

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

FRIENDS OF LIBERTY STATE PARK, INC.,	:	DOCKET NO: A-003444-06T1
	:	
	:	CIVIL ACTION
Appellant	:	
	:	ON APPEAL FROM:
v.	:	NEW JERSEY DEPARTMENT OF
	:	ENVIRONMENTAL PROTECTION
LISA JACKSON, Commissioner, New Jersey Department of	:	AUTHORIZATION UNDER COASTAL
Environmental Protection; and	:	GENERAL PERMIT NO. 17 (LURP
JON S. CORZINE, Governor, State of New Jersey,	:	FILE No.: 0906-04-0003.2) AND
	:	SUBSEQUENT REVIEW BY STATE
	:	OFFICIALS
	:	
Respondents.	:	

REPLY BRIEF OF APPELLANT FRIENDS OF LIBERTY STATE PARK, INC.

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PRELIMINARY STATEMENT

This appeal is about Respondent New Jersey Department of Environmental Protection's deliberate, and illegal, failure to follow its own regulations in order to expedite permit approvals for a waterfront development project. That this project was New Jersey's September 11th Memorial may explain why Respondent DEP felt pressured to circumvent its own rules. However, the tragedy of September 11th cannot excuse a subversion of the Coastal Permit Program Rules by the very agency charged with their enforcement. A governmental agency's failure to adhere to its own regulations is per se arbitrary and capricious.

Respondent DEP (DEP) short-circuited the regulatory process in two ways: first, the DEP decided not to require an individual waterfront development permit from the DEP's Land Use Regulation Program; and second, the DEP decided not to require a formal approval from the DEP's State Historic Preservation Office (HPO). By eliminating the individual waterfront development permit, the DEP eliminated newspaper notice to the public, notice to the Army Corps of Engineers, the opportunity for a hearing and a comprehensive environmental impact statement. Without a thorough environmental review or public hearing, the DEP never honestly or publicly considered the impacts of the proposed "Empty Sky" memorial. By eliminating the HPO approval, the DEP eliminated notices to governmental entities and non-governmental organizations concerned with historic preservation and landmarks, thereby depriving them of

the opportunity to administratively challenge a decision allowing the project to proceed. There were no written findings of any HPO decision. Again, this prevented the DEP from seriously considering the project's impacts upon the adjacent landmarks, the Central Railroad of New Jersey Terminal and the Morris Canal Basin.

It is not too late for judicial review. The challenged decision is both quasi-legislative and a matter of public importance, meaning that the 45-day time bar is inapplicable. The notice appearing in the DEP Bulletin was defective. There was no notice whatsoever of an HPO approval.

After site preparation in 2006, the project has not moved forward. The haste with which the DEP issued permits was paralleled by the Department of Treasury's short-sightedness in planning and funding construction. After site preparation, the State discovered that the project would cost much more than the estimated \$9 million. During 2007, bids were between \$22 million to \$25 million. The site has been fenced off and construction has not proceeded.

The emotional and politicized atmosphere that prompted the DEP to ignore its own regulations and Treasury to begin a project it cannot finish necessitates a clear-headed judicial review. The fact that the project stalled after site preparation makes this the opportune time.

LEGAL ARGUMENT

I. This Appeal Ought To Be Decided On Its Merits.

As argued previously, there are several reasons that this appeal is not subject to the 45-day bar set forth in Rule 2:4-1(b). First, the decision to approve the Memorial under a coastal general permit was quasi-legislative and not subject to the 45-day bar. Pb19-29. Second, construction of the Memorial and the legitimacy of the approval process are undeniably a matter of public importance. Pb29-36. Third, the notice that appeared in the DEP Bulletin was defective because it appeared in the wrong section of the DEP Bulletin. Pb31-32. Fourth, the HPO provided no notices of any kind because the HPO never formally considered the application. Pb49-50.

II. The Challenged Administrative Decision Is Quasi-Legislative.

The DEP argues that the challenged decision is not quasi-legislative because it involves a specific permitting decision with a specific set of facts. However, permitting decisions have been overturned as quasi-legislative, particularly where the DEP has misinterpreted its own regulations, Dept. of Envir. Protection v. Stavola, 103 N.J. 425 (1986), or made a decision in violation of its rules of procedure, In re Waterfront Development Permit No. WD88-0443-1, 244 N.J. Super. 426, 432 (App.Div. 1990) cert. den. 126 N.J. 320 (1991). The exercise of agency permitting authority is hybrid in nature, with attributes that are quasi-legislative and quasi-judicial. Matter of Issuance of A Permit, 120 N.J. 164, 171 (1990). ("Although

administrative agencies generally act either through rule-making or adjudication, DEP's permitting process does not fit precisely into either category.") A synopsis of the relevant Coastal Permit Program Rules demonstrates that this permitting was quasi-legislative.

Coastal general permits are categorical and not specific to particular projects. They are permits "issue[d] for activities which are substantially similar in nature..." N.J.A.C. 7:7-1.5(e). An applicant seeking a DEP approval under a coastal general permit does not apply for the permit itself, which is considered already issued, but for a "coastal general permit authorization." N.J.A.C. 7:7-7.1; N.J.A.C. 7:7-7.3.

Coastal general permits are essentially a "pre-approval" for specific types of small-scale development. First adopted in 1995, these pre-approvals were intended to streamline the regulatory process without sacrificing the DEP's ability to protect the coastline. 27 N.J.R. 1005 (Mar. 20. 1995). As explained in the 1995 rule proposal, "[u]sing a General Permit rather than an individual permit will not compromise the Department's efforts to protect and preserve the coastal area from inappropriate development, because the proposed general permits will only apply to single family homes or duplexes, or to other smaller developments, and will contain specific criteria intended to minimize their environmental impacts." Id.

Precisely because the coastal general permit is a pre-approval, the concept of their limited and specific nature is

the foundation of the coastal general permit regulatory scheme. N.J.A.C. 7:7-7.1 et seq. A coastal general permit category can be established only after the DEP has determined that the "regulated development will have only minimal adverse environmental impacts when performed separately, will have only minimal cumulative adverse impact on the environment and is in keeping with the legislative intent to protect and preserve the coastal area from inappropriate development." N.J.A.C. 7:7-7.1. New coastal general permit categories are created only after a rule promulgation and hearing in compliance with the Administrative Procedure Act. N.J.A.C. 7:7-7.1(b) (citing N.J.S.A. 52:14B-1 et seq.); N.J.A.C. 7:7-7.1(c)3.

In evaluating whether a coastal general permit application can be approved, or authorized, the key determination is whether the proposed activity is "covered by" the specific description of the development authorized. N.J.A.C. 7:7-7.3(a). Under the rules, the specific description must include "at a minimum" the "size and type of the development that may be undertaken" and a "precise description of the geographic area to which the [permit] applies." N.J.A.C. 7:7-7.1 Under the application procedures "when all aspects of a project do not qualify for a coastal general permit, then the entire project shall require an individual coastal permit application." N.J.A.C. 7:7-7.1; (emphasis added). Further, when the applicant has failed to "correctly identify project impacts, or unanticipated adverse

effects caused by the development" the permit may be suspended and then revoked. N.J.A.C. 7:7-4.11.

The specific definition of recreational facilities contained in the coastal general permit does not include a Memorial. N.J.A.C. 7:7-7.17. Despite Respondents' assertions, the Memorial is not an "angled walkway" or a "path." Da2, Da16; Pa78a. The project's price tag alone, between \$22 million and \$25 million according to Treasury's bid sheet, signifies that the Memorial cannot be a path or walkway. Pa335a. The February 5, 2004 permit application described the features of the project including: 30-foot high, 200-foot long brushed stainless steel walls; underground concrete piles; a "sculpted landscape" with a 10-foot hill; groves of dogwood trees growing to a height of 25-30 feet; high intensity lighting from the base of the walls; and metal halide lights shooting light beams into the sky from the top of the walls. Pa75a-76a. The entire Memorial site is 1.6 acres. Pa76a.

The idea that the Memorial qualifies for a coastal general permit for recreational facilities is a misinterpretation of the plain language of the Coastal Permit Program Rules. The pre-application letter from the DEP Office of Permit Coordination to the applicant, DEP Div. of Parks and Forestry, indicates that this misinterpretation was deliberate. Pa92a-93a. The letter states that the Environmental Assessment (EA) for the Memorial identified an individual Waterfront Development Permit as a regulatory requirement. Pa92a. However, the Office of Permit

Coordination determined that "a Coastal General Permit will be required for the project from the NJDEP's Land Use Regulation Program Instead of an Individual Waterfront Development Permit." Pa92a. (emphasis added) According to the EA, "[b]ased on a pre-application meeting with the NJDEP and follow-up discussions, this project will qualify for a coastal general permit (NJCA 7:7-7.17)...." Pa325a. The Office of Permit Coordination has never produced any written explanation for this peculiar and unsupportable decision. Even without explanation, it is not hard to imagine what transpired during the pre-application meeting and follow-up discussions.

The Memorial approval is not a mere permitting decision or a difference of opinion about how to interpret the coastal general permit: it is a radical departure from the DEP's regulatory scheme. To approve the Memorial under a coastal general permit, the DEP should have established a new coastal general permit category through a rule-making. The misinterpretation of the plain language of the coastal general permit coupled with the agency's failure to follow the coastal general permit application procedures, make the DEP's decision quasi-legislative.

III. The Permit Should Be Ruled Invalid Due To the DEP's Arbitrary and Capricious Decision Not To Follow The Coastal Permit Program Rules

An administrative agency must follow its own rules and regulations. In re CAFRA Permit, 152 N.J. 287, 308(1997); In re

Waterfront Development Permit No. WD88-0443-1, 244 N.J. Super. 426, 432-433 (App.Div. 1990). Upon judicial review, the court should assure itself that the agency has adhered to its duly promulgated rules and regulations. In The Matter Of Crown/Vista Energy Project, 279 N.J. Super. 74, 79 (App.Div. 1995).

Although judicial review of agency decisions is limited, it is not "simply a pro forma exercise in which the court rubber stamps findings that are not reasonably supported by the evidence." Chou v. Rutgers, 283 N.J. Super. 524, 539, (App.Div. 1995), cert. den., 145 N.J. 374 (1996). Action by a State agency in contravention of its own regulations is per se arbitrary and capricious because it violates express or implied legislative policy. County of Monmouth v. Dept. of Corrections, 236 N.J. Super. 523, 525 (App.Div. 1989).

Counsel for Respondents maintains that "DEP reasonably concluded that the Memorial which is a 200 foot long, 16 foot wide path bordered by stainless steel walls fell within the ambit of this permit." Db16. Neither the permit application, nor the arguments presented by counsel demonstrate how the Memorial complies with the "specific conditions" for recreational facilities as required by N.J.A.C. 7:7-7.17(b)(2) and N.J.A.C. 7:7-7.17(a)(1). The permit application states merely that the Memorial "most closely matches the descriptions of ... Pathways, bicycle paths and jogging and nature trails" Pa78a. Even if "within the ambit" were the standard for approving a coastal general permit application, the large-scale

Memorial is not comparable to any of the small-scale recreational facilities listed in the coastal general permit.

The evidence supporting the DEP's decision is neither substantial nor credible. By approving the project under the coastal general permit, the DEP guaranteed that the evidence would not be substantial. The coastal general permit precluded the possibility of a public hearing, because there are no hearings on individual coastal general permit applications. N.J.A.C. 7:7-7.1(c)3. With no hearing and an improperly-noticed, 15-day public comment period, the DEP did not receive and did not consider comments prior to authorization.

If a hearing had been held, the DEP would have been forced to consider the Memorial's impact on the views from the Public Plaza. The public reaction was best expressed by the former managing editor of The Bergen Record, who wrote "[t]he [Memorial] plan is a grandiose, overblown architectural fantasy that would forever spoil the breathtaking view from the park of the harbor, the Status of Liberty, Ellis Island and the skyscrapers of Lower Manhattan." Pa350. In her letter to Appellant, DEP Commissioner Lisa Jackson admitted "this design might impact views from some portions of the entry road and the parking area [However it] is important to note that Liberty State Park has ... many other vantagepoints that provide sweeping views of the harbor and skyline." Pa202a. Despite the DEP's awareness that the proposed Memorial would impact the views, there is nothing in the EA, the permit file, or the permit

application indicating that this obvious flaw in the Memorial's design was considered prior to the permit authorization.

Pa321a-328a; Pa41a-53a; Pa54a-137a.

By arbitrarily changing the type of permit required, the DEP also changed the substantive rules applied to review the permit application, resulting in a less rigorous review. On an application for an individual waterfront development permit, the applicant must "include a detailed statement of compliance with the Coastal Zone Management rules, N.J.A.C. 7:7E." N.J.A.C. 7:1-6.2(b) The Coastal Zone Management rules are the DEP's substantive rules used to review permit applications. N.J.A.C. 7:7E-1.1. For the coastal general permit, the applicant need only submit a compliance statement showing that the construction has no impacts on "Special Areas" defined at N.J.A.C. 7:7E-3, a subset of the Coastal Zone Management rules. If the fuller Compliance Statement had been required, scenic resources and design would have been taken into account. N.J.A.C. 7:7E-8:12(c) provides:

New coastal development that is visually compatible with its surroundings in terms of building and site design, and enhances scenic resources is encouraged. New coastal development that is not visually compatible with existing scenic resources in terms of largescale elements of buildings and site design is discouraged.

"Scenic resources" are defined to include "views of the natural and/or build landscape." N.J.A.C. 7:7E-8.12(a).

In re Waterfront Development Permit No. WD88-0443-1, 244 N.J. Super. 426 (App.Div. 1990) cert.den. 126 N.J. 320 (1991), is also a case where DEP procedural violations threatened scenic resources. Hartz Mountain Industries applied for a Waterfront Development Permit to complete the build out stage of construction of Lincoln Harbor along the Hudson River in Weehawken. Id. at 427-428. After hearing, the DEP Division of coastal Resources prepared a draft decision finding that the view from the Lincoln Tunnel Helix "enjoyed by millions is significant to the Hudson River Waterfront region and the State of New Jersey as a whole" and that the view could be protected by reducing the height of the buildings. Id. at 430-431. However, the DEP Commissioner intervened and issued the permit himself, pursuant to his own written opinion. Id. at 431. He found that although the view would be partly blocked, economic factors outweighed the benefit of the "momentary glimpse" of the view. Id. Under the regulations, permitting decisions were to be made by the Division of Coastal Resources, appealed to the Commissioner, then referred to the Office of Administrative Law for hearing before a final decision by the Commissioner. Id. at 435. Based upon the DEP Commissioner's violation of his own regulations, the Appellate Division vacated the permit. Id. at 436. The Appellate Division explained: "[t]o allow the Commissioner to depart from this carefully thought out program whenever he wishes would simply diminish the integrity of the agency's standards without any corresponding benefit." Id. at

435 This carefully tooled system[...] greatly reduces the risk of arbitrary action..." Id.

In the present case, as in Waterfront Development, departing from the rules "suppressed the normal salutary functioning of the DEP's procedural regulations..." Id. at 436. The DEP's attempt to change the rules without a rule-making also undermines the entire regulatory scheme. Coastal general permits are limited to specific types of small-scale development so that the DEP can ensure minimal environmental impacts and protect the coastline from inappropriate development. When proposed development does not meet specific coastal general permit descriptions, inappropriate development with significant adverse environmental impacts is the result.

In contrast to Waterfront Development Permit, where the DEP Commissioner tried to over-ride the findings and conclusions made by the Division of Coastal Resources, in this case, the DEP prevented them from being made at all. By depriving the public of a properly noticed comment period and hearing, the DEP deprived itself of the ability to make an informed decision. This result-oriented approach to permitting was arbitrary and capricious.

IV. Even Under The Standard Identified By Respondents, the Permitting Decision Is Not Quasi-Judicial.

To support the proposition that the permitting was quasi-judicial, Respondents state "[w]hen determining whether an agency decision is a quasi-judicial act, the crucial question is

whether the fact finding involves a certain person or persons whose rights will be directly affected" citing Northwest Covenant Medical Ctr. v. Fishman, 167 N.J. 123, 135 (2001).

Db10-11. In the present case, there was no "certain person" whose rights will be directly affected: the permit applicant was the DEP Division of Parks and Forestry, the State is the developer and the Memorial is a public works project in a public park. Respondents' contention that the coastal general permit decision "confer[ed] specific rights on a specific applicant" is not without irony. Db12.

In Stavola, where the Supreme Court concluded that the DEP attempt to regulate beach club cabanas was not supported by a plain reading of its regulations, the DEP also tried to "allege that rulemaking is not necessary here because the ruling is limited to the actual parties and the actual projects involved." Dept. of Envir. Protection v. Stavola, 103 N.J. 425, 438. (1986). The Supreme Court was unpersuaded, ruling that the DEP's regulation of beach club cabanas was essentially quasi-legislative and invalid without an authorizing rule or regulation. Id. at 437-438.

Respondents also cite In re CAFRA Permit No., 152 N.J. 287 (1997), in support of their argument that permitting decisions cannot be reviewed after the 45-day period. However, Gateway differs from the present case: the Supreme Court did not evaluate whether the decision was quasi-legislative or quasi-judicial. The only issue was whether a 1993 permit modification

required the DEP to set aside a 1986 waiver of the Bay Island Corridor policy. Id. at 305-306. Unlike Appellant in the present case, ALS received unmistakable notice of the finality of the DEP waiver decision in 1989. Id. at 301. ALS then waited until 1993 to challenge the waiver.

V. Large-Scale Waterfront Development In Liberty State Park Is A Matter of Public Importance, Calling For A Decision On The Merits.

Arguing that the Court should decline to apply the public interest exception to the 45-day bar, Respondents write: “[T]he State submits that the public’s interest is in the completion of the 9/11 Memorial in Liberty State Park.” Db22. After structuring the approval process to avoid public input and public scrutiny, after ignoring numerous requests for a public hearing, and after disregarding communications about the Memorial’s negative impacts, Respondents now presume to know what is in the public interest. The record speaks for itself, and contradicts Respondents’ assertions about the public interest.

As stated in the Memorial Design Competition RFP, Liberty State Park “is an extraordinary and unique public resource. The park hosts over 4 million visitors per year from all over the world.” Pa5a (emphasis added). The RFP continues “the mission of Liberty State Park is to provide the public with access to the harbor’s resources, a sense of its history and the charge of responsibility for its continued improvement.” Pa5a (emphasis added). The RFP also acknowledges the uniquely important view

from the Memorial site stating that it offered "some of the most dramatic views of New York City and the former World Trade Center site anywhere along the Hudson." Pa8a. The Phase One Progress report, which is part of Liberty State Park's Comprehensive Master Plan, contains a visual analysis, which states: "[v]iews toward the harbor from the water's edge offer enormous interest and great diversity. From the CNJ ferry terminal at the north of the site, lower Manhattan pinned by the twin towers of the World Trade Center punctuates the skyline with an astonishing sense of proximity..." Pa291a-297a. State design competition literature and park planning documents acknowledge the importance of public access to the harbor, which includes visual access, and the public role in park improvement.

On July 20, 2006, the Mayor of Jersey City, Jerramiah T. Healy wrote Respondent Governor Corzine: "Local opposition to this construction is mounting ... [I]t is my hope that you take into consideration the feelings of the daily park users and all Jersey City residents by hosting a public hearing now ..."

Pa204a, 205a. The Mayor of Bayonne, Joseph V. Doria sent a similar letter. Pa207a. On August 10, 2006, the Hudson County Board of Freeholders approved a resolution supporting Appellant's request for a public meeting, and sent it to then-DEP Commissioner Lisa Jackson. Pa209a-210a. On November 7, 2007, State Senator Loretta Weinberg, along with two assembly people, wrote Respondent Governor Corzine: "[w]e join with other legislators and continue to support Sam Pesin and the

Friends of Liberty State park in their goal to prevent a memorial from being placed where it destroys the view of New York City.” Pa310a. On April 28, 2008, the entire Hudson County legislative delegation consisting of three state senators and six assembly people, sent an open letter to Governor Corzine, which was published in the Jersey Journal. Pa337a-338a. The legislators wrote “the ‘Empty Sky’ memorial is deliberately planned to obstruct the view which many of the four million visitors to LSP come to see... it’s not popular locally ...” Pa337a-338a. Elected officials most familiar with Liberty State Park and the views of their constituents united to demand a public hearing. Because it is a matter of public importance, these politicians were willing to take a public position that could be labeled insensitive or unpatriotic.

Respondent Governor Corzine received hundreds of post-cards and e-mails from regular citizens.¹ Appellant also collected 742 petition signatures, which were submitted to the Governor. Liberty State Park and the views from the park belong to the public. Inappropriate development that was improperly approved is fundamentally an issue of public interest.

VI. Actual Notice Cannot Replace Notice That Conforms To DEP Regulations And Due Process.

The sole public notice of the coastal general permit authorization appeared in the March 23, 2005 DEP Bulletin.

¹While it is difficult to estimate how many communications the Governor received, Appellant made an OPRA request for communications with personal messages and e-mails and received 827 in response.

Pa140a-144a. The permit was mistakenly denominated as a CAFRA permit. Pa140a-144a. The DEP Bulletin notice consisted of two lines, with a description stating "LIBERTY STATE PARK GP#17; RECREATION FACILITY PUBLIC PARK." PA142a. The notice appeared in the DEP Bulletin section dedicated to CAFRA permit applications. CAFRA stands for "The Coastal Area Facility Review Act" and regulates projects in the southern part of New Jersey, south of the Cheesequake Creek in Old Bridge, Middlesex County. N.J.S.A. 13:19-1 and N.J.S.A. 13:19-4. Waterfront development projects in Hudson County cannot be approved under CAFRA permits because Hudson County is north of the CAFRA area. The permit file does not contain a copy of any public notice displayed at the site, as required by the Coastal Permit Program Rules. Pa41a-53a; N.J.A.C. 7:7-1.5 ("The notice of authorization shall be posted prominently at the site during construction...") That the Land Use Regulation Program permit file does not contain a single public comment illustrates the inadequacy of the public notice. Pa41a-43a. Given the numerous public comments that started pouring in a year later, if the public had been properly noticed, the DEP would have received comments at the time of the permit authorization.

Even if notice of a coastal general permit for recreational facilities had been published in the correct section of the DEP Bulletin, it would not have been sufficient. Notice of a coastal general permit for recreational facilities apprises the public of a small-scale project with minimal impacts. Had

respondent applied for the proper permit, the individual waterfront development permit identified in the EA, Pa92a, newspaper notice a minimum of four inches in width would have been required. N.J.A.C. 7:7-4.5(f) and N.J.A.C. 7:7-4.5(g). At a minimum, the newspaper notice would have provided public notice of the public comment period, described the proposed development and announced the commencement date of the 30-day public comment period. N.J.A.C. 7:7-4.5(g). Newspaper notice is also required when the DEP decides to hold a public fact-finding hearing. N.J.A.C. 7:7-4.5. Either way, the Coastal Permit Program Rules would have required newspaper notice on an individual waterfront development application.

The DEP's attempt to change the rules without a rule-making violates basic notions of due process and the Administrative Procedure Act. N.J.S.A. 52:14B-3(2). When the DEP initially adopted the coastal general permit through a rule-making, it held a hearing in compliance with its Coastal Permit Program Rules. 27 N.J.R. 3976, 3996 (Oct. 16, 1995) (formerly codified as N.J.A.C. 7:7-7.2(a)13.) Nothing in the 1995 rule proposal could have alerted appellant, or any member of the public, that a project such as the Memorial could be authorized under the coastal general permit. 27 N.J.R. 1005-1008, 1019 (Mar. 20, 1995). Had appellant attended the 1995 hearing, it is unlikely that appellant, a park advocacy group, would have opposed a permit pre-approving the small-scale recreational facilities listed therein.

After the initial rule adoption in 1995, the coastal general permit for recreational facilities was re-adopted in 2000 and again in 2006, each time after a rule-proposal and hearing. 32 N.J.R. 3784(b) (Oct. 16 2000); 39 N.J.R. 5222(a) (Apr. 17 2006). Nothing in those rule proposals warned that the DEP was considering an expansion of the permit category. Again, had Appellant attended hearings on the rule re-adoption, he would have found the rule entirely unobjectionable. In other words, there was never any meaningful opportunity to be heard on a permit for a project such as the Memorial.

In light of the DEP's changing position on regulated activities, and because there are no hearings on individual coastal general permits, administrative due process requires a rule-making. N.J.A.C. 7:7-7.1(c)3; N.J.S.A. 52:14B-3(2). An ad hoc adjudication does not provide sufficient notice. Stavola, 103 N.J. at 437 ("The lack of any specific standard results in confusion to the public and to DEP").

Respondents argue that actual notice is sufficient, citing Reidel v. Sheeran, 73. N.J. Super. 105 (Law Div. 1962). However, Reidel was a prerogative writ action and involved the 45-day time bar for appeals under the predecessor of Rule 4:69-6, now applicable only to Law Division actions. Rule 2:4-1(b), enacted after Reidel, governs appeals from final decisions or actions of state administrative agencies. To be subject to the Rule 2:4-1(b) 45-day time bar, an agency decision should contain

adequate factual and legal conclusions and give unmistakable notice of its finality. In re CAFRA Permit, 152 N.J. 287 (1997) (citing DeNike v. Bd. of Trustees, Employees Retirement Sys. of N.J., 34 N.J. 430, 435 (1961)). Actual notice does not give unmistakable notice of finality of the agency decisions, particularly where the decision is quasi-legislative or a matter of public importance.

VII. Respondents' Historic Preservation Analysis Is Not Grounded In The Record.

Counsel for Respondents has tried to present, as legal argument, brand new findings relating to whether the Memorial constitutes an "undertaking" as defined by the Historic Places Rules. Db18-20. Counsel tries to attribute these findings to the HPO without citing any document in the record.

Yet the record shows that the State already determined that the CRNNJ terminal and the Morris Canal Basin were "within the area of the undertaking's potential impact." N.J.A.C. 7:4-7.1. A handwritten note to the permit file states "SHPO - May have impact on historic resources." Pa53a. The State's EA noted "[a] review and approval by DEP's Historic Preservation Office is required for work is within ¼ mile of a historic structure." Pa325a. In fact, the Office of Permit Coordination recommended that design and construction phases be coordinated with the Historic Preservation Office. Pa327a. Two weeks before the permit authorization Diane Dow of the Land Use Regulation Program wrote to Dan Saunders of the HPO "Do you have an idea of

when I might get comments from your office? should I just condition the permit on getting approval from you?" Pa52a. On May 5, 2005, the day before the permit authorization, Ruth Foster of the Office of Permit Coordination wrote Saunders "I received a call [from the consulting firm that prepared the application] indicating that there is a problem getting final SHPO approval to go ahead with construction on the 9/11 memorial proposed for Liberty State Park." Pa51a. In reply, Saunders wrote: "[w]e will send a memo stating our reservations" Pa51a. The Saunders e-mail goes on to discuss resolving a conflict between the Memorial and the landmark Central Railroad of New Jersey terminal. Contemporaneous documents show that the application preparer, the Office of Permit Coordination and the Land Use Regulation Program all sought an approval from HPO.

Having determined that the project was an undertaking, it was incumbent upon the HPO to determine whether the undertaking was an "encroachment" or would damage or destroy the historic property under the criteria set forth in the Historic Places Rules and the Secretary of the Interior Standards for the treatment of Historic Properties. N.J.A.C. 7:4-7.2(c)1. Even if there had been a finding of no encroachment, certain governmental entities and non-governmental organizations that may have wanted to challenge such a finding were entitled to notice of a "no encroachment" finding. N.J.A.C. 7:4-7.2(c)2. If there is a finding of encroachment, the procedure is more elaborate, noticing is more extensive and there is opportunity

for hearing. N.J.A.C. 7:4-7.2(c). However, there were no HPO findings and no notices in the present case.

Counsel's argument that the project is not an undertaking is an attempt to justify the absence of HPO findings on encroachment and the lack of notices. It is frankly implausible that a large-scale, \$25 million dollar, waterfront development project on the Hudson River, sandwiched directly between two historic landmarks, would not constitute an undertaking under the definition in the regulations.

Respondents' counsel argues that because a freight house and a Ferry Head house once stood alongside the landmark CRRNJ terminal, the Memorial does not constitute an undertaking. Db19. Without any record, one cannot be certain why the demolition of buildings surrounding the CRRNJ terminal was approved. However, someone may have determined that it was important to keep the lines of sight to the terminal open. The DEP web page for Liberty State Park notes that the terminal "sits prominently at the north end of the park." Pa270a.

Counsel further argues that the Memorial cannot have any indirect effect upon the adjacent landmarks because the setting has changed over time. The setting around most landmarks changes over time. Still, the HPO follows its procedures and evaluates the impact of public undertakings on historic properties. Failing to do so, as occurred here, is arbitrary and capricious.

CONCLUSION

For the foregoing reasons, Appellant requests that the Court revoke the coastal general permit and that Respondents be directed to make all reasonable efforts to restore the site to its pre-construction condition.

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