



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON SUMMARY

DECISION CROSS-MOTIONS

OAL DKT. NO. ELU 02203-14

AGENCY DKT. NO. 0213-09-0002.2

APD110001

115 RIVER ROAD, LLC,

Petitioner,

v.

**NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,**

LAND USE REGULATION,

Respondent.

Michael J. Gross, Esq., for petitioner (Giordano, Halleran & Ciesla, attorneys)

Michael Schuit, Deputy Attorney General, for respondent (Gurbir S. Grewal,
Attorney General of New Jersey, attorneys)

Record Closed: May 2, 2019

Decided: May 29, 2019

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

Petitioner, 115 River Road, LLC (115 River Road) appeals from an adverse action taken by the New Jersey Department of Environmental Protection (DEP) on its

application for a Waterfront Development Permit on May 9, 2017, under the Coastal High Hazard Area Regulation, N.J.A.C. 7:7-9.18.

115 River Road had initially proposed an addition of a third floor to an existing two-story building located on a pier over the Hudson River at 115 River Road, Borough of Edgewater, Bergen County. The proposed construction would include a catering facility and eighteen residential apartments on the proposed third floor addition, and modification of the existing first floor for a new restaurant and outdoor patio within the existing footprint. The subject project is located over a tidal waterway – namely, the Hudson River – but is not in the Meadowlands District nor within the area governed by the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:9-1 et seq. By Jurisdictional Determination dated September 20, 2011, the DEP had advised petitioner that a Waterfront Development Permit would be required.¹

On October 5, 2016, 115 River Road submitted its Waterfront Development Permit Application (Permit Application) to the DEP, proposing an addition to the third story of the existing structure to include a catering room, banquet hall, and hotel space with eighteen guest suites. After certain deficiencies were addressed, the DEP denied approval of 115 River Road's Permit Application on May 9, 2017.

PROCEDURAL HISTORY

This matter was originally transmitted to the Office of Administrative Law (OAL) on February 24, 2014, by the DEP for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. This matter was initially assigned to the Honorable Imre Karaszegi, A.L.J., but was reassigned to the Honorable JoAnn Candido, A.L.J., on or about May 10, 2017, after Judge Karaszegi's elevation to the Superior Court. The appeal to the DEP's denial of the Permit Application was sent

¹ This Jurisdictional Determination that a Waterfront Development Permit was required was appealed and, after a period of attempted alternative dispute resolution, was filed at the OAL in 2014, to which this substantive denial was joined. There is no procedural history of note between 2014 and 2017.

directly to Judge Candido on or about August 8, 2017, and did not, accordingly, result in the issuance of a new docket number at the OAL.

In order to allow the parties to engage in additional negotiations, this matter was maintained in a state of inactivity through 2018. As discussed in more detail below, the project was modified, and 115 River Road and the DEP entered into a Stipulation of Settlement and Withdrawal of Request for Hearing in the Office of Administrative Law, dated November 16, 2018. The Notice of Settlement was published in the DEP Bulletin for public notice and a thirty-day comment period on December 5, 2018. Upon the close of the comment period, 115 River Road was advised that the DEP was refusing to issue the anticipated Waterfront Development Permit notwithstanding the Stipulation.

On March 14, 2019, the DEP filed a Motion for Summary Decision on the Coastal High Hazard Area Regulation and its applicability to 115 River Road's project. On April 3, 2019, 115 River Road filed its response to the Motion and filed a Cross-Motion seeking to either enforce the Stipulation or obtain an order over-ruling the DEP's basis for denying the Permit on the merits.² On April 15, 2019, the DEP filed its Letter-Brief in Reply. The matter was reassigned to the undersigned on or about April 22, 2019. I held oral argument on the pending Cross-Motions for Summary Decision on May 2, 2019. The motions are now ripe for determination.

STATEMENT OF UNDISPUTED FACTS

1. Petitioner 115 River Road, LLC, is the owner of real property located at 115 River Road, designated as Block 96, Lots 3.04 and 4.01 on the official Edgewater tax map (Property).

² The execution and publication of the Stipulation of Settlement and Withdrawal of Hearing Request was unknown to the OAL until the present motion practice commenced; in fact, it remained a silent but material procedural fact until 115 River Road referenced it in its response. In its initial motion papers, DEP made no mention of it.

2. The 115 River Road project proposes to expand development on an existing pier that is located over the Hudson River. The timber pile supported existing pier extends 525' into the Hudson River.

3. That existing pier and a deteriorated warehouse were rehabilitated under a Waterfront Development Permit (File No. 0213-94-0003.1) issued in 1997. The renovated structure consisted of approximately 32,000 square feet, containing office space and a restaurant. There is also an additional 25,000 square foot garage parking area located on the first level, as well as an asphalt driveway/parking area.

4. More specifically, the Property consists of Pier 115 Bar & Grill located on the first floor on the westward edge of the pier, containing both indoor and outdoor dining areas. The second floor consists of office space, including the office and some storage for the Bar & Grill. The existing third floor consists of some additional office space.

5. The Property is also located in a mapped high velocity water area known as a "V zone." N.J.A.C. 7:7-9.18(a).³ Specifically, the FEMA preliminary work maps indicate that the tidal 100-year flood plain is at elevation ten (10') feet, and the flood elevation within the V zone in the Hudson River is at elevation fourteen (14') feet.

6. Edgewater is not a municipality deemed as a "Special Urban Area." N.J.A.C. 7:7-9.41, although it had been at some point historically.

7. The revised project proposed to expand the existing third floor with a catering room, banquet hall and hotel space with 18 guest suites. The third-floor expansion was proposed to extend over the existing footprint of the first and second floors of the existing building. No additional structural work to the ground floor or the timber pilings were proposed.

³ N.J.A.C. 7:7-9.18 provides: "Coastal high hazard areas are flood prone areas subject to high velocity waters (V zones) as delineated on FEMA flood mapping, and areas within 25 feet of oceanfront shore protection structures, which are subject to wave run-up and overtopping."

8. It did not propose to provide any new “usable landscaped public open space.” N.J.A.C. 7:7-9.46.

9. By letter dated March 6, 2018, the Construction Official for the Borough of Edgewater valued the existing structure at \$3.14 million and the proposed third floor addition at between \$950,000 and \$1.3 million, or at most, a forty-one (41%) per cent improvement, or not “substantial.”

ARGUMENTS OF THE PARTIES

The DEP argues, pursuant to N.J.A.C. 7:7-9.18(b), that residential development (including hotels and motels), and commercial development, are prohibited in coastal high hazard areas identified on applicable FEMA flood mapping that are included in the high velocity V zone. The agency also asserts that 115 River Road failed to include any open space in its proposal. Insofar as Edgewater is not deemed to be a “special urban area,” there is no exception possible for this project to receive a Waterfront Development Permit.

The DEP admits that the Manager of the Land Use Regulation Division negotiated and entered into the Stipulation of Settlement with 115 River Road only last November. Nevertheless, it asserts that he, and supervisors reviewing same, made a voidable error when it executed the Stipulation of Settlement and published it for public comment because the Stipulation should have been recognized and considered to be “the use of the settlement process to circumvent [Waterfront Development Regulations] substantive permitting requirements and to allow regulated development in a [] region governed exclusively . . . by that governing statute.” Dragon v. NJDEP, 405 N.J. Super. 478, 492 (App. Div. 2009). It also acknowledged that there were no adverse public comments; in fact, at oral argument, counsel for the DEP conceded that no comments had been submitted.

Petitioner 115 River Road argues that the Stipulation of Settlement must be enforced and can be enforced notwithstanding Dragon. It cites to the facts that its

project will not expand the footprint of the existing pier development and waterfront structure, will only complete a third floor already in existence, and will make no changes to the pier or pilings. Based upon these facts, 115 River Road argues that the proposal should not be considered a “development” under the Coastal Zone Management Rules, N.J.A.C. 7:7-9.18, or a “substantial improvement” under the Flood Hazard Area Rules, N.J.A.C. 7:13-12.5(k).

115 River Road further points to the prior designation of Edgewater as a “special urban area” at the time of this original waterfront development, and the allowance of comparable projects in current “special urban areas,” as evidence that the policies behind the V zone regulations will not be violated by approval of this project either through enforcement of the Stipulation or on the merits.

LEGAL ANALYSIS AND CONCLUSIONS

The above-recitation of the undisputed facts together with a reading of the legal submissions of the parties makes it clear that the only issue pending determination on these cross-motions for summary decision is the applicability of the V zone rules to the 115 River Road project. It is well established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public and private litigation resources. Here, both parties have moved for a determination, as a matter of law, that the application of the regulations entitles each to a favorable decision.

As an initial matter, I must consider the argument of 115 River Road that the DEP should have to stand by the terms of its agreement in the Stipulation of Settlement, and that these motions can be decided as a matter of enforcing same as a binding contract. For the reasons set forth below, I **CONCLUDE** that Dragon does preclude the DEP from settling an individual waterfront development permit with 115 River Road on terms that violate the substantive terms of the laws governing such

developments. It is unfortunate, and should be a matter worthy of internal review, as to why so much time, effort, and personnel were brought to bear during negotiations of the Stipulation without anyone running interference on the Dragon question. Nevertheless, as stated by the DEP, the law and courts cannot allow the perpetuation of such an error. As will be explained by delving into the merits, the 115 River Road proposal cannot meet the substantive provisions of the Coastal High Hazard Area regulations, N.J.A.C. 7:7-9.18, and the Hudson River Waterfront Area regulations, N.J.A.C. 7:7-9.46, both within the Coastal Zone Management Rules, Chapter 7.⁴

Legal analysis must begin with the applicable definitions and regulations themselves. 115 River Road owns the existing pier development in Edgewater on the Hudson River waterfront.⁵

“The Hudson River Waterfront Area” 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).]

That regulation further provides –

⁴ “Management of the coastal zone requires a concern for development that would directly or indirectly increase potential danger to life and property.” N.J.A.C. 7:7-9.39

⁵ N.J.A.C. 7:7-2.4(a) provides in relevant part:

The waterfront area regulated under this chapter varies in width in accordance with the following:

1. Within any part of the Hackensack Meadowlands District delineated at N.J.S.A. 13:17-4, the area regulated by this section shall include any tidal waterway of this State and all lands lying thereunder, up to and including the mean high water line.
2. Within the CAFRA area, the regulated waterfront area shall include any tidal waterway of this State and all lands lying thereunder, up to and including the mean high water line.
3. In those areas of the State outside both the CAFRA area and outside of the Hackensack Meadowlands District, the regulated waterfront area shall include:
 - i. All tidal waterways and lands lying thereunder, up to and including the mean high water line; . . .

Hudson River waterfront area development shall be consistent with all other applicable rules with particular attention given to N.J.A.C. 7:7-9.38, Public open space; N.J.A.C. 7:7-9.39, Special hazard areas; N.J.A.C. 7:7-9.41, Special urban areas; N.J.A.C. 7:7-9.48, Lands and waters subject to public trust rights; N.J.A.C. 7:7-15.14, High rise structures; N.J.A.C. 7:7-16.9, Public access rule; N.J.A.C. 7:7-16.10, Scenic resources and design; and N.J.A.C. 7:7-16.3, Water quality.

[N.J.A.C. 7:7-9.46(c).]

The regulation goes on to explain the rationale for its allowance of some Hudson River waterfront development, but only within its primary focus on special urban areas.

Rationale: The Hudson River waterfront area has historically been, and is currently, heavily populated and extensively developed. Development pressures are intense in this area. Given its preexisting density of development, this rule seeks to encourage further development if constructed to ensure the safety of people and property in order to steer development towards actively disturbed areas and away from undisturbed areas of the coast. Further, this rule serves to encourage redevelopment efforts in several cities in the Hudson River waterfront area to increase the economic and social vitality of these areas while making wise use of existing footprints⁶ of development and infrastructure. Building height requirements are different for buildings in this special area than for other areas of the coast in order to facilitate this redevelopment and are balanced by requiring public open space and visual access to the water through other means.

[N.J.A.C. 7:7-9.46(g) (emphasis added).]

These several Hudson River waterfront development regulatory provisions form the backdrop to this appeal and these motions. While making use of “existing footprints” fits into the 115 River Road proposal, there is no dispute that Edgewater is

⁶ "Footprint of development" means the vertical projection to the horizontal plane of the exterior of all exterior walls of a structure. N.J.A.C. 7:7-1.5

not within the “several cities” that are now designated as “special urban areas.” I **CONCLUDE** that it also cannot be disputed that the proposal of 115 River Road must be considered a “development.” Once again, we must start with the basics.

“Development” means any activity for which a coastal wetlands permit, waterfront development permit, or Federal consistency determination is required, including site preparation and clearing. Development for an application under CAFRA means the construction, relocation, or enlargement of the footprint of development of any building or structure and all site preparation therefor, the grading, excavation, or filling on beaches and dunes, and shall include residential development, commercial development, industrial development, and public development. Development under CAFRA and the Waterfront Development Law does not include repairs or maintenance such as replacing siding, windows, or roofs, unless such repairs or maintenance are associated with enlargements which are not exempt under CAFRA pursuant to N.J.A.C. 7:7-2.2(c)4 or the Waterfront Development Law pursuant to N.J.A.C. 7:7-2.4(d). Development under CAFRA does not include debris removal or cleanup provided such activities do not involve excavation, grading, or filling on beaches and dunes.

[N.J.A.C. 7:7-1.5 (emphasis added).]

Because the present proposal meets the definition of a development within a coastal high hazard V zone, the next question is whether it falls within an exception such that 115 River Road can demand the Permit.

Except as provided at (c), (d), (e), and (f) below, residential and commercial development is prohibited in coastal high hazard areas.

(d) Hotel and commercial development in Atlantic City or in a special urban area within the Hudson River Waterfront Area described at N.J.A.C. 7:7-9.46(a) are acceptable in coastal high hazard areas provided such development complies with the Atlantic City rule, N.J.A.C. 7:7-9.47 or special urban area and Hudson River Waterfront rules, N.J.A.C. 7:7-9.41 and 9.46, as applicable, the Federal flood reduction standards at 44 CFR Part 60, and the UCC.

* * *

(i) Rationale: V zones are areas subject to high velocity waters and are further defined as areas capable of supporting a three-foot-high breaking wave. These areas are designated on FEMA flood maps as zone V or VE. On many FEMA flood maps, oceanfront bulkheads, revetments or seawalls have been used to delineate the landward limit of the coastal high hazard area. However, wave run-up, which is the rush of water up a structure or beach that occurs on the breaking of a wave, and overtopping may also cause considerable damage behind bulkheads, revetments and seawalls inshore of the V zone limit. Both V zone and wave run-up zone are high hazard areas where structures are vulnerable to severe storm damage. Most developments allowed under this rule are those which comply with other State regulations (that is, the Uniform Construction Code (UCC) promulgated by the Department of Community Affairs) and Federal standards (that is, the flood reduction standards at 44 CFR Part 60). Beach use and tourism-oriented developments and water dependent developments are not subject to the UCC or 44 CFR Part 60, but are subject to storm damage. However, they enhance the public use and enjoyment of the beach and ocean and accordingly are conditionally acceptable.

Residential development (other than limited infill development) and commercial development in coastal high hazard areas is limited to the Hudson River Waterfront area and Atlantic City allowing reasonable development in already densely-developed areas while protecting people and property from the negative impacts of flooding and coastal storms.

The Uniform Construction Code and Federal flood reduction standards establish specifications for construction that reduce risk to people and property in the event of a flood. The Department has, therefore, determined that certain development in coastal high hazard areas that meets these standards is appropriate.

[N.J.A.C. 7:7-9.18.]

I **CONCLUDE** that 115 River Road cannot meet the special urban area exception to the coastal high hazard regulations. While 115 River Road makes a compelling case for why this less-than-substantial development within its existing footprint on its existing pier in Edgewater makes as much sense as the same

improvement in a municipality that is equally densely developed but happens to be designated as a “special urban area,” that is a regulatory judgment granted to the DEP and neither it nor this forum.

The court “may not vacate an agency determination because of doubts as to its wisdom or because the record may support more than one result,” but is “obliged to give due deference to the view of those charged with the responsibility of implementing legislative programs.” In re N.J. Pinelands Comm'n Resolution PC4-00-89, 356 N.J. Super. 363, 372, 812 A.2d 1113 (App. Div.) (citing Brady v. Bd. of Review, 152 N.J. 197, 210, 704 A.2d 547 (1997)), certif. denied, 176 N.J. 281, 822 A.2d 610 (2003).

[In re Adoption of Amendments to Northeast, Upper Raritan, Sussex County, 435 N.J. Super. 571, 583-84.]

See also Bow & Arrow Manor, Inc. v. West Orange, 63 N.J. 335, 343 (1973) (“not the function of the court to rewrite or annul a particular zoning scheme duly adopted by a governing body merely because the court would have done it differently”). This forum certainly does not have the authority to second-guess the wisdom of allowing a waterfront development in a V-zone in one town but not allow it a few towns north.

Similarly, 115 River Road cannot meet the Flood Hazard exception it seeks to come under.

(l) The Department shall issue an individual permit to elevate, enlarge, or otherwise modify all or a portion of a lawfully existing building, which does not result in a substantial improvement⁷, only if the following requirements are satisfied:

1. The lowest floor of the elevated, enlarged, or modified portion of the building meets the requirements of (i) above.

⁷ N.J.A.C. 7:13-1.2 provides the definition, which it is not disputed 115 River Road would not meet --

“Substantial improvement” means any reconstruction, rehabilitation, addition, or other improvement of a structure, the cost of which equals or exceeds 50 percent of the market value of the structure as determined before the start of construction of the improvement. This term includes structures that have sustained substantial damage regardless of the actual repair work performed.

i. Where only a portion of a building is elevated, enlarged, or modified, the lowest floor of the remainder of the building is not required to be elevated or otherwise modified to meet the requirements of (i) above; and

2. Any enclosed area beneath the lowest floor of the elevated, enlarged, or modified portion of the building is modified as necessary to meet the requirements of (p) below.

[N.J.A.C. 7:13-12.5 (emphasis added).]

This regulation, as properly construed by the DEP, requires elevation of the first floor to meet the flood hazard concerns, even if the development is less than substantial, which it is.

In sum, and for the reasons set forth above, while the DEP staff erred by entering into the Stipulation of Settlement and Withdrawal of Request for Hearing in the Office of Administrative Law, I **CONCLUDE** that respondent, as well as this forum, is prohibited from enforcing said settlement under Dragon because the substantive provisions applicable to this project located in a coastal high hazard zone cannot be met.

ORDER

For the reasons set forth above, the Motion for Summary Decision filed by the respondent New Jersey Department of Environmental Protection is and the same is hereby **GRANTED**, and the Cross-Motion for Summary Decision filed by the petitioner, 115 River Road, LLC, is and the same is hereby **DENIED**.

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. 52:14B-10.

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 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 29, 2019

DATE



GAIL M. COOKSON, ALJ

Date Received at Agency:

5/29/19

Mailed to Parties:

id