State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON SUMMARY DECISION CROSS-MOTIONS

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

RIVERVIEW DEVELOPMENT LLC,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAND USE REGULATION,

Respondent.

Neil Yoskin, Esq., for petitioner Riverview Development LLC (Sokol, Behot & Fiorenzo, attorneys)

Jennifer L. Dalia, Deputy Attorney General, for respondent New Jersey Department of Environmental Protection (John J. Hoffman, Acting Attorney General of New Jersey, attorneys)

John J. Lamb, Esq., for participant Bergen Ridge Homeowners Association, Inc. (Beattie Padovano, attorneys)

Record Closed: August 15, 2013 Decided: November 4, 2013

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

Petitioner Riverview Development LLC (Riverview) appeals from an adverse action taken by the New Jersey Department of Environmental Protection (DEP) on its Waterfront Development Permit on June 1, 2011, under the Coastal Zone Management Regulations, N.J.A.C. 7:7E-1.1 to -8A.5. The procedural history to this permit is complex, as evidenced by two separate appeals to the New Jersey Superior Court Appellate Division filed by third-party advocacy groups from an original grant of this same permit on October 23, 2006. Those parties were Bergen Ridge Homeowners Association, Inc. (Bergen Ridge) and NY/NJ Baykeeper (Baykeeper). On one appeal, Bergen Ridge challenged the agency's October 15, 2008, denial of its request for an administrative hearing at the OAL from the 2006 grant of Riverview's permit. The Appellate Division affirmed the determination that Bergen Ridge does not have a particularized interest or a statutory right to an OAL hearing. In re Riverview Development LLC Waterfront Development Permit No. 0908-05-0004.3 WFD 06001, 411 N.J. Super. 409 (App. Div. 2010) (Riverview I).

Baykeeper filed a separate appeal on the merits of the permit issued to Riverview. In re Riverview Development LLC Waterfront Development Permit No. 0908-05-0004.3 WFD 06001, Dkt. No. A-5952-08T2 (Riverview II). Baykeeper's appeal was remanded to the DEP upon the request of the DEP before the court had reached the merits, which was accomplished under Order of the Appellate Division dated November 12, 2010. By then, Bergen Ridge had been granted intervener status in Baykeeper's appeal. The DEP thereafter requested and received additional submissions from Riverview, Baykeeper and Bergen Ridge. As stated above, DEP reversed its earlier 2006 determination and issued a "denial" of Riverview's permit under its Letter-Order dated June 1, 2011.[1]

This matter was transmitted to the Office of Administrative Law (OAL) on July 21, 2011, by the DEP for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was assigned to me on July 27, 2011. At the time of transmittal, the DEP noted that the same two entities sought to appear as

[1] The agency has since requested that the Appellate Division consider the appeal over which it had retained jurisdiction to be moot.

intervenors or participants in the administrative hearings. After submittal of motion papers, I entered an Order on September 19, 2011, determining that Baykeeper and Bergen Ridge should be permitted to observe and participate in written post-hearing briefing and exceptions only. As detailed below and in prior interlocutory orders, all of which are incorporated by reference herein, the matter retained its procedural complexity in this forum as well.

I convened an initial telephonic case management conference on October 3, 2011, with counsel. At that time, it was agreed that motion practice would proceed, potentially obviating the necessity of plenary hearings. Petitioner anticipated a motion for an order that would designate the June 1, 2011, action of the DEP as a "revocation" of the previously granted permit rather than a reconsideration and "denial" of a permit. By Motion for [Partial] Summary Decision dated November 7, 2011, Riverview did in fact challenge the characterization of the June 2011 adverse action by the DEP from which it has appealed. On February 1, 2012, I entered an Order on the Burden of Proof to be applied in this matter. I determined that the June 2011 action by the DEP was an affirmative suspension of a previously issued permit, and not a mere reconsideration or initial application denial.

With respect to the merits, both counsel agreed that the regulatory compliance issues could be determined as a matter of law on stipulated facts and cross-motions. Accordingly, and with the assistance of additional communications and conferences, briefing schedules for both motions were established after a period of discovery and some additional case management conferences. Nevertheless, merits briefs that would have been forthcoming in the spring of 2012 were adjourned at the request and/or consent of both parties because of both a forthcoming rule proposal that was expected to impact the High-Rise Structure Rule and a potential modification to the Riverview project that might have alleviated the objector's concerns.

Another case management conference was scheduled for September 4, 2012, to await those developments and discussions. At that time, it was conveyed that the modification to the High-Rise Structure Rule had not been proposed yet, North Bergen

was still scheduled to hear the application for site plan approval on a revised plan that month, and a settlement meeting on project revisions was about to take place. During another conference call on September 28, 2012, counsel for DEP advised that the rule modifications had been postponed by Hurricane Sandy and were unlikely to be concluded prior to January 2014. Further, counsel for Riverview noted that settlement discussions had not borne fruit and that the briefing on the cross-motions on the underlying merits should be put back on a schedule. Briefing dates for the fall of 2012 were established to commence October 26 and to conclude December 3, 2012, but those were never realized. On January 15, 2013, I required counsel's participation on another conference call in order to re-establish a briefing schedule for February 15 through March 29, 2013. That schedule did not hold sway either.

On April 22, 2013, Riverview filed a Motion for Summary Judgment on the Applicability of the High-Rise Structures Rule. By letter dated May 7, 2013, Bergen Ridge sought permission to submit a brief on the motion and represented that the DEP had no objection. I directed that Bergen Ridge file a more formal notice of motion in order to provide Riverview the opportunity to review the basis for the application and to submit its position on Bergen Ridge's request, which it did. By Order entered on May 22, 2013, I granted Bergen Ridge's request for leave to file briefs on the merits motion.[2] Since then, there has been additional motion practice as well as extensions of time within which to file papers on the same.

On July 3, 2013, the DEP, supported by Bergen Ridge, filed a Cross-Motion for Summary Decision on the High-Rise Structure Rule and its applicability to Riverview's project. On July 16, 2013, Riverview filed its response to the Cross-Motion. On July 18, 2013, Bergen Ridge filed a second letter-brief in "response" to the DEP Cross-Motion. On July 22, 2013, Riverview filed a new Motion to Amend its June 8, 2011, Administrative Hearing Request to include a claim under the doctrine of equitable estoppel. On July 31, 2013, the DEP filed its Letter-Brief in Response to the Motion to Amend; and on August 1, 2013, Bergen Ridge filed its opposition as well. On August 5, 2013, Riverview filed its reply to the oppositions to its Motion to Amend. Finally, on

August 15, 2013, the DEP filed its reply on its Cross-Motion for Summary Decision. The record on these motions closed on that date. Baykeeper did not participate in this motion practice. The undersigned did not request oral argument on the motions and declined to grant one upon the request of Riverview.

STATEMENT OF UNDISPUTED FACTS

1. The Riverview project is located in the "Hudson River Waterfront Area." [N.J.A.C. 7:7E-3.48(a)(2)]

2. Riverview filed an application with the DEP in November 2005 for a Waterfront Development Permit (WFD) under the Coastal Permit Program Rules, N.J.A.C. 7:7-2.3, and the Coastal Zone Management Regulations, N.J.A.C. 7:7E--1.1 to --8A.5, in order to construct a residential housing complex consisting of townhouses along the Hudson River walkway, a two-floor parking deck, and three high-rise towers. The towers would rise to a maximum height of ninety-five feet and would hold 256 condominium units. This initial application was withdrawn a few months later and resubmitted with minor modifications in May 2006.

3. A public hearing on the WFD application was held on June 27, 2006.

4. On October 23, 2006, the DEP issued a Waterfront Development Permit (0908-05-0004.3 WFD 060001) (Permit) to Riverview.

5. On November 27, 2006, Bergen Ridge requested an administrative hearing on the grant of the permit. On December 7, 2006, Baykeeper similarly filed a request for an administrative hearing from the grant of Riverview's Permit.

6. Almost two years later, October 15, 2008, the DEP issued its denial of Bergen Ridge's hearing request.

[2] Riverview sought interlocutory review of this Order to the Commissioner which was denied.

7. Soon after the denial of its hearing request, Bergen Ridge appealed that denial to the Appellate Division. [Riverview I]

8. On June 11, 2009, more than two and one-half years after it was filed, the DEP issued its denial of Baykeeper's hearing request.[3]

9. On or about July 27, 2009, Baykeeper filed an appeal from the merits of the grant of the Permit to the Appellate Division. [Riverview II]

10. On January 27, 2010, the Appellate Division issued its published decision in Riverview I.

11. After issuance of the decision in the Bergen Ridge appeal, the Appellate Division reactivated the Baykeeper appeal.

12. On April 13, 2010, the Appellate Division granted Bergen Ridge's motion to intervene in Riverview II.

13. On July 7, 2010, Baykeeper and Bergen Ridge submitted merits briefs to the Appellate Division.

14. On or about September 29, 2010, the DEP submitted a Motion to Remand to the Appellate Division.[4]

15. In its request for the remand, the DEP set forth the following with respect to the "high-rise" regulatory focus, N.J.A.C. 7:7E-7.14, of its application to the Appellate Division (emphasis added):

> There appears to be no disagreement among the parties that the 95 foot high-rise towers are so oriented that the longest dimension of each will be perpendicular to the river. However, if the "low-rise" parking/townhouse component of the project were deemed to be a part of the unitary high-rise

[3] As set forth in Riverview I, supra, 411 N.J. Super. at 422 n.5, the DEP has provided no explanation for these "considerable delay[s]."

[4] But for the agency's request, it is reasonable to presume that the Appellate Division would have reached the merits.

> structure, then this conclusion would not follow, as the longest dimension of that structure would be parallel to the river.
>
> The permit decision does not elaborate upon the Department's interpretation of the high-rise rule, with regard to whether the parking/townhouse area is covered. The record does not state whether the Department has had occasion to interpret the rule prior to this application. Thus, a remand is appropriate to enable the Department to amplify the record concerning its decision to issue the permit and to explain the basis for that permit decision. A remand would also allow the Department to seek additional information from the applicant if determined necessary under the coastal rules under challenge in this appeal.

16. The Appellate Division granted the DEP's motion on November 12, 2010, setting forth that the matter was "remanded for the NJDEP to reconsider application of N.J.A.C. 7:7E-7.14(c) [high-rise structures rule] to the permit application, and to reconsider its traffic impact findings."

17. The DEP supplemented its administrative record with submissions from Riverview, Baykeeper and Bergen Ridge during the winter and spring of 2011.[5]

18. By Letter-Order dated June 1, 2011, the DEP "reconsidered" the Permit under both the high-rise structures rule and the traffic impacts rule and determined that the proposed development did not meet their standards. Accordingly, it "denied" the Permit.

LEGAL ANALYSIS AND CONCLUSIONS

The above-recitation of the undisputed facts together with a reading of the legal submissions of the parties makes it clear that the only issue pending determination on this summary disposition motion is the applicability of the High-Rise Structure Rule to the Riverview project. It is well established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The

Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Here, both parties have moved for a determination, as a matter of law, that the application of the High-Rise Structures Rule entitles it to a favorable decision.

Legal analysis must begin with the rule itself, which sets forth:

> (a) High-rise structures are structures which are more than six stories or more than 60 feet in height as measured from existing preconstruction ground level.
>
> (b) The standards for high-rise structures are as follows:
>
> 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;

[5] In May 201, Riverview submitted to the North Bergen Planning Board an amended application that removed the 17 townhouses from the proposal and reduced the number of parking spaces. [Certification of Neil Yoskin, Esq. (Yoskin Cert.), Exhibit A]

> 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]

Faced with the application of a statute or regulation, a jurist must first read the plain language. Interpretative tools are only resorted to if the plain meaning cannot be discerned from the actual wording of the law. As the Appellate Division has instructed:

> The starting point in statutory construction, and if the meaning is sufficiently clear, all that may be required, "is to look at the plain language of the statute." In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 491, 852 A.2d 1083 (2004). "If the statute is clear and unambiguous on its face and admits of only one interpretation, [courts] need delve no deeper than the act's literal terms to divine the Legislature's intent." Ibid. (quoting State v. S.R., 175 N.J. 23, 31, 811 A.2d 439 (2002)). . . .
>
> Moreover, even if it were necessary to refer to legislative history to determine the intended application of N.J.S.A. 13:9B-23(b), this history confirms our interpretation of the plain language.
>
> [Doyal v. NJDEP, 390 N.J. Super. 185, 189-90 (App. Div. 2007)]

In this case the language seems clear and plain but insofar as the term "structure" has never been defined in the Rule, some insight from the legislative history is warranted. Further, I start my analysis from the point at which the DEP requested that the appeal be remanded. At that time, it set forth its rationale that it was in order to review whether

and how it had historically interpreted the High-Rise Structures Rule with respect to the lower parking area. I repeat from the above-quoted language of its own motion:

> The permit decision does not elaborate upon the Department's interpretation of the high-rise rule, with regard to whether the parking/townhouse area is covered. The record does not state whether the Department has had occasion to interpret the rule prior to this application.

Thus, the DEP itself raised the issue of the consistency of its past applications of the High-Rise Structures Rule in determining the right approach to take on the Riverview project. After careful review of the history of the regulations, I concur with Riverview that the purpose and policy behind the High-Rise Structures Rule is evident in on its face, using common sense, and under the agency's own articulation of it.

In 1978, the DEP submitted its Coastal Management Strategy to the Governor and the Legislature as set forth at 10 N.J.R. 184(a). The regulations over Coastal Zone Management were first adopted as Chapter 7:7E-1.1 et seq, R.1978 d.292, effective September 28, 1978. See 10 N.J.R. 384(a).[6] Initially, these regulations did not encompass the entire coastal area of New Jersey from stem to stern but they quickly were expanded. The early history of that expansion is reflected in today's current codification:

> In 1977, the Commissioner of the Department of Environmental Protection submitted to the Governor and Legislature the Coastal Management Strategy for New Jersey CAFRA Area (September 1977), prepared by the Department as required by CAFRA, N.J.S.A. 13:19-16, and submitted for public scrutiny in late 1977. The Department revised the Coastal Management Strategy and published the "New Jersey Coastal Management Program-Bay and Ocean Shore Segment and Final Environmental Impact Statement" in May 1978. The proposed program covered the CAFRA area only. In August 1978, the Governor submitted the revised "New Jersey Coastal Management Program-Bay and Ocean Shore Segment and Final Environmental Impact

[6] Unfortunately for legal research, agencies did not publish the entire text of proposed or adopted rules in the New Jersey Register in the early days of New Jersey administrative practice. Rather, it would be mentioned that the rules were located at a depository or available by mail.

> Statement" for Federal approval. The approval was received in September 1978. In May 1980, the Department submitted further revisions, published as the "Proposed New Jersey Coastal Management Program and Draft Environmental Impact Statement." These revisions incorporated the northern waterfront area, Delaware River area and New Jersey Meadowlands into the Program. In August 1980, the Department submitted the "New Jersey Coastal Management Program and Final Environmental Impact Statement" for Federal approval. The approval was received in September 1980.
>
> [N.J.A.C. 7:7E-1.1 (emphasis added)]

As referenced by petitioner, in 1986, the DEP published the CAFRA Rules and Policies and stated therein:

> Considerable recent 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. As of October, 1982, under these rules, the Department has approved 36 high-rise structures and denied four. The policy seeks not to ban high-rise structures, but to provide criteria for the development at suitable locations in the coastal zone.
>
> [Pa44 (emphasis added)]

This language actually was set forth earlier in the New Jersey Coastal Management Program and Final Environmental Impact Statement (EIS) of the DEP to the United States Department of Commerce, National Oceanic and Atmospheric Administration, Office of Coastal Zone Management, North Atlantic Region, for approval in August 1980 and referenced above.

> Considerable recent 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.

> Under CAFRA, DEP has approved several high-rise structures in Atlantic City and denied two CAFRA applications for high-rise proposals, one in downtown Toms River (Ocean County) and another in Brigantine (Atlantic County). This policy strikes a balance, between banning high-rises and allowing tall residential structures anywhere in the coastal zone.[7]

Approval of the DEP's EIS document completed the review process under Section 306 of the Federal Coastal Zone Management Act. 16 U.S.C.A. 1451 et seq. In the federal Response to Comment document, Comment 217 stated: "These policies do not prohibit high rise housing and serve to protect the public use and view of the water."[8] The regulations today continue to carry forward the "Rationale" from this very first publication of the rule.

In 1984, the CAFRA Regulations underwent some evaluation but the only new concern appeared to be the impact of a high-rise structure's shadow on solar collection panels. Even with this new consideration, it was still determined that the proper policy balance included allowing high-rise structures.

> New high rise buildings should be situated and designed, using techniques such as reduced floor space on higher floors, to minimize shadows on existing solar collectors. It is

[7] Certainly, the Coastal Management Rules intended to provide the DEP with a flexible, balanced approach to competing interests in the sights and resources of the New Jersey coast.

> The location rules (N.J.A.C. 7:7E-3 through 6), use rules (N.J.A.C. 7:7E-7) and resource rules (N.J.A.C. 7:7E-8) stem from the coastal goals at (c) above. The Department does not expect each proposed use of coastal resources to involve all location rules, use rules, and resource rules. Decision-making on proposed actions involves examining, weighing, and evaluating complex interests using the framework provided by this chapter. The Coastal Zone Management rules provide a mechanism for integrating professional judgment by Department officials, as well as recommendations and comments by applicants, public agencies, specific interest groups, corporations, and citizens into the coastal decision-making process. In this process, interpretations of terms, such as "prudent," "feasible," "minimal," "practicable," and "maximum extent," as used in a rule or a combination of rules, may vary depending upon the context of the proposed use, location, and design.
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> [N.J.A.C. 7:7E-1.1]

[8] See Public Notice: Federal ruling on N.J.A.C. 7:7E. See: 14 N.J.R. 1467(b). http://www.gpo.gov/fdsys/pkg/CZIC-td194-56-n5-n47-1980/html/CZIC-td194-56-n5-n47-1980.htm

> recognized that it may be impossible to use a site for high rise construction without reducing sunlight to some solar collectors. In this case, the project would be acceptable if designed to minimize impacts on solar collectors to (to maximum extent practicable) less than 20 percent of peak collection hours during the shortest days of the year.

In 1984, substantial amendments to the CAFRA regulations were proposed.[9] With respect to the High-Rise Structures Rule, it specifically stated:

> The use of this policy was reviewed in an October, 1982 BCPD study entitled "A Summary of All CAFRA Projects Reviewed under the High Rise Policy." Proposed amendments would:
>
> (a) Clarify that this policy be applied to all high rise structures.
>
> (b) Specify the minimum distance between a high rise and coastal waters as one public road or 34 feet (the standard width of the right-of-way of a two lane road).
>
> (c) Specify when high rises must not overshadow beaches.

[9] In 1984, the Department submitted amendments to the federal agency for approval and summarized the background of the CAFRA regulations at that point thusly:

> Adopted as rules on September 28, 1978 for the Bay and Ocean Shore Segment (generally, the Coastal Area under CAFRA of New Jersey's Coastal Zone, they were extensively amended on September 26, 1980, at which time they became applicable throughout the Coastal Zone. Since September, 1980, they have been amended four times, but never in a comprehensive fashion. In 1983, the Division of Coastal Resources undertook its first comprehensive review of the policies since September, 1980. Based upon comments from environmentalists, developers, and the general public, experience of project review officers in applying the policies and upon changing conditions in the Coastal Zone, the Division is now planning to propose a package of amendments to the Policies.
>
> On balance, these amendments would constitute neither a strengthening nor weakening of the degree of regulatory control exercised by the Department. Rather the proposed amendments represent a refinement of the policies to make them more responsive to actual coastal issues.

See "Summary and Rationale for Draft Proposed Substantive Amendments to Rules on Coastal Resource and Development Policies,"
http://www.gpo.gov/fdsys/pkg/CZIC-kfn2251-8-a434-a2-1984/html/CZIC-kfn2251-8-a434-a2-1984.htm

Once the federal Coastal Service Center approved the proposals, the DEP published the proposals at 17 N.J.R. 1465(a) (June 17, 1985), repeating the reference to an October, 1982 BCPD study.[10] It proposed that the high-rise housing standards, then N.J.A.C. 7:7E-7.2(h), would be expanded into a high-rise policy to be re-numbered as N.J.A.C. 7:7E-7.14. The proposed amendment would, *inter alia*, "Specify when high rises must not overshadow beaches[.]" Id. at 1469.

While the within dispute with the Riverview permit focuses on the perpendicular requirement, it must be viewed as part of the entire High-Rise Structures Rule with instruction from the language specifically about "overshadowing." Originally, the important consideration of overshadowing was expressed simply as: "The structure must not overshadow beaches between May and October, or waterfront parks year round[.]" The new proposal in 1985 stated: "The structure must not overshadow the dry sand beach between 10 A.M. and 4 P.M. between June 1 and September 20, and must not overshadow waterfront parks year round." N.J.A.C. 7:7E-7.14(a)(4). Since then, changes have been made to exempt some redevelopment in the City of Long Branch, and cross reference to the Hudson River special areas. See, e.g., 20 N.J.R. 139(a) at 141 (Jan. 19, 1988).

During the adoption of the 1988 amendments, the DEP published its Response to Comment document that included the following written colloquy:

> COMMENT: Several commenters criticized the application of the 60 degree upland building height restriction. They believe that the restriction does not allow designers to adequately address the mix of variables that need to be considered in providing desirable development. They further state that current design plans would result in less shadowing on the waterfront than adherence to the rule would provide.
>
> RESPONSE: The Department has determined that its 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. The Department has deleted the 60 degree

[10] This Study could not be publicly located through the use of internet resources.

> restriction from the proposal (N.J.A.C. 7:7E-3.46(c)2).
>
> COMMENT: Many commenters supported the concept of protecting views of the Hudson and the Manhattan skyline from low-lying locations and public parks along the New Jersey waterfront.
>
> RESPONSE: Current State rules, such as the scenic resources and high rise structures rule at N.J.A.C. 7:7E-7.14, encourage developers to protect viewsheds.

Further, with respect to some public concern about height requirements for the Hudson River special areas,

> RESPONSE: A primary objective of this proposal is to give developers flexibility in the massing and heights of buildings on piers by removing the 60 foot limit on building height imposed by the high rise structures policy (N.J.A.C. 7:7E-7.l4). In exchange for this flexibility, developers are required to dedicate areas of pier deck to public open space, with more area required for taller buildings. Given the above, the Department believes that reinstating an explicit limit to building height would be counterproductive. Therefore, the provision, at N.J.A.C. 7:7E-7.14, remains unchanged upon adoption as to a height restriction.
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> [20 N.J.R. 2058(b), 2060 (Aug. 15, 1988)][11]

It cannot be concluded otherwise than that "visual intrusion," "viewshed," "open air," "shadows" and "overshadowing" on waterfronts, as well as the "openness" of light and air, are the paramount considerations behind the High-Rise Structures Rule and have been since it was first reduced to regulation in 1978, through the Hudson River special considerations added in 1980 and 1988, and continuing up to the present.

[11] Query whether other considerations buttress the points articulated herein with regard to Riverview's upland, non-pier, development:

> The following standards apply to all developments proposed on piers and will be used by the Division as a guide for developments proposed on platforms. In some cases, a platform may, in effect, function as upland and, thus, be more appropriately reviewed under policies that regulate upland development. Developers proposing platform development that does not adhere to this section's requirements are encouraged to contact the Division for guidance when conceptual plans have been prepared.
> [20 N.J.R. 2058(b), 2060 (Aug. 15, 1988)]

In addition to petitioner's calling upon the history of the High-Rise Structures Rule, not addressed by the DEP, both parties have compared and contrasted some other residential tower developments along the Hudson River. Petitioner draws attention to three high-rise projects that have been approved by the DEP and constructed: Maxwell Place in Hoboken, Crystal Point in Jersey City, and Watermark in North Bergen. It contends that only Maxwell Place is both comparable to Riverview and in compliance with the High-Rise Structures Rule; Crystal Point and Watermark having been approved by DEP in spite of violating the rule.

It appears to be undisputed that Maxwell Place is a project with two high-rise towers and a connecting five-story structure between them, just one-story shy of itself needing to comply with the High-Rise Structures Rule. The towers' longest dimensions are perpendicular to the Hudson River. Crystal Point and Watermark are each a single high-rise tower. Crystal Point is situated on a lot that is bound on two sides by water described by that developer as the Hudson River shoreline. The project encompasses a 435 feet long section of the Hudson River Waterfront Walkway. It is a forty-two story high rise with 269 residential units. The first six floors have a larger footprint that accommodates 275 parking spaces and 6,000 feet of retail space. [Yoskin Cert., Exhibit F at Environmental Summary Report at 1] In its application, Crystal Point set forth with respect to compliance with the High-Rise Structures Rule:

> The tower is oriented such that its longest lateral dimension is perpendicular to the Hudson River on the northern side of the property. To the maximum extent practicable the proposed structure will not block the views from existing residential structures, public roads or pathways. Shifting the orientation of the building would not improve the view of the river from existing buildings over the proposed building orientation. In particular, the building immediately to the west is oriented perpendicular to the subject property and thus its main view shed is from the longest dimension of the building, which is north/south oriented. The Hudson River will still be visible from 2nd Street and the Hudson River Walkway.
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> [Id. at 7-8]

Watermark is a single high-rise tower with a low-rise parking structure. Its longest dimension is parallel to the Hudson River, perpendicular to River Road, with a north-northeast orientation along the natural land-river boundary line. It appears to have the Hudson River Walkway running along that longest dimension.

DEP and Bergen Ridge argue that the Riverview project does not conform to the High-Rise Structures Rule because the total length of the projects' dimension that runs parallel to the Hudson River is greater than the dimension that is perpendicular to that water body. They achieve that measurement by either measuring from the northernmost corner of one tower along the length of that tower plus the low-rise structure plus the next tower plus the next low-rise structure plus the southernmost tower. In the alternative, it is argued that the three separated towers added together have a longer parallel dimension than their separate perpendicular dimension.

With respect to Crystal Point and Watermark, the DEP distinguish both projects because they are each bounded on two sides by the Hudson River with the impact minimized to the extent practicable with the orientation as designed. The DEP seems to characterize Maxwell, which it approved on August 6, 2003, and which appears to be the project most similar to Riverview, as an error it is trying not to repeat; yet, on that front at least, the newly proposed amendment[12] to the High-Rise Structures Rule would appear to institutionalize that alleged mistaken application rather than be proof that the regulation does not already encompass it or Riverview. I say alleged because the DEP sets forth in the proposal that the change "recognizes that a structure below six stories and 60 feet is not required to comply with the rule's provisions. . . [T]his change better reflects the objective of the rule which is to address the impact of taller structures on views." [Yoskin Cert., Exhibit L]

Obviously, I am not concerned with whether Crystal Point and Watermark should have been approved but these existing developments do serve to highlight the past

practices of the DEP which it stated to the Appellate Division would prove relevant to its review remand. Nevertheless, the undisputed facts do indicate that those projects were bounded on two sides by the Hudson River, leaving the developer and the DEP with more flexibility in determining its compliance with the High-Rise Structures Rule. I agree, however, with petitioner that it is impossible to distinguish on any rational basis the Maxwell development. [Compare Yoskin Cert., Exhibit B to Exhibit E.][13] Instead, the DEP seems to both concede that it was incorrect and assert that the Maxwell Place project assured the DEP that no existing waterfront views were impacted. [DEP Merits Brief at 13-14] The DEP otherwise did not really address the historical policies and rationale behind the High-Rise Structures Rule in its cross-motion. There are not 612 feet of high-rise structure to the Riverview that are overshadowing the Hudson River or its Walkway, blocking views or open air.

I **CONCLUDE** that the DEP is straining beyond the breaking point the High-Rise Structures Rule, its rationale and policy foundations, and its own past practices, to argue herein that the low-rise parking structure of Riverview, which is indisputably the element which it now is using to re-measure the project's compliance with the perpendicular orientation of subpart (b)(3), violates the Rule. I return to the legal guidance the courts provide on construction of a complex set of laws and regulations:

> In resolving this issue, our focus must be broad enough to consider the policy of the Act in its entirety, as disclosed by its legislative history. Although individual words and phrases are instructive, they cannot be regarded as controlling:
>
> > We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole act, and that in fulfilling our responsibility in interpreting legislation, "we

[12] The proposal adds to the applicability section of the regulation: "high-rise structures are those portions of structure which are more than six stories. . ." The proposal, part of comprehensive Coastal Management Zone revisions, would also renumber N.J.A.C. 7:7E-7.14 to 7:7-15.14.

[13] Participant Bergen Ridge asserted that petitioner's argument leads to a situation where high-rise towers could be stacked like dominoes facing the Hudson River with just a few feet of slivers of light between them. Not only does this argument fail to account for any DEP review, but ignores the fact that Riverview's two low-rise structures are each 123 feet wide – wider than any tower and clearly wider than a sliver. [Bergen Ridge July 18 Second Brief, Exhibit A]

> must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy." [Richards v. United States, 369 U.S. 1, 11, 82 S.Ct. 585, 591, 7 L.Ed.2d 492, 499 (1962) (footnotes omitted).]
>
> We adhere to the canon of statutory construction that "the general intention of a statute will control the interpretation of its parts." State v. Bander, 56 N.J. 196, 201 (1970), citing Denbo v. Moorestown Twp., 23 N.J. 476, 481-82 (1957).
>
> [Waterfront Com. of New York Harbor v. Mercedes-Benz of North America, Inc., 99 N.J. 402, 414 (1985)]

In sum, I **CONCLUDE** that it was arbitrary for the agency to have "reconsidered" the Riverview project and suspended the 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," one that it has not uniformly applied or defined previously, N.J.A.C. 7:7-4.11, and one which it knows is not consistent with the objectives of the Coastal Zone Management Rules. There is a straight line that can be drawn from August 2003 when Maxwell Place was approved, through the October 2006 approval of Riverview's Permit, through numerous other high-rise projects (probably dating back to the 1980's), and to the "recognition" in the proposed rule 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-rise towers.

ORDER

For the reasons set forth above, the Motion for Summary Decision filed by the petitioner is and the same is hereby **GRANTED** and the Cross-Motion for Summary Decision filed by the respondent New Jersey Department of Environmental Protection is and the same is hereby **DENIED**. The Motion to Amend is **DENIED** as moot.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 4, 2013 Gail M. Cookson

DATE **GAIL M. COOKSON**, ALJ

Date Received at Agency: 11/4/13

Mailed to Parties:

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