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SEP 19 2009

PAOLELLA I, LLC, a New Jersey Limited Liability Company,

Plaintiff,

v.

STATE OF NEW JERSEY  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION, COUNTY OF UNION  
AND COUNTY OF ESSEX.

Defendant.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - ESSEX COUNTY

DOCKET NO.: ESXL-7880-09

Civil Action

COMPLAINT IN LIEU OF  
PREROGATIVE WRITS AND  
OTHER RELIEF

PAOLELLA I, LLC, a limited liability company, by way of Complaint in Lieu of Prerogative Writs against the Defendants, State of New Jersey Department of Environmental Protection, County of Union and County of Essex (collectively the "Defendants") says:

FIRST COUNT

1. At all times relevant hereto, Plaintiff, Paolella I, LLC (hereinafter referred to as "Paolella" or "Plaintiff"), was and is a limited liability company of the State of New Jersey with its principal place of business at c/o Paul Anthony Agency, Inc., 130 Route 22 East, North Plainfield, New Jersey.

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2. At all times relevant hereto, Defendant New Jersey Department of Environmental Protection ("NJDEP") was and is an administrative agency of the State of New Jersey located in the executive branch of State government.

3. At all times relevant hereto, Defendant County of Essex ("Essex County") was and is a body corporate and politic, existing under the laws of the State of New Jersey.

4. On or about September 1, 2005, Plaintiff served Essex County with a Tort Claims Notice in accordance with the New Jersey Tort Claims Act, N.J.S.A. 59:1 -1 et seq.

5. At all times relevant hereto, Defendant County of Union ("Union County") was and is a body corporate and politic, existing under the laws of the State of New Jersey.

6. On or about September 1, 2005, Plaintiff served Union County with a Tort Claims Notice in accordance with the New Jersey Tort Claims Act, N.J.S.A. 59:1 -1 et seq.

7. At the request of and upon notice by Union County, Plaintiff filed a second Tort Claims Notice on or about September 22, 2005 which was submitted on the tort claim form prescribed by Union County.

8. Paoletta is the owner of property located at 129 Millburn Avenue, Millburn, Essex County, New Jersey (the "Property").

9. The Property is improved with a 23,000 square foot office building tenanted by medical related uses, along with associated off street parking. The Property fronts on Millburn Avenue, and is bounded in the rear by the Passaic River.

10. In or about 1996 and 1999, there were large floods at the Property which resulted in significant damage to the building and to the tenanted uses, including expensive medical equipment in an area of the building on the Property below ground level.

11. The storm events which caused the above-referenced flood also caused substantial damage to other properties in Millburn, in and near the Property, as a result of the Passaic River overflowing its banks.

12. As a result of the flooding, Paoella installed approximately \$100,000 of drainage related improvements in order to assist with the prevention of significant damage in the event another flood occurred.

13. In response to these floods, Union County, Essex County and the Township of Millburn formulated a project (the "Project") under which a large flood control wall would be constructed along the banks of the Passaic River on and near the Property, and continuing to a bridge adjacent to property on which an Exxon service station is located.

14. Upon information and belief, Essex County was responsible for securing and allocating sufficient funding to acquire property on its side of the Passaic River in order to successfully complete the Project.

15. Under the plan for the Project, a large metal wall would be constructed on the banks of the Passaic River. Under the arrangement between the parties, Millburn was given the task of acquiring any and all property rights needed for the construction of the flood wall.

16. Millburn was thereupon able to acquire voluntary easements on all but two of the properties on which the flood wall would be constructed.

17. Millburn was able to obtain easements on these properties at no cost because the wall was to be constructed in a manner that had no negative effect on the remainder of the properties on which the wall would be constructed.

18. Millburn was unsuccessful in its efforts to obtain permission to obtain the necessary property and build the wall from: (1) property owned by Exxon (Defendants Essex

and Union Counties eventually constructed the flood wall on this property without Exxon's consent resulting in a lawsuit); and (ii) the Property owned by Plaintiff.

19. While most property on which the flood wall would be constructed would be unaffected by the Project, the Property owned by Paoella would be dramatically affected. Specifically, the section of the flood wall proposed for Plaintiff's Property would run directly through a row of parking in the rear parking area, resulting in the loss of at least ten parking spaces.

20. The parking loss estimate was based upon a plan submitted by Hatch, Mott MacDonald, the engineers for Essex County and Union County, engaged for the flood wall Project (See Map at Exhibit "A"). The parking loss is not in dispute.

21. The loss of ten parking spaces would cause a parking shortage and dramatically affect the value of the Property and Plaintiff's ability to lease space thereon. As such, Plaintiff was simply unable to donate the land to Defendants for use of the flood wall and the Project.

22. Because the loss of parking due to the Project would severely impact the value and utility of the Property, Plaintiff made a reasonable request for compensation in return for the loss of land and parking spaces needed for the flood wall, which was, after all, a public improvement, and not being constructed merely for Plaintiff's benefit.

23. In response to Plaintiff's request for compensation, Millburn determined to acquire the land needed for the Project through the use of eminent domain.

24. A letter from William Steinhart, MAI, of Appraisal Consultants Corp., an appraiser retained by Millburn was sent to Plaintiff noting that an inspection of the Property would take place as a prelude to acquiring the Property by eminent domain.

25. After this letter was sent, however, there was no further communication from Millburn to Plaintiff with respect to the acquisition of the Property by eminent domain. It is Plaintiff's belief that Millburn realized the cost to acquire the land for the Project from Paoella was going to be substantial, as the damages to the property due to the loss of parking would be significant.

26. Because Millburn had failed to budget any monies for the acquisition, the plan to acquire the property from Paoella for the Project was thereafter abandoned by Millburn.

27. The fact that Millburn was unable to acquire the land from Plaintiff for the flood wall did not stop the project from going forward.

28. On May 5, 2000, Defendant NJDEP issued Stream Encroachment Permit #000-00-0004.1 and 4.2 (Exhibit "B"). This permit allowed the construction of the flood wall Project, including construction on Plaintiff's property (subject, of course, to acquiring the rights to build on the Property).

29. At the time of issuance of the permit, however, there had been no resolution of the property acquisition issue between Paoella and Millburn.

30. Accordingly, on July 21, 2003 Union County wrote to Millburn expressing its displeasure at the inability of Millburn to acquire the land from Paoella needed for the flood control wall. In this letter, attached hereto as Exhibit "C", Union County indicated that:

Failure to complete this phase of the project will negate the effects of the flood wall on the Millburn side of the river. Businesses and residents of Millburn near the river will continue to be subject to regular, severe flooding. This will result in continued losses to businesses and families, and could conceivably open Millburn to lawsuits for failing to act when presented with the opportunity."

31. In response to this letter, Millburn wrote to Union County on August 13, 2004 stating that "it was never the intention of Millburn to pay any significant amounts of money for the easements." (Exhibit "D").

32. Thereafter on September 3, 2004, Union County responded to Millburn's letter stating that "the joint aspect of this project would not have been undertaken unless there was a commitment to timely obtain the necessary easements for the project." (Exhibit "D"). The letter continued:

This inability to proceed at 120 Millburn Avenue will place all the effected landowners at risk on the Millburn side of the river, as the absence of that one parcel will eliminate the efficacy of the entire wall on that side ... this decision is not an acceptable choice to the County of Union because it can take no further action. The County cannot acquire the necessary easement itself. Only the Township of Millburn or the County of Essex can address this problem.

33. Upon information and belief, Millburn has never responded to the September 3, 2004 letter from Union County.

34. Despite the dire warnings of the consequences of not having the land needed from plaintiff for the flood wall, in 2004, the flood wall was constructed, except that part of the wall located on Plaintiff's Property was not constructed.

35. This construction caused not only the problems set forth in Union County's letter(s) to Millburn, as noted above, but also construction of the flood wall essentially left a hole on Plaintiff's property through which the flood waters are directed during major storm events. As a result, water backs up onto Plaintiff's Property and Millburn Avenue during flood events, which have occurred as recently as 2007.

36. In addition, construction of the flood wall on all properties except that owned by Plaintiff, completely obviated the flood control measures which Plaintiff had taken at great expense in response to the floods in 1996 and 1998.

37. The construction of the flood wall, in the manner in which it was done, has caused substantial, significant and greater erosion along the bank on the Property, as water has been channeled into that area.

38. The construction of the flood wall, in the manner in which it was done, has also caused substantial, significant and greater flooding on the Property, as water is now channeled directly onto the Property through the gap in the flood wall.

39. Because the construction of the flood wall was damaging to Plaintiff's Property and, in fact, violates the NJDEP Stream Encroachment Permit conditions which require complete construction of the flood wall, Plaintiff, through counsel, wrote to Ray Smolien, Manager of NJDEP Northern Enforcement on January 20, 2005 filing a formal Complaint about the situation, and demanding compliance with the conditions of the Stream Encroachment Permit conditions. (Exhibit "E").

40. Despite clear non-compliance with permit conditions, however, no action was taken by NJDEP.

41. After letters and phone calls failed to cause NJDEP to respond, on May 15, 2006, Plaintiff sent a letter to NJDEP Northern Enforcement demanding that action be taken (Exhibit "F"). This was followed up by a letter dated August 30, 2006 to NJDEP Northern Enforcement (after phone calls were not returned), warning NJDEP that the hurricane season was approaching and that action needed to be taken (Exhibit "G"). This was followed up by yet another letter dated September 12, 2006 complaining about action not being taken by NJDEP (Exhibit "H").

42. In early October 2006 NJDEP Northern Enforcement indicated that action would be taken with respect to Plaintiff's complaint. Another letter was sent to NJDEP Northern Enforcement dated November 16, 2006 (Exhibit "I") asking for a status update.

Because no action was taken another letter was sent to NJDEP Northern Enforcement on November 30, 2006 (Exhibit "J").

43. Finally, on February 2, 2007, NJDEP sent a letter to the Stream Encroachment Permittee demanding, among other things, that within sixty days of receipt of the letter, there be a submission "to the Department as built copies of the plans, along with as built calculations and data demonstrating the existing flood elevations in the vicinity of the flood wall gap." (Exhibit "K").

44. Although Plaintiff filed the initial complaint that led to the letter, NJDEP has refused to disclose to Plaintiff whether there has ever been a response, and has stated that if there was a response Plaintiff would not be entitled to a copy of it.

45. In April of 2007, the event that Plaintiff had been warning NJDEP about occurred - there was a major storm and the river overflowed its banks going through Plaintiff's Property and onto Millburn Avenue causing severe flooding and damage. Due to the manner in which the flood wall was constructed and the gap in the flood wall on Plaintiff's Property, the event caused more damage than normally would have occurred absent construction of the flood wall in the first place.

46. The event was documented to NJDEP by way of letter dated April 18, 2007 (Exhibit "L") and on May 2, 2007 photographs were sent to the NJDEP documenting the flooding and damage to the site. On June 12, 2007 another letter was sent to NJDEP asking what action was going to be taken to enforce the completion of the flood wall. (Exhibit "M").

47. After additional months passed without any action being taken and without any phone calls being returned, Plaintiff finally spoke with NJDEP Northern Enforcement in or about January 2008. Northern Enforcement indicated that action would be taken immediately and that Plaintiff would be advised. Despite a letter, with a copy to the NJDEP Commissioner,

and numerous phone calls. NJDEP Northern Enforcement has refused to respond to Plaintiff's attempts at contact.

48. In or about June of 2008, Plaintiff's counsel contacted a deputy attorney general representing NJDEP, who said that some response would be forthcoming with a few weeks. More promises for responses were made leading to more delays, until finally the matter came to the attention of a DAG representing NJDEP who advised Plaintiff's counsel that she would arrange a meeting with the Essex County, Union County and Millburn to discuss the issue. Despite phone calls and letters the meeting was never scheduled.

49. At this point, the river banks in the area of Plaintiff's Property are eroding as a result of water being channeled into Plaintiff's Property from the flood wall on other parts of the river. During major storm events, Plaintiff also has the increased risk that there will be a repeat of the prior incident, and that the river will be channeled onto Plaintiff's Property, causing significant flooding. Because NJDEP has failed to take appropriate action, Plaintiff has had major storm damage and is left at risk that a major storm will occur and its Property will be further damaged.

**WHEREFORE,** Plaintiff demands judgment compelling NJDEP to either take all necessary action to enforce the terms and conditions of the issued Stream Encroachment Permit, or to compel Defendant Union County to file for a new permit in order to complete construction of the flood wall on Plaintiff's Property.

#### SECOND COUNT

50. Plaintiff repeats and realleges the allegations of the First Count as if the same were set forth herein at length.

51. The flood wall as constructed, by causing water to be channeled onto Plaintiff's Property causing erosion and further damage to the Property during storm events.

and the failure to remedy that condition, constitutes a continuous nuisance and interference with the Property, which Plaintiff respectfully requests the Court to address by either ordering Defendants Essex and Union Counties to complete construction of the flood wall, award damages or otherwise remedy the nuisance.

**WHEREFORE.** Plaintiff demands judgment as follows:

(a) For an Order compelling Defendants to remedy the nuisance and do what is necessary in order to complete construction of the flood wall on Plaintiff's Property, and to acquire the rights needed for the flood wall in accordance with law; or

(b) For an Order compelling Defendants to otherwise remediate the parts of the flood wall already completed; and

(c) For damages as a result of the failure to remedy the continuous nuisance which causes erosion of the bank adjacent to Plaintiff's Property, and other damages which are continuing with each storm event the flood wall either continues to exist or the flood wall on Plaintiff's Property remains to be completed; and

(d) For costs, damages should there be further flooding on plaintiff's property and attorneys fees; and

(e) For such other relief as the Court deems equitable and just.

### **THIRD COUNT**

52. Plaintiff repeats and realleges the allegations of the First and Second Count as if the same were set forth herein at length.

53. By failing to build the flood wall on Plaintiff's Property as outlined above, or, in the case of NJDEP, by not compelling Union County to adhere to its Stream Encroachment Permit, Defendants have essentially turned Plaintiff's Property into a de facto flood storage

area, for which Plaintiff has not been paid just compensation as required by the "takings" clause of the United States and the New Jersey Constitutions.

**WHEREFORE**, Plaintiff demands judgment as follows:

(a) For a ruling that NJDEP and/or Union County and Essex County have acquired Plaintiff's Property without just compensation and ordering the parties to set a value for the taking under the New Jersey Eminent Domain Act, N.J.S.A. 20:3-1 et seq.

(b) For costs, damages and attorneys fees as required by statute.

(c) For such other relief as the Court deems equitable and just.

#### **FOURTH COUNT**

54. Plaintiff repeats and realleges the allegations of the First, Second and Third Counts of the Complaint as if the same were set forth herein at length.

55. By failing to build the flood wall on Plaintiff's Property as outlined above Defendants have essentially turned Plaintiff's Property into a de facto flood storage area negating the effect of the expensive flood remediation and drainage projects undertaken by Plaintiff on the Property.

56. The construction of the flood wall in the manner that it has been has caused damage to plaintiff as a result of the negligent construction of the improvement.

**WHEREFORE**, Plaintiff demands judgment as follows:

(a) For an award of damages for the amounts expended by Plaintiff on flood remediation and drainage projects on the Property.

(b) For costs, damages and attorneys fees as required by statute.

(c) For such other relief as the Court deems equitable and just.

FIFTH COUNT

57. Plaintiff repeats and realleges the allegations of the First, Second, Third and Fourth Counts of the Complaint as if the same were set forth herein at length.

58. By constructing the flood wall across neighboring properties upon which Defendants could obtain voluntary easements and by not constructing the flood wall upon Plaintiff's Property or by failing to remedy the effects of the flood wall as currently built, Defendants created a dangerous condition on their property causing injury to Plaintiff.

59. The actions taken by Defendants in creating and failing to remedy the dangerous condition is and was palpably unreasonable.


**WHEREFORE**, Plaintiff demands judgment as follows:

- (a) For an award of damages for the amounts expended by Plaintiff on flood remediation and drainage projects on the Property;
- (b) For damages to Plaintiff's Property, which damages are continuing each storm event that the flood wall either continues to exist or the flood wall on Plaintiff's Property remains to be completed;
- (c) For costs, damages and attorneys fees as required by statute; and
- (d) For such other relief as the Court deems equitable and just.

WATERS, McPHERSON, McNEILL, P.C.  
Attorneys for Plaintiff, Paoletta I, LLC

Dated: September 17, 2009

By: \_\_\_\_\_

  
BLAKE S. DAVIS

**DESIGNATION OF TRIAL COUNSEL**

Blake S. Davis, Esq. is hereby designated as trial counsel.

**CERTIFICATION**

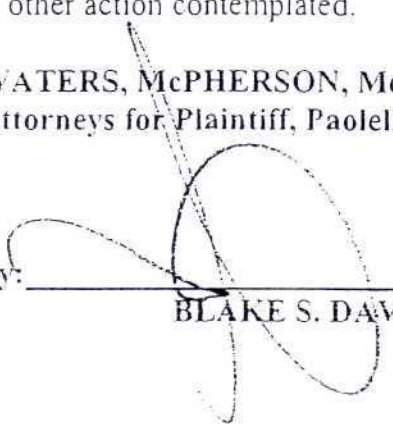
I hereby certify that the matters in controversy are not the subject of any other litigation or arbitration action nor are any such other action contemplated.

**WATERS, McPHERSON, McNEILL, P.C.**  
**Attorneys for Plaintiff, Paoella I, LLC**

**Dated: September 17, 2009**

By: \_\_\_\_\_

**BLAKE S. DAVIS**



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