



State of New Jersey

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MICHAEL DUNN,)	<u>ADMINISTRATIVE ACTION</u>
)	FINAL DECISION
Petitioner,)	
)	
v.)	
)	
NEW JERSEY DEPARTMENT OF)	OAL DKT. NO. ELU 12368-2019S
ENVIRONMENTAL PROTECTION,)	AGENCY DKT. NO. 0501-16-0005.1
LAND USE REGULATION,)	WFD180001
)	
Respondent.)	

This Order addresses the challenge by Petitioner Michael Dunn (Petitioner) of the New Jersey Department of Environmental Protection's (Department) October 10, 2018, denial of a Waterfront Development Individual Permit (Permit) that Petitioner sought to legalize the post-2016 construction of a fixed pier, floating dock, ramp, and boat lift that had replaced Petitioner's previously existing in-water structures at his waterfront property at 7508 Sunset Drive, Block 74.06, Lot 4, in Avalon Borough, Cape May County (Property).

On July 8, 2022, Administrative Law Judge Jeffrey R. Wilson (ALJ) issued an Initial Decision granting the Department's motion for summary decision and denying Petitioner's cross-motion for the same. The ALJ found that the new structures are neither exempt from the requirements of the Waterfront Development Law, N.J.S.A. 12:5-1 to -11, nor benefit from a legacy status under the Coastal Zone Management Rules, N.J.A.C. 7:7. (CZM Rules).

Consequently, Petitioner was required to receive Department approval prior to construction, demonstrate a need for the new structures that could not be satisfied by the previously existing structures, and reduce the width of the new pier to a maximum of eight feet. Petitioner failed to meet these requirements. As a result, the ALJ concluded the Department appropriately denied the Permit.

After review of the record before me and for the reasons set forth below, I adopt the ALJ's Initial Decision.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner's Property is a bayfront lot with a three-story, single-family dwelling situated on a tidally flowed area referred to as the Shivone Canal (Canal). The Canal is a navigable waterway which forms the eastern boundary of the Cape May Coastal Wetlands Wildlife Management Area. As a result of its location, activities waterward of the Property's mean high-water line are governed by the Waterfront Development Law. As such, unless otherwise exempt under the Zane Exemption,¹ any proposed construction is subject to the requirements of the CZM Rules, which implement the Waterfront Development Law.

At issue in this matter is the construction of three waterward structures that previously existed on the Property but were demolished and relocated sometime after 2016. The previous structures, as depicted on aerial photography from 1970 and 1977, consisted of (1) a fixed pier waterward of the Property bulkhead, measuring 13.94 feet wide by 29.1 feet long and located approximately in the middle of the Property's waterward area; (2) a floating dock, measuring 8

¹ As discussed further below, the "Zane Exemption" refers to a 1981 amendment to the Waterfront Development Law that exempts certain structures that were in existence prior to the 1981 amendment from obtaining a Waterfront Development Permit in certain circumstances.



feet wide by 20.27 feet long, located on the right-hand side (eastward) of the fixed pier when viewed from the property; and (3) a ramp from the bulkhead to the floating dock, measuring 3 feet wide by 20 feet long, which was also situated on the right-hand side (eastward) of the pier. These structures, along with two mooring pilings, were later legalized by a Waterfront Development Individual Permit that the Department granted on July 19, 2000.

In 2015, Petitioner purchased the Property and began to undertake renovations. Petitioner was issued a Coastal General Permit 5 by the Department on April 19, 2016, authorizing the demolition of the then-existing dwelling and construction of a new dwelling, pool, and associated structures. At the same time, the Department issued Petitioner a Waterfront Development Individual Permit (2016 Permit), legalizing a waterside ramp measuring 3 feet wide by 20 feet long and authorizing the construction of a boat lift measuring 12 feet wide by 15 feet long. No changes were authorized to the location of the existing water structures.

Sometime thereafter, however, Petitioner demolished all then-existing water structures, including the fixed pier, floating dock, and ramp, and replaced them with (1) a fixed pier measuring 13.7 feet wide by 26.4 feet long; (2) a floating dock measuring 8 feet wide by 20 feet long; and (3) a ramp measuring 3 feet wide. Petitioner located the new pier six to seven feet westward of the previous pier's location, closer to his neighbor's property. Petitioner also moved the floating dock westward on the property and farther away from the waterfront bulkhead. The new ramp was moved eastward to the floating dock, and the boat lift was moved westward such that it now butted up against the edge of Petitioner's property line.

On December 11, 2017, Petitioner submitted to the Department an application for a permit modification to legalize the size and new location of the boat lift. The Department informed Petitioner, however, that the new pier, dock, and ramp would likewise need to be legalized. To



legalize the structures, a new Waterfront Development Individual Permit application was required. Accordingly, on June 27, 2018, Petitioner submitted the Waterfront Development Individual Permit application that is at issue in this matter.²

By letter dated October 10, 2018, the Department denied Petitioner's permit application pursuant to the Recreational Docks and Piers rule set forth at N.J.A.C. 7:7-12.5(b) and (e). The Department determined that two requirements of the rules had not been met. First, contrary to the requirement at N.J.A.C. 7:7-12.5(b)1, Petitioner had not demonstrated a need for the new structures that could not be satisfied by the previous structures approved under the 2016 Permit. Second, contrary to the requirements at N.J.A.C. 7:7-12.5(b)7 and (e), Petitioner had not reduced the width of the new pier to a maximum of eight feet. Petitioner was required to do so in accordance with N.J.A.C. 7:7-12.5(e) because he had relocated the pier six to seven feet to the west of the previous pier's historic location, causing the new pier to cover water areas the previous pier had not covered in 1970 or 1977. The Department considered this an "increase in coverage over the water area" under the regulations.

Petitioner requested a hearing to contest the Department's decision and, on September 9, 2019, the matter was transferred to the Office of Administrative Law. Shortly thereafter, on October 28, 2019, Petitioner's immediately adjacent neighbors, Bradley and Carrie Kurtzman, filed a motion to intervene and join the matter as a party or, in the alternative, to participate in the matter under N.J.A.C. 1:1-16.6. The Kurtzmans sought to support the Department's denial of the Permit. On January 29, 2020, ALJ Wilson denied the Kurtzmans' motion with respect to their

² On July 23, 2018, Petitioner withdrew the pending application for a permit modification he had submitted on December 11, 2017.



request to intervene but granted it with respect to their request to participate.³ The Department moved for summary decision on December 18, 2020, and Petitioner filed a cross-motion for summary decision on January 27, 2021.

On July 8, 2022, ALJ Wilson issued an Initial Decision, granting the Department's motion for summary decision and denying Petitioner's motion for the same. The ALJ found the new structures were not exempt from the requirements of the CZM Rules under the Zane Exemption to the Waterfront Development Law because the new structures were not the same size or in the same location as the previous structures. Absent the exemption, Petitioner was required but failed to receive Department approval prior to beginning construction. Petitioner was also required but failed to demonstrate a need for the new structures that could not be satisfied by the previous structures, in accordance with N.J.A.C. 7:7-12.5(b)(1). Petitioner's stated need was to provide a direct pathway from the dock to Petitioner's home without having to go around Petitioner's newly built in-ground pool. The ALJ concluded that this did not constitute sufficient "need" but rather only "ease of access" or "maneuverability." The ALJ further found that the new pier does not benefit from the legacy status at N.J.A.C. 7:7-12.5(e), which is otherwise afforded to structures constructed prior to 1978. Petitioner lost this benefit when he demolished the previous pier and relocated the new one, resulting in an increase in coverage over the water area as contemplated at N.J.A.C. 7:7-12.5(e). Consequently, Petitioner was required to reduce the width of the fixed pier to a maximum of eight feet in order to meet the current requirements of the CZM Rules. Petitioner failed to do so. As a result, the ALJ concluded the Department properly denied Petitioner's Permit.

³ Pursuant to the ALJ's order, and in accordance with N.J.A.C. 1:1-16.6(c), the Kurtzmans' participation was limited to the right to argue orally, file a statement or brief, and file exceptions to the initial decision.



Petitioner submitted exceptions to the Initial Decision on July 21, 2022. In his exceptions, Petitioner states that, by focusing on the Zane Exemption, the ALJ failed to address Petitioner's primary concern—that the Department erroneously concluded the new pier resulted in an increase in coverage over the water area. According to Petitioner, an “increase in coverage over the water area” as contemplated at N.J.A.C. 7:7-12.5(e) is effected only if the new structure is larger than the structure that was removed, or if you increase the number of structures. Petitioner contends there was no increase in coverage over the water area in this case because the new pier is smaller than the previous pier and no additional piers were added. Accordingly, Petitioner did not lose the legacy status afforded under N.J.A.C. 7:7-12.5(e) and is therefore not required to reduce the width of the pier to meet the current requirements of the rules. Lastly, Petitioner stresses the relocation of the structures was merely *de minimus* and adds that the need for the relocation was a matter of safety.

The Department submitted a reply on July 28, 2022, opposing Petitioner's exceptions. The Department rebutted Petitioner's reading of N.J.A.C. 7:7-12.5(e), contending that once a pre-existing pier wider than eight feet is relocated, the relocation constitutes an increase in coverage over the water area and the pier must be reduced to a maximum width of eight feet. Regarding Petitioner's new claim that he relocated the structures as a matter of safety, the Department pointed to Petitioner's previous assertions that he built the new waterfront structures solely because he wanted a direct pathway from his dock to his home.



On August 3, 2022, the Kurtzmans submitted a letter in support of the Department's reply, and on August 12, 2022, Petitioner submitted a response to the Department's reply and the Kurtzmans' letter.⁴

DISCUSSION

Under N.J.A.C. 1:1-12.5, a party is entitled to summary decision where it shows that there is no genuine issue as to any material fact challenged and that it should prevail as a matter of law. E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010). To defeat the motion, the non-moving party must submit responding affidavit(s) setting forth specific facts to show that there is a genuine issue that can be determined only in an evidentiary hearing. N.J.A.C. 1:1-12.5(b); see Housel v. Theodoridis, 314 N.J. Super. 597, 604 (App. Div. 1998) (to defeat a summary judgment motion, the non-moving party cannot simply "sit on his or her hands," but must present specific facts showing there is a genuine issue for trial). Like the standard for summary judgment under N.J. Court Rule 4:46-2, the standard on a motion for summary decision requires the court or agency 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." Piccone v. Stiles, 329 N.J. Super. 191, 194 (App. Div. 2000) (quoting Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)). And even though the allegations of the pleadings may raise an issue of fact, if the moving papers show that, in fact, there is no real material issue, then summary judgment should be granted. Leslie Blau Co. v. Alfieri, 157 N.J. Super. 173, 201 (App. Div. 1978) (citing Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 75 (1954)). The ALJ's ruling granting summary decision in favor of

⁴ Parties are permitted under N.J.A.C. 1:1-18.4 to submit exceptions to the initial decision and replies to the other parties' exceptions. Responses to a reply are not permitted. Accordingly, I do not consider Petitioner's August 12, 2022, response in this final decision.



the Department, and denying Petitioners' cross motion for summary decision, was appropriate under these circumstances.

There is no dispute that Petitioner demolished the previously existing structures and constructed new structures, as Petitioner concedes. At issue is whether the new structures satisfy the requirements of the CZM Rules and, therefore, the Permit can be approved to legalize them. Because the previously existing structures had been constructed prior to January 1, 1981, however, the ALJ found it relevant to determine whether a permit is required to begin with or whether the new structures are instead exempt from Department approval pursuant to the Zane Exemption. ALJ Wilson found, and I concur, that the structures are not exempt.

Under the Waterfront Development Law, no development or improvement of any waterfront upon any navigable water of the State such as those at issue in this matter, "shall be commenced or executed without the approval of the [Department]." Codified at N.J.S.A. 12:5-3, the Zane Exemption exempts from Department approval the "repair, replacement or renovation of a permanent dock, wharf, pier, bulkhead or building existing prior to January 1, 1981, provided such activities do not increase the size of the structure and the structure is used solely for residential purposes." The Zane Exemption is implemented through the CZM Rules at N.J.A.C. 7:7-2.4(d). As pertinent to this case, the regulation exempts "any structure . . . which is in the waterfront area" (N.J.A.C. 7:7-2.4(d)) from compliance with the Waterfront Development Law if, but only if, "[t]he repair, replacement, renovation, or reconstruction [is] in the same location and size . . . of the preexisting structure of any dock, wharf, pier, [or] bulkhead . . . legally existing prior to January 1, 1981 . . . provided that the structure is used solely for . . . the docking of or servicing of pleasure vessels." N.J.A.C. 7:7-2.4(d)(6). As discussed in the Initial Decision, "reconstruction" is defined in the CZM Rules as the "repair or replacement in the same location and size of the preexisting



structure.” N.J.A.C. 7:7-1.5. Although “repair,” “replacement,” and “renovation” are not defined in the rules, these associated terms suggest reparative and restorative activities. The commonly understood meaning of these terms, when coupled with the term “reconstruction” as defined in the rules, indicates the continuing existence of a structure in the same location, with portions being repaired, replaced, or renovated.

By Petitioner’s own admission, the structures that had existed prior to 1981 have been demolished. Petitioner acknowledges that he did not undertake “repair,” “replacement,” or “renovation” of the waterside structures, and the ALJ found that the new structures are not considered “reconstruction” as defined in the CZM Rules because the structures were relocated. Although Petitioner admits to demolishing the structures and constructing new ones, he asserts that the structures were not relocated, but rather the new structures are located within the historic footprint of the previous structures. Yet there is no dispute that Petitioner located the new fixed pier six to seven feet to the west of the previous fixed pier’s historic location and moved the new floating dock westward on the property and the new ramp and boat lift eastward. It follows that the structures are simply no longer considered the same structures and no longer in the same location as those existing prior to January 1, 1981. As a result, the ALJ concluded that Petitioner cannot avail himself of the Zane Exemption. I ADOPT the ALJ’s conclusion.

Unable to rely on the Zane Exemption, Petitioner’s proposed waterward activities are subject to Department approval. As such, Petitioner was required to obtain that approval prior to construction. I ADOPT the ALJ’s conclusion that no such approval was received, as Petitioner admittedly demolished the three previously existing structures and replaced them without having obtained a permit.



When Petitioner did seek to legalize the structures, Petitioner was required, in accordance with N.J.A.C. 7:7-12.5(b)1, to demonstrate a need for the new structures that could not be satisfied by the previous structures. The ALJ found that no such need had been demonstrated. Petitioner stated that he constructed the new pier in its new location because he wanted a direct pathway to his home. The ALJ found that Petitioner's desire for greater "ease of access" or "maneuverability" is not a "need" pursuant to the plain meaning of N.J.A.C. 7:7-12.5(b)1. The previous structures served the purpose for which they were intended and no apparent safety or health risk existed. "Need" is a matter of necessity as opposed to mere convenience. If one could demonstrate "need" simply by indicating the reason for the change, no matter the reason, then the provision at N.J.A.C. 7:7-12.5(b)1 would be rendered useless. Need must be demonstrated by more than mere purpose. For example, evidence that the fixed pier, floating dock, or ramp had become structurally unsound, had evidenced problems of stability or loss of use, or constituted a health or safety hazard could in appropriate circumstances constitute sufficient need to empower the Department to grant a permit in accordance with N.J.A.C. 7:7-12.5(b)1.

Responding to this finding, Petitioner now indicates in his exceptions that the new location provides "safer and more direct access to and from the dock," and that he replaced "deteriorated and dilapidated structures with a new and structurally sound stationery structure." Although Petitioner now claims this, at no point has he proffered any evidence to substantiate his assertion that the previous structures were unsafe in any way. I ADOPT the ALJ's conclusion that Petitioner did not meet the requirement at N.J.A.C. 7:7-12.5(b)1, and thus the new pier and dock were not conditionally approvable.

I likewise ADOPT the ALJ's conclusion that Petitioner was required but failed to reduce the width of the newly constructed fixed pier to eight feet because the fixed pier no longer benefits



from the legacy status otherwise afforded under N.J.A.C. 7:7-12.5(e) to structures that predate the applicable CZM Rules. N.J.A.C. 7:7-12.5(e) provides:

For sites which have existing dock or pier structures exceeding eight feet in width over water areas and/or wetlands, which were constructed prior to September 1978 and for which the applicant proposes to increase the coverage over the water area or wetland by relocating or increasing the number or size of docks or piers, the existing oversized structures must be reduced to a maximum of eight feet in width over water areas and six feet in width over wetlands and intertidal flats.

Accordingly, any existing pier over eight feet in width that was constructed prior to September 1978 need not be reduced to a maximum width of eight feet unless the applicant proposes to increase the coverage over the water area by relocating the pier or increasing the number or size of the pier. There is no dispute that a fixed pier existed on the Property prior to September 1978, as depicted on the aerial photographs from 1970 and 1977. At issue is whether the new fixed pier resulted in an increase in coverage over the water area as contemplated at N.J.A.C. 7:7-12.5(e). Petitioner asserts that he did not increase the size of the pier or its coverage over the water area, but rather reduced both. Petitioner further asserts that he did not increase the number docks or piers, but merely demolished and constructed one pier and dock. Petitioner contends, therefore, that the structures continue to benefit from the legacy status afforded under N.J.A.C. 7:7-12.5(e).

The ALJ correctly found, however, that the legacy status afforded under N.J.A.C. 7:7-12.5(e) was lost when the fixed pier was relocated and, as a result, the Department properly determined the new pier must be reduced to a maximum width of eight feet. Although Petitioner's construction of the new pier indeed resulted in a reduction of the size of the pier itself, coverage over the water area was increased by relocating the oversized structure into a water area not covered by the fixed pier in 1970 or 1977. The rule provides that a dock or pier must be reduced



to a maximum of eight feet in width over a water area if an applicant proposes an increase in coverage over the water area by increasing the number of structures, the size of the structure, *or* “by relocating” the structure. N.J.A.C. 7:7-12.5(e). An increase in coverage over the water area, therefore, is effected not only by increasing the number or size of the structures, but also by merely relocating a structure.

To support this conclusion, the ALJ pointed to the regulatory history of the applicable rule. Prior to a 2002 rule amendment, N.J.A.C. 7:7-12.5(e) required that docks constructed before September 1978 and exceeding eight feet in width over water areas or wetlands be reduced to eight feet in width if an increase in the manner or size of the dock is proposed. The Department amended the provision, however, to also require a reduction in width if the structure is relocated. In the notice of proposal to amend the provision, the Department expressly stated that “[t]his amendment would also require a reduction in dock width if the docks were to be relocated. . . .” 34 N.J.R. 74(a) (January 7, 2002). The Department went on to state that, if the property owner relocated a structure, “the existing structure is no longer considered the same structure and thus is required to conform with the current [CZM Rules].” The amendment was adopted and effective on February 3, 2003, (35 N.J.R. 632(a) (February 3, 2003), prior to Petitioner acquiring the Property and constructing the new fixed pier.

As discussed above, Petitioner demolished the previously existing fixed pier and constructed a new pier six to seven feet to the west. Once relocated, no matter the increase or decrease in the size of the pier, the pier was “no longer considered the same structure” as that which previously existed, and therefore lost the legacy status otherwise afforded under N.J.A.C. 7:7-12.5(e). As a result, petitioner was required to reduce the width of the pier to a maximum of eight feet. Petitioner admittedly failed to do so. The ALJ correctly found, therefore, that



Petitioner's new fixed pier is subject to and does not meet the requirements of N.J.A.C. 7:7-12(b)7 and (e). As a result, and I concur, the ALJ correctly concluded that the Department properly denied the Permit.

CONCLUSION

For the reasons set forth above, I ADOPT the ALJ's Initial Decision affirming the Department's denial of Petitioner's Permit. IT IS SO ORDERED.

Dated: November 21, 2022



Shawn M. LaTourette, Commissioner
NJ Department of Environmental Protection



SERVICE LIST

MICHAEL DUNN,
Petitioner
v.
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
LAND USE REGULATION,
Respondent

OAL DKT. NO. ELU 12368-19

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