State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

JACK AND SARAH CAYRE, Petitioners, v. **NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION/ LAND USE REGULATION,** Respondent.	OAL DKT. NO. ELU 6686-16 AGENCY DKT. NO. 1310-11-0001.1 (CAF140001)
AND	
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION/ COASTAL AND LAND USE COMPLIANCE AND ENFORCEMENT, Petitioner, v. **JACK AND SARAH CAYRE,** Respondents.	OAL DKT. NO. ECE 8199-16 AGENCY DKT. NO. PEA150001-1310-11-0001.1 (CONSOLIDATED)

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Joshua S. Bauchner, Esq. (Ansell Grimm & Aaron, PC), for Petitioners-Respondents

Ryan Atkinson and **Kevin Fleming**, Deputy Attorneys General (Gurbir Singh Grewal, Attorney General of New Jersey), for Respondent-Petitioner

Record Closed: December 17, 2018 Decided: December 19, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE

This matter arises from the denial by the Department of Environmental Protection (DEP) of Jack and Sarah Cayre's (Cayres) application for an after-the-fact permit under the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 to -21, for a stone revetment and a concrete pavilion that they had constructed on their oceanfront property in the Borough of Deal, and from the DEP's issuance of an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) against the Cayres for violations of CAFRA, the Flood Hazard Control Act (FHACA), N.J.S.A. 58:16A-50 to -68, and the regulations implementing those statutes.

PROCEDURAL HISTORY

On July 23, 2014, the DEP issued a Notice of Violation to the Cayres in connection with the construction of a concrete pavilion and the reconstruction of a stone revetment on their oceanfront property. The Cayres subsequently submitted an after-the-fact permit application for the construction, which the DEP denied on June 1, 2015. On December 17, 2015, the DEP issued an AONOCAPA against the Cayres for violations of CAFRA, FHACA, and their implementing regulations.
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The Cayres appealed both the permit application denial and the AONOCAPA, and pursuant to N.J.S.A. 52:14B-1 to -15, the Commissioner of the DEP transmitted the appeals to the Office of Administrative Law (OAL) as contested cases, which were assigned to me for determination. On September 27, 2016, I consolidated the permit application denial appeal, OAL Dkt. No. ELU 06686-16, and the AONOCAPA appeal, OAL Dkt. No. ECE 08199-16, pursuant to N.J.A.C. 1:1-17.1 to -17.3.

As part of this matter, the parties have filed several motions. On May 5, 2017, the DEP moved for summary decision on both the issue of the Cayres' liability for statutory and regulatory violations and the issue of the appropriate penalty for such violations. An opposition brief was filed by the Cayres on May 19, 2017. On August 25, 2017, I issued an order granting the DEP's motion in part and denying the DEP's motion in part.

First, I granted the DEP's motion in part by finding that the DEP properly denied the Cayres' permit application because the Cayres violated the Coastal Engineering Rule, N.J.A.C. 7:7-15.11, and the Coastal Bluffs Rule, N.J.A.C. 7:7-9.29, by failing to provide the DEP with documentation showing that other, non-structural or hybrid structural/non-structural measures would not have been feasible alternative shore protection measures, and because the Cayres failed to provide the DEP with a proper wave scour and slope stability analysis for the structures erected on their property. I also ruled that, on the penalty issue, the DEP properly determined that, by constructing the stone revetment and the pavilion without a CAFRA permit, despite knowing that they needed one, the Cayres had committed a "willful act or omission" that constituted a "major conduct" violation for purposes of calculating a penalty.

Second, I denied the DEP's motion in part on the issue of penalty to the extent that I determined that there was a genuine issue of material fact necessitating a hearing with respect to whether the construction of the stone revetment and concrete pavilion occurred on a beach, as defined N.J.A.C. 7:7-9.22(a).[1]

[1] The DEP seeks a penalty of $170,000 for violations of CAFRA and its implementing regulations. However, the DEP is not pursuing a penalty for violations of FHACA.

In response to my partial summary decision order, the Cayres filed two separate motions for reconsideration. First, on September 8, 2017, the Cayres filed a motion for reconsideration arguing in part that there were genuine issues of material fact with respect to the Cayres' compliance with the Coastal Engineering Rule and the Coastal Bluffs Rule and whether the permit application included a proper wave scour and slope stability analysis for both the stone revetment and the concrete pavilion. On October 19, 2017, I issued an order denying the Cayres' motion on the liability issues concerning their compliance with the Coastal Engineering Rule and the Coastal Bluffs Rule and their failure to provide a wave scour and slope stability analysis for the concrete pavilion as part of their permit application. On the latter issue, I again noted that "[w]hile [their engineer's] report references both the revetment and the 'cabana,' it does not clearly provide all of the information requested by the DEP, especially as to the beach pavilion structure."[2] (October 19, 2017, Order, p. 5.) However, I granted the Cayres' motion in part and modified my prior ruling that the Cayres' engaged in "major conduct" in building the structures without a permit, instead finding that there is a genuine issue of material fact whether the construction constituted a "willful act or omission" for purposes of calculating a penalty.

On September 8, 2017, the DEP notified me that it was dropping the beach penalty. (Administrative Consent Order, Paragraph 19.) Then, on November 13, 2017, and again on January 5, 2018, the Cayres submitted a request to amend their permit application pursuant to N.J.A.C. 1:1-3.2(b), which provides that:

> When the Office of Administrative Law acquires jurisdiction over a matter that arises from a State agency's rejection of a party's application, and at the hearing the party offers proofs that were not previously considered by the agency, the judge may either allow the party to amend the application to add new contentions, claims or defenses or, if considerations of expediency and efficiency so require, the judge shall order the matter returned to the State agency.
> [Ibid.]

[2] "Cabana" and "pavilion" refer to the same structure on the Cayres' property.

According to the Cayres, the basis for their request was "newly discovered evidence" in the form of photographs that "reveal that the revetment and cabana . . . were constructed on top of a pre-existing rock foundation from the previous shore protection structure which was partially destroyed during Superstorm Sandy." (January 5, 2018, Letter Further Requesting to Amend Permit Application.) For this reason, the Cayres sought to amend their permit application to include a more thorough wave scour and slope stability analysis by their engineer, Dr. J. Richard Weggel. I treated the Cayres' request as another motion for reconsideration of my order granting partial summary decision, but I declined to change my prior ruling and issued an order denying the Cayres' motion on May 24, 2018.

I issued my partial summary decision order on August 25, 2017 and subsequently entertained two motions for reconsideration from the Cayres. I then submitted my partial summary decision order to the Commissioner of the DEP for immediate review as an initial decision in accordance with N.J.A.C. 1:1-12.5(e). That decision modified the August 25, 2017, order to reflect my reconsideration of the "major conduct" issue, as discussed above.

The Commissioner determined that my initial decision was interlocutory and denied review until all issues had been resolved. After the Commissioner denied interlocutory review, the parties were able to enter into an ACO to resolve the penalty case, NJDEP v. Cayre, ECE 8199-16. Thus, the only issue remaining in the contested case is the denial of the Cayres' permit on which I granted summary decision to the DEP.

FACTS

The Cayres are the owners of real property located at 11 Marine Place, Block 56, Lot 2, Borough of Deal, Monmouth County. (Exh. R, paragraph 1.) In August 2011, the Cayres, or persons acting on their behalf, submitted applications for a CAFRA General Permit #9 and an Individual CAFRA permit to authorize construction of a seawall, pool, and cabana on the property. Id. at 2. On January 12, 2012, the DEP denied the

application. Id. at 3. The Cayres filed an Administrative Hearing Request to challenge the denial but ultimately withdrew the appeal. (Exh. C, p. 2.)

On October 29, 2012, Superstorm Sandy destroyed a stone revetment along the Cayres' property. (Cayres' Brief, p. 1.) The Cayres subsequently replaced the revetment and added a poured concrete pavilion. Ibid. The pavilion contains hook-ups to electricity, water utilities, sewer, and natural gas and/or propane. (Exh. R, paragraphs 16-18, 24.) It also contains a functioning restroom and sinks. Id. at paragraphs 19-20. The pavilion is seasonally furnished with such amenities as a refrigerator, ice maker, television, lights, and speakers. Id. at paragraphs 25-28. It is undisputed that the Cayres completed this construction without the required CAFRA permit. (Cayres' Brief, p. 1.)

On July 11 and July 17, 2014, a representative of the DEP's Bureau of Coastal & Land Use Compliance & Enforcement (Bureau) inspected the site. (Exh. M, p. 3.) The inspector found that the reconstructed stone revetment was located waterward of the previously existing revetment and was smaller in width. Ibid. In addition, the inspector noted that the concrete pavilion had been constructed into the stone revetment, through a coastal bluff. Ibid.

On July 23, 2014, the DEP issued the Cayres a Notice of Violation pursuant to CAFRA and FHACA for reconstruction of the stone revetment and construction of the concrete pavilion, which was built into the stone revetment, through a coastal bluff, and, according to the DEP, onto the beach. (Exh. L, p. 2.) On November 25, 2014, the Cayres applied for an after-the-fact CAFRA permit to legalize the stone revetment and pavilion. (Exh. M, p. 4.) On June 1, 2015, DEP's Division of Land Use Regulation denied the Cayres' CAFRA permit application. (Exh. C, p. 1.) The DEP found the construction failed to comply with the rules relating to beaches (N.J.A.C. 7:7E-3.22, now N.J.A.C. 7:7-9.22), coastal bluffs (N.J.A.C. 7E-3.31, now N.J.A.C. 7:7-9.29), flood hazard areas (N.J.A.C. 7:7E-3.25, now N.J.A.C. 7:7-9.25), coastal engineering

(N.J.A.C. 7:7E-7.11, now N.J.A.C. 7:7-15.11) and housing use (N.J.A.C. 7:7E-7.2, now N.J.A.C. 7:7-15.2).[3]

LEGAL ANALYSIS

In a contested case, a motion for summary decision may be granted "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). Under this regulation, which mirrors the motion for summary judgment in the Court Rules, R. 4:46-1, "the determination [of] whether there exists a genuine issue with respect to a material fact challenged requires . . . a consideration of whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995). In making this determination, the analysis is "whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533-34. Summary decision is also proper when the opposing party "points only to disputed issues of fact that are 'of an insubstantial nature.'" Id. at 529.

As set forth in greater detail below, the DEP is entitled to summary decision as to its denial of the CAFRA permit because the undisputed facts demonstrate that the permit application lacked information regarding compliance with the Coastal Engineering Rule, N.J.A.C. 7:7-15.11, and the Coastal Bluffs Rule, N.J.A.C. 7:7-9.29.

I. The CAFRA permit was properly denied because the permit application lacked information regarding compliance with the Coastal Engineering Rule and the Coastal Bluffs Rule.

[3] The DEP's Coastal Zone Management rules were recodified effective July 6, 2015 with no substantive changes to the relevant rules. The remainder of this decision cites to the current codification of the rules.

Summary decision is appropriate as to the DEP's denial of the CAFRA permit because the permit application failed to show compliance with at least two Coastal Zone Management Rules. The construction of the concrete pavilion violates the Coastal Engineering Rule because the Cayres failed to show that alternative, non-structural or hybrid shore protection measures were infeasible at the location. Additionally, the construction violates the Coastal Bluffs Rule because the Cayres failed to show that the concrete pavilion meets the required shore protection standards.

A. The construction violates the Coastal Engineering Rule because the Cayres failed to show that non-structural or hybrid shore protection measures were infeasible.

According to the Coastal Engineering Rule, "[c]oastal engineering measures include a variety of non-structural, hybrid, and structural shore protection and storm damage reduction measures to manage water areas and protect the shoreline from the effects of erosion, storms, and sediment and sand movement." N.J.A.C. 7:7-15.11(a). The Coastal Engineering Rule sets forth a hierarchy of shore protection measures. See N.J.A.C. 7:7-15.11(b). Non-structural shore protection measures, which allow for the growth of vegetation, must be used "unless it is demonstrated that use of non-structural measures is not feasible or practicable." N.J.A.C. 7:7-15.11(b)(1). When this showing is made, hybrid shore protection measures, such as stone or rip rap, may be used. N.J.A.C. 7:7-15.11(b)(2). Structural shore protection measures, such as bulkheads and sea walls, are to be used only when it has been demonstrated that non-structural and hybrid shore protection measures are impracticable or infeasible. N.J.A.C. 7:7-15.11(b)(3). The regulation provides factors to consider in determining whether a protection measure is "feasible." See N.J.A.C. 7:7-15.11(b)(1)-(b)(3).

Assuming that the concrete pavilion is a shore protection measure,[4] it would be classified as "structural" under N.J.A.C. 7:7-15.11(b)(3). Thus, the Cayres were required to submit documentation showing that a non-structural or hybrid shore protection measure was infeasible at that location. No such showing was made. Their argument that documentation was not required because Superstorm Sandy wiped out the previous revetment is not persuasive. In fact, the Cayres admit that the stone

revetment, a less obtrusive measure of shore protection, could have been extended in the area where the concrete pavilion was constructed. (Exh. R, paragraph 32.)

The Cayres argue that "[i]t should be apparent from the undisputed circumstances surrounding the instant permit application that non-structural or hybrid shore protection measures were neither feasible nor practicable at this oceanfront location." (Cayres' Brief, p. 18.) In other words, the destruction from Superstorm Sandy should provide sufficient proof that non-structural or hybrid shore protection measures were not feasible or practicable on the property. Id. at p. 19. According to the Cayres, "[t]he DEP's myopic requirement for documentation of something that is so obvious to even the casual observer is arbitrary and capricious." Ibid.

Through this argument, the Cayres acknowledge that their permit application lacked specific documentation regarding compliance with the Coastal Engineering Rule. The Cayres have not pointed to legal authority to suggest that they have made the appropriate showing under the regulation. For these reasons, the CAFRA permit application was properly denied for failure to demonstrate compliance with the Coastal Engineering Rule.

B. The construction violates the Coastal Bluffs Rule because the Cayres failed to show that the concrete pavilion meets the required shore protection standards.

Under the Coastal Bluffs Rule, a coastal bluff is defined as "a steep slope (greater than 15 percent) of consolidated (rock) or unconsolidated (sand, gravel) sediment which is adjacent to the shoreline or which is demonstrably associated with shoreline processes." N.J.A.C. 7:7-9.29(a). Coastal bluffs "have a significant function in storm damage prevention and flood control, by eroding in response to wave action and resisting erosion caused by wind and rain runoff." N.J.A.C. 7:7-9.29(d). "Disturbance of coastal bluffs which undermines their natural resistance to wind and rain erosion increases the risk of their collapse and causes cuts in the bluffs." Ibid. This, in turn, "increases danger to structures at the top of the bluff and reduces the

[4] It is disputed whether the concrete pavilion serves as a shore protection measure at all.

bluff's ability to buffer upland area from coastal storms." Ibid. For these reasons, development is generally prohibited on coastal bluffs. N.J.A.C. 7:7-9.29(b). However, there is an exception for development that serves "shore protection activities which meet the appropriate coastal engineering rule, N.J.A.C. 7:7-15.11 . . . ." Ibid.

The Cayres do not dispute that the pavilion was built through a coastal bluff and is thus subject to the Coastal Bluffs Rule. (Cayres' Counterstatement of Material Facts, paragraph 32.) Instead, the Cayres argue both in their brief and orally that the construction of the pavilion falls into the exception for shore protection activities. Notably, this exception can only apply to shore protection activities that meet the Coastal Engineering Rule. As previously explained, the Cayres have failed to comply with the Coastal Engineering Rule; thus, the exception for shore protection activities cannot apply.

Further, the Cayres failed to show that the concrete pavilion would provide sufficient shore protection functions. The DEP notes that the Cayres refused to provide the requested wave scour analysis and slope stability analysis to evaluate potential shore protection functions of the pavilion. (DEP's Reply Brief, p. 9.) Instead, the Cayres only provided an analysis that discussed the revetment on either side of the pavilion. Ibid. (citing Exh. H).

The DEP was required to deny the CAFRA permit application because the Cayres failed to provide the necessary proof that the pavilion sufficiently serves shore protection functions and complies with the requirements of the Coastal Engineering Rule. Although there is a dispute as to whether the pavilion qualifies as a shore protection structure, summary decision as to the permit denial is still appropriate due to the lack of information in the application.

The DEP was justified in denying the permit based on the Coastal Engineering Rule and Costal Bluffs Rule alone, as noncompliance with a single rule is sufficient to support the permit denial. For these reasons, there is no material factual dispute as to DEP's denial of the CAFRA permit and summary decision is appropriate.

CONCLUSION

The DEP is entitled to summary decision as to its CAFRA permit denial because the undisputed facts demonstrate that the permit application lacked information regarding compliance with the Coastal Engineering Rule and the Coastal Bluffs Rule. The Cayres violated the Coastal Engineering Rule by failing to show that non-structural or hybrid shore protection measures were infeasible on the property. Further, the Cayres violated the Coastal Bluffs rule by failing to demonstrate that the concrete pavilion would serve shore protection functions by refusing to provide information requested by the DEP.

However, summary decision on the penalty issue is inappropriate due to genuine issues regarding the Cayres' conduct and whether the Cayres built the structures on a beach, as defined by N.J.A.C. 7:7-9.22(a). These issues affect the proper penalty and necessitate a hearing.

DECISION AND ORDER

Based on the foregoing, I **ORDER** that the DEP's motion for summary decision as to denial of the CAFRA permit (OAL DKT. NO. ELU 6686-16) is **GRANTED**.

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.

December 19, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: 12/19/18

Date Mailed to Parties: 12/19/18

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