



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. ECE 12015-14
AGENCY DKT. NO. PEA 120001-
1507-11-0039.1

**NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION –
COASTAL AND LAND USE COMPLIANCE
AND ENFORCEMENT,**

Petitioner,

v.

ENZO MARRANO,

Respondent.

Elsbeth Hans, Deputy Attorney General, for respondent (John J. Hoffman,
Acting Attorney General of New Jersey, attorney)

Enzo Marrano, respondent, pro se

Record Closed: September 11, 2015

Decided: October 26, 2015

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE

Respondent Enzo Marrano appeals the petitioner New Jersey Department of Environmental Protection – Coastal and Land Use Compliance and Enforcement's (Department) Administrative Order and Notice of Civil Administrative Penalty Assessment issued against him.

PROCEDURAL HISTORY

On July 19, 2011, the Bureau of Coastal and Land Use Compliance and Enforcement issued a Notice of Violation (NOV) to the respondent. The NOV cited the installation of an unauthorized 12' x 12.4' boat lift and associated pilings. The respondent was required to submit for and obtain a Waterfront Development Permit to legalize the boatlift and three irregular shaped fixed docks. On June 15, 2012, after an investigation found that respondent had neither received a permit for or removed the boatlift and docks, the Department issued a Second/Final NOV to the respondent informing the respondent that the Department may assess a civil administrative penalty if compliance was not achieved by July 31, 2012. On December 19, 2012, the Department issued an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) seeking remediation of the site and assessing a penalty of \$4,000.

On February 6, 2013, respondent's daughter Natalie Castaneda filed a request for an adjudicatory hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.A.C. 7:7-8.8 et seq., citing respondent's health complications as the reason that he was unable to submit the request. The Department sent several letters seeking further information to process the request. On September 16, 2013, Ms. Castaneda advised that respondent did not have sufficient knowledge to answer the findings in the AONOCAPA, but did have a 2011 survey and still wished to appeal. The Department transmitted the matter to the Office of Administrative Law where it was filed on September 19, 2014. A hearing was conducted on September 11, 2015, and the record closed on that date.

TESTIMONY

John Hanf, Jr. testified that he is a principal environmental specialist who works at the Toms River Bureau of Coastal and Land Use Enforcement, New Jersey Department of Environmental Protection. His duties are to perform inspections and enforce the Freshwater Wetlands Protection Act, Coastal Area Facilities Review Act (CAFRA) as well as flood hazards. He investigates complaints from the county, state and local governments as well as police and citizens that come in on a hotline. Fifty to sixty percent of his investigations pertain to waterfront structures. Anything past the high mean water line is in his jurisdiction. When investigating, he speaks to the property owner first, which may take a while since the owners may be away. The properties are often summer homes that are not occupied at the time. Mr. Hanf then does a background check for permits with the Bureau of Land Use Regulation through the New Jersey Environmental Management System (NJEMS). He then returns to the site to take measurements and photographs. If there are no permits issued, he will tell the owner that he or she needs one and issue either a warning or a notice of violation.

Regarding the property in question, Mr. Hanf testified that he visited the respondent's property on at least six occasions. He identified the survey of the property that respondent had supplied in connection with the application for a permit filed after the first notice of violation. (P-1.) The survey was prepared for respondent and his daughter. The survey showed a triangular area that constituted the manmade lagoon where respondent had a boat lift and docks. The first inspector to the property had been Chris Pike who had conducted an inspection in June 2011. Mr. Pike's report was contained in a compliance evaluation summary that Mr. Hanf was able to print out from the computer system. (P-2.) According to the business record, Mr. Pike, a senior environmental specialist observed the boat lift and docks in the open water way that needed permits. Mr. Pike issued a Notice of Violation on July 19, 2011, for having structures that he did not have a permit to have. (P-3) The owner tried to obtain permits, but the application was denied. (P-4.) The boat lift did not meet coastal permit rules, N.J.A.C. 7:7-7.19. Mr. Hanf showed on the survey how the boat lift did not meet the criteria in that it could extend no more than 3.4 feet based on the rule. Respondent's boat lift measured 12' x 12.4" with associated pilings and three irregular

shaped fixed docks. (P-1, Measurements marked in red.) Respondent did not appeal the permit denial.

Mr. Hanf further testified that when he investigated on June 11, 2012, after the March 20, 2012 permit denial, it was to see if the structures had been removed. Respondent had not removed them as shown in the pictures he took. (P-5, P-6 and P-7.) The boat lift, pilings and docks were all still there. Respondent was not there so he took pictures from the adjacent owner's property and took measurements using Google earth, which shows the location of structures by satellite imagery. Based on the structures existing on respondent's property without permit, Mr. Hanf prepared a Notice of Violation dated June 15, 2012, giving respondent until July 31, 2012 to correct the actions or the Department would issue an Administrative Order. (P-8.) On September 12, 2012, Mr. Hanf followed up to see if the structures had been taken out, but they had not been. (P-9 and P-10.) The Department inspected again on November 16, 2012 and the structures were still there. (P-12.) The Department issued an AONOCAPA on December 19, 2012 for noncompliance and unauthorized development. He was given thirty days to remove the docks, pilings and boat lift. Mr. Hanf went back two more times but the structures were not removed, even as late as May 14, 2015, when he again inspected and took pictures. (P-12.) He assessed a penalty of \$4,000 using the penalty rationale sheet. He reviewed it with his supervisor. Respondent's noncompliance was deemed to be major conduct. The penalty amount was \$2,000 and he was charged with two days of violation for each day a notice of violation issued.

On cross-examination, Mr. Hanf clarified that a neighbor brought the boat lift to the attention of the Department, but it was the Department's own investigation that lead to the Notice of Violation. He explained that the boat lift is a hazard to navigation because it hinders navigation. Respondent's six-foot dock extends much farther than allowed under the regulations.

Enzo Marrano did not dispute any of the facts to which Mr. Hanf testified. Rather, Mr. Marrano testified that after getting the first letter from the Department, he got a survey done and took it to Trenton. He explained his situation to someone at the

Department and showed the survey and whomever he spoke to said that it was fine. He used the picture to show how oil and trash in the water caused him to need a boat lift. (P-12.) There had been a six-foot walkway, but he took it off to have the boat closer to the bulkhead. He put the lift in ten or eleven years ago in order to have the boat clean. He does not recall to whom he spoke at the Department. He recalled going to Toms River, but did not recall speaking to Mr. Hanf. The Toms River office of the Department told him to go to Trenton. He does not believe that it is right that he had the dock ten years and now is told that he cannot have it.

FINDINGS OF FACT

The facts, as testified to by John J. Hanf, Jr. are undisputed and therefore **FOUND** as **FACT**. I also **FIND** that respondent had the boat lift installed over ten years ago believing that the builder had obtained the proper permits. However, I **FIND** that respondent has known that his boat lift and other structures did not have the proper permits since 2011, yet he has never taken any action to correct them to comply with regulations or remove them. I **FIND** that respondent's January 24, 2012 application for a permit was denied by letter of March 20, 2012 and respondent did not appeal. Although I **FIND** that respondent went to Trenton to try to get approval for the structures, the only evidence in the record is the denial of the permit. Respondent provided nothing other than hearsay testimony to say that the Department had approved the survey showing the structures. I **FIND** that the Department conducted investigations on June 11, 2012; September 12, 2012; and November 16, 2012 and each time, Mr. Hanf observed that the violations had not been addressed. In light of the foregoing, respondent has been able to use the noncomplying structures for much longer than he should have and it is past time for them to be removed.

CONCLUSIONS OF LAW

I **CONCLUDE** that based upon the foregoing findings, which were undisputed, the Department has proven by a preponderance of the credible evidence in the record that respondent violated the Waterfront Development Act, N.J.S.A. 12:5-3 et seq. N.J.A.C. 7:14-8.5(i) provides:

(i) The Department may, in its discretion, move from the midpoint of the range to an amount no greater than the maximum amount nor less than the minimum amount in the range on the basis of the following factors:

1. The compliance history of the violator;
2. The number, frequency and severity of the violation(s);
3. The measures taken by the violator to mitigate the effects of the current violation or to prevent future violations;
4. The deterrent effect of the penalty;
5. The cooperation of the violator in correcting the violation, remedying any environmental damage caused by the violation and ensuring that the violation does not reoccur;

I further **CONCLUDE** that based on the factors set forth, the Department properly exercised its discretion to assess a reasonable and appropriate penalty of \$4,000 against respondent for the violations set forth in the AONOCAPA. Each day during which a violation continues constitutes “an additional separate and distinct violation” under the Waterfront Development Act N.J.S.A. 12:5-3 et seq. and the DEP rules at N.J.A.C. 7:7-8.8. Accordingly I further **FIND** that the DEP is authorized to issue a penalty based on the number of days of violations, such as from the time the permit conditions were required to be implemented, but the DEP assessed a penalty for only two days of violation.

Generally, a regulatory agency retains “broad discretion in determining the sanctions to be imposed for a violation of the legislation it is charged with administering.” In re Scioscia, 216 N.J. Super. 644, 660 (App. Div. 1987) (citing

Knoble v. Waterfront Comm. of N.Y. Harbor, 67 N.J. 427 (1975)). “Consequently, such a sanction will be set aside on appeal only if it is arbitrary, capricious or unreasonable.” Scioscia, supra, 216 N.J. Super. at 660 (citing Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)). However, the broad discretion afforded administrative agencies has its limits. Crema v. New Jersey Dept. of Env'tl. Prot., 94 N.J. 286, 299 (1983). Administrative agencies should articulate the standards and principles that govern their discretionary acts by setting forth procedural and substantive safeguards, standards and rules. Id. at 301.

In the present case, the application of duly promulgated rules pursuant to the penalty provisions of N.J.S.A. 58:10A-10 is consistent with principles which guide discretionary agency actions. The Department has set forth its rationale for penalty amounts, indicating the formula used to assess each penalty and citing the pertinent administrative code provisions.

I **CONCLUDE** that the penalty in the amount of \$4,000 was properly assessed by the Department in the AONOCAPA under the DEP's penalty matrix set forth in N.J.A.C. 7:14-8.5. I also **FIND** that the DEP properly exercised its discretion in assessing one penalty per violation (even though the violation continued for years).

ORDER

I hereby **ORDER** that the Department's determination that respondent violated the Act and the imposition of a penalty are **AFFIRMED** in the amount of \$4,000. I further **ORDER** that respondent remove the offending structures immediately.

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.



October 26, 2015

DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency:

Date Mailed to Parties:

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APPENDIX

WITNESSES

For petitioner:

John H. Hanf, Jr.

For respondent:

Enzo Marrano

EXHIBITS

For petitioner:

P-1	Survey Map of Property
P-2	Chris Pike's June 2011 Investigation Notes
P-3	July 2011 NOV
P-4	Permit Denial Letter
P-5 - P-7	June 2012 photos
P-8	June 2012 NOV
P-9 & P-10	September 2012 photos
P-11	AONOCAPA dated December 19, 2012
P-12	May 2015 photo

For respondent:

None