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115 RIVER ROAD, LLC,	)	<u>ADMINISTRATIVE ACTION</u>
	)	FINAL DECISION
Petitioner,	)	
	)	
v.	)	
	)	
NEW JERSEY DEPARTMENT OF	)	OAL DKT NO.: ELU 02203-14
ENVIRONMENTAL PROTECTION, LAND USE	)	AGENCY REF. NO.: 0213-09-0002.2
REGULATION,	)	APD110001 and 0213-09-0002.4
	)	WFD160001
Respondent.	)	
	)	

This Order addresses the consolidated appeal by 115 River Road, LLC (115 River) of two related decisions issued by the Department of Environmental Protection (Department) for a proposed addition to an existing building located almost entirely on a pier extending into the tidal waterways of the Hudson River and identified as Block 96, Lots 3.04 and 4.01 in the Borough of Edgewater, Bergen County (the Property). The two decisions addressed by the Order are: (1) the September 20, 2011 jurisdictional determination finding that a permit was required under the Waterfront Development Law, N.J.S.A. 12:5-3; and (2) the May 9, 2017 denial of 115 River's subsequent application for a waterfront development permit under the

Waterfront Development Law and the Coastal Zone Management (CZM) rules, N.J.A.C. 7:7.<sup>1</sup>

The two matters were separately referred to the Office of Administrative Law as contested cases and consolidated. In a May 29, 2019 Initial Decision, Administrative Law Judge (ALJ) Gail M. Cookson found that the Department was entitled to summary decision as to the waterfront development permit denial because the undisputed facts show that 115 River cannot meet the special urban areas exception under the coastal high hazard regulations at N.J.A.C. 7:7-9.18. For the reasons set forth herein, I ADOPT the Initial Decision.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The Property consists of a former warehouse building located on a timber pile pier extending 525 feet into the waters of the Hudson River. The majority of the existing building is two stories except for a small portion at the farthest point extending into the water, about 1/10<sup>th</sup> of the length of the existing building, that is three stories. The existing structure includes office space, a parking garage, and a restaurant. The current preliminary FEMA work map (Map No. 34003C0286J, dated August 29, 2014) shows that the pier lies in a mapped high velocity water zone, or “V zone.” V zones are high hazard areas prone to flooding and high velocity waters and subject to wave run-up and overtopping. N.J.A.C. 7:7-9.18. The FEMA map indicates that the tidal 100-year flood plain at the Property is at an elevation of 10 feet and the flood elevation within the V zone of the Hudson River is at an elevation of 14 feet.

In July 2011, 115 River requested a jurisdictional determination as to the necessity of a waterfront development permit for the addition of a new catering facility and eighteen

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<sup>1</sup> The Coastal Zone Management rules were amended in relevant part effective January 16, 2018. For the purposes of this Order, I will refer to the rules as they are currently codified. Any discussion of the pre-amendment rules are noted in the body of the Order.

residential apartments to be built alongside the existing third floor structure, as well as the modification of the existing first floor to construct a new restaurant patio space within the first floor's existing footprint and existing outdoor area (First Proposed Project). In response, the Department concluded that a waterfront development permit would be required under N.J.A.C. 7:7-2.3(a)3i and N.J.A.C. 7:7-2.3(c)2, because work would be performed at or below (outshore) of the mean high water line and would entail development over a tidal waterway under the CZM rules at N.J.A.C. 7:7-2.3(a)3 and -2.3(c)2. 115 River submitted a request for an adjudicatory hearing to challenge this jurisdictional determination on September 27, 2011. The parties engaged in Alternative Dispute Resolution (ADR) but were unsuccessful, and the appeal of the jurisdictional determination was transmitted to the Office of Administrative Law (OAL) on February 24, 2014 as a contested case.

Separate from 115 River's appeal of the jurisdictional determination, 115 River submitted an application for a waterfront development individual permit on October 5, 2016 with slight modifications to the First Proposed Project. Particularly, the third-floor addition component of the First Proposed Project was amended to replace the proposed 18 residential apartments with the same number of guest suites (Second Proposed Project). The Department denied 115 River's permit application on May 9, 2017, citing its failure to conform with: the Coastal High Hazard Areas regulations, N.J.A.C. 7:7-9.18; the Flood Hazard Areas regulations, N.J.A.C. 7:7-9.25; the Hudson River Waterfront Area regulations, N.J.A.C. 7:7-9.46; the Coastal Zone Management Rules' Housing regulations, N.J.A.C. 7:7-15.2; and the Commercial Facility Use Rule, N.J.A.C. 7:7-15.10. In response to the permit denial, 115 River submitted a request for an adjudicatory hearing on June 12, 2017. Shortly thereafter, the appeal of the substantive

denial of the waterfront development permit was consolidated with the appeal of the jurisdictional determination at OAL. 115 River requested that the matter be placed on the inactive list as the parties attempted to negotiate a settlement through ADR. To facilitate settlement negotiations between the parties, the matter was maintained in a state of inactivity through 2018.

In July of 2018, the parties confirmed that they would enter into a tentative Settlement Agreement, to be drafted by 115 River. Under the terms of the Settlement Agreement, the proposed project was modified to remove any residential component, including hotel use, and was limited to commercial use only. 115 River and the Department entered into a Stipulation of Settlement and Withdrawal of Request for Hearing (Stipulation of Settlement) in OAL on November 16, 2018. Under paragraph 4 of the Stipulation of Settlement and N.J.A.C. 7:7-28.4(b), governing notices of settlement agreements and coastal permit decisions, the agreement was subject to a public comment period. Under paragraph 5 of the Stipulation of Settlement, the Department agreed to issue the Individual Waterfront Development Permit unless it received a comment indicating that the Department's decision to issue the permit was based upon incomplete or inaccurate information or violated the CZM Rules. Notice of the Settlement was published in the December 5, 2018 DEP Bulletin, with a thirty-day comment period, and no comments were submitted. Upon the close of the comment period, 115 River was advised that the Department declined to issue the anticipated waterfront development permit notwithstanding the Stipulation of Settlement.

The Department indicated that the Stipulation was entered into in error and that the Department could not comply with a stipulation that would result in a violation of the

standards in the rules. The Department also filed a motion for summary decision on the coastal high hazard areas rule and its applicability to 115 River's Project. 115 River responded and filed a cross-motion seeking to enforce the Stipulation or obtain an order overruling the Department's basis for denying the Permit on the merits; 115 River argued that the Stipulation of Settlement was binding as a matter of law and that summary decision was inappropriate while material facts remained in dispute. ALJ Cookson concurred with the Department's interpretation of the coastal high hazard areas rule and issued an initial decision granting the Department's motion for summary decision. The ALJ also denied 115 River Road's motion in the same initial decision.

#### **INITIAL DECISION**

In a May 29, 2019 Initial Decision, the ALJ granted the Department's motion for summary decision and denied 115 River's cross motion for summary decision. First, the ALJ examined 115 River's argument that the Department ought to be bound by the Stipulation of Settlement and Withdrawal of Request for Hearing in the Office of Administrative Law concluding that, while the Department's staff had erred by entering into the Stipulation, the Department was prohibited from enforcing the settlement agreement because it would impermissibly circumvent the substantive provisions of a governing regulation. In reaching the substance of the matter, the ALJ found that 115 River's proposed project must be considered a "development" as defined by the CZM rules, requiring 115 River's proposal to fall within an exception to the rules prohibiting commercial development in a V zone. The ALJ found that there was no dispute that Edgewater was not designated as a special urban area that would be exempt from the regulations governing coastal high hazard areas. The ALJ also found that 115

River's proposed project did not qualify under any exception under the Flood Hazard Control Act (FHACA) rules at N.J.A.C. 7:13-12.5.

### **EXCEPTIONS**

115 River filed exceptions to the Initial Decision on June 12, 2019. First, 115 River takes exception to the ALJ's conclusion that the Department did not have to comply with the Stipulation of Settlement. 115 River asserts that the ALJ did not give enough credence to the Stipulation of Settlement itself and the public policy in favor of settlement agreements in the State of New Jersey. 115 River also asserts that the case law on point, Dragon v. NJDEP, 405 N.J. Super. 478 (App. Div. 2009), which was cited by the ALJ, is not applicable because the Department failed to show that 115 River was using settlement negotiations as a means to circumvent substantive permitting requirements.

Second, 115 River takes exception to the ALJ's conclusion that the proposal cannot meet the substantive provisions of the coastal high hazard areas rule and the Hudson River waterfront area rule because the development is not located in a "special urban area." 115 River asserts that the development satisfies the Hudson River waterfront area regulations because the proposal makes use of "existing footprints." Additionally, 115 River asserts that the ALJ focused unnecessarily on the fact that Edgewater is not designated as a special urban area. 115 River argues that the fact the proposal is not located in the special urban area should not be the only rationale used to deem that the Department does not have to comply with the terms of the Stipulation of Settlement as 115 River does not seek a waiver of a substantive requirement.

Third, 115 River takes exception to the ALJ's conclusion that the proposed development cannot meet the flood hazard exception under the FHACA rules. 115 River asserts that the flood hazard exception cannot be decided by summary decision, as there are material facts in dispute between the parties.

The Department filed its reply to 115 River's exceptions on June 19, 2019. The Department responded to the first exception, asserting the ALJ's analysis under Dragon was correct, and the Department cannot waive substantive regulatory requirements via settlement. Additionally, the Department asserted that Dragon does not require the Department to establish or show that 115 River attempted to use the Settlement Agreement to circumvent any permit requirements.

In its response to the second exception, the Department asserted that 115 River failed to address the fact that Edgewater is not a special urban area under the Coastal Zone Management rules. The Department also stated that 115 River's exception regarding the public policy surrounding settlement agreements was inappropriate, and that such policy considerations should not result in violation of the Department's regulatory requirements.

Finally, the Department addressed 115 River's third exception to the ALJ's finding that 115 River could not meet the flood hazard exception. The Department asserted that, while the flood hazard exception generally allows for enlargement of a building if it would not be a substantial improvement, the exception does not apply if the building is located in a V zone. While the proposed addition to the third floor is not a "substantial improvement" within the definition of that term in the regulations, the Property is located within a V zone, and the exception therefore does not apply.

## DISCUSSION

### Coastal high hazard areas rule (V zones), N.J.A.C. 7:7-9.18

The coastal high hazard areas rule at N.J.A.C. 7:7-9.18 governs residential and commercial development in an area delineated on FEMA flood maps as subject to wave run-up and overtopping *and* is mapped as an area that is (1) flood prone and subject to high velocity waters, or (2) within 25 feet of oceanfront shore protection structures. Flood prone areas subject to high velocity water are known as V zones. N.J.A.C. 7:7-9.18(a).

Under the coastal high hazard areas rule, residential and commercial developments are prohibited in V zones subject to five exemptions: (1) residential development of a single-family home or duplex landward of the mean high water line, (2) residential development in Atlantic City, or in a “special urban area” within the Hudson River waterfront area, (3) hotel or commercial development area in Atlantic City, or in a “special urban area” within the Hudson River waterfront area; (4) water dependent development and amusements, and (5) beach use related commercial development. None of these exemptions applied to 115 River’s proposed development as explained below. N.J.A.C. 7:7-9.18(a)-(f). Of note, no arguments were made that 115 River’s proposed development qualifies as (1) residential development of a single-family home or duplex, (2) water dependent amusement, or (3) beach use related commercial development. Accordingly, those three exemptions to the coastal high hazard areas rule are not discussed.

The current preliminary FEMA work map (Map No. 34003C0286J, dated August 29, 2014), applicable at the time of the permit application, shows that the Property lies in a



mapped V zone subject to wave run-up and overtopping. Therefore, the coastal high hazard areas rule applies.

Under the current CZM rules, residential development is defined as “a development that provides one or more dwelling units,” and a dwelling unit means “a[n] ...apartment ...hotel or motel room.” N.J.A.C. 7:7-1.5. 115 River’s First Proposed Project proposed, in part, the residential development of eighteen apartments, a development that would be prohibited in coastal high hazard areas under both the pre-amendment and current version of the rule. 49 N.J.R. 2122(a). In its permit application, 115 River’s Second Proposed Project modified the original project to include the residential development of eighteen hotel suites, also prohibited under both the pre-amendment and current rules. 49 N.J.R. 2122(a). Pursuant to negotiations meant to settle the matter, and which ultimately resulted in the November 16, 2018 Stipulation of Settlement, 115 River modified its proposed plans for the Property to remove the residential development of either apartments or hotel suites but continued to propose commercial development for the third-floor addition. Prior to the 2018 rule change, commercial development was “generally discouraged,” as opposed to the full prohibition of residential development. Under the new rule at N.J.A.C. 7:7-9.18(d), *hotel and commercial* development are prohibited in coastal high hazard areas unless the development qualifies as: (1) residential development in Atlantic City, or in a “special urban area” within the Hudson River waterfront area, or (2) hotel or commercial development area in Atlantic City, or in a “special urban area” within the Hudson River waterfront area. The Atlantic City exemption for residential or hotel and commercial development is not applicable here because the Property is not “within the municipal boundary of the City of Atlantic City” such that the rule would apply. The remaining

exemption, for residential or hotel and commercial development in a “special urban area” within the Hudson River waterfront area, is discussed below.

I ADOPT the ALJ’s findings that 115 River’s proposal meets the definition of development within a coastal high hazard V zone and, as such, does not qualify for a waterfront development permit absent an exemption.

**Special urban areas rule, N.J.A.C. 7:7-9.41**

The Property is located in the Hudson River waterfront area, which “extends from the George Washington Bridge in Fort Lee, Bergen County to the Bayonne Bridge in Bayonne, Hudson County, inclusive of all land within the municipalities of Bayonne, Jersey City, Hoboken, Weehawken, West New York, Guttenberg, North Bergen, Edgewater and Fort Lee subject to the Waterfront Development Law.” N.J.A.C. 7:7-9.46(a)(2). Under the CZM rules, development restrictions apply for construction in the Hudson River waterfront area. However, some exceptions apply to those restrictions for areas of the Hudson River waterfront area which are defined as “special urban areas.” N.J.A.C. 7:7-9.41. In the Hudson River waterfront area rule, it is acknowledged that while the Hudson River waterfront area is heavily populated and extensively developed, certain areas are exempted from the prohibition on development to “encourage redevelopment efforts in several cities in the Hudson River waterfront area to increase the economic and social vitality of these [special urban] areas” such that “[b]uilding height requirements are different for buildings in ... special area[s] than for other areas ... to facilitate this redevelopment.” N.J.A.C. 7:7-9.41(g). A special urban area is defined as a municipality listed on the Department of Community Affairs (DCA) annual Urban Aid Municipality list established each fiscal year. N.J.S.A. 52:27D-178. Edgewater, where the Property is located,

was not listed on the Urban Aid Municipality SFY 2017 list, so it did not qualify as a special urban area at the time of the permit application. The Property therefore does not qualify for a special urban area exemption for residential and commercial development in a Hudson River waterfront area.

I ADOPT the ALJ's finding that 115 River does not qualify as a special urban area in the Hudson River waterfront area such that it would qualify as exempt from the coastal high hazard rule's prohibition on commercial and residential development.

**Flood Hazard Area Control Act rules (requirements for a building), N.J.A.C. 7:13-12.5**

The Flood Hazard Area Control Act rules at N.J.A.C. 7:13-12.5 lists requirements for a preexisting building in a flood hazard area which must be met before the Department can issue a permit to modify any portion of the structure. Critically, the rules mandate that the lowest floor of the building be set at least one foot above the flood hazard area design flood elevation and no lower than the elevation required under the Uniform Construction Code, N.J.A.C. 5:23. The rules also provide a series of conditions a preexisting building must meet if it is to be exempt from the requirements, namely, that no part of the building be located in a V zone. N.J.A.C. 7:13-12.5(i)(4)(iv). 115 River's proposed project not only fails the requirement that the lowest floor be set at least one-foot above the flood hazard area design flood elevation, it is also located in a V zone.

I ADOPT the ALJ's finding that 115 River does not meet the Flood Hazard Area Control Act rules, nor any of the exceptions.

### **Stipulation of Settlement**

In Dragon v. NJDEP, 405 N.J. Super. 478 (App. Div. 2009), the Appellate Division found that the Department could not waive a substantive provision of its regulations through the execution of a settlement agreement. Dragon, at 489. The purpose of the coastal high hazard areas rule V zone requirements is to protect residents, users of hotels and motels, and first-responders- in the event of hazardous storms- from fast moving water, wave action more than 3 feet in height, and wave run up and over-topping. These requirements, as explained in Dragon, represent standards for determining the acceptability of development and the environmental impact of projects and are substantive in their protection of residents from environmental threats. The Stipulation of Settlement, which would have resulted in the Department granting a waterfront development permit to 115 River, violated Dragon because it waived the Department's substantive regulations concerning development in a coastal high hazard area. Therefore, the Department is prohibited from entering into and enforcing the Settlement because the substantive provisions applicable to this project cannot be met.

I ADOPT the ALJ's finding that the Department is precluded from issuing the Permit under a Stipulation of Settlement whose terms violate the substance of the applicable rules.

CONCLUSION

For the reasons above, I ADOPT the ALJ's findings.

IT IS SO ORDERED.

Date: 10/7/19



Catherine McCabe, Commissioner  
New Jersey Department of  
Environmental Protection

115 RIVER ROAD, LLC  
v.  
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAND USE REGULATION

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