



NEW JERSEY LAW REVISION COMMISSION

Draft Final Report Concerning Eminent Domain Actions and Interest Rates

June 5, 2023

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes in order to determine the law of the State.

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Project Summary¹

In Title 20 of the New Jersey statutes, the “Eminent Domain Act of 1971,” N.J.S. 20:3-1 et seq. (“Act” or “Eminent Domain Act”), provides “a uniform practice and procedure for the exercise of the power of eminent domain,”² and contains a provision repealing “[a]ll acts and parts of acts inconsistent with any of the provisions of this act.”³ The Act sets forth the manner of fixing interest on a compensation award in eminent domain proceedings. In N.J.S. 20:3-32, the Act provides that “the amount of such interest shall be fixed and determined by the court in a summary manner after final determination of compensation.”⁴

In Title 27 of the New Jersey statutes, the Commissioner of Transportation is authorized to “acquire lands or rights therein . . . by condemnation.”⁵ N.J.S. 27:7-22 also sets forth a fixed interest rate of six percent per annum on just compensation awards.⁶

In *State by Comm’r of Transp. v. St. Mary’s Church Gloucester*, the Appellate Division held that the six percent interest rate provision in N.J.S. 27:7-22 was impliedly repealed by the general repealer provision in N.J.S. 20:3-50.⁷

The Commission released a Tentative Report in February 2023 that proposed modifications consistent with the holding in *St. Mary’s* and additional modifications clarifying the procedure for calculating interest pursuant to N.J.S. 20:3-32.⁸ The Report was distributed to interested and knowledgeable organizations and individuals for comment.⁹

Consistent with the Appellate Division determination in *St. Mary’s Church*, the Commission recommends modifications eliminating the fixed rate interest provisions in N.J.S. 27:7-22 and several additional eminent domain statutes.¹⁰

¹ Legal research and preliminary work on this project was conducted by Daniel Tomascik, Angela Febres, and Lauren Haberstroh during their time with the Commission.

² Eminent Domain Revision Commission, *Report of Eminent Domain Revision Commission*, at 6 (April 15, 1965).

³ N.J. STAT. ANN. § 20:3-50 (West 2022) (“This act shall apply to every agency, authority, company, utility or any other entity having the power of eminent domain exercisable within the State of New Jersey except as exempted in section 49 of this act.”). See also N.J. STAT. ANN. § 20:3-49 (West 2022) (“ . . . this act shall not affect statutes insofar as they regulate the ascertainment and payment of compensation for property condemned or taken by bodies organized and administered as a result of or under compacts between States.”).

⁴ N.J. STAT. ANN. § 20:3-32 (West 2022)

⁵ N.J. STAT. ANN. § 27:7-22 (West 2022).

⁶ N.J. STAT. ANN. § 27:7-22 (“the person or persons to whom the award is payable shall be entitled to recover from the department the difference between the amount of the deposit and the amount of the award, with interest at the rate of 6% per annum thereon from the date of the making of the deposit.”).

⁷ *State by Comm’r of Transp. v. St. Mary’s Church Gloucester*, 464 N.J. Super. 579, 589 (App. Div. 2020).

⁸ See N.J. Law Revision Comm’n, *Tentative Report Concerning Interest Rates in Eminent Domain Actions* (Feb. 16, 2023), www.njlrc.org (last visited Jun. 1, 2023).

⁹ See *infra* pp. 14-17.

¹⁰ N.J. STAT. ANN. § 5:10-9 (West 2022); N.J. STAT. ANN. § 13:8A-24 (West 2022); N.J. STAT. ANN. § 27:23-5 (West 2022); N.J. STAT. ANN. § 40:14A-20 (West 2022); N.J. STAT. ANN. § 40:37A-73 (West 2022); N.J. STAT. ANN. §

With respect to N.J.S. 20:3-32, the Appendix sets forth two options. Commenters expressed concerns that the calculation of interest rates has constitutional implications and that a list of reference sources may be perceived as limiting a court's discretion, even though that is not intended.¹¹ As a result, the first drafting option does not recommend any modification. The second option incorporates language articulating the procedure for calculating the interest rate on just compensation awards, as described by New Jersey courts,¹² as well as language intended to make clear that the list of sources contained in the statute is not exclusive.

Statutes Considered

The relevant portions of the statutes considered by the Appellate Division in *St. Mary's Church* are shown below.

N.J.S. 20:3-32 provides that:

Unless agreed upon by the parties, the amount of such interest shall be fixed and determined by the court in a summary manner after final determination of compensation, and shall be added to the amount of the award or judgment, as the case may be.¹³

N.J.S. 20:3-50 provides that:

All acts and parts of acts inconsistent with any of the provisions of this act are, to the extent of such inconsistency, hereby repealed. This act shall apply to every agency, authority, company, utility or any other entity having the power of eminent domain exercisable within the State of New Jersey except as exempted in section 49 of this act.¹⁴

N.J.S. 27:7-22 provides, in pertinent part, that:

The commissioner may acquire lands or rights therein whether for immediate or future use by gift, devise or purchase, or by condemnation in the manner provided in chapter 1 of the Title Eminent Domain (§ 20:1-1 et seq.), except as otherwise provided by this section.

* * *

40:60-25.58 (West 2022); N.J. STAT. ANN. § 40:68-41 (West 2022); N.J. STAT. ANN. § 52:18A-65 (West 2022); N.J. STAT. ANN. § 58:22-13 (West 2022).

¹¹ See *infra* pp. 14-17.

¹² See *infra* pp. 6-9.

¹³ N.J. STAT. ANN. § 20:3-32 (emphasis added).

¹⁴ N.J. STAT. ANN. § 20:3-50; see also N.J. STAT. ANN. § 20:3-49 (emphasis added).

If the amount of the award as finally determined by the court shall exceed the amount so deposited, the person or persons to whom the award is payable shall be entitled to recover from the department the difference between the amount of the deposit and the amount of the award, with interest rate of 6% per annum thereon from the date of the making of the deposit.¹⁵

* * *

Background

In *State by Comm’r of Transp. v. St. Mary’s Church Gloucester*, the Commissioner of Transportation (“Commissioner”) condemned property belonging to the church for use in a highway construction project.¹⁶ The Commissioner deposited \$1,865,000 with the court as estimated compensation for the property.¹⁷ Following a trial, a jury awarded the church \$2,960,000 as just compensation, which left a balance due to the church of \$1,095,000 with interest.¹⁸

The parties disputed the applicable interest rate. The Commissioner proposed a pre- and post-judgment interest rate calculated in accordance with New Jersey Court Rule 4:42-11, and the church asserted that an interest rate of six percent per annum should be imposed pursuant to N.J.S. 27:7-22.¹⁹ The Commissioner argued that N.J.S. 27:7-22 was repealed by N.J.S. 20:3-50, which requires that the interest rate “be fixed and determined by the court.”²⁰

The trial court determined that N.J.S. 27:7-22 was not repealed by the Eminent Domain Act and stated that the “statute is clear and unambiguous” regarding the appropriate interest rate.²¹ Consequently, it imposed the six percent per annum interest rate required by the statute on the just compensation award.²² The Commissioner of Transportation appealed.²³

Analysis

The Appellate Division began its analysis with a review of the statutory language in N.J.S. 27:7-22 and N.J.S. 20:3-50.²⁴ In N.J.S. 27:7-22, the statute instructs that condemnation be conducted in the manner set forth in Title 20, “except as otherwise provided by this section.”²⁵ The *St. Mary’s Church* Court noted that the “exception” later in the statute that provides for a six

¹⁵ N.J. STAT. ANN. § 27:7-22 (emphasis added).

¹⁶ *St. Mary’s Church*, 464 N.J. Super. at 582.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 583; *see also* N.J. STAT. ANN. § 20:3-50.

²¹ *Id.* at 583.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 584.

²⁵ N.J. STAT. ANN. § 27:7-22.

percent interest rate is imposed when “the amount of the award as finally determined by the court shall exceed the amount ... deposited.”²⁶

The *St. Mary’s Church* Court also addressed the provisions of the Eminent Domain Act. In addition to the general repealer in N.J.S. 20:3-50, the Court cited to N.J.S. 20:3-6, which provides that “condemnation of . . . property and the compensation to be paid therefor[,] . . . and all matters incidental thereto and arising therefrom shall be governed, ascertained and paid by and in the manner provided in this act”²⁷ The Court addressed the conflict between the Eminent Domain Act and N.J.S. 27:7-22, as an issue of first impression.²⁸

Finding that it could not “rely solely on the plain language of the statutes because their provisions . . . express conflicting mandates,” the Court in *St. Mary’s Church* examined the legislative intent in enacting the Eminent Domain Act.²⁹

To determine whether the Legislature intended to repeal the interest rate provision in N.J.S. 27:7-22, the Court considered the factors set forth in *Mahr v. State*,³⁰ which include: (1) an “intention to effectuate a repeal [that] is clear and compelling;” (2) “a clear repugnancy between the two acts, or a manifest intention to cover the same subject matter by way of revision; or” (3) a “purpose to repeal prior legislation . . . revealed” by “the specific provision in relation to the general object of a statute.”³¹

The *St. Mary’s Church* Court found that “[e]ach of these factors militate toward a conclusion that N.J.S.A. 20:3-50 repealed the interest provision of N.J.S.A. 27:7-22.”³² The New Jersey Supreme Court “has held that the Legislature’s primary purpose when enacting the Act was ‘to make uniform the legal requirements for all entities and agencies having the power to condemn.’”³³ The statutes also “clear[ly] . . . are repugnant to each other,” in that one provides a mandatory six percent interest rate and the other “vests in the trial court the discretion to set a rate.”³⁴

Finally, the Court noted that early versions of the Act contained a six percent interest rate, which “mirrored that in N.J.S.A. 27:7-22.”³⁵ Prior to enactment, however, the proposed legislation

²⁶ *St. Mary’s Church*, 464 N.J. Super. at 584.

²⁷ *Id.* at 584; *see also* N.J. STAT. ANN. § 20:3-6 (West 2023).

²⁸ *Id.* at 585 (“We uncovered no precedential authority addressing the issue before the court.”).

²⁹ *Id.* at 586.

³⁰ 12 N.J. Super. 253, 261 (App. Div. 1951).

³¹ *St. Mary’s Church*, 464 N.J. Super. at 587, *quoting Mahr*, 12 N.J. Super. at 261.

³² *St. Mary’s Church*, 464 N.J. Super. at 587.

³³ *Id.*, *quoting Cty. Of Monmouth v. Wissell*, 68 N.J. 35, 43 (1975).

³⁴ *St. Mary’s Church*, 464 N.J. Super. at 588.

³⁵ *Id.*

was amended to remove the fixed interest rate provision,³⁶ which demonstrated that “the Legislature intended uniformity in condemnation to include interest rates set through the exercise of judicial discretion.”³⁷

Accordingly, the Appellate Division held that “[t]he fixed-interest provision [in N.J.S. 27:7-22] was impliedly repealed by N.J.S.A. 20:3-50.”³⁸

Calculation of Interest Rate Pursuant to N.J.S. 20:3-32

When fixing the interest rate on a just compensation award pursuant to N.J.S. 20:3-32 in the Eminent Domain Act,³⁹ courts have been directed to consider the following: “prevailing commercial interest rates, the prime rate or rates, and . . . the applicable legal rates of interest.”⁴⁰

Appellate Division Decisions

This direction originated in *Wayne Twp. in Passaic County v. Cassatly*, which was decided four years after the enactment of Act.⁴¹ The *Cassatly* Court considered an appeal by a municipality of a 7% interest rate imposed by the trial court on a just compensation award.⁴² The trial judge did not hold an evidentiary hearing on the issue and gave “[n]o reasons” for his imposition of a 7% interest rate.⁴³

The Court noted that “[i]nterest is . . . regarded as part of the condemnee’s constitutional right to just compensation.”⁴⁴ With respect to fixing an interest rate, the Appellate Division stated that N.J.S. 20:3-32 “expressly provides the judge with flexibility in determining the appropriate interest rate in a given case and seems to implement the view that the awarding of interest is best considered on a case-by-case basis.”⁴⁵

³⁶ See Senate Amendments to Assembly Bill No. 504, at 3 (May 10, 1971) (“Amend page 14, section 39, line 1, omit ‘at 6%’, insert ‘as set by the court.’”); see also Governor William T. Cahill Objections to Assembly Bill No. 504, at 8 (Dec. 2, 1971) (“Page 15, section 36, line 2: Delete ‘per annum’”).

³⁷ *St. Mary’s Church*, 464 N.J. Super. at 588; see also Eminent Domain Revision Commission, *Report of Eminent Domain Revision Commission*, at 39 (Apr. 15, 1965) (“The courts have awarded interest at 4% . . . [s]ome agencies pay at the rate of 6% . . . Accordingly, it is recommended that interest at 6% per annum on the amount of compensation (exclusive of any amount deposited in court) be paid by the condemning agency . . .”).

³⁸ *St. Mary’s Church*, 464 N.J. Super. at 589 (“the trial court erred in determining that N.J.S.A. 27:7-22 mandated six percent interest on St. Mary’s just compensation award.”).

³⁹ N.J. STAT. ANN. § 20:3-32 (“Unless agreed upon by the parties, the amount of such interest shall be fixed and determined by the court in a summary manner after final determination of compensation, and shall be added to the amount of the award or judgment, as the case may be.”).

⁴⁰ *Wayne Twp. in Passaic Cnty. v. Cassatly*, 137 N.J. Super. 464, 474 (App. Div. 1975), *certif. denied*, 70 N.J. 137 (1976).

⁴¹ *Wayne Twp. in Passaic Cnty. v. Cassatly*, 137 N.J. Super. 464, 474 (App. Div. 1975), *certif. denied*, 70 N.J. 137 (1976).

⁴² *Id.* at 471.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 472.

For that reason, the *Cassatly* Court cautioned “that the appropriate rate of interest cannot be determined by an uninformed judge.”⁴⁶ It instructed that a judge should “receiv[e] evidence as to prevailing commercial interest rates, the prime rate or rates, and . . . the applicable legal rates of interest.”⁴⁷ Of these, the court should impose an interest “rate . . . which will best indemnify the condemnee for the loss of use of the compensation to which he has been entitled from the date on which the action for condemnation was instituted, less interest on all amounts previously deposited from the date of deposit.”⁴⁸ *Cassatly* provided that the interest rate “selected by the court is designed to . . . put [the property owner] in the same position he would have been in had [he] been paid in full on the date the action was commenced.”⁴⁹

A court’s discretion to fix the rate of interest on a just compensation award pursuant to N.J.S. 20:3-32 has been consistently described by New Jersey courts over the last fifty years.⁵⁰ The case law has uniformly held that judges should consider “prevailing commercial interest rates, the prime rate or rates, and . . . the applicable legal rates of interest,” in order to make an informed decision regarding the interest rate that “best indemnif[ies] the condemnee for the loss of use of the compensation.”⁵¹

The Appellate Division has not required an evidentiary hearing in every case,⁵² but has noted that “the statutory requirement mandating interest be fixed ‘in a summary manner’ does not reasonably imply ‘a proceeding devoid of evidential input.’”⁵³ Furthermore, the Appellate Division has also held that “when the action has been pending for a substantial period of time during which the level of interest rates has been a changing phenomenon, we have mandated

⁴⁶ *Id.* at 474.

⁴⁷ *Id.* (“[t]he statutory requirement that the rate of interest be determined ‘in a summary manner’ does not necessarily imply a proceeding devoid of evidential input.”).

⁴⁸ *Id.* at 475 (noting also that “[i]f no evidence is given as to the prevailing commercia[l] rate, the court may conclude that the legal rate of interest reflects that rate” and cautioning that “[t]he interest rate selected should not . . . exceed the legal rate”).

⁴⁹ *Id.*

⁵⁰ *Casino Reinvestment Dev. Auth. v. Hauck*, 317 N.J. Super. 584, 587 (App. Div. 1999), *aff’d*, 162 N.J. 576 (2000) (holding that the court’s consideration of “the prevailing commercial interest rates, the prime rate or rates, and the applicable legal rates of interest,” indicated the judge had “properly fulfilled its statutory function”); *see See Twp. of W. Windsor v. Nierenberg*, 345 N.J. Super. 472, 478 (App. Div. 2001) (citing the *Cassatly* language to describe the statutory function of the judge under N.J.S. 20:3-32); *see also Twp. of Piscataway v. S. Washington Ave., L.L.C.*, 2011 WL 3667616, at *1 (N.J. Super. Ct. App. Div. Aug. 23, 2011) (reiterating that after considering “prevailing commercial interest rates, the prime rate or rates, and the applicable legal rates of interest . . . [t]he court’s obligation . . . is not to select among those rates [but] to ‘select that rate or rates of interest which will best indemnify the condemnee for the loss of use of the compensation.’”).

⁵¹ *See Cassatly*, 137 N.J. Super. at 475; *see also Piscataway*, 2011 WL 3667616, at *7 (reminding that “[t]he focus . . . is not on what [the condemnor] saved by delayed payment but on what the [condemnee] lost because of the delayed payment”).

⁵² *Hauck*, 317 N.J. Super. at 595 (finding that the Law Division “fairly considered” the “documentary submissions” of the property owner regarding the appropriate rate of interest, and held that it “discern[ed] no error in the award of interest”).

⁵³ *Id.*

plenary hearings for the presentation of expert evidence as to the prevailing commercial and legal rates of interest.”⁵⁴

New Jersey Court Rule 4:42-11

The Appellate Division has repeatedly upheld awards of simple interest rates based on New Jersey Court Rule 4:42-11,⁵⁵ which provides an additional interest rate to consider when determining the rate that will “best indemnify” the condemnee.⁵⁶ Rule 4:42-11 sets forth “Post Judgment Interest” rates in subsection (a), and in subsection (b), it provides the manner of calculating interest in “Tort Actions.”⁵⁷

The calculation of post-judgment interest, pursuant to subsection (a) of the rule, is dependent on the date and amount of the judgment. For judgments entered after January 1, 1986, subsections (a)(ii) and (iii) are applicable.⁵⁸ If a judgment does not exceed the monetary limit of the Special Civil Part when entered,

the annual rate of interest shall equal the average rate of return, to the nearest whole or one-half percent, for the corresponding preceding fiscal year terminating on June 30, of the State of New Jersey Cash Management Fund (State accounts) as reported by the Division of Investment in the Department of the Treasury, but the rate shall be not less than 0.25%.⁵⁹

In subsection (a)(iii), which applies to judgments that exceed the Special Civil Part limit, interest

⁵⁴*Jersey City Redevelopment Agency v. Clean-O-Mat Corp.*, 289 N.J. Super. 381, 400 (App. Div. 1996), *citing Cassatly*, 137 N.J. Super. at 474.

⁵⁵ *See e.g. Hauck*, 317 N.J. Super. at 595 (“[i]n allowing interest commensurate with the rates set by R. 4:42-11, the Law Division cited the fact that unlike *Cassatly*, where interest rates substantially increased during the pendency of the condemnation action, . . . interest rates had remained stable during the pendency of these proceedings”); *Borough of Saddle River*, 424 N.J. Super. 516, 541 (App. Div. 2012), *rev'd and remanded*, 216 N.J. 115 (2013); *City of Long Branch v. W. of Pier Assocs., LLC*, 2014 WL 563812, at *5 (N.J. Super. Ct. App. Div. Feb. 13, 2014) (finding that “the judge considered all of the testimony presented by the parties, together with the extensive documentary record, and properly concluded that the rate set forth in [R. 4:42-11] best indemnified defendants for the loss of the use of the compensation to which they were entitled”); *Parking Auth. of City of Camden v. Est. of Rubin*, 2020 WL 635701, at *11 (N.J. Super. Ct. App. Div. Feb. 11, 2020) (“[i]n deciding to apply the court rule interest rate, the judge relied on several factual findings: the court rule interest rate had remained stable throughout the proceedings; defendant's property was losing money at the time of the taking; defendant had requested an award three times the jury's verdict; and defendant contributed to delays in the proceedings.”).

⁵⁶ *Hauck*, 317 N.J. Super. at 594 (explaining that the interests rates set by New Jersey Court Rule 4:442-11 “essentially track the Cash Management Fund rates”).

⁵⁷ N.J. Ct. R. 4:42-11 (West 2022); N.J. Ct. R. 4:42-11(b) (providing for pre-judgment simple interest in “tort actions, including products liability actions,” but not “on any recovery for future economic losses . . . in the same amount and manner provided for by paragraph (a) of” R. 4:42-11(a)).

⁵⁸ N.J. Ct. R. 4:42-11(a)(i) (setting forth interest rates “[f]or periods prior to January 2, 1986”).

⁵⁹ N.J. Ct. R. 4:42-11(a)(ii); *see also* N.J. Ct. R. 6:1-2(a)(1) (including in “Matters Cognizable in the Special Civil Part,” certain “[c]ivil actions . . . seeking legal relief when the amount in controversy does not exceed \$20,000”).

is calculated “at the rate provided in subparagraph (a)(ii) plus 2% per annum.”⁶⁰

In each year since 2017, the Supreme Court has issued an order setting the annual rate of interest in subsections (a)(ii) and (iii) for the next calendar year.⁶¹ An order issued on October 25, 2022, indicates that the “post-judgment annual rate of interest” in subsection (a)(ii) will be 0.25%, and 2.25%, in subsection (a)(iii).⁶²

The Eminent Domain Act explicitly provides for the imposition of pre-judgment interest by requiring that “[i]nterest as set by the court upon the amount of compensation determined to be payable hereunder shall be paid by the condemnor from the date of the commencement of the action until the date of payment of the compensation.”⁶³ In *St. Mary’s Church*, the Commissioner of Transportation argued that the rate of interest on the compensation award should be calculated in accordance with R. 4:42-11(a)(iii), with respect to both the pre-⁶⁴ and post-judgment rate.⁶⁵

The Appellate Division has consistently interpreted N.J.S. 20:3-32 to require courts to consider a variety of interest rate sources when fixing an appropriate interest rate on a just compensation award. The uniform language employed by the courts in this context provides clear guidance to courts exercising their discretion pursuant to N.J.S. 20:3-32.

Other Eminent Domain Statutes

As directed by the Commission during the October 2021 meeting, Staff conducted a review of New Jersey’s eminent domain statutes and identified other statutes that conflict with the Eminent Domain Act in the same manner as N.J.S. 27:7-22.

Statutes Imposing Six Percent Interest Rate

In addition to N.J.S. 27:7-22, language setting a six percent fixed interest rate on just

⁶⁰ N.J. Ct. R. 4:42-11(a)(iii).

⁶¹ Publisher’s Note, N.J. Ct. R. 4:42-11 (West 2022).

⁶² *Id.*

⁶³ N.J. Stat. Ann. 20:3-31 (West 2022) (emphasis added); see *Nierenberg*, 345 N.J. Super. 472, 475 (“[the judge] concluded that when market rates are stable, pre-judgment interest should be based on *Rule* 4:42–11 simple interest rates.”); see also *Cassathy*, 137 N.J. Super. at 468-69 (“[t]he Superior Court, Law Division, entered judgment on verdict for damages and awarded prejudgment interest of 7% Excess over amount previously deposited by plaintiff, calculated from date action was commenced”).

⁶⁴ See *DialAmerica Mktg., Inc. v. KeySpan Energy Corp.*, 374 N.J. Super. 502, 504 (App. Div. 2005) (“[i]n this appeal from an award of prejudgment interest, we are . . . called upon to construe *the prejudgment interest provisions of R. 4:42–11(a)*, applicable in tort actions, in the context of a suit claiming contractual damages.”) (emphasis added). The *Keyspan* court noted that, in the context of a contract claim, “prejudgment interest is assessed on a discretionary basis as the result of the application of equitable principles,” *id.*, and therefore, “the strictures of *R. 4:42–11* apply by their literal terms only to tort actions.” *Id.* at 508.

⁶⁵ *St. Mary’s Church*, 464 N.J. Super. at 582 (“[t]he Commissioner submitted a proposed order awarding pre-judgment interest of 3.5%, which reflects 1.5% interest plus 2% per annum in accordance with Rule 4:42-11(a)(iii), and post-judgment interest in annual rates ranging from 2.25% to 3.5%, also in accordance with Rule 4:42-11(a)(iii).”).

compensation awards appears in seven other statutes authorizing the exercise of eminent domain.⁶⁶ These seven statutes are contained in five different titles and were enacted prior to, or at about the same time as,⁶⁷ the Eminent Domain Act of 1971.⁶⁸ The language imposing a six percent interest rate is basically identical to that in N.J.S. 27:7-22⁶⁹ in all but one of these statutes.⁷⁰

The language of these other eminent domain statutes differs a bit from the language in N.J.S. 27:7-22 which states that the exercise of eminent domain should be exercised in accordance with Title 20⁷¹ “except as otherwise provided.”⁷² Both N.J.S. 13:8A-24 and N.J.S. 58:22-13 contain language that is very similar to the language in N.J.S. 27:7-22.⁷³ Two statutes – N.J.S. 27:23-5 and N.J.S. 52:18A-65 – provide that “the compensation to be paid . . . shall be ascertained and paid in the manner provided in [Title 20], insofar as the provisions thereof are applicable and not inconsistent with the provisions contained in this act.”⁷⁴ The remaining three statutes do not contain a caveat to the language directing that the power of eminent domain (or condemnation) is exercised in accordance with Title 20.⁷⁵

⁶⁶ N.J. STAT. ANN. § 13:8A-24; N.J. STAT. ANN. § 27:23-5j.; N.J. STAT. ANN. § 40:14A-20; N.J. STAT. ANN. § 40:37A-73; N.J. STAT. ANN. § 40:68-41d.; N.J. STAT. ANN. § 52:18A-65; N.J. STAT. ANN. § 58:22-13.

⁶⁷ N.J.S. 13:8A-24 was signed into law in January 1972, and therefore, was enacted *after* the Eminent Domain Act, which was enacted on December 21, 1971. L.1971, c. 361, § 1. However, it was not until May 1971 that legislators removed the six percent interest rate from N.J.S. 20:3-32. *See* Amendments to A.B. 504, *supra* note 36, at 3.

⁶⁸ L.1948, c.454, p.1860, §5 (N.J.S. 27:23-5); L.1946, c. 138, p. 662, § 20, eff. April 23, 1946 (N.J.S. 40:14A-20); L.1967, c. 184, § 15, eff. July 27, 1967 (N.J.S. 40:68-41); L.1960, c. 183, p. 749, § 30, eff. Jan. 18, 1961 (N.J.S. 40:37A-73); L.1950, c. 255, p. 880, § 16 (N.J.S. 52:18A-65); L.1958, c. 34, p. 106, § 13 (N.J.S. 58:22-13).

⁶⁹ N.J. STAT. ANN. § 27:7-22 (“[i]f the amount of the award as finally determined by the court shall exceed the amount so deposited, the person or persons to whom the award is payable shall be entitled to recover from the department the difference between the amount of the deposit and the amount of the award, with interest rate of 6% per annum thereon from the date of the making of the deposit.”) (emphasis added).

Four statutes do not include the phrase “by the court” in the sentence setting a six percent interest rate. N.J. STAT. ANN. § 27:23-5j.; N.J. STAT. ANN. § 40:14A-20; N.J. STAT. ANN. § 40:37A-73; N.J. STAT. ANN. § 40:68-41d..

⁷⁰ *See* N.J. STAT. ANN. § 52:18A-65 (“[i]f the amount adjudged to be due him shall exceed the amount so deposited, he shall be entitled to recover from the Authority the excess with interest at the rate of six per centum (6%) per annum thereon from the date of making the deposit.”) (emphasis added).

⁷¹ *See* N.J. STAT. ANN. § 20:3-48 (West 2022) (“Any reference to Title 20 of the Revised Statutes or to any section or sections thereof or any amendment or supplement thereof in any other statute, in effect on the effective date of this act, shall hereafter be given effect as though reference therein were made to this act or the applicable provisions thereof.”).

⁷² N.J. STAT. ANN. § 27:7-22 (“by condemnation in the manner provided in chapter 1 of the Title Eminent Domain (§ 20:1-1 et seq.), except as otherwise provided by this section.”) (emphasis added).

⁷³ N.J. STAT. ANN. § 13:8A-24 (“by the exercise of the power of eminent domain in the manner provided in chapter 1 of Title 20 of the Revised Statutes,¹ except as otherwise provided by this act”) (emphasis added); N.J. STAT. ANN. § 58:22-13 (“[w]henver the power of condemnation is exercised by the department pursuant to this act, the provisions of chapter 1 of Title 20 (Eminent Domain) of the Revised Statutes, as amended and supplemented,¹ shall be applicable and such power of condemnation shall include the condemnation of public as well as privately owned property, except as otherwise provided by this act.”) (emphasis added).

⁷⁴ N.J. STAT. ANN. § 27:23-5j. (“in the manner provided in the “Eminent Domain Act of 1971.” P.L.1971, c. 361 (C.20:3-1 et seq.)”); N.J. STAT. ANN. § 52:18A-65 (“in the manner provided in chapter one of Title 20 of the Revised Statutes”) (emphasis added).

⁷⁵ N.J. STAT. ANN. § 40:14A-20 (“Every sewerage authority is hereby empowered . . . to acquire and take such real property. . . , by condemnation, in the manner provided by chapter 1 of Title 20, Eminent Domain, of the Revised Statutes (R.S. 20:1-1 et seq.)¹ and, to that end, may invoke and exercise in the manner or mode of procedure prescribed

There is no case law addressing whether the general repealer in N.J.S. 20:3-50 repeals the fixed interest rate provisions in these additional eminent domain statutes. There are also no pending bills that addresses the impact of N.J.S. 20:3-50 on these statutes.⁷⁶

Since these statutes pre-date the Eminent Domain Act and employ language which closely tracks the relevant language in N.J.S. 27:7-22, the reasoning and holding of *St. Mary's Church* regarding the effect of the general repealer provision in the Eminent Domain Act appears to be applicable to these statutes as well.⁷⁷

Statutes Imposing the “Legal Rate” of Interest

In addition to the seven statutes discussed above, there are four statutes that direct courts to impose interest at the “legal rate” on a just compensation award.⁷⁸ The *Cassatly* Court provided that “the legal rate. . . is[] the rate permitted to be contracted under the usury statute,” in N.J.S. 31:1-1.⁷⁹ The current version of the usury statute provides that “no person shall, upon contract,

in said chapter . . . , all of the powers of such local unit or units to acquire or take property for public use.”) (emphasis added); N.J. STAT. ANN. § 40:68-41 (“When the district shall have determined upon the construction of any particular project facility or structure authorized by this act, it may proceed to condemn and take land or water rights and structures necessary therefor in accordance with chapter 1 of Title 20, of the Revised Statutes¹ (Eminent Domain)”) (emphasis added).

The third statute, N.J.S. 40:37A-73, does not refer to Title 20 at all, but a related statute authorizing the power of eminent domain provides that it shall be exercised “in the manner provided for in the “Eminent Domain Act of 1971,” P.L.1971, c. 361 (C.20:3-1 et seq.)” N.J. STAT. ANN. § 40:37A-69 (West 2022).

⁷⁶ There are two pending bills which involve N.J.S. 27:23-5 and one that involves N.J.S. 40:37A-73. With respect to the language addressing eminent domain in N.J.S. 27:23-5, the bills add statutory citations and make the language gender-neutral, but do not otherwise impact the language at issue here. *See* S.B. 376, 2022 Leg., 220th Sess. (Jan. 11, 2022) (“[p]rohibits NJTA from implementing automatic toll increases and increasing tolls for three years; reduces NJTA tolls”) and A.B. 1413, 2022 Leg., 220th Sess. (Jan. 11, 2022) (“[r]equires certain toll road operators and bi-state agency to allow drivers to choose towing company.”).

With respect to N.J.S. 40:37A-73, there is one bill pending that adds statutory citations and allows electronic notice of the filing of a declaration of taking of property. *See* S.B. 2207, 2022 Leg., 220th Sess. (Mar. 7, 2022) (“Electronic Publication of Legal Notices Act”).

⁷⁷ Unlike N.J.S. 27:7-22 and the other eminent domain statutes fixing a six percent interest rate, N.J.S. 27:23-5 has been amended since 1971. *See* L.1984, c. 73, § 41, eff. July 10, 1984; L.1991, c. 183, § 6, eff. June 30, 1991; L.2003, c. 79, § 9. The 1984 amendment did not make any relevant changes, but in 1991 and 2003, the Legislature amended subsection (j), which addresses the power of eminent domain and contains the fixed interest provision. *Id.* In 1991, the Legislature replaced each instance of “chapter one of Title 20 of the Revised Statutes” with “the Eminent Domain Act of 1971.” L.1991, c. 183, § 6, eff. June 30, 1991. In 2003, subsection (j) was substantially revised as part of transitioning the New Jersey Highway Authority and its “projects and functions . . . to the New Jersey Turnpike Authority,” but the fixed interest provision was not altered. Statement to S.B. 2352, 2003 Leg., 210th Leg., at 51 (Feb. 27, 2003) (identical to A.B. 3392).

⁷⁸ N.J. STAT. ANN. § 5:10-9; N.J. STAT. ANN. § 40:37D-8; N.J. STAT. ANN. § 40:60-25.58; N.J. STAT. ANN. § 40:66A-31.4a.

⁷⁹ *Cassatly*, 137 N.J. Super. at 472 (“[a]lthough N.J.S.A. 31:1—1 . . . retained the 6% Legal rate, it allowed for its upward revision to no more than 8% By the Commissioner of Banking and Insurance (later the Commissioner of Banking) with the advice of a special advisory board.”).

take, directly or indirectly for loan of any money, wares, merchandise, goods and chattels, above the value of \$6.00 for the forbearance of \$100.00 for a year”⁸⁰

Unlike the seven statutes that impose a six percent interest rate on compensation awards, statutes that require a court to impose the “legal rate” of interest do not clearly fall within the holding of *St. Mary’s Church* that the six percent fixed interest rate provision in N.J.S. 27:7-22 was repealed by N.J.S. 20:3-50 in the Eminent Domain Act.⁸¹ The interest provision in the Eminent Domain Act, however, explicitly vests the court with discretion to set the interest rate on just compensation awards,⁸² and case law interpreting this provision requires courts to consider various interest rates, not just the “legal rate” of interest.⁸³

Therefore, a provision requiring a court impose the “legal rate” of interest, potentially conflicts with N.J.S. 20:3-32 in a manner similar to N.J.S. 27:7-22, as articulated by the *St. Mary’s Church* decision.

Statutes Imposing the “Legal Rate” of Interest Enacted Prior to the Act

Two of the four statutes that impose the “legal rate” of interest were enacted prior to the Eminent Domain Act.⁸⁴ The “legal rate” of interest provision in N.J.S. 5:10-9 is nearly identical to the fixed interest rate provision in N.J.S. 27:7-22.⁸⁵ The language in N.J.S. 40:60-25.58 is essentially similar, but it provides additional detail regarding the amount of the award subject to interest.⁸⁶

Like the statutes imposing a six percent interest rate, N.J.S. 5:10-9 directs that, when exercising eminent domain, “the compensation to be paid thereunder shall be ascertained and paid in the manner provided in [Title 20] insofar as the provisions thereof are applicable and not inconsistent with the provisions contained in this act.”⁸⁷ N.J.S. 40:60-25.58 does not contain a

⁸⁰ N.J. STAT. ANN. § 31:1-1 (West 2022).

⁸¹ *St. Mary’s Church*, 464 N.J. Super. at 589.

⁸² N.J. STAT. ANN. § 20:3-32 (“[u]nless agreed upon by the parties, the amount of such interest shall be fixed and determined by the court”).

⁸³ *See supra* pp. 6-9.

⁸⁴ L.1971, c. 137, § 9, eff. May 10, 1971 (N.J.S. 5:10-9); L.1967, c. 11, § 2, eff. March 13, 1967 (N.J.S. 40:60-25.58).

⁸⁵ N.J. STAT. ANN. § 5:10-9e. (“[i]f the amount of the award as finally determined shall exceed the amount so deposited, the person or persons to whom the award is payable shall be entitled to recover from the authority the difference between the amount of the deposit and the amount of the award, with interest at the then legal rate from the date of making the deposit.”) (emphasis added).

⁸⁶ N.J. STAT. ANN. §40:60-25.58 (“[i]f the amount so fixed shall exceed the amount so deposited in court by the municipality or otherwise paid to the persons entitled thereto, the court shall enter judgment against the municipality in the amount of such deficiency, together with interest at the legal rate on such deficiency from the date of the vesting of title to the date of the entry of the final judgment (*subject, however, to abatement for use, income, rents or profits derived from such property by the owner thereof subsequent to the vesting of title in the municipality*), and the court shall order the municipality to deposit the amount of such deficiency in court.”) (emphasis added).

⁸⁷ N.J. STAT. ANN. § 5:10-9a.

qualifier, but simply states: “[t]he ultimate amount of compensation shall be determined pursuant to Title 20 of the Revised Statutes.”⁸⁸

There is no case law that addresses the potential conflict between these two statutes and the interest provision in N.J.S. 20:3-32, nor is there any case law providing a further definition of the term “legal rate” of interest in the context of eminent domain. Neither statute has been amended since its enactment, and there are no pending bills addressing either statute.

The two statutes that impose a “legal rate” of interest and that were enacted prior to the Eminent Domain Act seem to be similarly situated to N.J.S. 27:7-22 with respect to the holding in *St. Mary’s Church*.

Statutes Imposing the “Legal Rate” of Interest Enacted After the Act

By contrast, N.J.S. 40:37D-8 and N.J.S. 40:66A-31.4a, which impose the “legal rate” of interest but were enacted after the Eminent Domain Act, do not appear to be similarly situated to N.J.S. 27:7-22.⁸⁹ Significantly, in *St. Mary’s Church*, the Appellate Division relied on factors that are used to determine whether “subsequent legislation will operate to repeal prior legislation without an express repealing clause.”⁹⁰

Despite being enacted after the Act, the language employed in these two statutes is very similar to that used in the other statutes discussed herein.⁹¹ The legislative history of N.J.S. 40:66A-31.4a, however, clearly demonstrates the Legislature’s awareness of the provisions of the Eminent Domain Act.⁹² The Statement accompanying the bill proposing N.J.S. 40:66A-31.4a indicated that the “procedures for ‘taking’ roughly parallel those contained in the Eminent Domain Act of 1971,” specifically “[t]he manner of determining compensation.”⁹³ The Statement continues

⁸⁸ N.J. STAT. ANN. § 40:60-25.58.

⁸⁹ L.1994, c. 98, § 8, eff. Aug. 11, 1994 (N.J.S. 40:37D-8); L.1977, c. 319, § 1, eff. Jan. 10, 1978 (N.J.S. 40:66A-31.4a).

⁹⁰ *Mahr v. State*, 12 N.J. Super. 253, 262 (Ch. Div. 1951) (emphasis added), quoting *State ex rel. Board of Health v. Borough of Vineland*, 72 N.J.Eq. 289, 65 A. 174 (Ch. 1906), *aff’d* 72 N.J.Eq. 862, 68 A. 110 (E. & A. 1907).

⁹¹ N.J. STAT. ANN. § 40:37D-8a. (providing that “the compensation to be paid . . . shall be ascertained and paid in the manner provided in the ‘Eminent Domain Act of 1971,’ . . . , insofar as the provisions thereof are applicable and not inconsistent with the provisions contained in this act,” and instructing the condemnee shall recover “the difference between the amount of the deposit and the amount of the award, with interest at the then legal rate from the date of making the deposit”) (emphasis added); N.J. STAT. ANN. § 40:66A-31.4a (“[t]he ultimate amount of compensation shall be determined pursuant to the Eminent Domain Act of 1971 If the amount so fixed shall exceed the amount so deposited in court by the county or otherwise paid to the persons entitled thereto, the court shall enter judgment against the county in the amount of such deficiency, together with interest at the legal rate on such deficiency from the date of the vesting of title to the date of the entry of the final judgment . . .”) (emphasis added).

⁹² See Senate County and Municipal Government Committee Statement to S.B. 873, 1976 Leg., 219th Sess. (Jan. 1976); see also *Mahr*, 12 N.J. Super. at 261 (“Laws are presumed to be passed with deliberation and with full knowledge by the Legislature of the existing law upon the subject.”), quoting *In re Gopsill*, 77 N.J.Eq. 215, 77 A. 793, 794 (Prerog.Ct. 1910).

⁹³ Senate County and Municipal Government Committee Statement to S.B. 873, 1976 Leg., 219th Sess. (Jan. 1976).

that the provisions in the bill are “more generous” than the Act.⁹⁴

In light of this express recognition, and more generally because the statutes were enacted after the Eminent Domain Act, Staff does not recommend any modifications to N.J.S. 5:10-9 or N.J.S. 40:66A-31.4a.

Outreach

Outreach was conducted to knowledgeable and interested individuals and organizations including: New Jersey Department of Transportation, New Jersey Turnpike Authority; New Jersey Department of State, New Jersey Sports and Exposition Authority; New Jersey League of Municipalities; New Jersey Association of Counties; New Jersey Department of Community Affairs, Division of Local Government Services; New Jersey Attorney General’s Office; New Jersey State Bar Association; and several private attorneys, including those who represented the parties in *St. Mary’s Church*.

Comments were received from private attorneys practicing in the area of eminent domain: Anne S. Babineau with Wilentz, Goldman & Spitzer, P.A.; Peter Wegener with Bathgate, Wegener & Wolf, P.C.; and Anthony F. DellaPelle with McKirdy, Riskin, Olson & DellaPella, P.C.

Support

On behalf of Wilentz, Ms. Babineau indicated that “it would be a good thing to clarify the inconsistency between the NJSA 20:30-32 and the holding [of] the Appellate Division in *St. Mary’s Church*.”⁹⁵

Alternative Language

- *Letter from Peter Wegener*

On behalf of the firm of Bathgate, Wegener & Wolf, P.C., Mr. Wegener submitted a comprehensive letter addressing both the legal background of calculating interest rates in the

⁹⁴ *Id.* For example, N.J.S. 40:66A-31.4a provides that “[u]pon the filing of the declaration of taking and the making of the deposit as aforesaid, the court shall designate a day not exceeding 90 days after such filing, except for good cause shown, on which persons in possession shall be required to surrender possession to the county.” N.J. STAT. ANN. § 40:66A-31.4a. (emphasis added). The Act, by contrast, allows only twenty days for a property owner “to vacate said property or yield possession” once the declaration of taking have been served on him. N.J. STAT. ANN. § 20:3-19 (“[a] property owner who refuses to vacate said property or yield possession and remains in possession more than 20 days after service of notice shall be deemed a trespasser and shall be then liable for rents, issues and profits 20 days after service.”) (emphasis added).

⁹⁵ E-Mail from Anne S. Babineau, Esq., Wilentz, P.A., to Whitney G. Schlimbach, Counsel, NJLRC (Apr. 14, 2023, 11:14 AM EST) (“We do represent many clients in redevelopment related matters and although we take no position on behalf of any client that we have represented or will [re]present, we believe that it would be a good thing to clarify the inconsistency between the NJSA 20:30-32 and the holding [of] the Appellate Division in *St. Mary’s Church*.”) [on file with NJLRC].

context of eminent domain and providing the firm’s position on the proposed modifications.⁹⁶ Mr. Wegener noted that the firm “agree[s] with the proposed statutory modifications to effectuate what seems to be the legislative intent to avoid imposing a fixed rate of interest and to require that a court consider the facts and circumstances of the individual case including prevailing commercial interests rates and/or prime rates.”⁹⁷

However, Mr. Wegener firmly opposed the modification incorporating New Jersey Court Rule 4:42-11 (“tort rule”) into N.J.S. 20:30-32.⁹⁸ Mr. Wegener indicated that “Legislat[ive] authoriz[ation of] consideration of R. 4:42-11 rates is at odds with the philosophy and mandate of having the trial court determine the appropriate rate of interest based upon the facts and circumstances of the individual case.”⁹⁹

Mr. Wegener explained that the tort rule interest rate is significantly lower than other standard interest rates¹⁰⁰ and “bears no rational relationship to the commercial world within which property owners have to live and do business.”¹⁰¹ In addition, the tort rule “provides for simple interest,” while the Appellate Division has affirmed a trial court’s conclusion “that the award of interest must be compounded as a mandate of constitutional dimension.”¹⁰²

In *Township of West Windsor v. Nierenberg*,¹⁰³ the Appellate Division noted “that the argument that there should be a uniform rule is supported by the idea that similarly situated cases should be treated in a like manner.”¹⁰⁴ Conceding that “[a]llowing courts to rely upon the tort rule would treat every case alike,” Mr. Wegener averred that “it would simply be unconstitutional to

⁹⁶ See Letter Re: “Comments on Interest on Condemnation Awards,” from Peter Wegener, Esq., Bathgate, Wegener & Wolf, P.C., to Whitney G. Schlimbach, Counsel, NJLRC, attached to E-Mail from Peter Wegener, Esq., Bathgate, Wegener & Wolf, P.C., to Whitney G. Schlimbach, Counsel, NJLRC (Apr. 14, 2023, 1:53 PM EST) (hereinafter “Wegener Letter”) [on file with NJLRC].

⁹⁷ *Id.* at 1.

⁹⁸ *Id.* (“ . . . it would be a grave error to give legislature imprimatur to New Jersey Court Rule R. 4:42-11 (the tort rule), which bears no rational relationship of any imaginable circumstance involving a fair determination of just compensation to a person whose property has been taken by the government”).

⁹⁹ *Id.* at 2.

¹⁰⁰ *Id.* (noting that the tort rule “provides rates for demand deposits of the New Jersey Cash Management Fund, essentially a checking account for municipalities and government agencies”).

¹⁰¹ *Id.* at 6-7 (noting that “when the situation is reversed and citizens are holding money due to the State . . . [t]he assessed interest rate on the tax balances due . . . is 10% compounded annually,” and comparing the tort rule interest rate, which is “typically an outlier,” to the “Client Mortgage Rate,” the “Prime Rate,” and “N.J. Rates on Tax Balance”).

¹⁰² *Id.* at 4-5 (citing *Borough of Wildwood Crest v. Smith*, 235 N.J. Super. 453, 457 (Law Div. 1988), *aff’d.*, 235 N.J. Super. 404 (App. Div. 1988) (“Just compensation requires that the owners of the land be compensated for the delay or shortfall in the deposit of this amount. If the full value of just compensation had been paid to the property owner contemporaneously with the taking, the landowner would have had the opportunity to earn compound interest on those funds. Prohibiting the landowner from recovering compound interest on a deficiency acts to effectively reduce the awarded past value by understating its worth.”)).

¹⁰³ *Twp. of W. Windsor v. Nierenberg*, 345 N.J. Super. 472, 479-80 (App. Div. 2001).

¹⁰⁴ Wegener Letter, *supra* note 96, at 8 (pointing out that the Appellate Division affirmed the trial court’s decision to apply the prime rate after the trial court heard the testimony of opposing experts, one of whom recommended applying the tort rule interest rate and the other, the prime rate) (citing *Nierenberg*, 345 N.J. Super. at 475-77).

subject any property owner . . . to a rule that his interest is limited to the State’s demand deposit rate at simple rather than compound interest.”¹⁰⁵

Mr. Wegener expressed strong opposition to the inclusion of the tort rule in subsection (b), which sets forth the interest rates a court may consider when determining interest rates, in N.J.S. 20:3-32.¹⁰⁶ Alternatively, he recommended replacing “the interest rate set by N.J. Ct. R. 4:42-11” in subsection (b)(4) with “applicable mortgage rates.”¹⁰⁷

However, Mr. Wegener also emphasized that it “was a deliberate choice by the Legislature” *not* to provide a uniform rule and that the development of such a rule might be best suited to the Civil Practice Committee or a “task force of experience practitioners.”¹⁰⁸ The letter concludes that the inclusion of the tort rule “conflicts with the legislative philosophy of deciding interest on a case by case basis.”¹⁰⁹

- *Memorandum from Anthony DellaPelle*

Mr. DellaPelle similarly sent a Memorandum briefly summarizing the legal background of interest rate calculations in eminent domain actions and setting forth his firm’s position on the proposed modifications to N.J.S. 20:3-32 and the relevant eminent domain statutes.¹¹⁰ Mr. DellaPelle provided that “the recommendations reflect[ing] the holding of . . . *St. Mary’s Church* . . . would likely prevent disputes and appeals based upon contradictory statutory language.”¹¹¹

However, with respect to the modifications to N.J.S. 20:3-32, Mr. DellaPelle explained that,

because the proposed amendments . . . for the first time list suggested sources of information for the court to consider in fixing the rates of interest in an eminent domain action, we are concerned that this new language may be construed to limit the trial court’s consideration of evidence relative to the court’s determination of

¹⁰⁵ Wegener Letter, *supra* note 96, at 8 (continuing “to treat all owners alike by cheating them all is never an appropriate answer”).

¹⁰⁶ *Id.* at 9. See also N.J. Law Revision Comm’n, *Tentative Report Concerning Interest Rates in Eminent Domain Actions*, at 15, Feb. 16, 2023, www.njlrc.org (last visited May 25, 2023).

¹⁰⁷ Wegener Letter, *supra* note 96, at 9 (concluding that “[t]he Legislature can provide more but not less than the constitutional minimum”).

¹⁰⁸ *Id.* at 9 (citing *Nierenberg*, 345 N.J. Super. at 480).

¹⁰⁹ *Id.* at 10 (“Giving a legislative imprimatur to . . . the tort rule . . . would allow the interest to be set on the basis of a rule, which has no rational application to the constitutional mandate, rather than on the facts and circumstances of the individual case and the prevailing commercial rates in the marketplace.”).

¹¹⁰ See Memorandum Re: “Comments relating to the NJLRC’s proposed recommendation to revise *N.J.S.A.* 20:3-32, *N.J.S.A.* 27:7-22, and other relevant eminent domain statutes,” from Anthony DellaPelle, Esq., McKirdy, Riskin, Olson & DellaPelle, P.C., attached to E-Mail from Anthony DellaPelle, Esq., McKirdy, Riskin, Olson & DellaPelle, P.C., to Whitney G. Schlimbach, Counsel, NJLRC (Apr. 14, 2023, 10:52 AM EST) (hereinafter “DellaPelle Memo”) [on file with NJLRC].

¹¹¹ *Id.* at 3.

the rate(s) of interest to be fixed to the sources listed in new proposed N.J.S.A. 20:3-32(b).¹¹²

Mr. DellaPelle explained that “the Legislature has no power to limit the constitutional requirement that the award, and interest on that award, *indemnify* the condemnee for the taking of the owner’s property.”¹¹³ Furthermore, “[i]nterest payable on tort actions [pursuant to the tort rule] do not rise to the constitutional magnitude of interest upon a condemnation award which is a *part and parcel of constitutionally-required just compensation*.”¹¹⁴

Therefore, Mr. DellaPelle opposed the modifications to N.J.S. 20:3-32 because “[a]ny relevant evidence directed to that rate which will best *indemnify* the condemnee should be considered by the court,” and the modifications “appear[] to *limit* the ‘sources’ to which a Court might refer in determining the rate of interest.”¹¹⁵ Mr. DellaPelle characterized the modification as “an invitation to blind application of the Court rule interest rates applicable to prejudgment interest,” and, “[a]s discussed, interest in a condemnation action is a matter of constitutional magnitude bearing little resemblance to judgments in ordinary civil actions.”¹¹⁶

Although emphasizing that modification of N.J.S. 20:3-32 is not necessary, Mr. DellaPelle indicated that the statute should not be modified beyond “simply reiterat[ing] the holding of *Wayne Township in Passaic County v. Cassatly*.”¹¹⁷

However, if the Commission elects to retain the proposed language setting forth the sources a court may consider in N.J.S. 20:3-32, Mr. DellaPelle recommended that “the proposed language be further amended to clarify that the listed sources of potential interest-related evidence *are only examples* and should not in any way preclude the court from considering other sources of admissible evidence.”¹¹⁸

Pending Bills

There are currently no bills pending that involve N.J.S. 20:3-32, nor are there any that addresses N.J.S. 27:7-22 or any of the other statutes included in the Appendix, in relation to the

¹¹² *Id.* at 3-4

¹¹³ *Id.* at 4 (citing *Jersey City Redevelopment Agency v. Kugler*, 58 N.J. 374, 384 (1971)).

¹¹⁴ *Id.* (noting that “courts have recognized the difference” between “claimants” as referenced in the New Jersey Court Rules and “condemnees” in eminent domain actions) (citing *CRDA v. Marks*, 332 N.J. Super. 509 (App. Div. 2000), *certif. denied*, 165 N.J. 607 (2000)).

¹¹⁵ *Id.* at 5.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 6 (“b. In determining the amount of interest, the court shall fix a rate that **justly indemnifies the condemnee for the loss of use of the compensation** to which the condemnee was entitled”) (citing *Wayne Twp. in Passaic County v. Cassatly*, 137 N.J. Super. 464 (App. Div. 1975), *certif. denied* 70 N.J. 137 (1976)).

¹¹⁸ DellaPelle Memo, *supra* note 110, at 6-7 (providing alternative proposed language in a new subsection (b)(5) that a court may consider “any other evidence that may be relevant in fixing the amount of interest that will indemnify the condemnee for its loss”).

holding of the Appellate Division in *St. Mary's Church*.

Conclusion

The recommended modifications in the Appendix reflect the holding of the Appellate Division in *St. Mary's Church*, that the general repealer provision in the Eminent Domain Act repealed the fixed interest provision in N.J.S. 27:7-22. The modifications eliminate provisions imposing a fixed interest rate in N.J.S. 27:7-22 and other affected eminent domain statutes, and add language to these statutes directing that the interest rate should be determined by the court as set forth in N.J.S. 20:3-32.

With respect to N.J.S. 20:3-32, the Appendix sets forth two options. The first option does not recommend any modification in light of the response from practitioners.¹¹⁹ The second option incorporates a procedure for calculating the interest rate on just compensation awards, including sources that the courts may consider, as well as language making clear that the list of sources contained in the statute is not exclusive.

¹¹⁹ See *supra* pp. 14-17.

APPENDIX

The proposed modifications discussed above are shown below (proposed additions are shown with underlining, proposed deletions with ~~strike through~~, and language changed since the February 16, 2023 Commission meeting with **bolding**).

N.J.S. 20:3-32. Disputes as to interest.

OPTION #1

~~a.~~ Unless agreed upon by the parties, the amount of such interest shall be fixed and determined by the court in a summary manner after final determination of compensation, and shall be added to the amount of the award or judgment, as the case may be.

b. In determining the amount of interest that justly indemnifies the condemnee for the loss of use of the compensation to which the condemnee was entitled, the court may consider:

(1) prevailing commercial interest rates;

(2) the prime rate or rates;

(3) the applicable legal rates of interest; and,

(4) the interest rate set by N.J. Ct. R. 4:42-11.

COMMENT

Reflecting the response to outreach, there are no modifications recommended with respect to N.J.S. 20:3-32 in Option #1. Two commenters strongly opposed the inclusion of N.J. Ct. R. 4:42-11 as a source to be considered by the courts, given the constitutional dimension of calculating interest rates on just compensation awards.¹²⁰ One commenter suggested replacing the reference to the Court Rule with a different interest rate source (“applicable mortgage rates”)¹²¹ and the other indicated that a modification setting forth a procedure for calculating interest rates may inappropriately limit a court’s discretion in this area.¹²²

¹²⁰ See Wegener Letter, *supra* note 96, at 3 (explaining that the interest rate set by the court rule has “no rational relation to the constitutional requirement to restore a condemnee to the position he would have been in had the money been paid at the time of the taking”); see also DellaPelle Memo, *supra* note 110, at 5 (“interest in a condemnation action is a matter of constitutional magnitude bearing little resemblance to judgments in ordinary civil actions”).

¹²¹ Wegener Letter, *supra* note 96, at 9 (“[w]hile trial judges may want a uniform rule and embrace the [court] rule, the constitution does not countenance it and the Legislature should not validate its use” because “[t]he Legislature can provide more but not less than the constitutional minimum”).

¹²² DellaPelle Memo, *supra* note 110, at 5 (“the proposed modification appears to *limit* the ‘sources’ to which a Court might refer in determining the rate of interest which will *best indemnify* the condemnee,” but “[a]ny relevant evidence directed to that rate which will *best indemnify* the condemnee should be considered by the court”).

While the commenters proposed different solutions to the issues they raised, their positions are consistent with leaving N.J.S. 20:3-32 as is, in order to ensure that the proposed modifications do not implicate the constitutional concerns raised. In addition, the *St. Mary's* decision addressed only whether the Eminent Domain Act repealed fixed interest rate provisions.

OPTION #2

a. Unless agreed upon by the parties, the amount of such interest shall be fixed and determined by the court in a summary manner after final determination of compensation, and shall be added to the amount of the award or judgment, as the case may be.

b. In determining the amount of interest that justly indemnifies the condemnee for the loss of use of the compensation to which the condemnee was entitled, the court may consider **any relevant evidence, including:**

(1) prevailing commercial interest rates;

(2) the prime rate or rates;

(3) the applicable legal rates of interest; and,

(4) the interest rate set by N.J. Ct. R. 4:42-11.

COMMENT

In Option #2, the modifications divide the statute into two subsections. Subsections (b)(1) to (3) contain language derived from *Cassatly*, which described the appropriate manner of calculating interest pursuant to N.J.S. 20:3-32.¹²³ This language has been cited subsequently by numerous appellate courts,¹²⁴ and compliance with this language has been described by courts as fulfillment of a judge's "statutory function."¹²⁵ In addition, subsection (b)(4) includes N.J. Ct. R. 4:42-11 as a source that may be considered by the courts, in light of the numerous court opinions indicating that the court rule is often considered by the courts when calculating interest rates in eminent domain actions.¹²⁶

Additional language has been added to subsection (b) to reflect the feedback received from commenters.¹²⁷ Although Option #1 more fully reflects the commenters' positions, the additional language in Option #2 incorporates alternative language provided by one of the commenters which was intended to ensure that the court's discretion is not inappropriately limited by the sources listed in the statute.¹²⁸

¹²³ *Cassatly*, 137 N.J. Super. at 474-75.

¹²⁴ *See supra* pp. 6-9. The word "best" is replaced with "justly" to better indicate that the interest rate should accurately and appropriately indemnify the condemnee for the loss of use of compensation.

¹²⁵ *Nierenberg*, 345 N.J. Super. at 478.

¹²⁶ *See supra* note 56.

¹²⁷ *See supra* pp. 14-17.

¹²⁸ *See DellaPelle Memo, supra* note 110, at 6 ("in the alternative, and in the event that the NJLRC believes it is appropriate to add more language to the statute . . . we recommend that, at minimum, the proposed language be further amended to clarify that the listed sources of potential interest-related evidence *are only examples* and should not in any way preclude the court from considering other sources of admissible evidence"). The following proposed language

N.J.S. 27:7-22. Acquisition of land; condemnation; procedure for immediate possession.

The commissioner may acquire lands or rights therein whether for immediate or future use by gift, devise or purchase, or by condemnation in the manner provided in chapter 1 of the Title Eminent Domain (§ 20:1-1 et seq.), except as otherwise provided by this section.

* * *

If the amount of the award as finally determined by the court shall exceed the amount so deposited, the person or persons to whom the award is payable shall be entitled to recover from the department the difference between the amount of the deposit and the amount of the award, with interest ~~at the rate of 6% per annum~~ thereon fixed and determined by the court in the manner provided in N.J.S.A. 20:3-32 of the Eminent Domain Act of 1971, P.L.1971, c. 361 (C. 20:3-1 et seq.) from the date of the making of the deposit.

* * *

COMMENT

The proposed modifications to N.J.S. 27:7-22, as well as the other eminent domain statutes falling within the holding of the Appellate Division in *St. Mary's Church* (set forth below),¹²⁹ replace the fixed interest rate provision with language directing that the interest rate shall be “fixed and determined by the court” and cross-referencing the interest provision in N.J.S. 20:3-32 in the Eminent Domain Act.

N.J.S. 5:10-9. Eminent domain.

a. Upon the exercise of the power of eminent domain, the compensation to be paid thereunder shall be ascertained and paid in the manner provided in chapter 1 of Title 20¹ of the Revised Statutes insofar as the provisions thereof are applicable and not inconsistent with the provisions contained in this act.

* * *

e. The authority shall cause notice of the filing of said declaration and the making of said deposit to be served upon each party in interest named in the petition residing in the State, either personally or by leaving a copy thereof at his residence, if known, and upon each party in interest residing out of the State, by mailing a copy thereof to him at his residence, if known. . . . In the event that the residence of any such party or the name of

was provided: “*any other evidence that may be relevant in fixing the amount of interest that will indemnify the condemnee for its loss.*” *Id.* at 7.

¹²⁹ N.J. STAT. ANN. § 5:10-9; N.J. STAT. ANN. § 13:8A-24; N.J. STAT. ANN. § 27:23-5; N.J. STAT. ANN. § 40:14A-20; N.J. STAT. ANN. § 40:37A-73; N.J. STAT. ANN. § 40:60-25.58; N.J. STAT. ANN. § 40:68-41; N.J. STAT. ANN. § 52:18A-65; N.J. STAT. ANN. § 58:22-13.

such party is unknown, such notice shall be published at least once in a newspaper published or circulating in the county or counties in which the land is located. If the amount of the award as finally determined shall exceed the amount so deposited, the person or persons to whom the award is payable shall be entitled to recover from the authority the difference between the amount of the deposit and the amount of the award, with interest ~~at the then legal rate~~ fixed and determined by the court in the manner provided in N.J.S.A. 20:3-32 of the Eminent Domain Act of 1971, P.L.1971, c. 361 (C. 20:3-1 et seq.) from the date of making the deposit.

* * *

COMMENT

The proposed modifications to N.J.S. 5:10-9 replace the fixed interest rate provision with language directing that the interest rate shall be “fixed and determined by the court” and cross-referencing the interest provision in N.J.S. 20:3-32 in the Eminent Domain Act.

N.J.S. 13:8A-24. Acquisition of lands; purchase; eminent domain; declaration of taking; filing; deposit of estimated compensation; notice; right to possession; adjustment of compensation.

Lands acquired by the State shall be acquired by the commissioner in the name of the State. They may be acquired by purchase or otherwise on such terms and conditions as the commissioner shall determine, or by the exercise of the power of eminent domain in the manner provided in chapter 1 of Title 20 of the Revised Statutes,¹ except as otherwise provided by this act. This power of acquisition shall extend to lands held by any local unit.

* * *

If the amount of the award as finally determined by the court shall exceed the amount so deposited, the person or persons to whom the award is payable shall be entitled to recover from the State the difference between the amount of the deposit and the amount of the award, with interest ~~at the rate of 6% per annum~~ thereon fixed and determined by the court in the manner provided in N.J.S.A. 20:3-32 of the Eminent Domain Act of 1971, P.L.1971, c. 361 (C. 20:3-1 et seq.) from the date of the making of the deposit.

* * *

COMMENT

The proposed modifications to N.J.S. 13:8A-24 replace the fixed interest rate provision with language directing that the interest rate shall be “fixed and determined by the court” and cross-referencing the interest provision in N.J.S. 20:3-32 in the Eminent Domain Act.

N.J.S. 27:23-5. General grant of powers.

The authority shall be a body corporate and politic and shall have perpetual succession and shall have the following powers:

- (a) To adopt bylaws for the regulation of its affairs and the conduct of its business;

* * *

- (j) To acquire in the name of the authority by purchase or otherwise, on such terms and conditions and in such manner as it may deem proper, or by the exercise of the power of eminent domain

Upon the exercise of the power of eminent domain, the compensation to be paid thereunder shall be ascertained and paid in the manner provided in the “Eminent Domain Act of 1971,” P.L.1971, c. 361 (C.20:3-1 et seq.), insofar as the provisions thereof are applicable and not inconsistent with the provisions contained in this act.

* * *

If the amount of the award as finally determined shall exceed the amount so deposited, the person or persons to whom the award is payable shall be entitled to recover from the authority the difference between the amount of the deposit and the amount of the award, with interest ~~at the rate of six per centum (6%) per annum~~ fixed and determined by the court in the manner provided in N.J.S.A. 20:3-32 of the Eminent Domain Act of 1971, P.L.1971, c. 361 (C. 20:3-1 et seq.) from the date of making the deposit.

* * *

COMMENT

The proposed modifications to N.J.S. 27:23-5 replace the fixed interest rate provision with language directing that the interest rate shall be “fixed and determined by the court” and cross-referencing the interest provision in N.J.S. 20:3-32 in the Eminent Domain Act.

N.J.S. 40:14A-20. Real property; acquisition.

Every sewerage authority is hereby empowered . . . to acquire and take such real property, including any such public property or such public interest therein, by condemnation, in the manner provided by chapter 1 of Title 20, Eminent Domain, of the Revised Statutes (R.S. 20:1-1 et seq.)¹ and, to that end, may invoke and exercise in the manner or mode of procedure prescribed in

said chapter, either in its own name or in the name of any local unit or units, all of the powers of such local unit or units to acquire or take property for public use.

* * *

If the amount of the award as finally determined shall exceed the amount so deposited, the person or persons to whom the award is payable shall be entitled to recover from the sewerage authority the difference between the amount of the deposit and the amount of the award, with interest ~~at the rate of 6% per annum~~ thereon fixed and determined by the court in the manner provided in N.J.S.A. 20:3-32 of the Eminent Domain Act of 1971, P.L.1971, c. 361 (C. 20:3-1 et seq.) from the date of making the deposit.

* * *

COMMENT

The proposed modifications to N.J.S. 40:14A-20 replace the fixed interest rate provision with language directing that the interest rate shall be “fixed and determined by the court” and cross-referencing the interest provision in N.J.S. 20:3-32 in the Eminent Domain Act.

N.J.S. 40:37A-73. Service of notice; payment.

Each authority shall cause notice of the filing of a declaration of taking of property as provided in this act and of the making of the deposit required by this act with respect thereto to be served upon each party to the action to fix the compensation to be paid who resides in the State, either personally or by leaving a copy thereof at his residence if known, and upon each such party who resides out of the State, by mailing a copy thereof to him at his residence if known. . . . If the amount of the award as finally determined shall exceed the amount so deposited, the person or persons to whom the award is payable shall be entitled to recover from the authority the difference between the amount of the deposit and the amount of the award, with interest ~~at the rate of 6% per annum~~ thereon fixed and determined by the court in the manner provided in N.J.S.A. 20:3-32 of the Eminent Domain Act of 1971, P.L.1971, c. 361 (C. 20:3-1 et seq.) from the date of making the deposit.

* * *

COMMENT

The proposed modifications to N.J.S. 40:37A-73 replace the fixed interest rate provision with language directing that the interest rate shall be “fixed and determined by the court” and cross-referencing the interest provision in N.J.S. 20:3-32 in the Eminent Domain Act.

N.J.S. 40:60-25.58. Declaration of taking; filing; deposit of estimated value; surrender of possession; notice; amount of compensation.

On or after the institution of an action by the municipality for condemnation of property and to fix the compensation to be paid for such property, the municipality may file with the Clerk of the Superior Court a declaration of taking, signed by the duly authorized municipal official, declaring that all or any part of such property described in the petition is being taken by and for the use of the municipality.

* * *

The ultimate amount of compensation shall be determined pursuant to Title 20 of the Revised Statutes. If the amount so fixed shall exceed the amount so deposited in court by the municipality or otherwise paid to the persons entitled thereto, the court shall enter judgment against the municipality in the amount of such deficiency, together with interest ~~at the legal rate~~ on such deficiency fixed and determined by the court in the manner provided in N.J.S.A. 20:3-32 of the Eminent Domain Act of 1971, P.L.1971, c. 361 (C. 20:3-1 et seq.) from the date of the vesting of title to the date of the entry of the final judgment (subject, however, to abatement for use, income, rents or profits derived from such property by the owner thereof subsequent to the vesting of title in the municipality), and the court shall order the municipality to deposit the amount of such deficiency in court.

* * *

COMMENT

The proposed modifications to N.J.S. 40:60-25.58 replace the fixed interest rate provision with language directing that the interest rate shall be “fixed and determined by the court” and cross-referencing the interest provision in N.J.S. 20:3-32 in the Eminent Domain Act.

N.J.S. 40:68-41. Entry upon lands or waters to make surveys, borings, sounding and examinations; condemnation; compensation.

* * *

When the district shall have determined upon the construction of any particular project facility or structure authorized by this act, it may proceed to condemn and take land or water rights and structures necessary therefor in accordance with chapter 1 of Title 20, of the Revised Statutes¹ (Eminent Domain) and may also proceed to acquire, purchase, take and hold such voluntary grants of real estate, riparian rights and other property above or under water as may be necessary to complete said project.

* * *

(d) Each authority shall cause notice of the filing of a declaration of taking of property as provided in this act and of the making of the deposit required by this act with respect thereto to be served upon each party to the action to fix the compensation to be paid who resides in the State, either personally or by leaving a copy thereof at his residence if known, and upon each such party who resides out of the State, by mailing a copy thereof to him at his residence if known. . . . If the amount of the award as finally determined shall exceed the amount so deposited, the person or persons to whom the award is payable shall be entitled to recover from the authority the difference between the amount of the deposit and the amount of the award, with interest ~~at the rate of 6% per annum~~ thereon fixed and determined by the court in the manner provided in N.J.S.A. 20:3-32 of the Eminent Domain Act of 1971, P.L.1971, c. 361 (C. 20:3-1 et seq.) from the date of making the deposit.

* * *

COMMENT

The proposed modifications to N.J.S. 40:68-41 replace the fixed interest rate provision with language directing that the interest rate shall be “fixed and determined by the court” and cross-referencing the interest provision in N.J.S. 20:3-32 in the Eminent Domain Act.

N.J.S. 52:18A-65. Condemnation.

Upon the exercise by the Authority of the power of eminent domain pursuant to paragraph h of section ten of this act,¹ the compensation to be paid thereunder shall be ascertained and paid in the manner provided in chapter one of Title 20 of the Revised Statutes² in so far as the provisions thereof are applicable and not inconsistent with the provisions contained in this act.

* * *

Upon the application of any party in interest and after notice to other parties in interest, including the Authority, the court may direct that the money deposited with the clerk of the court or any part thereof be paid forthwith to the person or persons entitled thereto for or on account of the just compensation to be adjudged to be due him in the action for condemnation; provided, that each such person shall have filed with the clerk of the court a consent in writing that, in the event the amount adjudged to be due him in the condemnation action shall be less than the amount deposited, the court, after notice as herein provided and hearing, may determine his liability, if any, for the return of such difference or any part thereof and enter judgment therefor. If the amount adjudged to be due him shall exceed the amount so deposited, he shall be entitled to recover from the Authority the excess with interest ~~at the rate of six per centum (6%) per annum~~ thereon fixed

and determined by the court in the manner provided in N.J.S.A. 20:3-32 of the Eminent Domain Act of 1971, P.L.1971, c. 361 (C. 20:3-1 et seq.) from the date of making the deposit.

* * *

COMMENT

The proposed modifications to N.J.S. 52:18A-65 replace the fixed interest rate provision with language directing that the interest rate shall be “fixed and determined by the court” and cross-referencing the interest provision in N.J.S. 20:3-32 in the Eminent Domain Act.

N.J.S. 58:22-13. Eminent domain; law applicable.

Whenever the power of condemnation is exercised by the department pursuant to this act, the provisions of chapter 1 of Title 20 (Eminent Domain) of the Revised Statutes, as amended and supplemented,¹ shall be applicable and such power of condemnation shall include the condemnation of public as well as privately owned property, except as otherwise provided by this act.

* * *

If the amount of the award as finally determined by the court shall exceed the amount so deposited, the person or persons to whom the award is payable shall be entitled to recover from the department the difference between the amount of the deposit and the amount of the award, with interest ~~at the rate of 6% per annum~~ thereon fixed and determined by the court in the manner provided in N.J.S.A. 20:3-32 of the Eminent Domain Act of 1971, P.L.1971, c. 361 (C. 20:3-1 et seq.) from the date of the making of the deposit.

* * *

COMMENT

The proposed modifications to N.J.S. 58:22-13 replace the fixed interest rate provision with language directing that the interest rate shall be “fixed and determined by the court” and cross-referencing the interest provision in N.J.S. 20:3-32 in the Eminent Domain Act.