

# [Bond Case Briefs](#)

*Municipal Finance Law Since 1971*

---

## **INVERSE CONDEMNATION - NEW JERSEY**

### [Petrozzi, et. al. v. City of Ocean City](#)

**Superior Court of New Jersey, Appellate Division - October 28, 2013 - A.3d - 2013 WL 5777349**

As the appeals court noted in its opinion, this case involved “recurrent issues facing shore communities and their residents.” “We are asked, primarily, to determine whether a municipality’s failure to perform its part of easement agreements with owners of beachfront properties is due to reasonably unforeseen circumstances beyond its control so as to be relieved of its contractual duty, and, if so, whether these homeowners are nevertheless left without a remedy.”

In 1989, Ocean City participated in a beach replenishment and dunes restoration program. In order to procure the requisite easements from oceanfront homeowners, the City proposed easements containing a restriction that the municipality would construct and maintain the dune system with a height limitation of no greater than three feet above the average elevation of the bulkhead.

Accretion caused areas of the dunes to grow in height and width, and the affected property owners began requesting that Ocean City comply with the dune maintenance provision in their easement agreements. By this time, however, Ocean City was required to apply for a CAFRA permit prior to performing dune maintenance to alter the size or height of any dunes within the municipality. The DEP denied the permit.

Landowners subsequently filed claims against the City alleging breach of the easement agreements and inverse condemnation.

The appeals court agreed with Ocean City that it was entitled to the defense of impossibility. “Not only were the CAFRA amendments and DEP’s subsequent disapproval of Ocean City’s permit application beyond the municipality’s control, they were also not reasonably foreseeable events.”

However, the court found that although Ocean City did not breach the contract, it did not automatically follow that the landowners were not entitled to monetary relief.

“Here, the parties agreed upon an exchange of performances and because of events not reasonably foreseen, Ocean City’s part of the exchange cannot now take place. Yet the fact remains plaintiffs surrendered their right to compensation in reliance on Ocean City’s promise to protect their ocean views. Absent that reliance, Ocean City would have had to pay plaintiffs for depriving them of their views. If Ocean City may retain the benefit of this bargain despite its failure to perform its promise — even if performance was impracticable — without consequence, the municipality would reap a windfall at plaintiffs’ expense and plaintiffs would have given something for nothing. Equity, however, demands some relief for plaintiffs and, therefore, a hearing to determine a fair and just restitutionary amount is warranted.”

“The question remains how to measure damages for restitution in this case. Obviously, the fixing of an appropriate restitutionary amount must consider the value of that which plaintiffs have been deprived, including loss of, or interference with, their ocean views due to the accretive effects. But

offset against the burdens suffered by plaintiffs are the potential gains conferred by the partial consideration performed by Ocean City to date, namely the non-speculative, reasonably calculable benefits arising from the municipality's dune project. These may include the added wave/storm surge protection afforded by the accretive effect of the dunes. We emphasize that the remedy we grant is an equitable one, and not a substitute for eminent domain, for which a jury trial is not appropriate.

The court concluded that the landowners are entitled on remand to a hearing to determine a fair and just restitutionary amount for performing their part of the bargain with Ocean City.