State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION

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

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William J. Wolf, Esq. (Bathgate, Wegener & Wolf, attorneys), and **Lawrence D. Katz**, Esq., for petitioner Todd Sawyer

William J. Wolf, Esq. (Bathgate, Wegener & Wolf, attorneys) and **William T. Gage**, Esq., for petitioners Paul and Peggy Anne Kalamaras

Bruce A. Velzy and **Jacob Umoke**, Deputy Attorneys General, for respondent (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: January 10, 2023 Decided: February 16, 2023

BEFORE **TRICIA M. CALIGUIRE**, ALJ:

STATEMENT OF CASE

Petitioners Richard Lupo/Doro Dolci, LLC, Todd Sawyer, and Paul and Peggy Anne Kalamaras (collectively, petitioners) appeal the denials by respondent New Jersey Department of Environmental Protection, Bureau of Land Use Regulation (NJDEP), of petitioners' applications for Coastal Area Facility Review Act (CAFRA) General Permits #4 (GP-4),[1] for the construction of single-family homes on adjacent properties in Mantoloking, New Jersey.

[1] General Permits are designed to streamline the permitting process for certain activities which should have minimal environmental impact. In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 415, 423 (2004) (involving cranberry growing operations in preserved areas). An applicant who cannot meet general permit requirements can alternately seek an individual permit for the same project.

PROCEDURAL HISTORY

The first two above-docketed matters were transmitted on November 18, 2021, by the NJDEP to the Office of Administrative Law (OAL), for determination as contested cases, pursuant to N.J.S.A. 52:15B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Both matters were assigned to me. By letter dated February 15, 2022, petitioners in those matters, through counsel William J. Wolf, Esq., requested that the matters be consolidated, and, on February 22, 2022, an order of consolidation was entered.

On June 9, 2022, NJDEP transmitted the third matter, OAL Docket No. ELU 04676-22, to the OAL for determination as a contested case, and it was assigned to me. On September 13, 2022, NJDEP moved to consolidate ELU 04676-22 with the other two matters. On September 28, 2022, Mr. Wolf, counsel for petitioners in ELU 09573-21 and ELU 09574-21, filed a brief in opposition to the motion for consolidation. Although Mr. Wolf also represents the petitioners in ELU 04676-22, his co-counsel in that matter, William T. Gage, Esq., submitted a letter on September 26, 2022, confirming that his clients would rely on the brief previously filed by Mr. Wolf. On October 24, 2022, an order was entered consolidating all three matters.

On September 22, 2022, petitioners filed a motion for an order scheduling a site visit for the purpose of viewing properties adjacent to and near those under review here and which were allegedly deemed eligible for the same permits being denied to petitioners. On October 3, 2022, respondent filed a brief (dated September 30, 2022) opposing a site visit and on October 14, 2022, an order was issued denying the motion (as discussed further below).

On November 15, 2022, respondent filed an amended motion for summary decision on the grounds that the undisputed material facts support the NJDEP decision to deny all three permits as a matter of law. Respondent supplemented this filing on November 21, 2022, with an amended statement of undisputed material facts. On December 13, 2022, petitioners filed a brief in opposition to the motion for summary decision and notice of cross-motion for partial summary decision on the grounds that respondent's denial of petitioners' permit applications breached the contract created

between the State and petitioners in certain Deeds of Dedication and Perpetual Storm Damage Reduction Easement. On December 23, 2022, respondent filed its reply; petitioners filed a reply with respect to the cross-motion only on January 10, 2023, and the cross-motions are now ripe for determination.

FACTUAL DISCUSSION

Based on the documents filed by the parties in support of their cross-motions, including the certifications of Eric Virostek, Bruce A. Velzy, William J. Wolf, Emil W. Solimine, and Lawrence J. Greenberg, I **FIND** the following **FACTS** are undisputed:

1. The properties that are the subject of the disputed permit applications are located at 1023 and 1025 Ocean Avenue, Block 23, Lots 2 and 2.01, Lots 3 and 3.01, and Lots 4 and 4.01. These adjacent properties are under three separate contracts for sale pending receipt of development permits.

2. The properties are located on the Atlantic Ocean. There are currently no structures on the properties between Ocean Avenue (also known as Route 35) and the ocean.

3. There are no structures on Block 23, Lot 1, which is adjacent to Lot 2 on the north; there are no structures within 100 feet of Lot 2 to the north or south.

4. There are no structures within 100 feet of the northern lot line of Lot 3; there is a house within 100 feet of the southern lot line of Lot 3.

5. There are no structures within 100 feet of the northern lot line of Lot 4; there is a house within 100 feet of the southern lot line of Lot 4.

6. Prior to Superstorm Sandy, which occurred in 2012, there was a single home on the properties, reaching from Lot 2 to Lot 4. This single home was expanded in 2008; NJDEP approved the construction on the then-existing

primary dune. This home was extensively damaged during Superstorm Sandy and demolished by 2016.

7. During Superstorm Sandy, the dune described above was washed away by the storm into Barnegat Bay (to the west). The entire property was later graded and leveled.

8. In 2018, the U.S. Army Corps of Engineers (ACOE) built a dune which stretches approximately one mile along the beachfront, from Lot 1 to Lot 43. As part of the project, a sheet metal wall was installed thirty feet below ground and extending fifteen feet above ground (ACOE wall). The wall essentially separates the residences on Ocean Avenue from the water; there is no development on the seaward side of the ACOE wall.

9. Since 2018, single-family residences have been built on many of the beachfront lots on Ocean Avenue west of the ACOE wall.

10. The NJDEP contends that the ACOE wall is covered by a natural and man-made dune and is therefore not visible. Respondent further contends that the entire property on which petitioners propose to build, to the west of the wall, is a dune and therefore, construction is prohibited by regulation, absent eligibility for narrow exceptions.

11. Petitioners contend that the original dune was washed away by Superstorm Sandy and the ACOE wall separates the ACOE's constructed dune from the rest of the property. The proposed construction would take place on the landward (west) side of the dune.

12. The proposed developments are less than 500 feet from the mean high water line.

13. The dune crests along the ACOE wall at approximately twenty feet on each of petitioners' properties. From there, the sand-covered land slopes

westward to an elevation of approximately five feet at Ocean Avenue, the western boundary of Lots 2, 3, and 4.

14. Petitioners contend that the similarity in the topography of other lots (which received NJDEP development permits) along Ocean Avenue to their own, and the proximity of the engineered dune to all the lots extending from Lot 1 to Lot 43, supports their claim that the NJDEP's denial of GPs-4 in these matters was arbitrary, capricious and not in accordance with law and must be reversed.

15. Respondent contends that ten of the residences on nearby beachfront lots were either permitted under other regulations or not permitted at all, making any alleged similarities irrelevant.

16. On May 9, 2013, Emil and Yvonne Solimine, then-owners of all three lots at issue here, entered into three identical Deeds of Dedication and Perpetual Storm Damage Reduction Easement, by which they granted the Borough of Mantoloking and the State of New Jersey the right to use a delineated portion of their property to, among other things, construct storm damage reduction measures including berms and dunes. Each deed contains the limitation that "nothing herein is intended or shall be deemed to alter the boundary lines or setback lines of the Property." Certification of William J. Wolf, Esq., (December 12, 2022) (Wolf Cert.), Ex. X at 3, 9; Sur Reply Br. of Petitioners in Opposition to the Motion for Summary Decision Filed by DEP and in Support of the Cross-Motion for Partial Summary Decision Filed by Petitioners (January 10, 2023) (Sur Reply Br. of Petitioners), Exs. A, B, and C.

POSITIONS OF THE PARTIES

Respondent contends that "petitioners' proposed developments do not meet the regulatory standards for a [GP-4] which requires compliance with the Coastal High Hazard Area [rules at N.J.A.C. 7:7-9.18 and with] the Dunes rules [at N.J.A.C. 7:7-9.16],"

nor do the developments qualify "for certain, narrow exceptions" to these rules. Br. of Respondent in Support of [Amended Motion for] Summary Decision (November 18, 2022) (Br. of Respondent), at 1, citing N.J.A.C. 7:7-6.4. Specifically, the undisputed facts demonstrate that petitioners' proposals do not comply with the Coastal High Hazard Area rules or the Dunes rules, and do not meet the narrow exceptions in either rule, and therefore, NJDEP's action in denying petitioners' applications for GPs-4 must be upheld.

In response, petitioners contend that summary decision is not appropriate on the issue of their eligibility for GPs-4 because material facts are in dispute, that being whether the proposed developments would impact a natural and/or man-made dune. In other words, while NJDEP argues that the entire property is a dune, petitioners disagree and argue that the footprints of their proposed developments do not impact the dune.

Petitioners also contend that the Coastal High Hazard rules do not prevent development on Lots 2, 3 and 4 as long as that development "meets damage control mitigation standards." Amended Br. of Petitioners in Opposition to the Motion for Summary Decision and Notice of Cross-Motion for Partial Summary Decision (December 12, 2022) (Br. of Petitioners), at 20. The arbitrariness of NJDEP's action with respect to the subject permits is shown by the fact that NJDEP issued CAFRA permits to "every other beachfront owner in Block 23." Ibid.

Further, by cross-motion, petitioners contend that NJDEP cannot deny their applications because to do so would breach the obligations the State assumed when it entered contracts for easements on petitioners' property for the purpose of building the disputed dunes.

LEGAL ANALYSIS AND CONCLUSION

Summary decision is a well-recognized procedure for resolving cases in which the facts that are crucial to the determination of the matters at issue are not actually in dispute. By applying the applicable law and standard of proof to the undisputed facts, a decision may be reached in a case without the necessity of a hearing at which evidence is

presented and testimony taken. The procedure is equally applicable in judicial as well as executive branch administrative proceedings. N.J.A.C. 1:1-12.5.

The regulations provide that the decision sought by the movant "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

The standards for determining motions for summary judgment are found in Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74–75 (1954), and later in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). A motion for summary decision may only be granted where the moving party sustains the burden of proving "the absence of a genuine issue of material fact," and all inferences of doubt are drawn against the movant. Judson, 17 N.J. at 74-75. Nevertheless, if the opposing party offers only facts which are immaterial or insubstantial in nature, these circumstances should not defeat a motion for summary judgment. Id. at 75. Although the pleadings may raise a factual issue, the question before the judge is whether those facts are "material" to the legal issues to be tried.

Summary decision is appropriate when "the evidence . . . is so one-sided that one party must prevail as a matter of law.'" Brill, 142 N.J. at 541, quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986). In reviewing the proffered evidence to determine the motion, the judge must be guided by the applicable evidentiary standard of proof that would apply at trial on the merits. In cases concerning permitting of activities under the environmental laws of the State, an applicant bears the burden of proving by a preponderance of the evidence that its proposal meets the criteria established by law. Matter of Vineland Chemical Co., 243 N.J. Super. 285, 315 (App. Div. 1990) (appeal of conditions of a discharge permit). Accordingly, the undisputed facts described above will be considered in light of applicable law to determine whether petitioners have met the burden of proving that the decision of NJDEP to deny GPs-4 was arbitrary, capricious and/or not in accordance with or supported by law and/or regulations.

In enacting CAFRA, the New Jersey Legislature authorized respondent to regulate development along the Atlantic Ocean, including the construction of residential buildings. N.J.S.A. 13:19-2. By amendment in 1993, "development" includes the construction of residential (and other) properties on dunes. N.J.S.A. 13:19-3. Specifically:

> "Development" for an application under CAFRA means the construction, relocation, or enlargement of the footprint of development of any building or structure and all site preparation therefor, the grading, excavation, or filling on beaches and dunes, and shall include residential development, commercial development, industrial development, and public development.
>
> [N.J.A.C. 7:7-1.5.]

Pursuant to its statutory authorization, respondent promulgated regulations outlining the coastal permit application process and the "substantive standards for determining development acceptability and [the associated] environmental impacts." In re Protest of Coastal Permit Program Rules, 354 N.J. Super. 293, 312 (App. Div. 2002). Under these regulations, a GP-4 is only available to proposed developments which meet specific requirements under enumerated regulatory programs. See N.J.A.C. 7:7-6.4. Each of the applications involved here was denied for failure to meet the requirements of the Coastal High Hazard Area regulations, N.J.A.C. 7:7-9.18, and the Dunes regulations, N.J.A.C. 7:7-9.16. Certification of Eric Virostek in Support of DEP Amended Motion for Summary Decision (Virostek Cert.) (November 14, 2022), Exs. J, K, and O.

To start, the CAFRA regulations provide for a GP-4 as follows, in pertinent part:

> (a) This general permit authorizes the development of one or two single-family homes or duplexes and/or accessory development (such as garages, sheds, pools, driveways, grading, filling, and clearing, excluding shore protection structures), provided the one or two single-family homes or duplexes and accessory development are located landward of the mean high water line.[2]

[2] There is no dispute that the proposed developments are each located landward of the mean high water line.

(b) Development under this general permit shall not result in the development of more than two single-family homes or duplexes either solely or in conjunction with a previous development as defined at N.J.A.C. 7:7-2.2(b)8.

(f) Development under this general permit shall comply with N.J.A.C. 7:7-9.16, Dunes, except as provided under (f)1 or 2 below:[3]

1. Development that is located on the landward slope of a secondary or tertiary dune described at (f)1ii below, whichever is most landward, need not comply with the dunes rule, N.J.A.C. 7:7-9.16[; or]

2. Development that is located on a dune which is isolated from a beach and dune system by a paved public road, public seawall or public bulkhead, existing on July 19, 1993, need not comply with the dunes rule, N.J.A.C. 7:7-9.16[.]

(h) Development under this general permit shall comply with N.J.A.C. 7:7-9.18, Coastal high hazard areas, and 9.19, Erosion hazard areas, except as excluded under (h)1 below;

1. Development under this general permit that is located on a site partially or completely within an erosion hazard area or coastal high hazard area need not comply with the coastal high hazard areas rule, N.J.A.C. 7:7-9.18, and the erosion hazard areas rule, N.J.A.C. 7:7-9.19, if:

   i. The lot was shown as a subdivided lot prior to July 19, 1993;

   ii. The lot is served by a municipal sewer system; and

   iii. A house or commercial building is located within 100 feet of each of the lot lines that run roughly perpendicular to the mean high water line. The 100 feet shall be measured outward from each lot line, along a line generally parallel to the mean high water line[.]

[N.J.A.C. 7:7-6.4(a), (b), (f), (h).]

[3] Neither party contends that either of these exceptions apply in these matters. .

Application of the Coastal High Hazard Area Rules

The CAFRA rules condition eligibility for a GP-4 on compliance with the regulations promulgated under other statutes and, notwithstanding the dispute over compliance with the Dunes rules (discussed below), respondent contends that it is entitled to summary decision simply because the applications do not comply with the Coastal High Hazard Area rules. The regulations define coastal high hazard areas as "flood prone areas subject to high velocity waters (V-zones) on [Federal Emergency Management Agency] flood mapping . . . which are subject to wave run-up and overtopping." N.J.A.C. 7:7-9.18(a). There is no dispute that the three properties are in a coastal high hazard area. See Virostek Cert., Ex. E at 12; Ex. F at 12; and Ex. NN at 12. As stated by respondent, the applications were denied because "new development is prohibited in [V-zones] unless there are houses within 100 feet of both lot lines for each of these properties, known as the infill rule." Br. of Respondent, at 20, citing N.J.A.C. 7:7-6.4(h)(1)(iii), -9.18(b) and (c), and -15.2I(6)(i)(3). The infill rule provides, in pertinent part:

> Development that is located on a site partially or completely within a coastal high hazard area or erosion hazard area need not comply with the coastal high hazard areas rule, N.J.A.C. 7:7-9.18, or erosion hazard areas rule at N.J.A.C. 7:7-9.19 if:
>
> (3) A house or commercial building is located within 100 feet of each of the lot lines that run roughly perpendicular to the mean high-water line. The 100 feet shall be measured outward from each lot line, along a line generally parallel to the mean high-water line[.]
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> [N.J.A.C. 7:7-15.2(f)(4)(i)(3).]

Based on the regulation, for any of the properties to be exempted from the Coastal High Hazard Area rules, there must be a house or commercial building within 100 feet of that property's northern and southern lot lines. Currently, the lots at issue are vacant, Lot 3 has a structure within 100 feet of its southern lot line, and the most southern lot, Lot 4, has a structure within 10.3 feet of its southern lot line. With their applications, however, petitioners submitted the following statement of compliance with the infill rule:

> This area of Mantoloking is still undergoing redevelopment following the devastation caused by Superstorm Sandy. Prior to Sandy, a house was located within 100 feet of each of the lot lines that run roughly perpendicular to the mean high water line. Each lot is a valid buildable lot.
>
> [Virostek Cert., Ex. E: "Statement of Compliance with the Coastal Zone Management Rules," Prepared by Envirotactics, Inc. (November 2020), at 7-8.[4]]

Petitioners, through their expert, Envirotactics, make two arguments to support their compliance with the infill rule. First, because the V-zone is a damage mitigation zone, there is no regulatory "prohibition against building a house in a V zone if it meets damage control mitigation standards." Br. of Petitioners, Ex. N at 13. Presumably, petitioners intend to incorporate such standards in their proposed developments. Even so, they fail to cite to statute, regulation, or case law to support this policy argument. More persuasive, though, is their second argument, that since 2012, the NJDEP permitted residential development on fourteen properties within the same tax block (23) even though all are within the V-zone and none had prior development within 100 feet of their lot lines at the time of application. Id., Ex. Z at 2–5.

In response, NJDEP distinguishes the fourteen referenced properties in which the infill rule was not used to prevent construction (after Superstorm Sandy) on the grounds that all were granted either GP-5 or GP-9, for the reconstruction of a previously legally constructed home, not a GP-4, as is sought here. Respondent's Reply Br. in Support of Summary Decision (December 23, 2022) (Reply Br. of Respondent), at 23, citing N.J.A.C. 7:7-6.5. The regulation permitting reconstruction uses nearly identical language to describe the infill rule exception as that found in the regulation applicable to petitioners:

> Development under this [GP-5] shall comply with N.J.A.C. 7:7-9.18, Coastal high hazard areas . . . except as excluded under (f)1 below;
>
> 1. Development under this general permit that is located on a site partially or completely within an erosion hazard area or coastal high hazard area need not comply with the

[4] Identical language was used in the compliance statements prepared by Envirotactics for the other two properties. Virostek Cert., Ex. F at 7–8; Ex. NN at 8.

> coastal high hazard areas rule, N.J.A.C. 7:7-9.18, and the erosion hazard areas rule, N.J.A.C. 7:7-9.19, if:
>
> i. The lot was shown as a subdivided lot prior to July 19, 1993;
>
> ii. The lot is served by a municipal sewer system; and
>
> iii. A house or commercial building is located within 100 feet of each of the lot lines that run roughly perpendicular to the mean high water line. The 100 feet shall be measured outward from each lot line, along a line generally parallel to the mean high water line.
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> [N.J.A.C. 7:7-6.5(f).]

This beachfront area of Mantoloking was vacant after Superstorm Sandy and much of the redevelopment did not begin until 2015. Petitioners' expert uses data from respondent's website to conclude that none of fourteen properties was, at the time of application, within 100 feet of a "valid authorized residential or commercial development." Br. of Petitioners, Ex. Z. But that is not the precise language used in the regulations. An applicant for a GP-4 or GP-5 is exempt from the Coastal High Hazard Area rules even if located in a V-zone if another building is already located within 100 feet of each lot line; the applicant has no obligation to prove that such building is validly authorized or properly permitted.[5]

Ordinarily, intent is to be gleaned from the words used, and they are to be given their ordinary and well understood meaning in the absence of an explicit indication to the contrary, and only if an ambiguity exists is it necessary to go beyond the words of the regulation itself. State v. Gelman, 195 N.J. 475, 482 (2008). The regulations (authorizing GP-4 and GP-5) both state simply that if there is a house or commercial building within 100 feet of a property's northern and southern lot lines, the owner of that property does not need to meet the requirements of the Coastal High Hazard Areas rules.

[5] Petitioners appear to recognize that as soon as rebuilding began, some property owners may have taken advantage of the infill rule to obtain permits, even when the pre-existing construction was not duly authorized.

This is not to say that every applicant for redevelopment on Lots 5 through 18 met the requirements of the infill rule. Respondent's silence on that specific question, and its focus on the need to encourage rebuilding after Superstorm Sandy, permits the inference that they did not. As respondent notes, however, proof that the agency erred in issuing a permit to someone else contrary to the infill rule is not reason to ignore the legislative intent of limiting residential development "to already densely developed areas to protect people and property from the negative impacts of flooding and coastal storms." Br. of Respondent, at 21; see also Doyal v. Dept. of Envtl. Prot., 390 N.J. Super. 185, 193 (App. Div. 2007) (Reviewing court is obligated "to construe the statute to effectuate the plainly expressed legislative intent . . . rather than to perpetuate an administrative construction that the DEP now recognizes was erroneous.")

The dispute here is not as to the facts, but the application of the law to the facts and therefore, I **CONCLUDE** that summary decision is appropriate as to this issue. For the above reasons, I **CONCLUDE** that petitioners do not meet the infill exception to the Coastal High Hazard Area rules and therefore, do not meet the CAFRA requirements for a GP-4.

Application of the Dunes Rules

Should the Commissioner (or a reviewing court) find that the Coastal High Hazard Area rules do not prohibit development here, petitioners' eligibility for GPs-4 would also depend on application of the Dunes rules, necessitating the following inquiry. N.J.A.C. 7:7-6.4(f).

The Dunes rules provide, in pertinent part:

> (a) A dune is 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. "Dune" includes the foredune, secondary or tertiary dune ridges and mounds, and all landward dune ridges and mounds, as well as man-made dunes, where they exist.

> 1. Formation of sand immediately adjacent to beaches that are stabilized by retaining structures, and/or snow fences, planted vegetation, and other measures are considered to be dunes regardless of the degree of modification of the dune by wind or wave action or disturbance by development.
>
> 2. A small mound of loose, windblown sand found in a street or on a part of a structure as a result of storm activity is not considered to be a "dune."
>
> (b) Development is prohibited on dunes, 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 natural functioning of the beach and dune system, either individually or in combination with other existing or proposed structures, land disturbances, or activities. In addition, the removal of vegetation from any dune, and the excavation, bulldozing, or alteration of dunes is prohibited, unless these activities are a component of a Department-approved beach and dune management plan.
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> [N.J.A.C. 7:7-9.16(a), (b).]

In denying the applications, respondent stated that each "subject site is located entirely on the landward side of a primary dune system" and therefore, development is prohibited unless the applicant can show that the proposed development "has no practicable or feasible alternative in an area other than a dune and will not have adverse long-term impacts to the natural functioning of the beach and dune system." Virostek Cert., Ex. J at 4, 5; Ex. K at 4, 5; Ex. O at 5.

The first question here is whether respondent's contention that petitioners' entire properties are (a continuous) primary frontal dune can be determined as a matter of law. Both parties agree that dunes are present on at least Lots 2.01, 3.01, and 4.01, from the crest of the ACOE wall east to the mean high water line. Virostek Cert, ¶ 14. There is no dispute as to the topography of each site; respondent used the measurements supplied by petitioners' expert when evaluating the three applications. See Br. of Respondent, ¶ 26I, at 13.[6]

[6] While petitioners objected to some of the findings of fact proposed by respondent, petitioners did not object to this use of their expert's measurements. See Br. of Petitioners, at 4.

The regulations are clear in defining a dune to include a "man-made formation of sand . . . 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). A primary frontal dune is defined as:

> [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. Secondary and tertiary dunes mean 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.]

It is also clear that prior to Superstorm Sandy, "the three lots were occupied by a single house that had been established on the primary dune crest many years earlier." Wolf Cert., Ex. I: "A Review of Existing Primary Dune Extents on Three Individual Oceanfront Parcels Located in Mantoloking, Ocean County, New Jersey for Three, 70-Foot Frontage Lots (Block 23, Lots 2, 2.01, 3, 3.01, 4 & 4.01; 1025 Ocean Avenue)," Prepared by Dr. Stewart Farrell, Stockton University, Port Republic, New Jersey (February 28, 2022), at 1. The permit denials issued to each petitioner here begin with a description of the permits issued by respondent for the 2008 expansion of the then-existing single-family home covering Lots 2 through 4. In 2008, respondent determined "that the limit of the dune was located at Ocean Avenue and the proposed expansion was located on a primary dune." See Virostek Cert., Exs. J at 1; K at 1; and O at 1. In 2012, Superstorm Sandy washed the primary dune into Barnegat Bay, leaving only "scattered back dune slopes." Wolf Cert., Ex. I at 3, 12. Damaged homes were torn down, much of the land was graded level, and sand was returned to the beachfront. Id. at 4–5.

Petitioners' argument is essentially that the original dune was lost in the storm and the ACOE wall now not only separates the dune (on Lots 2.01, 3.01, and 4.01) from the residential area of the property, but "precludes a sand dune from developing on [Lots 2, 3, and/or 4]." Br. of Petitioners, at 6, ¶ 2 (emphasis added). While petitioners cite Dr. Farrell for this statement, Id. at 9, on review, his report does not make that point. Dr. Farrell's description of the restoration of the dune system along the shore, including Lots

2, 3 and 4, does, however, support petitioners' argument that the dune was built up on the seaward side of the ACOE wall:

> Grading, debris removal, and physical transport of accumulated sand was utilized in generating a dune dike feature intended to meet the FEMA 5-year storm defense feature as fast as possible after Hurricane Sandy. This feature was entirely manmade and was placed seaward of any portion of the proposed building footprint area. Today, it remains as the landward-most dune feature on the property.
>
> Subsequently, sand was moved by bulldozer up the beach and added to the seaward dune slope profile, never pushed landward of the original salvaged sand ridge. The [New Jersey Department of Transportation] then erected the 45-foot steel sheet pile wall at the existing dune crest.
>
> Finally, all the material pumped onto the Mantoloking coastline by the [ACOE] is seaward of the steel wall moving the mean high-water line hundreds of feet seaward and increasing the dune elevation to 22.0 feet[.] All beach/dune activities will occur seaward of the steel sheet pile wall and about 60 feet from the landward toe of the salvaged sand dune[.]
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> [Wolf Cert., Ex. I at 11.]

Petitioners contend that the "dune line was established by the [ACOE]," and "demarcated by elevation 12 on the western slope of the dune created by the [ACOE]." Virostek Cert., Ex. E at 10. The elevation at that point is 20.7 feet, decreasing landward to an elevation of five feet where the property meets Ocean Avenue. Virostek Cert., ¶ 18. Beyond the demarcation line, to the west, is "an additional area consisting of 2,441 square feet . . . that was protected by a Dune Conservation Restriction filed in 2011." Virostek Cert., Ex. E at 10. Petitioners contend that all development is proposed westward of the ACOE demarcation line, beyond the dune toward Ocean Avenue.

Respondent, however, takes the position that the properties are "located entirely on a dune on [the] landward side." Virostek Cert., Ex. G: "Analysis of Proposed Development [for] Block 23, Lots 2 & 2.01, Borough of Mantoloking, Ocean County," (September 8, 2022), at 12. Essentially, where petitioners consider the ACOE wall as separating the dune from the rest of the property, respondent sees only a continuous

"formation of sand that rises [from the beach] to an elevation of 20 feet on the applicant's property before sloping inland to Ocean Avenue, a distance of approximately 280 feet." Id. at 16. Significantly, respondent states that:

> While there are steeper portions of this dune system, the entire property is part of the same sand source and slopes downward by approximately 15 feet in elevation in an inland direction over a 280' distance before it meets [Ocean Avenue].
>
> The change in elevation from 20' to 5' is considered to be an inland slope,[7] which ends for regulatory purposes at [Ocean Avenue].
>
> [Ibid.]

By regulation, the NJDEP applies the Dunes rules only if proposed development is located on a "continuous or nearly continuous mound or ridge of sand," with "relatively steep waterward and landward slopes," located "immediately landward of and adjacent to the beach," and "subject to erosion and overtopping from high tides and waves during major coastal storms." Seigel v. N.J. Dep't of Envtl. Prot., 395 N.J. Super. 604, 617, 620 (App. Div. 2007) (emphasis added) (finding that a primary frontal dune was not present where after an initial steep decline, the rest of the landward side of the lot had a gradual declining slope, in contrast to the "sharp waterward side elevation").

To determine the extent and location of the dune, two issues must be considered: (1) whether the ACOE wall does, as petitioner urges, separate the dune from the rest of the property or, as respondent contends, the ACOE wall simply is part of a "man-made dune" as anticipated by the regulations prohibiting development on any dune absent eligibility for narrow exceptions; and (2) whether the slope from the crest of the dune on the landward side differs from that on the seaward side.

Finally, respondent contends that because the proposed development "covers the entire property landward of the 20' elevation," all of which is considered a dune, the development is prohibited "unless it has no practicable or feasible alternative in an area

[7] The term "slope" is not defined in the regulations; respondent uses the dictionary definition: "a surface of which one end or side is at a higher level than another." Virostek Cert., Ex. G. at 16.

other than a dune and will not have adverse long-term impacts to the natural functioning of the beach and dune system." Seigel, 395 N.J. Super. at 621, citing N.J.A.C. 7:7-9.16(b) (emphasis in original). Respondent offers alternatives that petitioners could have pursued, including a smaller project landward of the nine-foot elevation line,[8] but rejected. Respondent concluded that since petitioners failed to offer evidence that the proposed projects, whether each alone or in conjunction with the other two applicants, "would not cause significant adverse or long-term impacts on the natural functioning of the beach and dune system," none of the applicants were exempt from the Dunes rules.

Here, petitioners argue that the Appellate Division in Seigel found the alternatives offered by NJDEP to the proposed development in that case fundamentally unfair, alternatives which are quite similar to those recommended by respondent in these matters.[9] See 395 N.J. Super. at 622. Even more persuasive is that the Seigel court was unconvinced that the construction proposed by Seigel could cause significant or long-term negative impacts "given the scale of existing development." Ibid. Specifically, Seigel applied for a permit to build a second home on her property, behind the main house. The Court noted:

> With the exception of her neighbor's property immediately to the north, petitioner's property is surrounded by fully developed lots each containing two dwellings, one fronting the ocean and the other directly behind the first and fronting First Avenue. The property is one of only a handful of beachfront properties in all of Manasquan with only one house constructed on the lot.
>
> [Id. at 607.]

An analogous situation exists here. As described in the procedural history, above, petitioners asked me to conduct a site visit because they (all) applied for CAFRA permits to build homes similar in size and location to other, recently constructed, nearby beachfront homes and they believed that "to visualize the property features that are

[8] It is unclear why respondent would permit development on the dune landward of the nine-foot elevation line, notwithstanding that it would impact a smaller portion of the alleged primary frontal dune.

[9] Though respondent is not moved by petitioners' argument that reducing the footprint of the proposed construction would similarly reduce the overall value of the property, as a practical matter, petitioners' argument rings true.

germane to the relief requested . . . a visit to the site and similar property [was] warranted." Ltr. Br. of Petitioners in Support of an Order Scheduling a Site Visit (September 22, 2022), at 2, citing Route 15 Assoc. v. Twp. of Jefferson, 187 N.J. Super 481, 490 (App. Div. 1982). Essentially, petitioners argued that the best evidence that the proposed developments "would not cause significant adverse or long-term impacts on the natural functioning of the beach and dune system" is that respondent made just that determination with respect to other developments located on lots starting only 100 feet (or less) down the beach.

Petitioners contend that respondent already allowed homes on adjacent properties that are just as close to the engineered dune and, based on respondent's position in this matter, that NJDEP believes are actually built on the dune. The similarity of the properties and the proximity of permitted construction to the ocean and to the dune is obvious from the photos submitted by the parties.[10] As I said in denying the motion for a site visit:

> [A] site visit would be useful only in confirming what is obvious from the photographs, that the properties at issue here are visually very similar to those all along the beachfront, many of which include homes similar in scale to the structures petitioners wish to build. What I would not be able to discern from standing on the beach is why the NJDEP's experts say that these properties are different enough from the other properties to make them ineligible for CAFRA permits.[11] Legal conclusions will not be drawn from a trip to the beach but from consideration of the arguments that will be made by both parties[.]

Here, respondent argues that the permitting decisions made with respect to nearby properties are distinguishable for the following reasons:

[10] While I understand that the perspective from which a photograph is taken may impact the appearance of various elements, the photos of the homes on Lots 5 through 14 taken from Ocean Avenue toward the east show that the homes sit on higher ground, so to speak, than the entrances to the driveways. In other words, the slope which respondent describes as proof of the continuing dune on Lots 2 through 4 is also found on the adjacent properties. Br. of Petitioner, Ex. K. If respondent disagrees, I left open reconsideration of a site visit. See Order on Motion for Site Visit (October 14, 2022), at 5.

[11] As stated above, the main difference appears to be eligibility for the infill rule exception.

1. The other properties received GPs-5 for the reconstruction of previously legally constructed homes pursuant to N.J.A.C. 7:7-6.5(a), and here, petitioners seek to build new homes under GPs-4, N.J.A.C. 7:7-6.4.

2. While petitioners claim that the other ten properties on which similar development was permitted have similar elevations to Lots 2, 3, and 4, petitioners also "admit that each property is unique." See Certification of Bruce A. Velzy, DAG, (November 14, 2022), Exs. AA at 2–10, 14; BB at 2–10, 14; JJ at 2–10, 14; and Y at 9.

3. Four of the ten nearby identified houses are "roughly the same size before and after Superstorm Sandy, meaning neither the development's footprint nor dune impact had expanded,"[12] while petitioners propose to expand the prior home's footprint and dune impacts, making it reasonable for respondent to deny their permit applications. Here, NJDEP seeks to prevent new construction in an area that is prone to high hazards, such as flooding and hurricanes.[13]

[Reply Br. of Respondent, at 23-24.]

In making these arguments, NJDEP seeks to prevent new coastal development, or at least to preserve the limits of development as existed prior to Superstorm Sandy. That is not enough to show that three more homes of similar size to those already built on Ocean Avenue on the landward side of the ACOE wall, which are no closer to the crest of the ACOE dune than homes already constructed, will cause significant adverse or long-term impacts on the natural functioning of the beach and dune system.

Based on the above, I **CONCLUDE** that summary decision is not appropriate on the issue of petitioners' compliance with the Dunes rules because questions of material

[12] Respondent does not describe the relative size of the other six new homes as compared to the pre-Sandy development, but it can be inferred by its silence that those new homes are larger.
[13] While the prospective homeowners may be willing to take the risks associated with such weather events, support for respondent's position may be found in the associated costs to public infrastructure and for public services.

fact and of law remain (despite the voluminous record compiled to date). Should a more complete record be necessary (at the direction of the Commissioner), expert testimony would be required as to the following questions:

1. How does a man-made structure, such as the ACOE wall, prevent a dune from forming on that structure's landward side, as petitioners claim is the case here? Is that only the case when, as here, the dune is constructed on level ground, as existed after Superstorm Sandy?

2. The regulations appear to anticipate that the weather (wind and wave action) may impact a dune, but state that such impacts are irrelevant once a dune is established. N.J.A.C. 7:7-9.16(a). Is there caselaw to support a finding that once a dune is established, even if washed into an adjacent body of water (as happened here), it is still protected from development? Would that have been true if the NJDOT and the ACOE had not worked to first rebuild, and then enlarge the dune?

3. It can be argued based only on the aerial photographs, that the shore in Mantoloking is overdeveloped because of zoning ordinances and permitting decisions made long before the current petitioners filed their GP-4 applications. What, then, are the long-term negative impacts of the development proposed here "given the scale of existing development" as recognized by the Seigel court?

Petitioners' Cross-Motion for Summary Decision

Petitioners contend that when the State of New Jersey entered into the deeds by which the Solimines granted easements on their property to permit the construction of storm protection measures, including the ACOE wall, the State agreed that "nothing herein is intended or shall be deemed to alter the boundary lines or setback lines of the Property" and now, "[d]espite the clear language of the easement, [respondent] prohibited Petitioners from building single family houses in the area reserved for them by Mantoloking." Br. of Petitioners, at 45. By this unambiguous language, petitioners

contend that they "have a contractual right to build within the footprint designated by Mantoloking[.]" Sur Reply Br. of Petitioners, at 2.

While petitioners may be correct that the easements should not be used to alter the boundary or setback lines of the three properties as such lines are set by municipal ordinances,[14] development within those boundary lines was already subject to NJDEP's regulatory authority as set forth in CAFRA. N.J.S.A. 13:19-19 states:

> [CAFRA] shall be regarded as supplemental and in addition to powers conferred by other laws, including . . . municipal zoning authority.

Petitioners presume that in consideration for the grant of the easements, the State not only gave up its authority to regulate development but agreed to defer to the Borough of Mantoloking's zoning and/or planning ordinances in a CAFRA zone, action that would have been contrary to the policy of the Legislature in enacting CAFRA:

> [A] municipality retains its power of zoning and planning and those powers are supplemented via the state regulation. However, where a clash between the two authorities involves a . . . significant environmental factor in the protection of the coastal areas, the state regulatory scheme must prevail. Where the Legislature has established a policy, such as it has in the CAFRA Act, a municipality may do nothing which would contradict that policy.
>
> [Three F Enterprises v. Dept. of Envtl. Prot., OAL Dkt. No. ESA 03021-84, Initial Decision (October 17, 1984), Affd., Comm'r. (November 29, 1989) citing Garden State Farms, Inc. and Dept. of Transp. v. Mayor and Comm. of Borough of Hawthorne, 146 N.J. Super. 438, 442 (App. Div. 1977).]

While petitioners cite authority regarding the interpretation of contractual provisions, they fail to cite caselaw to support their theory that by entering into contracts for easements that essentially protect, and preserve the value of, private property, the

[14] Here, petitioners point to respondent's recommendation that they build closer to Ocean Avenue, which would have violated the setback lines adopted by the Borough of Mantoloking. Petitioners may be correct that such action would not have been permitted by the Borough, but that issue is not dispositive as the basis for summary decision here is the application of the Coastal High Hazard Area rules, not the dearth of practical alternatives to building on a dune.

State gave up its authority to regulate the use of such properties. For the above reasons, I **CONCLUDE** that the cross-motion of petitioners for partial summary decision is **DENIED**.

ORDER

It is **ORDERED** that the motion for summary decision of respondent **NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION** to uphold its decision to deny petitioners' applications for GPs-4 under the Coastal Area Facility Review Act for failure to meet the requirements of the Coastal High Hazard Area rules is **GRANTED**, the motion of respondent for summary decision to uphold its decision to deny petitioners' applications for GPs-4 for failure to comply with the Dunes rules is **DENIED**, the cross-motion of petitioners for partial summary decision is **DENIED**, and the appeals of petitioners are **DISMISSED**.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 16, 2023
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nn