



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

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January 17, 2024

VIA EMAIL & REGULAR MAIL

Edward R. Pasternak, Esq. (epasternak@dorseysmrau.com)

Dorsey & Semrau, LLC

714 Main Street

Boonton, NJ 07005

Re: Third-party Adjudicatory Hearing Request
Permittee: Tom Maoli c/o V-Fee Realty Investment, LLC
Challenged By: Borough of Mendham
File No. 1418-20-0001.1 LUP230001
Office of Legal Affairs File No. T23-0197

Dear Mr. Pasternak,

The Department has received your hearing request filed on October 31, 2023, on behalf of the Borough of Mendham (Petitioner) challenging a Flood Hazard Control Act Individual Permit, Flood Hazard Act Verification – Method 6, Freshwater Wetland General Permit 11 for outfall/intake structures, a special activity transition area redevelopment waiver, a special activity transition area reduction waiver, and a water quality certificate, collectively constituting the Permit (Permit) issued by the Department to Tom Maoli of V-Fee Realty Investment, LLC (Permittee) on September 19, 2023, pursuant to the Flood Hazard Area Control Act (FHACA) Rules, N.J.A.C. 7:13, and the Freshwater Wetlands Protection Act (FWPA) Rules, N.J.A.C. 7:7A. Initially, the Department issued a notice of deficiency for Petitioner's hearing request, and ultimately notified Petitioner that the deficiency was timely cured on December 12, 2023.

The Permit verifies the flood hazard area elevation and limits as well as the riparian zone limits along an unnamed tributary of the North Branch Raritan River on Block and Lot: [801, 20] in Mendham Borough, Morris County (the Property). Additionally, the Permit authorizes the construction of an outfall and the stormwater Green Infrastructure Best Management Practices associated with the Property's redevelopment. Prior to the Permit's validation, the Permit requires a conservation restriction be recorded with Morris County pursuant to Pre-Construction Condition Number 1. Notice of the Permit was published in the DEP Bulletin on October 4, 2023.

BACKGROUND

Permittee is proposing to redevelop approximately 13-acres of the Property by removing existing buildings (retail and sports stores) and associated structures to construct a multifamily residential development. The Property's undeveloped portions are characterized by successional woodlands and wetlands. Petitioner is the municipality in which the Property is located.

Petitioner objects to the Permit, contending that the Department failed to recognize and consider the regulated waters present on the Property. Petitioner seeks a modification or revision of the Permit to account for the alleged presence of regulated waters. In support of Petitioner's hearing request, Petitioner submitted the Adjudicatory Hearing Checklist, a copy of the Permit, copies of comments sent to the Department, a copy of One Water Consulting LLC's engineering comments and photographs, and a United States Geological Survey StreamStats report. Petitioner did not claim a constitutional or statutory right to an adjudicatory hearing.

Permittee responded to Petitioner's hearing request on December 14, 2023, via an opposition letter. Permittee's letter cited the FHACA rule deadline, N.J.A.C. 7:13-23.1(b), to timely file an adjudicatory hearing and asserted Petitioner's hearing request should be denied. Additionally, Permittee cited a settlement between the Petitioner and the Permittee where Permittee asserts the hearing request, on its own, constitutes a violation of the settlement agreement and justifies a denial of Petitioner's hearing request.

DISCUSSION

Third-party objectors to a decision by the Department do not have an automatic right to an adversarial, adjudicatory hearing before an administrative law judge. To avoid "chaotic unpredictability and instability," the Administrative Procedure Act (APA) prohibits agencies from promulgating "any rule or regulation that would allow a third party to appeal a permit decision" unless specifically authorized to do so by federal law or State statute. See N.J.S.A. 52:14B-3.1 and 3.3. The term "third party" includes any individual other than the applicant, State agency, or other individual with a "particularized property interest sufficient to require a hearing on constitutional or statutory grounds." N.J.S.A. 52:14B-3.2. For parties other than the applicant or the agency to have standing, they must demonstrate: (1) a right to a hearing under the applicable statute, or (2) a "particularized property interest" of constitutional significance. Ibid.; see also In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. 452, 463-4 (2006). The standing requirement exists, in part, to ensure permit application processing is not bogged down by time-consuming and costly hearings which consume substantial public and private resources. In re Riverview Dev., 411 N.J. Super. 409, 424 (App. Div. 2010).

Petitioner seeks a hearing on the Permit issued in accordance with the FHACA, the FWPA, and the respective rules. However, neither the FHACA, N.J.S.A. 58:16A-50 to -103, nor the FWPA, N.J.S.A. 13:9B-1 to -30, grant statutory hearing rights to third party objectors. In re Riverview Dev., LLC, 411 N.J. Super. at 430; In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. 452, 462 (2006); see also N.J.A.C. 7:7A-21.1(e) and N.J.A.C. 7:13-23.1(e) (expressly limiting its procedure for granting an adjudicatory hearing request by the terms of the APA). Absent a statutory provision that expressly confers a right to a hearing, an administrative agency cannot create such



a right by mere regulation. In re Riverview Development, LLC, 411 N.J. Super. at 429. Petitioner has not identified a statute entitling it to a hearing; accordingly, Petitioner must demonstrate a "particularized property interest" of constitutional significance. N.J.S.A. 52:14B-2, -3.1(b) to (d), -3.2; In re Riverview Development, LLC., 411 N.J. Super. at 423.

As the Supreme Court has pointed out, "third parties generally are not able to meet . . . this rigorous review standard [particularized property interest]." In re NJPDES No. NJ0025241, 185 N.J. 474, 482 (2006); see also In re Freshwater Wetlands, 185 N.J. at 464. Courts have consistently held that proximity or any type of generalized property right shared with other property owners, such as recreational interests, traffic, views, quality of life, and property values, is insufficient to demonstrate a particularized property right required to establish third-party standing for a hearing. See Spalt, 237 N.J. Super. at 212 (close residency, fear of resultant injury to property, damage to recreational interest or shared generalized property rights are not particular property rights); In re Riverview Dev., 411 N.J. Super. at 437-38 (general claims of adverse aesthetic and traffic impacts did not create sufficient property interest to entitle neighboring homeowners to hearing); In re AMICO/Tunnel Carwash, 371 N.J. Super. 199, 211 (App. Div. 2004) (anticipated adverse traffic impacts and effect of use and enjoyment of properties did not entitle neighboring residents to a hearing); In re Thomas Urban/Square Props., LLC, 461 N.J. Super. 57, 61 (App. Div. 2019) (claims that commercial development would lead to flooding did not create sufficient property interest to entitle adjacent property owners to an adjudicatory hearing to contest a freshwater-wetlands general permit). As the court stated in Amico, citing Spalt, "simply because some of the plaintiffs reside close to the . . . site and are fearful of resultant injury to their property, does not mean that they are entitled to an adjudicatory hearing. Fear of damage to one's . . . generalized property rights shared with other property owners is insufficient to demonstrate a particularized property right." Amico, 371 N.J. Super. at 212. See also Musconetcong Watershed Ass'n v. N.J. Dep't of Env't Prot., 476 N.J. Super. 465 (App. Div. 2023) (Proximity to the permitted site and a general fear of future development are insufficient to trigger a right to an adjudicatory hearing).

While Petitioner has raised concerns about the Department's decision to issue the Permit, Petitioner has not asserted any claim of a particularized property interest. Petitioner's concerns surrounding the delineation of regulated waters pertinent to the Permit are indistinguishable from those shared by neighboring property owners and do not rise to a particularized property interest sufficient to create a right to an adjudicatory hearing. Additionally, whether Petitioner's hearing request violates the settlement agreement between private parties is beyond the Department's purview.



CONCLUSION

Because neither the FHACA nor the FWPA provide a statutory right for a third-party adjudicatory hearing and Petitioner has not demonstrated a particularized property interest of constitutional significance, Petitioner is not entitled to an adjudicatory hearing. Therefore, Petitioner's request for an adjudicatory hearing is denied.

Sincerely,



Melissa P. Abatemarco, Director
Office of Legal Affairs

c: Derek W. Orth, Esq.
Jessica Cobb, DWLM
OLA File # T23-0197

