit effectively silencing the Shore Municipalities' concerns and denying them standing to challenge the DEP's actions, creates an absurd result. It leaves no party able to challenge the agency's bias or lack of impartiality until after the damage is done. The trial court should have exercised its equitable powers to ensure that decisions of this magnitude are made with transparency and care, free from bias, and that the long-term interests of New Jersey's coastal communities are protected.

This case is about ensuring that a once-in-a-century transition to green energy is vetted with the care and scrutiny it demands. The Atlantic Shores project represents an unprecedented leap forward, but one that must be balanced with the potential irreversible harm to local economies and the environment. If there is so much as even an iota of political influence—real or perceived—it must be reviewed by an independent entity not beholden to the Governor's agenda. The stakes are simply too high for a rubber-stamped process, and yet, that is precisely what occurred here.

PROCEDURAL HISTORY

The Shore Municipalities brought this action on December 1, 2023 by way of Verified Complaint and Order to Show Cause. [Pa13-96¹] The thrust of the complaint alleged that Governor Murphy’s aggressive alternative energy agenda, as outlined in various executive orders, pressured the DEP to approve offshore wind projects, including the Atlantic Shores project, thereby compromising the ability of the DEP’s Commissioner and agency staff to neutrally and impartially review Atlantic Shores’ application. The complaint, thus, sought as relief that the trial court direct that DEP refer the Atlantic Shores’ application to the Office of Administrative Law for an impartial ALJ to conduct a hearing and review it in the first instance.

The Order to Show Cause, which was entered by the trial court on December 6, 2023, sought preliminary restraints against the DEP from issuing any federal consistency certification for the Atlantic Shores project pending the completion of expedited discovery concerning the DEP’s bias and lack of impartiality, continuing through the court’s final disposition of the action. [Pa93-96]

On or about December 14, 2023, Atlantic Shores intervened in the action by consent. [Pa97-100] The DEP and Atlantic Shores both moved to dismiss the

¹ “Pa” refers to Plaintiff/Appellants’ Appendix.

action on January 10, 2024, arguing the court lacked jurisdiction, that the Shore Municipalities' complaint was somehow both unripe and untimely, and that the complaint failed to state a claim upon which relief could be granted. [Pa101-106]

The trial court heard oral argument on the motions to dismiss and on the order to show cause on March 13, 2024. T4-47² It then issued an order and statement of reasons on March 28, 2024, granting the DEP and Atlantic Shores' motions to dismiss. [Pa107-113] The court determined that it lacked jurisdiction because the DEP had not yet made a final decision on the consistency determination and it did not believe that this was a contested case that gave the Shore Municipalities a right to an administrative hearing. [Pa112-13] The court held that once the DEP issues its consistency decision, the Shore Municipalities can appeal that decision directly to this Court pursuant to R. 2:2-3. [Pa112]

Immediately following the trial court's dismissal of the lawsuit, the DEP issued its consistency determination on April 1, 2024 which arbitrarily, although predictably, found that the Atlantic Shores project is in compliance with New Jersey's Coastal Zone Management rules, despite undeniable adverse impacts of the project. [Pa114-62] On May 14, 2024, the Shore Municipalities filed an appeal of that final agency decision, which is separately pending under Docket

² "T" refers to the March 13, 2023 Transcript of Hearing.

No. A-2743-23.³ The Shore Municipalities separately filed the instant appeal on May 13, 2024 of the trial court’s dismissal of its pre-decision request to refer the matter to the OAL before an impartial adjudicator and its request for pre-decision discovery on the DEP’s bias and lack of impartiality.

STATEMENT OF FACTS

Governor Phil Murphy has taken an unyielding stance to make New Jersey the national leader in offshore wind projects, despite increasing evidence of their detrimental impacts. Governor Murphy pledged to decrease the impact of climate change through a commitment to reaching 100 percent clean energy by 2050. [Pa16] Within a few weeks of taking office, he signed Executive Order 8, setting “an aggressive offshore wind energy goal.” [Pa17] He directed DEP, BPU, and all other State agencies to “take all necessary actions to implement” that agenda. Id. In November 2019, Governor Murphy signed Executive Order 92, making that agenda even more aggressive, with a production goal of 7,500 MW by 2035. Id. On September 21, 2022, Governor Murphy signed Executive Order 307, which, again increased New Jersey’s offshore wind by nearly 50% by the year 2040. [Pa18]

³ The Shore Municipalities also contemporaneously filed a motion with DEP for a stay pending appeal, along with a third third-party hearing request, which the agency denied on June 14, 2024. The Shore Municipalities subsequently move before this Court for a stay pending appeal.

In addition to those executive orders, since taking office in 2018, the Murphy Administration has led a targeted effort focused on achieving clean energy, including signing the Clean Energy Act (“CEA”) into law, (P.L.2018, c.17) [Pa17], unveiling the state’s Energy Master Plan, which outlines key strategies to reach his goal of 100 percent clean energy by 2050, developing a “wind port” in Salem County along the Delaware Bay that would become a hub for construction of wind turbines, establishing a Wind Institute to coordinate workforce development and research and development in offshore wind, and authorizing a \$250 million investment in the Port of Paulsboro for turbine component manufacturing. [Pa17-18] Governor Murphy is one of the nation's strongest advocates for offshore wind as “a core strategy” to reduce reliance on fossil fuels. He repeatedly has made clear that he wants to make New Jersey the “hub” of East Coast’s offshore wind energy and “epicenter” of the wind energy industry. Governor Murphy stated, “[o]ur renewed and strengthened commitment to offshore wind development testifies to my Administration’s understanding that, regardless of our impressive successes to date, there is always more that we can do to make New Jersey more sustainable while further advancing the state’s economic vitality.” [Pa18] To be sure, this is a legacy making initiative.

Governor Murphy explicitly has charged all State agencies, including the DEP, to “take all necessary actions” to implement his aggressive goal of offshore wind energy generation in New Jersey. The Governor stated at a Climate Change Conference, “[t]his is a whole of government approach. So anyone who thinks this is just a Department of Environmental Protection initiative, *which it obviously is*, is missing the broader picture. [Pa19] The DEP, in turn, has worked to implement Governor Murphy’s agenda. DEP Commissioner Shawn M. LaTourette has echoed the Murphy Administration’s “commitment to improving our environment . . . through our pursuit of a just clean energy transition and clean water for all” and applauded the Governor’s “course for accelerating New Jersey’s green economic growth.” [Pa19]

In response to the Governor’s directives, the BPU issued multiple solicitations for qualified Offshore Wind (OSW) projects to build an OSW facility in areas leased from the Federal Bureau of Ocean Energy Management (“BOEM”) in federal waters off the coast of New Jersey. [Pa19] In June 2021, the BPU awarded a total of 2,658 megawatts of offshore wind capacity to two projects, including Atlantic Shores Offshore Wind, which is the subject of this lawsuit. Those two projects represented the largest combined offshore wind award in the nation at the time. [Pa20]

The Atlantic Shores projects would be owned and operated by Atlantic Shores Offshore Wind Project 1, LLC and Atlantic Shores Offshore Wind Project 2, LLC, (together, the Projects). The Projects involve the construction of up to 200 wind turbines, with structures reaching over 1000 feet tall and rotor blades extending more than 900 feet. [Pa20] The proposed installation covers an expansive area just off of the pristine beaches of Long Beach Island and Atlantic County and at its closest point, the wind turbine generators (as well as offshore substations and various cables) would be approximately 8.7 miles from the New Jersey shoreline. [Pa21] The proposed Projects would be the first of their kind in the United States and will be the largest, tallest, and closest-to-shore wind farm ever built.

Because the turbines are proposed to be constructed more than three miles off the shore, DEP's role in reviewing it has been limited. Nonetheless, under the federal Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451 et seq., New Jersey, through DEP, was authorized to review the project for consistency with its enforceable coastal policies.

The CZMA is a federal statute designed to promote the "effective management, beneficial use, protection, and development of the coastal zone." 16 U.S.C. § 1451(a). In the CZMA, Congress recognized that "[b]ecause of their proximity to and reliance upon the ocean and its resources, the coastal states

have substantial and significant interests in the protection, management, and development of the resources of the exclusive economic zone that can only be served by the active participation of the coastal states in all Federal programs affecting such resources and, wherever appropriate, by the development of state ocean resource plans as part of their federally approved coastal zone management programs. 16 U.S.C. § 1451(m).

In furtherance of these goals, the CZMA and its implementing regulations require that federal actions within a state's coastal zone, or which would have a reasonably foreseeable coastal effects within a state's coastal zone, be consistent with the enforceable policies of that state's federally-approval coastal management program to the maximum extent possible. 16 U.S.C. § 1456(c)(1)(A); 15 C.F.R. § 930 et seq. The CZMA thus bars federal agencies from approving proposed development affecting the coastal zone "until the state or its designated agency has concurred with the applicant's certification" that the development is consistent with the state's coastal policies. 16 U.S.C. 1456(c)(3)(A).

New Jersey has an approved coastal zone management program, contained in DEP's Coastal Zone Management ("CZM") Rules, N.J.A.C 7:7-1.1 et seq. Among other requirements, these rules contain requirements to protect scenic resources, N.J.A.C. 7:7-16.10, threatened and endangered wildlife, N.J.A.C.

7:7-9.36, critical wildlife habitat, N.J.A.C. 7:7-9.37, surf clam areas, N.J.A.C. 7:7-9.3, marine fish and fisheries, N.J.A.C. 7:7-16.2, and prime fishing areas, N.J.A.C. 7:7-9.4

Pursuant to the CZMA, Atlantic Shores submitted a request to DEP for a federal consistency certification. On May 31, 2023, the DEP and Atlantic Shores mutually agreed to stay the DEP six-month consistency review period in an effort to “provide sufficient time for discussions, meetings, and exchange of materials between Atlantic Shores and the NJDEP.” Pursuant to the stay agreement, the DEP consistency decision was originally due by January 12, 2024. [Pa22; Pa47-51] The DEP has held several rounds of public comment periods on Atlantic Shores’ application.

On June 29, 2023 and then again on October 19, 2023, the Shore Municipalities submitted comments raising serious concerns about the impacts of Projects of such size, scope, and proximity on the shore economy as well as environmental resources, noting that approval of the Projects would destroy the coastal resources upon which the Municipalities rely and the very resources New Jersey’s Coastal Zone Management regulations were designed to protect. [Pa52-85]

Among other things, the Shore Municipalities noted that constructing such large turbines so close to shore would have devastating negative visual impacts

communities that thrive from offering scenic and immaculate beach views. The New Jersey Administrative Code explicitly limits coastal development that is not visually compatible with existing scenic resources. N.J.A.C. 7:7-16.10(c) restricts “[n]ew coastal development that is not visually compatible with existing scenic resource in terms of large-scale elements of building and site design.” That regulation reflects the broader principle that development projects, particularly those of significant scale, must be carefully assessed for their potential impact on scenic resources. A project “which is of a scale and location that has significant effect on the scenic resources of a region is considered to have a regional impact and to be of State concern.” N.J.A.C. 7:7-16.10(g). Such developments are “discouraged”—meaning they are “likely to be rejected or denied” by the DEP, especially when they could have a significant adverse effect on the scenic resources of the coastal zone. N.J.A.C. 7:7-1.5; N.J.A.C. 7:7-16.10(g).

The visual impact assessments conducted as part of the Projects’ planning confirmed these concerns. For instance, the visual simulations provided by Atlantic Shores indicate that from key observation points along Long Beach Island, including popular locations like Beach Haven, the turbines would be highly visible and intrusive. The assessment rated the visual impact at several of these points as “significant,” meaning the turbines would dominate the view,

drawing immediate attention, and alter the visual experience that visitors expect from these scenic locations. [Pa25-28; Pa57-62] The economic implications of the visual disruptions are substantial. The Shore Municipalities have long been marketed and celebrated for their scenic ocean views and natural beauty. This visual appeal is integral to the tourism industry, which generates hundreds of millions of dollars annually in revenue. The Projects' proximity to shore threatens to diminish the area's attractiveness and consequent competitiveness as a tourist destination, leading to staggering losses of million of dollars in state and local tax revenue. [Pa28; Pa62-66] The visual degradation could also impact property values; studies have shown that proximity to wind turbines can reduce property values, particularly in communities where views and scenic quality are central to the appeal. Id.

The Shore Municipalities further raised concern that the Projects would negatively impact fish and fisheries. [Pa30-33; Pa69-72] The proposed wind turbines and associated infrastructure, including underwater cables and substations, pose significant risks to marine life. The physical presence of these massive structures is likely to disrupt essential habitats for fish and other marine species, leading to a decline in local populations. This is particularly concerning for commercial and recreational fisheries that depend on healthy fish populations. N.J.A.C. 7:7-16.2, which governs marine fish and fisheries, dictates

that development projects must avoid or minimize adverse impacts on fishery resources. The regulation specifically aims to protect areas critical to the lifecycle of marine species, including spawning grounds, nurseries, and feeding areas.

The Shore Municipalities also indicated the potential harm to endangered marine mammals, most notably the critically endangered North American Right Whale (NARW). [Pa33-36; Pa72-75] The relevant regulations, including N.J.A.C. 7:7-9.36, which pertains to the protection of threatened and endangered wildlife, and N.J.A.C. 7:7-9.37, which governs critical wildlife habitats, underscore the need for stringent protective measures. Those rules mandate that any development project must avoid significant adverse impacts on endangered species and their habitats. The population of the NARW has been declining for years; they are already under significant threat from ship strikes, entanglements in fishing gear, and habitat loss. The introduction of offshore wind turbines in their migratory paths and feeding grounds would exacerbate those threats, leading to increased mortality rates, further endangering this already vulnerable species that is on the brink of extinction. [Pa33-36; Pa72-75]

Last but certainly not least, the Shore Municipalities voiced grave concerns about the ability of the DEP to impartially review the Atlantic Shores project application. [Pa37-38; Pa53-54] Central to those concerns is the intense

political pressure exerted by Governor Murphy's administration, which has made offshore wind development a cornerstone of its environmental and energy policy. The Governor's executive orders have established aggressive targets for offshore wind energy production and mandated that all relevant state agencies, including the DEP, "take all necessary actions" to achieve these goals. The Shore Municipalities expressed concern that the top-down directive has effectively compromised the DEP's ability to serve as a neutral arbiter in reviewing the Atlantic Shores application. The DEP Commissioner, who serves at the pleasure of the Governor, is under significant pressure to align with the administration's priorities, which creates an inherent conflict of interest, as the Commissioner and DEP staff unquestionably have felt immense pressure to approve the Projects, despite the undeniable devastating economic and environmental impacts. Anyone who has spent time in government and understands the relationship that the Governor has with his or her cabinet members appreciates the existence of that pressure as well as the extraordinary difficulty in resisting that pressure. The DEP's role as an independent regulator is crucial in safeguarding New Jersey's coastal resources from projects that could cause significant harm. Because the DEP has become closely aligned with the Governor's agenda, the Shore Municipalities fear the DEP would prioritize the

advancement of offshore wind projects over a thorough and impartial evaluation of their potential impacts.

To address those concerns, the Shore Municipalities requested that the DEP refer the matter to the OAL for review by an impartial administrative law judge. [Pa54] An ALJ, who is not subject to the same political pressures as the DEP, would be able to objectively assess whether the Atlantic Shores Projects comply with the relevant regulations, including those designed to protect scenic resources, marine life, and coastal ecosystems.

The DEP rebuffed the Shore Municipalities' request for an independent assessment of the Projects [Pa91], causing the Shore Municipalities to file this action in the Chancery Division wherein they sought to compel DEP to refer the matter to the OAL. Significantly, as part of its request for a hearing before the OAL, the Shore Municipalities sought pre-decision discovery aimed at showing bias within the DEP decision-making process – i.e., documents and communications that would reveal any undue influence or lack of neutrality in the DEP's actions – which would support the need for an adjudicative hearing before DEP could act.

The Shore Municipalities informed the chancery court in their briefing that they “intend to seek [] targeted expedited discovery in support of their claims that DEP is incapable of acting impartially in its review of the Atlantic

Shores application.” [Pa167]. They explained that “absent an injunction against the DEP issuing a consistency determination [], the DEP can proceed to issue its determination before there has been any record created concerning its ability to do so consistent with principles of procedural due process.” [Pa170)] The Shore Municipalities emphasized the need for discovery to develop a record regarding bias at oral argument, explaining:

if this Court doesn’t intervene now, we will never get discovery or a plenary hearing on bias, and that means that there is a strong likelihood that a bias (indiscernible) appearance of bias with no record supporting his objectivity is going to make this extraordinary and irreversible decision that will affect every single citizen that lives on LBI and, frankly, the entire State.

T8:15-22 (emphasis added). The request for pre-decision discovery aimed at ascertaining bias and a hearing before a neutral adjudicator were at the core of the relief sought by the Shore Municipalities in their application to the trial court.

On March 28, 2024, the trial court denied the relief sought by the Shore Municipalities and dismissed its lawsuit on procedural grounds – because no final DEP agency decision – i.e., the consistency determination – had taken place. As such, the court never reached the merits of the Shore Municipalities’ substantive claims and, consequently, foreclosed its opportunity to develop a record concerning the DEP’s bias. Immediately thereafter, on April 1, 2024, the

DEP issued its consistency certification, predictably rubber-stamping the Project. [Pa114-168] And since the trial court denied the Shore Municipalities' application, the DEP's decision to approve the project proceeded without any record developed about the agency's bias.

LEGAL ARGUMENT

This Court reviews the trial court's decision dismissing the Shore Municipalities' complaint for lack of jurisdiction under a de novo standard of review. "Whether subject matter jurisdiction exists is a purely legal issue, which [appellate courts] review de novo." Santiago v. N.Y and N.J. Port Auth., 429 N.J. Super. 150, 156 (App. Div. 2012) (citation omitted). "As a result, the motion judge's 'interpretation of the law . . . [is] not entitled to any special deference.'" Ibid. (quoting Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995) (alteration in Santiago). Applying that standard, and for the reasons set forth below, the trial court erred in finding that it lacks jurisdiction and dismissing the Shore Municipalities' lawsuit.

1. The trial court erred in finding that it lacks jurisdiction to hear the merits of Plaintiffs' claims. [Pa111-12]

The trial court erroneously concluded that it lacked jurisdiction because the DEP had not yet made a final decision on the consistency determination. In so holding, the trial court misconstrued the relief that the Shore Municipalities

sought, as well as applied an overly narrow interpretation of R. 2:2-3. The Shore Municipalities were not seeking to challenge a final agency decision; they were challenging the fairness and impartiality of the process leading up to that decision, including developing a pre-hearing record on bias. The Shore Municipalities' request for an adjudicatory hearing was not merely about obtaining a forum to review the DEP's final decisions on the consistency certification. An appeal of that decision is already pending in the parallel proceeding under Docket No. A-2743-23 where the Shore Municipalities contest the DEP's consistency certification. This lawsuit was fundamentally about ensuring that the DEP's actions are impartial and free from undue political influence.

The trial court's reliance on R. 2:2-3 – vesting this Court with exclusive jurisdiction over final agency decisions – was misplaced. R. 2:2-3 provides that appeals may be taken as of right to the Appellate Division “to review final decisions or actions of any state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer....” R. 2:2-3(a)(2) was promulgated, among other reasons, for the purpose of providing a speedy review of a proceeding conducted within the state administrative agency itself and involving parties who are given an opportunity to be heard. But what is not contemplated is that a full plenary proceeding among adversaries be held before

the Appellate Division. This can only be had in the Law Division. See Committee to Recall Robert Menendez From the Office of U.S. Senator v. Wells, 204 N.J. 79, 89 (2010) (noting, without challenging jurisdiction, that the Committee had filed a complaint in lieu of prerogative writs in the Law Division to compel agency to accept or reject notice of intention).

R. 2:2-3 has been interpreted to mean that the mode of review so provided is exclusive. Pascucci v. Vagott, 71 N.J. 40, 51–52 (1976). However, a limitation upon the applicability of that rule exists “where the proposed administrative action has not been preceded by the creation in the agency of a record which is amenable to appellate review.” Montclair Twp. v. Hughey, 222 N.J. Super. 441 (App. Div. 1987).

For example, in Pfleger v. N.J. State Highway Dept., 104 N.J. Super. 289 (App. Div. 1968), plaintiff filed a Chancery Division complaint seeking to enjoin the State Highway Department from proceeding with contemplated construction on State Highway 35 because the elevation adjacent to plaintiffs’ premises would cause severe flooding of his property. Plaintiff amended his complaint to compel the Department of Transportation (DOT) to initiate condemnation proceedings to establish the value of the property taken, and to transfer the action to the law division. Id. at 290. Rather than transfer the case to the Law Division, the Chancery Division transferred the case to the Appellate

Division under R.R. 4:88-8, the predecessor rule that governed at the time, because the lawsuit was brought against a state administrative agency.

This Court reversed, holding that the case should have been transferred to the Law Division. This Court stated that there was no administrative machinery within the DOT for itself condemning land, for hearing the arguments for and against seeking condemnation in court, for deciding whether or not a ‘taking’ has been effected; or any procedure by which a record may be made before the DOT that this Court can review. Id. at 292.

In Frapaul Constr. Co. v. Transportation Dep't of N.J., 175 N.J. Super. 84 (App. Div. 1980), plaintiff entered into a contract with the DOT for construction work in Paterson. A dispute arose over the payment for portable curbing, with plaintiff claiming payment for 6,300 linear feet based on the actual amount installed, while the DOT maintained that only 3,200 linear feet was required under the contract. Plaintiff submitted its claim to the DOT’s Claims Committee, which denied the claim. An appeal followed. Id. at 87-89.

This Court ultimately determined that the case belongs in the Law Division, as the Claims Committee’s decision was not a final agency action and did not provide a sufficient record for appellate review. In discussing the parameters of 2:2-3(a)(2), the Court noted that “the appellate review provided for is basically a substitution for the common law writ of certiorari” which was

“a form of appellate review to correct errors of law apparent on the face of the record of proceedings in a lower judicial or quasi-judicial tribunal. Id. at 90. The Court held that the conclusions of the DOT Claims Committee are not final decisions within the meaning of R. 2:2-3(a)(2) and the Claims Committee does not provide a judicial type of hearing such as is necessary to adjudicate a construction contract controversy, including the lack of provisions for discovery or presentation of evidence. Id. at 91.

In Colon v. Tedesco, 125 N.J. Super. 446, 452 (Law Div. 1973), plaintiff alleged the Department of Labor and Industry had failed to act to regulate conditions at a migrant camp. The Department moved to dismiss, alleging the Law Division lacked jurisdiction over the dispute. The court declined to do so, finding that:

In the case at bar there has been no adversary type of proceeding in the Department of Labor and Industry. There is no provision for same. This is not a quasi-judicial matter before said Department. No intramural record of any kind has been made. The Appellate Division cannot obtain a record to review, absent a plenary hearing before a judge.

Colon, 125 N.J. Super. at 452.

Last but not least, in Hughey, 222 N.J. Super. 441, this Court addressed whether consolidated actions against the DEP were properly brought in the Law and Chancery Divisions or whether they should have been filed directly in the

Appellate Division. The case arose after Governor Kean, using emergency powers, directed the DEP to remove radium-contaminated soil from residential areas in Montclair and Glen Ridge. When the DEP planned to move the contaminated soil to a site in the environmentally sensitive Pinelands, the Township of Jackson and Ocean County sought to enjoin the DEP's actions through lawsuits in the Law Division, citing threats to public health and environmental harm.

The DEP argued that the actions are under the exclusive purview of this Court pursuant to R. 2:2-3(a)(2). This Court disagreed, affirming the decision to keep the cases in the trial courts. The Court held that the “R.2:2–3(a)(2) contemplates appellate review only of administrative actions of a *quasi*-judicial or *quasi*-legislative nature based on a record.” *Id.* at 441. However, in that case, the consolidated actions were “brought to halt an alleged threatened breach of public and private rights, not to review an administrative proceeding” and involved issues that required fact-finding, the gathering of evidence, and the application of legal principles—functions appropriate for trial courts. *Id.* at 448.

The same principles apply here. The circumstances of this case warranted the exercise of jurisdiction in the trial court to establish a record concerning DEP's lack of impartiality. The Shore Municipalities' allegations of agency bias and the absence of objective fact inquiry lie at the heart of this action. The DEP

disputed those allegations and claimed it was capable of neutrally reviewing Atlantic Shores' application. There have been and will be no proceedings before the DEP concerning its impartiality, and no discovery has been or can now be obtained. By way of the below action, the Shore Municipalities sought to develop a record in the trial court over DEP's neutrality, including communications and directives from the Governor's office and DEP's Commissioner, communications and promises to Atlantic Shores, and the thoroughness of DEP's review.⁴ Nothing in the language, purpose, history, nor application of R. 2:2-3 foreclosed the trial court from granting the Shore Municipalities the relief they were seeking.

⁴ Significantly, the Atlantic Shores South Project is not the only offshore wind turbine project in the works. The same applicant – Atlantic Shores –has another consistency certification application pending for a similar project immediately adjoining this one off the coast of Long Beach Island. See https://dep.nj.gov/wp-content/uploads/bulletin/bu2024_0515.pdf.

Other applications are also likely forthcoming, as Governor Murphy has pledged to achieve 100% clean energy by the next two decades and has charged every agency in the State, including the DEP, to “take all necessary actions” to implement his aggressive goal of offshore wind energy generation in New Jersey. [Pa17]

Thus, the need to determine if the DEP is acting impartially is more than about the Atlantic Shores project; it is about ensuring that the DEP carries out its function properly as to all wind energy projects with the right goals and in the best interests of New Jersey's citizens, not merely to fulfill the Governor's agenda.

This Court has held that in certain instances, it is appropriate for courts to assume jurisdiction “where the tribunal or the agent designated to conduct the hearing in the first instance is biased or prejudiced or the interest of essential justice requires the intervention of the courts.” Nero v. Bd. of Chosen Freeholders of Camden Cnty., 144 N.J. Super. 313, 320 (App. Div. 1976). In Nero, plaintiffs filed a complaint seeking to enjoin the Camden County Board of Chosen Freeholders from conducting hearings on charges of inefficiency, neglect of duty, and misconduct in office against them, among other things, alleging bias. The trial court denied plaintiffs’ motion for summary judgment, but this Court granted leave to appeal, recognizing the public importance of the issue. The Court ultimately vacated the summary judgment order and remanded the case for a plenary hearing to determine whether the board could impartially hear the charges. It stated,

[A] ‘fair trial in a fair tribunal is a basic requirement of due process.’ This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decisionmaker constitutionally unacceptable but ‘our system of law has always endeavored to prevent even the probability of unfairness.’ ... experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.

Id. at 322. The Court concluded that this was “one of those rare instances” where “justice and administrative due process mandate the granting of relief” that

plaintiffs sought and remanded the matter for a hearing on the allegations of bias, prejudice or partiality of the board. Id. at 324.

This, too, is one of those rare instances where the interests of justice and the principles of due process mandate the granting of relief sought by the Shore Municipalities. The allegations in this case regarding the DEP's impartiality, particularly given the significant political pressures, and the grave stakes involved, demand a thorough examination by an impartial arbiter. The trial court should have exercised its jurisdiction to ensure that the process leading to the DEP's consistency determination was fair, unbiased, and free from undue influence. By dismissing the Shore Municipalities' complaint without allowing the development of a full factual record, the trial court failed to safeguard the essential rights of the Shore Municipalities, who will stand on the brink of economic collapse if the Project proceeds as planned.

2. The trial court erred in finding that Plaintiffs were not entitled to an administrative hearing. [Pa111-12]

The trial court held that because the Shore Municipalities have no inherent right to an administrative hearing at this stage, the matter was not appropriate for judicial review. [Pa112] That conclusion is fundamentally flawed, as it fails to account for the critical fact that where significant factual disputes and substantial property interests are involved, particularly in cases with profound

economic and environmental implications, due process demands a hearing before a neutral and unbiased fact-finder.

“No principle or rule of action, is better settled at the common law, than that whenever a court or any person acting under legal authority, is to act judicially, or to exercise a discretion in a matter affecting the rights of another, the party thus to be affected . . . may be heard in defence [sic], or for the protection of those rights.” New Jersey Tpk. Co. v. Hall, 17 N.J.L. 337, 339 (1839). Entitlement to the hearing may be ascribable to the constitutional guarantees of due process or “to the indispensability of fundamental procedural fairness.” Cunningham v. Dep’t of Civ. Serv., 69 N.J. 13, 19–20 (1975); see Avant v. Clifford, 67 N.J. 496, 520 (1975) (“[I]n the exercise by New Jersey courts of their function of review (as here) of the action of administrative agencies . . . , we have not been satisfied with enforcement of naked constitutional right, but have gone further to strike down arbitrary action and administrative abuse and to insure procedural fairness in the administrative process.”).

The constitutional mandates of due process and fundamental fairness implicated in this case compelled a hearing before a neutral fact finder so that the Shore Municipalities could present evidence of the imminent and devastating impacts Atlantic Shores’ project of unprecedented scale and proximity to shore

would have. At the same time, the Shore Municipalities sought to determine whether the DEP was fulfilling its duty as an impartial and independent regulator responsible for ensuring Atlantic Shores' compliance with coastal management policies, or if the agency was instead unduly influenced by the Governor's aggressive energy agenda, thus compromising the integrity of the process.

A constitutional right to a hearing is triggered where “(1) contested factual issues [] may be presented in an evidentiary manner in proceedings which are targeted at a person, group of persons or entity, and (2) particularized property rights or other special interests” exist. Cedar Grove Tp. v. Sheridan, 209 N.J. Super. 267, 275 (App. Div. 1986). Classification of the type of proceeding is a relevant factor in determining whether a hearing is required. Where the agency must consider evidence and apply the law to the facts, or apply a discretion or judgment judicial in nature on evidentiary facts, the function is ordinarily quasi-judicial and triggers the need for procedural due process. Cunningham, 69 N.J. at 18, 24 (holding that although no statutory provision in the Civil Service Act mandates hearing where a person on special reemployment list is refused reinstatement to comparable position, a hearing was warranted given there were disputed facts underlying question of comparability of positions, and applicant’s interest); Jersey City v. Dept. of Civil Service, 57 N.J. Super. 13 (App. Div. 1959) (holding hearing was warranted where controverted factual questions

existed regarding job responsibilities); cf. Cedar Grove 209 N.J. Super at 278–79 (noting that DOT was acting in legislative capacity regarding decision on traffic-light placement, thus not warranting a hearing); In re Grant of Charter Sch. Application of Englewood on Palisades Charter Sch., 320 N.J. Super. 174, 235 (App. Div. 1999) (holding that Commissioner investigating charter-school application was acting in his legislative capacity, not in a quasi-judicial capacity because “there was no need to gather evidence or apply law to found facts).

It is undisputed that the DEP’s consistency decision amounts to a quasi-judicial determination and not a mere legislative function, as the agency must analyze and assess scientific evidence to determine if the Atlantic Shores project is consistent with the CZMA. Moreover, the Shore Municipalities have a particularized property rights or other special interests sufficient to have warranted a hearing. A “‘property’ interest contemplated by the Fourteenth Amendment may take many forms over and above the ownership of tangible property.” Nicoletta v. N.J. Dist. Water Supply Comm’n, 77 N.J. 145, 154 (1978) (citing Fuentes v. Shevin, 407 U.S. 67, 86 (1972)). The chief ingredient in determining a property interest sufficient to trigger the right to protection by procedural due process is “a legitimate claim of entitlement.” Id. at 154-55.

The Shore Municipalities have an undeniable property interest in collecting tax revenue – a right that is threatened to be severely hampered by the

construction of the proposed Projects. This is not a mere economic inconvenience, but a fundamental threat to the municipalities' ability to function and to serve their communities. The Shore Municipalities are all small towns located within Long Beach Island and just to its south along the coast of New Jersey and have one important common attribute – the pristine beaches that attract tourism from which the towns derive substantial revenue. The presence of wind turbines as close offshore as proposed by Atlantic Shores will alter the natural seascape and diminish the aesthetic appeal of the coastline – a primary draw for tourists. The economic viability of the Shore Municipalities depend heavily on their ability to maintain aesthetically pleasing environments that attract visitors.

As supported by scientific studies, construction of massive wind turbines so close to shore inevitably will lead to a decrease in tourist arrivals, affecting businesses and reducing the overall economic activity in the area. A decline in tourism necessarily will result in lower tax revenues from sales and hospitality taxes and diminish property tax revenues, impacting the towns' budgets and their ability to fund public services and infrastructure improvements. It will further depress property values in those areas. Additionally, the decline in tourism would, in turn, decrease the municipalities' revenue that is derived from beach

badges. This cascade of economic damage cannot be understated; it directly affects the Shore Municipalities' core function of governance.

The issues go beyond just mere aesthetics or environmental concerns. It is a matter of economic survival for the Shore Municipalities. This is about the effect of the visual impacts on the municipalities' tourism, revenue, and, in turn, taxes. The proposed turbines will have an unavoidable profound impact on local economies in the affected areas of coastal New Jersey and that seasonal economies like the Shore Municipalities would suffer staggering losses of its tourist revenues, including crippling the hundreds of millions of dollars they receive in state and local tax revenue. The financial impacts of the proposed Projects are devastating, and the stakes for Plaintiffs are sufficiently grave to have warranted a hearing. See, e.g., Application of John Madin/Lordland Dev. Int'l for Pinelands Dev. Approval, 201 N.J. Super. 105, 123 (App. Div. 1985) (holding that municipalities were entitled to a hearing in the context of developmental approvals within the Pinelands area because “[the municipalities’] interest mandates that they have standing to be heard or to challenge development approval, particularly where projects reach the magnitude proposed by the developers herein.”).

The Supreme Court has stated, “[i]t is difficult to foresee all eventualities. It may be that situations will arise in which despite the absence of an intrusion

upon the property or political powers of a county or municipality, it may appropriately speak with respect to some hurt experienced generally by its inhabitants. We need not and do not foreclose that possibility.” Bergen Cnty. v. Port of New York Auth., 32 N.J. 303, 315-16 (1960). This is one of those situations. The circumstances here warranted assessment before a neutral arbiter free of political influences.

The trial court having denied the Shore Municipalities’ request, this Court is now in a position to review the Atlantic Shores’ consistency determination in the separately pending appeal without the benefit of a fulsome record, including expert testimony, on the devastating impacts of the Atlantic Shores’ project. The absence of a fully developed record is detrimental to a proper appellate review. Failing to address those impacts with the requisite rigorous scrutiny given the magnitude and impacts of the Project sets a dangerous precedent by permitting politically expedient decisions to override legitimate concerns of local communities and environmental safeguards.

CONCLUSION

As the Shore Municipalities explained at oral argument to the trial court, “[w]e are in the midst of a once in a lifetime kind of transformation of our world economy [from] combustion engine and one supported by clean energy” and Governor Murphy “has presented himself as a national leader on clean energy...

This is not just an initiative. We're talking about legacy-making material, perhaps the biggest priority of Governor Murphy's tenure." T7:6-19 The proposed project is the largest, tallest, closest to shore offshore wind farm ever built anywhere in the world, and as counsel noted, "the State's most treasured shoreline is going to look like an industrial park." T7:22-8:8 Without a meaningful opportunity to be heard, "this project racing forward unchecked. And the stakes [] couldn't be higher." T7:19-22

The trial court's denial of the Shore Municipalities' application resulted in a decision by the DEP to approve the biggest project this State has ever seen, with the most profound consequences, with no record from which this Court can even ascertain whether the agency's decision was based on legitimate considerations or the result of overwhelming political pressure. Jurisdiction in the trial court was proper; the trial court was not precluded from reviewing claims of procedural irregularities or bias in the agency's decision-making process before a final decision was made. Consequently, the Shore Municipalities respectfully request the Court reverse the trial court's decision and remand the matter to allow for discovery and a hearing with respect to the DEP's bias and political pressure to fulfill the Governor's aggressive energy agenda.

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