



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. ELU 03138-22

Agency Ref. No. LUP200001,0906-
20-0006.1

EMERSON LEASING CO. III, LLC,

Petitioners,

vs.

NJDEP / LAND USE REGULATION,

Respondent.

Agnes Antonian, Esq.; Christina Sartorio Ku, Esq., (Connell Foley, LLP, attorneys) and **Neil Yoskin, Esq.** (Cullen and Dykman, LLP, attorneys) for Petitioner

Jill Denyes, Deputy Attorney General, and Jay Stypinski, Deputy Attorney General, for respondent (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: November 3, 2022

Decided: March 1, 2023

BEFORE: **JOHN P. SCOLLO, ALJ:**

STATEMENT OF THE CASE

Petitioner, Emerson Leasing Co, III, LLC, is the owner of a property at 316 Fifteenth Street, Jersey City, New Jersey (Lot 3.04, Block 6903 Jersey City) known as the Emerson Building (the "Emerson Building", "Emerson Lofts III", the "Site" or the "Project"). The Petitioner's proposed project involves substantially improving the

existing five-story building by reconstructing it to become a mixed-use building containing residential units, commercial space and a basement parking garage. The building lies within the tidal flood hazard area of the Hudson River and is therefore subject to the Flood Hazard Area Control Act (N.J.S.A. 58:16A-50). The building lies within an area of Jersey City, which recently has been undergoing a transformation from a former industrial area to a mixed residential / commercial area.

On or about May 20, 2020, the Petitioner applied for a Flood Hazard Area Control Act Permit in connection with the reconstruction and adaptive re-use of the Emerson Building. On August 27, 2020, the Respondent-NJDEP, pursuant to N.J.A.C. 7:13-12.5(p), denied the permit because the basement floor is not at or above the adjoining exterior grade along at least one entire exterior wall and thus could not provide positive drainage of the enclosed area, i.e., the basement. The Petitioner, pursuant to N.J.A.C. 7:13-15.1, sought a hardship exception to the requirements of N.J.A.C. 7:13-12.5 (p), to allow it to use the building's basement for the parking of vehicles. The NJDEP also denied the Petitioner's hardship exception application because the Petitioner had not demonstrated that it has met the requirements for the issuing of a hardship exception under N.J.A.C. 7:13-15.1(b) and (c).

In the Motions at bar, the Respondent seeks Summary Decision ordering the dismissal of the Petitioner's appeal. The Petitioner's Cross-Motion seeks Summary Decision ordering the overturning of the NJDEP's denial of the individual permit and the denial of the hardship exception application.

NOTE: Throughout this Initial Decision Summary Decision, all italics have been supplied by the Tribunal.

PROCEDURAL HISTORY

On August 27, 2020, the Respondent, NJDEP, issued a letter denying the application. On October 20, 2020 the Petitioner appealed the denial. The parties engaged in Alternative Dispute Resolution (ADR), but on February 17, 2022 the ADR process was determined to have been unsuccessful and was thus terminated. The

Petitioner then sought a hearing in the Office of Administrative Law, where its petition was filed under OAL Docket Number ELU 03138-22 on April 21, 2022 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 John P. Scollo, ALJ, who held a Pre-Hearing Conference on April 28, 2022 and issued a Pre-Hearing Order on April 29, 2022. The parties engaged in discovery. Several status conferences have been held.

On September 30, 2022 the Respondent, NJDEP, filed its Motion for Summary Decision. On October 20, 2022, the Petitioner, Emerson, filed Opposition papers and its Cross-Motion for Summary Decision. On October 31, 2022, the Respondent filed its Reply papers and on November 3, 2022, the Petitioner filed its “response” to the Reply (i.e., a sur-reply).

On October 5, 2022, at the invitation of the parties, I, John P. Scollo, ALJ, went to the site and, with counsel for both parties and others present, was conducted through the site (including the basement in which the planned parking area would be located) observing the site and receiving information from the parties about the history and physical structure of the Emerson Building, anticipated modifications (including the installation of a movable flood barrier in the entranceway of the garage), and ongoing modifications in the adjacent roadway (including, but not limited to, the installation of new underground pipes and conduits and the addition of fill to raise the level of the adjacent and nearby roadways).

BACKGROUND

In its August 27, 2020 letter The Respondent-NJDEP denied Emerson’s individual application for a substantial improvement (the “application”) of the existing building at Lot 3.04, Block 6903 in Jersey City and denied Emerson’s hardship exception request.

The Tribunal points out that the parties agree or at least do not deny:

- (1) that the Emerson Building is a lawfully existing building that has not been subject to substantial damage as a result of fire, flooding, or other natural disaster;
- (2) that the site is not in a floodway, but it is entirely within the floodplain of the Hudson River, thus requiring a Flood Hazard Area Control Act Individual Permit;
- (3) that the site is not situated within a V zone or coastal A zone; but it is situated in an AE 11 zone;
- (4) that the Flood Hazard Area Elevation (referencing the FEMA 100-year flood elevation) of the entire site is 11.0 feet NAVD88;
- (5) that the proposed surrounding grade of the exterior of the building ranges from 9.00 feet to 12.03 feet and that, according to the proposed plan, at the center of the proposed basement garage entrance the bottom of the curb is at 10.6 feet NAVD88 and the top of the curb is at 10.72 feet NAVD88;
- (6) that the proposed inclined ramp and movable flood barrier at the garage entrance will reach a high point of 12.10 feet NAVD88 when the flood barrier is up;
- (7) that the depth of the basement floor below grade varies from 8.38 feet NAVD88 to 11.41 feet NAVD88;
- (8) that the lowest floor elevation of the basement enclosure is .62 feet NAVD88; and
- (9) that the floor of the basement is below grade along all exterior walls.

At this time the Tribunal must point out that to understand the parties' arguments, it is necessary to understand certain terms. One such term is "lowest floor".

The term "lowest floor" is defined in N.J.A.C. 7:13-1.2. There are two definitions of "lowest floor" given in N.J.A.C. 7:13-1.2. The first definition only applies where the building lies within a V zone or coastal A zone, and thus is inapplicable to the site in question. The second definition of "lowest floor" applies to buildings not in a V zone or coastal A zone, and thus applies to the site in question. In the second definition, the

term “lowest floor” means “the top surface of the floor of the lowest enclosed area of [the] building ..., excluding any unfinished or flood-resistant enclosure that is usable solely for vehicle parking, building access, or limited storage, and is constructed in compliance with this chapter.”

POSITIONS / ARGUMENTS OF THE PARTIES

RESPONDENT-NJDEP’S POSITION REGARDING THE INDIVIDUAL PERMIT

In its motion for summary decision, the NJDEP defends its denial of Emerson's application for an individual permit because NJDEP determined that the proposed project did not meet the requirements of the Flood Hazard Area Control Act (N.J.S.A. 58:16A-50) and its applicable regulations, particularly referencing N.J.A.C. 7:13-12.5 (k) and N.J.A.C. 7:13-12.5 (p). Because the project involves the substantial improvement of an existing building that has not been subject to substantial damage as a result of fire, flooding, or other natural disaster, Section (k) of N.J.A.C. 7:13-12.5 would apply. Section (p) of N.J.A.C. 7:13-12.5 would also apply.

Section (k) provides that an individual permit to undertake the substantial improvement of such a building will be issued *only if* all three of its stated criteria are met.

One of the three stated criteria of 12.5(k) is 12.5 (k)(2). It says that “In no case shall the lowest floor of this portion of the building be set below the FEMA 100-year flood elevation, except as provided in (i)(3) and (i)(4), above.” The FEMA 100-year flood elevation is 11.0 feet NAVD88. The lowest point in the subject basement’s floor is .62 feet NAVD88. Clearly, the lowest point of the basement floor is below the FEMA 100-year flood elevation. Moreover, 12.5(i)(3)(iv) states: “In no case shall the lowest floor of the building be set below grade along all adjoining exterior walls.” In this case, the floor of the basement is below the grade along all adjoining exterior walls. NJDEP therefore argues that Emerson has not met the requirements of 12.5(k)(2).

Another of the three stated criteria of 12.5 (k) is 12.5(k)(3). We see that in order to issue an individual permit, 12.5(k)(3) requires that the floor of an enclosed area beneath the lowest floor of the entire building must be modified as necessary to meet the requirements of N.J.A.C. 7:13-12.5 (p). In other words, 12.5(k)(3) refers to 12.5(p). N.J.A.C. 7:13-12.5 (p) provides, in applicable part, that the NJDEP:

shall issue an individual permit to construct an enclosure that lies beneath the lowest floor of a habitable building, *or* to construct an enclosure that lies below the flood hazard area design flood elevation that is either attached to or detached from a habitable building and is intended to be used as a garage or parking area, *only if* the following requirements are satisfied:

- (1) The enclosure is used solely for the parking of vehicles, building access or storage;
- (2) The floor of the enclosure is situated *at or above* the adjoining exterior grade along at least one entire exterior wall, in order to provide positive drainage of the enclosed area;

[(3), (4),(5) and (6) are omitted as irrelevant.]

In its August 27, 2020 denial letter, the NJDEP's analysis of 12.5(k) was that it only allowed issuance of the permit if the requirements of 12.5 (p) were satisfied.

It is important to note that Subchapter 12.5 (p) allows the issuance of the individual permit *only if all six* of its requirements are satisfied. In order to satisfy Section 12.5 (p)(2), it is required that the floor of the enclosure (here the floor is at elevation .62 feet DAVA88) be at or above the adjoining exterior grade along at least one entire wall. In this case, the floor is several feet below the adjoining exterior grade not only along one entire wall, but along all walls. In NJDEP's analysis, it determined that the elevation of the basement floor was only .62 feet NAVD88 and that the floor was not situated at or above the adjoining exterior grade along at least one entire exterior wall. That is to say, it was not at or above the elevation of 11.0 feet NAVD. In light of these facts, the individual permit cannot be issued due to the provisions of N.J.A.C. 7:13-12.5(p)(2).

Since 12.5(k)(3) refers to 12.5(p), and the site does not meet the requirements of 12.5(p), NJDEP therefore denied the individual permit because Emerson has not met the requirements of 12.5(k)(3) and of 2.5(p)(2). NJDEP therefore argues that its denial of the individual permit should be affirmed.

NJDEP's POSITION REGARDING ITS DENIAL OF THE HARDSHIP EXCEPTION APPLICATION

The DEP maintains that hardship exceptions only arise when the applicant can demonstrate that it meets the definite criteria set forth in the Flood Hazard Area Control Act Rules. The criteria are set forth in N.J.A.C. 7:13-15.1 (b) and (c) and (e).

The NJDEP's position is that, pursuant to N.J.A.C. 7:13-15.1(a), in order for Petitioner-Emerson to obtain a hardship exception, it must demonstrate that it meets the at least one of the three criteria set forth in N.J.A.C. 7:13-15.1(b) and all three criteria set forth in N.J.A.C. 7:13-15.1(c). NJDEP maintains that it denied the hardship exception application because Emerson did not meet any of the criteria of 15.1(b) and did not meet any of the criteria of 15.1(c).

Recalling that the applicant need satisfy only one of the three criteria of N.J.A.C. 7:13-15.1(b), the NJDEP summarizes each of the three criteria as follows:

(1) That there is no feasible and prudent alternative to the proposed project or regulated activity which would avoid or substantially reduce the anticipated adverse effects of the project or regulated activity;

(2) That the cost of compliance with the requirements of the regulations is unreasonably high in relation to the environmental benefits that would be achieved by compliance; or

(3) That the NJDEP and the applicant agree to one or more alternative requirements that, in the judgment of the NJDEP, would provide equal or better protection to public health, safety, and welfare and the environment.

Turning to N.J.A.C. 7:13-15.1 (c), the NJDEP summarizes each of the three mandatory criteria as follows:

- (1) That due to an extraordinary condition of the applicant or the site condition, regulatory compliance would result in an exceptional and/or undue hardship for the applicant, and/or would adversely impact public health, safety, and welfare;
- (2) That the proposed project or regulated activities will not adversely affect the use of contiguous or nearby property; and
- (3) That the proposed project will not pose a threat to the environment or to public health, safety, or welfare.

NJDEP supports its position that it properly denied Emerson's hardship exemption request by arguing that Emerson did not, at the time of its presentation of its hardship exemption application, demonstrate that there was no feasible and prudent alternative to the proposed project, as required by N.J.A.C. 7:15.1(b)(1). The NJDEP points out that now, before the OAL, Emerson argues that Jersey City's Redevelopment Plan requires it to preserve the original structure and façade. NJDEP's position is that the Redevelopment Plan does not supersede the State's environmental laws; and the NJDEP, incidentally, notes that the record does not contain any proof that the Emerson Building has ever been designated as historic under the New Jersey Register of Historic Places Act, N.J.S.A. 13:1B-15.128 et seq. and its associated regulations, N.J.A.C. 7:4-1.1 et seq., nor under any federal historic preservation laws, nor under any municipal ordinances. The NJDEP also argues that, in its application, Emerson did not submit evidence that it ever requested relief from the City's Redevelopment Plan. NJDEP argues that Emerson did not, at the time of the application, show that locating the parking area to another location was not feasible and therefore, Emerson fails to meet the first criteria.

The DEP argues that Emerson, with its application, did not provide financial data to demonstrate that it complied with the requirements of N.J.A.C. 7:13-15.1(b)(2). NJDEP argues that Emerson, at the time of the application, did not supply financial data and therefore, Emerson fails to meet the second criteria.

NJDEP argues that Emerson did not provide alternative requirements that protected the public health, safety and welfare, which would demonstrate compliance with N.J.A.C. 7:13-15.1(b)(3). NJDEP argues that it and the applicant, at the time of the application, did not agree on any alternative requirements to protect the public health, safety, and welfare and the environment and therefore, Emerson fails to meet the third criteria. NJDEP argues that since Emerson did not satisfy at least one of the criteria of N.J.A.C. 7:13-15.1 (b), a hardship exception cannot be issued.

The NJDEP supports its argument that it properly denied the hardship exemption application by arguing that Emerson did not demonstrate that it complied with any of the three required criteria set forth in N.J.A.C. 7:13-15.1(c): (1) the criteria that there was an extraordinary situation of the applicant or of the site that would result in a hardship for Emerson and/or that would adversely affect the public health, safety, and welfare; (2) that the project would not adversely affect the use of contiguous or nearby properties; and (3) that the project would not pose a threat to the environment or the public health, safety, or welfare.

In regard to the first criteria of 15.1(c), the NJDEP points out that Emerson stated that the site was eligible for listing as a historic site, Emerson never offered any proof that the Emerson Building was actually designated as a historic site and / or that such designation would prevent the applicant from using the first floor of the building for parking. It would therefore follow that the applicant has not demonstrated an extraordinary condition of the property which creates an undue hardship.

NJDEP also notes that the City's Redevelopment Plan's concern is for aesthetics and the preservation of building facades, while the aim of the Flood Hazard Area Control Act Regulations is to help ensure public safety. The NJDEP argues that flooding is a public safety concern which must be deemed of greater importance than aesthetics. So, it would follow that the applicant has not demonstrated how or why concern for aesthetics (the preservation of the building's façade), constitutes an extraordinary condition of the property which, in turn, creates an undue hardship.

The NJDEP asserts that Emerson offered no evidence of an extraordinary situation other than its post-application assertion that it cannot alter the building or its façade, which is not an extraordinary circumstance or a circumstance that would supersede the State's environmental laws. Therefore, Emerson fails to meet the first criteria of N.J.A.C. 7:13-15.1(c).

In regard to the second criteria, the NJDEP argues that, at the time of the application, Emerson did not offer any evidence regarding the project's effects upon contiguous and nearby properties. Therefore, Emerson fails to meet the second criteria of N.J.A.C. 7:13-15.1(c).

In regard to the third criteria, the NJDEP argues that, at the time of the application, Emerson did not offer any evidence regarding possible threats to the environment or to public health, safety, or welfare. Therefore, Emerson fails to meet the third criteria of N.J.A.C. 7:13-15.1(c).

NJDEP asserts that Emerson was required to show in its hardship exemption request that its project would not affect the use of adjacent or nearby properties, but failed to make such a showing. NJDEP asserts that Emerson was required to show in its hardship exemption request that its project would not pose a threat to the environment and to the public health, safety, and welfare, but failed to make such showings. The NJDEP comments that Emerson's post-application proposals of flood-proofing were not submitted to the NJDEP with the hardship exemption request and therefore, it cannot be said that the NJDEP's denial of the hardship exemption request was arbitrary and capricious. Therefore, Emerson fails to meet the criteria of N.J.A.C. 7:13-15.1(e).

The NJDEP notes that N.J.A.C. 7:13-15.1 (c) requires compliance with all three of its stated criteria. NJDEP argues that since Emerson has not demonstrated compliance with the first criteria and did not even attempt to demonstrate compliance with the second criteria and the third criteria, a hardship exception cannot be issued.

The NJDEP also supports its argument that it properly denied the hardship exemption application by pointing out that pursuant to N.J.A.C. 7:13-15.1(e), Emerson was required to submit, but did not submit, the following required items in support of its hardship application: (1) a detailed narrative explaining how Emerson meets at least one requirement of 15.1(b) and all three of the requirements for 15.1(c); (2) a description of potential impacts which the project might have on the environment; (3) structural, socio-economic, flood-proofing, and/or other information relevant to support Emerson's request; (4) (not applicable); (5) projected data regarding flood height, velocity and duration of floodwaters and evidence of the floodwater's capacity to cause or increase flooding upstream or downstream; and (6) detailed financial information that supports the hardship request.

In response to Emerson's point that hardship exceptions were granted to other projects in the immediate area of the Emerson Building, NJDEP responded that it is not required to grant hardship exceptions unless all applicable criteria are met. The NJDEP argues that because Emerson has not demonstrated that it meets the criteria of N.J.A.C. 7:13-15.1 (b) and 15.1(c), the denial of the hardship exception application should be affirmed.

EMERSON'S POSITION REGARDING THE INDIVIDUAL PERMIT

Regarding the issuance of the individual permit, Emerson states that its continued position has been that the Project design fully complies with the Flood Hazard Area Control Act Rules for dry flood-proof construction, and so the individual permit should have been issued.

Emerson cites and relies on the second definition of "lowest floor" found in N.J.A.C. 7:13-1.2 in support of its position that N.J.A.C. 7:13-12.5(p) is inapplicable to this matter. Emerson argues that the term "lowest floor", as defined in N.J.A.C. 7:13-1.2, does not include any "unfinished or flood-resistant enclosure that is usable solely for vehicle parking, building access, or limited storage, and is constructed in compliance with this chapter". Emerson argues that since the basement of the Emerson Building

will undergo floodproofing in compliance with this chapter, specifically N.J.A.C. 7:13-12.5 (r), (s), and (t), thereby becoming flood-resistant, the floodproofing of the basement takes the Project outside the purview of N.J.A.C. 7:13-12.5(p). It would then follow that N.J.A.C. 7:13-12.5 (p)(2)'s requirement that the basement floor be above the exterior grade for the entirety of one wall becomes inapplicable. Thus, with the flood-proofing accomplished, there is nothing prohibiting the use of the basement as a parking garage. Therefore, Emerson argues, the NJDEP's decision to deny the individual permit, based on N.J.A.C. 7:13-12.5(p), should be reversed.

EMERSON'S POSITION REGARDING THE DENIAL OF THE HARDSHIP EXCEPTION APPLICATION

In regard to its application for a hardship exception, Emerson's position is that there is good cause for its issuance and that the NJDEP's denial of a hardship exception was arbitrary and capricious.

In N.J.A.C. 7:13-15.1 (c), there are three separate criteria, all of which must be satisfied by an applicant for a hardship exception. These three criteria are similar to the three criteria contained in N.J.A.C. 7:13-15.1(b), but they are not exactly the same. The arguments which Emerson puts forth below address both 15.1(b) and 15.1(c). As stated above, an applicant for a hardship exception must satisfy at least one criteria of 15.1(b), but must satisfy all three of the criteria of 15.1(c).

A summary of Emerson's arguments follow. In N.J.A.C. 7:13-15.1 (b), there are three separate criteria. The first, found at 15.1(b)(1) concerns whether it is determined (by the NJDEP) that there is no feasible and prudent alternative to the project or regulated activity as proposed and which would avoid or substantially reduce adverse effects, and that the granting of the exception would not compromise the public health, safety or welfare or the environment. This is similar to, but not exactly the same as the first criteria of 15.1(c)(1). In support of its position, Emerson states that it is required to retain and restore the original structure of the Emerson Building because of its historic nature. Emerson notes that the nature of the original construction of the building (with thick poured concrete floors) the floors cannot be elevated or modified to re-locate the

parking to a level above the basement. Emerson notes that the building is “eligible” for listing in the National Register of Historic Places, but it does not state that it is actually listed in any register of historic places.

Emerson points out that the City’s Redevelopment Plan requires that parking for the building’s residents and commercial customers be off-street parking. Emerson’s point is that since on-street parking is effectively prohibited and since it may not alter the building in a way that relocates the parking to a place other than the proposed basement parking area, there is no feasible alternative for the parking of cars and thus a hardship arises. The basement garage proposal with its associated floodproofing measures constitute Emerson’s good faith attempt to comply with the need for off-street parking while safeguarding the needs of the environment and the public’s health, safety, and welfare.

The second criteria, found at N.J.A.C. 7:13-15.1(b)(2), concerns whether the cost of compliance with the regulations of Chapter 13 would be unreasonably high in relation to the environmental benefits that would be achieved by compliance. This is similar to, but not the same as the second criteria of 15.1(c)(2). Emerson argues that not building the basement garage (the “no-build alternative”) is not feasible because there is a need for off-street parking. Moreover, the Emerson Building is the centerpiece of the project and Emerson has already spent substantial funds on infrastructure in the immediate area. Emerson argues that filling-in the basement would be cost-prohibitive and could also endanger the building’s already-existing pilings and foundation.

The third criteria, found at N.J.A.C. 7:13-15.1(b)(3) concerns the inability of the NJDEP and Emerson to agree to one or more alternative requirements that provide equal or better protection to the public and to the environment. This is similar to, but not the same as 15.1(c)(3). Emerson argues that the ongoing infrastructure improvements at the site, together with the proposed flood-control and flood-proofing additions actually increases the level of safety and decreases harm to the environment. Emerson argues that in light of the improvements it has accomplished and proposes to accomplish, the NJDEP’s denial of a hardship exemption is demonstrably arbitrary and capricious.

Emerson concludes by saying that it fully addressed all the criteria contained in N.J.A.C. 7:13-15.1 (b) and in N.J.A.C. 7:13-15.1(c) in its application for a hardship exception.

In addition to Emerson's arguments regarding N.J.A.C. 7:13-15.2 (b) and (c), Emerson points-out that the NJDEP granted hardship exceptions for the construction of below-grade, dry floodproofed parking areas in analogous circumstances at other nearby projects. Emerson argues that the NJDEP's failure to explain its rationale for granting hardship exceptions at other locations while denying a hardship exception to Emerson's project, supports Emerson's conclusion that the NJDEP has acted in an arbitrary and capricious manner.

FACTUAL DISCUSSION

I **FIND** that the parties are aware of the measures which Emerson has already undertaken at the site and which Emerson intends to put into place at the site. I **FIND** that all the relevant facts regarding the managing of stormwaters and of the measures already undertaken and to be put into place by Emerson have already been presented by the parties in their exhibits and arguments and are already known to this Tribunal.

I **FIND** that additional testimony is not necessary because it will not change the facts that have already been established. I **FIND** that this matter can and should be decided as a matter of law and is appropriate for resolution by summary decision.

APPLICABLE LAW

The Standard for Summary Decision

A Motion for Summary Decision may be granted if the papers and discovery presented, as well as, any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the Motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact

which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c). See Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954) and Brill v. Guardian Life Insurance Co. of Am., 142 N.J. 520, 540 (1995).

Regulations Applicable to the Flood Hazard Area Control Act N.J.S.A. 58:16A-50, et seq.

The Regulations governing flood hazards (the "Flood Hazard Area Control Act Rules") are found at N.J.A.C. Title 7, Chapter 13, currently N.J.A.C. 7:13-1.1 to 7:13-24.11. The purpose of Chapter 13 is to minimize damage to life and property from flooding caused by development within flood hazard areas. Key subchapters are described as follows. Note: All words set forth below in italics were italicized by the Tribunal.

Subchapter 1 contains general provisions covering the purpose and scope of the Regulations; definitions of terms; the authority of the New Jersey State Department of Environmental Protection' over authority over the implementation of the Flood Hazard Area Control Act and the delegation of the Department's authority to counties; and includes that the chapter shall be construed liberally to effectuate the purpose of the Acts under which it was adopted. Some key terms found in Subchapter 1 are: "Building", "Flood hazard area" (both "tidal;" and "fluvial"), "Flood hazard area design flood" (referencing the "100-year flood" and N.J.A.C. 7:3-13), "Flood hazard area design flood elevation"; "Flood-proofing" (both "dry" and "wet"), "General permit", "Habitable building", "Individual permit", "lowest floor", "NGVD" (the national geodetic vertical datum of 1929), "100-year flood", "project"; Reconstruct", "Regulated activity" (or "activity"), "Regulated area"; "Site"; "Site plan"; "Stormwater"; "Stormwater runoff"; "Structure", "Substantial improvement", "Water", and "Water surface elevation".

Subchapters 2, 6, 7, 8. 9, 10, 11 and 12 cover various permit requirements. activity-specific requirements for Individual permits are set forth in Subchapter 12. Subchapter 15 covers the topic of a Hardship Exception for an Individual Permit.

N.J.A.C. 7:13-12.5 covers the activity-specific requirements for permits pertaining to buildings. Set forth below are key requirements for buildings for which activity-specific permits are sought.

Section (a) of N.J.A.C. 7:13-12.5 states:

(a) This section sets forth specific design and construction standards that apply to any building proposed within:

1. A flood hazard area; and
2. An area that was previously situated in a flood hazard area, but which was filled, raised or otherwise removed from the flood hazard area after January 3, 1980, whether in accordance with or in violation of this chapter, except in the following cases:
 - i. A Department delineation is available for the site, and the Department approves a revision of its delineation that removes the area in question from the flood hazard area; or
 - ii. No Department delineation is available for the site, but FEMA issues a Letter of Map Amendment that removes the area in question from the 100-year flood plain.

Section (i) of N.J.A.C. 7:13-12.5 governs the construction of a new habitable building. It contains specific requirements for the construction of a new building's lowest floor.

Section (k) of N.J.A.C. 7:13-12.5 states:

The Department shall issue an individual permit to undertake the substantial improvement of a lawfully existing building that has not been subject to substantial damage as a result of fire, flooding, or other natural disaster *only if* the following requirements are satisfied:

1. The lowest floor of any constructed, elevated, enlarged, or modified portion of the building meets the requirements of (i) above;
2. The lowest floor of the remainder of the building is modified where necessary to meet the requirements of (i)

above to the extent feasible. In no case shall the lowest floor of this portion of the building be set below the FEMA 100-year flood elevation, except as provided in (i)3 and 4 above; and

3. Any enclosed area beneath the lowest floor of the entire building is modified as necessary to meet the requirements of (p) below.

Section (p) of N.J.A.C. 7:13-12.5 states:

The Department shall issue an individual permit to construct an enclosure that lies below the lowest floor of a habitable building, or to construct an enclosure that lies below the flood hazard area design flood elevation that is either attached to or detached from a habitable building and is intended to be used as a garage or parking area, *only if* the following requirements are satisfied:

1. The enclosure is used solely for parking of vehicles, building access or storage;

2. The floor of the enclosure is situated at or above the adjoining exterior grade along at least one entire exterior wall, in order to provide drainage of the enclosed area;

3. The enclosure is constructed with permanent flood openings that meet the requirements of the Uniform Construction Code at N.J.A.C. 5:23;

4. No portion of the building is located within a V zone;

5. No portion of the building is located within a coastal A zone, unless an architect or engineer certifies that the building's foundation is designed in accordance with the Uniform Construction Code, N.J.A.C. 5:23; and

6. Where an enclosure is more than six feet in height, the following requirements are satisfied:

i. The deed for the lot on which the enclosure is constructed is modified to:

(1) Explain that the enclosure is likely to be inundated by floodwaters, which may result in damage and/or inconvenience;

(2) Disclose the depth of flooding that the enclosure would experience during the FEMA 100-year flood; if available, and the flood hazard area design flood;

(3) Prohibit habitation of the enclosure; and

(4) Explain that converting the enclosure into a habitable

area may subject the property owner to enforcement under this chapter; and

ii. The modified deed is recorded in the office of the County Clerk or the registrar of deeds and mortgages of the county in which the building is located, and proof that the modified deed has been recorded is provided to the Department prior to the sooner of either:

(1) The start of any site disturbance (including pre-construction earth movement, removal of vegetation or structures, or construction of the project); or

(2) The date that is 90 calendar days after the issuance of the individual permit.

Section (r) of N.J.A.C. 7:13-12.5 states:

Except for an enclosure that meets the requirements of (p) above, the Department shall issue an individual permit for a building that is flood-proofed only if one of the following requirements is satisfied:

1. The applicant dry flood-proofs the building in accordance with (s) below; or
2. The applicant demonstrates that it is not feasible to dry flood-proof the building in accordance with (s) below and instead wet flood-proofs the building in accordance with (t) below.

Section (s) of N.J.A.C. 7:13-12.5 states:

The Department shall issue an individual permit to dry flood-proof a building under (r)1 above only if the building is designed and constructed with measures to prevent floodwaters from entering the building during a flood depth of at least one foot above the flood hazard area design flood elevation.

Section (t) of N.J.A.C. 7:13-12.5 states:

The Department shall issue an individual permit to wet flood-proof a building under (r)2 above only if the building is designed and constructed to be flood-resistant during a flood depth of at least one foot above the flood hazard area design flood elevation, so that floodwaters can enter the building through permanent openings, while not damaging the structural integrity of the building.

The regulations governing Hardship Exception Individual Permit applications are found at 7:13-15.1. Beginning at N.J.A.C. 7-13-15.1(a), it states:

(a) The Department shall issue an individual permit for a project or regulated activity that does not comply with one or more of the requirements at N.J.A.C. 7:13-11 and 12 *only if* :

1. One or more of the requirements at (b) below are satisfied; and
2. All of the requirements at (c) are satisfied.

(b) A project or regulated activity is eligible for a hardship exception under this section *only if* one or more of the following apply:

1. The Department determines that there is no feasible and prudent alternative to the proposed project or regulated activity, including not pursuing the project or regulated activity, which would avoid or substantially reduce the anticipated adverse effects of the project or regulated activity, and the granting of the hardship exception would not compromise the reasonable requirements of public health, safety, or welfare, or the environment;
2. The Department determines that the cost of compliance with the requirements of this chapter is unreasonably high in relation to the environmental benefits that would be achieved by compliance; or
3. The Department and applicant agree to one or more alternative requirements that, in the judgment of the Department. Provide equal or better protection to public health, safety, or welfare and the environment.

(c) In addition to meeting at least one of the requirements in (b) above, a project or regulated activity is eligible for a hardship exemption under this section *only if* the applicant demonstrates that:

1. Due to an extraordinary situation of the applicant or site condition, compliance with this chapter would result in an exceptional and/or undue hardship for the applicant and/or would adversely affect public health, safety, or welfare.
2. The proposed project or regulated activities would not adversely affect the use of contiguous or nearby property; and
3. The proposed project or regulated activities will not pose a threat to the environment, or to public health, safety and welfare.

(d) In determining whether to approve and hardship

exception for an application satisfying the requirements of (b) or (c) above, the Department shall consider the extent to which the applicant, prior or current property owners(s), and/or their agents may have directly caused or contributed to the hardship.

(e) To obtain an individual permit based on a hardship exception, the applicant shall submit an application for an individual permit pursuant to N.J.A.C. 7:13-18 and shall include the following information as applicable:

1. A detailed narrative that:
 - (i) Explains how the project or regulated activity for which the applicant is seeking a hardship exception meets at least one of the requirements at (b) above as well as all of the requirements of (c) above; and
 - (ii) Demonstrated that the applicant has pursued alternate designs and/or locations for the project or regulated activity, as applicable, which have proven to be not feasible;
2. A description of any impacts of the proposed impacts of the proposed project or regulated activity upon the environment;
3. If the hardship exception request relates to the requirements for buildings at N.J.A.C. 7:13-12.5, all necessary structural, socio-economic, flood-proofing, and/or other information relevant to support the request;
4. If the hardship exception request relates to the access requirements of N.J.A.C. 7:13-12.6, proposed access routes to and from the property during flood;
5. If the hardship exception request relates to any potential impacts from or to flooding, the projected height, velocity and duration of the floodwaters expected at the site during the flood hazard area design flood, as well as evidence that the project will not adversely affect the hydraulic capacity of any water so as to cause or increase flooding upstream and/or downstream of the proposed project;
6. If the hardship exception request is based on economic grounds, detailed financial documentation to support the request.
7. A description of any development in the area and any potential impacts of the proposed project or regulated activities on that development; and
8. Any additional information that the Department determines is reasonable and necessary to evaluate whether the hardship exception request meets the requirements of

this section.

(f) The department shall review an application for an individual permit based on a hardship exception in accordance with the procedures for an individual permit at N.J.A.C. 7:13-21.

(g) A delegated agency shall not issue an individual permit based on a hardship exception.

LEGAL ANALYSIS AND CONCLUSIONS

The following is the Tribunal's analysis of the phrase "and constructed in compliance with this chapter" and of the term "lowest floor". Three regulations must be analyzed to find out whether the lowest floor of the Emerson Building can or cannot be considered to be "constructed in compliance with this chapter".

First, 12.5(p), on its face, clearly prohibits use of the Emerson Building's basement as a parking garage because the floor is not at or above grade along at least one entire exterior wall. So 12.5 (p) does not provide any support to Emerson in its quest to construct the parking garage in the basement.

Second, under 12.5 (i) at 12.5 (i) (3) (iv) it states that "In no case shall the lowest floor of the building be set below grade along all adjoining exterior walls."

Third, in 12.5 (k), where it at first seems to allow issuance of the permit when the applicant has modified the building to meet the requirements of 12.5(i) arguably by the undertaking of flood-proofing, it goes on to say that "In no case shall the lowest floor of this portion of the building be set below the FEMA 100-year flood elevation, except as provided in 12.5(i)(3) and 12.5(i)(4). With these possible exceptions in mind, we look at 12.5(i)(3) and 12.5(i)(4). As already explained, 12.5(i)(3)(iv) prohibits setting the lowest floor of non-residential portions of the building below grade along all adjoining walls. Thus we turn to 12.5(i)(4). Section (ii) of 12.5(i)(4) prohibits setting the lowest floor of the building below grade along all adjoining exterior walls. Therefore, neither 12.5(i) nor 12.5(k) provide any support to Emerson in its quest to construct the parking garage in the basement.

In its Opposition papers, Emerson analyzes the wording used in the second definition of the term “lowest floor”, as found in N.J.A.C. 7:13-1.2. There the term “lowest floor” includes the phrase “excluding any unfinished or flood-resistant enclosure that is usable solely for vehicle parking, building access, or limited storage, and is constructed in compliance with this chapter”. Emerson argues that this phrase means two things. First, it nullifies the applicability of 12.5(p)(2). Second. It means that a below-grade flood-proofed enclosure may indeed be used for the parking of vehicles because it constitutes an exception to the requirements of 12.5(k)(3) whenever the enclosed area beneath the lowest floor of the entire building will be modified (e.g., floodproofed) as necessary to meet the requirements of 12.5 (p). Emerson’s interpretation of the term “lowest floor” would lead us to conclude that 12.5(p)(2) and 12.5(k)(3) can be ignored. However, the NJDEP points out that 12.5 (p) contains the phrase “and is constructed in compliance with this chapter”. NJDEP maintains that far from nullifying 12.5(p)(2), this phrase underscores 12.5(p)(2). The NJDEP maintains that there is no way that the proposed underground enclosure (the garage) can be considered to be “constructed in compliance with this chapter” because it does not meet the requirements of 12.5(p)(2). N.J.A.C. 7:13-12.5(p)(2) prohibits enclosures whose floor, along at least one entire exterior wall, lies below the adjoining exterior grade. There are no exceptions, either express or implied in the language of 12.5(p)(2). In other words, regardless of the nature of the proposed modifications or additions, including the floodproofing proposed herein, when the lowest point of the floor of the enclosure is not at or above the adjoining exterior grade along at least one exterior wall so as to allow for positive drainage, it cannot be considered as being “constructed in compliance with this chapter”.

I **CONCLUDE** that Emerson’s interpretation of the term “lowest floor” must be rejected and I **CONCLUDE** that it cannot be used to nullify 12.5(p)(2) and 12.5(k)(3) or to create an exception to 12.5(k)(3) or 12.5(p)(2).

I **CONCLUDE** that 12.5(p)(2) is the controlling regulation in this matter and I **CONCLUDE** that 12.5 (r), (s) and (t) are inapplicable.

I **CONCLUDE** that 12.5(p)(2), despite any proposals for flood prevention, prohibits the use of the basement in question as a parking area for vehicles because the lowest point of the basement floor is .62NAVD, and as such, it is not at or above the adjoining exterior grade along at least one exterior wall.

Emerson asserts that there are seven factual issues present in the matter that do not preclude the granting of summary decision to itself, but which preclude the granting of summary decision to the NJDEP. All seven of these purported factual issues relate to proposed physical modifications and additional flood-prevention technologies. Out of these proposals, Emerson attempts to create factual issues. This Tribunal is not convinced that any of these purported factual issues presents a genuine issue of fact. The only issues are legal issues (i.e., what regulations apply given the circumstances of the Site, along with how and why the regulations should be applied). I **CONCLUDE** that there are no unresolved issues of material fact which would bar the resolution of the matter at bar by summary decision.

While Emerson proposes expensive physical modifications and additions to the building which it asserts will make the building compliant with each of the NJDEP's concerns for the public's health, safety and welfare and with adequate concern for the environment, it cannot be assumed that these modifications and additions will actually preclude the possibility of basement flooding at some time in the future. Proposed facts do not create factual issues. The real question is whether the individual permit and the hardship exception were denied based on a good faith interpretation of the regulations under the circumstances of the Site. In the instant matter, Emerson has not and cannot overcome the fact that the lowest point in the basement is an elevation of .62 NAVD88 and that there cannot be positive drainage (i.e., drainage by gravity) of accumulated floodwater in the basement in the event of a flood. Under the applicable regulation, N.J.A.C. 7:13-12.5(p), any number of proposed modifications and additions do not and cannot change the outcome that the regulation does not allow the use of the basement as a parking area. The fact that no viable alternative has been presented yet for the parking of vehicles at other locations (such as part of the commercial space on the first floor or perhaps at a nearby Emerson-owned property) does not create a hardship sufficient enough to convince this Tribunal to ignore the very plain mandate of N.J.A.C.

7:13-12.5(p) and to thereby overturn the NJDEP's decision to deny the individual permit. I **CONCLUDE** that the NJDEP did not act in an arbitrary and capricious manner when it denied Emerson's individual permit application.

In regard to the NJDEP's denial of Emerson's hardship exception application, I **CONCLUDE** that Emerson has not demonstrated compliance with N.J.A.C. 7:13-15.1 (b), (c), and (e). Although Emerson may have addressed the criteria of 15.1 (b), (c), and (e) in its papers, there is a difference between "addressing" and "meeting" criteria. Emerson has not yet proved that it actually met the aforesaid criteria.

Despite NJDEP's granting of hardship exceptions to nearby projects, it must be remembered that each property is considered unique. Each site or project has its own peculiar circumstances, and so the granting of a hardship exception in one set of circumstances does not mandate the granting of hardship exceptions in each and every set of circumstances, regardless of some similarities between the sites / projects. The NJDEP is not bound to grant hardship exceptions to an applicant merely because it has done so regarding applicants at other sites. The granting of hardship exceptions to one or more nearby projects does not require the NJDEP to disregard the regulations or to grant hardship exceptions in all cases. I **CONCLUDE** that the NJDEP did not act in an arbitrary and capricious manner when it denied Emerson's hardship exception application.

I **CONCLUDE** that the NJDEP's actions as contained in its letter dated August 27, 2020 should be and hereby are **AFFIRMED**.

ORDER

This matter having been brought before the Tribunal by both counsel on their respective Motion and Cross-Motion seeking Summary Judgment, and the Tribunal having considered the submissions and having read the arguments of counsel, and for good cause:

It is **ORDERED** that the Respondent-NJDEP's Motion for Summary Decision is hereby **GRANTED**; and it is further

ORDERED that Petitioner-Emerson Leasing Co. III, LLC's Cross-Motion for Summary Decision is **DENIED**; and it is further

ORDERED that each counsel shall acknowledge his receipt of this **ORDER** (which is being sent to counsel by email) by return email.

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.

March 1, 2023
DATE

John P. Scollo
JOHN P. SCOLLO, ALJ

Date Received at Agency:

March 1, 2023

Date Mailed to Parties:
db

March 1, 2023

Batista, Diana [OAL]

From: Microsoft Outlook
To: Agnes Antonian; Christina Sartorio Ku; Neil Yoskin
Sent: Wednesday, March 1, 2023 11:50 AM
Subject: Relayed: RE: ELU 03138-22 Emerson Leasing Co., III, LLC v. NJDEP-Land Use Regulation - Initial Decision Summary Decision

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

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[Neil Yoskin \(nyoskin@cullenllp.com\)](mailto:nyoskin@cullenllp.com)

Subject: RE: ELU 03138-22 Emerson Leasing Co., III, LLC v. NJDEP-Land Use Regulation - Initial Decision Summary Decision

Batista, Diana [OAL]

From: Microsoft Outlook
To: Denyes, Jill (LPS); Stypinski, Jay (LPS)
Sent: Wednesday, March 1, 2023 11:50 AM
Subject: Relayed: RE: ELU 03138-22 Emerson Leasing Co., III, LLC v. NJDEP-Land Use Regulation - Initial Decision Summary Decision

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Subject: RE: ELU 03138-22 Emerson Leasing Co., III, LLC v. NJDEP-Land Use Regulation - Initial Decision Summary Decision

Batista, Diana [OAL]

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DECISION COVER SHEET

This decision

 X has

 has not

been e-mailed to the parties. Please
process accordingly.

(Exhibits in file: Yes No)