



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NOS. ELU-FH 07873-08

& ELU-FW 07874-08

AGENCY DKT. NO. 1400-07-0005.1 &
1400-07-0005.2

FHS-AIR, LLC,

Petitioner,

v.

**NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
LAND USE MANAGEMENT,**

Respondent.

Dennis M. Toft, Esq., for petitioner (Wolff & Samson, attorneys)

Jason Stypinski, Deputy Attorney General, for respondent (Gurbir S. Grewal,
Attorney General of New Jersey, attorney)

Robert Goodsell, Esq., for DM Airport, LTD, intervenor (Post Polak, attorneys)

Record Closed: July 19, 2019

Decided: July 19, 2019

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

Petitioner, FHS-Air, LLC (FHS), a developer, appealed the denial of permits it sought from the Department of Environmental Protection (DEP) on property it leased from intervenor, DM Airports, LTD (DM), an airport operator. On May 31, 2019, DM terminated the lease. Can FHS pursue its adjudicatory hearing? No. The DEP 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. In re Amico/Tunnel Carwash, 371 N.J. Super. 199, 210 (App. Div. 2004).

PROCEDURAL HISTORY

On November 2, 2007, FHS applied for a stream-encroachment permit; on February 28, 2008, the DEP denied the application; and on May 1, 2008, FHS appealed the determination, requesting an adjudicatory hearing.

Similarly, on January 10, 2008, FHS applied for a freshwater-wetlands permit; on March 31, 2008, the DEP denied the application; and on May 1, 2008, FHS appealed the determination, also requesting an adjudicatory hearing.

Meanwhile, DM had moved to intervene and had also requested adjudicatory hearings, in support of FHS.

On July 10, 2008, the DEP 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.

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.

On June 27, 2019, the DEP filed its response in support of the motion; on July 8, 2019, FHS filed its opposition; and on July 9, 2019, DM filed its response.¹

These cases are hereby consolidated for purposes of disposition.

FINDINGS OF FACT

Based upon the documents submitted in support of the motion to dismiss, I **FIND** the following as **FACT**:

DM is the operator of Morristown Municipal Airport, located in the Township of Hanover and the Borough of Florham Park, 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 DEP. On November 2, 2007, FHS applied for a stream-encroachment permit, and on January 10, 2008, FHS applied for a freshwater-wetlands permit, but on February 28, 2008, the DEP denied the application for the stream-encroachment permit, and on March 31, 2008, the DEP denied the application for the freshwater-wetlands permit.

¹ Although FHS filed its opposition out of time under N.J.A.C. 1:1-12.2, it was still accepted and considered in rendering this decision.

On May 1, 2008, FHS submitted a request for an adjudicatory hearing to review the denials, and on May 1, 2008, DM also submitted a request for an adjudicatory hearing in support of FHS.

For the two and a half years that followed, FHS, DM, and the DEP engaged in settlement discussions regarding these permits and their denials. As part of those settlement discussions, FHS and DM presented various revised plans for Site 22, all in an effort to address the reasons the DEP denied the applications for the permits.

In early 2011, FHS and DM advised the DEP and this tribunal that they were considering pursuing approval of a project that would combine Site 22 with Sites 7 and 62, which were two other parcels at the airport that were subject to separate requests for adjudicatory review, challenging the DEP's denial of wetlands and flood-hazard-area permits. Over the course of approximately one year, discussions occurred between DM and FHS regarding possible development of all three sites. By mid-2013, however, FHS and DM decided to abandon the potential development of Site 22 and focus on Site 7 instead, with a view toward resolving the bases for the denials of the permits for Sites 7 and 62. Accordingly, since early 2011, no submissions have been made to the DEP regarding Site 22, and no settlement discussions were convened with the DEP concerning Site 22.

Until mid-2016, FHS and DM engaged in settlement discussions with the DEP regarding the resolution of the permit denials for Sites 7 and 62. Those discussions included submission of revised engineering plans for Site 7, which addressed flood-hazard-area requirements, but by the end of 2016, despite repeated requests from DM that FHS execute an agreement with DM regarding the development of Sites 7 and 62, FHS failed and refused to execute any such agreement with DM to develop those sites. Accordingly, DM ended its efforts to obtain such an agreement, and by letter dated August 22, 2017, withdrew its requests for adjudicatory hearing for Sites 7 and 62. As the letter withdrawing those requests notes, the only other party to those requests for adjudicatory hearing, Tri-State Volo Morristown, LLC, was no longer a party to those requests, and, as a result, those cases were withdrawn from this tribunal in their entirety.

The attorney for FHS and the deputy attorney general for the DEP were copied on the letter dated August 22, 2017, and by a letter of the same date, FHS was further advised that if FHS desired to move ahead with Site 22, any plans to develop the site—whether in connection with this case or otherwise—had to be submitted to DM first for its approval.

To repeat, the last submission FHS made to the DEP regarding any possible resolution of the denials of the permits for Site 22 was in early 2011, and to date, FHS has made no other submission to any party and has otherwise taken no other action in this case.

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

Before filing its motion, DM notified FHS that it determined to terminate the lease for Site 22 for the failure of FHS to develop the site—unless FHS took certain action within the twenty days under the lease to avoid termination. When FHS failed to respond, DM notified FHS that it had terminated the lease, effective May 31, 2019.

As of May 31, 2019, FHS no longer has a sublease with DM to develop Site 22. FHS, however, counters that the termination of the sublease was improper. Moreover, FHS indicates that it is not ready to give up its pursuit of the project at the airport. Regardless, the fact remains that the sublease was terminated.

CONCLUSIONS OF LAW

State agencies are prohibited from granting third-party hearing rights unless a hearing right exists as a matter of federal law or state statute, N.J.S.A. 52:14B-3.1(d), and the DEP 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, In re Amico/Tunnel Carwash, 371 N.J. Super. 199, 210 (App. Div. 2004).

Meanwhile, the rules of administrative procedure are to be construed, among other things, to eliminate unjustifiable expense and delay. N.J.A.C. 1:1-1.3.

In this case, the DEP denied the applications for freshwater-wetlands and stream-encroachment permits for Site 22, and FHS appealed those determinations in 2008. The parties then engaged in settlement discussions immediately through 2016, which changed the scope of the project and resulted in my notice of January 28, 2019, for the parties to appear in-person for a settlement conference on March 22, 2019. FHS, however, refused. In fact, FHS has made no submissions or taken any actions whatsoever in either of these two cases since 2011. Meanwhile, DM terminated its sublease with FHS.

The fact that FHS contends that the termination of the sublease was improper is just a point of information. That legal issue is not before me. More significantly, its indication that it is not ready to give up its pursuit of the project at the airport belies its actions in this case. Therefore, I **CONCLUDE** 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 FHS should be **DISMISSED** from this case under N.J.A.C. 1:1-1.3, to avoid any additional expense and delay.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that this case is hereby **DISMISSED** under N.J.A.C. 1:1-1.3.

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.

DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

July 19, 2019

Date Mailed to Parties:

dr