

appeal the Department's denial of their application for an after-the-fact individual permit under the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 to 51, for a stone revetment and concrete pavilion on their oceanfront property in the Borough of Deal, Monmouth County. Second, the Cayres appeal an Administrative Order and Notice of Civil Administrative Penalty (AONOCAPA) for building the revetment and pavilion without a permit, in violation of CAFRA, the Flood Hazard Area Control Act (FHACA), N.J.S.A. 58:16A-50 to 103, and the implementing regulations.¹ The AONOCAPA penalty was settled between the parties. In an December 19, 2018 Initial Decision, Acting Director and Chief Administrative Law Judge (ALJ) Lisa James-Beavers found that the Department was entitled to summary decision as to the CAFRA permit denial because the undisputed facts showed that the Cayres' permit application failed to comply with the coastal engineering rule, N.J.A.C. 7:7-15.11 and the coastal bluff rule, N.J.A.C. 7:7-9.29. For the reasons set forth herein, I ADOPT, as MODIFIED, the Initial Decision.

FACTUAL AND PROCEDURAL BACKGROUND

I ADOPT the ALJ's recitation of the facts as amplified and modified below.

The Cayres are the owners of real property located at 11 Marine Place, Block 56, Lot 2, Borough of Deal, Monmouth County. In August 2011, the Cayres submitted applications for a CAFRA general permit #9 and a CAFRA individual permit to authorize construction of a seawall, pool, and cabana on the property. On January 12, 2012, the Department denied the application.

¹ The Coastal Zone Management Rules were recodified effective July 6, 2015 with no substantive changes to the rules listed. These have been recodified as follows: beaches, N.J.A.C. 7:7-9.22; flood hazard areas, N.J.A.C. 7:7-9.25; housing use, N.J.A.C. 7:7-15.2; coastal bluffs, N.J.A.C. 7:7-9.29; coastal engineering, N.J.A.C. 7:7-15.11. For the purposes of this Order, I will refer to the rules as they are currently codified.

The Cayres filed an Administrative Hearing Request to challenge the denial but ultimately withdrew the appeal.

On October 29, 2012, Superstorm Sandy destroyed a stone revetment along the Cayres' property. The Cayres subsequently replaced the revetment and added a poured concrete pavilion. The pavilion contains hook-ups to electricity, water utilities, sewer, and natural gas and/or propane. It also contains a functioning restroom and sinks. The pavilion is seasonally furnished with such amenities as a refrigerator, icemaker, television, lights, and speakers. It is undisputed that the Cayres completed this construction without the required CAFRA permit.

On July 11 and July 17, 2014, a representative of the Department's Bureau of Coastal & Land Use Compliance & Enforcement inspected the site. The inspector found that the reconstructed stone revetment was located waterward of the previously existing revetment and was smaller in width. In addition, the inspector noted that the concrete pavilion had been constructed into the stone revetment, through a coastal bluff. Based upon the findings of these two inspections, on July 23, 2014 the Department issued the Cayres a Notice of Violation for constructing the structures without the necessary permits and approvals.

The Cayres submitted an application for an after-the-fact CAFRA individual permit on November 25, 2014. The permit was denied on June 1, 2015. On December 17, 2015, the Department issued the AONOCAPA, which directed the Cayres to submit a restoration plan for review and approval and assessed a \$221,000 civil administrative penalty for the violations, later corrected to \$170,000.²

²The Department corrected the AONOCAPA to reflect the square footage of impacted area and to reference the correct version of the penalty assessment table.

The Department granted the Cayres' requests for administrative hearings to contest the permit denial and the AONOCAPA and transmitted the matters to the Office of Administrative Law (OAL) where they were consolidated. On May 5, 2017, the Department moved for summary decision on both the permit denial and the penalty. The Department argued that summary decision on the permit denial should be granted because the Cayres' failed to show that the concrete pavilion met the Coastal engineering rule at N.J.A.C. 7:7-15.11, the Coastal bluffs rule at N.J.A.C. 7:7-9.29, and the beaches rule at N.J.A.C. 7:7-9.22. Specifically, the Department argued that the Cayres failed to show that the pavilion was a permissible shore protection structure, failed to demonstrate that non-structural or hybrid shore protection measures were not feasible or practicable, failed to show that there was no prudent or feasible alternative in an area other than a beach, and failed to show that the structures would not cause significant adverse long-term impacts to the natural function of the beach and dune system. The Department submitted two certifications in support of its motion.

The Cayres filed an opposition brief, arguing that material facts were in dispute therefore precluding summary decision. The Cayres asserted that the pavilion is a shore protection structure under the rules and that they did not need to address the hierarchy analysis required by the coastal engineering rule. The Cayres argued that destruction of the previously existing structure by Superstorm Sandy effectively established that non-structural or hybrid shore protection measures were neither feasible nor practicable at the location.

On August 25, 2017, ALJ James-Beavers issued an order granting the Department's motion on the permit denial. On the penalty, the ALJ granted the motion in part and denied it in

part, finding a question of fact existed as to whether the construction occurred on a beach, warranting an additional point for penalty purposes. The Cayres then filed two separate motions for reconsideration. On October 19, 2017, the ALJ denied the Cayres' initial motion for reconsideration in part and granted it in part. Specifically, the ALJ denied the motion with respect to the permit denial, but granted the motion as to the penalty, finding there was a genuine issue of material fact as to whether the Cayres' actions were "willful." On November 13, 2017, the Cayres requested permission to allow them to supplement the permit denial record or to return the case to the Department for further consideration. The Cayres presented a supplemental certification by their consultant, Dr. Weggel, which they claimed rebutted the Department's assertion that the Cayres' application failed to provide a wave scour analysis for the pavilion. On January 5, 2018, the Cayres filed another request to amend their CAFRA permit application and supplement the OAL proceeding to include a supplemental report prepared by their consultant. The Department opposed both requests. The ALJ viewed these requests to amend their permit application as a second motion for reconsideration based on new information. The ALJ denied the motions by order dated May 24, 2018, finding that the Cayres failed to show good cause for reconsideration.

On June 8, 2018, the ALJ issued an order of partial summary decision, which consolidated her findings in the prior orders, and submitted the order for immediate review pursuant to N.J.A.C. 1:1-12.5(e). The Department and the Cayres both filed exceptions and replies. I denied interlocutory review and returned the matter to ALJ James-Beavers in accordance with N.J.A.C.

1:1-12.5(e). Subsequently, the parties entered into an administrative consent order to resolve the AONOCAPA, leaving only the CAFRA permit denial remaining for decision.

The ALJ then issued her Initial Decision on December 19, 2018, again granting summary decision to the Department on the permit denial. The ALJ found that the Department was entitled to summary decision as to the CAFRA permit denial because the undisputed facts showed that the Cayres' permit application failed to comply with the Coastal engineering rule and the Coastal bluff rule.

The Cayres filed exceptions on December 28, 2018. They argued that the decision failed to view the facts in a light most favorable to the Cayres, that the ALJ improperly categorized the revetment portion of the structure as "hybrid" rather than "structural," and that the ALJ and the Department did not understand that the "scour analysis" requested by the Department could not have been provided because there would be no "scour" along the pavilion. In its response to the Cayres' exceptions, the Department stated that, regardless of how the pavilion was categorized, the Cayres failed to provide a hierarchy analysis under the rules, and that the Cayres improperly attempted to supplement the record with an expert report containing a "scour analysis" long after the record had been closed and summary decision rendered.

I find that Summary Decision in favor of the Department is appropriate as the undisputed facts in the record show that the Cayres' CAFRA permit application failed to meet the requirements of at least two Coastal Zone Management (CZM) rules.

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. Contini v. Bd. of Educ., 286 N.J. Super. 106, 121 (App. Div. 1995). When a party moves for summary decision, the non-moving party must submit responding affidavit(s) setting forth specific facts to show that there is a genuine issue which 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.” Contini, *supra*, 286 N.J. Super. at 122 (quoting Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)).

Summary decision in favor of the Department is appropriate here. Initially, the Cayres’ pavilion is clearly not a shore protection activity permissible under the Department’s rules. In fact, the Cayres failed to provide information that would allow the Department to determine the pavilion’s ability to function as a permissible shore protection activity. Second, even if the pavilion could be considered a permissible shore protection activity, the Cayres did not attempt

to demonstrate that the pavilion was the least intrusive shore protection activity that could be developed on the coastal bluff, as required by the rules.

According to the underlying permit denial, the Cayres' application failed to meet a number of the CZM rules including beaches, N.J.A.C. 7:7E-3.22; flood hazard areas, N.J.A.C. 7:7E-3.25; housing use, N.J.A.C. 7:7E-7.2; coastal bluffs N.J.A.C. 7:7E-3.31; and coastal engineering, 7:7E-7.11. While not waiving their ability to adjudicate all bases for denial, the Department's summary decision motion was grounded solely in the Cayres' failure in their application to meet the beaches, coastal bluffs and coastal engineering rules. The ALJ's decision did not address the beaches rule but upheld the Department's denial of the Cayres' CAFRA permit application based on the coastal bluffs and coastal engineering rules. Because I agree that the Cayres' CAFRA permit application does not meet the Coastal bluffs or Coastal engineering rules, I too see no reason to address the beaches rule.

CAFRA grants wide authority to the Department to protect and maintain New Jersey's coastal area. Island Venture Assocs. v. N.J. Dep't of Env'tl. Prot., 179 N.J. 485, 490. "The primary purpose of CAFRA is to protect the unique and fragile coastal zones of the State." Id. (citing In re Egg Harbor Assocs., 94 N.J. 358, 364, 464 A.2d 1115, 1118 (1983)). By enacting CAFRA, the Legislature intended to limit potential adverse environmental impacts while encouraging development of compatible land uses in the coastal zone. Seigel v. N.J. Dep't of Env'tl. Prot., 395 N.J. Super. 604, 615, 930 A.2d 461 (App. Div.) (citing N.J.S.A. 13:19-2), certif. denied, 193 N.J. 277, 937 A.2d 978 (2007). Agency decision involving an application for development under CAFRA invokes these 'competing policy considerations.'" Ibid. (quoting In re Cape May Cty. Mun. Utils.

Auth., 242 N.J. Super. 509, 516, 577 A.2d 840 (App.Div.1990)). The Commissioner may deny a CAFRA permit if the proposed development would violate or tend to violate the purpose and intent of CAFRA. N.J.S.A. 13:19-11.

Coastal bluffs rule, N.J.A.C. 7:7-9.29, and coastal engineering rule, N.J.A.C. 7:7-15.11

A coastal bluff is 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). Under the rule, “[d]evelopment is prohibited on coastal bluffs, except for linear development which meets the rule on the location of linear development . . . shore protection activities which meet the appropriate coastal engineering rule, N.J.A.C. 7:7-15.11, and single family homes and duplexes which are not located along the shorelines of the Atlantic Ocean, Delaware Bay, Raritan Bay, or Sandy Hook Bay” N.J.A.C. 7:7-9.29(a).

The rule explains that the stabilization of coastal bluffs with vegetation is encouraged and discusses the reason for the protection of coastal bluffs. “[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. Bluff erosion is also an important source of beach nourishment where the coastal bluff faces an open water body. 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. This increases danger to structures at the top of the bluff and reduces the bluff's ability to buffer upland area from coastal storms. Vegetation helps stabilize bluffs and can reduce the rate of erosion caused by wind and rain runoff.”

The Cayres do not dispute that the pavilion was constructed into a coastal bluff but claim that it is exempt because it is a shore protection activity that meets the coastal engineering rule, N.J.A.C. 7:7-15.11. I reject this argument for two independent reasons. First, the pavilion is not a shore protection structure. Second, even if one could consider it such, the pavilion does not meet the applicable coastal engineering rule because the Cayres failed to demonstrate that the pavilion was the least intrusive means of shore protection at the site.

Shore Protection Activity

The pavilion structure that the Cayres built into the coastal bluff is not a permissible shore protection measure under CAFRA or its implementing Coastal Zone Management rules, N.J.A.C. 7:7. The pavilion is a poured concrete structure featuring electric, gas, water, and sewer connections, functioning restroom, sink and shower, lights, television, refrigerator, icemaker, and barbeque. In their brief, the Cayres argue that it remains a genuine issue of material fact whether the pavilion is a “shore protection measure” as contemplated under the rules, and that the Department impermissibly analyzed the structure based on its intended use. (Cayres’ brief, page 11). The ALJ found that a dispute remained as to whether the pavilion qualified as a shore protection structure, however still granted summary decision because the permit denial was appropriate given the lack of information in the Cayres’ application. (Initial Decision at 10).

As set forth above, shore protection activities that meet the appropriate coastal engineering rule, N.J.A.C. 7:7-15.11, are exempt from the general prohibition of development on coastal bluffs. N.J.A.C. 7:7-9.29(a). However, the Cayres’ concrete pavilion does not fit within the scope of the exception. In order to qualify under N.J.A.C. 7:7-15.11, a “coastal engineering

measure” must operate to “manage water areas and protect the shoreline from the effects of erosion, storms, and sediment and sand movement.” The rule lists several examples of coastal engineering measures including “[b]each nourishment, sand fences, pedestrian crossing of dunes, stabilization of dunes, dune restoration projects, dredged material management, living shorelines, and the construction of retaining structures such as bulkheads, gabions, revetments, and seawalls.” While not an exhaustive list, each listed example operates to “manage water areas and protect the shoreline from the effects of erosion, storms, and sediment and sand movement.” It is not a reasonable reading of this rule to determine that a poured concrete pavilion featuring electric, gas, water, and sewer connections, functioning restroom, sink and shower, lights, television, refrigerator, icemaker, and barbeque could fit within that scope. The rule simply does not contemplate it.

Thus, I MODIFY the ALJ’s decision and find that it is inconsistent with the conservation purposes of CAFRA, as well as a reasonable reading of the rules, that the Cayres’ pavilion be considered as a shore protection activity exempt from the prohibition of development under the Coastal Bluffs rule.

That said, even if the Cayres’ pavilion had the potential to be considered an exempt shore protection activity within the scope of the Coastal Bluffs rule, the ALJ properly found that the Cayres failed to provide the necessary proof that the pavilion would adequately serve shore protection functions. In its review of the Cayres’ permit application, the Department reviewed the October 2014 report of the Cayres’ own expert, Dr. Stewart Farrell, PhD. His report concedes that the pavilion would differ functionally from the adjoining stone revetment under extreme

storm forces. He states that a problematic feature of the pavilion is that the overhanging roof structure “creates a closed compartment with no outlet for any large wave bores rushing into the opening and being forced to stop immediately at the back wall. Since there is no escape for the water, hydrostatic pressures rise to extreme levels on each wave impact.” Id. In the event of such a storm event, he says, “the roof would be blown off upward and somewhat landward to drop on the bluff edge and crumble into the structure below.” Id.

The Department requested that a “scour analysis” and “slope stability analysis” be performed for the pavilion structure to determine the frequency of storm events that would undermine the structure and to what extent and what loads would be imparted on the pavilion and revetment. (Denial, page 10). This was sought to address concerns regarding failure due to monolithic sliding resulting from wave attack. (Permit Denial, page 10).

In response, the Cayres provided a report by Dr. Weggel dated April 13, 2015. However, Dr. Weggel’s own report states “the purpose of this report is to evaluate the stability of the revetment slope under gravity and wave action when water levels having a 1% chance of occurring in any one year (the 100-year storm surge) occur.” (Exhibit H, Weggel report, Introduction)(emphasis added). Dr. Weggel goes on to provide a wave and gravitational forces stability analysis for the revetment but does not provide any discussion regarding the pavilion, except to say that “waves during the 1% event will break 112 [sic] seaward of the revetment and cabana. Consequently, wave forces on the wall itself and scour at its base are not concerns regarding its stability.” (Exhibit H, Weggel report, page 5). Department staff correctly

determined this to be inadequate information regarding the pavilion's shore protection functions.

Thereafter, when responding to the Department's motion for summary decision, the Cayres declined to address the lack of justification in Dr. Weggel's 2015 report except to summarily deny any such lack, stating that "the document speaks for itself." (Cayre Brief, page 4, #37). After the ALJ, in her August 25, 2017 initial decision granting and denying summary decision, agreed that the Cayres failed to show that the pavilion provided sufficient shore protection functions, the Cayres reversed course attempting to amend the record by providing a new certification and subsequently an additional report, both authored by Dr. Weggel in December 2017. The ALJ properly declined to consider the additional certification and report as they did not contain new contentions that were unavailable to the Cayres prior to hearing on the Department's motion. In filing their exceptions, the Cayres again attempt to improperly augment the record by again furnishing the December 2017 report by Dr. Weggel. However, this new report is clearly disallowed by the rules, which state that "evidence not presented at the hearing shall not be submitted as part of an exception, nor shall it be incorporated or referred to within exceptions. N.J.A.C. 1:1-18.4(c).

I ADOPT the ALJ's finding that the Cayres failed to show that the pavilion provided sufficient shore protection functions to justify application of the Coastal bluffs rule exemption at issue.

Hierarchy Analysis

Putting aside whether the Cayres' pavilion could ever qualify as an exempt shore protection activity under the Coastal bluffs rule, which it does not, the Cayres' application is also deficient because it fails to demonstrate that less intrusive measures were feasible or practicable at the site. The Coastal engineering rule sets forth an order, or hierarchy, in which shore protection measures are to be used. Non-structural shore protection measures are preferred over hybrid measures, which are, in turn, preferred over structural measures. N.J.A.C. 7:7-15.11(b). Examples given in the rule of hybrid measures are those that allow for the growth of vegetation such as stone, rip-rap, sloped concrete articulated blocks and gabion revetments. Ibid. Examples of structural measures are bulkheads, revetments, and sea walls. Ibid. The clear purpose of the rule is to insure the least intrusive type of shore protection for a given location.

The Cayres' application failed to demonstrate that a less intrusive shore protection measure than the poured concrete pavilion was feasible at the site. The Cayres argue that no such demonstration was required because Superstorm Sandy effectively performed this demonstration for them by damaging the previously existing stone revetment on the property. The Cayres claim that such storm activity on their property is all that is needed to meet the hierarchy requirement in the rule, and that "the Department's myopic requirement for documentation of something that is so obvious to even the casual observer is arbitrary and capricious."

I agree with the ALJ's finding that the Cayres' argument is unpersuasive. The Cayres admit that the hybrid stone revetment could have been extended through the area where the pavilion was constructed. This admission contradicts their argument that a structural concrete pavilion,

which does not allow for vegetation growth, was necessary because the stone revetment was shown to be infeasible. Their argument also doesn't account for the possibility that the previously existing structure might have been poorly designed or constructed. That the Cayres' reconstructed the stone revetment on both sides of the pavilion also belies this argument.

The Cayres do not in their motions before the ALJ or in their exceptions assert that they provided a hierarchy analysis required under the rules, but only continue to claim that they did not need to provide one. There is no question that the pavilion is a structural feature such that the coastal engineering rule requires a showing that a less intrusive shore protection measure was not feasible. The Department does not have the authority to waive the substantive requirements of CAFRA. Dragon v. New Jersey Dep't of Environmental Protection, 405 N.J. Super. 478 (App. Div. 2009). The Department was required to deny the CAFRA permit absent the showing that a less intrusive shore protection measure was not feasible.

For the reasons above, I ADOPT as MODIFIED, the ALJ's findings.

IT IS SO ORDERED.

DATE:

August 1, 2019



Catherine R. McCabe, Commissioner
New Jersey Department of
Environmental Protection

JACK AND SARAH CAYRE,
v.
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION/
LAND USE REGULATION
OAL DKT NO.: ELU 6686-16; AGENCY REF. NO.: 1310-11-0001.1

AND

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION/
COASTAL AND LAND USE COMPLIANCE AND ENFORCEMENT,
v.
JACK AND SARAH CAYRE.
OAL DKT NO.: ELU 6686-16, ECE 8199-16;
AGENCY REF. NO.: PEA150001-1310-11-0001.1
(CONSOLIDATED)

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