



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

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Governor

BOB MARTIN
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Lt. Governor

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
PESTICIDE CONTROL AND COASTAL
AND LAND USE COMPLIANCE AND
ENFORCEMENT,

ADMINISTRATIVE ACTION
FINAL DECISION

OAL DKT NO.: ECE-LU 11991-10
AGENCY REF. NO.: PEA090002-1520-08-
0003.1

Petitioner,

v.

BAY FRONT MARINA AND YACHT
BASIN, LLC, AND KEITH BOYCE,

Respondents.

This is the appeal of an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) issued on November 12, 2009, by the Department of Environmental Protection (the Department) against Respondents, Bay Front Marina and Yacht Basin, LLC (Bay Front Marina) and Keith Boyce (collectively Respondents) for violations of the Waterfront Development Act, N.J.S.A. 12:5-1 et seq., the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq., the Tidelands Act, N.J.S.A. 12:3-1 et seq.,¹ and their implementing regulations. The appeal was dismissed by Administrative Law Judge John Schuster, III (the

¹ While the opening paragraph of the AONOCAPA does not cite the Tidelands Act, the body of the AONOCAPA cites the statute specifically.

ALJ) in an Initial Decision dated July 17, 2014, as a result of the Respondents' failure to prosecute their appeal.

DISCUSSION

The Office of Administrative Law (OAL) scheduled an in-person pre-hearing conference for June 24, 2014, but no one appeared on behalf of the Respondents. The ALJ therefore granted the Department's motion to dismiss the appeal for failure to prosecute. Respondent, Mr. Boyce, had already failed to attend an in-person pre-hearing conference scheduled on May 20, 2014. At that in-person conference, Mr. Boyce also could not be reached by telephone. On May 27, 2014, the ALJ notified the parties that he was scheduling an in-person pre-hearing conference for June 24, 2014. On May 28, 2014, the ALJ sent a letter to the parties in which he wrote, "I note from the file that Mr. Boyce has failed to participate in some of the prior proceedings at the [OAL]. This is to further advise if Mr. Boyce or his legal representative does not participate in the June 24 conference, his appeal will be dismissed."

On May 31, 2014, Mr. Boyce e-mailed the Deputy Attorney General (DAG) stating that he had a court date on June 24, 2014, in West Orange Municipal Court and requested that the DAG reschedule the hearing. In his response e-mail of June 2, 2014, the DAG informed Mr. Boyce that it was Mr. Boyce's obligation to send a letter to the ALJ requesting that the June 24th conference be rescheduled; the DAG also consented to the rescheduling.² In a June 6, 2014 e-mail to Mr. Boyce, the DAG asked whether Mr. Boyce had sent a letter to the ALJ requesting rescheduling and advised him that failing to appear for the in-person conference could result in

² In addition to finding that Mr. Boyce was informed that it was his obligation to reschedule the pre-hearing conference if he could not attend, the ALJ noted that West Orange Municipal Court held one session beginning at 2 p.m. and another at 5 p.m. The pre-hearing conference was scheduled for 10 a.m.

the dismissal of his appeal. Mr. Boyce failed to contact the ALJ to request rescheduling and subsequently failed to appear at the in-person conference on June 24, 2014. The DAG certified the above stated facts on the record before the ALJ on June 24, 2014. The ALJ issued his Initial Decision on July 17, 2014, dismissing the appeal and ordering respondents to pay the assessed penalty of \$60,000 as set forth in the AONOCAPA.

John M. McDonnell, Chapter 7 bankruptcy trustee for Bay Front Marina, submitted a letter on July 25, 2014 in response to the Initial Decision. Mr. McDonnell had not entered an appearance in this matter before the OAL prior to submitting the letter. His letter did not challenge the substance of the ALJ's Initial Decision but rather asserted that an automatic stay in the bankruptcy proceeding would prevent further action by the Department against the debtor marina. The DAG responded to Mr. McDonnell's letter explaining that, until the conclusion of the enforcement action and the recording of the penalty assessment as a money judgment, the automatic stay does not apply.

Mr. McDonnell's letter does not raise any exceptions under the rules of the OAL governing administrative hearing practice, which require him to "specify the findings of fact, conclusions of law or dispositions to which exception is taken" and to propose alternatives "in lieu of or in addition to those reached by the judge." N.J.A.C. 1:1-18.4. Rather, Mr. McDonnell challenges the OAL's authority to process Mr. Boyce's appeal. The entry of a money judgment, as opposed to the enforcement of a money judgment, is allowed as an exception to the automatic stay in a bankruptcy proceeding under Section 362(b)(5), 11 U.S.C.A. § 362(b)(5). Penn Terra Ltd. v. Dept. of Env'tl. Resources, Commonwealth of Pa., 733 F.2d 267, 272, 274 (3d Cir. 1984). The automatic stay has no effect upon the ALJ's authority to dismiss this appeal for failure to prosecute and to order entry of a penalty assessment against Bay Front Marina or Mr. Boyce.

Likewise, the stay does not limit the Commissioner's authority to adopt the Initial Decision as a Final Decision.

Because Respondents failed to appear for the hearing in this matter and failed to provide any explanation for that failure, I find that the ALJ appropriately dismissed their appeal. I therefore ADOPT the ALJ's Initial Decision dismissing the appeal.

I further find that the ALJ's determination to fix the penalty as assessed by the Department was correct. Regarding the penalty, the following facts, as stated in the AONOCAPA, were uncontested by Mr. Boyce in his hearing request. Keith Boyce is a managing member of Bay Front Marina, a restaurant and marina complex located at 96 Bryant Road in Ocean Township, Ocean County. At the time the Department's Notice of Violation was issued to the property owner on April 8, 2008, Mr. Boyce was a prospective purchaser who had requested an inspection of the property. He subsequently purchased the property with full knowledge of and commitment to resolve the existing violations, which included unauthorized development activities—specifically, construction of a 15 foot x 25 foot room waterward of the pre-existing building within 150 feet of the mean high water line without a CAFRA permit; occupation of tidelands by a 50-foot breakwater without a valid grant, lease or license; and the unauthorized addition of five 1.5 foot x 11 foot finger piers along the south side of the 241-foot pier, as well as a 50 foot x 8 foot dock and a 50 foot x 4 foot dock forming an "F" shape at the end of the 241-foot pier without a waterfront development permit. Following Mr. Boyce's purchase of the property, an inspection conducted on January 8, 2009, revealed that the violations not only remained uncorrected but had been exacerbated by the construction of twelve additional pilings waterward of the large pier. Another inspection conducted on April 30, 2009, found that the floating docks were reconfigured and moved to other locations within the marina

instead of being removed. At that time, Mr. Boyce refused to remove the structures, stating that he was improving the site.

There is no dispute that Mr. Boyce violated the Waterfront Development Act, N.J.S.A. 12:5-3, and CAFRA, N.J.S.A. 13:9-1 et seq., by intentionally leaving pre-existing unauthorized structures he acquired through purchase of the site as well as intentionally building new unauthorized structures on the site without the required CAFRA and Waterfront Development permits pursuant to N.J.A.C. 7:7-2.1 and 2.3(c), respectively, or a Tidelands grant, lease or license for occupying the state's riparian land pursuant to N.J.S.A. 12:3-5.

The Department's penalty assessment was explained in the Coastal Permit Program Rules Penalty Rationale accompanying the AONOCAPA, and the ALJ adopted the penalty assessment in his Initial Decision. The Environmental Enforcement Enhancement Act of 2007, effective January 4, 2008, modified both the Waterfront Development Act, at N.J.S.A. 12:5-6(e), and CAFRA, at N.J.S.A. 13:19-18(d), to allow the Department "to assess a civil administrative penalty of not more than \$25,000 for each violation of [the statute in question], or any rule or regulation adopted, or permit or order issued pursuant thereto."

"[E]ach day during which each violation continues shall constitute an additional, separate and distinct offense." N.J.S.A. 12:5-6(e); N.J.S.A. 13:19-18(d). Concerning criteria for determining the penalty, "[a]ny amount assessed under this subsection shall fall within a range established by regulation by the commissioner for violations of similar type, seriousness, duration, and conduct; provided, however, that prior to the adoption of the regulation, the commissioner may, on a case-by-case basis, assess civil administrative penalties up to a maximum of \$25,000 per day for each violation, utilizing the criteria set forth herein." N.J.S.A. 12:5-6(e); N.J.S.A. 13:19-18(d). The Department exercised its authority to assess penalties

based on conduct, seriousness, and duration—the criteria set forth in N.J.S.A. 12:5-6(e) and N.J.S.A. 13:19-18(d).

With respect to the Waterfront Development Act violations, Mr. Boyce's intentional conduct was categorized as major and warranted three penalty points. Because the total area impacted by the structures was approximately 2013 square feet, the seriousness of the violation added six points. Two additional points were assigned because the area of impact is designated as a Special Area containing shellfish habitat (1 point), N.J.A.C. 7:7E-3.2, and a Special Area for submerged aquatic vegetation habitat (1 point), N.J.A.C. 7:7E-3.6. The total of eleven points results in a \$25,000 base penalty. Although the violations continued for more than a year, the Department exercised its discretion and assessed a penalty for only two days of continuing noncompliance, resulting in a penalty of \$50,000 for the waterfront development violations.

As to the CAFRA violations, the Department assessed penalties under N.J.A.C. 7:7-8.5, which assigns penalty points based on the conduct of the violator and the square footage of the area of disturbance. Mr. Boyce's intentional actions were categorized as major conduct, resulting in the assignment of three points under the penalty rule for unpermitted activity. The disturbance of an area of approximately 375 square feet warranted two points. The total of five points resulted in a base penalty of \$5000. Although the violations persisted for more than a year, the Department assessed a penalty of \$10,000 based on two days of violation. The administrative penalty for violations of both statutes totals \$60,000.

I find the ALJ's conclusion that the Department's penalty is fair and reasonable under all the circumstances presented here to be correct and ADOPT it in this Final Decision.


CONCLUSION

For the reasons set forth therein and above, I ADOPT the Initial Decision and note further that the AONOCAPA (EA ID No. PEA090002-1520-08-0003.1) and the assessed penalties constitute a Final Order as to each of the named Respondents. Specifically, having failed to prosecute their appeal, penalties in the amount of \$60,000 are final as against Bay Front Marina and Yacht Basin, LLC, and Keith Boyce. Dismissal is warranted because Respondents failed to appear on the day of the in-person pre-hearing conference, failed to reschedule, and failed to offer any legitimate explanation thereafter for their failure to appear. Further, Respondents have taken no exception to the substance of the Initial Decision.

Accordingly, Respondents are hereby ORDERED to submit payment of penalties by check payable to the Treasurer, State of New Jersey, in the amount of \$60,000 along with a copy of this Final Decision as set forth in Paragraph 24 of the AONOCAPA, within twenty (20) days of this decision.

IT IS SO ORDERED.

DATE: October 3, 2014



Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

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