State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. ELU 02864-14
AGENCY DKT. NO. 1601-02-0001.1 FWW020002

INTELLECT REAL ESTATE DEVELOPMENT,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

A. Michael Rubin, Esq., for petitioner

Jennifer L. Dalia, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: June 23, 2014 Decided: August 7, 2014

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Department of Environmental Protection (DEP or Department) issued a Decision and Order stating, “Intellect's appeal from DEP's cancellation of its application for a Freshwater Wetlands General Permit 11 (GP 11) under the Freshwater Wetlands

Protection Act (FWPA), N.J.S.A. 13:9B-1 to -30, was moot, because Intellect's application was not exempt from the requirements of the Highlands Water Protection and Planning Act (the "Highlands Act" or "HWPPA"), N.J.S.A. 13:20-1 to -35."

Petitioner, Intellect Real Estate Development (Intellect) appealed DEP's Decision before the Appellate Division. Intellect Real Estate Dev. v. Dep't of Environ. Prot., No. A-5818 (App. Div. February 19, 2013) (slip op. at 1-2).

The Appellate Division affirmed the DEP's decision that Intellect was not exempt from the Highlands Act's requirements because "only projects that received municipal approvals before March 29, 2004," were eligible for "grandfathering" under the Act. Id. at 16.

Additionally, the court concluded, if Intellect may benefit from a favorable decision on its GP 11 application, then Intellects application is not a moot issue and remanded the matter to DEP. Id. at 18.

On March 4, 2014, the Appellate Division Ordered DEP to conduct a hearing "on the cancellation of [Intellect]'s [GP 11] application within 45 days." Intellect Real Estate Dev. v. Dep't of Environ. Prot., No. A-5818 (App. Div. March 4, 2014) (Order on Motion at 1). Thereafter, the matter was transmitted to the Office of Administrative Law (OAL) 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. Upon receipt and review of the parties stipulated facts and written arguments the record closed on June 23, 2014.

STIPULATION OF FACTS

The parties stipulated to undisputed facts, which I **FIND** as **FACT**.

1) Respondent, New Jersey Department of Environmental Protection ("DEP"), is charged with implementation of the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1, et seq., and, in conjunction with the Highlands Council, implementation

of the Highlands Water Protection and Planning Act ("HWPPA"), N.J.S.A. 13:20-1, et seq.

2) Petitioner, Intellect Real Estate Development ("Intellect"), is the contract purchaser and prospective developer of Block 4, Lot 4 ("the Property"), in Bloomingdale Borough (Bloomingdale), Passaic County.

3) The Property is located within the Highlands Preservation Area, which was designated on August 10, 2004.

Municipal Approval Process

4) On June 21, 2002, Intellect filed an application for preliminary site plan approval and a use variance with the Bloomingdale Board of Adjustment (the "Board") seeking approval of an eight-lot subdivision.

5) On October 23, 2003, after conducting numerous hearings, the Board granted the use variance.

6) On September 14, 2004, Bloomingdale's Municipal Council (the "Council") reversed the Board's decision.

7) Intellect appealed the Council's reversal of the Board's decision in the Law Division.

8) The Law Division vacated the Council's action based upon violations of the Open Public Meetings Act, N.J.S.A. 10:4-6 to -21, and remanded the matter to the Council.

9) Intellect appealed, arguing the Law Division should have reinstated the grant of the use variance without remand.

10) The Appellate Division affirmed the Law Division's remand order, Intellect Real Estate Dev. v. Bloomingdale, No. A-0265-05 (App. Div. Nov. 14, 2006), and the Supreme Court denied certification, 189 N.J. 650 (2007).

11) On April 10, 2007, Intellect submitted to the Council a revised and reduced plan for five residential units. Thereafter, the Council approved a resolution terminating any further remand proceeding or appeal.

12) On November 13, 2008, the Board adopted a resolution memorializing approval of the modified development plan, but noted the approval was "expressly subject to and conditioned upon approval . . . by the Highlands Council."

DEP Approval Process

13) In April 2002, Intellect requested a Freshwater Wetlands Letter of Interpretation ("LOI") from DEP's Land Use Regulation Program ("LURP").

14) On June 28, 2002, before receipt of the LOI, Intellect submitted an application for a Freshwater Wetlands General Permit 11 ("GP 11"). Additionally, Intellect submitted a transition area averaging plan for a Transition Waiver application and a Stormwater Report.

15) The notes contained in the file of Diane Dow[1], state that during a phone call on September 18, 2002, DEP notified Intellect's consultant that "the project did not meet DEP's water quality standards."[2]

16) On November 1, 2002, DEP issued the LOI, initially finding that the wetlands were of "exceptional resource value."

[1] Diane Dow is a DEP official.

[2] After submission of the joint stipulation of fact, Intellect indicated that it erroneously consented to paragraph fifteen and that this fact was in dispute. It contends that "[t]his phone call is not in Intellect's records, nor is anything found in Intellect's paperwork received in its OPRA request received by the DEP Records Department on 3/28/08." (Intellect's Letter, dated April 17, 2014.) DEP maintains that paragraph fifteen accurately reflects events that occurred, but asserts that this dispute is immaterial for purposes of the present matter. (DEP Letter, dated April 22, 2012.)

17) On November 14, 2002, Intellect requested reconsideration of DEP's jurisdictional determination regarding the wetlands resource classification on the Property.

18) On January 27, 2003, DEP modified its classification of the wetlands on the property to be "intermediate and exceptional resource values."

19) On November 18, 2003, Intellect submitted to DEP revised development plans and a new drainage report to reflect changes in the revised LOI.

20) On February 2, 2004, DEP adopted new stormwater management regulations.

21) On March 29, 2004, DEP notified Intellect that DEP was still awaiting water quality calculations it had requested in September 2002 and also explained that Intellect would now need to comply with the new stormwater regulations.[3]

22) On or about June 24, 2004, Intellect submitted information required under the new stormwater management regulations.

23) On or about July 22, 2004, Intellect was notified that the engineer reviewing the stormwater management submissions believed the project met the new stormwater regulations but noted that Intellect needed to submit "signed and sealed" copies of the plans.[4]

24) On July 30, 2004, Intellect submitted the required signed and sealed plans.

[3] After submission of the joint stipulation of fact, Intellect indicated that it erroneously consented to paragraph twenty-one and that this fact was in dispute. It contends that "[p]lans were submitted on 6/28/02 as confirmed by an OPRA request on 3/25/08." (Intellect's Letter, dated April 17, 2014.) DEP maintains that paragraph twenty-one accurately reflects events that occurred, but asserts that this dispute is immaterial for purposes of the present matter. (DEP Letter, dated April 22, 2012.)

[4] After submission of the joint stipulation of fact, Intellect indicated that it erroneously consented to paragraph twenty-three and that this fact was in dispute. It contends that "[t]he note to Diane Dow from Nabil Andrews stated 'Project meets Storm Water Rules needs signed and sealed GP-1, CD-1, DA-3. Called John Aubin on 7/22/04. He will send two copies." (Intellect's Letter, dated April 17, 2014.) DEP maintains that paragraph twenty-three accurately reflects events that occurred, but asserts that this dispute is immaterial for purposes of the present matter. (DEP Letter, dated April 22, 2012.)

25) Shortly thereafter, Intellect performed some site preparation on the property, drilling a well and constructing an access road.

26) On August 10, 2004, the HWPPA became effective. The HWPPA requirements include, but are not limited to, a 300-foot buffer around Highland's open waters, including freshwater wetlands, N.J.S.A. 13:20-30(b); limiting impervious cover to 3% of land area, N.J.S.A. 13:20-30(b)(6); and prohibiting development on steep slopes and in forested areas, N.J.S.A. 13:20-30(b)(7)(8) for all proposed Major Highlands Development in the Highlands Preservation Area, which includes any disturbance of more than one-quarter acre of forested area or any increase in impervious surface of one-quarter acre or more, N.J.S.A. 13:20-3.

27) On October 12, 2004, DEP sent Intellect a Pre-Cancellation Letter explaining that the HWPPA would supersede its pending GP-11 application. DEP offered Intellect two options: (1) re-submit the application "in accordance with the environmental standards contained in the new law"; or, (2) submit written documentation that the "proposed activity is exempt under the new law."

28) On December 15, 2004, DEP received a letter from Intellect stating that it was not withdrawing its GP-11 application.

29) Intellect neither resubmitted its application nor applied for an exemption. Instead, on January 24, 2005, Intellect sent a follow-up letter requesting that DEP "forgo cancellation of the pending application until such time as the Superior Court decides the case" because "if the Court decides in favor of [Intellect] . . . the project will meet one of the two criteria for grandfathering under the Highlands Act." Additionally, Intellect's letter set forth Intellect's understanding that it had submitted all revisions and supporting information DEP needed to approve the GP-11 and transition area averaging plan waiver.[5]

[5] After submission of the joint stipulation of fact, Intellect indicated that it erroneously consented to paragraph twenty-nine and that this fact was in dispute. It contends that "Intellect did send a letter requesting exemption of 1/24/05 and the DEP did not respond to that letter for almost a year later."

30) Because no additional information was submitted by Intellect, on January 5, 2006, DEP sent a second Pre-Cancellation Letter indicating that Intellect should withdraw its GP-11 application and either re-submit it, in accordance with the environmental standards contained in the HWPPA, or apply for an exemption from the HWPPA.

31) On February 13, 2006, Intellect's counsel sent a letter to DEP stating its position that there is no statutory authority for cancelling an application for a GP-11 and transition area averaging plan waiver and further advising that Intellect would not withdraw its GP-11 application.

32) On March 24, 2006, Intellect's counsel sent a letter to DEP requesting that DEP issue the GP-11 and transition area averaging plan waiver.

33) On June 15, 2006, Intellect's counsel sent a letter to DEP seeking a response to its prior letters requesting issuance of the GP 11 and transition area averaging plan waiver.

34) On July 31, 2006, Intellect's counsel sent a letter to DEP requesting issuance of the GP-11 and waiver.

35) Pursuant to its October 12, 2004 letter (see Par. 27), on August 1, 2006, DEP notified Intellect that its application was cancelled pursuant to N.J.A.C. 7:7A-12.6.

Post-Cancellation Procedure

36) On August 23, 2006, Intellect's counsel wrote to DEP stating that Intellect did not submit proof of exemption from the HWPPA because it was awaiting the outcome of its Superior Court action on the municipal approvals.

(Intellect's Letter, dated April 17, 2014.) DEP maintains that paragraph twenty-nine accurately reflects events that occurred, but asserts that this dispute is immaterial for purposes of the present matter. (DEP Letter, dated April 22, 2012.)

37) On September 5, 2008, Intellect's counsel wrote to DEP requesting phone logs pertaining to Intellect's project on Block 4, Lot 4, Bloomingdale Township, Passaic County, which had been requested through an OPRA request on April 9, 2008.

38) On September 15, 2008, Intellect's counsel wrote to DEP confirming that DEP's previous examination of the Intellect file in response to Intellect's OPRA request revealed no phone logs.

39) Intellect requested a hearing to contest the GP-11 application's cancellation, and the matter was transmitted to the Office of Administrative Law ("OAL").

40) In May 2010, both parties filed cross motions seeking summary decision as to whether DEP's cancellation of the GP-11 was proper.

41) On March 1, 2011, the Administrative Law Judge granted DEP's motion for summary decision, finding the project was not exempt from the HWPPA because Intellect did not receive municipal approvals before March 29, 2004. The ALJ also found the matter was moot because Intellect would need to obtain HWPPA approval even if its GP-11 application had not been cancelled.

42) On July 14, 2011, DEP's Commissioner adopted the ALJ's initial decision and agreed no effective relief could be granted to Intellect because "the failure of Intellect to have received municipal approvals would make issuance of the [GP-11] permit meaningless, as both municipal and [DEP] approvals would have been required prior to March 29, 2004."

43) Intellect appealed DEP's decision before the Appellate Division.

44) On February 19, 2013 the Appellate Division affirmed the denial of Intellect's application for a HWPPA exemption. The Appellate Division found Intellect did not qualify for an exemption from the HWPPA's requirements because it had not

obtain[ed] the requisite municipal approval of its project prior to the statutory deadline of March 29, 2004.

45) Further, the Appellate Division remanded a portion of the appeal for a hearing on the following issue: whether Intellect could have benefitted from an administrative hearing on the appropriateness of DEP's cancellation of the GP-11 application. (Whether DEP's cancellation of the G-11 application was proper?) Among other things, the Appellate Division stated:

> [W]e cannot decide whether, under the facts presented in this case, Intellect could have benefited from a hearing on the merits of its argument that cancellation of its [GP 11] application was improper. Given the scaled-back version of the development, whatever Intellect previously submitted to DEP may be irrelevant.
>
> However, we take the Deputy Attorney General at her word. If Intellect may benefit from a favorable decision on its [GP 11] application, whether DEP properly cancelled the application is not a moot issue. We express no opinion on the merits of the dispute. However, under the circumstances, we are compelled to remand the matter to DEP.

46) On March 4, 2014, the Appellate Division issued an Order requiring DEP to conduct a "remand hearing on the cancellation of [Intellect's] GP-11 application within 45 days of this order."

47) On March 12, 2014, DEP transmitted the matter to OAL for a hearing, and on March 13, 2014, OAL issued a Notice of Filing.

ISSUE

Whether DEP's decision to cancel Intellect's Freshwater Wetlands General Permit No. 11 application under the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 to -30 was a moot issue because Intellect could not have benefited from

possessing that permit after the Legislature passed the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 to -35?

Arguments of the parties

Petitioner Intellect asserts that the Legislature included a "safety valve" in the Highlands Act by providing for the "waiver of any provision of the Highlands permitting review on a case-by-case basis in order to avoid the taking of property without just compensation." (Petitioner's Brief at 5-7, May 9, 2014). Petitioner further maintains that the waiver provision under N.J.S.A. 13:20-33(b)(3) could include setting aside N.J.S.A. 13:20-30(b)'s 300-foot buffer around Highland's open waters, N.J.S.A. 13:20-30(b)(6)'s limitation of impervious cover to three percent (3%) of land area; and N.J.S.A. 13:20-30(b)(7-8)'s prohibition of development on steep slopes and in forested areas for all proposed Major Highlands Development in the Highlands Preservation Area. (Ibid.) Thus, Intellect maintains the waiver authorizes DEP to "allow the prior permit conditions to control, so long as the [GP-11] permit remains in force." Id. at 8-9.

Additionally, Intellect claims that an applicant who already possesses a valid Freshwater Wetlands LOI can submit the letter: (1) in place of a required delineation report showing "all Highlands open waters and the associated 300-foot buffers on the site in its entirety" when applying for a Highlands Area Resource Determination (HRAD) under N.J.A.C. 7:38-9.4(c)(1), or (2) in lieu of an HRAD if "the applicant also provides information regarding any additional Highlands resource areas not previously identified in the LOI" when applying for a Highlands Preservation Area approval (HPAA) under N.J.A.C. 7:38-9.5(a)(5)(ii)(1). (Ibid.) Intellect further contends:

> Had DEP timely approved Intellect's application for a GP-11 (complete, final, and ready for decision on July 30, 2004), such permit would have been approved and in force on the date the Highlands Act came into force, August 10, 2004. If Intellect had possessed a valid GP-11 permit at that time, then it could have applied for the N.J.S.A. 13:20-33(b)(3) statutory waiver of Highland Act environmental standards regulations (including the onerous 300-foot buffer, the prohibition on linear development on steep slopes, and the 3% impervious surface maximum), and DEP could follow its

> policy of allowing prior FWPA permittee to adhere to the less onerous standards found in the prior GP-11 for the natural life of said permit, thereby avoiding the considerable new costs associated with new analyses, planning, and construction associated with reworking the entire development project to conform to new, extremely different permitting criteria.
>
> Therefore, given that there are substantial benefits available to FWPA permittees who enter into the Highlands Act compliance arena holding a current, approved, and valid FWPA permit, the issue of whether DEP injured Intellect by not timely approving the GP-11 application prior to the entry into force of the Highlands Act is not moot.
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> [Id. at 10.]

Respondent DEP argues that Intellect "could not have benefitted from a favorable decision on its GP-11 application because it would still be required to obtain [a HPAA] for major Highlands Development." (Respondent's Brief at 4, May 9, 2014) DEP maintains, "the only way to develop in the Highlands Preservation Area [under N.J.S.A. 13:20-33] is to obtain a [HPAA] or an authorized Highlands waiver" and that the HPAA and its implementing regulations do not allow an applicant with a preexisting GP-11 to avoid any steps of the HPAA application process or guarantee the applicant's ultimate approval. (Id. at 5.)

Further, DEP explains the reason an applicant subject to the HPAA process would not benefit from a preexisting GP 11. Specifically, the Highlands Act provided that "[t]he Highlands permitting review program . . . shall consolidate the related aspects of other regulatory programs" and asserts that the Legislature's instruction "to 'consolidate' the review process of development projects which were not exempt" rather than "review them under separate independent land use laws such as the FWPA". (Id. at 5-6.) DEP emphasizes that the regulations acknowledge the co-existence of multiple regulatory programs within DEP and aim to consolidate reviews so that "projects obtaining HPPAs shall require no additional permits or approvals from the [DEP]." (Id. at 6-7.) However, the regulations ultimately prohibit undertaking any regulated activity without a HPAA. (Id. at 7.)

Additionally, DEP acknowledges that the regulations provide for the submission of Freshwater Wetlands LOIs for limited purposes under N.J.A.C. 7:38-9.4(c)(1) and N.J.A.C. 7:38-9.5(a)(5), but it emphasizes that the "authorization to submit LOIs is wholly unrelated to [Intellect]'s contention that DEP should have issued a GP-11". Indeed, Intellect "does not allege . . . that DEP denied it the right to submit a LOI as part of its [Higlands Act] application." (Id. at 7-8.) Moreover, the potential factual use of a LOI "to provide or confirm information about the presence or absence, boundaries, and/or resource value classification of freshwater wetlands, transition areas, and/or State open waters" as acknowledged by the DEP's rules "falls far short of providing any regulatory approval for development in the Highlands Preservation Area." (Id. at 8.)

DEP further maintains that "[a]n applicant holding a GP-11 on the effective date of the [Highlands Act] would still need to submit a complete Highlands permit application to develop its property" and "a GP-11 would be of no legal benefit to [Intellect]." (Id. at 8-9.)

Finally, DEP avers that its cancellation of Intellect's "then-pending GP-11 application was proper because the enactment of the [Highlands Act] consolidated the permitting process for development in the Highlands Preservation area and, consequently, rendered GP-11 Permits meaningless in the Highlands Preservation Area." (Id. at 9-12.)

DEP reiterates that the waiver to avoid a taking of property under N.J.S.A. 13:20-33(b) and its implementing rules does not result in any deference to prior permitting schemes. (Respondent's Brief at 6-7, June 9, 2014.) Instead, DEP asserts that "the Legislature intended for the [Highlands Act] to supersede; not 'defer' to prior permits." (Id. at 7.) DEP also reemphasizes the distinction between a LOI and the GP-11 previously sought by Intellect. (Id. at 7-8.) The Department notes that a LOI "could provide some factual information in an application for an HPAA if Intellect applied for one" but emphasizes that "the HPAA's authorization to submit LOIs [for limited purposes] does not mean that Intellect would benefit from issuance of a [GP-11], as it would not have provided any authorization for Intellect's proposed development." (Ibid.)

Intellect replies that "pre-HPPA approval of the GP-11 would have had a substantial and clear benefit" because it would allow Intellect to obtain a waiver under N.J.S.A. 13:20-28(a)(3). Moreover, that would have allowed it "to avoid the much more restrictive 300-foot buffer, 3% impervious surface area cap, and linear development requirements for the lifetime of the GP-11[.]" (Petitioner's Brief at 2-3, June 16, 2014.) Intellect notes DEP's approval delays in reviewing the GP-11 application and argues that it is "manifestly unjust" to apply the HPPA rules to its development, resulting in additional expenditures above an "excess of $1 million" already spent. (Id. at 6-10.) Finally, Intellect argues that DEP's failure to issue the GP-11 constitutes an unconstitutional taking through inverse condemnation. (Id. at 10-13.)

DISCUSSION

The parties agree on undisputed facts but dispute DEP's position that to cancellation of Intellect's Freshwater Wetlands General Permit No. 11 application under the Freshwater Wetlands Protection Act, is a moot issue because Intellect could not have benefited from possessing General Permit No. 11 after the Legislature passed the Highlands Water Protection and Planning Act,

An action is considered 'moot' when it no longer presents a justiciable controversy because the issues have become academic. Anderson v. Sills, N.J. Super. 143 N.J. Super. 432, 437 (Ch. Div. 1976). Further, a case is moot when a determination is sought on a matter which, whenever rendered, cannot have any practical effect on the existing controversy. Johnson v. New Lisbon Development Center, CSV 2854-00, Initial Decision (July 30, 2001), adopted, MSB (Sept. 25, 2001) <http://lawlibrary.rutgers. edu/oal/search.html>. "[F]or reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest." Anderson, supra, 143 N.J. Super. at 437-438.

The Legislature enacted the Highlands Act, N.J.S.A. 13:20-1 to -35, effective August 10, 2004, based on a determination that "it is in the public interest of all the citizens of the State of New Jersey to enact legislation setting forth a comprehensive

approach to the protection of the water and other natural resources of the New Jersey Highlands . . . includ[ing] the adoption by the Department of Environmental Protection of stringent standards governing major development in the Highlands preservation area[.]" N.J.S.A. 13:20-2.

The Highlands Act created two areas within the Highlands Region, a planning area and a preservation area, set forth their boundaries, and provided that development proposed in each area would be subject to certain requirements. N.J.S.A. 13:20-7. It provided for a "Highlands Preservation Area approval" (HPAA) process to determine whether a development satisfied its requirements in the region. N.J.S.A. 13:20-30. Thus, the HPAA shall:

> Consist of the related aspects of other regulatory programs which may include, but need not be limited to, the "Freshwater Wetlands Protection Act[]" [and other regulatory programs] . . . , and any rules and regulations adopted pursuant thereto.
>
> [N.J.S.A. 13:20-30(a).]

Specific requirements for all Major Highlands developments[6] to obtain an HPAA became effective upon enactment of the Highlands Act including N.J.S.A. 13:20-30(b)(1)'s 300-foot buffer around Highland's open waters, N.J.S.A. 13:20-30(b)(6)'s limitation of impervious cover to 3% of land area, and N.J.S.A. 13:20-30(b)(7-8)'s prohibition of development on steep slopes and in forested areas. N.J.S.A. 13:20-30(b).

The Department was also required to "establish a Highlands permitting review program for the coordinated review of any Major Highlands development in the preservation area". Further, to obtain HPAA a major Highlands development would have to abide by environmental standards in the preservation area pursuant to N.J.S.A. 13:20-31, -32. The Highlands permitting review program was required to "consolidate

[6] "Major Highlands development" is defined to include: (1) any non-residential development in the preservation area; [and] (2) any residential development in the preservation area that requires an environmental land use or water permit or that results in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more[.] [N.J.S.A. 13:20-3.]

the related aspects of other regulatory programs" including the FWPA. N.J.S.A. 13:20-33(a).

Petitioner's claim that its property is being taken without just compensation is not an issue in this proceeding. However, I have addressed the circumstances in which the Highlands Act provides a mechanism for the waiver of its requirements to avoid the taking of property without just compensation. The Highlands Act required that the Highlands permitting review program establish "A provision that may allow for a waiver of any provision of the Highlands permitting review on a case-by-case basis in order to avoid the taking of property without just compensation." Further:

> The grant of a waiver pursuant to this subsection by the department shall be conditioned upon the department's determination that the major Highlands development meets the requirements prescribed for a finding as listed in subsection a. of [N.J.S.A. 13:20-34] to the maximum extent possible.
>
> [N.J.S.A. 13:20-33(b)(3).]

Thus, DEP promulgated rules providing for it to "waive any requirement for an HPAA if necessary to avoid the taking of property without just compensation" on a case by case basis. N.J.A.C. 7:38-6.8(a); see also N.J.A.C. 7:38-6.4(a)(3).

> A waiver under [N.J.A.C. 7:38-6.8] shall apply only after the Department determines that the proposed development does not meet all the requirements in this chapter as strictly applied, all the applicant's administrative and legal challenges to that determination as set forth in (b)1 below have concluded, and the HPAA applicant meets [certain requirements regarding the absence of alternative development options and attempts to transfer development rights outlined in N.J.A.C. 7:38-6.8(g)].
>
> 1. An applicant may challenge any Department HPAA decision under the rules as strictly applied if the applicant disputes the Department's findings of facts or application of the rules to those facts. Following an administrative hearing, the Commissioner shall issue a Final Decision approving or denying a HPAA under the rules as strictly applied. The applicant may appeal a Final Decision which denies the

> HPAA or approves it with conditions to the Appellate Division of Superior Court. If a court finds that the applicant is not entitled to an HPAA under the rules as strictly applied, the Department shall review and decide the applicant's request for a waiver to avoid a taking of property. The applicant may challenge the Department's final agency action on the waiver application after any hearing in the OAL.
>
> [N.J.A.C. 7:38-6.8(b).]

Additionally, N.J.A.C. 7:38-8.1 provides

> Activities described in applications for an HPAA may require the review of several regulatory programs within the Department [including the FWPA]. In accordance with N.J.S.A. 20-33a, the Department shall not issue an HPAA unless the Department determines that the proposed activity either complies with the requirements of these other regulatory programs or that the activity meets the requirements for a waiver pursuant to N.J.A.C. 7:36-6.[7]
>
> [N.J.A.C. 7:38-8.1(a).]

Furthermore, "[t]o the extent possible, the Department will strive to consolidate all of the reviews at (a) [including those under the FWPA] above so that projects obtaining HPAAs shall require no additional permits or approvals from the Department." N.J.A.C. 7:38-8.1(b).

I have carefully considered and reject Intellect's position that it could have benefitted from possessing a GP 11 because the permit would have allowed it to apply for a waiver of the Highland Act's environmental standards under N.J.S.A. 13:20-33(b)(3). Intellect's belief represents a misunderstanding of the waiver provision and implementing regulations.

Under N.J.S.A. 13:20-33(b)(3) and its implementing regulations, DEP may set aside the Highlands Act requirements identified by Intellect if enforcement of those requirements would result in a taking of property without just compensation. However,

[7] The reference to N.J.A.C. 7:36-6 appears to be an error, because no such rule exists. Chapter 36 provides the DEP's rules involving Green Acres laws. See N.J.A.C. 7:36-1.1. Instead, the DEP rules governing HPAA and the waivers available are located at N.J.A.C. 7:38-6.1 to -6.9.

prior permit conditions would not be restored if a waiver were to be granted.[8] Indeed, the plain language of N.J.S.A. 13:20-33(b)(3) and its implementing regulations demonstrates that a waiver would simply allow the developer to obtain a HPAA without satisfying the requirements that resulted in the taking of the property. Consequently, a GP 11 is not a prerequisite for obtaining a waiver under N.J.S.A. 13:20-33(b)(3) and its implementing regulations and would provide no advantage when seeking or after obtaining a waiver.

I have also considered the purposes Freshwater Wetlands LOIs in applying for a HRAD or HPAA under the Highlands Act. A Freshwater Wetlands LOI is a "document issued by the Department under N.J.A.C. 7:7A-3, indicating the presence or absence of wetlands, State open waters, or transition areas; verifying or delineating the boundaries of freshwater wetlands, State open waters, and/or transition areas; or assigning a wetland a resource value classification." N.J.A.C. 7:7A-1.4; see also N.J.A.C. 7:7A-3.1. However, a Freshwater Wetlands LOI "does not grant approval to conduct any regulated activities" because its "sole function . . . is to provide or confirm information about the presence or absence, boundaries, and/or resource value classification of freshwater wetlands, transition areas, and/or State open waters." N.J.A.C. 7:7A-3.1(b).

The DEP's regulations implementing the Highlands Act provide limited use for Freshwater Wetlands LOIs when an applicant seeks a HRAD[9] or HPAA. For example, an HRAD applicant with a Freshwater Wetlands LOI can submit that letter in lieu of a required delineation report showing "all Highlands open waters and the associated 300-foot buffers on the site in its entirety[.]" N.J.A.C. 7:38-9.4(c)(1). Additionally, a HPAA applicant with a Freshwater Wetlands LOI can submit that letter in lieu of an HRAD if

[8] N.J.A.C. 7:38-8.1(a) demonstrates that requirements imposed by the FWPA and other regulatory programs may continue to apply when the DEP considers applications for an HPAA and that to obtain a HPAA, the developer must either comply with the requirements of the other regulatory programs or obtain a waiver. The requirements of the other potentially applicable regulatory programs such as the FWPA are reviewed as part of the application for an HPAA as the DEP "strive[s] to consolidate all of the reviews . . . so that projects obtaining HPAAs shall require no additional permits or approvals from the Department." Ibid.

[9] A HRAD is a document "indicating the location of any Highlands Resource Area on a site or portion of a site." N.J.A.C. 7:38-1.4. "Highland resource areas" are "those features of the Highlands that merit special protection pursuant to N.J.S.A. 13:20-32b, such as Highlands open waters; flood hazard areas; steep slopes; forested areas; rare, threatened or endangered species habitat; rare or threatened plant habitat; areas with historic or archaeological features; and unique or irreplaceable land types." Ibid.

"the applicant also provides information regarding any additional Highlands resource areas not previously identified in the LOI[.]" N.J.A.C. 7:38-9.5(a)(5)(ii)(1).

CONCLUSIONS

Based on the whole of the evidence, I **CONCLUDE** that while Intellect could benefit from a Freshwater Wetlands LOI in applying for a HRAD or a HPAA by potentially accelerating the application process or avoiding additional costs, the issue in this matter is not whether Intellect could benefit from a Freshwater Wetlands LOI. Indeed, Intellect already received a Freshwater Wetlands LOI prior to DEP's cancellation of Intellect's GP 11 application. Succinctly, Intellect was not seeking a Freshwater Wetlands LOI at the time the DEP cancelled its GP 11 application. Instead, Intellect was seeking an entirely different document, a GP 11.

A Freshwater Wetlands LOI differs from a GP 11, which is a permit that authorizes activities in freshwater wetlands, transition areas, and State open waters necessary for the construction of various outfalls and intake structures. N.J.A.C. 7:7A-5.11. Unlike the limited use of a Freshwater Wetlands LOI in applying for an HRAD or HPAA, I **CONCLUDE** that a valid GP 11 would have provided Intellect with no benefit when seeking a HRAD or a HPAA under the Highlands Act.

I further **CONCLUDE** that Intellect lacked the requisite municipal approvals by the deadline that would have exempted it from the Highlands Act's requirements, and would have received no discernible benefit from having its GP 11 application granted rather than cancelled.

Furthermore, I **CONCLUDE** that Intellect's claims that application of the Highlands Act's requirements to its property resulted in a taking of the property or were manifestly unjust are beyond the scope of the present remand.

Finally, I **CONCLUDE** that Intellect's challenge to the DEP's cancellation of its GP 11 application after the effective date of the Highlands Act is moot.

Therefore, I **CONCLUDE** the matter must be **DISMISSED**.

It is so **ORDERED.**

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.

August 7, 2014
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: August 7, 2014

Date Mailed to Parties:
dr