



# State of New Jersey

## DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE  
*Governor*

BOB MARTIN  
*Commissioner*

KIM GUADAGNO  
*Lt. Governor*

RIVERVIEW DEVELOPMENT, LLC, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 NEW JERSEY DEPARTMENT OF )  
 ENVIRONMENTAL PROTECTION, )  
 DIVISION OF LAND USE )  
 REGULATION, )  
 )  
 Respondent. )

### ADMINISTRATIVE ACTION FINAL DECISION

OAL DKT NO.: ELU-WD 08640-11  
AGENCY REF. NO.: 0908-05-  
0004.3WFD060001

### INTRODUCTION

This matter arises from Riverview Development, LLC's ("Riverview") appeal of a 2011 determination by the New Jersey Department of Environmental Protection's ("DEP" or "the Department") Division of Land Use Regulation ("the Division"), that Riverview's proposed development in the Hudson River Waterfront Area does not comply with the Coastal Zone Management Rules, specifically the High-Rise Structures Rule, N.J.A.C. 7:7E-7.14 ("the Rule"), and the Traffic Rule, N.J.A.C. 7:7E-8.14.

The matter was referred to the Office of Administrative Law ("OAL") as a contested case. Administrative Law Judge ("ALJ") Gail M. Cookson granted third-parties Bergen Ridge Homeowners Association ("Bergen Ridge") and NY/NY Baykeeper ("Baykeeper") limited participant status. Riverview and the Division filed cross-motions for summary decision on application of the High-Rise Structures Rule. Specifically, the parties moved for summary

decision on whether Riverview's project complies with the perpendicular orientation standard in N.J.A.C. 7:7E-7.14(b)3, such that the longest lateral dimension of a "high-rise structure" is oriented perpendicular to the Hudson River. ALJ Cookson concurred with Riverview's interpretation of the High-Rise Structures Rule and granted Riverview's motion for summary decision. The ALJ also thereby denied the Division's motion. For the reasons set forth below, the Initial Decision granting summary decision in favor of Riverview and denying summary decision in favor of the Division is ADOPTED in part, MODIFIED in part, and REJECTED in part.

### FACTUAL DISCUSSION

The factual history of this permit proceeding is lengthy and complex. A complete presentation of that history is necessary in order to understand the context of the Division's reconsideration of Riverview's permit, which gave rise to this proceeding. In May 2006, Riverview applied for a waterfront development ("WFD") permit under the Waterfront Development Act, N.J.S.A. 12:5-1 et seq., and the Coastal Zone Management Rules, N.J.A.C. 7:7E, to construct a residential development along the Hudson River in North Bergen Township. The proposed development would consist of three residential towers positioned above a two-floor parking deck with seventeen townhomes.<sup>1</sup> The development would also include 1,150 linear feet of the Hudson River Walkway and related amenities.<sup>2</sup> On October 23, 2006, the Division issued to Riverview a Waterfront Development Permit, Permit No. 0908-05-0005.4 WFD 060001.

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<sup>1</sup> Each residential tower reaches 120 feet in height as measured from existing preconstruction ground level, and 95 feet in height as measured from the top of the two-floor parking podium. It appears from the record that the project was modified to include 23 two-bedroom townhouses, but the 23 townhomes were then eliminated from the project. (See Certification of Neil Yoskin ¶ 6, April 18, 2013.)

<sup>2</sup> Riverview first applied for a permit to construct its proposed development in November 2005. It subsequently withdrew that permit application in March 2006, because the proper lots had not been identified.

After the Division approved the permit, Bergen Ridge and Baykeeper separately requested hearings to contest the permit. Bergen Ridge represents the owners of thirty-four townhomes built into the middle of the Palisades cliff face, west of the location of Riverview's proposed project. Baykeeper is a nonprofit organization whose aim is to protect, preserve and restore the Hudson-Raritan Estuary. On October 15, 2008, Bergen Ridge's request for a hearing was denied on the basis that Bergen Ridge does not have a statutory right to a hearing, nor a constitutionally protected interest impacted by Riverview's permit. On June 11, 2009, Baykeeper's request was also denied.

Bergen Ridge appealed the denial of its hearing request to the Appellate Division. Baykeeper also filed an appeal with the Appellate Division, but directly challenged the validity of the Division's 2006 permit decision. On January 27, 2010, the Appellate Division affirmed the Department's denial of Bergen Ridge's request for an administrative hearing. In re Riverview Dev., LLC, Waterfront Dev. Permit No. 0908-05-0004.3 WFD 060001, 411 N.J. Super. 409 (App. Div.), certif. denied, 202 N.J. 347 (2010). Baykeeper's appeal on the merits, which had been stayed pending the resolution of Bergen Ridge's appeal, was thereafter reactivated. Bergen Ridge then requested leave to intervene in Baykeeper's direct appeal, which the Appellate Division granted.

On September 29, 2010, before the Appellate Division had an opportunity to reach the merits of the appeal, the Division moved for the matter to be remanded to the agency for amplification of the record and/or reconsideration of its 2006 permit decision. The Appellate Division granted the Division's motion by order dated November 12, 2010. The order provided that the matter was remanded for the Division to "reconsider application of N.J.A.C. 7:7E-7.14(b) to the permit application and to reconsider its traffic impact findings." The Appellate

Division also ordered that all parties to the appeal, including Bergen Ridge and Baykeeper, shall be provided with notice of all proceedings, and shall be permitted to submit evidence and to participate in the proceedings on remand. The Appellate Division also ordered the Department to render a decision by March 31, 2011, and retained jurisdiction over the appeal.

By letter dated January 26, 2011, the Division invited Riverview, Bergen Ridge and Baykeeper to submit any information they wished the Division to consider on remand. Submissions were received by the Division between January and May 2011 (the Appellate Division had granted the Division two extensions of time from the original March 31, 2011, deadline). On June 1, 2011, the Division informed Riverview that it had determined to deny the permit, on the grounds that the project does not comply with the perpendicular orientation standard in the High-Rise Structures Rule and the Traffic Rule.<sup>3</sup> Specifically, the Division found that the parking garage, townhomes and high-rise towers constituted a single “high-rise structure.” Accordingly, the longest lateral dimension of that “structure” (as measured along the parking garage) was oriented parallel to the Hudson River. In addition, the Division found that the sum of the dimension of each of the towers running parallel to the Hudson River, which reflects the cumulative effect of the towers on the views from nearby residential structures, would exceed the largest east-west direction of the northernmost tower. For those two reasons, the Division determined Riverview’s project does not comply with the High-Rise Structures Rule.

With regard to the Traffic Rule, the Division determined that based upon a revised traffic study Riverview submitted to North Bergen Township for review, several intersections along River Road would be operating at a Level of Service of E or below, which is discouraged under

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<sup>3</sup> By letter dated June 2, 2011, the Department notified the Appellate Division that reconsideration of the permit was complete and it had determined to deny the permit.

N.J.A.C. 7:7E-8.14(d). Additionally, the Division found that Riverview did not demonstrate that traffic disturbances caused by the proposed development were resolved to the satisfaction of North Bergen Township and Hudson County as required pursuant to N.J.A.C. 7:7E-8.14(c). Therefore, the Division also determined that Riverview's project does not comply with the Traffic Rule

Riverview submitted an administrative hearing request on June 8, 2011, contending that the Division's reconsideration and denial was contrary to the permit suspension and revocation procedures set forth in N.J.A.C. 7:7-4.11, thereby violating due process, and also that the Division's conclusions regarding the High-Rise Structures Rule and Traffic Rule are arbitrary, capricious, unreasonable and otherwise not in accordance with law.

The Department granted Riverview's hearing request on July 12, 2011, and the matter was transmitted to the OAL as a contested case. Bergen Ridge and Baykeeper then filed Notices of Motion to Intervene and/or Participate on August 15, 2011, and September 1, 2011, respectively.<sup>4</sup> By order dated September 19, 2011 ("the 2011 Order"), ALJ Cookson denied the motions to intervene, but permitted Bergen Ridge and Baykeeper to participate in this proceeding, which participation would be limited to written post-hearing submissions and the right to file exceptions. Bergen Ridge requested interlocutory review of ALJ Cookson's order, which I declined on October 6, 2011.

During a case management conference between the ALJ and the parties in October 2011, the parties agreed that questions of regulatory compliance could be determined as a matter of law on stipulated facts through motions for summary decision. Riverview also indicated that it

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<sup>4</sup> Before Riverview's hearing request was granted, both Bergen Ridge and Baykeeper sought to confirm with the Department's Office of Legal Affairs that they would be parties to the administrative hearing. After the matter was transferred to the OAL, ALJ Cookson informed Bergen Ridge and Baykeeper, by letter dated August 1, 2011, that they would have to file Notices of Motion to Intervene and/or Participate.

contemplated a separate motion for summary decision declaring the Division's 2011 permit action a revocation of an extant permit.

Subsequently, on November 7, 2011, Riverview filed a Notice of Motion for Summary Decision, requesting that the Division's 2011 decision be deemed a revocation or suspension, rather than a reconsideration and denial, of the permit granted in 2006. Riverview also argued that the burden of proof should therefore shift to the Division to show non-compliance with the rules in dispute.<sup>5</sup> The Division responded by letter brief dated December 12, 2011.

By order dated February 1, 2012 ("the 2012 Order"), ALJ Cookson concluded that the Division's action in 2011 should be considered a suspension of Riverview's previously granted permit. However, ALJ Cookson also found that, because the parties had already agreed that compliance with the High-Rise Structures Rule would be presented by way of stipulation of facts and cross-motions for summary decision, the placement of burdens of proof would be mostly meaningless. (2012 Order 11-12.) ALJ Cookson therefore ordered that Riverview's motion be deferred, until the merits of Riverview's administrative appeal were decided through the parties' cross-motions for summary decision.

Although a briefing schedule had been established for the parties' cross-motions for summary decision on the application of the High-Rise Structures Rule, that schedule was adjourned several times over the course of 2012 at the parties' joint requests for several reasons. Those reasons include an anticipated rule proposal that could affect the High-Rise Structures Rule, modifications to Riverview's site plan and ongoing settlement discussions. The anticipated

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<sup>5</sup> While that motion was pending, the Division moved to dismiss the pending Appellate Division appeal as moot. The Appellate Division granted the Division's motion by order dated February 1, 2012, without prejudice to any party filing a new appeal within 45 days of the conclusion of the instant administrative proceeding.

rule proposal was postponed as a result of Hurricane Sandy, and attempts to settle the matter were apparently unsuccessful.

Accordingly, on April 22, 2013, Riverview filed its motion for summary decision on the application of the High-Rise Structures Rule, arguing that the perpendicular orientation standard applies only to the high-rise components of its project, and that, consequently, each of those high-rise components is correctly oriented in relation to the Hudson River in compliance with N.J.A.C. 7:7E-7.14(b)3.

Bergen Ridge subsequently requested permission from the ALJ to file a brief in opposition to Riverview's pending motion. ALJ Cookson granted this request by order dated May 22, 2013. Riverview requested interlocutory review of ALJ Cookson's order, which I declined on June 13, 2013. On July 3, 2013, the Division filed its cross-motion for summary decision on application of the High-Rise Structures Rule, and Bergen Ridge also filed its brief in opposition to Riverview's motion and in support of the Division's. Riverview and Bergen Ridge filed their responses to the Division's motion on July 17, 2013 and July 19, 2013, respectively.

On July 22, 2013, in the midst of the parties' briefing on the cross-motions, Riverview moved to amend its administrative hearing request to include an additional claim of equitable estoppel, arguing that it had expended resources in reliance on the Division's initial permit decision in 2006. The Division and Bergen Ridge opposed that motion on July 30, 2013 and July 31, 2013, respectively. Riverview replied to the Division and Bergen Ridge's opposition on August 2, 2013. On that date, Riverview also filed a supplemental certification in support of its motion for summary decision. Finally, on August 15, 2013, the Division filed its reply to Riverview's opposition to its cross-motion.

On December 5, 2013, third-party participant Bergen Ridge filed a notice of motion to dismiss this proceeding as moot, in light of post-Hurricane Sandy amendments to the Flood Hazard Area Control Act Rules, N.J.A.C. 7:13, and preliminary changes to the Federal Emergency Management Agency's Flood Insurance Rate Maps. I denied that motion by order dated February 28, 2014.

### INITIAL DECISION

In a November 4, 2013, Initial Decision, the ALJ granted Riverview's motion for summary decision on application of the High-Rise Structures Rule, and denied the Division's cross-motion. The ALJ found that an analysis of the history and objectives of the High-Rise Structures Rule, as well as the Coastal Zone Management Rules generally, was warranted insofar as the term "structure" is not defined in the High-Rise Structures Rule. The ALJ found that the "paramount considerations" of the High-Rise Structures Rule relate to visual intrusion, viewsheds, the availability of light and air, and overshadowing of waterfronts. (Initial Decision 15.) Therefore, the ALJ reasoned that the High-Rise Structures Rule does not implicate low-rise structures adjoining or adjacent to high-rise towers.

The ALJ also considered other projects in Hudson County for which the Department had previously granted a permit, including Maxwell Place in Hoboken, Crystal Point in Jersey City and the Watermark in North Bergen, and the Department's draft amendment to the High-Rise Structures Rule.<sup>6</sup> The ALJ found that those other projects for which the Division had previously granted a permit highlight the Division's past practices, and that it was impossible to distinguish

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<sup>6</sup> Riverview had submitted those permits and the draft amendment for the ALJ's consideration in support of Riverview's 2013 motion for summary decision.



the Maxwell Place development from Riverview's project on any rational basis. Based on the draft rule amendment, the ALJ also rejected the Division's argument that Maxwell Place was erroneously decided, since the draft amendment appeared to institutionalize an application of the Rule that the Division asserts is erroneous.<sup>7</sup>

Additionally, the ALJ found that the Department had neither previously defined, nor consistently applied, the term "structure," and that it is now applying the High-Rise Structures Rule to Riverview's project in a way that is inconsistent with the objectives of the Coastal Zone Management Rules. The ALJ concluded that it was arbitrary for the Division to have "suspended [Riverview's] previously granted Permit, not on the basis of any new information or modification to the plan, but simply because it found a different way to define and measure the 'structure' ...." (Initial Decision 19.) Additionally, since the ALJ granted Riverview's motion for summary decision, she denied as moot Riverview's motion to amend its administrative hearing request to include the claim of equitable estoppel.

### EXCEPTIONS

All of the parties and third-party participants to this proceeding filed exceptions to the Initial Decision.<sup>8</sup> First, Riverview agrees with ALJ Cookson's findings of fact and conclusions of law in their entirety. However, Riverview asserts that the Initial Decision is inaccurate insofar as it suggests that compliance with the High-Rise Structures Rule was the only issue outstanding, since Riverview had also appealed the Division's 2011 determination that the development did

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<sup>7</sup> The draft amendment would have modified subsection (a) of the Rule to define "high-rise structures" as "*those portions of structures which are more than six stories or more than 60 feet in height as measured from preconstruction ground level.*" (Initial Decision 17 n. 12; see also Certification of Neil Yoskin, Ex. L.)

<sup>8</sup> Since Baykeeper joined in the exceptions submitted by Bergen Ridge and the Division, there is no need to address Baykeeper's submission separately.

not comply with the Traffic Rule. Riverview believes the Division will reinstate its permit in view of the Initial Decision, at which time Riverview can modify its project to comply with the Traffic Rule.

The Division and Bergen Ridge both take exception to the ALJ's conclusion that the High-Rises Structures Rule applies not to the entire "structure" as dictated by the plain language but only to the high-rise components. Both also characterize that interpretation as de facto rulemaking, and take exception to any consideration of, and reliance upon, a draft amendment to the High-Rise Structures Rule that was never proposed and adopted by the agency.<sup>9</sup>

The Division also asserts that the ALJ's discussion of the objectives of the High-Rise Structures Rule was not sufficiently tied to her conclusion such that exclusion of low-rise portions of a structure would uphold those objectives. Furthermore, the Division argues that the only information "with a real nexus" to the Initial Decision is the draft amendment to the High-Rise Structures Rule, and reliance on that information was erroneous. Finally, the Division takes exception to the finding that the Division's 2011 permit action was arbitrary, since the Appellate Division expressly remanded the matter to the agency in 2010 so that the Division could amplify the record and/or reconsider application of the High-Rise Structures Rule to Riverview's project.

Bergen Ridge takes further exception to any suggestion that the administrative appeal is concluded upon a determination on the application of the High-Rise Structures Rule, and argues that the issue of compliance with the Traffic Rule still remains with the OAL. Bergen Ridge also argues that the Division's interpretation and application of its own regulation should have been afforded greater deference, and that the predominant purpose of the High-Rise Structures Rule is not, as the Initial Decision suggests, to prevent overshadowing but to avoid the blocking of

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<sup>9</sup> With regard to this exception, Bergen Ridge indicated that it was submitting an OPRA request to ascertain how the draft rule amendment "'mysteriously' surfaced from [Riverview] during [this] appeal."

views. Bergen Ridge contends that since Riverview's project blocks existing views from public roads and other locations, the Initial Decision is not supported by the plain language of N.J.A.C. 7:7E-7.14.

Furthermore, Bergen Ridge takes exception to the consideration of any materials that were not submitted to the Division following the 2010 remand and prior to the Division's 2011 decision, including other waterfront development permits previously approved by the Division and that were submitted by Riverview in support of its motion for summary decision. Bergen Ridge contends that submission of that information after the Division's 2011 permit action violates the Appellate Division's 2010 Order and is otherwise inappropriate. Bergen Ridge also asserts that other permit decisions are not binding on the Division by their terms, and it was inappropriate to consider the limited record of those decisions rather than the "entire file." Bergen Ridge also seeks to distinguish Crystal Point and the Watermark developments from Riverview's project on the basis that they are built on manmade extrusions of land extending out into the Hudson River, and the orientation of a high-rise structure should be considered with reference to the general north-south flow of the Hudson River rather than with reference to such manmade extrusions.

Bergen Ridge also suggests that not every staff member within the Division knows the Coastal Zone Management Rules to the same extent, and that the Division may have been trying to effectuate various policy agendas over time. All of those internal circumstances at the agency, alleges Bergen Ridge, may have resulted in differing applications of the High-Rise Structures Rule. Finally, Bergen Ridge argues that the Division's prior findings with regard to the Maxwell Place permit were incorrectly considered in the light most favorable to Riverview, the moving party.

Riverview responded to the Division and Bergen Ridge's exceptions on November 18, 2013 and November 22, 2013, respectively. Riverview objects generally to the filing of any exceptions by Bergen Ridge. Additionally, Riverview argues that the ALJ engaged in an expansive analysis of the history of the High-Rise Structures Rule, which includes the Division's application of the rule in other cases. There is also no rule that precludes the submission of information regarding other permit actions taken by the Division, and Bergen Ridge had the opportunity to comment on those submissions since ALJ Cookson permitted Bergen Ridge to participate in this proceeding. Riverview also argues that it was not inappropriate to consider a draft amendment to the High-Rise Structures Rule, because that draft was offered for the limited purpose of illustrating the Division's belief that it was necessary to clarify the manner in which the rule is applied. Furthermore, the draft rule amendment was only one factor in the ALJ's decision. Lastly, Riverview objects to Bergen Ridge's suggestion that Riverview or its counsel engaged in any sort of improper conduct in obtaining the draft rule amendment.

## LEGAL DISCUSSION

### ***I. Application of the High-Rise Structures Rule***

"High-rise structures" are defined as "structures which are more than six stories or more than 60 feet in height as measured from existing preconstruction ground level." N.J.A.C. 7:7E-7.14(a). Thus, by its terms, the Rule requires the Division to first identify each "structure" to which the definition of "high-rise structure" in N.J.A.C. 7:7E-7.14(a) is applied, in order to determine whether and how the High-Rise Structures Rule applies to a particular development. If a structure meets the definition of a "high-rise structure," then that structure is subject to the applicable standards in N.J.A.C. 7:7E-7.14(b).

The Division determined that, based on certain physical characteristics of Riverview's project, the proposed building in its entirety, including the parking garage, townhomes and residential towers, constitutes a single "high-rise structure." Therefore, the dimensions of the entire building should be considered in assessing compliance with the perpendicular orientation standard at N.J.A.C. 7:7E-7.14(b)3. Although not fully articulated in the Division's 2011 decision, it is implicit therein that the Division initially determined that Riverview's proposed building in its entirety is a single "structure," in order to then find that "structure" to be a "high-rise structure" pursuant to N.J.A.C. 7:7E-7.14(a). In the Initial Decision, however, the ALJ characterized the parking garage podium of Riverview's project as a low-rise "structure" separate from the residential towers.<sup>10</sup> (Initial Decision 18-19.) As application of the High-Rise Structures Rule requires first identifying each "structure" of a proposed development, and then assessing whether that "structure" constitutes a "high-rise structure," a pivotal issue in this matter that is highlighted by the Initial Decision is the correct interpretation of the term "structure" as used in N.J.A.C. 7:7E-7.14.

In the Initial Decision, the ALJ noted that the term "structure" is not defined in the High-Rise Structures Rule. The term is, however, defined in the Coastal Permit Program Rules, N.J.A.C. 7:7, as "*any assembly of materials above, on or below the surface of the land or water, including but not limited to buildings, fences, dams, pilings, footings, breakwaters, culverts, pipes, pipelines, piers, roads, railroads, bridges, and includes floating structures.*" N.J.A.C. 7:7-1.3 (emphasis added). That definition is broad and inclusive and thus, for purposes of the High-

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<sup>10</sup> The conclusion that follows from this characterization is that only the residential towers are "high-rise structures" to which the High-Rise Structures Rule applies. Riverview, however, does not contend that the high-rise and low-rise components of its project should be considered separate structures, and instead argues that "[N.J.A.C. 7:7E-7.14(b)3], when read in context, applies only to the High-Rise *components* of a structure." (Petitioner's Response Brief 3.) Thus, Riverview's argument would lead to a different conclusion from the one reached by the ALJ, namely, that the standard at N.J.A.C. 7:7E-7.14(b)3 should only be applied to those portions of a structure that are greater than six stories or 60 feet in height as measured from existing preconstruction ground level.

Rise Structures Rule, does not preclude Riverview's parking garage podium and residential towers from being considered as "structures" in their own right.<sup>11</sup>

The Division's initial permit decision in 2006 with regard to Riverview's development also highlights the ambiguity in the meaning of the term "structure" as it is used in the High-Rise Structures Rule. Although the precedential value of other permits is limited, as will be discussed in greater detail below, the Division's past findings with regard to Riverview's development suggest that the Division has interpreted the term "structure" differently over time. Based upon the Waterfront Development Environmental Report accompanying the Division's initial approval of Riverview's permit in 2006, the Division applied the High-Rise Structures Rule only to the residential towers.<sup>12</sup> Thus, the Division has interpreted "structure" to refer to the tower components of a building, which (if they meet the definition of a "high-rise structure") must comply with the criteria in N.J.A.C. 7:7E-7.14(b). However, for at least one other development, namely Crystal Point, the Division did not distinguish between the podium and tower components of a high-rise project.<sup>13</sup>

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<sup>11</sup> The ordinary meaning of the term "structure" is similarly broad and inclusive. In support of the Division's argument that the High-Rise Structures Rule, and specifically the perpendicular orientation standard at N.J.A.C. 7:7E-7.14(b)3, plainly applies to the entire Riverview building, Bergen Ridge asserts that the ordinary meaning of the term "structure" according to Black's Law Dictionary should govern. Black's Law Dictionary defines a "structure" as "[a]ny construction, production or piece of work artificially built up or composed of parts purposefully joined together <a building is a structure>." Black's Law Dictionary (9<sup>th</sup> Ed. 2009). That definition is expansive, and each of the project's three residential towers could arguably be a "construction" that is "artificially built up or composed of parts purposefully joined together." Thus, although a building may be a "structure," the ordinary meaning of the term "structure" does not preclude components of a building from being considered "structures" as well.

<sup>12</sup> The Division stated in the Riverview Environmental Report that "[t]he three proposed high-rise towers will be 95 feet in height, and will be located at least 50 feet from the coastal waters." (See Petitioner's November 9, 2011, Brief and Appendix Pa 11.)

<sup>13</sup> The conclusion that Crystal Point consists of a podium component and a tower component is apparent from the Environmental Summary Report for the project ("the Crystal Point Report") and the information submitted by Riverview in support of its 2013 motion for summary decision. Specifically, the Crystal Point Report states that "the first six floors will have a footprint that is greater than the above tower and will contain 275 parking spaces...and 6,000 square feet of retail space." (Certification of Neil Yoskin Ex. F.) Crystal Point therefore also consists of a

ALJ Cookson considered extrinsic evidence to aid in interpreting the term “structure” as used in the High-Rise Structures Rule. The Initial Decision touches on three types of extrinsic evidence: (1) the regulatory history of the Coastal Zone Management Rules (i.e., the New Jersey Coastal Management Program); (2) other permits that have been approved by the Division; and (3) a draft amendment to the High-Rise Structures Rule that was not formally proposed for adoption. Each of those considerations will be addressed in turn.

***A. The Regulatory History of the Coastal Zone Management Rules***

The High-Rise Structures Rule is one of several “use rules” or policies of the Coastal Zone Management Rules, N.J.A.C. 7:7E. Each of the “use rules” sets out “rules and conditions applicable to particular kinds of development” in order to ensure the appropriate use of coastal resources. N.J.A.C. 7:7E-7.1.

The Department promulgated the Coastal Zone Management Rules to effectuate the policies of the New Jersey Coastal Management Program. The program was intended to promote the appropriate use of New Jersey’s coastal zone following passage of the federal Coastal Zone Management Act in 1972. In 1978, the State obtained federal approval of the Coastal Management Program with regard to the Bay and Ocean Shore Segment only. NJDEP, New Jersey Coastal Management Program and Final Environmental Impact Statement (August 1980) [hereinafter Coastal Management Program]. Subsequently, in 1980, former Governor Brendan Byrne submitted for federal approval a Coastal Management Program addressing the entirety of New Jersey’s coastal zone, including the Northern Waterfront Area, which encompasses the

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residential tower above a mixed-use podium. However, it is also apparent from the Crystal Point Report that the Division considered that project to consist of a single 42-story “high-rise structure” that includes the first six stories of parking and retail space.

location of Riverview’s proposed development in North Bergen Township. At that time, the High-Rise Structures Rule was not a separate use policy but was included under housing use policies, now codified at N.J.A.C. 7:7E-7.2, as a “high-rise housing” policy. Coastal Management Program, *supra*, at 177-181. The Department’s rationale for the high-rise policy was stated as follows:

Considerable residential development along the coast, from the Palisades to the barrier islands, has taken the form of high-rise, high-density towers. While conserving of land, some high-rise structures represent a visual intrusion, cause adverse traffic impacts, and cast shadows on beaches and parks. ... This policy strikes a balance, between banning high-rises and allowing tall residential structures anywhere in the coastal zone.

[Coastal Management Program, *supra*, at 181.]

Thus, the high-rise policy originated from the Department’s concern regarding the impacts of high-rise residential towers. Through the high-rise policy, the Department sought to address the visual intrusion, adverse traffic impacts and overshadowing of beaches and parks that could result from the indiscriminate construction of high-rise towers in the coastal zone.

Subsequently, in 1984, the Department proposed expanding the high-rise housing policy into a separate high-rise *structures* policy. NJDEP, Summary and Rationale for Draft Proposed Substantive Amendments to Rules on Coastal Resource and Development Policies (January 1984) [hereinafter Summary and Rationale]. The Department’s policy and rationale behind the high-rise policy remained largely unchanged from 1980 to 1984, except to account for its applicability to high-rise structures generally. The Department also indicated in 1984 that “[t]he policy seeks not to ban high-rise structures, but to provide criteria for their development [at] suitable locations in the coastal zone.” Summary and Rationale, *supra*, at 181-182.



In 1986, the high-rise structures policy was adopted as the High-Rise Structures Rule, N.J.A.C. 7:7E-7.14. 18 N.J.R. 314(a) (February 3, 1986). As adopted, the Rule provided that “[h]igh rise *housing* and structures are acceptable” subject to the conditions enumerated therein. As discussed above, the High-Rises Structures Rule was initially developed as sub-policy of the Housing Use Rule, N.J.A.C. 7:7E-7.2. The Housing Use Rule defines “housing” to include “single family detached houses, multi-family units with apartments or town houses, high rise *buildings* and mixed use developments.” N.J.A.C. 7:7E-7.2(a) (emphasis added). That definition of “housing” has remained unchanged since the statewide Coastal Management Program was submitted for federal approval in 1980. See Coastal Management Program, supra, at 177. The Department also retained the term “high rise housing” when it adopted the high-rise policy as a separate rule at N.J.A.C. 7:7E-7.14 in 1986, and that term remained in the High-Rise Structures Rule until the Department amended the Rule in 2003 to define the term “high-rise structure.” See 34 N.J.R. 74(a) (January 7, 2002); 35 N.J.R. 632(a) (February 3, 2003).

Pursuant to the changes to the High-Rise Rise Structures Rule adopted by the Department in 2003, the standards and conditions for high-rise structures were moved to subsection (b), and the definition of “high-rise structure” was codified at subsection (a). The term “housing” was removed from the rule entirely. The rule proposal summary did not explain this particular change, but it also did not suggest that omission of the term “high-rise housing” represented a deliberate attempt to alter or otherwise change how the Rule was to be applied. Since there is no indication that omission of the term “housing” was intended to alter application of the Rule, the definition of “housing” in the Housing Use Rule is particularly instructive to the intended meaning of the term “structure” as used in the High-Rise Structures Rule. In moving the high-rise housing policy to a separate policy in 1984, the Department simply repurposed the high-rise

housing policy and expanded its applicability to *all* structures rather than just those comprising “housing.” Given that housing includes “high-rise buildings,” I find that the Division’s determination that Riverview’s proposed building in its entirety constitutes a single “high-rise structure” is consistent with the regulatory history of the Rule.

***B. The Considerations and Objectives of the Perpendicular Orientation Standard, N.J.A.C. 7:7E-7.14(b)3***

Since I have determined that the term “structure” as used in the High-Rise Structures Rule should be interpreted to refer to Riverview’s proposed towers and podium as a single unit, I now address Riverview’s argument that the perpendicular orientation standard in particular, N.J.A.C. 7:7E-7.14(b)3, should only be applied to those portions of a high-rise structure greater than six stories or 60 feet as measured from existing preconstruction grade. As the parties do not otherwise dispute that Riverview’s proposed development consists of a single “structure” (see Petitioner’s Response Brief 3), and the disputed non-compliance with the perpendicular orientation standard was the basis of the Division’s 2011 determination that Riverview’s project does not comply with the High-Rise Structures Rule, the only outstanding question is the appropriate application of the perpendicular orientation standard.

The High-Rise Structures Rule currently encompasses the following eight standards for the development of high-rise structures within the coastal zone:

1. High-rise structures are encouraged to locate in an urban area of existing high density, high-rise and/or intense settlements;
2. High rise structures within the view of coastal waters shall be separated from coastal waters by at least one public road or an equivalent area (at least 50 feet) physically and visually open to the public except as provided by N.J.A.C. 7:7E-3.48;
3. The longest lateral dimension of any high rise structure must be oriented perpendicular to the beach or coastal waters, except

for a high rise structure that is located in the Redevelopment Zone of the City of Long Branch and authorized pursuant to the Long Branch Redevelopment Zone Permit at N.J.A.C. 7:7-7.4.

4. The proposed structure must not block the view of dunes, beaches, horizons, skylines, rivers, inlets, bays, or oceans that are currently enjoyed from existing residential structures, public roads or pathways, to the maximum extent practicable;
5. High-rise structures outside of the Hudson River waterfront special area as defined by N.J.A.C. 7:7E-3.48 shall not overshadow the dry sand beach between 10:00 A.M. and 4:00 P.M. between June 1 and September 20, and shall not overshadow waterfront parks year round;
6. The proposed structure must be in character with the surrounding transitional heights and residential densities, or be in character with a municipal comprehensive development scheme requiring an increase in height and density which is consistent with all applicable Coastal Zone Management rules;
7. The proposed structure must not have an adverse impact on air quality, traffic, and existing infrastructure; and
8. The proposed structure must be architecturally designed so as to not cause deflation of the beach and dune system or other coastal environmental waterward of the structure.

[N.J.A.C. 7:7E-7.14(b).]

Since the Rule's adoption in 1986, the Department has exempted high-rise structures in certain areas from compliance with particular standards. Those exemptions, and the Department's reasons for adopting them, shed light on the considerations that the standards in the High-Rise Structures Rule are intended to address, and how those standards serve to address them.

In 1988, the Department adopted a new Hudson River Waterfront Area Rule, currently codified at N.J.A.C. 7:7E-3.48. See 20 N.J.R. 2058(b) (August 15, 1988). In establishing the Hudson River Waterfront as a Special Area, the Department recognized the unique nature of that area and sought to "*protect views to the [Hudson River] and Manhattan skyline, preserve the sense of openness at the water's edge, reduce shading impacts on the Hudson Waterfront*

Walkway, and provide public access and public open space....” 20 N.J.R. 139(a), 140 (January 19, 1988) (emphasis added).

In order to effectuate those goals, the Department proposed height-related standards specifically for development in the upland portions of the Hudson River Waterfront Area and for development on piers. Furthermore, in the upland area, the proposed new rule set forth that “no structure shall be permitted to block sight lines,” where development is proposed “in front of the Palisades, Kings Bluff, Castle Point, the Lincoln Tunnel helix, and any other area determined to provide extraordinary views of the [Hudson River], the Statue of Liberty and/or the New York skyline.” Ibid.

In conjunction with adoption of the Hudson River Waterfront Area Rule, the Department also exempted high-rise structures in the Hudson River Waterfront Area from compliance with the overshadowing standard of the High-Rise Structures Rule, N.J.A.C. 7:7E-7.14(b)5. High-rise structures located on piers within the Hudson River Waterfront Area were also exempted from the setback standard at N.J.A.C. 7:7E-7.14(b)2, to the extent provided in the Hudson River Waterfront Area Rule.

The Department did not, however, adopt as part of the Hudson River Waterfront Area Rule the proposed standards relating specifically to upland development. The Department determined that the “existing policies on high-rise structures (N.J.A.C. 7:7E-7.14) and scenic resources and design (N.J.A.C. 7:7E-8.12) provide the Department with adequate discretion to consider the potential impact of proposed development *on significant views* on a case by case basis.” 20 N.J.R. 2060 (emphasis added). The Department also stated that the “existing policy on high-rise structures (N.J.A.C. 7:7E-7.14) is sufficient to regulate upland development that will

*ensure the availability of light and air (openness) resources on the waterfront.” Ibid.* (emphasis added).

Based upon the foregoing discussion, and the discussion of the Department’s rationale for the high-rise policy, I agree with the ALJ’s determination that visual intrusion, obstruction of viewsheds, the availability of light and air (i.e., a sense openness at the water’s edge), and overshadowing are the paramount concerns that the High-Rise Structures Rule seeks to address.

In addition to the exemptions for high-rise structures in the Hudson River Waterfront Area, the Department also exempted high-rise structures authorized pursuant to a Long Branch Redevelopment Permit from the perpendicular orientation standard in 1998. In creating an exemption in N.J.A.C. 7:7E-7.14(b)3 for high-rise structures in the Redevelopment Zone in Long Branch, the Department recognized that the Design Guidelines Ordinance of the City of Long Branch (“the Design Guidelines Ordinance”) “contains a new approach to ensuring that visual and physical access to the waterfront is not compromised...The Design Guidelines Ordinance contains setback, bulk, height and building line requirements which all contribute to addressing the objective of providing visual and physical access to the waterfront from several vantage points without reducing the presence of the shoreline.” 29 N.J.R. 3920(a) (September 15, 1997). Thus, in addition to the considerations behind the High-Rise Structures Rule that are addressed in the Initial Decision, the Department’s 1997 rule proposal summary suggests that the perpendicular orientation standard addresses physical, in addition to visual, access.

Physical access is not a consideration mentioned in the Department’s rationale for the High-Rise Structures Rule. However, public access to the waterfront, which includes physical and visual access, see N.J.A.C. 7:7E-8.11(a), is a goal of the New Jersey Coastal Management Program that is addressed elsewhere in the Coastal Zone Management Rules. The Public Access

Rule, N.J.A.C. 7:7E-8.11, applies generally to all development in the coastal zone. The Public Access Rule in effect when Riverview's permit application was initially under consideration provided that "[c]oastal development adjacent to all coastal waters...shall provide permanent and linear access to the waterfront to the maximum extent practicable...Development that limits public access and the diversity of the waterfront experiences is discouraged." N.J.A.C. 7:7E-8.11(b) (effective February 3, 2003). Additionally, when the Department adopted the Hudson River Waterfront Area Rule in 1988, it also adopted a corresponding amendment to the Public Access Rule, requiring all development within the Hudson River Waterfront Area to develop and maintain a section of the Hudson Waterfront Walkway in order to provide public access to the waterfront. 20 N.J.R. 2063. See also N.J.A.C. 7:7E-8.11(b)7 (effective February 3, 2003); N.J.A.C. 7:7E-3.48(e).

The overlap and interplay between the rules discussed above demonstrate that the Coastal Zone Management Rules function together to achieve the broad coastal goals enumerated at N.J.A.C. 7:7E-1.1 and the specific objectives served by each rule. Accordingly, the rules should be read together in a manner that promotes and effectuates those goals. When the High-Rise Structures Rule, Public Access Rule and Hudson River Waterfront Area Rule are read together, it is evident that promoting physical access is not a paramount objective of the perpendicular orientation standard at N.J.A.C. 7:7E-7.14(b)3, at least within the Hudson River Waterfront Area, since N.J.A.C. 7:7E-3.48(e) requires development of a portion of the Hudson Waterfront Walkway to promote physical access to the waterfront.

I find, however, that the perpendicular orientation standard specifically addresses concerns relating to visual intrusions, viewshed impacts and overshadowing of the waterfront. As discussed above, the Department, in developing the high-rise policy, was concerned with the

impact of high-rise *towers* constructed within the coastal zone. A high-rise tower with its longest lateral dimension oriented parallel to coastal waters would represent a greater visual intrusion along the waterfront, when viewed from the land towards the coastline, than a structure that is more slender but of identical height. A high-rise tower oriented parallel to coastal waters would also block existing viewsheds and overshadow the waterfront to a greater extent than a high-rise tower oriented perpendicular to coastal waters.

The concerns that relate to visual intrusions, viewshed impacts and overshadowing stem from the essential and distinguishing characteristic of tall structures. As the Department's rationale for the High-Rise Structures Rule indicates, it is *high-rise* structures that represent a visual intrusion and overshadow the waterfront. A six-story or 60-foot structure (i.e., a low-rise structure) would not otherwise be subject to an orientation requirement under the Coastal Zone Management Rules, even though that low-rise structure would have the same impact on views, overshadow the same amount of waterfront, and represent the same visual intrusion as the first six stories or first 60 feet (measured from ground level) of a high-rise structure. Therefore, upon consideration of the regulatory history of the Coastal Zone Management Rules and the rationale of the High-Rise Structures Rule, I find that the perpendicular orientation standard in N.J.A.C. 7:7E-7.14(b)3 is concerned only with those portions of a high-rise structure that are greater than six stories or 60 feet as measured from existing preconstruction level.

The perpendicular orientation standard should not be applied in a manner that leads to unreasonable or absurd results. Where a "high-rise structure" consists of both a low-rise podium and a high-rise tower, a literal application of that standard to the "high-rise structure" means that compliance with the perpendicular orientation standard would be assessed based upon the dimensions of that portion of the structure 60 feet or less from ground level, even though the

“low-rise” portion of the structure has no bearing on the objectives of the perpendicular orientation standard. Applying the perpendicular orientation standard to the entire “high-rise structure” would, in some instances, result in the orientation of the high-rise portions of structures with which N.J.A.C. 7:7E-7.14(b)3 is concerned, being governed by portions of structures with which N.J.A.C. 7:7E-7.14(b)3 is *not* concerned. Therefore, the perpendicular orientation standard can only reasonably be applied to those portions of a “high-rise structure” that meet the height criterion in N.J.A.C. 7:7E-7.14(a).

In the Initial Decision, the ALJ determined that “the High-Rise Structures Rule has a clear objective that does not touch and need not touch the *low-rise structures* adjacent to or adjoining the actual high-rises towers.” (Initial Decision 19.) For the reasons set forth above, I find that the podium and towers of Riverview’s proposed development are not separate “structures,” and that the objectives of the *perpendicular orientation standard* in particular do not touch on the low-rise *portions* of a “high-rise structure.”

### ***C. Other Waterfront Development Permits for Development in the Hudson River Waterfront Area***

In addition to the regulatory history of the Coastal Zone Management Rules, the ALJ considered three other waterfront development permits that Riverview submitted in support of its 2013 motion for summary decision, namely permits for Maxwell Place in Hoboken, Crystal Point in Jersey City and the Watermark in North Bergen.<sup>14</sup>

Although Riverview argues that those permits may shed some light on how the Division interpreted and applied the High-Rise Structures Rule on previous occasions, the precedential

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<sup>14</sup> Riverview submitted only the permit but not the Environmental Report for the Watermark for consideration. With regard to Maxwell Place and Crystal Point, Riverview submitted both the permit and accompanying reports.



value of those permits is strictly limited by their terms. A general condition of those permits is that they shall not be deemed to affect, in any way, an action by the Division on any future permit application.<sup>15</sup> Riverview asserts that it offered those permits for the ALJ's consideration not "to illustrate the fact that DEP has incorrectly applied the Rule," but to "illustrate the fact that [the Division] has been flexible in its application of the High-Rise Rule." (Petitioner's Response Brief 10.) However, any precedential value of those other permits in that regard is dubious because it is not apparent that the Division's determinations in those previous instances can be attributed to the Division's deliberate exercise of flexibility as opposed to merely reflecting an inconsistent application of the High-Rise Structures Rule over time. (See Respondent's Response Brief 14.)

Furthermore, I have afforded those permits no greater weight than to show that the term "structure" may be open to more than one interpretation. That limited purpose is not adversely affected by the Division's concession that those permits show that the Division may have inconsistently applied the High-Rise Structures Rule in the past, since the correct interpretation of the term "structure" is a principal issue discussed in the Initial Decision, and is the preliminary step in applying the High-Rise Structures Rule.

#### ***D. Draft Amendment to the High-Rise Structures Rule***

The ALJ's consideration of a draft amendment to the High-Rise Structures Rule to determine how the Rule should be interpreted and/or applied was erroneous, as the draft amendment was deliberative and not formally proposed for adoption. Even though the Division may have presented the draft amendment to Riverview during settlement discussions, the agency

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<sup>15</sup> Thus, contrary to any suggestion otherwise during these proceedings, the Division is not obligated to repeat a past application of a rule it later knows to be mistaken. See Doyal v. New Jersey Dept. of Environmental Protection, 390 N.J. Super. 185 (App. Div. 2007).

is not bound by a deliberative draft rule amendment that may not represent the Department's official position. Accordingly, and regardless of whether the contemplated change to the High-Rise Structures Rule was intended to clarify or modify the current interpretation of the Rule, the draft amendment should not have been afforded any weight in this proceeding.

Contrary to any suggestion otherwise by Bergen Ridge in its exceptions to the Initial Decision, there does not appear to have been any impropriety in Riverview's procurement of the draft rule amendment. Anticipated amendments to the Coastal Zone Management Rules were specifically referenced by the Division in its letter to the ALJ, dated May 9, 2012, pursuant to which the Division requested an adjournment of the briefing schedule on the cross-motions for summary decision. Since those contemplated changes could have led to a resolution of this matter, it would have been reasonable, and necessary, for the Division to provide Riverview with the draft amendment to the High-Rise Structures Rule in order to facilitate settlement discussions.

## ***II. The Division's 2011 Determination that Riverview's Project Does Not Comply with the High-Rise Structures Rule***

I now turn to the Division's 2011 determination that Riverview's project does not comply with N.J.A.C. 7:7E-7.14(b)3, and thus the High-Rise Structures Rule. The parties are in agreement that there are no material facts in dispute, since the Initial Decision arose from the parties' cross-motions for summary decision. Specifically, there appears to be no dispute that Riverview's project consists of a single "structure."<sup>16</sup> As discussed above, the Division offered

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<sup>16</sup> According to its 2011 decision, the Division arrived at the conclusion that Riverview's project is a single "structure" based upon (1) the physical characteristics of the project, and (2) the testimony of Riverview's planner, Ronald Reinersten, P.P., at a hearing before the North Bergen Planning Board ("the Planning Board"). Arguably, it was inappropriate for the Division to have relied on Mr. Reinersten's testimony to arrive at that conclusion, since the High-Rise Structures Rule and the Coastal Zone Management Rules were not relevant at that hearing. Rather, Mr. Reinersten was offering testimony regarding the Residential Site Improvement Standards ("RSIS"), specifically with regard to the number of parking spaces Riverview would be required to provide. Although counsel for Bergen Ridge

two reasons for finding that Riverview's project does not comply with N.J.A.C. 7:7E-7.14(b)3. Although the Division first applied the perpendicular orientation standard to the entire "high-rise structure" (and thus used the dimensions of the podium to assess the project's compliance with that standard), the Division also considered the high-rise towers separately from the rest of the building when it added the sum of the north-south dimensions of the towers. The Division now argues that even if Riverview's position that N.J.A.C. 7:7E-7.14(b)3 only applies to the high-rise portions of a structure is correct, the project still does not comply with the High-Rise Structures Rule because "the sum of the three high-rise sides parallel to the water is greater than the longest perpendicular side of this proposed development." (Respondent's Response Brief 12.)

Neither the language nor the intent of N.J.A.C. 7:7E-7.14(b)3 suggests that the sum of the dimensions of the high-rise portions of a structure that run parallel to the water should be considered in applying the perpendicular orientation standard. The Division in its 2011 permit decision noted that the sum of the north-south dimensions (parallel to the water) of the three towers represented the "cumulative effect of the towers on views from nearby residential structures." Pa3. Although the perpendicular orientation standard is intended to address potential impacts on viewsheds caused by high-rise development, utilizing the sum of the north-south dimensions of the high-rise portions of Riverview's structure to assess compliance with N.J.A.C. 7:7E-7.14(b)3 would ignore the fact that there is open space between the structure's high-rise

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had, at the hearing, asked Mr. Reinersten to reiterate his interpretation that Riverview's project is one "building," Mr. Reinersten could not have been cognizant of the possibility that his response would be dispositive on any issue other than the RSIS parking requirements. Mr. Reinersten even expressly qualified his testimony in that regard, when he stated that he was "just going strictly by the Residential Site Improvement Standards."

However, even if Mr. Reinersten's testimony is disregarded, the Division's conclusion that Riverview's project constitutes a single "structure" is not unreasonable, since the three residential towers share a common lobby, and access to the towers can only be obtained through the low-rise podium. Regardless of whether that conclusion should have also been apparent to the Division in 2006, the Division's reconsideration is consistent with the Appellate Division's remand order, as discussed in Section I, above, and the physical characteristics of the project provide sufficient evidence to support the Division's conclusion that the project is a single building, and thus a single "high-rise structure."

portions. The open space between those portions does not result in either obstruction of views, overshadowing or visual intrusion that would not otherwise be caused by a low-rise building with identical north-south dimensions as Riverview's proposed project and oriented in the same way, parallel to the water. The views impacted by Riverview's proposed development do not encompass a contiguous viewshed equal to the sum of the north-south dimensions of the towers that run parallel to the Hudson River.<sup>17</sup> Therefore, I conclude that Riverview's project complies with N.J.A.C. 7:7E-7.14(b)3.

Additionally, I address the ALJ's characterization of the Division's 2011 determination as a permit suspension rather than a permit denial. See Initial Decision 3, 19. In the 2012 Order setting forth the basis for the ALJ's characterization of the Division's 2011 action as a permit suspension, the ALJ reasoned that, absent any statutory restriction, a final action can only be reopened by an agency if doing so advances the interests of justice and the agency acted with reasonable diligence in seeking to reopen the decision. (2012 Order 9.) The ALJ then concluded that there was no need to reach the reasonable diligence analysis because the Department's rule governing the suspension and revocation of permits, N.J.A.C. 7:7-4.11, effectively functions as a statutory restriction barring the Division's reopening of its 2006 permit action, except for the reasons enumerated in N.J.A.C. 7:7-4.11. (2012 Order 9-10.)

I agree that there was no need to reach a reasonable diligence analysis. However, I agree on the separate basis that the Appellate Division expressly authorized the Division to reconsider

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<sup>17</sup> In 2006, the Division initially found that Riverview's project complies with N.J.A.C. 7:7E-7.14(b)4, which specifically addresses the obstruction of existing views by high-rise structures. As the Division, in 2011, did not alter its original finding that Riverview's project complies with N.J.A.C. 7:7E-7.14(b)4 and did not otherwise address that standard, N.J.A.C. 7:7E-7.14(b)4 is not an issue in this proceeding. However, I note that use of the phrase "to the maximum extent practicable" in N.J.A.C. 7:7E-7.14(b)4 provides the Division with discretion in considering the viewshed impacts of the entire "high-rise structure."

the application of High-Rise Structures Rule and the Traffic Rule to Riverview's project when it granted the Division's request to remand Riverview's permit to the agency.

In requesting the remand, the Division indicated that it might either amplify the record or reconsider its initial permit decision. Thus, as the Division argued in its December 21, 2011, letter brief in response to Riverview's 2011 motion for summary decision on this issue, the Appellate Division's order contemplated that a remand could result in a different determination from the one the Division reached in 2006. Having taken that possibility into account, the Appellate Division still granted the Division's motion, thereby permitting the Division to reopen Riverview's permit as to the High-Rise Structures and Traffic Rules only. A finding that the Division's 2011 reconsideration constitutes a suspension of Riverview's license is therefore wholly inconsistent with the Appellate Division's remand order.<sup>18</sup>

In the 2012 Order, the ALJ noted that the Division had conceded N.J.A.C. 7:7-4.11 would apply if the Division had not moved for a remand. (2012 Order 10.) Materially, however, the Division did request a remand for reconsideration and that request was granted by the Appellate Division. Accordingly, I REJECT the Initial Decision to the extent it concludes that the Division's 2011 action was a suspension of Riverview's permit, rather than a reconsideration

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<sup>18</sup> Although the 2012 Order indicates that N.J.A.C. 7:7-4.11 functions as a statutory restriction on the Division's reconsideration in this case because that rule specifies the grounds for suspension or revocation in the same way as the licensing statute in Herz v. Degnan, 648 F.2d 201 (3rd Cir. 1981), Herz is distinguishable from this matter for several reasons. In Herz, the agency charged with issuing and renewing professional licenses to practice psychology is the New Jersey Board of Psychological Examiners ("the Board"). However, it was the Attorney General, rather than the Board, that purported to set aside the grant and automatic renewal of Dr. Herz's license. Furthermore, the Attorney General had decided to do so sua sponte, without the agreement or consensus of the Board. The Attorney General also conceded that Dr. Herz was qualified to practice psychology and receive a license. Thus, the "only ground for revoking the license is that [the Board] could have refused to reconsider its previous denial because the application for reconsideration was untimely." 648 F.2d at 208-209. Moreover, the Board had already taken that issue into consideration when it decided to grant Dr. Herz her license. Id. at 209. In contrast, the central issue in this permit proceeding is whether Riverview's project complies with the substantive requirements for a waterfront development permit to begin with, rather than a procedural flaw in the grant of a permit. Herz is also distinguishable on the basis that a court did not issue an order expressly sanctioning the agency's reopening and reconsideration of its decision, as the Appellate Division did here.

and denial thereof. This proceeding should therefore be characterized as Riverview's challenge of the Department's 2011 denial of a permit.

***III. Exceptions to the Initial Decision and Riverview's Motion to Amend its Administrative Hearing Request***

With regard to the parties' and third-parties' other exceptions to the Initial Decision that have not already been addressed herein, I note first that the record does not indicate that the parties ever resolved the Division's contested determination that Riverview's project does not comply with the Traffic Rule. Thus, compliance with the Traffic Rule is still a disputed issue that remains with the OAL.

I also find no error in Bergen Ridge's filing of exceptions to the Initial Decision. In the 2011 Order, ALJ Cookson specifically determined that Bergen Ridge's participation in this proceeding would include the submission of written post-hearing exceptions.

Finally, I turn to Riverview's motion to amend its hearing request to include an additional claim of equitable estoppel. ALJ Cookson determined that Riverview's motion should be deemed moot since summary judgment on application of the High-Rise Structures Rule was granted in Riverview's favor. As discussed above, that conclusion is inaccurate since the issue of compliance with the Traffic Rule has yet to be resolved. Accordingly, Riverview's motion to amend its hearing request is not moot.

The New Jersey Supreme Court has held that equitable estoppel is rarely invoked against a government entity, particularly when estoppel will interfere with essential government functions. O'Malley v. Department of Energy, 109 N.J. 309, 316 (1987). An exception to that general principle applies where estoppel is necessary to prevent manifest injustice. Casamasino

v. City of Jersey City, 158 N.J. 333 (1999). The record before me is sufficient to show that Riverview's situation does not rise to the level of "manifest injustice." Riverview has been aware of the third parties' attempts to challenge the Division's initial approval of its permit since Bergen Ridge submitted a hearing request towards the end of 2006.<sup>19</sup> Riverview also participated in Baykeeper's appeal before the Appellate Division to dispute the merits of the Division's 2006 permit decision. Hence, Riverview cannot argue that it relied to its detriment on the 2006 WFD permit prior to the Division's 2011 action, when it knew of and defended against Bergen Ridge and Baykeeper's attempts to challenge the validity of its permit, and when it participated in the motion practice that led to the Division's reconsideration on remand.

### CONCLUSION

For the reasons set forth above, I find that Riverview's project complies with the perpendicular orientation standard of the High-Rise Structures Rule. Accordingly, I hereby ADOPT that portion of ALJ Cookson's November 4, 2013, Initial Decision granting Riverview's motion for summary decision on application of the High-Rise Structures Rule and denying the Division's cross-motion for summary decision. I REJECT any finding or indication in the Initial Decision that Riverview's proposed podium and residential towers are separate "structures," as that term is used in the High-Rises Structures Rule. I also REJECT that portion of the Initial Decision characterizing the Division's 2011 permit action as a suspension rather than a denial of a permit.

I MODIFY the Initial Decision insofar as it denies Riverview's motion to amend its hearing request as moot. That motion is denied, but for the separate reasons set forth above.

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<sup>19</sup> Riverview responded to Bergen Ridge's November 2006, hearing request by letter to then-Commissioner Lisa P. Jackson. See In re Riverview Dev., *supra*, 411 N.J. Super. at 421.

Further, I MODIFY the Initial Decision to the extent it suggests that this matter has been concluded in the OAL and that compliance with the High-Rise Structures Rule was the only unresolved issue in dispute. Accordingly, this matter is REMANDED to the OAL for resolution of the Division's contested determination that Riverview's project does not comply with the Traffic Rule.

IT IS SO ORDERED.

DATE July 1, 2014

A handwritten signature in blue ink, appearing to read "Bob Martin", is written over a horizontal line.

Bob Martin, Commissioner  
New Jersey Department of  
Environmental Protection



NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,  
DIVISION OF LAND USE REGULATION

v.

RIVERVIEW DEVELOPMENT, LLC  
OAL DKT. NO. ELU-WD 08640-11  
AGENCY REF. NO. 0908-05-0004.3WFD060001

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