



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

BOB MARTIN
Commissioner

KIM GUADAGNO
Lt. Governor

NEW JERSEY DEPARTMENT OF)	<u>ADMINISTRATIVE ACTION</u>
ENVIRONMENTAL PROTECTION,)	FINAL DECISION
COASTAL AND LAND USE)	
COMPLIANCE AND ENFORCEMENT,)	
)	
Petitioner,)	
)	
v.)	
)	OAL DKT NO. ECE 16102-12
SEASONS REALTY, LLC,)	AGENCY DKT. NO. PEA11002-
)	0263-97-000.1
)	
Respondent. ¹)	
)	

This Order addresses an appeal of an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) issued by the Department of Environmental Protection, Bureau of Coastal and Land Use Compliance and Enforcement (Department), to Seasons Realty, LLC (Seasons Realty), Frank Weidner, individually, and Tom Dibiasi, individually,² on December 27, 2011, alleging that they performed unauthorized regulated activities within a freshwater wetland and a freshwater wetland transition area in violation of the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq. and the implementing Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A-1.1 et

¹ The caption has been revised to reflect the proper status of the parties.

² The record, which consists of the Department's motion papers and several letters from counsel for the Department to counsel for Seasons Realty, does not explain the status of the individual respondents named in the AONOCAPA. The hearing request submitted to the Department on February 9, 2012 was on behalf of Seasons Realty. This Final Decision addresses only Seasons Realty.

seq. The AONOCAPA imposed a civil administrative penalty of \$45,000 pursuant to the N.J.S.A. 13:9B-21 and N.J.A.C. 7:7A-16.1. Seasons Realty (hereinafter Respondent) requested an administrative hearing on February 9, 2012 and the matter was transmitted to the Office of Administrative Law (OAL) on December 5, 2012, where it was assigned to Administrative Law Judge (ALJ) Irene Jones.

On October 6, 2015, the Department moved to dismiss the matter for failure to provide discovery. Respondent did not provide a response to the motion, nor did it provide the requested discovery in response to the motion.

Based on my review of the record, I concur with and ADOPT the ALJ's finding that Respondent's failure to prosecute this matter warranted dismissal.

FACTS AND PROCEDURAL BACKGROUND

Respondent owned and developed property located at 59 Dimming Road, Block 1224, Lot 10, in Upper Saddle River, Bergen County (the Property). On March 28, 2008, the Department's Division of Land Use Regulation issued a Freshwater Wetlands Transition Area Waiver Averaging Plan and a Transition Area Waiver for Redevelopment (the Waiver) to Seasons Realty. The Waiver authorized the modification of a 50-foot transition area for construction of a driveway extension and the construction of a single family dwelling and retaining wall within the previously disturbed transition area on the Property. The Waiver required Respondent to file and record, prior to conducting regulated activities, a Department-approved conservation restriction for the Property to protect the modified transition area from future encroachment.

On April 29, 2008, the Department performed a compliance evaluation of the Property. As a result of that inspection, the Department determined that the Respondent violated the terms of the Waiver by over clearing vegetation and stockpiling materials in approximately 2,200 square feet of transition area beyond the limits depicted in the Department-approved plan; and by over clearing vegetation and stockpiling materials in approximately 1,000 square feet of freshwater wetlands beyond the limits depicted in the Department-approved plan. The Department issued a Notice of Violation (NOV) to Respondent on May 13, 2008, which was returned unclaimed. On September 11, 2008, the Department re-sent the NOV, which was again returned unclaimed. On March 29, 2010, the Department again mailed and faxed the NOV to Respondent's counsel. In response to that NOV, Respondent's counsel advised that the Property had been sold on November 12, 2008.

The Department inspected the Property again on July 13, 2010 and determined that the physical violations had been corrected, but that the conservation restriction had not been recorded. On March 1, 2011, Department staff met with Respondent's counsel and served him on behalf of Respondent with a new NOV for failure to file and record the required conservation restriction. On May 15, 2011, Respondent's counsel sent email correspondence questioning the need for the conservation restriction because the violation had been corrected prior to sale of the property. Not having received a copy of the recorded conservation restriction for months following the March 1, 2011 meeting and counsel's May 15, 2011 email, the Department issued the AONOCAPA.

In the OAL, the ALJ conducted a prehearing conference call and the matter was set down for hearing and adjourned twice, during which time Respondent failed to respond to

the Department's discovery requests. The Department's motion to dismiss for failure to provide discovery followed on October 6, 2015. The ALJ issued an Initial Decision on June 23, 2016 concluding that Respondent failed to answer discovery and prosecute its case. Respondent did not file exceptions to the Initial Decision. Nor did the Department.

LEGAL DISCUSSION

N.J.A.C. 1:1-1.3(a), read in conjunction with Rule 1:13-7 of the Court Rules, authorizes an ALJ to dismiss an action that has been pending for more than four months without action.

The record demonstrates that the Department's counsel wrote to Respondent's counsel and communicated verbally with him on numerous occasions regarding Respondent's obligation to provide discovery. Nonetheless, Respondent failed to provide discovery or set forth a reasonable schedule for compliance in accordance with N.J.A.C. 1:1-10.4. Respondent had more than nine months to comply with its discovery obligations before the Department filed its Motion to Dismiss. Further, Respondent failed to file a reply brief or certification explaining why discovery could not be completed. Respondent has failed to comply with its discovery obligations or otherwise prosecute this matter. Therefore, I ADOPT the ALJ's conclusion that this contested case should be dismissed.

CONCLUSION

For the above reasons, I ADOPT the ALJ's Initial Decision dismissing this case. Accordingly, Respondent is hereby ORDERED to submit for review and approval a draft conservation restriction as set forth in paragraph 14 of the AONOCAPA and to take all

steps pertaining thereto as further explained in paragraphs 15 through 18 of the AONOCAPA. Respondent is further directed to pay the civil administrative penalty of \$45,000 as set forth in Paragraph 19 of the AONOCAPA within 20 days from the date of this Final Decision.³

IT IS SO ORDERED.

DATE: August 3, 2016

A handwritten signature in blue ink, appearing to read "Bob Martin", is written over a horizontal line.

Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

³ Although it is not necessary to discuss the penalty assessment because Respondent, who was represented by counsel, has failed to prosecute its case, I find based on the facts set forth in the Department's AONOCAPA and the Department's Penalty Rationale annexed thereto, that the penalty assessed was appropriate in this matter. The Waiver issued to Respondent allowed an otherwise unauthorized encroachment into a regulated area. That encroachment was expressly conditioned on the filing and recording of a conservation restriction to protect the modified wetlands transition areas established under the Waiver. The Department's conclusions concerning the conduct and seriousness of the violation are supported, and I note, further, that the Department exercised reasonable discretion in assessing a penalty for only three days of violation in this matter.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION
BUREAU OF COASTAL AND LAND USE COMPLIANCE AND
ENFORCEMENT v. SEASONS REALTY, LLC

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