

**BEFORE THE STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES**

IN THE MATTER OF THE PETITION)	
OF OCEAN WIND LLC PURSUANT TO)	
N.J.S.A. 48:3-87.1(f) FOR A)	BPU DOCKET NO. QO22050347
DETERMINATION THAT CERTAIN)	
EASEMENTS AND CONSENTS NEEDED)	
FOR CERTAIN ENVIRONMENTAL)	
PERMITS IN, AND WITH RESPECT TO,)	
THE COUNTY OF CAPE MAY ARE)	
REASONABLY NECESSARY FOR THE)	
CONSTRUCTION OR OPERATION OF)	
THE OCEAN WIND 1 QUALIFIED)	
OFFSHORE WIND PROJECT)	
)	

**REPLY BRIEF OF OCEAN WIND LLC IN RESPONSE TO THE
MOTION OF CAPE MAY COUNTY FILED JUNE 8, 2022**

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I. Introduction

Please accept this reply brief on behalf of Ocean Wind LLC (“Ocean Wind”) in response to a motion filed by the County of Cape May (“County”; “Motion”) on June 8, 2022. The County’s Motion asks the New Jersey Board of Public Utilities (“Board” or “BPU”) “to decline jurisdiction and for the dismissal of the within Petition, without prejudice, as untimely and unripe for disposition and nonjusticiable.” For the reasons set forth in this reply brief, Ocean Wind respectfully asks that the Board deny the County’s Motion. The Motion is replete with factually inaccurate statements and legally unsound arguments, and is little more than an attempt to delay the Ocean Wind 1 Qualified Offshore Wind Project (“Ocean Wind 1” or “Project”; “QOWP”). As such, the Board should deny the Motion and establish a procedural schedule for the conduct and resolution of Ocean Wind’s Petition in this matter.

II. Standard of Review

The County’s Motion fails to even discuss the standard of review applicable to a motion to dismiss a Petition before the Board, let alone argue that it has satisfied its burden. A review of the applicable standards reveals that the Motion does not satisfy them.

Under *N.J.A.C. 14:1-5.4* (Procedures of Board on filing of petition) subsections (a) and (b) provide, in pertinent part as follows:

- (a) If in the opinion of the Board the petition complies substantially with these rules and appears on its face to state a matter within the Board’s jurisdiction, ... the Secretary of the Board shall file same.
- (b) If after review the Board determines that a petition is deficient, the Board may refuse to consider and may issue an order dismissing said petition.

[*N.J.A.C. 14:1-5.4*(a) and (b)].

Section II of the Petition (“Jurisdiction And Regulatory Standard For Approval”) sets forth clearly the basis for the Board’s jurisdiction with respect to the Petition. *Petition*, at pp. 3-6. The Petition was filed pursuant to *N.J.S.A.* 48:3-87.1(f). *Id.*, at p. 3. The Petition sets forth, with supporting testimony and appendices, Ocean Wind’s discussions and communications with the County beginning in 2019, “about the Project, including the consents and property rights required from and with respect to the County.” *Id.*, at p. 4. Having been unable to secure the required consents and property rights, on September 28, 2021, more than ninety (90) days prior to the filing of the Petition on May 20, 2022, Ocean Wind submitted a formal, written request to the County concerning the property rights, consents, and associated actions it required from the County. *See* Exhibit OW-3 (Direct Testimony of Madeline Urbish), at pp. 6-7.

Clearly, the Petition sets forth with specificity the grounds for the Board’s jurisdiction and how Ocean Wind has addressed those grounds. In fact, notwithstanding the County’s characterization of its Motion, it is obvious that the County does not actually challenge the jurisdiction of the Board over the subject matter of the Petition. Instead, as discussed below, the County argues that Ocean Wind has failed to meet the prerequisites for the Board’s ability to act on its jurisdiction because Ocean Wind’s written request to the County dated September 28, 2021 (“September 28 Letter”) was allegedly deficient for a lack of specificity. Thus, it is clear that the County does not claim, nor could it, that the Petition is deficient in any way and, therefore, the Motion does not implicate the Board’s authority to dismiss under *N.J.A.C.* 14:1-5.4.

Nor does the Motion meet the standards under New Jersey Rules of Court, R. 4:6-2(a)¹ pertaining to motions to dismiss for “lack of jurisdiction over the subject matter.” Under such

¹ The Board often looks to the New Jersey Rules of Court when ruling on a motions to dismiss. *See, e.g., I/M/O the Petition of Public Service Electric and Gas Company for Approval of its Clean Energy Future-Electric Vehicle and Energy Storage (“CEF-EVES”) Program on a Regulated Basis, BPU Docket No. EO18101111* (Order on Motion to Dismiss, by Commissioner Chivukula, as presiding officer, dated July

motions a Court is required to “carefully look at the gravamen of the complaint to see whether the claim, however denominated” comes within the Court’s jurisdiction. *See Rosen v. Continental Airlines, Inc.*, 430 N.J. Super. 97, 101, n.2 (App. Div. 2013) (noting that had defendant moved under R. 4:6-2(a), different principles would have applied than are applicable to motions under R. 4:6.2(e) for failure to state a claim upon which relief can be granted). In fact, when a facial challenge based on subject matter jurisdiction is at issue, the Court is required to “carefully look at the gravamen of the complaint to see whether the claim, however denominated,” comes within the Court’s jurisdiction. *A.P. by S.P. v. Allegro School, Inc.*, 2017 WL 4330363, at *6 (D.N.J., Sept. 29, 2017) (affirming dismissal on lack of Federal subject matter jurisdiction under substantially identical Fed.R.Civ.P. 12(b)(1) “lack of subject matter jurisdiction” standard). As discussed above, the Petition sets forth clearly the basis for the Board’s jurisdiction and how the Petition addresses the elements of such jurisdiction and the County has not persuasively even suggested that the Board’s jurisdiction is in question. As the Board has confirmed:

The New Jersey Supreme Court has declared that ‘[a]dministrative agency power derives solely from a grant of authority by the Legislature,’ See e.g., *General Assembly of New Jersey v. Byrne*, 90 N.J. 376, 393 (1982). Thus, an administrative agency, such as the Board possesses only “the powers expressly granted which in turn are attended by those incidental powers which are reasonably necessary or appropriate to effectuate the specific delegation.” *New Jersey Guild of Hearing Aid Dispensers v. Lon*, 75 N.J. 544, 562 (1978) (citations omitted).

I/M/O The Petition of Fiber Technologies Networks, LLC For An Order Finding Unreasonable the Make-Ready Costs Imposed by Verizon New Jersey Inc. et al., BPU Docket No. TO09121004, June 18, 2012 (Order Granting Verizon New Jersey Inc.’s Motion for Interlocutory Review), at p.

4. Here, the Petition establishes that the Board has subject matter jurisdiction over the circumstances and claims made by Ocean Wind and that jurisdiction is fully grounded in the

1, 2020 and ratified by the Board in its Order dated January 27, 2021, at p. 24); *N.J.A.C. 1:1-1.3* (court rules may be applied in administrative proceedings in certain circumstances).

Legislature's grant of authority in and under *N.J.S.A. 48:3-87.1(f)*. Therefore, to the degree the Motion claims that the Board lacks subject matter jurisdiction over the proceeding, the Motion should be denied.

If the basis of the Motion is to argue that Ocean Wind's September 28 Letter was not sufficient to state a claim against the County upon which relief can be granted, this argument is also fatally flawed. On a motion to dismiss for failure to state a claim upon which relief can be granted, the complaint (in this case, the Petition) is "searched to determine if a cause of action can be found within its four corners." *Van Watta Mechanical Corp. v. DiStaulo*, 227 N.J. Super. 175, 180 (App. Div. 1994). Pursuant to R. 4:6-2(e), a court, must grant a defendant's motion to dismiss if the plaintiff's complaint has failed to articulate a legal basis entitling plaintiff to relief. *Sickles v. Cabot Corp.*, 379 N.J. Super. 100, 106 (App. Div. 2005). As a general rule of pleading, "a pleading which sets forth a claim for relief...shall contain a statement of the facts on which the claim is based, showing that the pleader is entitled to relief, and a demand for judgment for the relief to which the pleader claims entitlement." R. 4:5-2. The Petition, as described above, meets each and all of these criteria.

Ruling on a motion to dismiss for failure to state a claim upon which relief can be granted **"requires treating all the allegations of the pleading as true, and considering only whether those allegations are legally sufficient to establish the necessary elements of the claimed cause of action."** *Maxim Sewerage v. Monmouth Ridings*, 273 N.J. Super. 84, 90 (Law Div. 1993)(emphasis added). Plaintiff's factual allegations, must "articulate...a legal basis entitling it to relief." *Camden County Energy Recovery Assocs., supra.*, 320 N.J. Super. at 64. Under this standard, considering all "facts" set forth in Ocean Wind's Verified Petition and pre-filed testimony as true, there is no basis upon which the Petition should be dismissed as a matter of law.

The County's arguments and certification alleging the inadequacy of the September 28 Letter rest not on objective facts, but rather on subjective conclusions that the notice was inadequate. Moreover, the County's allegations concerning defects in the September 28 Letter were never mentioned to Ocean Wind and appear for the first time in its Motion and Certification of Kevin Lare. Indeed, the Certification of Mr. Lare, which was prompted by Ocean Wind's Petition, only now states what the County wants in terms of unequivocal, unconditioned and specific demands from Ocean Wind and compliance with certain other conditions (Certification, at ¶¶55-56), none of which are set forth as requirements in *N.J.S.A. 48:3-87.1(f)*, and all of which may have been addressed had "[e]fforts to fully assess the need for easements [not] been unsuccessful because [the County] has been unwilling to provide information on the status of the land on which Ocean Wind is seeking easements." *Petition*, at ¶49. Rather than provide a basis for dismissal, the County's claims in its Motion and accompanying Certification underscore the very reason for proceedings under *N.J.S.A. 48:3-87.1(f)* – to afford a forum and due process before and under the auspices of the Board for the resolution of the specific needs of the qualified offshore wind project pursuant to the authority granted by the Legislature, if, after consultation with a municipality, county, or other political subdivision of the State, or any agency, authority, or other entity thereof, the qualified offshore wind project is unable to obtain an easement, right-of-way, or other real property interest therefrom after 90 days of a written request therefor to the applicable entity. *N.J.S.A. 48:3-87.1(f)(1) and (2)*.

The Petition has fully and completely alleged a cause of action under *N.J.S.A. 48:3-87.1(f)* and treating all the allegations of the pleading as true, and considering only whether those allegations are legally sufficient to establish the necessary elements of the claimed cause of action" (*Maxim Sewerage v. Monmouth Ridings, supra*), there is no basis upon which to dismiss the

Petition for failure to state a cause of action against which relief can be granted, and, therefore, for the reasons stated herein, the Motion must be denied. *See also I/M/O the Petition of Public Service Electric and Gas Company for Approval of its Clean Energy Future-Electric Vehicle and Energy Storage (“CEF-EVES”) Program on a Regulated Basis*, BPU Docket No. EO18101111 (Order on Motion to Dismiss, by Commissioner Chivukula, as presiding officer, dated July 1, 2020 and ratified by the Board in its Order dated January 27, 2021, at p. 24).

III. Contrary to the County’s argument, the Board is not required to “liberally construe the [Offshore Wind Economic Development] Act in favor of the County.”

In the introductory section to its Motion, the County cites a provision of the New Jersey State Constitution (Article IV, Section VII, paragraph 11) and argues that it requires the Board “to liberally construe the [Offshore Wind Economic Development] Act² in favor of the County: and that “where the Board is faced with competing but similarly weighted arguments by the Petitioner and the County, the Constitution compels the Board to resolve the issue in favor of the County.” Motion, p. 2. The County is incorrect in its interpretation of the N.J. Constitution, its application to OWEDA, and the standard of review of Ocean Wind’s instant Petition.

First, OWEDA is not a “law concerning municipal corporations formed for local government, or concerning counties,” so Article IV, Section VII, paragraph 11 of the N.J. Constitution is not applicable to OWEDA or this proceeding. Second, the entire legislative purpose of OWEDA (and specifically, *N.J.S.A. 48:3-87.1(f)*, the section under which this matter was filed) was to give the Board wide-ranging jurisdiction to allow for the approval and development of offshore wind projects. *N.J.S.A. 48:3-87.1(f)* specifically gives the Board the authority to preempt municipal or county authority in certain, limited circumstances. Accordingly,

² The Offshore Wind Economic Development Act (“OWEDA”), *N.J.S.A. 48:3-87.1 et seq.*

the County's argument concerning deference or favor to the County is contrary to the plain language of OWEDA and is completely misplaced.

Moreover, in corollary statutes and proceedings involving the Board's jurisdiction to supersede local authority, there is unequivocal and long-standing legal precedent that requires the Board to rule in favor of a public utility if the evidence is in equipoise. Under *N.J.S.A. 40:55D-19* and its predecessors, the Board may preempt municipal and county decisions involving issues under the Municipal Land Use Law (*N.J.S.A. 40:55D-1 et seq.*; "MLUL"). The courts of this State have upheld the Board's decisions under this statute for decades, and in doing so have explained that the purpose of such preemption is to prevent a municipality from impeding necessary infrastructure projects that are beneficial to the public at large. *See, e.g., Petition of Monmouth Consolidated Water Company*, 47 *N.J.* 251, 258 (1966) (holding that the Board's jurisdiction is appropriate and important because local officials cannot be expected to balance local interests against the greater good of the public); *In re Public Service Electric & Gas Co.*, 35 *N.J.* 358, 376-77 (1961) (the BPU "must weigh all interests and factors in light of the entire factual picture and adjudicate the existence or non-existence of reasonable necessity therefrom" and "if the balance is equal, the utility is entitled to the preference, because the legislative intent is clear that the broad public interest to be served is greater than local consideration."); *Matter of Petition of S. Jersey Gas Co.*, 447 *N.J. Super.* 459, 481 (App. Div. 2016); *Accord Montville-Whippany App. Div.*, 2019 WL 5681460, at *4; September 2020 Order at 6 (quoting *Public Service*, 35 *N.J.* at 77). This preference flows from the very purpose of the statute—to provide the BPU the power to

perform its duty to protect the public interest and supersede local opposition to a reasonably necessary utility project. *See Application of Hackensack Water Co.*, 41 N.J. Super. 408, 423 (App. Div. 1956) (“Hackensack”) (“The performance of [a utility’s] obligations to the public...cannot be thwarted by contrary action of one municipality...”).

In the seminal *Hackensack* case, the Appellate Division upheld the BPU’s approval of the construction of a water tower in a residential area over the objections of the town and its residents under the statutory predecessor to N.J.S.A. 40:55D-19. The Court reasoned that:

the proper regulation of public utilities and the enforcement of the obligations of proper service are obviously matters of more than local concern. A utility rarely confines its sphere of operations to the boundary lines of one political subdivision. The performance of its obligations to the public and the power of the board to compel such performance in the interest of the general public good cannot be thwarted by contrary action of one municipality, which might well be inclined to view a situation only from the standpoint of its citizens.

[*Hackensack*, 41 N.J. Super. at 422-23].

Thus, the Legislature enacted a statute recognizing “that the public interest in proper regulation of public utilities transcends municipal or county lines, and that a centralized control must be entrusted to an agency whose continually developing expertise will assure uniformly safe, proper and adequate service by utilities throughout the State.” *Public Service*, 35 N.J. at 371. Similarly, the Board has, in its own decisions under N.J.S.A. 40:55D-19, followed the case law precedent with respect to this standard of review. *I/M/O The Petition Of Public Service Electric And Gas Company For A Determination Pursuant To The Provisions Of N.J.S.A. 40:55D-19 (Susquehanna – Roseland Transmission Line)*, BPU Docket No. EM09010035 (Order dated April 21, 2010 at p. 48).

While this proceeding under N.J.S.A. 48:3-87.1(f) is not identical to matters under N.J.S.A. 40:55D-19, there are many similarities. Both statutes involves the Board’s jurisdiction to preempt or override municipal/county authority and both contain a “reasonable necessity” standard. In

regard to the Board's ability to preempt local decisions, Ocean Wind, as the developer of a Qualified Offshore Wind Project approved by the Board, is clearly analogous to the public utility in the long line of precedent discussed above. Accordingly, it is clear that the Board is not required to, and should not, give any deference or preference to the County in this matter.

IV. Ocean Wind's September 28, 2021 letter to Cape May County satisfied the consultation requirement of *N.J.S.A. 48:3-87.1(f)(3)* as to permitting consents.

The County argues that Ocean Wind's September 28 Letter was not specific enough as to the environmental permits/consents needed for the Project and, therefore, did not satisfy the written "request" requirement of *N.J.S.A. 48:3-87.1(f)(2)*, and that provision's 90-day clock, prior to filing the Petition. *Motion, pp. 2-5*. However, the written request and timing requirements of *N.J.S.A. 48:3-87.1(f)(2)* do not apply to permitting consents. As discussed more fully below, Ocean Wind was only required to consult with the County with regard to permitting consents under *N.J.S.A. 48:3-87.1(f)(3)*. The September 28 Letter, along with the various meetings and correspondence detailed in the Direct Testimony of Madeline Urbish, more than satisfied the consultation requirement under OWEDA.

As an initial matter, the County mistakenly conflates the "request" requirement for easements under *N.J.S.A. 48:2-87.1(f)(2)* with the minimal "consultation" requirement under *N.J.S.A. 48:2-87.1(f)(3)*. Preemption of municipal and county consents is governed by section *N.J.S.A. 48:2-87.1(f)(3)*, which provides in part:

(f) Notwithstanding the provisions of any other State law, rule, or regulation to the contrary, a qualified offshore wind project or an open access offshore wind transmission facility approved by the board pursuant to this section shall, after consultation with a municipality, county, or other political subdivision of the State, or any agency, authority, or other entity thereof:

...

(3) be authorized to file a petition with the board seeking a determination that all municipal or county approvals, consents, or affirmative filings with other public entities required to construct or operate a qualified offshore wind project or an open access offshore wind transmission facility are preempted and superseded, upon a finding by the board that such municipal or county approvals, consents, or affirmative filings are reasonably necessary for the construction or operation of the qualified offshore wind project or the open access offshore wind transmission facility.

N.J.S.A. 48:3-87.1(f)(3) (emphasis added)

Pursuant to *N.J.S.A. 48:2-87.1(f)(3)*, Ocean Wind was permitted to file this Petition for the preemption of the County's consents "after consultation" with the County. Black's Law Dictionary defines "consultation" as "[a] meeting in which parties consult or confer." *Consultation*, Black's Law Dictionary (8th ed. 2004). As detailed in the Direct Testimony of Madeline Urbish, Ocean Wind consulted with the County about the Project, through various communications, including meetings, for more than two years prior to filing this Petition. During this extensive consultation period, Ocean Wind discussed with the County, among other things, its jurisdiction over certain roads impacted by the Project, the consents needed for environmental permitting, and the methods by which the County's consent could be confirmed. Thus, Ocean Wind clearly satisfied the consultation requirement of *N.J.S.A. 48:2-87.1(f)(3)*.

Even if the statute were construed so that the requirements of *N.J.S.A. 48:2-87.1(f)(2)* apply to permitting consents, Ocean Wind satisfied those requirements through the September 28, 2021 letter.³ The September 28 Letter was detailed and provided more information than required under OWEDA. Specifically, the September 28 Letter identifies the New Jersey Department of Environmental Protection ("NJDEP") permit applications that the Project would need relevant to

³ The County also cites to *N.J.S.A. 48:3-87.1(g)* to argue that "no competent requests" were made. However, Ocean Wind did not file the Petition under that section of the statute. Further, that section of the statute would not apply since it is limited to the preemption of ordinances and regulations adopted pursuant to the Municipal Land Use Law, *N.J.S.A. 40:55D-1 et seq.*

the County. These include NJDEP Division of Land Resource Protection (“DLRP”) permits (through the multi-permit application process that encompasses Waterfront Development Act permits, Coastal Area Facility Review Act permits, and coastal and freshwater wetlands permits). A number of other permits were identified as well. In addition, the September 28 Letter identified other approvals and consents needed from the County that may be needed in connection with other governmental entities (including the Cape Atlantic Conservation District and County Planning Board). The September 28 Letter provided the County with the statutory 90-day notice for requests for easements under *N.J.S.A. 48:3-87.1(f)(2)* and set forth with specificity the permits that are reasonably necessary for the Project for which the County’s consent is or may be required.

The County attempts to concoct an argument that the request set forth in the September 28 Letter lacked specificity based primarily on two phrases: “are anticipated to include” and “if required.” However, as explained above, Ocean Wind provided the County with a specific list of all permits that were known to be reasonably necessary for the Project and that may require the County’s consent. Therefore, all of the County’s arguments about the lack of specificity with respect to environmental permits and consents within the September 28 Letter are not valid.

Further, the County argues that Ocean Wind failed to comply with the “pre-action requirements” of OWEDA because the “demand” for the County to sign the Property Owner Certification Form did not qualify as a “request” under the statute. However, the County appears to be confused about the purpose of the Property Owner Certification Form (“Certification Form”) and how it fits within *N.J.S.A. 48:3-87.1(f)(3)*. The Certification Form is not a separate permit or approval but is simply a way of evidencing a landowner’s consent associated with environmental permitting.

Given the County's misunderstanding, it is important to explain the purpose of the consents required for environmental permitting and how the Certification Form and the alternative consent letter would satisfy this requirement. The NJDEP and other permitting agencies require that an applicant have the authority to perform the proposed regulated activities on the property subject to the permit application. In instances when the applicant is not the owner of the property, such as a utility with a proposed project that crosses multiple properties, the applicant must provide to the agency an easement or proof that the underlying landowner consents to the applicant performing the regulated activity on the property. Proof of consent can be evidenced through a signed Certification Form or through a letter signed by the landowner stating that it consents to: (1) the proposed regulated activities on its property; (2) the filing of the application with the agency; and (3) the agency performing inspections on the property ("consent letter"). The consent letter also makes clear that the landowner reserves its right to negotiate for any permanent and temporary easements needed and the compensation to be paid for those easements. The NJDEP has historically recognized and accepted consent letters as an alternative to the Certification Form. The NJDEP has approved a form of consent letter for Ocean Wind's Project.

Here, Ocean Wind fully explained to the County the purpose and need for the County's consent for environmental permitting. Specifically, in the September 28 Letter, Ocean Wind requested:

Cape May County's consent for the Project to apply for New Jersey Department of Environmental Protection (NJDEP) Division of Land Resource Protection (DLRP) permits. This consent includes: (1) approval to perform the regulated activities on County land/property; (2) consent for the NJDEP to enter County property; and (3) Cape May County sign-off on Property Owner Certification Form as required for application submission relevant to County property/roads/rights-of-ways.

In response to the letter, the County did not request information about Ocean Wind's permit applications or the consents required for those applications. Instead, the County represented that

it would be completing its own due diligence about the Project. Exhibit OW-3 (Direct Testimony of Madeline Urbish) at p. 8, lines 18-19.

On January 7, 2022, Ocean Wind sent the County (via email) a letter explaining the need for the NJDEP permit consent, along with a copy of the DLRP Owner Certification form. *See* Exhibit A to this reply brief. Further, during an in-person meeting on January 12, 2022 between Ocean Wind and County representatives, Ocean Wind provided the County with the Certification Form and form consent letter approved by the NJDEP. Ocean Wind requested that the County sign either the Certification Form or the consent letter so that Ocean Wind could file its permit applications with the NJDEP. At no time did the County request copies of Ocean Wind's permit applications. If requested, Ocean Wind would have provided the County with a copy of its final permit applications prior to submittal, since the Project is proposed to cross County property. Subsequently, the County voted unanimously to decline to grant its consent to Ocean Wind in connection with its environmental permitting. The only stated reason the County provided for declining to grant its consent was because Ocean Wind filed a petition with the BPU against Ocean City. *See* Exhibit OW-3 (Direct Testimony of Madeline Urbish), Appendix H.

For these reasons, and as set forth in the testimony of Madeline Urbish in support of the Petition, Ocean Wind clearly satisfied both the consultation requirement of *N.J.S.A.* 48:2-87.1(f)(3) and the request requirement of *N.J.S.A.* 48:2-87.1(f)(2). Consequently, the County's argument that Ocean Wind attempted to "shift the burden" of identifying required consents to the County or to the Board does not withstand scrutiny. If anything, Ocean Wind's 90-day notice was over-inclusive, not under-inclusive. Moreover, the County has refused to consent to *any* environmental permit applications. In its Petition and prefiled testimony in this matter, Ocean Wind has specified exactly which County consents it seeks to have the Board preempt. *See*

Petition, pp. 12-13; Exhibit OW-2 (Direct Testimony of Pilar Patterson), pp. 15-17. In sum, the County's claims regarding the September 28 Letter and Certification Form are entirely without merit, both factually and legally, and the Board should reject them.

V. Contrary to the County's arguments, Ocean Wind's April 12, 2022 offer to acquire easements was sufficient and valid; the provisions of the Eminent Domain Act cited by the County are not applicable to the pending Petition.

Beginning at page 6 of the Motion, the County devises an argument that Ocean Wind's April 12, 2022 offer ("April 12 Offer") to acquire easements across the County's property identified as Block 3350.01, Lot 17.01 in Ocean City (the "Property") was legally deficient. Like its argument with respect to permit application consents, this argument also consists of parsing language in the letter down to individual words and then claiming that the request was too vague or ambiguous. This argument, like the others in the Motion, is factually inaccurate and legally vacuous.

In fact, the April 12 Offer was a specific offer to acquire both a permanent and temporary (during construction) easement from the County. *See* Exhibit OW-3 (Direct Testimony of Madeline Urbish), Appendix J. The April 12 Offer explained the need for the requested easements, proposed compensation, and explained the basis of that offer of compensation (10 times the appraised value of the adjacent parcel owned by Ocean City). The only reason certain aspects of the April 12 Offer were conditional was directly tied to the County's refusal to provide Ocean Wind with information that Ocean Wind has been requesting for months with respect to the Property.

As detailed in the Direct Testimony of Madeline Urbish (Exhibit OW-3) in this matter, Ocean Wind had been trying to confirm whether the Property was public road right-of-way ("ROW") or owned in fee by the County. *See* Exhibit OW-3, p. 12, lines 9 through 16; p. 13, lines

1 through 14. As the County implicitly admits in its Motion, despite repeated requests from Ocean Wind (both informal and via the Open Public Records Act (“OPRA”)), the County was either unable or unwilling to confirm whether the Property was public road ROW. This is a key fact. If it is public road ROW, Ocean Wind does not need to acquire an easement from the County because *N.J.S.A. 48:3-87.1(f)(1)* gives a QOWP the statutory right to construct underground cables within public ROW. This in no way constitutes an attempt by Ocean Wind to “shift the burden” to the County, as alleged in the Motion (at p. 7). If the County does not know whether its own land is public ROW or owned in fee, who does? In fact, the County’s refusal to clearly state whether the Property is public ROW or owned in fee only reveals the County’s lack of cooperation. After repeated requests and OPRA filings, Ocean Wind still has not received a definitive answer from the County. Contrary to the County’s claim, this is not a “shifting of burden”—it is merely evidence of the County’s refusal to engage in meaningful discussion or provide basic information, which in turn necessitated the instant Petition. It strains the bounds of credibility for the County, after it did not provide basic ownership information to Ocean Wind, to now argue that the instant Petition is “premature.” Rather, *N.J.S.A. 48:3-87.1(f)* was enacted to address this exact situation and afford relief to a QOWP where a municipality or county is attempting to block construction of the onshore portion of a Project through lack of cooperation.

The County next argues that Ocean Wind did not comply with certain requirements of the Eminent Domain Act, *N.J.S.A. 20:3-1 et seq.* (“EDA”). *Motion*, at pp. 7-10. More specifically, the County claims that it was deprived of “an opportunity to accompany the appraiser during inspection of the property.” *Motion*, at p. 8. Similarly, the County argues that Ocean Wind did not include an appraisal with its offer. *Id.*

The County's argument with respect to the EDA must fail because the procedures it references are not applicable to this Petition under *N.J.S.A. 48:3-87.1(f)*. Although the County states that its "conclusion is supported by the Legislature's incorporation by reference Of he EDA (sic) in *N.J.S.A. 48:3-87.1(f)*", what the County fails to acknowledge is that the specific procedures in OWEDA supersede those in the EDA. *N.J.S.A. 48:3-87.1(f)* states, in relevant part:

If a qualified offshore wind project or an open access offshore wind transmission facility is unable to obtain an easement, right-of-way, or other real property interest from a municipality, county, or other political subdivision of the State, or any agency, authority, or other entity thereof, after 90 days of a written request therefor to the applicable entity, the qualified offshore wind project or open access offshore wind transmission facility, as the case may be, may file a petition with the board seeking authority to obtain the easement, right-of-way, or other real property interest. * * *

If the board determines that the requested easement, right-of-way, or other real property interest are reasonably necessary for the construction or operation of the qualified offshore wind project or open access offshore wind transmission facility, the board shall issue an order approving the acquisition of the requested easement, right-of-way, or other real property interest, and **notwithstanding the provisions of any other State law, rule, or regulation to the contrary**, such order shall effectuate the qualified offshore wind project's or the open access offshore wind transmission facility's property interest and shall be recorded by the appropriate county recording officer at the request of the qualified offshore wind project or open access offshore wind transmission facility.

[*N.J.S.A. 48:3-87.1(f)(2)*, emphasis added].

The inclusion of the "notwithstanding the provisions of any other State law, rule, or regulation to the contrary" language in the statute clearly removes the other requirements of the EDA from this proceeding under OWEDA. In fact, the only reference to the EDA in OWEDA is at the tail end of *N.J.S.A. 48:3-87.1(f)(2)* and is related to the payment of fair compensation after the BPU proceeding has concluded: "Payment of fair compensation for the easement, right-of-way, or other real property interest shall be made to the appropriate entity pursuant to the procedures set forth in the "Eminent Domain Act of 1971," P.L.1971, c.361 (C.20:3-1 *et seq.*)" *N.J.S.A. 48:3-87.1(f)(2)*. Consequently, it is clear that the 90-day notice requirement and other

procedures set forth in OWEDA supersede the procedures in the EDA, up to the time compensation is due to be paid. Therefore, the County's argument that Ocean Wind failed to comply with the appraisal requirement of the EDA is inapposite to this proceeding.

In addition, the County has not suffered any harm or been put at any disadvantage in this situation. Ocean Wind made the offer for the easement on April 12, 2022. The April 12 Offer clearly stated that the proposed dollar amount was based on a multiple of a recent appraisal of adjacent property owned by Ocean City. To date, the County has not responded to the offer. The County is still free to accept the offer or to make a counter-offer. Its failure to do so should have no bearing on the prosecution of this Petition before the Board.

Next, the County argues that the April 12 Offer was the first notice it had of Ocean Wind's need for an easement, and that the 90-day period under *N.J.S.A. 48:3-87.1(f)* began to run from that date and does not expire until July 11, 2022 (which, in turn, would make the May 20, 2022 Petition "premature"). *Motion* at p. 10. This argument too must fail, because Ocean Wind provided written notice of the need for the acquisition of an easement over the same parcel of land in the September 28 Letter. On page 2 of the September 28 Letter⁴, Ocean Wind informed the County of its need to pursue a diversion of a portion of Green Acres-encumbered property at Block 3350.01, Lot 17.01, owned by the County⁵:

⁴ Exhibit OW-3 (Direct Testimony of Madeline Urbish), Appendix F.

⁵ As of the date of the September 28 Letter, Ocean Wind believed that Block 3350.01, Lot 17.01 was encumbered by Green Acres restrictions. As indicated in the Petition in this matter, Ocean Wind has since determined that the Property does not have Green Acres restrictions. *See Petition*, at p. 12.

- Cape May County’s consent to an application to the NJDEP for a diversion of Green Acres property within Ocean City (if required). The Green Acres diversion involves the following property:

Requirement	Property Name/Description	Owner	Municipality	Block	Lot
HDD onshore cable route	Roosevelt Blvd bridge crossing South (East)	Cape May County	Ocean City	3350.01	17.01

At the time the request was made, Ocean Wind was attempting to determine whether the Property was public road ROW or whether it was being used for recreational purposes, which would have potentially required a Green Acres diversion. Given the County’s unwillingness to cooperate, Ocean Wind, out of an abundance of caution, requested that the County go through the Green Acres diversion process in the event the Property was determined to be Green Acres encumbered. The only reason for Ocean Wind to ask the County to go through the diversion process is because it believed it may need an easement on the Property. In other words, the diversion process would ultimately allow the County to convey to Ocean Wind the easements across the Property needed for the Project. The Green Acres regulations define “diversion” to mean “to use or allow the use or control of parkland for other than recreation and conservation purposes, contrary to the Green Acres restrictions.” *N.J.A.C. 7:36-2.1*. The regulations further list as examples of uses that constitute a diversion of funded or unfunded parkland from recreation and conservation purposes, including but not limited to, “public or private utility or other non-recreation easements (surface or subsurface)”. *N.J.A.C. 7:36-25.2(c)*. Therefore, the County had notice of Ocean Wind’s request for easements on the Property on September 28, 2021, which is far more than 90 days before the May 20, 2022 Petition.

In addition, Ocean Wind has discussed the need for easements with the County as far back as July 2020. As stated in Ms. Urbish’s Direct Testimony:

On July 13, 2020, a virtual meeting took place between Project representatives and Cape May County officials, including Commissioner Director Gerald Thornton and Commissioner Will Morey, to discuss the overall Project status and the likely need for easements within the County to further Project progress. County representatives advised Ocean Wind that they did not want to authorize easements until both Ocean City and Upper Township had agreed to their respective easements for the Project. Accordingly, the County's argument that the Petition is premature must be rejected.

Exhibit OW-3, p. 4, lines 17-23.

In addition, when Ocean Wind wrote to the County in January 2022 concerning the DLUR Property Owner Consent form, it also explained that easements over County-owned property would be required. The January 6 letter to the County from Project Development Director Marc Reimer stated:

It is understood that your consent does not constitute a grant of any property rights to Ocean Wind LLC, and your right to negotiate with Ocean Wind LLC for the temporary and permanent easements needed for the Project and the compensation to ultimately be paid for any easements across or the sale of the Property are all reserved.

See Exhibit A to this brief (emphasis added).

Thus, it is clear that County was aware of the Project's need for easements as early as July 2020, and received written communications regard such easements via both the September 28 Letter and the January 2022 letter, both of which were provided far more than 90 days prior to filing the Petition in this matter.

Finally, Ocean Wind must note that the issue of the easements over the Property is likely to become moot. Based on the best information Ocean Wind was able to obtain through its own due diligence (including, as mentioned above, several OPRA requests), it appears that the portion of the Property to be impacted by the Project is, in fact, public road ROW. Ocean Wind's analysis concerning the status of the Property was set forth in the April 12 Offer, which referenced and enclosed, among other things, deeds, filed maps, and construction plans. As discussed above, a QOWP has a statutory right to construct underground cable in the public ROW and does not need

county consent or BPU approval to do so. *N.J.S.A. 48:2-87.1(f)(1)*. In the event that a definitive determination that the Property is public ROW, Ocean Wind will withdraw its relevant requests from the instant proceeding.

VI. Ocean Wind has had ongoing discussions with the County since 2019, but there has been no progress made to resolving the consents or property rights at issue in this matter.

In the final section of its Motion and in the accompanying Certification of Kevin Lare, the County disputes certain aspects of the history of communications between Ocean Wind and the County. *Motion*, at pp. 10-11. The County takes great pains to argue that the implication that it has been “in any way uncooperative, dilatory or obstructionist is false.” *Motion*, at p. 11. This is a curious argument, given that Ocean Wind’s Petition and testimony in no way cast aspersions at the County. Rather, the Petition and Testimony of Madeline Urbish (Exhibit OW-3) simply recounted the communications between the Project and the County from 2019 through 2022 in a factual and accurate manner.

However, the record in this matter is clear that, despite Ocean Wind’s efforts to secure the necessary consents and property rights from the County over a two and one-half year period, there has been no progress. This fact is clear and undisputed. As the Board is well-aware, Ocean Wind 1 has commercial operations deadlines that are fast approaching. To achieve those commercial operations dates, Ocean Wind must secure all the necessary permits and property rights to begin construction of the onshore portion of the Project. The relief Ocean Wind has requested in its Petition is timely and necessary, and Ocean Wind requests that the Board deny the County’s Motion.

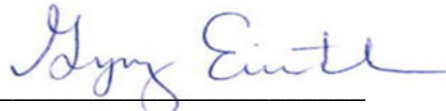
VII. Conclusion

For all the foregoing reasons, Ocean Wind respectfully requests that the Board deny the County's Motion. Ocean Wind also requests that the Board issue a procedural schedule for the conduct of this proceeding.

Dated: June 20, 2022

Respectfully submitted,

COZEN O'CONNOR

By: 
Gregory Eisenstark, Esq.

From: Keith Davis

Sent: Friday, January 7, 2022 2:27 PM

To: Michael Donohue (micdonohue@comcast.net) <micdonohue@comcast.net>

Cc: Greg Werkheiser <greg@culturalheritagepartners.com>; Madeline Urbish (MAURB@orsted.com) <MAURB@orsted.com>; Aaron Bullwinkel <AARBU@orsted.com>

Subject: Land Use Form/Letter - Consent

Mike:

Thanks again for your time this morning. We appreciate the dialogue. As promised, attached are the landowner consent forms to allow the NJ Department of Environmental Protection review to commence.

Looking forward to our meeting next week when of course we can discuss this further. Thank you.
Keith

Keith A. Davis, Esq.

Nehmad Davis & Goldstein, PC, Counselors at Law
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4030 Ocean Heights Avenue
Egg Harbor Township, NJ 08234
Cape May County Office:
2123 Dune Drive – Suite 1
Avalon, NJ 08202

Telephone: 609.927.1177
Fax: 609.926.9721
kdavis@ndglegal.com
www.ndglegal.com

We are now Nehmad, Davis & Goldstein, P.C.! Kindly note our new website and email addresses. Thank you

LEAP Email Reference |F:ee60de80-d5ff-44fc-9150-e292ce1c06b6|M:294749b7-1142-7948-818d-fce12a44d857| (Please do not delete)



January 6, 2021

Cape May County
William E. Sturm, Jr. Administration Building, 4 Moore Road
Cape May Court House, NJ 08210
Phone: 609-465-1000
Email: coclerk@co.cape-may.nj.us

Re: Cape May County Roads and Rights of Way
Ocean City and Upper Township, Cape May County, New Jersey (the "Property")

Dear Sirs,

As part of its proposed Ocean Wind Offshore Wind Farm Project (the "Project"), Ocean Wind LLC will be submitting environmental permit applications to the New Jersey Department of Environmental Protection, which permit applications will, among other properties, impact the above-referenced Property owned by Cape May County.

As the owner of the Property we ask that you consent, by counter-signing this letter below, for Ocean Wind LLC to apply for the necessary environmental permits to conduct the Project activities across portions of the Property.

By signing below, you also give your consent for access to the Property by representatives of Ocean Wind LLC and by representatives or agents of NJDEP for the purpose of conducting a site inspection(s) or survey(s) including but not limited to minor physical disturbances of the Property (e.g., limited to identification of wetland soil and/or hydrology characteristics via handheld small-diameter auger samples).

It is understood that your consent does not constitute a grant of any property rights to Ocean Wind LLC, and your right to negotiate with Ocean Wind LLC for the temporary and permanent easements needed for the Project and the compensation to ultimately be paid for any easements across or the sale of the Property are all reserved.

Very truly yours,

Marc Reimer
Project Development Director, Ocean Wind LLC

Agreed to this date:

Cape May County


New Jersey Department of Environmental Protection

Land Use Management Program

Division of Land Use Regulation

PROPERTY OWNER CERTIFICATION

INSTRUCTIONS: All applicants are required to complete Sections A and B of this form. Applicants who are individual owners of record of the property upon which the activities will occur must also complete Section C.

All other persons who are required to certify to this application in accordance with N.J.A.C. 7:7-23.2(d), N.J.A.C. 7:7A-16.2(d), and N.J.A.C. 7:13-18.2(d) must complete Sections A and C.

Separate forms may be submitted for each signatory, or a single form may be submitted with all required signatures.

SECTION A. SITE INFORMATION (required)

 Project Name: Ocean Wind Offshore Wind Farm Project

 Applicant's Name: Ocean Wind LLC

 Street Address: Ocean Wind LLC, 399 Boylston Street, 12th Floor

 Municipality: Boston

 County: Suffolk

 Zip Code: 02116

 Blocks and Lots: Cape May County Roads and Rights of Way, Ocean City and Upper Township
SECTION B. SIGNATURE OF APPLICANT

The undersigned applicant hereby certifies that he/she is one of the following: 1) an owner of the site on which the activity is proposed or conducted; 2) an agent designated by the site owner(s) to obtain the permit, verification, or letter of interpretation on the owner's behalf; 3) a representative of a public entity proposing an activity within a right-of-way or easement that is held or controlled by that entity or that will be appropriated by the entity under the power of eminent domain; OR 4) a person with the legal authority to perform the proposed activities.

The undersigned applicant also certifies to the following:

1. Does the application include any activities within an easement or right-of-way? ☒ Yes ☐ No
 If "Yes," has written consent from all easement or right-of-way holders in accordance with N.J.A.C. 7:7-23.2(g), 7:7A-16.2(g), and 7:13-18.2(g) been attached to this form? ☒ Yes ☐ No
2. Will any part of the project be located within property belonging to the State of New Jersey? ☒ Yes ☐ No
3. Does the application include activities on any property owned by any public agency that would be encumbered by Green Acres? ☒ Yes ☐ No
4. Does this project require a Section 106 (National Register of Historic Places) Determination as part of a federal approval? ☒ Yes ☐ No

 Applicant's Name: Marc Reimer, Project Development Director

Date: _____

Applicant's Signature: _____

Applicant's Name: _____

Date: _____

Applicant's Signature: _____

Applicant's Name: _____

Date: _____

Applicant's Signature: _____

Applicant's Name: _____

Date: _____

Applicant's Signature: _____

SECTION C. PROPERTY OWNER'S CERTIFICATION

All individual owners of record of the property upon which the activities will occur must certify to this application unless the applicant is a corporation, partnership, sole proprietorship, municipality, or State, Federal, or other public entity. If the applicant is a corporation, a principal executive officer of at least the level of vice president must certify below. In the case of partnerships and sole proprietorships, a general partner or the proprietor, respectively, is required to certify. For a municipality or for a State, Federal, or other public entity, the certification must be provided by either a principal executive officer or ranking elected official.

A duly authorized representative may sign this application on behalf of any individual who is required to certify provided that the authorization is made in writing and is submitted as part of this application. Please note that in lieu of a property owner's signature, a legal agreement with the current property owner may be attached to this form. Acceptable legal agreements include, but are not limited to, certificates of eminent domain and certificates of inverse condemnation. **Please note that contracts of sale are not considered an acceptable substitute for a property owner's signature.**

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining and preparing the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for knowingly submitting false information, including the possibility of fine and imprisonment. I hereby grant permission for the conduct of the proposed activities and consent to allow access to the site by representatives or agents of the Department for the purpose of conducting a site inspection(s) of the property in question.

Name of Owner/Easement Holder: Cape May County Date: _____

Signature: _____

Specific Block(s) and Lot(s) Owned: Cape May County Roads and Rights of Way, Ocean City and Upper Township

Name of Owner/Easement Holder: _____ Date: _____

Signature: _____

Specific Block(s) and Lot(s) Owned: _____

Name of Owner/Easement Holder: _____ Date: _____

Signature: _____

Specific Block(s) and Lot(s) Owned: _____

Name of Owner/Easement Holder: _____ Date: _____

Signature: _____

Specific Block(s) and Lot(s) Owned: _____

Name of Owner/Easement Holder: _____ Date: _____

Signature: _____

Specific Block(s) and Lot(s) Owned: _____

Name of Owner/Easement Holder: _____ Date: _____

Signature: _____

Specific Block(s) and Lot(s) Owned: _____