



# State of New Jersey

Department of Environmental Protection  
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PHILIP D. MURPHY  
*Governor*

CATHERINE R. MCCABE  
*Commissioner*

SHEILA Y. OLIVER  
*Lt. Governor*

|                                    |   |   |
|------------------------------------|---|---|
| FHS-AIR, LLC,                      | ) | <u>ADMINISTRATIVE ACTION</u>                |
|                                    | ) | FINAL DECISION                              |
| Petitioner,                        | ) |   |
|                                    | ) |   |
| v.                                 | ) |   |
|                                    | ) |   |
| NEW JERSEY DEPARTMENT OF           | ) | OAL DKT NOS.: ELU-FH 07873-08 & ELU-FW      |
| ENVIRONMENTAL PROTECTION, LAND USE | ) | 07874-08                                    |
| MANAGEMENT,                        | ) |   |
|                                    | ) | AGENCY REF. NOS.: 1400-07-0005.1 & 1400-07- |
| Respondent.                        | ) | 0005.2                                      |
|                                    | ) |   |
|                                    | ) |   |
|                                    | ) |   |

This Order addresses the appeal of the denial of the applications for two permits sought by Petitioner, FHS-Air, LLC (FHS), from the Department of Environmental Protection (Department): (1) a stream-encroachment permit, and (2) a freshwater-wetlands permit in accordance with the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 to -101, the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 to -30, and implementing regulations. FHS sought the permits for property sub-leased from intervenor, DM Airports, LTD (DM), an airport operator. DM terminated the sub-lease with FHS on May 31, 2019. At issue in this matter is whether FHS can continue to pursue its adjudicatory appeal now that the sub-lease with DM has been terminated. On July 19, 2019, Administrative Law Judge, Barry E. Moscovitz (ALJ) issued an Initial Decision holding that FHS cannot continue its appeal because the Department is precluded from

granting an adjudicatory hearing unless the petitioner demonstrates that it has a statutory right to a hearing or a constitutionally protected property interest affected by the permit.

The ALJ concluded that due to the termination of the sub-lease, FHS no longer has a particularized property interest allowing it to contest the denial of the freshwater-wetlands and stream-encroachment permits in this case, and that FHS should be dismissed from this case under N.J.A.C. 1:1-1.3, to avoid any additional expense and delay. After a review of the record before me and for the reasons set forth below, I ADOPT, as modified, the Initial Decision.

### **PROCEDURAL AND FACTUAL BACKGROUND**

DM is the operator of Morristown Municipal Airport, located in the Township of Hanover and the Borough of Florham Park, Morris County, under a ninety-nine-year lease with the Town of Morristown. The lease expires May 1, 2081. On August 21, 2007, DM entered into a sublease with FHS for a 7.4-acre parcel of property at the airport, identified as Site 22 and located on Block 6401, Lot 2, and Block 6501, Lot 1, on the tax map of Hanover, and Block 401, Lot 1, on the tax map of Florham Park (Site 22). Under the sublease, FHS proposed to construct a new 50,000-square foot hanger with associated offices and ancillary areas—including parking areas for aircraft and other vehicles, a rampway, and access roadways and taxiways for those vehicles.

To construct this project, FHS was required to obtain stream-encroachment and freshwater-wetlands permits from the Department. On November 2, 2007, FHS applied for a stream-encroachment permit, and on January 10, 2008, FHS applied for a freshwater-wetlands permit. The Department denied the application for the stream-encroachment permit on February 28, 2008. The denial found, in part, that the proposal to construct 100,000 square foot hanger and associated impervious surface, and to add some 35,000 cubic yards of fill, on a site

that is largely freshwater wetlands within the flood plain of Black Brook and prone to extreme flooding, could not be done in a way that adequately protects public health, safety, and welfare. The Department also denied the application for the freshwater-wetlands permit on March 31, 2008, finding that the applicant had not adequately demonstrated how the filling of 3.8 acres of freshwater wetlands and 5.5 acres of transition area would not exacerbate flooding problems in the vicinity of the project and downstream. On May 1, 2008, FHS submitted a request for an adjudicatory hearing to review the denials. DM intervened, also submitting a request for an adjudicatory hearing in support of FHS on May 1, 2008.

On July 10, 2008, the Department granted these requests and transmitted the cases to the Office of Administrative Law (OAL) as contested cases under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

For the two and a half years that followed, FHS, DM, and the Department engaged in settlement discussions regarding the permit applications and their denials. As part of the settlement discussions, FHS and DM presented various revised plans for Site 22, all in an effort to address the Department's basis for denial. These discussions proved unsuccessful. After that two-and-a-half-year period (ending in early 2011), discussion to resolve the issues relating to Site 22 ceased.

Instead, until mid-2016, FHS and DM engaged in settlement discussions with the Department regarding the resolution of separate permit application denials for two other parcels at the airport, Sites 7 and 62. However, when FHS and DM proved unsuccessful in resolving separate issues among themselves regarding a development agreement for Sites 7 and 62, DM

ended its efforts, and by letter dated August 22, 2017, withdrew its requests for adjudicatory hearing for Sites 7 and 62.

In its withdrawal letter, DM advised FHS that if it desired to move ahead with Site 22, any plans to develop the site had to first be submitted to DM for its approval. To date, FHS has made no other submission to any party and has otherwise taken no other action in this case.

DM requested an in-person settlement conference with OAL, which was scheduled for March 22, 2019. FHS later sought to convert it into a telephone status, suggesting that it wanted to discuss the development of Sites 7 and 62, which were not the subject of the hearing. DM objected, and after conferring with the Department, determined to move to dismiss FHS from this case.

On April 18, 2019, DM notified FHS that it would terminate the lease for Site 22 for the FHS' failure to develop the site—unless FHS took certain action within the twenty days under the sublease to avoid termination. When FHS failed to respond, DM notified FHS that it had terminated the sublease, effective May 31, 2019.

On June 17, 2019, DM moved to dismiss FHS from these cases for failure to prosecute their appeals. By and through its motion, DM also withdrew from these cases. The Department filed its response in support of DM's motion on June 27, 2019. On July 8, 2019, FHS filed a one-page letter in opposition to the motion; and on July 9, 2019, DM filed its response.<sup>1</sup> In its moving papers, DM certified that it terminated its sublease with FHS on May 31, 2019. In its response, FHS conceded this fact while characterizing it as improper.

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<sup>1</sup> Although FHS filed its opposition out of time under N.J.A.C. 1:1-12.2, it was still accepted and considered by the ALJ in rendering the Initial Decision. Likewise, I will also accept and consider FHS's opposition in rendering my decision.

On July 19, 2019, the ALJ issued an Initial Decision granting DM's motion to dismiss. The ALJ concluded that FHS no longer has a particularized property interest allowing it to contest the denial of the freshwater-wetlands and stream-encroachment permits in this case, and that the matter should be dismissed to avoid any additional expense and delay under N.J.A.C. 1:1-1.3. None of the parties submitted exceptions to the Initial Decision.

### **DISCUSSION**

I find that, based on DM's termination of FHS' sublease for Site 22, FHS no longer has any legal right to use the property in question under the relevant regulations and therefore this matter is moot. A matter is moot when a judicial decision would have no practical effect on the existing controversy. Greenfield v. New Jersey Dep't of Corrections, 382 N.J. Super. 254, 257-58 (App. Div. 2006) (citations omitted). If the disputed issue has been resolved, the matter is moot. DeVesa v. Dorsey, 134 N.J. 420, 428 (1993). As a general rule, courts do not decide a case if the controversy no longer exists. Ibid.

Both the Freshwater Wetlands Protection Rules, N.J.A.C. 7:7A-16.2(c), and the Flood Hazard Area Control Act Rules, N.J.A.C. 7:13-18.2(c) limit eligible permit applicants only to certain persons who own or control the property on which regulated activities are proposed:

1. The owner(s) of a site on which a regulated activity is proposed or conducted, or which is the subject of a letter of interpretation;
2. An agent designated by the owner(s) of a site to obtain or operate under a letter of interpretation or permit on behalf of the owner(s);
3. A public entity proposing an activity within a right-of-way or easement that is held or controlled by that entity or that will be appropriated by that entity under the power of eminent domain; or
4. A person that has the legal authority to perform the activities proposed in the application on the site, and to carry out all requirements of this chapter.

As explained in the rule statement “[t]he rules limit those who may make a permit application to ensure that Department resources are only expended on applications submitted by those with the necessary authority to conduct the activity for which authorization is sought.” 49 N.J.R. 834(a). Further, “[t]he Department cannot authorize the use of a permit unless the proposed activities will occur on a property which the applicant owns or controls. ...[t]he Department must be able to confirm that the owner of the property is aware and has consented to all proposed permit activities.” 39 N.J.R. 4573(a).

As a lessee, FHS falls under the fourth option, “a person (or entity) that has legal authority to perform the application on the site, and to carry out all requirements of this chapter.” DM, however, certified in their moving papers that it terminated its sublease with FHS on May 31, 2019. FHS acknowledged the termination of the sublease in its opposition to DM’s motion, though characterizing it as improper.

Based on these factual assertions, I find sufficient evidence in the record to indicate that the sublease between DM and FHS for Site 22 has been terminated. As FHS no longer has a sublease with DM, FHS no longer “has the legal authority to perform the activities proposed” in the freshwater-wetlands and stream-encroachment permits it sought for Site 22. See, N.J.A.C. 7:7A-16.2(c) and N.J.A.C. 7:13-18.2(c). In short, since there is no sublease between DM and FHS, FHS is no longer eligible to even apply for these permits. Under these circumstances, a decision on the merits is no longer necessary given that FHS has lost its right to use the property at Site 22. FHS’ legal argument that the Department unlawfully denied its applications for freshwater-wetlands and stream-encroachment permits is thereby moot.

Based on the above, I find that FHS no longer has a relationship to the property necessary under the Department's regulations to apply for, let alone secure, the subject permits, rendering the matter moot. I do, however, modify the Initial Decision to make the dismissal of this matter without prejudice to FHS. Should a legal action concerning the termination of the sublease be resolved in FHS' favor, thus restoring the sublease between DM and FHS, FHS may take appropriate action to renew its adjudicatory appeal.

For the reasons above, I MODIFY, the ALJ's findings.

IT IS SO ORDERED.

DATE:

11/27/19



Catherine R. McCabe, Commissioner  
New Jersey Department of  
Environmental Protection

FHS-AIR, LLC

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAND USE MANAGEMENT,

OAL DKT NO.: ELU-FH 07873-08 & ELU-FW 07874-08

AGENCY REF. NO.: 1400-07-0005.1 & 1400-07-005.2

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