State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO**.** ECE-LU 11221-11
AGENCY DKT. NO. PEA 100002-1107-10-0006.1

JOHN BLEIMAIER AND
MARINA PUSHKAREVA,
Petitioners,
v.
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION—COASTAL AND LAND USE COMPLIANCE AND ENFORCEMENT,
Respondent.

John Kuhn Bleimaier, Esq., for petitioners

Aaron Love, Deputy Attorney General for respondent (Robert Lougy, Acting Attorney General of New Jersey, attorneys)

Record Closed: March 14, 2016 Decided: April 26, 2016

BEFORE **JEFF S. MASIN,** ALJ t/a:

On May 4, 2011, the New Jersey Department of Environmental Protection (DEP) issued an Administrative Order and Notice of Civil Administrative Penalty Assessment (AO/NOCAPA) charging that John Bleimaier and Marina Pushkareva, owners of property located at 3612 Princeton Pike, Block 5101, Lot 30, Lawrence Township, New Jersey, violated the Flood Hazard Area Control Act (FHACA), N.J.S.A. 58:16A-50 et

seq., by performing unauthorized activities within a freshwater wetland transition area located on their property. More specifically, the AO/NOCAPA cited the placement of unauthorized fill in the transition area, and demanded that the owners remove the fill, restore the disturbed area, and pay a civil administrative penalty of $16,000. On June, 1, 2011, the owners requested a hearing to challenge the Department's charges. The contested case was transferred to the Office of Administrative Law on September 21, 2011. A Prehearing Order was issued on December 8, 2011, by the then assigned administrative law judge. The owners filed a motion for summary decision on January 19, 2012, as authorized by N.J.A.C. 1:1-12.5, and the respondent DEP filed opposition to the owner's motion and a cross-motion for summary decision on February 9, 2012. In November of 2013, while the motions remained pending, the parties agreed that the matter would be placed in the DEP's in-house mediation program. The attempt to resolve the case was unsuccessful and the matter reverted to the assigned judge. However, the judge was unable to rule on the pending motions due to a prolonged illness. The case was transferred to this judge, serving on recall, on March 14, 2016.

In order to understand the motions for summary decision, it seems best to first detail the allegations made by the DEP in support of the AO/NOCAPA and then to examine the owners' motion, which is of course made in response to the AO/NOCAPA's charges.

The AO/NOCAPA followed in the footsteps of a Notice of Violation, issued to the owners by the DEP on June 16, 2010. That Notice claimed that the owners were liable for violating the FHACA and the Freshwater Wetlands Protection Act (FWPA), N.J.S.A. 13:9B-1 et seq. and regulations adopted in support of these laws. It charged that they had performed unauthorized regulated activity in a flood hazard area without a flood hazard area permit or a coastal permit, as required by N.J.A.C. 7:7 and 7:7E. Allegedly, they placed and graded fill material, totaling approximately 1,100 cubic yards, within the delineated flood hazard area of the Shipetaukin Creek. In their motion for summary decision, the petitioners/owners acknowledge their ownership of the subject property.

In its Motion, the DEP contends that the property at 3612 Princeton Pike, Lawrence Township, adjoins the natural channel of the Shipetaukin Creek and that the

Department adopted an official flood hazard area map for Shipetaukin Creek. See Exhibit G to DEP's Motion. The property lies entirely within the mapped flood hazard area of the Creek. In support of the Motion, DEP offers the Certification of James F. Parvesse, who, at least at the time he signed the Certification on February 7, 2012, was the Township Engineer for Lawrence Township. Mr. Parvesse relates that on April 8, 2010, his office received a call from a member of the public, reporting that dump trucks had been observed entering the property at 3612 Princeton Pike, hereinafter referred to as "the property." Due to his concern that dumping might be occurring on the property without proper authorization, Mr. Parvesse sent his inspector to the site. The inspector reported that there were dump trucks delivering loads of fill to the back of the property and that there were piles of fill at the front and sides of the residence located on the property. Mr. Parvesse then went to the property. He arrived at about 3:00 p.m. He observed "multiple piles of fill around the front, sides and rear of the residence that appeared to have been recently dumped." While these had not yet been spread or graded, Mr. Parvesse explained that there was already a layer of fill covering "a large area in the rear yard." He estimated that there was "at least twelve (12) inches" of fill "towards the center of the area." Parvesse took photographs, which he describes as showing loads of fill; deep tire ruts where a truck "backed through the newly-spread fill to dump this load;" fill that had been spread back into the woods adjacent to a tributary of the Creek; and a bulldozer that was on the property, although not in operation when Parvesse was on-site. He believed the bulldozer was used to level and grade the fill. He also photographed a worker using a chainsaw to cut up trees that had already been felled. Mr. Parvesse explained that while on the property, he observed two double-axle dump trucks deliver loads of fill to the area at the rear of the residence. He estimated the capacity of these trucks at about ten cubic yards. They were full upon arrival and emptied their loads at the rear of the property, as shown in the photographs. Parvesse also related that he spoke to a resident of the house located on the property. She told Parvesse that it was her idea to have the fill delivered and spread on the property, and said that she did not realize that she needed a permit for this to occur.

As a result of Mr. Parvesse's observations, a municipal court summons was issued to the owners for violating the Lawrence Township Code and Use Ordinance for disturbing in excess of 5,000 square feet of land and adding more than one foot of fill

and filling land within the flood plain and flood plain buffer. Parvesse also notified the DEP of the potential violation of State law. The DEP then sent a representative to the site, who took photographs on April 29, 2010. These purport to show the newly-applied fill and heavy machinery tracks and to give indication of the depth of the fill in support of the observations, photographs and professional assessments made by Mr. Parvesse. Then, according to a Certification authored by Michael Palmquist, a Senior Environmental Specialist for the DEP, he went to the property on November 30, 2010, and observed the "area of fill behind the residence that extended 175 feet in length from the back of the house towards a natural ditch or drainage channel. The area was 180 feet wide, and roughly square in shape." Palmquist estimated that the depth of fill behind the residence is approximately twelve (12) inches deep.

In seeking summary decision in its favor, the DEP contends that there are no genuine disputes of material fact that require any hearing before a determination can be made as to the liability of the owners for the violations of law that the DEP contends occurred when this fill was placed without required authorization. The standard for granting summary decision is described in N.J.A.C. 1:1-12.5, which draws upon Judson v. Peoples Bank and Trust Co, 17 N.J. 67 (1954), and Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995). Summary decision will not lie where there exist genuine disputes concerning facts that are material to the determination of the legal issues necessary to resolve the case. If no such material facts are genuinely in question, then the applicable law is applied to the undisputed facts and the trier of fact then must determine whether the moving party is entitled to judgment under the applicable legal standard. Brill, supra, at 540. In a civil proceeding such as this administrative matter, the proponent of the motion bears the burden to prove its right to judgment on the legal issues by a fair preponderance of the credible evidence. In Re Polk, 90 N.J. 550, 560 (1982). Thus, before exploring the legal bases for the DEP's contention, we turn to the petitioners' motion and their response to the DEP's cross-motion to determine what, if any, material facts are in dispute. It is important here to recognize that petitioners' motion was filed prior to the DEP's motion for summary decision. The DEP's motion is accompanied by certifications and documentary evidence, offered as evidential proof of the DEP's factual contentions. In contrast, the petitioners' motion is accompanied by exhibits attached to their brief, which was submitted by Mr. Bleimaier, an attorney

practicing in New Jersey, representing himself here and expressly joined in his submissions by his co-petitioner and co-owner, Dr. Pushkareva. There is no certification or affidavit accompanying either the petitioners' motion or, importantly, their response to the DEP's cross-motion. The following factual assertions made by the petitioners are drawn from their brief.

The petitioners agree that they purchased the property, on which sits a single family house, in 2002. They agree that it is situated within the 100-year flood hazard zone. They describe flooding that inundated the property in the 1960's that led to the house being jacked up. In addition, "major storms and hurricanes have impacted the topography of the lot by both erosion and accretion, particularly near the stream bed of the Shipetaukin Creek."

Petitioners claim that while the DEP representatives visited the property on "numerous occasions," DEP borings made on site and the Department's other activities "have produced no evidence of the unlawful placement of fill on the property." Noting that it is lawful to repair flood damage, "including the replacement of soil eroded by flooding and the relocation of soil deposited by accretion," the petitioners claim that the DEP "has no evidence of any improper activity on the part of the petitioners." They claim that photographs do not show any "environmental intrusion save when the house was originally built and then raised." They also claim that they have the "legal right to maintain the property in its present configuration and topographical environment." And they rely upon the explicit command of the Flood Hazard Control Act that it be "liberally construed so as to effectuate it purpose," one purpose of which they contend is to alleviate hardship to residents, N.J.S.A. 58:16A-64. They contend that the DEP is "frivolously proceed[ing] to seek penalties from innocent private citizens effectively denying them constitutionally mandated due process."

In their responses to the DEP's cross-motion, the petitioners' claim that the DEP has not presented a "scintilla of evidence" to support DEP's claim that the amount of fill consisted of 110 truckloads. They claim that the "elevation of the . . . property is virtually identical to that of adjacent land." Citing the filling that occurred in the 1960's and 1970's to first construct the house and then jack it up, activity that predated the

regulatory scheme, they assert "[T]he presence of fill on the property is not an issue. The intrusion of new fill has not been established. In order to prevail the DEP had to show a change in the topography. N.J.A.C. 7:13-2.4(a)(a). There has been no such change."

Applicable Law

The Legislature adopted the Flood Hazard Area Control Act because

> It is in the interest of the safety, health, and general welfare of the people of the State that legislative action be taken to empower the Department of Environmental Protection to delineate and mark flood hazard areas, to authorize the Department of Environmental Protection to adopt land use regulations for the flood hazard area, to control stream encroachments, to coordinate effectively the development, dissemination, and use of information on floods and flood damages that may be available, to authorize the delegation of certain administrative and enforcement functions to county governing bodies and to integrate the flood control activities of the municipal, county, State and Federal Governments.
>
> [N.J.S.A. 58:16A-50(b).]

Regulations have been adopted to effectuate the legislative purpose, as authorized by the FHACA. N.J.S.A. 58:16A-55. Among these is a requirement that any "regulated activity" that occurs within a flood hazard area, must be permitted before allowed to proceed. N.J.A.C. 7:13-2.1(b). N.J.A.C. 7:13-2.4(a)(1) provides

> (a) Any action that includes or results in one or more of the following constitutes a regulated activity under this chapter if undertaken in a regulated area, as described at N.J.A.C. 7:13-2.3: 1. The alteration of topography through excavation, grading and/or placement of fill.

The Department is authorized to adopt official flood hazard area maps and has done so in accordance with procedures described at N.J.S.A. 58:16A-52. The DEP also authorized landowners to place up to five cubic yards of fill in a flood hazard area without applying for a permit, subject to limitations at N.J.A.C. 7:13-7.2(b)(3).

Immediate action to authorize the placement of fill where necessary to protect the "environment and/or public health, safety and welfare" may be allowed by DEP under an emergency permit. N.J.A.C. 7:13-12.1.

"Fill" is defined at N.J.A.C. 7:13-1.2.

> "Fill" means to deposit or place material on the surface of the ground and/or under water. "Fill" also means the material being deposited or placed. Fill includes, but is not limited to, concrete, earth, pavement, rock, sand, soil, structures or any stored material such as building material, construction equipment, landscaping material, piles of soil, stone or wood, trash, vegetation in planters and/or root balls, and vehicles. Fill does not include vegetation rooted in the ground, whether naturally occurring or planted.

The DEP's AO/NOCAPA is premised upon an event that it claims occurred on April 8, 2010. According to the certified statement of Township Engineer Parvesse, on that day he personally observed dump trucks on the property and saw them dump fill there and he personally was told by the resident, who claimed to be the "owners' daughter" that she had the fill brought to the property and placed there. Interestingly enough, nowhere in any of their submissions have the petitioners/owners even addressed what happened that day. Speaking of fill placed in the 1960's and 1970's, they make no apparent reference to the events of April 8, 2010, and do not say anything about the statement Parvesse makes or about what he claims the "daughter" admitted. They never deny the presence of these trucks, never deny that the admission was made, and make no denial of any knowledge of these events. Instead, both in their brief and in a later submission accompanied by an uncertified "Site Investigation Report," they argue that the topography has not changed (as the Site Report states, "Fill material introduced to the property since 1997 appears to have a diminimus affect on grading and drainage . . . ") and about the amount of fill calculated by DEP to have been placed on the property. And as noted, they certify nothing, despite the fact that opposition to a motion for summary decision must be accompanied by "affidavits." "When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a

genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). In practice, such motions and responses are often supported by certifications, not by affidavits, but the practice is to allow certifications to stand as proof to establish the existence of disputed material facts.

Based upon the undisputed credible evidence, I **FIND** that the events described by Mr. Parvesse as occurring in his presence on April 8, 2010, occurred. On that date fill was deposited on the property. The evidence of dump trucks, the bulldozer, and observed piles of fill, along with the undisputed evidence of a statement admitting that the resident had the fill placed at that time, all establish by a preponderance of the credible evidence that the fill seen there that day was not some remnant of 1960's or 1970's activity, or from some event after 1997, but was instead the placement of "new" fill to the site. There is no claim that this was done under the authority of any permit, or that the amount of fill was less that the limit of five cubic yards that can be placed without a permit. The failure of the petitioners to even address what Mr. Parvesse claimed to have seen that day, much less what he contends the "daughter" said, is extremely telling. It is also telling that despite the comments in the petitioners' submissions regarding the maintenance of property or its renewal after flood damage, they make no claim that the events of that day were in any way related to any such damage. Indeed, it is unclear exactly what the petitioners' position is as to what happened that day. It is as if the Parvesse observations did not exist. Except for their dispute about the amount of fill calculated by DEP, which is essentially a dispute as to the proper calculation of the civil administrative penalty, it seems that in fact the petitioners really do not dispute Parvesse's contentions. While never conceding that any fill was placed, they only argue that whatever "fill" occurred did not change the topography, and therefore there is no violation. But as will be discussed more fully below, there is no offer of any proof as to the condition of the property just prior to April 8, 2010, or of any recent damage to the property, the claim that the fill did not change the topography from what it may have been prior to April 8 is unsupported by any meaningful evidence. The DEP's undisputed proof establishes that filling occurred, and the observations of the Township Engineer in particular support the conclusion that the amount of fill placed that day was not insignificant. It is unclear whether his statement as to the two trucks indicates that each had a capacity of ten cubic yards, for a total of

twenty, or whether each held five, for a total of ten, but regardless, the combination of the two clearly exceeding the five cubic yards for which no DEP permit would be needed.

I **CONCLUDE** that on April 8, 2010, fill was dumped on the property and was at least to some extent graded, and that the petitioners had no permit for this "regulated activity." I **CONCLUDE** that the amount of fill exceeded the allowable five cubic yards for which no permit would have been necessary. I **CONCLUDE** that there is no dispute of any material fact concerning the liability of the petitioners for violating the FHACA. I **CONCLUDE** that summary decision as to the liability of the respondents for the violation of the FHACA is warranted and the motion is therefore **GRANTED** as to liability.

Penalty

The AO/NOCAPA sets out the DEP's rationale for the $16,000 civil administrative penalty imposed on the respondents. It relates that the original penalty provisions of the FHACA were modified by passage of the Environmental Enforcement Enhancement Act (EEEA), P.L. 2007, c. 246. Under that Act, N.J.S.A. 58:16A063(d), the Commissioner is authorized to assess a civil administrative penalty of not more than $25,000 for each violation of any provision of any rule or regulation and, for each day that the said violation continues, an additional penalty may be added, as each such day constitutes a new violation and distinct offense. The penalty is determined based upon an assessment of the seriousness, duration and conduct involved, and within the confines of regulations adopted by the DEP for assessing these penalties on a case-by-case basis. The AO/NOCAPA recites that the penalty assessed against the owners is established at $4,000 per day for each day that the violation continued. The DEP determined that while the owners did not intend to violate the Act, given the nature of the property and its location, the need for a permit to authorize the placement of the fill was foreseeable. As such, their "conduct" was characterized as "moderate." The "seriousness" factor was assessed by calculating how much fill was placed in the flood hazard area, or "flood fringe." This was calculated by using the area of fill measured by Mr. Palmquist and the depth of fill at an average of twelve inches, which the DEP argues is consistent with Mr. Parvesse's observations and those of Mr. Palmquist. This

total volume of fill was thus calculated at 1,166 cubic yards. The DEP then determined that while a distinct violation could have been assessed for each day between the issuance of the Notice of Violation on June 16, 2010, and the issuance of the AO/NOCAPA on May 4, 2011, it would only assess penalties for a total of four days. The DEP employed a penalty matrix which establishes a point system dependent upon the characterization of the aforementioned criteria, type (here the lack of a permit), conduct, and seriousness. Given the moderate nature of the conduct, the matrix assigned 2 points. Another 4 points were assigned based upon the area of flood fringe affected being over 1,001 cubic yards. The FHACA Penalty Assessment Table translates this total of 6 points to a $4,000 a day penalty. Thus the penalty is $16,000.

The petitioners/owners do not affirmatively concede that any fill was deposited on April 8, 2010, although they do not actually address the issue by certification or otherwise by countering evidence. However, they contend that the DEP's calculation of the amount of fill placed that day is not premised upon any rational basis. However, Mr. Palmquist's Certification notes his observation of the area of fill, his description of the condition of that fill, and the measurement of the area in which he observed the fill. Palmquist's factual assertions are supported by Mr. Parvesse's observations, made contemporaneous to the incident itself, of the areas in which Parvesse observed fill to have been dumped. These witnesses' certified statements are not challenged by anything except the argument that the topography is the same as that shown on an earlier survey. The evidence supporting this claim is a letter, unaccompanied by any certification or affidavit, from a "Principal Environmental Specialist," associated with an engineering firm, who states that he observed the property on October 18, 2013, nearly three years after Mr. Palmquist's observation. Even for the moment disregarding the fact that the lack of certification violates the requirement of N.J.A.C. 1:1-12.5(b), examination of this letter shows that it neither addresses the condition of the area in question just prior to the placement of the fill on April 8, 2010, or what may have happened to the area between November 2010 and October 2013 that might have impacted upon the topography. Both Judson and Brill note that effective opposition to the material factual assertions made in a motion for summary decision must not be of "an insubstantial nature, a mere scintilla, . . . fanciful, frivolous, gauzy or merely suspicious," Judson, supra, at 28 (internal citations omitted). While ordinarily, the trier of

fact is not to weigh the credibility of evidence offered to support the existence of genuine factual disputes, Judson, supra, at 75, nevertheless, if the evidence palpably fails to show even an arguable dispute as to the material evidence offered in support of the motion, summary decision may be granted. Here, although the Judson/Brill standard requires that all reasonable inferences arising from the evidence offered in regard to the motion must be accorded in favor of the opponent of the motion, id., I **FIND** that this letter is neither offered as appropriately certified evidence nor is its substance on its face sufficient to raise reasonable inferences in opposition to the DEP's specific time-relevant evidence in support of the amount of fill placed. Thus, the DEP's evidence is effectively unopposed by acceptable forms of evidence. As such, I **FIND** that the DEP's calculation of the amount of fill is supported by competent evidence and there is no effective contrary evidence to dispute its evidence, no basis to conclude that a genuine issue of material fact exists as to this issue. In such case, I **CONCLUDE** that summary decision as to the amount of fill is appropriate. Therefore, I **CONCLUDE** that the penalty assessment of $16,000 is properly determined as per the penalty matrix.

CONCLUSION AND ORDER

Summary decision is **GRANTED** to the DEP and **DENIED** to the petitioners. **IT IS THEREFORE ORDERED** that the petitioners shall pay a civil administrative penalty of $16,000 to the DEP, as directed in the AO/NOCAPA. In addition, the petitioners/owners shall comply with the AO/NOCAPA's direction to remove all unauthorized fill and provide the required plans and descriptions for, and shall restore the property, in conformity to all applicable regulations and with its plans to be approved by the DEP.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this

decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 086250402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 26, 2016
DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency:

Date Mailed to Parties:

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