



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

MICHAEL BARRY,

Petitioner,

v.

**NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION-
LAND USE REGULATION,**

Respondent.

OAL DKT. NO. ELU 02205-14

AGENCY DKT. NO. 1517-11-0023.1

CAF110001

Meghan Barrett-Burke, Esq., for petitioner (Connell Foley, LLP, attorneys)

John E. Doyle,¹ and **Bruce A. Velzey,** Deputies Attorney General, for respondent
(Christopher S. Porrino, Acting Attorney General of New Jersey, attorney)

Record Closed: May 18, 2015

Decided: October 6, 2017

BEFORE **ELIA A. PELIOS,** ALJ:

STATEMENT OF THE CASE

Petitioner Michael Barry (Barry) seeks to challenge a condition attached to a permit respondent Department of Environmental Protection (DEP) issued him under the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 to -21.

¹ On the motion.

PROCEDURAL HISTORY

On February 24, 2014, the DEP transmitted Barry's hearing request to the Office of Administrative Law (OAL) as a contested case. On March 3, 2015, the DEP filed the herein motion, petitioner filed a response on April 8, 2015, and respondent replied on April 17, 2015. Oral argument was held on May 18, 2015, and the record closed on the motion.

FACTUAL DISCUSSION AND FINDINGS

In this matter, Petitioner Barry seeks to challenge a condition attached to a permit the Respondent Department of Environmental Protection (DEP) issued him under the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 to -21. On September 1, 2011, Barry applied for a CAFRA permit for "[r]econstruction, with expansion, of an existing single family dwelling" on property he owns on Lot 2, Block 18.107 in Long Beach Township, Ocean County. Burke Cert., Exhibit A. In the application, his designated agents, Gwathmey Siegel Kaufman & Associates Architects (Gwathmey), provided certain information about the proposed development. Id. at Exhibit B. According to Gwathmey, "[a]s the project lies within 150' of the landward limit of [a] dune and reconstruction will increase the footprint a Coastal General Permit is required." Ibid. However, Gwathmey also stated that "[c]onstruction will be entirely limited to that portion of the site westward (landward) of the existing Landward Toe of Dune" and that, "[a]s such, the project as proposed is not subject to the policy of 7:7E-3.16, Dunes."² Ibid.

On September 28, 2011, DEP staff members, including Eric Virostek (Virostek) of the Bureau of Coastal Regulation, visited the property and concluded that "the proposed development is within the dune area." Doyle Cert., Exhibit B; Burke Cert., Exhibit C. Based on this conclusion, Virostek asked Gwathmey to submit a new site plan "[r]emov[ing] the note that says, 'LANDWARD TOE OF DUNE.'" Burke Cert., Exhibit C. Virostek told

² In 2015, after the relevant times in this matter, the DEP recodified certain provisions of the CAFRA rules. 46 N.J.R. 1051(a); 47 N.J.R. 1392(a) (effective July 6, 2015). For example, N.J.A.C. 7:7E-3.16 is now N.J.A.C. 7:7-9.16, which generally prohibits development on dunes. However, because the substance of the rules at issue in this matter did not change, citations are hereafter made to the current rules.

Gwathmey that “[i]t is our opinion that the entire site is a dune” and that “[w]e need you to show that the proposed dwelling meets the dune exclusions . . .” Ibid.

Gwathmey subsequently submitted a revised site plan and, on November 18, 2011, the DEP granted Barry a CAFRA permit to “[d]emolish the existing single family dwelling and construct a new single family dwelling with associated structures . . .” Doyle Cert., Exhibit A. The permit set forth several terms and conditions, including the following:

Acceptance of permit: If you begin any activity approved by this permit, you thereby accept this document in its entirety, and the responsibility to comply with the terms and conditions. If you do not accept or agree with this document in its entirety, do not begin construction. (Condition #2).

Prior to site preparation, a conservation restriction for the area waterward of the eastern façade of the proposed single family home . . . shall be RECORDED with the Office of the County Clerk . . . in the county wherein the lands included in this permit are located. (Condition #4).

[Ibid.]

On December 22, 2011, Barry’s counsel emailed Virostek about Condition #4, stating:

Please be advised that while the applicant is willing to grant a conservation easement, the area to be covered should be measured water ward from the building line. The area between the building line and the façade is flat. The survey shows the landward toe of the dune to be approximately at the building line. As you know, the deck which now exists between the façade and the building line will be demolished. That area is clearly not a dune.

Please confirm that the conservation easement for the large area on the east side may be measured from the building line.

[Burke Cert., Exhibit E.]

On January 24, 2012, Virostek replied that “the only thing we can do at this point is make another site inspection.” Ibid. In a follow-up email to Virostek on February 9, 2012,

Barry's counsel stated that "[w]e have everything ready to record" the conservation restriction, but asked again for "confirmation that the restricted area for the CR should be measured water ward from the building line." Ibid.

In a letter dated March 6, 2012, Barry's counsel told Virostek that "[p]ursuant to the conditions set forth in the CAFRA Permit, we will be recording" the conservation restriction, but that "we will also be filing a request for an adjudicatory hearing . . . with respect to the CAFRA Permit condition . . . restrict[ing] [the] property by conservation restriction from the façade of the proposed development east to the mean water line." Id. at Exhibit F.

On the same day, Barry requested a hearing to challenge Condition #4. Id. at Exhibit H. According to the request letter:

[i]t is apparent that the Department erroneously concluded that Applicant's property water ward of the proposed façade is a dune. Contrary to the Department's erroneous and overbroad conclusion, the dune on the property ends east of the Building Line of the property, and does not extend further west to the façade of the proposed development. Accordingly, the relief sought is to modify the CAFRA Permit to require a conservation restriction that only restrict the land from the building line east.

[Ibid.]

On April 5, 2012, Barry recorded the conservation restriction with the Ocean County Clerk in accordance with Condition #4, and provided the DEP with a copy of the conservation restriction. Id. at Exhibit G. The conservation restriction includes a provision stating that "[n]otwithstanding anything contained herein to the contrary, any modification or termination of this Conservation Restriction/Easement shall require the prior written approval of [the DEP]." Ibid. The parties do not dispute that Barry began, and completed, construction on the new house after he filed his appeal.

The preceding statements are not in dispute and are hereby **FOUND** as **FACT**.

LEGAL ANALYSIS AND CONCLUSIONS

CAFRA is designed to “provide[s] adequate environmental safeguards for the construction of any developments in the coastal area.” N.J.S.A. 13:19-2. As such, CAFRA requires a permit for development on a dune, which is “a wind- or wave-deposited or man-made formation of vegetated sand that lies generally parallel to and landward of the beach, and between the upland limit of the beach and the foot of the most inland slope of the dune.” N.J.S.A. 13:19-3; N.J.S.A. 13:19-5. CAFRA authorizes the DEP to promulgate rules governing the issuance of permits for development on a dune. N.J.S.A. 13:19-5.1.

Pursuant to its authority, DEP has adopted rules that allow for the expansion or reconstruction of a single-family home on a dune under certain circumstances, including if the single-family existed before July 19, 1993, “the development is located within the footprint of development of the existing single family home,” and “[a] conservation restriction for the dune areas waterward of the existing and/or approved single-family home . . . which complies with N.J.A.C. 7:7-18 is recorded[.]” N.J.A.C. 7:7-6.5(d)(3).

A conservation restriction is “a restriction, easement, covenant, or condition, in any deed, will or other instrument, other than a lease, executed by or on behalf of the owner of the land, appropriate to retaining land or water areas predominantly in their natural state . . . to forbid or limit any . . . acts or uses detrimental to the retention of land or water areas.” N.J.A.C. 7:7-1.5. Under N.J.A.C. 7:7-18.1, a conservation restriction must “conform with the New Jersey Conservation Restriction and Historic Preservation Act, N.J.S.A. 13:8B-1 et seq.,” “run with the land,” “[b]e in the form and include such terms as specified and approved by the [DEP];” and, be recorded in the county in which the property is located. Ibid. The Conservation Restriction and Historic Preservation Act authorizes the DEP to acquire a conservation restriction, and provides that a conservation restriction may not be released without a public hearing or the approval of the DEP Commissioner. N.J.S.A. 13:8-3, -5, and -6.

A person who is aggrieved by the DEP’s decision to approve or deny a CAFRA permit may request a hearing to challenge the decision. N.J.A.C. 7:7-28.1. If the DEP

grants the request, the matter will be referred to the OAL for a contested case hearing pursuant to N.J.S.A. 52:14B-1 to -15. N.J.A.C. 7:7-28.1(f).

The DEP argues that, because Barry began construction on the new house while his appeal was pending, he cannot now challenge Condition #4. In particular, the DEP argues that Barry “accepted, and waived his right to challenge the Permit’s conditions when he started construction” because Condition #2 specifically cautions that “[i]f you begin any activity approved by this permit, you thereby accept this document in its entirety, and the responsibility to comply with the terms and conditions” and that “[i]f you do not accept or agree with this document in its entirety, do not begin construction.” DEP’s Brief, p. 7.

The DEP also submits that summary decision should be rendered in its favor because, even if Barry had not waived his right to challenge Condition #4, the OAL is not the proper venue to modify a conservation restriction. Instead, under the New Jersey Conservation Restriction and Historic Preservation Act, N.J.S.A. 13:8B-1 to -9, the DEP Commissioner may only release or modify a conservation restriction after a public hearing.

In opposition, Barry maintains that Condition #2 does not preclude him from challenging Condition #4, even though he began construction after he filed his appeal because he “acted in good faith in completing his construction in keeping with the terms and conditions of the Permit while continuing his efforts to obtain relief from the Department’s wrongful application of the Dune Regulations.” Barry’s Brief, p. 6. Barry also argues that “the construction work . . . took place entirely outside of the area restricted by the Conservation Restriction, meaning that adjudication of this appeal will have no impact on the home built” and the DEP “is in no way disadvantaged in defending its decision because the area of the site is question was not disturbed.” Id. at pp. 5-6.

Next, Barry does not dispute that conservation restrictions may only be released or modified in accordance with the New Jersey Conservation Restriction and Historic Preservation Act, but contends that “the Act in no way divests [the OAL] of jurisdiction over Petitioner’s appeal.” Id. at p. 10. Instead, Barry suggests that “[u]pon a finding by [the OAL] that the Department wrongfully imposed” Condition #4, the OAL “should exercise its

power to Order the Commissioner to proceed to release the restriction in accordance with the requirements of the Act[.]” Ibid.

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, “[a] party may move for summary decision upon all or any of the substantive issues in a contested case.” N.J.A.C. 1:1-12.5(a). Such motion “shall be served with briefs and with or without supporting [certifications]” and “[t]he decision sought may be rendered if the papers and discovery which have been filed, together with [a certification], if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b).

Considering the foregoing, and the facts as described by the parties, I **FIND** that there are no material facts in dispute and **CONCLUDE** that summary decision is appropriate.

The DEP argues Barry forfeited his right to object to Condition #4 when he began construction on the new house. While Condition #2 clearly states that “[i]f you begin any activity approved by this permit, you thereby accept this document in its entirety” and that “[i]f you do not accept or agree with this document in its entirety, do not begin construction,” Barry proceeded with construction of the new house even though he did not agree with Condition #4. Thus, under the terms of the permit, Barry forfeited his right to object to Condition #4 once he began construction on the new house.

Equitable considerations also support the conclusion that Barry cannot now object to Condition #4. While neither party cites to any caselaw in support of its argument on this issue, and there may be an absence of New Jersey court decisions precisely on point, there is a recent California Supreme Court opinion that addressed a very similar situation.

In Lynch v. California Coastal Comm’n, 3 Cal. 5th 470 (July 6, 2017), the high court of California held that homeowners who received a permit from the California Coastal Commission to build a seawall forfeited their right to object to certain permit conditions by building the seawall while their appeal of the permit conditions was pending. Under the facts of Lynch, the plaintiffs, who owned oceanfront property in Encinitas, were issued a permit, subject to several conditions, to tear down an old seawall and build a new one. Id.

at 474. While plaintiffs voiced their objections to the Commission throughout the permit review process, and filed an appeal to challenge the conditions after the permit was approved, they satisfied all of the permit requirements, which included the recordation of deed restrictions, and built the seawall. Id. at 475-76.

Ultimately, the Court held that the plaintiffs had forfeited their right to challenge the permit conditions “by complying with all preissuance requirements, accepting the permit, and building the seawall.”³ Id. at 476. In so holding, the Court stated that “[t]he crucial point is that they went forward with construction before obtaining a judicial determination on their objections.” Id. at 478. According to the Court, “[p]laintiffs obtained all the benefits of their permit when they built the seawall. They cannot now be heard to complain of its burdens.” Ibid.

Although the conditions at issue did not affect the design or construction of the seawall, the Court rejected plaintiffs’ argument for an exception “allowing landowners to accept the benefits of a permit under protest if the challenged restrictions can be severed from the project’s construction.” Id. at 478-79. In the Court’s view, “[a]n exception allowing applicants to challenge a permit’s restrictions after taking all of its benefits would change the dynamics of permit negotiations and would foster litigation.” Id. at 479. Instead, “[r]equiring that parties seek to invalidate permit conditions . . . before proceeding with a project ‘serves the salutary purpose of promptly alerting the [agency] that its decision is being questioned’ and allows the government to mitigate potential damages.”⁴ Id. at 480 [quoting California Coastal Comm’n v. Superior Court, 210 Cal.App.3d 1488, 1496 (1989)].

Here, like in Lynch, Barry forfeited his right to challenge Condition #4 by complying with all of the permit requirements, including recording the conservation restriction, accepting the permit, and building the new house. Thus, by accepting all of the benefits of the permit, he cannot now challenge its burdens, and, like in Lynch, the fact that

³ As the Court explained, “forfeiture results from the failure to invoke a right, while waiver denotes an express relinquishment of a known right,” and “the more accurate term to describe the effect of plaintiffs’ actions is equitable forfeiture.” Id. at 475-476 (quotations omitted). The same is true here.

⁴ Because the Court held that plaintiffs forfeited their right to object by building the seawall, the Court did not reach the alternative theory that plaintiffs could not challenge the conditions because they recorded deed restrictions included in the permit. Id. at 482, n. 7.

construction of the new house did not affect the piece of property in dispute or that Barry accepted the permit under protest, should not alter this equitable result.⁵ Accordingly, I **CONCLUDE** that Barry forfeited his right to object to Condition #4.

The DEP also argues that the OAL cannot grant Barry the relief he seeks in the form of a modified conservation restriction. Under the New Jersey Conservation Restriction and Historic Preservation Act:

[a] conservation restriction . . . may be released in whole or in part, by the holder thereof, for such consideration, if any, as the holder may determine, in the same manner as the holder may dispose of other interests in land, subject to such conditions as may have been imposed at the time of creation of the restriction; provided, however, that prior to any release, a public hearing shall be held, after notice by publication thereof at least twice in each of the 3 weeks next preceding the date of such hearing in a newspaper of general circulation in the municipality or municipalities in which the land is situated. The hearing shall be held by the governmental body holding the restriction . . .

[N.J.S.A. 13:8B-5.]

Moreover, under the act, “[t]he provisions of [N.J.S.A. 13:8B-5] notwithstanding, no conservation restriction acquired pursuant to this act shall be released without the approval of the Commissioner of Environmental Protection.” N.J.S.A. 13:8B-6. The OAL plays no role in this process and, thus, cannot grant Barry the relief he seeks. Contrary to Barry’s suggestion, the OAL cannot order the Commissioner to begin the process for the release or modification of Condition #4. Accordingly, I further **CONCLUDE** that the OAL cannot grant petitioner the relief he seeks in the form of a modified conservation restriction.

Based on the foregoing, I finally **CONCLUDE** that respondent’s motion for summary decision should be **GRANTED**.

ORDER

⁵ The Court in Lynch declined to carve out an exception for objecting to permit conditions that do not affect construction even though the plaintiffs argued that due to “the instability of the coastal bluffs . . . they should not have had to await the outcome of litigation before taking action to protect their homes.” Id. at 478. Here, there was no similar concern about the safety of Barry’s home and, thus, even less reason to encourage Barry’s actions in building the new house while his appeal was pending.

Respondent's motion for summary decision is hereby **GRANTED**. Petitioner's appeal is hereby **DISMISSED**.

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.



October 6, 2016

DATE

ELIA A. PELIOS, ALJ

Date Received at Agency:

Date Mailed to Parties:

nd/lam