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MR. RICHARD LUPO/DORO DOLCI, LLC, Petitioners, v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAND USE REGULATION, Respondent.	)	ADMINISTRATIVE ACTION FINAL DECISION (Consolidated) OAL DKT NO.: ELU 09573-21 AGENCY REF. NO.: 1519-08-0006.2 LUP200001
TODD SAWYER, Petitioner, v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAND USE REGULATION, Respondent.	)	OAL DKT NO.: ELU 09574-21 AGENCY REF. NO.: 1519-08-0006.3 LUP200001
PAUL AND PEGGY ANNE KALAMARAS, Petitioners, v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAND USE REGULATION, Respondent.	)	OAL DKT NO.: ELU 04676-22 AGENCY REF. NO.: 1519-08-0006.4 LUP200001

This order addresses the consolidated challenges by Richard Lupo/Doro Dolci LLC, Todd Sawyer, and Paul and Peggy Anne Kalamaras (collectively, Petitioners) of the Department of Environmental Protection's (Department) denials of Petitioners' respective applications for Coastal Area Facility Review Act (CAFRA) General Permits #4 (GP-4) for the construction of single-family homes, pools, cabanas, and garages on adjacent properties in the Borough of Mantoloking, Ocean County (Properties), pursuant to the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 to -51, and its implementing Coastal Zone Management Rules (CZM Rules), N.J.A.C. 7:7. In each instance, the Department determined that Petitioners' proposed developments failed to meet the requirements of the CZM Rule's Coastal High Hazard Areas Rule, N.J.A.C. 7:7-9.18, and Dunes Rule, N.J.A.C. 7:7-9.16, or the narrow exceptions to those rules at N.J.A.C. 7:7-6.4(f) and (h).

On February 16, 2023, Administrative Law Judge Tricia M. Caliguire (ALJ) issued an initial decision (Initial Decision) granting in part and denying in part the Department's motion for summary decision and denying Petitioners' cross-motion for the same. The ALJ found the Department was entitled to summary decision as to the Coastal High Hazard Areas Rule because the undisputed facts show Petitioners cannot meet the infill exception to that rule. The ALJ concluded that summary decision is not appropriate on the issue of Petitioners' compliance with the Dunes Rule because questions of material fact and law remain.

For the reasons set forth below, I ADOPT the Initial Decision as MODIFIED herein.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioners seek to develop three adjacent properties, each consisting of two lots: Lots 2 and 2.01, Lots 3 and 3.01, and Lots 4 and 4.01, on Block 23 in the Borough of Mantoloking, Ocean County (the Properties). Each property fronts Ocean Avenue to the west (Lots 2, 3, and 4), and

features an adjoining beachfront parcel (Lots 2.01, 3.01, and 4.01) that fronts the public beach and Atlantic Ocean to the east. Prior to Superstorm Sandy,[1] the three Properties functioned as one, with a single home reaching from Lots 2 to 4 and a dune separating the home from the beach and Atlantic Ocean. Despite the presence of the dune, the home was extensively damaged, and the dune was washed away. The home was thereafter demolished and the Properties were graded and leveled. All three Properties have been vacant since.

Currently, the vacant Properties are owned by Emil and Yvonne Solimine (the Solimines). Although Petitioners do not own the Properties, they have each entered into contracts to separately purchase one of the three Properties, conditioned on their receipt of CAFRA permits. To receive such permits and undertake development on the Properties, Petitioners must meet the requirements of CAFRA's implementing CZM Rules. The rules are intended to ensure that development along coastal areas of the State is undertaken in a manner that is both "protect[ive] [of] the natural environment" and, most critically here, ensures "[s]afe, healthy and well-planned coastal communities and regions" by "promot[ing] concentrated patterns of development" and "[p]reserve[ing] and enhance[ing] beach and dune systems and wetlands, and manag[ing] natural features to protect the public from natural hazards." N.J.A.C. 1:1(c)6. Such natural hazards include coastal storms, flooding, and sea-level rise, which have become more frequent and intense in recent years and are projected to worsen due to climate change. Particularly pertinent to this matter are, as discussed below, the Coastal High Hazard Areas Rule, N.J.A.C. 7:7-9.18, and the Dunes Rule, N.J.A.C. 7:7-9.16, and the narrow exceptions to those rules at N.J.A.C. 7:7-6.4(f) and (h).

[1] Superstorm Sandy (also, Hurricane Sandy) was a Category 3 Atlantic hurricane that caused unprecedented damage to the coastal Mid-Atlantic region of the United States in late October 2012, including many homes in the Borough of Mantoloking. One of the communities hit hardest by Superstorm Sandy, the Borough was left in pieces by a storm surge that washed entirely across the Barnegat Peninsula, creating multiple breaches from the Atlantic Ocean to the Barnegat Bay. The largest of the breaches created a channel between the ocean and bay at the intersection with County Route 528.

Under the Coastal High Hazard Areas Rule, residential and commercial development is prohibited in coastal high hazard areas. Coastal high hazard areas are flood prone areas subject to high velocity waters (V zones) as delineated by the Federal Emergency Management Agency (FEMA), and areas within 25 feet of oceanfront shore protection structures, which are subject to wave run-up and overtopping. Development is prohibited in coastal high hazard areas because they are unusually "vulnerable to severe storm damage," as witnessed during Superstorm Sandy, and as such present extraordinary danger to persons and property even "behind bulkheads, revetments and seawalls inshore of the V zone limit. . . ." N.J.A.C. 7:7-9.19(i). All three Properties in this matter lie entirely within a coastal high hazard area.

Development of property located partially or completely within a coastal high hazard area can be permitted, however, under a limited exception known as the Infill Rule. In accordance with the Infill Rule, development may be permitted where 1) such development would not alter the existing need for public expenditure in shore protection; 2) the risk involved is reduced to a minimum in terms of the quantity and intensity of developments that will be permitted; and 3) it would allow the infill sites to be developed to the degree currently existing in the area. N.J.A.C. 7:7-15.2(h). To ensure this, the Infill Rule requires, among other things, that an existing "house or commercial building is located within 100 feet of each lot line running roughly perpendicular to the mean highwater line." N.J.A.C. 7:7-6.4(h)1.iii and 7:7-15.2(e)6.i.(3) (emphasis added). Here, each lot line running perpendicular to the Atlantic Ocean is not located within 100 feet of an existing house or commercial building. Given the orientation of the Properties, the lot lines running roughly perpendicular to the mean high water line are the northern and southern lot lines of each Property. While a single-family dwelling is located within 100 feet of the southern lot lines of Lots 3 and 4, no house or commercial building is located within 100 feet of the southern lot line of the

remaining lots or the northern lot line of any of the Properties. Accordingly, the requirements of the Infill Rule cannot be met.

Even where the Infill Rule might otherwise be met, under the Dunes Rule, development is prohibited on a dune, "except for development that has no practicable or feasible alternative in an area other than a dune and that will not cause significant adverse long-term impacts on the beach and dune system," either individually or in conjunction with other existing or proposed development or activity, N.J.A.C. 7:7-9:16(b).[2] As discussed, a dune that had existed at the Properties was washed away during Superstorm Sandy. However, as detailed below, a new dune was since formed. Although the parties in this matter agree that the new dune covers Lots 2.01, 3.01, and 4.01, the parties dispute whether that dune extends over Lots 2, 3, and 4.

In 2013, after Superstorm Sandy had washed away the previous dune, an effort to rebuild had begun. As part of that effort, the Solimines entered into three identical Deeds of Dedication and Perpetual Storm Damage Reduction Easement (Deeds of Easement), by which they granted the Borough of Mantoloking and the State of New Jersey the right to use a delineated portion of the lots to, among other things, construct storm damage reduction measures, including a dune. As authorized in the Deeds of Easement, the New Jersey Department of Transportation (DOT) installed a sheet metal wall that extends thirty feet below ground and fifteen feet above ground between Ocean Avenue and the beach (DOT wall). The DOT wall divides Lot 2 from 2.01, Lot 3 from 3.01, and Lot 4 from 4.01. In 2018, the U.S. Army Corps of Engineers (ACOE) formed a new, roughly one-mile-long dune along the Mantoloking beachfront from Lot 1 to Lot 43 (ACOE

[2] There are two exceptions to this rule, at N.J.A.C. 7:7-6.4(h), but neither Petitioners nor the Department contend that either exception is applicable here.

dune).[3] As a result, the DOT wall is now entirely covered by the ACOE dune and is not visible. Sand crests along the DOT wall at approximately twenty feet on each of the Properties and slopes westward across the Properties to an elevation of approximately five feet at Ocean Avenue.

Consequently, the Properties are now at least partially covered by the new ACOE dune formed over the DOT wall. There is no dispute that among the six lots, Lots 2.01, 3.01, and 4.01 are entirely covered by the new ACOE dune. Petitioners assert, however, that the DOT wall separates the ACOE dune (on Lots 2.01, 3.01, and 4.01) from the areas of the Properties proposed for residential development (Lots 2, 3, and 4), and in fact "precludes a sand dune from developing on [Lots 2, 3, and/or 4]." Petitioners contend that the entirety of their proposed development would be undertaken westward of the DOT wall, on Lots 2, 3, and 4, beyond the ACOE dune toward Ocean Avenue.

A dune is defined under the Dunes Rule as a "wind or wave deposited or man-made formation of sand (mound or ridge) that lies generally parallel to, and landward of, the beach and the foot of the most inland dune slope." N.J.A.C. 7:7-9.16(a). Although the Dunes Rule does not require any particular degree of slope, understanding the nature of the slope of sand on the Properties is necessary to determine the location of the base of the dune. While sand now slopes inland from the crest of the ACOE dune to Ocean Avenue, the degree of slope varies on each lot moving seaward from Ocean Avenue. Petitioners' expert stated that Lots 2 and 3 have an average slope of 0.6% from Ocean Avenue to 164.4 feet east, 3.9% from 164.4 feet east of Ocean Avenue to 319.9 feet east of Ocean Avenue, and an average slope of 45.9% from there to the crest of the ACOE dune. Petitioners' expert stated that Lot 4 has an average slope of 2.3% from Ocean Avenue

[3] The Department requests that reference in the Initial Decision to an "ACOE wall" be corrected to "DOT wall" because the metal wall within the ACOE dune was built by the New Jersey Department of Transportation (DOT). The Initial Decision is so MODIFIED and references to the DOT Wall are reflected as such herein.

to 185.2 feet east, 2.6% from 185.2 feet east to 313.8 feet east, and 43% from there to the crest of the ACOE dune.

In 2020 and 2021, Petitioners sought but were denied GPs-4 to construct three separate single-family homes, pools, cabanas, and garages on the respective Properties. In issuing the denials, the Department determined Petitioners' proposed developments did not meet the requirements of the aforementioned rules. More specifically, the Department determined the proposed developments did not meet the Coastal High Hazard Areas Rule and could not satisfy the Infill Rule exception because no house or commercial building is located within 100 feet of the northern lot line of any of the Properties. The Department also determined Petitioners' proposed developments did not meet the requirements of the Dunes Rule, or satisfy its narrow exceptions, because all six lots of the three Properties were entirely covered by a dune.

Petitioners challenged the Department's determinations and separately requested and were granted adjudicative hearings. The Department transmitted the first two captioned matters to the Office of Administrative Law on November 18, 2021, followed by the third captioned matter on June 9, 2022, and the matters were consolidated. On November 18, 2022, the Department moved for summary decision. Petitioners followed on December 12, 2022 with a cross motion for the same.

The ALJ issued an Initial Decision on February 16, 2023, granting in part (as to the Coastal High Hazard Areas Rule) and denying in part (as to the Dunes Rule) the Department's motion for summary decision and denying Petitioners' cross-motion for the same. The ALJ concluded that the Department properly denied Petitioners' permit applications because Petitioners could not satisfy the Infill Rule exception to the requirements of the Coastal High Hazard Areas Rule. The ALJ found that the Infill Rule plainly states that an applicant for a GP-4 is exempt from the Coastal

High Hazard Areas Rule only if a house or commercial building is located within 100 feet of each of the lot lines that run roughly perpendicular to the high water line. Here, the undisputed facts showed that no house or commercial building is located within 100 feet of the northern lot line of any of the Properties. The ALJ concluded that the Department's denial was therefore not arbitrary, capricious, or otherwise not in accordance with law. Accordingly, the ALJ granted summary decision in favor of the Department as to the Coastal High Hazard Areas Rule.

The ALJ concluded that summary judgment was not appropriate with regard to the Dunes Rule. The ALJ found that expert testimony would be needed to make a determination regarding the Dunes Rule because one could not determine as a matter of law whether the Properties are entirely covered by a dune. The ALJ similarly found that one could not determine as a matter of law whether there was "no practicable or feasible alternative" location for the proposed developments other than on the dune or whether development would "not have adverse long-term impacts to the natural functioning of the beach and dune system" as required under the Dunes Rule at N.J.A.C. 7:7-9.16(b). As such, the ALJ denied the Department's motion for summary decision as to the Dunes Rule.

Lastly, the ALJ was not persuaded by Petitioners' assertion that a contractual right to build within the footprint as designated by the Borough of Mantoloking was established when the State and the Solimines agreed in the Deeds of Easement that "nothing herein is intended or shall be deemed to alter the boundary lines or setback lines of the Property." The ALJ concluded that the boundary lines or setback lines of the Properties are not altered merely by the Department exercising its authority to regulate development on the Properties. Development within those boundary lines was already subject to the Department's regulatory authority as set forth in

CAFRA, and CAFRA supersedes Mantoloking's zoning of the Properties for residential use. Accordingly, the ALJ denied Petitioner's cross motion for summary decision.

Petitioners filed exceptions to the Initial Decision on February 28, 2023. The Department filed exceptions to the Initial Decision on March 1, 2023, and a reply to Petitioners' exceptions on March 7, 2023. The substance of Petitioners' and the Department's submittals are addressed where appropriate below.

DISCUSSION

Under N.J.A.C. 1:1-12.5, a party is entitled to summary decision where the moving party shows that there is no genuine issue as to any material fact challenged and should prevail as a matter of law. E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010). To prevail, the non-moving party must submit responding affidavit(s) setting forth specific facts to show that there is a genuine issue that can be determined only in an evidentiary hearing. N.J.A.C. 1:1-12.5(b); see Housel v. Theodoridis, 314 N.J. Super. 597, 604 (App. Div. 1998) (to defeat a summary judgment motion, the non-moving party cannot simply "sit on his or her hands," but must present specific facts showing there is a genuine issue for trial). Like the standard for summary judgment under N.J. Court Rule 4:46-2, the standard on a motion for summary decision requires the court or agency to determine whether the evidence, when viewed in the light most favorable to the non-moving party, is "'sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.'" Piccone v. Stiles, 329 N.J. Super. 191, 194 (App. Div. 2000) (quoting Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995)). And even though the allegations of the pleadings may raise an issue of fact, if the other papers show that, in fact, there is no real material issue, then summary judgment should be granted.

Leslie Blau Co. v. Alfieri, 157 N.J. Super. 173, 201 (App. Div. 1978) (citing Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 75 (1954)).

As discussed below in sections I, II, and III, the ALJ's ruling granting the Department's motion for summary decision in part and denying in part, as well as denying Petitioners' cross motion for summary decision, was appropriate under these circumstances.

I. Coastal High Hazard Areas Rule

The CAFRA permits Petitioners seek first require that Petitioners' proposed developments comply with the requirements of the Department's Coastal High Hazard Areas Rule. The Coastal High Hazard Areas Rule prohibits residential and commercial development in coastal high hazard areas, with limited exceptions to permit certain construction in areas that are already highly developed because such infill development would not alter the existing need for public expenditure in shore protection. N.J.A.C. 7:7-15.2(h). The Infill Rule, as discussed above, allows development partially or completely within a coastal high hazard area if, among other requirements, "[a] house or other commercial building is located within 100 feet of each of the lot lines that run roughly perpendicular to the mean high water line." N.J.A.C. 7:7-6.4(h)1.iii and 15.2(e)6.i.(3). The rule directs that the Department measure the required 100 feet "outward from each lot line, along a line generally parallel to the mean high water line." N.J.A.C. 7:7-6.4(h)1.iii, 9.18(b) and (c), and 7:7-15.2(e)6.i.(3).

Here, due to the orientation of the Properties, the parties agree that the lot lines running roughly perpendicular to the mean high water line are the northern and southern lot lines of each Property. Accordingly, the Department measured 100 feet outward and parallel to the mean high water line from the northern and southern lot lines of each Property. In doing so, the Department found that a single-family dwelling is located within 100 feet of the southern lot lines of Lots 3

and 4, but no house or commercial building is located within 100 feet of the northern lot line of any of the Properties. As such, the Department determined that Petitioners could not satisfy the Infill Rule.

Petitioners do not dispute the Department's measurements or that no house or commercial building is located within 100 feet of the northern lot line of any of the Properties. Indeed, Petitioners do not challenge the Department's determination that the Infill Rule has not been satisfied. Rather, Petitioners assert that the Department's denial of their CAFRA permit applications was inappropriate because the Department had previously permitted residential development on properties within the same tax block as Petitioners' Properties. According to Petitioners, those properties were also located within a coastal high hazard area and, at the time of application, no "valid authorized" house or commercial building was located within 100 feet of the relevant lot lines. Br. of Petitioners, Ex. Z. However, as the Department has asserted, and the ALJ has confirmed, previous permitting decisions regarding unrelated lots in Mantoloking or elsewhere are not material or dispositive in this matter.

The ALJ found and I concur that the Infill Rule does not require that the Department determine under what conditions neighboring properties or any surrounding buildings were constructed, under which class of permit, or even whether the buildings were permitted at all. Instead, the Department is required to determine, in accordance with the plain language of the Infill Rule, whether a house or commercial building is located within 100 feet of each of the lot lines that run roughly perpendicular to the high water line.[4] If no house or building is so situated, then the Infill Rule is not satisfied and the permit must be denied. To the extent Petitioners claim

[4] As the ALJ correctly found, because the language of the regulation is not ambiguous, it is unnecessary to reach beyond the text of the regulation.

that the Department erroneously issued other unrelated permits, the ALJ found and I concur that an allegation, whether proven or not, that the Department may have erred in issuing another permit does not bind the Department to continued error. See Doyal v. New Jersey Dept. of Envtl. Prot., 390 N.J. Super. 185, 193 (App. Div. 2007) (finding that a reviewing court is obligated to "construe the statute to effectuate the plainly expressed legislative intent…rather than to perpetuate an administrative construction that the [Department] now recognizes was erroneous.").

Consequently, the ALJ concluded and I concur that the Department's application of the Infill Rule was not arbitrary, capricious or unreasonable. The Department denied Petitioners' permit applications because Petitioners simply could not satisfy the limited exception for infill development. The parties do not dispute this. Nevertheless, Petitioners take exception to the ALJ's conclusion here. Petitioners contend the ALJ erred, not merely in finding the Department's determination was not arbitrary, capricious, or unreasonable, but in applying the Infill Rule at all. According to Petitioners, the Infill Rule is statutorily unsupported and open-ended, should not be applied in an otherwise heavily developed area, and that their permit applications should be treated the same as those of homeowners who rebuilt storm-damaged homes in the immediate aftermath of Superstorm Sandy. In short, it appears that Petitioners now seek to challenge the Infill Rule itself. I note the proper forum for such a challenge to the statutory basis of a Department rule is the New Jersey Superior Court, Appellate Division. See Pascucci v. Vagott, 71 N.J. 40, 51-52 (1976). As such, I cannot address Petitioners' rule challenge in this decision.

Petitioners also allege a lack of candor from the Department with regard to its application of the Infill Rule. According to Petitioners, while the Department was asserting that Petitioners had not satisfied the Infill Rule, it had simultaneously issued a GP-4 for Block 23, Lot 56, which is, according to Petitioners, similarly situated to Petitioners' Properties. Petitioners assert they were

made aware of this only after the briefing period in this matter closed, yet the Department had known about this permit prior to briefing. As Petitioners' assertion here relies on purported evidence not presented at the adjudicatory hearing, such evidence is not before me. In accordance with N.J.A.C. 1:1-18.4(c), "[e]vidence not presented at the hearing shall not be submitted as part of an exception, nor shall it be incorporated or referred to within exceptions." Any motion to reopen a hearing, after an initial decision has been filed, and thus submit evidence previously unpresented, must be properly addressed as such to the agency head. N.J.A.C. 1:1-18.5. There is no such motion here. To the extent Petitioners intend to introduce new evidence by taking exception to the Initial Decision, I cannot address such evidence beyond noting, as discussed above, that the disposition of other unrelated permits is not material in this matter.

Finally, Petitioners contend that, because the ALJ's ruling precludes the development proposed on Lots 2, 3, and 4, an inverse condemnation claim is triggered. Relying on Dragon v. New Jersey Dept. of Envtl. Prot., 405 N.J. Super. 478 (App. Div. 2009), Petitioners contend the Department may waive the Infill Rule to avoid an unconstitutional taking of property and exposure to an inverse condemnation claim. As such, Petitioners urge that the ALJ's Initial Decision be rejected and the rule waived accordingly. Petitioners, however, have not and cannot at this point establish a regulatory takings claim and thus the Department cannot undertake reconsideration of or waive the rule as Petitioner requests.

The Court in Dragon specifically discussed N.J.A.C. 7:7-19.2, which sets forth the factors the Department must evaluate in order to reconsider (that is, waive) the application of any requirement under the CZM rules.[5] The factors include whether the property owner's investments

[5] N.J.A.C. 7:7-1.10, as cited by the Court, has since been recodified at N.J.A.C. 7:7-19.2. See 47 N.J.R. 1392(a) (July 6, 2015).

were reasonable and reflected reasonable expectations, the minimum beneficial economically viable use of the property, and the environmental impacts of that use. N.J.A.C. 7:7-19.2(b). Any waiver of a requirement based on the above evaluation can then be made "only if strict guidelines are met . . . ." Dragon, 405 N.J. Super. at 490. In accordance with N.J.A.C. 7:7-19.2(g), a property owner may request the Department waive a requirement only after (1) the conclusion of any administrative and/or judicial appeal of the permit decision; and (2) a court has determined that the issuance, modification, or denial of a coastal permit without reconsideration would result in a taking of property without just compensation. As condition neither has occurred here, no regulatory takings claim can arise at this time. Thus, no reconsideration or waiver can be made by the Department.

As a result, I find that Petitioners' claim concerning alleged inverse condemnation is not ripe and I ADOPT the ALJ's conclusion that summary decision in favor of the Department is appropriate as to the Coastal High Hazard Areas Rule.

II. Dunes Rule

Even if Petitioners' proposed developments could satisfy the requirements of the Coastal High Hazard Areas Rule, the permits Petitioners seek also require compliance with the Dunes Rule. The Dunes Rule prohibits construction on a dune, "except for development that has no practicable or feasible alternative in an area other than a dune and that will not cause significant adverse long-term impacts on the beach and dune system," either individually or in conjunction with other existing or proposed development or activity, N.J.A.C. 7:7-9:16(b). A dune is defined under the Dunes Rule as a "wind or wave deposited or man-made formation of sand (mound or ridge) that lies generally parallel to, and landward of, the beach and the foot of the most inland

dune slope." N.J.A.C. 7:7-9.16(a). Dunes "include the foredune, secondary or tertiary dune ridges and mounds, and all landward dune ridges and mounds, as well as man-made dunes[.]" Id.

As discussed above, the parties do not dispute that Lots 2.01, 3.01, and 4.01 are covered by a dune stretching from the crest of the DOT wall to the mean high water line. The parties do dispute, however, whether that dune extends over Lots 2, 3, and 4. Petitioners contend the dune does not, based on the definition of "primary frontal dune" at N.J.A.C. 7:7-6.4(f)1ii rather than the broader definition of "dune" as described above. A primary frontal dune is defined at N.J.A.C. 7:7-6.4(f)1ii to mean "a continuous or nearly continuous mound or ridge of sand with relatively steep waterward and landward slopes[.]" In contrast, the definition of "dune" for the purposes of the applicability of the Dunes Rule does not require that the mound or ridge be continuous or have relatively steep waterward and landward slopes. Relying on Seigel v. New Jersey Dept. of Envtl. Prot., 395 N.J. Super. 604 (App. Div. 2007), Petitioners assert their proposed developments are not on a primary frontal dune and should therefore be permitted. However, both Petitioners' and the Initial Decision's reliance on Seigel is misplaced.

The decision in Seigel is focused on an exception to the Dunes Rule at N.J.A.C. 7:7-6.4(f). Seigel, 395 N.J. Super. at 614-15, 617-20. Development may be permitted on a secondary or tertiary dune[6] if a permit applicant can satisfy all the elements under the exception. N.J.A.C. 7:7-6.4(f)1i-iv. Here the definition of "primary frontal dune" becomes relevant, as the second element of the exception requires that the cross-sectional area waterward of the crest of the primary frontal dune be greater than 1,100 square feet. N.J.A.C. 7:7-6.4(f)1ii. The definition of primary frontal dune used by Petitioners and discussed in Seigel is strictly, as stated at N.J.A.C. 7:7-6.4(f)1ii, for

[6] Secondary and tertiary dunes are defined as the second and third dune mound or ridge, respectively, landward from and adjacent to the primary frontal dune. N.J.A.C. 7:7-6.4(f)1ii.

the purposes of analyzing this element of the subject.[7] No such analysis is necessary here because Petitioners cannot satisfy the first element of the exception, which requires that the development be more than 500 feet from the mean high water line. Petitioners admit their Properties are not more than 500 feet from the mean high water line. As such, Petitioners cannot satisfy the exception at N.J.A.C. 7:7-6.4(f).

As a result, Petitioners' proposed development must comply with the broader Dunes Rule at N.J.A.C. 7:7-9.16, which is not concerned with whether the dune is primary frontal, secondary or tertiary. The proposed development therefore depends on whether the sloping sand on which Petitioners intend to build is a "dune" as defined at N.J.A.C. 7:7-9.16(a), *i.e.*, a "wind or wave deposited or man-made formation of sand (mound or ridge) that lies generally parallel to, and landward of, the beach and the foot of the most inland dune slope." Using this definition, Petitioners contend there is no dune on Lots 2, 3, and 4, and that the DOT wall in fact precludes the formation of a dune landward of the wall. Yet the Dunes Rule expressly defines "dune" as a "mound or ridge" of sand that may be man-made and contains no exception for the portion of a mound or ridge that is landward of its crest or stabilized by man-made internal structures such as the DOT wall. The Rule expressly states the "[f]ormation of sand immediately adjacent to beaches that are stabilized by retaining structures . . . and other measures are considered to be dunes . . . ." Ibid.

Still, it does not follow from the above that the entirety of the Properties is in fact covered by the mound or ridge. The parties do not dispute that the sand on all three Properties exhibits a sharp increase in slope at a point between 313 and 320 feet waterward of Ocean Avenue. Although

[7] N.J.A.C. 7:7-6.4(f)1ii provides, "[f]*or the purpose of this subparagraph*, primary frontal dune means a continuous or nearly continuous mound or ridge of sand with relatively steep waterward and landward slopes immediately landward of and adjacent to the beach, and subject to erosion and overtopping from high tides and waves during major coastal storms." (emphasis added).

the Dunes Rule does not require any particular degree of slope, whether the abrupt change in slope of sand on the Properties marks the base of the dune containing the DOT wall cannot be determined as a matter of law. Questions concerning where the dune on the Properties ends, whether alternatives to building on the dune are impractical or infeasible,[8] and whether any construction would adversely impact the beach-dune system given heavy development along the surrounding beachfront, involve disputed material facts which preclude summary decision on this issue.

Therefore, I ADOPT the ALJ's conclusion that summary decision is not appropriate as to the Dunes Rule.

III. **Easement Deeds**

Petitioners assert that a contractual right to build within the footprint of the Properties as designated by the Borough of Mantoloking was established when the State and the Solimines agreed in the Deeds of Easement that "nothing herein is intended or shall be deemed to alter the boundary lines or setback lines of the Property." In their exceptions, Petitioners contend the ALJ erred in determining this issue on the basis of State preemption of an area of law (in this case, land use regulation). Petitioners assert the issue is instead governed solely by the law of contracts. However, Petitioners cite no authority supporting their argument that by entering into contracts for easements that preserve the boundary and setback lines of properties, the State relinquishes its authority to regulate the use of those properties.

The Borough of Mantoloking establishes the boundary lines and setback lines of properties

[8] Nonetheless, I hereby reject footnotes 8 and 9 of the Initial Decision. An exception to the prohibition of development on a dune can exist if there is "no practicable or feasible alternative in an area other than a dune . . . ." N.J.A.C. 7:7-9.16(b). To show no exemption applies here, the Department indicated what it deemed to be a practicable and feasible alternative. Footnotes 8 and 9 are observations on that alternative. However, the ALJ did not undertake a complete analysis of alternatives, and Petitioners neither proffered any nor demonstrated that the Department's alternative was infeasible. Nevertheless, I do not read footnotes 8 and 9 to draw findings or conclusions of fact or law. Therefore, I see no need to reject them as such.

in the Borough, and thereby the footprints in which it authorizes development to occur. CAFRA and its implementing CZM Rules govern not only how development occurs within the footprints established by the Borough of Mantoloking, but also whether development can occur in those locations at all. CAFRA is "supplemental and in addition to powers conferred by other laws, including . . . municipal zoning authority." N.J.S.A. 13:19-19. Consequently, coastal development must comply with both municipal zoning (including boundary and setback lines) as well as CAFRA.

Therefore, I concur with the ALJ's finding that the easements do not constitute a contractual obligation for the State to waive its authority under CAFRA to regulate development within the Properties' boundary and setback lines, and I ADOPT the ALJ's conclusion that summary decision in favor of Petitioners is not appropriate in this matter.

CONCLUSION

For the foregoing reasons, I ADOPT the ALJ's Initial Decision of February 16, 2023 as MODIFIED above.

IT IS SO ORDERED.

Dated: January 2, 2024

Shawn M. LaTourette, Commissioner
NJ Department of Environmental Protection

MR. RICHARD LUPO/DORO DOLCI, LLC
v.
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF LAND USE REGULATION
OAL DKT. NO.: ELU 09573-21
AGENCY DKT. NO.: 1519-08-0006.2, LUP 200001

AND

TODD SAWYER
v.
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF LAND USE REGULATION
OAL DKT. NO.: ELU 09574-21
AGENCY DKT. NO.: 1519-08-0006.3, LUP 200001

AND

PAUL AND PEGGY ANNE KALAMARAS
v.
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF LAND USE REGULATION
OAL DKT. NO.: ELU 04676-22
AGENCY DKT. NO.: 1519-08-0006.4, LUP200001

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