



State of New Jersey

Department of Environmental Protection

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Trenton, New Jersey 08625

PHILIP D. MURPHY

Governor

CATHERINE R. McCABE

Commissioner

SHEILA Y. OLIVER

Lt. Governor

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

Petitioner,

v.

JOSEPH DONOFRIO, INDIVIDUALLY,
PATRICK DONOFRIO, INDIVIDUALLY,
ESTATE OF PATRICK DONOFRIO, AND
ESTATE OF JOSEPH DONOFRIO,

Respondents.

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

Petitioner,

v.

OWL CONTRACTING COMPANY AND
DOUGLAS KELLY,

Respondents.

) ADMINISTRATIVE ACTION

) FINAL DECISION

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) OAL DKT NO.: ECE 03062-14

) AGENCY REF. NO.: PEA070001-143404-0004.1

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(CONSOLIDATED)

This Order addresses the appeal of an Administrative Order and Notice of Civil
Administrative Penalty Assessment (AONOCAPA) issued on August 21, 2008 and amended on

January 28, 2016, (AONOCAPA) by the New Jersey Department of Environmental Protection, Bureau of Coastal and Land Use Compliance and Enforcement (Department) to Respondents, the Estate of Patrick Donofrio, the Estate of Joseph Donofrio, Jr., Donald Donofrio, Thomas Donofrio, Owl Contracting Company, and Douglas Kelly Sr. (Respondents).¹ The AONOCAPA addresses the placement and grading of unauthorized fill material in freshwater wetlands and within the flood hazard area on contiguous properties identified as Block 21, Lots 1 & 2 in Rockaway Borough, and Block 61601, Lot 11 and Block 62002, Lot 3 in Denville Township (the Properties) in violation of both the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., and implementing regulations, N.J.A.C. 7:7A-1.1 et seq. (FWPA) and the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., and implementing regulations, N.J.A.C. 7:13-1.1 et seq., (FHACA).

The AONOCAPA ordered full restoration of the Properties in accordance with a Department-approved restoration plan and assessed a total penalty of \$167,500. The Department later reduced the overall penalty to \$55,750, based on a downward revision of wetlands impacts after further inspection as part of its January 28, 2016 amendment of the AONOCAPA. At the time of the violations, Block 21, Lots 1 & 2 and Block 62002, Lot 3 (Donofrio Property) were owned by Joseph Donofrio, Jr. Donald Donofrio, and Patrick Donofrio, each holding a one-third interest, while Block 61601, Lot 11 (JCMUA Property) was, and continues to be, owned by the Jersey City Municipal Utilities Authority. Owl Contracting (Owl) is a trade name for Kelly Excavating & Paving, Inc., which first began to utilize the Donofrio Property in 1989,

¹ The AONOCAPA was initially issued to Joseph Donofrio Jr., Donald Donofrio, Patrick Donofrio, Owl Contracting Company and Douglas Kelly but was subsequently amended to add Thomas Donofrio and substitute the Estates of Patrick Donofrio and Joseph Donofrio, Jr. for the since-deceased individuals.

through an oral lease which allowed Owl to access the Donofrio Property to park equipment and trucks.

The Donofrios,² and Owl and Kelly each timely requested a hearing, and the Department transferred the matters to the Office of Administrative Law (OAL) where they were consolidated and assigned to Administrative Law Judge (ALJ) Leland S. McGee. By order dated June 8, 2016, the ALJ granted Owl and Kelly's motion for partial summary decision concluding that Owl and Kelly were not liable for the fill on the JCMUA Property. Despite this ruling, on August 23, 2018, the ALJ subsequently issued an initial decision (Initial Decision) granting the Department's cross-motion for summary decision on all counts and finding all Respondents jointly and severally liable for violations on both the Donofrio and JCMUA Properties.

After a review of the record before me and for the reasons set forth below, I ADOPT the Initial Decision and REJECT any prior inconsistent rulings by the ALJ.

PROCEDURAL AND FACTUAL BACKGROUND

The Properties and the Respondents

The Properties are situated at the confluence of the Rockaway River and Beaver Brook in Rockaway and Denville.³ The JCMUA Property lies adjacent to and east of the Donofrio Property and lacks any direct road frontage.

² The hearing request was submitted on behalf of the Estate of Patrick Donofrio, Thomas Donofrio and Joseph Donofrio on October 10, 2008. Donald Donofrio joined the hearing request by letter also dated October 10, 2008.

³ The Donofrio Property is not demarcated on the land by tax map designations so there was no precise description of the property.

In 1982, Joseph Donofrio, Sr. conveyed the Donofrio Property to his three sons, Joseph Donofrio Jr., Donald Donofrio, and Patrick Donofrio in equal one-third shares as tenants-in-common. Each of the sons, in turn, used the land for various business operations with Joseph Jr. handling the day-to-day management including negotiating leases on behalf of himself and his two brothers. After a series of conveyances, Patrick Donofrio's son, Thomas Donofrio, acquired sole ownership of the Donofrio Property in January 2013.⁴

The AONOCAPA

The Department performed inspections of the Properties on April 14 and 16, 2004. These inspections revealed that approximately 5,250 cubic yards of unauthorized fill material had been placed and graded within the delineated flood hazard area and floodway of the Rockaway River and Beaver Brook and freshwater wetlands and wetland transition areas on both the Donofrio and JCMUA Properties. The unauthorized fill included 15-20% construction debris such as brick, concrete, asphalt, metal, rubber, plastic, tile and tires. At the conclusion of the April 16, 2004 inspection, the Department issued a Field Notice of Violation to Joseph Donofrio Jr. for violations of the FHACA and the FWPA. The Field Notice of Violation required the submittal of a restoration plan and removal of all fill from the regulated areas within 45 days. On April 29, 2004, the Department issued a second Notice of Violation to Joseph Donofrio Jr., also including Owl Contracting for the violations.

⁴ In March 2007, Thomas Donofrio acquired his uncle Joseph Donofrio Jr.'s one-third interest. In January 2012, Thomas Donofrio inherited his father Patrick Donofrio's one-third interest through a conveyance following Patrick Donofrio's death in 2007. In January 2013, Thomas Donofrio acquired the final one-third interest via conveyance from Donald Donofrio.

In 2005, Owl removed a stockpile of soil from the Properties. However, following a reinspection of the Properties that revealed continued violations of the FHACA and FWPA, the Department issued the initial AONOCAPA on August 21, 2008.

In June 2009, Thomas Donofrio and Owl submitted a Restoration Plan to the Department. The Restoration Plan covered both the Donofrio and JCMUA Properties and indicated that both of the Properties are located entirely within the flood hazard area regulated under the FHACA and portions of the flood hazard area as well as wetlands and transition areas on the Properties were filled during the period of the Donofrio's ownership and Owl's operations between 1995 and 2004. The Department's review of available information, including historic aerial photographs, indicated no evidence of filling as of 1987, but revealed evidence of land disturbances to the Properties in 1995, 1999, and into 2004, consistent with the Restoration Plan.

Superior Court Lawsuit

In September 2006, Joseph Donofrio Jr. commenced an action against his brothers, Patrick and Donald Donofrio, in the Chancery Division of the Morris County Superior Court seeking to partition the Donofrio Property. Subsequently in January 2007, Patrick Donofrio countersued and filed a third-party complaint against Owl and Douglas Kelly Sr., among others, infusing environmental claims into the lawsuit ("Superior Court Lawsuit"). In March 2007, Joseph Donofrio Jr. sold his one-third interest in the Donofrio Property to Patrick Donofrio's son, Thomas Donofrio, thereby resolving the partition portion of the lawsuit, leaving only the environmental claims for future adjudication.

In 2012, these environmental claims were tried without a jury before Judge Robert J. Brennan J.S.C. At the time of the bench trial, the Donofrio Property was owned in two-third parts

by Thomas Donofrio and one-third part by Donald Donofrio as tenants in common. The issues at trial were framed by a Second Amended Complaint (Amended Complaint). In the eleven count Amended Complaint, the Donofrios sought declaratory judgment finding that Owl, Kelly and others were responsible, pursuant to the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. (Spill Act), and common law, for the unlawful filling and illegal dumping of materials, including hazardous substances, on the so-called "Injured Parcel." The Amended Complaint defined "Injured Parcel" to include both the Donofrio Property and the JCMUA Property.

In his May 16, 2012 oral decision rendered at the conclusion of trial, Judge Brennan confirmed the facts set forth above and held that: (1) unauthorized filling and dumping occurred on the Properties during the Donofrios' ownership and Owl's tenancy; (2) the Donofrios and Owl had a duty to prevent this illegal dumping; and (3) that, while there was no evidence that either the Donofrios or Owl brought the fill onto the Properties, they were responsible under the Spill Act due to their failure to discharge their duty to prevent the illegal dumping. Subsequently, on August 28, 2012, Judge Brennan issued a written opinion finding and declaring:

... with respect to the injured land that is the subject matter of Plaintiffs' claims and related violation notices issued by the [Department], that Kelly Excavating and Paving, Inc. (t/a Owl Contracting) and Douglas Kelly, Sr., individually, are responsible and jointly and severally liable under and within the meaning of the New Jersey Spill Act, based on their failure to monitor the injured property, for one-third (1/3) share, while Thomas Donofrio and Donald Donofrio, as landlords and property owners, are responsible and jointly and severally liable under and within the meaning of the New Jersey Spill Act, based on their failure to monitor the injured property, for two-thirds (2/3).

OAL Proceedings and Amendment to the AONOCAPA

The Department waited until after the conclusion of the Superior Court lawsuit before transmitting the contested cases to the OAL. On October 20, 2015, while the consolidated matters were pending at OAL, the Department moved to amend the AONOCAPA to add Thomas Donofrio as a respondent, to substitute the estates of Patrick Donofrio and Joseph Donofrio for the since-deceased individual respondents, as well as to reduce the overall penalty assessment from \$167,500 to \$55,750 based on a downward revision of wetlands impacts after further inspection. On November 19, 2015, the ALJ granted the Department's motion to amend the AONOCAPA as requested, which the Department did on January 28, 2016. While the Department's amendment made the noted changes to the named respondents and the overall penalty assessment, the underlying factual allegations and alleged violations remained the same.

On March 10, 2016, the ALJ granted JCMUA's motion to intervene in the consolidated matters. In that same order, however, the ALJ partially reversed his November 19, 2015 order and ruled that individual estates of Joseph Donofrio Jr. and Patrick Donofrio could not be substituted as respondents in the matter. As a result, the Department sought and was granted interlocutory review of the ALJ's reversal and, on April 25, 2016, Commissioner Bob Martin issued an Interlocutory Order rejecting and reversing the ALJ's March 10, 2016 order, to the extent it refused to allow the Department to substitute the estates of Patrick Donofrio and Joseph Donofrio for the deceased individual respondents.

Just prior to the Department's issuance of the Interlocutory Order, Owl and Kelly filed a motion for partial summary decision seeking dismissal of the Department's claims as to the JCMUA property. Owl and Kelly argued that it would be improper to assign them responsibility

for the placement of fill onto the JCMUA Property because Judge Brennan's opinion and decision based their liability solely on their status as tenants of the Donofrios, not as tenants of the JCMUA property, and the lease did not extend onto the JCMUA Property. Further, Kelly argued that he could not be held personally responsible solely because he was the responsible corporate officer of Owl.

The Department opposed the Owl and Kelly motion and cross-moved for summary decision on the AONOCAPA as to all claims and Respondents. JCMUA effectively joined the Department's motion. The Department argued the Superior Court ruling and judgment did not limit Respondents' liability to the Donofrio Property but rather found Respondents responsible for the filling and dumping at both the Donofrio Property and the adjoining JCMUA Property due to their collective control of access to the Properties. The Department further argued that the doctrines of collateral estoppel and res judicata barred Owl and Kelly from re-litigating their liability for cleanup of the JCMUA Property because the Superior Court had already decided the issue. Additionally, the Department argued the responsible corporate officer doctrine was irrelevant to Douglas Kelly Sr. as he had already been found personally responsible for the filling and dumping on the Properties. Finally, the Department argued the \$55,750 penalty was properly assessed.

By order dated June 8, 2016, the ALJ granted Owl and Kelly's motion for partial summary decision and denied the Department's cross-motion. In his decision, the ALJ concluded that Owl and Kelly were not liable for the fill on the JCMUA Property as a matter of res judicata because Judge Brennan only decided as to the fill on the Donofrio Property. The ALJ further concluded that Owl and Kelly should not be held liable for the fill on the JCMUA Property as they did not

own or lease that property and, therefore, had no way to control it or to prevent the dumping of the fill. Although the ALJ's June 8, 2016 order is not clear on the issue, the record reveals an understanding of the parties that the Department's cross-motion was denied only as to the claims against Owl and Kelly regarding the JCMUA property.

The remnants of the Department's cross-motion were opposed by Donald Donofrio, Thomas Donofrio and the Estate of Patrick Donofrio. Donald Donofrio argued that he was dismissed with prejudice from the Spill Act lawsuit before Judge Brennan's decision and, therefore should not be held responsible for any illegal filling on the Properties. He further argued that he is indemnified by Thomas Donofrio by agreement and, like Owl and Kelly, he cannot be held responsible for the JCMUA property because he was not the owner of that property.

In his opposition to the Department's cross-motion for summary decision, which was joined by the Estate for Patrick Donofrio, Thomas Donofrio argued that contested issues of fact as to his liability under the FWPA and FHACA preclude summary judgment with regard to the Donofrio Property. Thomas Donofrio also argued that the penalty issued by the Department was excessive. Thomas Donofrio also filed his own motion for partial summary decision seeking dismissal of the Department's claims as to the JCMUA property for the same reasons raised by Owl, Kelly and Donald Donofrio.

The Department opposed Thomas Donofrio's cross-motion for summary decision arguing that his ownership and control of the Donofrio Property rendered him liable under the FWPA and the FHACA. The Department further argued that Thomas Donofrio was and is liable as a purchaser of the Donofrio Property who was on notice of the alleged violations. The Department

also argued that Thomas Donofrio is estopped from re-litigation of liability due to Judge Brennan's decision in the Superior Court lawsuit and the doctrine of res judicata. Finally, the Department asserted that the penalties were properly calculated and assessed against both the Donofrio and JCMUA Properties.

Initial Decision

In his August 23, 2018 Initial Decision, the ALJ granted the Department's Cross-Motion for Summary Decision as to all Respondents on both the Donofrio and JCMUA Properties. Specifically, the ALJ ruled that Donald Donofrio as well as the Estates of both Patrick and Joseph Donofrio Jr. did not raise any material factual dispute in the form of an affidavit or certification to defeat the Department's motion as to either of the Properties. Further, the ALJ found that Owl and Kelly did not oppose summary decision on liability for violations on the Donofrio Property, notwithstanding his earlier order regarding their liability as to the JCMUA Property. Additionally, despite drawing the opposite conclusion in his June 8, 2016 ruling on the Owl and Kelly motion for partial summary decision, the ALJ ruled that all Respondents are collectively liable for the penalties associated with the JCMUA Property because Judge Brennan's decision in the Superior Court lawsuit rendered them responsible for the entire Injured Parcel, which included the JCMUA Property. The ALJ also more specifically found Thomas Donofrio liable for penalties on the JCMUA Property because he is the owner of the Donofrio Property and that the penalties imposed by the Department on Respondents were properly assessed. Despite these rulings, the conclusion of the Initial Decision erroneously states that Respondents' motion for summary decision was granted on all allegations.

The Department, JCMUA, Donald Donofrio, Thomas Donofrio, and the Estate of Patrick Donofrio all filed exceptions to the ALJ's Initial Decision. Donald Donofrio, Thomas Donofrio, the Estate of Patrick Donofrio, as well as Owl and Kelly filed replies to the Department's filed exceptions.

DISCUSSION

Standard of Review

A party is entitled to summary decision where the moving party shows there is no genuine issue as to any material fact challenged and should prevail as a matter of law. N.J.A.C. 1:1-12.5; Contini v. Bd. Of Educ., 286 N.J. Super. 106, 121 (App. Div. 1995). Like the standard for summary judgment under Rule 4:46-2, the standard on a motion for summary decision requires the court or agency head to determine whether the evidence, when viewed in the light most favorable to the non-moving party, is "sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Contini, supra, 286 N.J. Super. at 122 (quoting Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)).

Based on the applicable standard, I find the Department was entitled to summary decision on the alleged violations and the resulting penalties assessed in the AONOCAPA. I find the ALJ correctly determined that Respondents are jointly and severally liable for violations set forth in the AONOCAPA on both the Donofrio and JCMUA Properties. Moreover, I find that, to the extent the order has not been otherwise overruled by the findings set forth in the Initial Decision, the ALJ incorrectly granted Owl and Kelly's motion for partial summary decision finding those parties to have no liability regarding the JCMUA Property and reject the ALJ's June 8, 2018 Order accordingly. I further find that the ALJ incorrectly indicated that he had granted Respondents'

motion for summary decision in his Initial Decision based on the findings contained therein. Accordingly, I accept the findings and conclusions set forth in the Initial Decision as follows.

Regulatory Framework

The Department regulates flood hazard areas to protect the public from the hazards of flooding, preserve the quality of surface waters and protect the wildlife and vegetation that exist within and depend upon such areas for food and habitat. The vegetation found in such areas is essential for maintaining bank stability and water quality. Unless properly controlled, development within flood hazard areas can increase the intensity and frequency of flooding by reducing flood storage, increasing stormwater runoff and obstructing the movement of floodwaters. Disturbing vegetation in flood hazard areas can destabilize channels, leading to increased erosion and sedimentation that exacerbates the intensity and frequency of flooding and reduces filtration of stormwater runoff. The Department regulates freshwater wetlands to protect from disturbance and to provide predictability in the protection of freshwater wetland resources. Freshwater wetlands protect drinking water supplies by purifying surface water and groundwater resources, providing protection against flood and storm damage, providing essential habitat for wildlife and vegetation, and maintaining critical baseflow to surface waters and groundwater. Development and disturbance of freshwater wetlands can lead to ecological and water quality decline, loss of habitat, and exacerbated flooding.

Both the FHACA and FWPA prohibit placing fill in flood hazard areas, wetlands and/or wetland transition areas without a Department permit and subject any party responsible for those activities to enforcement action. Specifically, under the FHACA “[n]o person shall engage in a regulated activity in a regulated area without a flood hazard area authorization or permit”

and initiation of any regulated activities without said authorization “shall subject the party or parties responsible for the regulated activity to enforcement action.” N.J.A.C. 7:13-2.1. “Regulated activities” include “[t]he alteration of topography through excavation, grading and/or placement of fill” as well as “[t]he clearing, cutting, and/or removal of vegetation in a riparian zone.” N.J.A.C. 7:13-2.4. “Regulated areas” include flood hazard areas and riparian zones along regulated waters. N.J.A.C. 7:13-1.2

The FWPA contains almost identical language. See N.J.A.C. 7:7A-2.1 (“[n]o person shall engage in a regulated activity subject to this chapter without a permit or authorization ... [i]nitiation of a regulated activity without a permit ... shall subject the person or persons responsible for the regulated activity to enforcement action). “Regulated activities” include “removal, excavation, disturbance or dredging of soil” as well as “dumping, discharging or filling with any materials” in freshwater wetlands. N.J.A.C. 7:7A-2.2. “Regulated activities” within wetland transition areas include “removal, excavation, or disturbance of the soil” as well as “dumping or filling with any materials.” N.J.A.C. 7:7A-2.3.

Donofrio Property

I accept the ALJ’s finding that Respondents are jointly and severally liable for violations contained in the AONOCAPA that occurred on the Donofrio Property. In so doing, I accept the ALJ’s finding that the Estates of Patrick and Joseph Donofrio Jr. as well as Donald Donofrio have not raised any material factual disputes to the Department’s cross-motion for summary decision and are therefore liable for the violations on the Donofrio Property. Similarly, I accept the ALJ’s finding that Owl and Kelly did not oppose the Department’s motion with regard to the Donofrio Property. Finally, as discussed more fully below, I accept the ALJ’s finding that Thomas Donofrio

is liable for penalties on the Donofrio Property as a result of his acquisition of the property with notice of the ingoing violations.

Under N.J.A.C. 1:1-12.5, “[w]hen 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.” Here, the Department’s cross-motion is well supported by evidence in the form of Department Inspector Peter Keledy’s certification as well as the factual and legal findings from the Superior Court Lawsuit. More specifically, there is no dispute that the Donofrio Property lies within a flood hazard area and contain wetlands and wetland transition areas and that dumping and filling occurred within these protected areas without a permit or other authorization from the Department in violation of the FHACA and FWPA. Additionally, as the record before me reflects, the court’s findings in the Superior Court Lawsuit established that these unauthorized activities occurred during the time of Joseph Donofrio, Jr., Patrick Donofrio and Donald Donofrio’s ownership of the Donofrio Property and Owl’s occupation under the aforementioned lease. While Judge Brennan did not find evidence that Respondents directly placed fill onto either the Donofrio Property, he reasonably found, based on evidence in the record, that Respondents are collectively responsible for the dumping and filling under the Spill Act due to their failure to monitor and protect those properties over which they exercised control. As set forth above, the unauthorized fill which was the subject of the aforementioned Spill Act claims is also subject to regulation under both the FHACA and the FWPA and Respondents are similarly subject to liability for any violations for which they are responsible. See N.J.A.C. 7:13-2.1(a); N.J.A.C. 7:7A-2.1(a). Therefore, while Judge Brennan’s decision pertained to responsibility under the Spill Act, the

record before me, including his determination, supports an additional finding of liability under the FHACA and the FWPA for the Donofrio Property. Therefore, I find that the ALJ was correct to grant the Department's cross-motion as to all Respondents on for the Donofrio Property.

JCMUA Property

With regard to liability for the JCMUA Property, there is again no dispute that the property lies within a flood hazard area and contains wetlands and wetland transition areas and that dumping and filling occurred within these protected areas without a permit or other authorization from the Department in violation of the FHACA and FWPA. Further, the record reflects, as has already been established in the Superior Court Lawsuit, that these unauthorized activities occurred during the time of Joseph Donofrio, Jr., Patrick Donofrio and Donald Donofrio's ownership and Owl's occupation of the Donofrio Property and that Respondents are collectively responsible for the dumping and filling under the Spill Act due to their failure to monitor and protect those properties, including JCMUA's Property, over which they exercised control. Therefore, Respondents are similarly liable under both the FHACA and the FWPA for any violations occurring on the JCMUA Property for which they are responsible. See N.J.A.C. 7:13-2.1(a); N.J.A.C. 7:7A-2.1(a). Based upon the facts in the record including: reports and site plans by two environmental consultants, both of whom confirmed that contaminated fill extends from the Donofrio Property onto the JCMUA Property, the unclear boundaries between the Properties, the lack of road frontage to the JCMUA Property, the nature of activities on the Properties, the Superior Court's determination that the violations occurred during the time in which Respondents controlled the Donofrio Property, I accept the ALJ's finding that Respondents are jointly and severally liable for violations set forth in the AONOCAPA on the JCMUA Property due

to their failure to monitor and prevent violations on the Donofrio Property which can reasonably be determined to have extended onto the JCMUA Property. Consistent with Judge Brennan's ruling, I make this finding notwithstanding any argument by Respondents that they lacked rights to enter upon the JCMUA Property as it is apparent from the facts at hand that the fill resulted from operations emanating from the Donofrio Property, over which Respondents clearly had control.

In so doing, I reject, to the extent it has not already been overruled by the Initial Decision, the ALJ's June 8, 2016 Order which found that Judge Brennan's Superior Court ruling did not include the JCMUA Property. As described above, Judge Brennan explicitly stated that the Amended Complaint framed the Superior Court Lawsuit. That Amended Complaint, in which the Donofrios sought relief from Owl and Kelly, specifically defined the Injured Parcel to include both their property and the JCMUA Property. Most notably, Judge Brennan's August 28, 2012 Judgment apportioning ultimate responsibility for the illegal filling, by its own clear and explicit terms, applied to the "injured land that is the subject matter of Plaintiffs' claims and related violation notices issued by the [Department]," both of which included the JCMUA Property.

Additionally, I find that since the issue of responsibility for filling on the JCMUA Property has already been determined during the Superior Court Lawsuit, Owl and Kelly cannot now relitigate that issue. Collateral estoppel "bars litigation of any issue which was actually determined in a prior action ... involving a different claim or cause of action." Tarus v. Borough of Pine Hill, 189 N.J. 497, 520 (2007). Collateral estoppel applies where there is "identity of the issues litigated and to be litigated, notice and a full and fair opportunity to be heard afforded the party sought to be precluded, and equality of forum." Pressler & Verniero, Current N.J. Court

Rules, comment 7 on R. 4:5-4 (2018). Estoppel requires a final judgment on the merits in the prior proceeding, a determination that the issue was essential to the judgment, and identity of the parties, or privity between the party asserting estoppel and a party in the previous litigation. Perez v. Rent-A-Center, Inc., 375 N.J. Super. 63, 76 (App. Div. 2005), *rev'd on other grounds*, 186 N.J. 188 (2006). "Simply put, for collateral estoppel purposes, 'the question to be decided is whether a party has had his day in court on an issue.'" State v. K.P.S., 221 N.J. 266, 278 (2015)(quoting McAndrew v. Mularchuk, 38 N.J. 156, 161 (1962)). Accordingly, I find that Owl and Kelly are now barred from re-litigating the issue of responsibility for filling and dumping on the JCMUA Property under collateral estoppel principles.

Thomas Donofrio

With regard to the specific arguments against liability set forth by the current owner of the Donofrio Property, Thomas Donofrio, I accept the ALJ's finding that Thomas Donofrio is liable for penalties on the JCMUA Property due to his status as owner of the Donofrio Property who was on notice of the alleged FWPA and FHACA violations. For the same reasons, I find Thomas Donofrio liable for penalties on the Donofrio Property. Successors in ownership become liable when they knowingly purchase a property on which a violation exists and the Department may enforce a violation of the FWPA and FHACA against the purchaser of a property whereon violations have occurred, especially where the purchaser has constructive or actual notice of the alleged violations and the Department's enforcement action. N.J. Dep't of Env. Protection v. Huber, No. A-5874-07T3, 2010 N.J. Super. Unpub. LEXIS 121, at *33 (App. Div. Jan. 20, 2010), *aff'd as modified*, 213 N.J. 338 (2013). It would simply defeat the comprehensive purpose of these Acts, if violations were legalized by the sale or transfer of property. The record shows that

Thomas Donofrio had actual notice of the violations alleged by the Department in the AONOCAPA. The Department issued its initial notices of the alleged violations in 2004. These notices formed the basis for the environmental claims made in the Superior Court Lawsuit to which Thomas Donofrio was a party. Thereafter, by acceptance of the conveyances of the individual one-third shares in the Donofrio Property, Thomas Donofrio knowingly accepted potential responsibility for the alleged violations.

Donald Donofrio

I also add that I find Donald Donofrio's argument that he was dismissed from the Superior Court Lawsuit unconvincing. While it appears that a stipulation of dismissal was filed with the Superior Court Clerk, a review of the record before me does not reveal a corresponding court order dismissing him from the matter. R. 4:30 (allowing dismissal of parties by court order). Judge Brennan certainly did not consider Donald Donofrio dismissed from the matter; instead finding him to be in default for failure to appear. It should be further noted that his dismissal would not affect my decision as the uncontested facts show that he was part owner of the Donofrio Property during the time the filling took place and was therefore culpable for the ensuing FWPA and FHACA violations. For largely the same reasons, I find Donald Donofrio's indemnification arguments of no import to the matter before me as they pertain only to how the individual respondents may allocate liability amongst themselves and not to whether Donald Donofrio is liable under the FWPA and FHACA.

Penalty Assessment

Finally, I accept the ALJ's finding that the Department properly assessed the FWPA and FHACA penalties here. The Department "has broad discretion in determining the sanctions to be

imposed for a violation of the legislation it is charged with administering." In re Scioscia, 216 N.J. Super. 644, 660 (App. Div. 1987), certify. Denied, 107 N.J. 652 (1987); see DEP v. Singh, 2007 N.J. Super. Unpub. LEXIS 305, *6-7 (App. Div. 2007) (holding that DEP's discretionary application of statutory penalty criteria to the facts in a given case are "presumed valid and reasonable" within the area of its expertise and delegated authority). The penalties assessed are supported by the record considering the type, conduct, seriousness and duration of the violations and are hereby affirmed.


CONCLUSION

For the reasons set forth therein and above, I conclude the ALJ properly granted summary decision in the Initial Decision in favor of the Department. Accordingly, I ADOPT the ALJ's determination that Respondents are jointly and severally liable for violations set forth in the AONOCAPA on both the Donofrio and JCMUA Properties. Further, to the extent it has not already been overruled or inconsistent language remains in the Initial Decision, I REJECT any ruling by the ALJ granting Owl and Kelly's motion for partial summary decision as to liability for violations on the JCMUA Property. All Respondents are hereby ordered to immediately comply with the conditions of the AONOCAPA and remit the \$55,750 penalty due thereunder within 30 days from the date of this Final Decision.

IT IS SO ORDERED.

DATE:

JAN 04 2019


Catherine R. McCabe, Commissioner
New Jersey Department of
Environmental Protection

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

v.

JOSEPH DONOFRIO, INDIVIDUALLY, PATRICK DONOFRIO, INDIVIDUALLY,
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(CONSOLIDATED)

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