SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000246-23-T4

IN RE CHALLENGE BY BLACKRIDGE REALTY, INC. TO CAFRA PERMIT ISSUED TO STEVEN SILVERMAN AND 290 OCEAN L.L.C.

DEP FILE NO. 1325-16-0007.1, LUP 210001

Civil Action

On Appeal from a Final Determination of the Commissioner of the Department of Environmental Protection

BRIEF
FOR
APPELLANT, BLACKRIDGE REALTY, INC.

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PRELIMINARY STATEMENT

This is a challenge to the Department of Environmental Protection's (DEP) approval of 290 Ocean LLC's proposed 99 foot tall, slab sided, 8-story, 109 unit apartment building only 88 feet from the boardwalk in Long Branch in direct contravention of DEP's rules meant to prohibit massive development close to New Jersey's water front. DEP denied the permit application due to the project's blatant disregard of its rules. But then 290 Ocean filed an administrative appeal, and in a stunning about face DEP approved the project, offering only a convoluted and illogical explanation that because Long Branch stopped requiring compliance with the relevant DEP Coastal Regulations for 290 Ocean's specific spot, DEP would not apply those rules either.

In order to construct a building close to the New Jersey shore line a Coastal Area Facility Review Act (CAFRA) permit is required. The purpose of CAFRA is to protect New Jersey's coastal area from the "ever-accelerating serious adverse economic, social and aesthetic effects" stemming from future inappropriate development in the delicately balanced environment of the coastal area. *N.J.S.A.* 13:19-2. Under CAFRA, DEP developed a comprehensive environmental design strategy known as the Coastal Zone Management Program (Coastal Regulations), a center piece of which is the Scenic Resources and Design Rule adopted in 1990. *N.J.A.C.* 7:7-16.10. That Rule requires that buildings close to the waterfront and

over 15 feet tall leave 30% of the site open as a view corridor to the water front and be separated from the waterfront (here the Long Branch boardwalk) by a distance of two times the height of the building (2 to 1 step back). The rule also requires that the building be visually compatible with surrounding development and enhance scenic resources. See discussion of the proposed Rule in 22 N.J.R.1191-92 (April 16, 1990).

The mandatory 30% view shed and 2 to 1 step back requirements of the Rule are numerical standards that any architect or engineer can follow when designing a building—there is no special agency expertise involved. 290 Ocean chose to ignore the Rule and applied for a CAFRA permit to build an almost 100 foot tall building rising straight up (not stepped back) only 88 feet from the Long Branch boardwalk, whereas a building that tall must be set back almost 200 feet. And it provides only a 25% view shed. Appellant Blackridge Realty, owner of an adjacent apartment building, filed objections to the application. Blackridge's apartment building was constructed in compliance with view shed and step back requirements and thus has significantly less interior space (fewer apartment units) than a block like, taller, wider, non-stepped back building such as 290 Ocean proposed.

DEP first denied the application due to its blatant non-compliance with the mandatory requirements of the Rule. Then 290 Ocean appealed administratively. It argued that because Long Branch changed its municipal zoning to eliminate Scenic Resources and Design Rule standards for the 290 Ocean property (only for the 290

Ocean property) and because various existing buildings in Long Branch are not stepped back from the boardwalk, that DEP should waive compliance with the Rule. However, the buildings surrounding the 290 Ocean site are completely or partially stepped back and it is unknown how old other non-stepped back buildings in Long Branch are and thus pre-date the Rule.

Stunningly DEP bought 290 Ocean's arguments, waived compliance with the Scenic Resources and Design Rule, and approved a too wide, much too tall building that is not compatible with its surroundings and is located only 88 feet from the Long Branch boardwalk. In doing so DEP deprived Blackridge Realty of the right to be treated equally and fairly under the law by depriving it of the economic benefits of building a block like apartment building containing a much larger number of apartments as DEP has permitted 290 Ocean to do.

What possibly caused DEP's sudden reversal? DEP unconvincedly explained its reasons in the convoluted and illogical story it spun in the proposed settlement. The answer is DEP approved the 290 Ocean project because Long Branch and the developer want a more lucrative project than compliance with the Rule would yield. 290 Ocean doesn't want a stepped back apartment building with fewer units like Blackridge was required to build, DEP's Coastal Regulations be damned. Appellant Blackridge Realty respectfully requests that this Court not let DEP's capitulation and waiver of the Scenic Resources and Design Rule stand.

PROCEDURAL HISTORY

In January 2021 Seven Silverman and 290 Ocean, LLC (290 Ocean) applied to the Department of Environmental Protection for a Coastal Area Facility Review Act (CAFRA) permit to construct an apartment building almost 100' tall, with 8 stories containing 109 apartment units to be located about 88 feet from the boardwalk in Long Branch, Monmouth County. Aa1-Aa4. On March 8, 2021 Appellant Blackridge Realty, Inc. filed written objections with aerial photos to the application. Aa5-Aa12. On March 22, 2021, DEP sent 290 Ocean a deficiency letter. Aa13-Aa15. On June 22, 2021, DEP's Division of Land Resource Protection denied the permit for the same reasons as in Appellant's objections, namely non-compliance with the Coastal Zone Management Rule governing the design of buildings close to the waterfront, the Long Branch boardwalk. *N.J.A.C.* 7:7-16.10. Aa16-Aa21.

290 Ocean appealed for an administrative hearing on August 5, 2021, which was approved on February 18, 2022. Aa22. On August 4, 2022, 290 Ocean submitted a set-back survey (revised) of buildings along the Long Branch waterfront. Aa23-Aa28. On August 5, 2022, DEP agreed to a tentative settlement which would reverse the denial and issue a CAFRA permit for the oversize building. Aa29-Aa40. On December 22, 2022, Appellant filed written objections along with pictorial exhibits to the settlement. Aa41-Aa53. On June 30, 2023, DEP reversed the permit

denial and issued the CAFRA permit. Aa54-Aa60. No explanation accompanied the permit issuance.

Notice of the approval was published in the DEP Bulletin on July 19, 2023. Aa61-Aa62. Appellant Blackridge appealed to DEP and requested an administrative hearing on August 9, 2023, to challenge the permit. Aa63-Aa70. On August 28, 2023, DEP denied Appellant's appeal request. Aa71-Aa75. On September 25, 2023, Appellant filed a Notice of Appeal and CIS with the Appellate Division and an Amended Notice of Appeal on December 21, 2023. Aa76-Aa85.

STATEMENT OF FACTS

290 Ocean's CAFRA permit allows it to construct an 8 story apartment building with 109 apartments and 234 garage parking spaces. Aa54. The building would be slab sided and rise straight up almost 100 feet and be located only about 88 feet from the boardwalk in Long Branch. Aa16-Aa21; Aa29-Aa34.

A key DEP Coastal Zone Regulation, the Scenic Resources and Design Rule, *N.J.A.C.* 7:7-16.10, governs the design of high rise buildings adjacent to the beach, dune or boardwalk along the ocean or bayfront. [1] That Rule states:

7:7-16.10 Scenic Resources and Design

(a) Scenic resources include the views of the natural and/or built landscape.

(b) Large-scale elements of building and site design are defined as the elements that compose the developed landscape such as size, geometry, massing, height and bulk structures.

(c) 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 large-scale elements of building and site design is discouraged.

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[1] The view shed and step back requirements of the Rule were originally proposed in 1990, 22 N.J.R. 1191-92 (April 16, 1990) and were later adopted in 1994. 26 N.J.R. 2934 (a), 3080 (July 18, 1994).

(d) In all areas, except the Northern Waterfront Region, the Delaware River Region and Atlantic City, new coastal development adjacent to a bay or ocean or bayfront or oceanfront, beach, dune or boardwalk and higher than 15 feet in height measured from the existing grade of the site or boardwalk **shall comply with the following…:**

1. Provide an open view corridor perpendicular to the water's edge in the amount of 30 percent of the frontage along the waterfront where an open view currently exists: and

2. Be separated from either the beach, dune, boardwalk, or waterfront, whichever is further inland, by a distance of equal to two times the height of the structure [step back requirement] …. [emphasis supplied].

The 290 Ocean project failed to meet any of the mandatory requirements of the Scenic Resources and Design Rule. Aa16-Aa21. It is not visually compatible with its surroundings, does not provide a 30% open view corridor and, most glaring, it is not stepped back at a 2 to 1 ratio from the boardwalk. Rather it is wider than the rule allows, leaving only a view corridor 25% wide, and it rises straight up 99 feet

only 88 feet from the boardwalk instead of being stepped back so as not to overwhelm the existing scenic coastal environment. A building so close to the boardwalk should be a maximum of 44 feet high to comply with the rule. DEP recognized these gross deficiencies and on June 22, 2021, denied the permit application. Aa16-Aa21. The permit denial found:

> In accordance with *N.J.A.C.* 7:7-16 (d)1, new coastal development adjacent to a bay or ocean or bayfront or oceanfront, beach, dune or boardwalk and higher than 15 feet in height measured from the existing grade of the site or boardwalk must provide an open view corridor perpendicular to the water's edge of at least 30 percent of the frontage along the waterfront where an open view currently exists. The proposed 109 residential unit high rise development would have a height of 99' as measured from the average existing ground elevation of 26.40' and would be subject to this requirement. The frontage width of the Property's site is 225.35' per Applicants' plan Sheet C200 "EXISTING CONDITIONS AND SITE PREPARATION PLAN". A 30% open view corridor perpendicular to the waters' edge of the frontage along the waterfront where an open view currently exists would be 67.60 feet. As proposed, the project would only provide an open view corridor of 57.06 feet, or 25% of the width of the site per Applicants' plans Sheets C300 "SITE LAYOUT PLAN'. Thus, the proposed frontage would fail to meet the required 30% minimum view corridor requirement.
>
> In addition, in accordance with *N.J.A.C.* 7:7-16.10(d)2, new coastal development adjacent to a bay or ocean or bayfront or oceanfront, beach, dune or boardwalk and higher than 15 feet in height measured from the existing grade of the site or boardwalk must be separated from either the beach, dune, boardwalk, or waterfront, whichever is further inland, by a distance that is equal to two times the height of the structure.
>
> The proposed 109 residential unit high rise development would be 99 feet in height, as measured from the average existing ground elevation of 26.40 feet as shown on the submitted plan Sheet A-201

> "BUILDING ELEVATIONS". As proposed, the proposed high rise structure would be separated from the inland edge of the boardwalk by approximately 88 feet as shown on the submitted plan Sheet C300 "SITE LAYOUT PLAN". However, the required distance separation from the boardwalk for the proposed 99 foot structure would be approximately 198 feet.
>
> Assuming the same building location on the Property as proposed by the Applicant, the maximum permissible height for the proposed structure in this location would only be approximately 44' high. As proposed, the project fails to meet the setback requirements of this rule.
>
> As demonstrated above, the proposed project fails to comply with the Scenic Resources and Design rule at *N.J.A.C* 7:7-16.10 because it does not provide the required 30% open view corridor to the waters' edge and fails to meet the two to one setback requirement for the height of the building. Aa16-Aa18. [2]

Following the permit denial on August 5, 2021, 290 Ocean appealed for an administrative hearing. Aa22. Before any hearing proceedings took place on 290 Ocean's appeal, on August 5, 2022, DEP entered into a "Settlement Agreement" with 290 Ocean that anticipated resolving the administrative appeal by issuing the requested permit following a public comment period. Aa29-Aa40.

In agreeing to the settlement DEP explained the purpose of the Scenic Resources and Design Rule as follows:

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[2] The permit was also denied due to concerns about stormwater runoff. The bulk of 290 Ocean's CAFRA application and most of the Items Comprising the record on Appeal deal with stormwater, however, stormwater runoff is not at issue in this appeal.

> These provisions are intended to prevent what occurred along the Atlantic City boardwalk, namely that the massive hotel casino structures were constructed with no setbacks from the boardwalk: Aa31.

Atlantic City is specifically exempt from the 30% open view and the 2 to 1 step back requirements of the Scenic Resource and Design rule. *N.J.A.C* 7:7-16.10(d). Long Branch and the rest of the State's Atlantic coast line are bound by those requirements in order to prevent what happened in Atlantic City.

The Settlement Agreement also bafflingly explains DEP's reasoning for waiving adherence to the Scenic Resources and Design Rule as follows: Development in Long Branch's Redevelopment Zone is ordinarily governed by *N.J.A.C* 7:7-7.1, which allows development without a separate individual CAFRA permit so long as the proposed development complies with the applicable Long Branch Redevelopment Plan and Design Guidelines Ordinances because those ordinances were reviewed and approved by DEP as consistent with the Coastal Zone Management Rules, which include the Scenic Resources and Design Rule. Aa31-Aa32. However, because Long Branch amended its ordinances in October 2020 to no longer require adherence to the Scenic Resources and Design Rule for the 290 Ocean location (no longer required a 30% open view corridor or 2 to 1 step back),

the 290 Ocean project would require an individual CAFRA permit, and thus it would be subject to the 30% view and step back requirements. Aa32. *N.J.A.C* 7:7-7.1(g). But in an extraordinary twist of logic DEP went on to explain that since Long Branch no longer required adherence to the Scenic Resources and Design Rule it would not either. Aa32-Aa33.

DEP attempted to justify non-compliance with the 30% view and step back requirements by citing a survey submitted by 290 Ocean that purports to show that of 45 current structures along the Long Branch boardwalk (structures over 15 feet tall which would trigger the Scenic Resources and Design Rule for proposed new construction), 23 were not stepped back. Aa23-Aa28. However, Blackridge Realty's building, Block 216, Lot 14.01, which is adjacent to the north of 290 Ocean is fully stepped back, and the two buildings to the immediate south of 290 Ocean are substantially stepped back. Block 216, Lots 1.01 and 10. Aa25. See also the aerial photos submitted to DEP on March 8, 2021. Aa5-Aa12. Moreover, the age of the various buildings is not discussed, ignoring the fact that the Scenic Resources and Design Rule looks to future development and has no application to existing structures that may pre-date the Rule. Finally, the survey does not even address the 30% view corridor requirement.

Blackridge Realty submitted written comments opposing the proposed settlement, along with an aerial photo of the surroundings showing that the buildings near the 290 Ocean site are fully or at least substantially stepped back. Aa41-Aa49. Two renderings showing how the proposed 290 Ocean apartment building would be far bulkier and higher and thus incompatible with the surrounding area were also submitted. Aa50-Aa53.

On June 30, 2024, DEP issued a CAFRA permit for the 290 Ocean project, reversing the earlier denial and approving the 99 foot tall, 8 floor, 109 unit apartment building only 88 feet from the boardwalk. Aa54-Aa60. The permit approval fails to discuss the 30% view shed or step back requirements in the Scenic Resources and Design Rule or in Appellant's written objections based on the Rule. Similarly, when DEP denied Appellant's administrative appeal request on August 28, 2024, it failed to include any substantive discussion of why the Scenic Resources and Design Rule requirements were waived. The denial included only a lengthy discussion of why Appellant was not entitled to an administrative hearing. Aa71-Aa75.

ARGUMENT

POINT I

THE 290 OCEAN PROJECT BLATENTLY VIOLATES ALL REQUIRENMENTS OF THE SCENIC RESOURCES AND DESIGN RULE BECAUSE IT IS NOT STEPPED BACK, BECAUSE IT DOES NOT PRESERVE 30% OF THE CURENT WATERFRONT VIEW, AND BECAUSE IT IS NOT COMPATIBLE WITH ITS SURROUNDINGS;

PLAINLY THE SETTLEMENT IS AN ARBITRARY, CAPRICIOUS AND UNREASONABLE FAILURE TO ENFORCE AN IMPORTANT COASTAL ZONE RULE (Raised below: Aa5-Aa12; Aa41-Aa53; Aa63-Aa70)

A. Standard of Review of DEP's CAFRA Permit Approval.

Administrative agencies generally possess wide, but not unlimited, discretion and authority to select the means and procedures by which to meet their statutory objectives. *New Jersey State Ass'n of Nurse Anesthetists, Inc. v. New Jersey State Bd. of Medical Examiners*, 372 N.J. Super. 554, 560-561 (App. Div. 2004). In the environmental field, this is because DEP has expertise involving scientific and technical decisions necessary to protect the State's public health in subject matters such as hazardous waste cleanup, pollution discharge standards or the like. *In re N.J.A.C. 7:26 B*, 128 N.J. 442, 451 (1992). However, no such scientific or technical subject matter is involved here—only a simple matter of measuring the dimensions of a proposed building and its location vis-à-vis the Long Branch boardwalk. These measurements are set forth on the plans in 290 Ocean's permit application. There is no dispute about them.

When reviewing an agency action or determination, appellate courts must reverse an agency determination that is arbitrary, capricious, unreasonable or beyond the agency's delegated powers. *In re Implementation of L. 2012, C. 24, N.J.S.A. 48:3-*

87(t), 443 N.J. Super. 73, 78 (App. Div. 2012). An agency determination is arbitrary and capricious if it "violates express or implied legislative policies." *Seigel v. N.J. Dep't of Envtl. Prot.,* 395 N.J. Super. 604, 613 (App. Div. 2007). As stated by the Supreme Court of New Jersey, an agency determination is arbitrary and capricious when a court is satisfied that the agency has "mistakenly exercised its discretion or misperceived its own statutory authority." *In re Polk*, 90 N.J. 550, 578 (1982).

B. DEP's CAFRA Permit Approval is Arbitrary, Capricious and Unreasonable

The proposed 290 Ocean building violates the Scenic Resources rule in many ways:

1. The construction does not leave 30% of the property with an open view of the waterfront. (This requirement of the Scenic Resources Rule is not considered or discussed in the Settlement Agreement.)

2. The proposed construction does not comply with the required 2 to 1 setback ratio. 290 Ocean involves construction of a 99 foot high building with only an 88 foot setback from the boardwalk. The setback must be approximately 200 feet.

3. The proposed construction would be 20 feet taller and much bulkier than Blackridge's fully stepped back building adjacent to the north of the 290 Ocean site. Moreover, all the nearby buildings to the south of 290 Ocean are substantially stepped back. The applicant's proposed block-like building rising straight up 99' is not visually compatible with its surroundings.

<u>30% VIEW OF WATERFRONT</u>

290 Ocean Avenue's proposed construction fails to provide a view corridor

to the water front (boardwalk) that is 30% of the site's frontage facing the waterfront. *NJAC* 7:7-16.10 (d)l. Currently, the site, which is 225' wide along the waterfront, is empty and today has a 100% view corridor to the waterfront. Aa11.The proposed 290 Ocean apartment building will have side setbacks of 21.15' to the south and 34.56' to the north counting the balcony terrace overhangs or a total of about 56', which provides only a 25% view corridor to the waterfront whereas the Scenic Resources and Design Rule requires a 30% view corridor or about 67'. Aa3; Aa18. 290 Ocean ignores the 30% requirement and claims that the proposal meets the rule because of the perpendicular orientation of the building to the ocean. However, even with a perpendicular orientation the building is simply too wide by about 12 feet. Aa18. The proposed 290 Ocean building violates *N.JA.C.* 7:7-16.10(d)(l).

2-TO-1 RATIO

Instead of being stepped back from the boardwalk two times the height of the structure, the applicant has proposed a wall of apartments 99' high and only 88' plus or minus from the boardwalk. The setback of the proposed building should be about 200'. The design of 290 Ocean does not attempt to comply with the Rule at all, openly ignores the stepped back requirement, and unquestionably violates the Scenic Resources and Design Rule. *N.J.A.C.* 7:7-16.10(d)(2).

VISUALLY COMPATIBLE WITH SURROUNDINGS

The 290 Ocean applicant intentionally ignored the Scenic Resources and Design Rule as though it did not exist and designed a building which would dwarf Blackridge Realty's adjacent building and other buildings in the area in order to maximize profit. See renderings of relevant buildings and aerial photo exhibit. Aa48-Aa53. 290 Ocean's proposed building is in the middle of the rendering and Blackridge Realty's is to its right. Aa51. Plainly the 290 Ocean building is not visually compatible with surrounding buildings.

As the renderings and aerial photos all show, buildings in the area are fully or at least substantially stepped back. The proposed 290 Ocean building is not stepped back at all and it is far bulkier and taller than surrounding buildings. The construction of 290 Ocean, if permitted to proceed, would result in a building incompatible with the surrounding area and in violation of *N.JA.* C. 7:7-16.10 (c). Aa5-Aa12; Aa48-Aa53.

POINT II

DEP'S APPROVAL OF A CAFRA PERMIT FOR THE 290 OCEAN PROJECT, REVERSING ITS EARLIER DENIAL, IS AN ILLEGAL WAIVER OF THE SCENIC RESOUCES AND DESIGN RULE UNDER ESTABLISHED CASE LAW. (Raised Below: Aa41-Aa43; Aa65)

The New Jersey Supreme Court has long established limitations on an administrative agency's waiver of its own regulations. An agency that seeks the power to waive its substantive regulations must adopt a regulation pertaining to any such waiver and setting forth appropriate standards to govern agency decision-making. *In re CAFRA Permit No. 87-0959-5 Issued to Gateway Assocs.*, 152 N.J. 287, 308 (1997).

An agency exceeds its statutory authority when it acts contrary to the regulations that bind the agency. *Dragon v. New Jersey Dep't of Environmental Protection*, 405 N.J. Super. 478, 492 (App. Div. 2009) (overturning a DEP decision after finding that the waiver of its own regulations lacked regulatory authority). In *Dragon*, the Appellate Division dismissed DEP's argument that the agency had authority to issue a permit that would violate relevant DEP regulations via a settlement. *Id.* The Court ruled that without rules authorizing a waiver, and without a justifying rationale for settling litigation, an agency's failure to follow its own regulations is automatically arbitrary and capricious and therefore must be

reversed. *Id.* A reviewing court must therefore set aside as arbitrary and capricious any agency action that violates the agency's own rules and regulations. *Id.*

Dragon involved waiving compliance with the CAFRA rule on Coastal High Hazard Areas, *N.J.A.C.* 7:7-9.18, which generally prohibits residential development in a V-Zone unless it qualifies as "infill" development. Infill is where the proposed development has existing homes within 100 feet on both sides of the lot. There was no question that the proposed development in *Dragon* did not constitute infill. Nonetheless, DEP agreed to settle the matter and issue a Letter of Authorization allowing the development, thus waiving compliance with the Coastal High Hazard regulation. The Appellate Division held that the settlement was ultra vires and arbitrary and capricious because it impermissibly allowed DEP to waive compliance with a substantive Coastal Zone Management regulation, specifically *N.J.A.C.* 7:7-9.18. The Court concluded that CAFRA does not give DEP either the express or implied power to authorize non-compliant development in a settlement agreement. *Dragon.* supra at 484.

There is a striking similarity between the settlement in the *Dragon* case and the 290 Ocean settlement. In both cases DEP entered into settlements permitting the applicants to proceed with construction despite blatant non-compliance with applicable regulations, and in both cases no regulations exist governing waivers, and in both cases there was no justifying litigation risk.

The project in *Dragon* clearly did not meet the Coastal High Hazard Areas Rule; the 290 Ocean project clearly does not meet the Scenic Resources Rule. DEP faced no litigation risk—it simply caved and gave Long Branch a bigger tax ratable and 290 Ocean enhanced economic benefit.

POINT III

DEP'S WAIVER OF THE SCENIC RESOURCES AND DESIGN RULE FOR 290 OCEAN, APPELLANT'S ECONOMIC COMPETITOR, DEPRIVES BLACKRIDGE REALTY OF DUE PROCESS FUNDAMENTAL FAIRNESS AND EQUAL PROTECTION OF LAW (Raised Below: Aa63-Aa64; Aa66; Aa70)

Appellant Blackridge Realty and Respondent 290 Ocean own similarly situated adjacent properties. Blackridge built an apartment building within the constraints of the Scenic Resources and Design Rule, giving up significant interior space for more, or more generously portioned, apartment units in a higher, wider building closer to the boardwalk and ocean. 290 Ocean is Blackridge's direct economic competitor for apartment rentals. Yet DEP has allowed 290 Ocean to skip

the Rule's constraints and construct a much taller and wider building with substantially more interior space, closer to the ocean.

Fundamental fairness is an integral part of due process. See e.g., *Matter of Congressional Districts by New Jersey Redistricting Com'n.,* 249 NJ 561 (2022). There is nothing fair about allowing an economic competitor the rental advantages that come with a taller, wider, more spacious apartment building located closer to the water than what was allowed for its neighbor, when to do so violates the Coastal Rules and established case law prohibiting the ad hoc waiver of those rules. Moreover, the Equal Protection Clause requires a rational basis for different treatment. Blackridge was required per force of the Rule to construct a relatively much smaller building than DEP has allowed 290 Ocean, without a valid rationale for the disparate treatment. See *Enquist v. Oregon Dep't. of Agriculture,* 553 US 591 (2008).

This Court should restore fundamental fairness and equal protection and put 290 Ocean on a level playing field with Blackridge Realty, a playing field governed by the same Coastal Regulations.

SUMMATION

DEP decided that the Scenic Resource and Design Rule need not apply because the proposed project lies within the Long Branch Redevelopment Area

where, due to a recent amendment to the Long Branch Redevelopment Plan, the setback standard is locally inapplicable. But also due to that amendment, the need for a CAFRA permit was triggered along with compliance with the Scenic Resources and Design Rule. It is inexplicable how Long Branch's decision to dispense with the Rule for the 290 Ocean site thus triggering CAFRA review, somehow means that DEP should reverse its permit denial and abandon the setback, viewshed and compatibility requirements of the Rule. This circular reasoning does not hold, and the result is directly at odds with the legal requirements of *Dragon v. DEP, supra.*

DEP's permit approval is arbitrary, capricious, and unreasonable and designed to intentionally circumvent the regulatory requirements for construction of buildings near the waterfront in favor of 290 Ocean. The proposed building would be to the detriment of visual compatibility with the surrounding area, to the detriment of Long Branch's waterfront, and to the detriment of Blackridge Realty's apartment building's competitiveness. DEP has chosen to ignore the facts and override the Scenic Resources and Design Rule. DEP inappropriately used the settlement process to circumvent the Rule's substantive permitting requirements. In sum, DEP granted an improper waiver to 290 Ocean in violation of established case law and in contravention of a principal Coastal Zone regulation. For all the above reasons it is respectfully requested this Court

reverse DEP's approval of the CAFRA permit for the 290 Ocean project.

Respectfully submitted,

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Attorney for Appellant

By: _____
John M. Van Dalen

Dated: April 30, 2024

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-000246-23-T4

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BRIEF OF RESPONDENT 290 OCEAN LLC

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PRELIMINARY STATEMENT

This appeal filed by appellant Blackridge Realty, Inc. ("*Appellant*") is yet another front in its seemingly endless war to stop a competitor in the Long Branch rental apartment marketplace. Respondent New Jersey Department of Environmental Protection (the "*Department*") issued a permit (the "*Permit*") under the Coastal Area Facility Review Act ("*CAFRA*"), N.J.S.A. 13:19-1 et seq., to respondent 290 Ocean LLC ("*290 Ocean*") which authorized the construction of an eight (8) story, 109-unit apartment building (the "*Project*") in Long Branch. Appellant candidly *admits* that it is upset that the Project will be bigger, taller, nicer, and closer to the ocean than its own apartment building, located just next door to the Project, and that it will face stiff competition for renters as a result. The Appellate Division should view this appeal for what it truly is: an effort to stifle economic competition through meritless litigation.

The crux of Appellant's appeal—which is the latest in a string of lawsuits designed to stop the construction of the Project, none of which have been successful—is that the Project fails to comply with the view corridor, setback, and visual compatibility requirements of the Scenic Resources and Design ("*SRD*") Rule, N.J.A.C. 7:7-16.10, set forth in CAFRA's promulgating regulations, the Coastal Zone Management ("*CZM*") Rules, N.J.A.C. 7:7-1.1 et seq. But Appellant fails to acknowledge that the SRD Rule does not apply to the

Project. Rather, under the CZM Rules, specifically, N.J.A.C. 7:7-7.1 to -7.5 (the "*Long Branch Rule*"), development of the Project is explicitly subject to the standards set forth under Long Branch's Redevelopment Plan and Design Guidelines, which were reviewed and approved by the Department as consistent with the CZM Rules. Those guidelines do not require visual compatibility, an open view corridor, or setback as may otherwise have been required under the SRD Rule. Appellant buries a single paragraph deep in its brief to avoid confronting the importance of the Long Branch Rule. Appellant's artful avoidance is understandable: the Long Branch Rule simply does not require compliance with the SRD Rule, and the issuance of the Permit was not improper or unlawful in any way.

When granting the Department's interpretation of the applicable regulations the substantial deference to which it is entitled, this Court should conclude that the Department's issuance of the Permit was not arbitrary, capricious, or unreasonable and affirm accordingly. The Court should also find that the balance of Appellant's challenges to the Permit are simply part of Appellant's scorched earth, "*everything but the kitchen sink*" approach designed to prevent competition in the Beachfront Sector of the Long Branch Redevelopment Area and are patently without merit.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

A. General Background.

290 Ocean is the owner of vacant property designated as Block 216, Lots 11, 12, and 24 on the tax map of the City of Long Branch (the "*City*" or "*Long Branch*"), Monmouth County (the "*Property*" or "*290 Ocean Property*"). Aa29.[2] The Property is "bounded on the east by Ocean Avenue and on the west by Ocean Boulevard," Aa31, and "abutted by high-rise multi-family residential buildings to the north and south." 2Ra3; see 2Ra210. The Property is separated from the beachfront boardwalk by an unimproved right-of-way, Ocean Avenue (a public street), and an associated public sidewalk. Aa31; see 2Ra210. "The Property is only one of two vacant properties within this area of Long Branch where the [p]roperty is separated from the boardwalk by a public road (Ocean Avenue)." Aa32. 290 Ocean has been pursuing the governmental approvals necessary to construct a residential apartment building on the Property, including approvals from the Department. See 2Ra13; Aa29.

Appellant is the owner of property directly north of and adjacent to the 290 Ocean Property, which is designated on the City's tax map as Block 216,

[1] The Procedural History and Statement of Facts sections have been combined for purposes of clarity and conciseness, as they are inextricably intertwined.
[2] As used herein, "*Ab*" shall be referring to Appellant's Brief, "*Aa*" shall be referring to Appellant's Appendix, and "*2Ra*" shall be referring to Respondent 290 Ocean's Appendix.

Lot 14.01 (the "*Blackridge Property*"). Aa5; Aa25; Aa63. An existing residential apartment building constructed by Appellant is located on the Blackridge Property. Aa25; Aa64.

B. The CZM Rules And The Redevelopment Ordinances.

The Property is within the "coastal area" established by CAFRA. 2Ra18. In addition, the Property is within an area of Long Branch designated as an Area in Need of Redevelopment pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq. (the "*Redevelopment Area*"). 2Ra68. Specifically, the Property is in the Beachfront South Sector of the Redevelopment Area. 2Ra68. Development of the Property is accordingly subject to the applicable rules and standards set forth in the CZM Rules and the redevelopment plan for the Redevelopment Area.

1. The Scenic Resources And Design Rule.

The CZM Rules include the SRD Rule, which states, in pertinent part:

> (c) 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 large-scale elements of building and site design is discouraged.
> (d) In all areas, except the Northern Waterfront Region, the Delaware River Region and Atlantic City, new coastal development adjacent to a bay or ocean or bayfront or oceanfront, beach, dune or boardwalk and higher than 15 feet in height

> measured from the existing grade of the site or boardwalk shall comply with the following . . . :
> 1. Provide an open view corridor perpendicular to the water's edge in the amount of 30 percent of the frontage along the waterfront where an open view currently exists; and
> 2. Be separated from either the beach, dune, boardwalk, or waterfront, whichever is further inland, by a distance of equal to two times the height of the structure[.]
>
> [N.J.A.C. 7:7-16.10.]

2. The Redevelopment Ordinances And The Redevelopment Plan Amendment.

In 1996, the City adopted the Oceanfront-Broadway Redevelopment Plan (the "*Redevelopment Plan*") along with Design Guidelines Handbooks, which provides "the [d]evelopment rules for the" Redevelopment Area (the "*Design Guidelines*" and together with the Redevelopment Plan, the "*Redevelopment Ordinances*"). 2Ra132; see 2Ra68. Design Guidelines Handbook 6 ("*Handbook 6*") specifically applies to the Beachfront South Sector within which the 290 Ocean Property is located. 2Ra68; 2Ra130-38. The Department reviewed and approved the Redevelopment Ordinances (as adopted by the City in 1996) "as consistent with the [CZM] Rules." Aa32; 2Ra202. In addition, as discussed in Point I(B)(3), infra, the Department adopted the Long Branch Rule as part of the CZM Rules to set forth the standards and procedures applicable to development proposed in the Redevelopment Area. See Aa31-33; 2Ra202.

The Redevelopment Ordinances did not incorporate the SRD Rule's visual compatibility provision under N.J.A.C. 7:7-16.10(c) ("*Subsection C*") or the 30% open view corridor and 2-to-1 setback requirements under N.J.A.C. 7:7-16.10(d) ("*Subsection D*") as requirements for development in the Redevelopment Area.[3] Aa32; see 2Ra202; see also 2Ra130-38. Notably, Handbook 6 requires a building to be set back from Ocean Avenue by "40 feet or half the height of the building, whichever is greater." 2Ra136. It does not require any setbacks from a "beach, dune, boardwalk, or waterfront." N.J.A.C. 7:7-16.10(d)(2); see 2Ra136.

On December 9, 2020, Long Branch adopted an amendment to the Redevelopment Ordinances that applied specifically to the 290 Ocean Property pursuant to Ordinance No. 26-20 (the "*Redevelopment Plan Amendment*"). 2Ra68-69; see 2Ra1-12. By that time, the Property consisted of the "last remaining undeveloped parcels in the portion of the Beachfront South Redevelopment Area between Pavilion Avenue and North Bath Avenue." 2Ra4. The Redevelopment Plan Amendment was "intended to modify and supersede sections of the" Redevelopment Plan, Handbook 6, and "conflicting Sections of City of Long Branch Code Chapter 345" in order "to effectuate the

[3] As discussed in Point I(B)(2), infra, the visual compatibility, open view corridor, and 2-to-1 setback requirements under the SRD Rule were in effect in 1996 when the Redevelopment Ordinances were adopted.

redevelopment of the [Property] in a manner that is consistent with the surrounding land uses." 2Ra3-4. Certain area, bulk, off-street parking, and design standards for the Property were amended pursuant to the Redevelopment Plan Amendment, however, it did not alter the lack of the SRD Rule provisions as originally provided under the Redevelopment Ordinances.[4] See 2Ra6-9. In this respect, Appellant's assertion that "Long Branch amended its ordinances . . . to no longer require adherence to the [SRD] Rule for the 290 Ocean [Property]" is incorrect, since there was no such requirement in the Redevelopment Ordinances to begin with. Ab10.

C. 290 Ocean's CAFRA Application.

Following the adoption of the Redevelopment Plan Amendment, in January 2021, 290 Ocean submitted an application to the Department for a CAFRA individual permit to authorize the construction of an eight (8) story apartment building (the "*Proposed Building*") with 109 residential units, 234 parking spaces, and related improvements on the Property (the "*CAFRA Application*"). Aa16; Aa29; see 2Ra18.[5] The Project was designed in accordance with the Redevelopment Ordinances, as amended by the Redevelopment Plan

[4] For example, under the Redevelopment Plan Amendment, the Minimum Front Yard Setback from Ocean Avenue is fifty (50) feet. 2Ra6; compare 2Ra136.
[5] The Department's File and Activity Number for the CAFRA Application is 1325-16-0007.1, LUP210001. Aa16; Aa29.

Amendment. 2Ra24. Accordingly, the Proposed Building was approximately 99 feet high and set back approximately 50.5 feet from Ocean Avenue. 2Ra75. As further discussed in Point I(C), infra, due to the Redevelopment Plan Amendment, 290 Ocean applied for a CAFRA individual permit instead of seeking approval pursuant to the Long Branch Redevelopment Zone Permit, in accordance with the procedures set forth under the Long Branch Rule. See 2Ra83; see also 2Ra78. A copy of Ordinance No. 26-20, pursuant to which Long Branch adopted the Redevelopment Plan Amendment, was provided with the CAFRA Application, although a copy of the actual Redevelopment Plan Amendment was not provided therewith. 2Ra24; 2Ra67-69.

Prior notice of the Application was provided by 290 Ocean to Appellant. Aa1-4. Appellant objected to the Application by email to the Department on March 3, 2021. 2Ra80. Appellant then submitted an objection letter dated March 8, 2021 by email to the Department on March 9, 2021.[6] 2Ra82; Aa5-12. Appellant asserted, *inter alia*, that the Project failed to comply with the SRD Rule and, therefore, the Application should be denied. Aa5-9. Appellant argued that the Project was not visually compatible with surrounding buildings and did not enhance scenic resources in accordance with Subsection C. Aa6-7. Appellant

[6] Appellant submitted the same March 8, 2021 objection letter to the Department on May 5, 2021 and June 15, 2021. See 2Ra92-93; 2Ra106.

also argued that the Project did not comply with the 30% open view corridor and 2-to-1o setback requirements under Subsection D. Aa7.

On March 29, 2021, the Department issued a letter to 290 Ocean advising that the CAFRA Application was complete for public comment and requested additional information with respect to compliance with Subsection D of the SRD Rule. Aa13-15. Notice of the CAFRA Application and commencement of the public comment period was published in the April 7, 2021 DEP Bulletin. 2Ra86-87. On May 10, 2021, 290 Ocean responded to the Department's March 29, 2021 letter and asserted that the SRD Rule did not apply to the Project because, due to Ocean Avenue, it was "not 'adjacent' to the features which trigger compliance with" the Rule. 2Ra95-96.

D. The Department's Denial Of The CAFRA Application.

The Department denied the CAFRA Application on June 22, 2021 (the "*Denial*"). Aa16-21. The Department determined, in pertinent part, that the Project did not comply with the 30% open view corridor and 2-to-1 setback requirements under Subsection D of the SRD Rule. Aa18. The Department found that the Project would provide only a 25% open view corridor, and the 99-foot high Proposed Building was required to be "separated from the inland edge of the boardwalk" by approximately 198 feet (*i.e.*, two times the height of the Proposed Building), but the separation was approximately 88 feet. Aa18. The

Department did not rely on the visual compatibility provision under Subsection C as a basis for the Denial. See Aa17-21. Notice of the Denial was published in the July 7, 2021 issue of the DEP Bulletin. 2Ra127-28.

E. 290 Ocean's Request For Reconsideration And Administrative Appeal Of The Denial.

On June 24, 2021, 290 Ocean requested that the Department reconsider the Denial, and maintained its position that the SRD Rule does not apply to the Project because it "is separated from the boardwalk by a public street and, therefore, it is not 'adjacent' to the boardwalk." 2Ra108. 290 Ocean also asserted that the non-applicability of the SRD Rule in the Redevelopment Area was supported by the Redevelopment Ordinances which were reviewed and approved by the Department as consistent with the CZM Rules but did not incorporate the provisions of the SRD Rule. 2Ra129; 2Ra139; see 2Ra108-126. In further support of the request for reconsideration, 290 Ocean provided a setback survey and analysis showing that other similarly situated buildings did not comply with the SRD Rule's setback requirement, along with a copy of Handbook 6. 2Ra129-38; 2Ra139-54. By email on August 3, 2021, the Department advised that it was declining to reconsider the Denial. 2Ra155.

On August 5, 2021, 290 Ocean submitted a letter to the Department requesting an adjudicatory hearing and alternative dispute resolution to challenge the Denial, and asserted, *inter alia*, that the Project was not subject to

the requirements under Subsection D of the SRD Rule. 2Ra157-66. 290 Ocean maintained that Subsection D was not applicable to the Project because it was not "adjacent to" the boardwalk, which is the furthest inland waterfront feature. 2Ra160. 290 Ocean also asserted that Subsection D did not apply in the Redevelopment Area, as the open view corridor and setback requirements were not incorporated into the Redevelopment Ordinances, which were reviewed and approved by the Department as consistent with the CZM Rules, and the non-applicability of the SRD Rule in the Redevelopment Area was evident by the fact that the majority of nearby buildings did not comply with the setback requirement. 2Ra160. Appellant incorrectly asserts in its brief that 290 Ocean argued that "because Long Branch changed its municipal zoning to eliminate [SRD] Rule standards for the 290 Ocean [P]roperty . . . DEP should waive compliance with the Rule." Ab2-3.

290 Ocean provided additional information in support of its position that Subsection D of the SRD Rule did not apply to the Project. Aa30; Aa33. 290 Ocean again provided, *inter alia*, the survey of existing buildings on properties that were also separated from the boardwalk by Ocean Avenue (the "*Setback Survey*") and an updated analysis of the heights and setbacks of the buildings from the boardwalk (the "*Setback Analysis*," and together with the Setback Survey, the "*Setback Survey & Analysis*") to demonstrate that the Department

has not required compliance with Subsection D in this area.[7] Aa33; see Aa23-28; 2Ra141-48;. Of the 45 buildings analyzed, 23 buildings were not set back in accordance with Subsection D. Aa33; Aa23-28. The non-compliant buildings included other buildings in the Beachfront South Sector of the Redevelopment Area within which the 290 Property is located. See Aa25-26; 2Ra142-43.

F. The Settlement Agreement Between 290 Ocean And The Department.

On August 5, 2022, 290 Ocean and the Department entered into a Settlement Agreement (the "*Settlement Agreement*") pursuant to which the Department agreed that the Project was not required to comply with Subsection D of the SRD Rule and provided detailed reasoning for this conclusion. Aa29-40. The Settlement Agreement explained the Department's interpretation and application of the SRD Rule, when read together with the Long Branch Rule, the Redevelopment Ordinances, and the Redevelopment Plan Amendment. Aa30-34.

The following was acknowledged in the Settlement Agreement: the requirements under Subsection D "are intended to prevent what occurred along the Atlantic City Boardwalk, namely that the massive hotel casino structures

[7] Appellant notes in its brief that the "survey does not even address the 30% view corridor requirement." Ab11. It was not necessary to also survey the view corridors of the other buildings to determine whether they complied with the SRD Rule because the Rule requires both a 30% view corridor and 2-to-1 setback. N.J.A.C. 7:7-16.10(d).

were constructed with no setbacks from the Boardwalk"; in contrast, the buildings in Long Branch "are often separated from the boardwalk by public streets" and local ordinances "require adequate setbacks from public roads"; and the 290 Ocean Property is separated from the boardwalk by the public street Ocean Avenue, an associated sidewalk, and an approximately twelve (12) foot unimproved right-of-way. Aa31.

The Department further recognized in the Settlement Agreement that: "the [Redevelopment] Ordinances do not require an Open View Corridor and a Step Back as required elsewhere by the [SRD Rule]"; the Redevelopment Ordinances "were reviewed by the [Department] and approved as consistent with the [CZM] Rules"; the SRD Rule "has not been applied in the Long Branch Redevelopment Area because the Long Branch Redevelopment Zone Permit does not require compliance with the [SRD Rule] . . . as reflected in the [Redevelopment] Ordinances"; and "the existence of the Long Branch Rule and the public road separating the boardwalk from the Property makes this portion of Long Branch unique and unduplicated elsewhere throughout any portion of the Coastal Zone regulated by [CAFRA]." Aa32-33. The Department ultimately agreed that the Project was not required to comply with the SRD Rule because it was within the Redevelopment Area "where the scenic resource setback standard is not applied and thus most buildings of a similar scale do not comply with the setback

standard, and hence [the] [P]roject will not have a significant adverse effect on the scenic resources of the coastal zone." Aa34.

G. The Department's Issuance Of The CAFRA Permit To 290 Ocean.

Under the terms of the Settlement Agreement, the Department agreed to issue a CAFRA Individual Permit for the Project following a public comment period on the proposed settlement and subject to the Department's review of any comments submitted. Aa35. A Notice of Intent to Settle was published in the October 5, 2022 issue of the DEP Bulletin. 2Ra167-68. In addition, 290 Ocean provided specific notice of the Settlement Agreement to Appellant. 2Ra169-77.

Appellant objected to the Settlement Agreement by email to the Department on October 6, 2022 and by letter dated December 2, 2022. 2Ra182-83; Aa41-53. Appellant reiterated its argument that the Project failed to comply with Subsections C and D of the SRD Rule and that the proposed settlement constituted an unlawful waiver of the SRD Rule. 2Ra180-83; Aa41-53. The Department provided 290 Ocean copies of the public comments received. 2Ra184. By letter dated March 2, 2023, 290 Ocean provided responses to the public comments, and in particular, Appellant's comments. 2Ra192-96.

Following the conclusion of the public comment period, on June 30, 2023, the Department issued a CAFRA Individual Permit to Appellant (the "*Permit*"), which authorized the construction of the Project in accordance with the

Settlement Agreement. Aa54-59; see 2Ra209-12. The Department provided an Environmental Report & Response to Comments in conjunction with the issuance of the Permit (the "*Environmental Report*"), which included responses to comments related to the SRD Rule and the basis for the Department's decision to issue the Permit, consistent with the Settlement Agreement. 2Ra197-208.

H. Appellant's Appeal From The Permit.

Notice of the issuance of the Permit was published in the July 19, 2023 DEP Bulletin. Aa61-62. By letter dated August 9, 2023, Appellant submitted a request for an adjudicatory hearing to the Department to challenge the Permit and a petition that the Department decide on Appellant's hearing request within thirty (30) days. Aa63-70. Appellant again argued that the Project failed to comply with Subsections C and D of the SRD Rule, the Department unlawfully waived the SRD Rule for the Project, and it was deprived of its constitutional rights to equal protection and substantive due process. Aa63-66. On August 18, 2023, 290 Ocean submitted a letter to the Department opposing Appellant's hearing request. 2Ra213-17. By letter dated August 28, 2023, the Department denied Appellant's request for a hearing, concluding that Appellant did not have a statutory or constitutional right to an adjudicatory hearing. Aa71-75.

Appellant filed a Notice of Appeal on September 25, 2023 and an Amended Notice of Appeal on December 21, 2023, to further challenge the Department's issuance of the Permit to 290 Ocean.[8] Aa76-85.

LEGAL ARGUMENT

POINT I

THE DEPARTMENT'S DECISION TO ISSUE THE PERMIT TO 290 OCEAN WAS NOT ARBITRARY, CAPRICIOUS, OR UNREASONABLE BECAUSE THE SCENIC RESOURCES AND DESIGN RULE DOES NOT APPLY TO THE PROJECT PURSUANT TO THE LONG BRANCH RULE.

A. Standard Of Review

An appellate court reviews a final agency action with deference. In re Freshwater Gen. Permit No. 7 ("In re FWW GP7"), 405 N.J. Super. 204, 212-13 (App. Div. 2009). The deference afforded to an agency "is even stronger when the agency . . . has been delegated discretion to determine the specialized and technical procedures for its tasks." In re Freshwater Wetlands Gen. Permits ("In re FWW GPS"), 372 N.J. Super. 578, 593 (App. Div. 2004) (citation omitted). "This is because the agency has the staff, resources and expertise to understand

[8] Steven Silverman was included as a respondent in Appellant's Amended Notice of Appeal. Aa84. The appeal as to Steven Silverman was dismissed with prejudice pursuant to a Stipulation of Dismissal filed with the Court on February 29, 2024.

and solve those specialized problems." Ibid. (citation omitted). Moreover, courts "extend substantial deference to an agency's interpretation of its own regulations." In re FWW GP7, 405 N.J. Super. at 213 (citation omitted) (emphasis added). This Court has recognized that "[a]n agency's interpretation of its own rule is owed considerable deference because the agency that drafted and promulgated the rule should know the meaning of that rule." Ibid. (citation omitted); see In re Nicosia Flood Hazard Gen. Permit by Certification 5, __ N.J. Super. __, __ (App. Div. 2024) (slip op. at 15).

Courts should not "reverse the ultimate determination of an agency" unless it concludes that "it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence, or that it violated legislative policies expressed or implied in the act governing the agency." In re FWW GP7, 405 N.J. Super. at 212-13 (citations omitted). In the law, "arbitrary and capricious" "means having no rational basis." In re Proposed Xanadu Redevelopment Project, 402 N.J. Super. 607, 642 (App. Div. 2008) (citing Bayshore Sewerage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199 (Ch. Div. 1973)). In connection with actions by "administrative bodies, the term means 'willful and unreasoning action, without consideration and in disregard of circumstances.'" In re Xanadu, 402 N.J. Super at 642 (quoting Bayshore, 122 N.J. Super at 199). "Where there is room for two opinions, action is not arbitrary or capricious when

exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore, 122 N.J. Super at 199. "The fundamental consideration is that a court may not substitute its judgment for the expertise of an agency so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable [or not supported by the record]." In re FWW GPs, 372 N.J. Super. at 593 (citation omitted) (alteration in original). "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the [party] challenging the administrative action." In re Adoption of Amendments to Ne., Upper Raritan, Sussex Cnty., 435 N.J. Super. 571, 582 (App. Div. 2014) (citation omitted).

B. The Department Properly Interpreted The SRD Rule In The Context Of The CZM Rules In Their Entirety.

Despite being faced with facts and a detailed explanation to the contrary, Appellant continues to claim that the Project does not comply with the SRD Rule, and raises the same arguments that were presented, considered, and ultimately rejected by the Department based on its specific expertise. As asserted in its objection to 290 Ocean's CAFRA Application, in its objection to the Settlement Agreement, and in its administrative appeal of the Permit, Appellant again argues that the Project violates the SRD Rule because it is not visually compatible with the surrounding area in accordance with Subsection C

and does not comply with the 30% open view corridor and 2-to-1 setback requirements under Subsection D, and, therefore, the Department's issuance of the Permit to 290 Ocean allowing for the construction of the Project was arbitrary, capricious, and unreasonable. Ab12-16.

As an initial matter, Appellant misrepresents the facts in its attempt to argue that the Department's decision to issue the Permit was unlawful. Appellant incorrectly asserts that pursuant to the Redevelopment Plan Amendment, Long Branch "no longer require[d] adherence to the [SRD] Rule for the 290 Ocean location," and because Long Branch "no longer required adherence to the [SRD] Rule," the Department simply decided that "it would not either." Ab10-11. As discussed herein: under the Long Branch Rule, development within the Redevelopment Area must comply with the standards set forth in the Redevelopment Ordinances; the Redevelopment Ordinances do not require adherence to the provisions of the SRD Rule; the Redevelopment Plan Amendment did not "eliminate" the SRD Rule standards for the 290 Ocean Property, because no such standards existed to eliminate; and the only relevant consequence of the Redevelopment Plan Amendment in this case is the procedure subsequently followed by 290 Ocean to obtain approval from the Department for the Project under CAFRA.

The Department's conclusion that the SRD Rule was not applicable to the Project was based its interpretation of the CZM Rules, including specifically, the Long Branch Rule, and is amply supported by the record on appeal. Appellant fails to present any legitimate argument to challenge the threshold determination that the SRD Rule does not apply to the Project, and thus fails to meet its burden to demonstrate that the Department's decision to issue the Permit to 290 Ocean was arbitrary, capricious, or unreasonable in any way.

1. Legislative And Regulatory History Of CAFRA And The CZM Rules.

The policy considerations underlying CAFRA, the foundational goals of the CZM Rules, and the regulatory history of the SRD Rule and the Long Branch Rule provides guidance in resolving the issues presented in this case.

"In 1973, the Legislature enacted CAFRA 'to protect the unique and fragile coastal zones of the State.'" In re Protest of Coastal Permit Program Rules ("In re Protest CPP Rules"), 354 N.J. Super. 293, 309 (App. Div. 2002) (quoting Matter of Egg Harbor Associates (Bayshore Ctr.), 94 N.J. 358, 364 (1983)). The "desire to address the adverse environmental effects of coastal area development," however, was "balanced . . . with recognized economic considerations for those who inhabited the coastal areas." Seigel v. New Jersey Dep't of Envtl. Prot., 395 N.J. Super. 604, 615 (App. Div. 2007).

> CAFRA was intended to also "encourage the development of compatible land uses in order to improve the overall economic position of the inhabitants of that area within the framework of a comprehensive environmental design strategy which preserves the most ecologically sensitive and fragile area from inappropriate development and provides adequate environmental safeguards for the construction of any facilities in the coastal area."
>
> [Ibid. (quoting N.J.S.A. 13:19-2) (emphasis added).]

Consistent with the foregoing, CAFRA requires that any rules or regulations adopted pursuant thereto "be closely coordinated with the provisions of the State Development and Redevelopment Plan." N.J.S.A. 13:19-17(b).

Pursuant to the powers delegated to it by CAFRA, the Department is required "to regulate land use within the coastal zone for the general welfare." Bayshore Ctr., 94 N.J. at 364. Under CAFRA, any proposed development within the coastal area that meets certain "construction and development thresholds . . . must obtain a permit from [the Department] before the commencement of that construction unless otherwise expressly exempted." In re Protest CPP Rules, 354 N.J. Super. at 310. The Department "exercises its statutory authority under CAFRA through the [CZM Rules]." Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 185 N.J. 40, 61 (2005). The CZM Rules must "be liberally construed to effectuate the purpose of the Acts under which it was adopted." N.J.A.C. 7:7-1.7.

The CZM Rules "are founded on . . . broad coastal goals" which embody the need to balance environmental protection with economic considerations, as intended under CAFRA. N.J.A.C. 7:7-1.1(c). These foundational goals include "[h]ealthy coastal ecosystems," "[m]eaningful public access to and use of tidal waterways and their shores," and "[c]oastal open space." N.J.A.C. 7:7-1.1(c)(1), (3), (5). In addition to and in conjunction with the foregoing, the CZM Rules also include the goals of "[s]afe, healthy and well-planned coastal communities and regions" and "[c]oordinated coastal decision-making, comprehensive planning and research." N.J.A.C. 7:7-1.1(c)(6), (7). In relation to the goal of "[s]afe, healthy and well-planned coastal communities and regions," the CZM Rules further set forth the policy of "[m]anag[ing] coastal activities and foster[ing] well-planned communities and regions that," *inter alia*, "[e]ncourage mixed-use redevelopment of distressed waterfront communities," "[p]romote concentrated patterns of development," "[s]ustain coastal economies," and "[c]reate vibrant coastal communities and waterfronts." N.J.A.C. 7:7-1.1(c)(6). With respect to the goal of "[c]oordinated coastal decision-making, comprehensive planning and research," the CZM Rules set forth the policy of "[e]ncourag[ing] the preparation of comprehensive plans, including: . . . [s]pecial area management plans that protect significant natural resources and

provide the opportunity for sound coastal dependent economic development[.]" N.J.A.C. 7:7-1.1(c)(7).

2. The Scenic Resources And Design Rule.

Derived from CAFRA and the foundational goals of the CZM Rules are certain "Resource Rules," which are "the standards the Department utilizes to analyze the proposed development in terms of its effects on various resources of the built and natural environment of the coastal zone, both at the proposed site as well as in its surrounding region." N.J.A.C. 7:7-16.1; see N.J.A.C. 7:7-1.1(e).

One of the resource rules is the SRD Rule and pertains to scenic resources, which "include the views of the natural and/or built landscape." N.J.A.C. 7:7-16.10(a). As provided above, under Subsection C of the SRD Rule, "[n]ew coastal development that is visually compatible with its surroundings in terms of building and site design, and enhances scenic resources is encouraged," while "[n]ew coastal development that is not visually compatible with existing scenic resources in terms of large-scale elements of building and site design is discouraged." N.J.A.C. 7:7-16.10(c); see N.J.A.C. 7:7-16.10(b) ("Large-scale elements of building and site design are defined as the elements that compose the developed landscape such as size, geometry, massing, height and bulk structures.").

In addition, under Subsection D of the SRD Rule, certain "new coastal development adjacent to a bay or ocean or bayfront or oceanfront, beach, dune or boardwalk and higher than 15 feet in height measured from the existing grade of the site or boardwalk" must: (1) "[p]rovide an open view corridor perpendicular to the water's edge in the amount of 30 percent of the frontage along the waterfront where an open view currently exists"; and (2) "[b]e separated from either the beach, dune, boardwalk, or waterfront, whichever is further inland, by a distance of equal to two times the height of the structure." N.J.A.C. 7:7-16.10(d)(1)-(2).

The SRD Rule does not apply to every single development proposed within a CAFRA area. As provided in its stated Rationale, the SRD Rule "applies only to developments which by their singular or collective size, location and design could have a significant adverse effect on the scenic resources of the coastal zone." N.J.A.C. 7:7-16.10(g). In addition, the CZM Rules explicitly recognize that all resource rules do not necessarily apply to each and every development proposed in the coastal zone. N.J.A.C. 7:7-1.1(e) states:

> The Department does not expect each proposed use of coastal resources to involve all location rules, use rules, and resource rules. Decision-making on proposed actions involves examining, weighing, and evaluating complex interests using the framework provided by this chapter. The [CZM] Rules provide a mechanism for integrating professional judgment by Department officials, as well as recommendations and comments by

> applicants, public agencies, specific interest groups, corporations, and citizens into the coastal decision-making process.

A rule for scenic resources and design was first promulgated by the Department in 1978. 10 N.J.R. 184(a) (May 4, 1978); 10 N.J.R. 384(a) (Sept. 7, 1978). The rule was amended in 1986 to add the visual compatibility provision language under the current Subsection C. 17 N.J.R. 1466(a) (Jun. 17, 1985); 18 N.J.R. 314(a) (Feb. 3, 1986). In 1990, amendments were proposed to add the 30% open view corridor and 2-to-1 setback requirements under Subsection D, but were not adopted at that time. 22 N.J.R. 1188(a) (Apr. 16, 1990); 22 N.J.R. 2542(b) (Aug. 20, 1990). The amendments were proposed again in 1994 and adopted that same year. 26 N.J.R. 943(a) (Feb. 22, 1994); 26 N.J.R. 1561(c) (Apr. 18, 1994). Accordingly, the SRD Rule that was in effect when the Department reviewed the Redevelopment Ordinances for consistency with the CZM Rules in 1996 included the requirements of visual compatibility, 30% open view corridor, and 2-to-1 setback.

3. The Long Branch Rule And The Redevelopment Ordinances.

The Long Branch Rule is a Subchapter of the CZM Rules that applies specially to the Redevelopment Area and sets forth the substantive standards applicable to a proposed development and the procedures to follow in order to

obtain approval from the Department for same under CAFRA. See N.J.A.C. 7:7-7.1 to -7.5. N.J.A.C. 7:7-7.1 states, in pertinent part:

> (a) This Long Branch Redevelopment Zone Permit authorizes the construction of any development regulated under N.J.A.C. 7:7-2.2 within the Redevelopment Zone of the City of Long Branch, as defined in the Redevelopment Plan Ordinance of the City of Long Branch . . . , provided the conditions at (b) through (g) below and the notification requirements at N.J.A.C. 7:7-7.2 or 7.3, as applicable, are met[.]
> (b) The development shall be in compliance with the Redevelopment Plan Ordinance and the Design Guidelines Ordinance of the City of Long Branch.
> (c) The development must be approved by the Planning Board of the City of Long Branch . . . .
> . . . .
> (e) If the Planning Board . . . approves a development with a variance or waiver from a provision(s) of the Redevelopment Plan Ordinance or the Design Guidelines Ordinance of the City of Long Branch, and if the Department concurs in writing with such variance or waiver, the development is authorized under this Long Branch Redevelopment Zone Permit. The Department shall concur if the waiver or variance complies with this chapter, and if, notwithstanding the waiver or variance, the developments within the Redevelopment Zone continue to comply individually and collectively with this chapter.
> . . . .
> (g) For any development within the Redevelopment Zone of the City of Long Branch that does not meet the conditions for approval under this Long Branch Redevelopment Zone Permit, the applicant shall, pursuant to the applicable requirements of this chapter, either obtain from the Department a CAFRA individual permit or meet the

> requirements for authorization under a CAFRA general permit or permit-by-rule.

The Department first proposed the Long Branch Rule in 1997, following the City's adoption of the Redevelopment Ordinances in 1996, and adopted the Rule in 1998. 29 N.J.R. 3920(a) (Sept. 15, 1997); 30 N.J.R. 645(a) (Feb. 17, 1998). Since its initial adoption, the Long Branch Rule has been recodified and amended, however, the provisions relevant to this case have remained essentially the same.[9]

In the 1997 rule proposal, the Department explained that it was "proposing a special CAFRA permit applicable only to the [City] as a pilot project for streamlined CAFRA reviews." 29 N.J.R. at 3920. "The Department determined that the proposed special Long Branch Redevelopment Zone Permit [was] appropriate and feasible in the City" based on, *inter alia*, the City's designation of the Redevelopment Area. Ibid. The Department further stated:

> [T]he City has adopted an ordinance defining a Redevelopment Zone which is an area the City has determined is critical to the economic well-being of the City and would benefit the most from a comprehensive plan for revitalization and redevelopment, as well as a Design Guidelines Ordinance which contains the

[9] The Long Branch Rule was originally proposed and adopted as N.J.A.C. 7:7-7.5. See 29 N.J.R. at 3920, 3923; 30 N.J.R. at 646. It was recodified as N.J.A.C. 7:7-7.4 in 2000. 32 N.J.R. 864(a) (March 20, 2000); 32 N.J.R. 3784(b) (Oct. 16, 2000). In 2015, it was recodified again in its current form as multiple subsections of N.J.A.C. 7:7-7. 46 N.J.R. 1051(a) (June 2, 2014); 47 N.J.R. 1392(a) (July 6, 2015); see also 34 N.J.R. 74(a) (Jan. 7, 2002); 35 N.J.R. 632(a) (Feb. 3, 2003).

> standards applicable to development within the Redevelopment Zone.
>
> [Ibid. (emphasis added).]

The Department acknowledged in the rule proposal that it "participated in the development of the Design Guidelines [] in order to ensure that it [was] consistent with the [CZM Rules]," ibid.; it "determined that the Design Guidelines Ordinance complies with the [CZM Rules] such that development constructed in accordance with the Design Guidelines Ordinance and Redevelopment Plan Ordinance will be in compliance with the [CZM Rules]," id. at 3922; and "[t]he Design Guidelines Ordinance contains setback, bulk, height and building line requirements which all contribute to addressing the objective of providing visual and physical access to the waterfront from several vantage points without reducing the presence of the shoreline." Id. at 3921. The Department further recognized that "the flexibility associated with the new rule and amendment will provide developers with the ability to consider a variety of overall site plans and building designs and select a design which is the most economically feasible while still protecting the views and access to the waterfront." Id. at 3922.

C. The SRD Rule Does Not Apply To The Project Pursuant To The Long Branch Rule.

It is against the foregoing backdrop that the SRD Rule's applicability (or, more accurately, non-applicability) to the Project should be analyzed.

The SRD Rule, as with any other regulation, is "subject to the same rules of construction as a statute," and thus, "should be construed in accordance with the plain meaning of its language" and "in a manner that makes sense when read in the context of the entire regulation." Czar, Inc. v. Heath, 398 N.J. Super. 133, 138 (App. Div. 2008) (quoting Medford Convalescent & Nursing Ctr. v. Div. of Med. Assistance & Health Servs., 218 N.J. Super. 1, 5 (App. Div. 1985)) (emphasis added). Accordingly, administrative regulations should be read "in context with related provisions so as to give sense to the [regulations] as a whole." In re Nicosia, __ N.J. Super. at __ (slip op. at 20).

Here, Appellant essentially ignores the existence of the Long Branch Rule. In the context of the CZM Rules, as a whole, the SRD Rule does not apply to the Project because pursuant to the Long Branch Rule, development of the Project is subject to the standards set forth under the Redevelopment Ordinances (as may be amended) regardless of whether CAFRA approval was sought pursuant to a Long Branch Redevelopment Permit or an individual permit. See N.J.A.C. 7:7-7.1(b) ("The development shall be in compliance with the Redevelopment Plan Ordinance and the Design Guidelines Ordinance of the City of Long Branch."). And the Redevelopment Ordinances, as originally

adopted and amended by the Redevelopment Plan Amendment, do not require visual compatibility, an open view corridor, or a 2-to-1 setback as may otherwise be required by the SRD Rule. Aa32; 2Ra202. Notably, the Department reviewed the Redevelopment Ordinances and determined they were consistent with the CZM Rules even though same did not incorporate the requirements of the SRD Rule. 29 N.J.R. at 3922; Aa32; 2Ra202. In addition, the Setback Survey & Analysis demonstrated that the SRD Rule has not been applied in the Redevelopment Area, consistent with the conclusion that the Redevelopment Ordinances control. Aa23-28; Aa32; 2Ra141-48. The foregoing reasoning was set forth in detail in the Settlement Agreement and the Department's Environmental Report accompanying the Permit. Aa30-34; 2Ra202; 2Ra206.

Contrary to Appellant's contorted arguments, the Redevelopment Plan Amendment should not impact the current analysis. Because 290 Ocean obtained the amendment to the Redevelopment Ordinances for the Project, 290 Ocean did not seek to proceed with the development pursuant to the Long Branch Redevelopment Zone Permit, and instead, applied for a CAFRA Individual Permit in accordance with N.J.A.C. 7:7-7.1(g). See 2Ra78; 2Ra83. The Department's interpretation of the Long Branch Rule such that the Redevelopment Ordinances (as may be amended) apply to a development in the Redevelopment Area regardless of whether CAFRA approval was sought

pursuant to the Long Branch Redevelopment Permit or an individual permit is rational and reasonable when considering the goals and policies underlying CAFRA and the CZM Rules, which promote comprehensive planning for coastal communities. See N.J.S.A. 13:19-2; N.J.A.C. 7:7-1.1(c).

The Department's decision to issue the Permit for the Project should be upheld based on the language of the Long Branch Rule, the regulatory history of the Long Branch Rule, the stated rationale of the SRD Rule, the recognized need for liberality in applying the CZM Rules based on the policy considerations thereunder, and the deference afforded to the Department.

D. Even Absent The Long Branch Rule, The Project Complies With All Applicable Provisions Of The SRD Rule.

290 Ocean maintains that the Redevelopment Ordinances control pursuant to the Long Branch Rule, and under the Redevelopment Ordinances, compliance with the SRD Rule is not required. Notwithstanding the foregoing, the Project still complies with the SRD Rule.

1. The Project Is Visually Compatible With Its Surroundings.

Appellant's argument that the Project fails to comply with the visual compatibility requirement under Subsection C of the SRD Rule is wholly undermined by the evidence in the record. Ab16; see Aa33. The Setback Survey & Analysis showed that 23 out of 45 similarly situated buildings, including buildings in the Beachfront South Sector, were not set back in accordance with

the SRD Rule. Aa23-28; 2Ra141-48; see Aa33. Appellant asserts that "the two buildings to the immediate south of 290 Ocean," specifically, "Block 216, Lots 1.01 and 10," "are substantially stepped back," and misleadingly implies that these buildings comply with the SRD Rule. Ab11. The buildings located on Block 216, Lot 1.01 and Block 216, Lot 10 were analyzed as part of the Setback Survey & Analysis, and were found not to be in compliance with the SRD Rule's setback requirement. Aa25; 2Ra143. The Setback Survey & Analysis was provided to the Department, and it acknowledged in the Settlement Agreement that "many buildings in the vicinity of the Project do not comply with the Step Back requirement, as a result of which the Project's design will not have a significant adverse effect on the scenic resources of the coastal zone." Aa32-33.

2. Subsection D Of The SRD Rule Does Not Apply To The Project Because The 290 Ocean Property Is Not "Adjacent To" The Boardwalk.

Subsection D of the SRD Rule and the view corridor and setback requirements thereunder do not apply to the Project under the language of the rule itself. The requirements of Subsection D apply only to "new coastal development adjacent to a bay or ocean or bayfront or oceanfront, beach, dune or boardwalk, whichever is further inland." N.J.A.C. 7:7-16.10(d) (emphasis added). The 290 Ocean Property is not adjacent to the boardwalk (the closest of the delineated waterfront features). 2Ra95-98; 2Ra108; 2Ra129; 2Ra159-60. An

approximately twelve (12) foot unimproved right-of-way, the public street Ocean Avenue, and an associated sidewalk separates the Property from the boardwalk, and thus, Subsection D does not apply to the Project.[10] Aa31.

The Department's decision to issue the Permit for the Project is rationally and fairly supported by the record. Moreover, the Department's interpretation and application of the CZM Rules in this case (*i.e.*, the SRD Rule and Long Branch Rule) is entitled to substantial deference by the Court. See In re FWW GP7, 405 N.J. Super. at 213. The Department's action in this case was not arbitrary, capricious, or unreasonable, and its decision to issue the Permit should be affirmed.

POINT II

THE DEPARTMENT DID NOT UNLAWFULLY "WAIVE" THE SCENIC RESOURCES AND DESIGN RULE UNDER DRAGON BECAUSE THE RULE DOES NOT APPLY TO THE PROJECT IN THE FIRST INSTANCE.

Equally unavailing is Appellant's argument that by issuing the Permit for the Project, the Department unlawfully waived the SRD Rule in contravention of Dragon v. New Jersey Department of Environmental Protection, 405 N.J.

[10] 290 Ocean acknowledges that the Settlement Agreement and the Department's decision to issue the Permit were not based on a finding that Subsection D did not apply because the Property is not "adjacent to" the boardwalk, and that the Department has not made such a determination.

Super. 478 (App. Div. 2009). Ab17-19. As discussed in Point I(C), supra, the SRD Rule does not apply to the Project pursuant to the Long Branch Rule. The holding in Dragon thus does not apply, because no waiver occurred in this case.

In Dragon, a property owner (the "*applicant*") applied for a CAFRA permit to demolish an existing house and construct a new larger house. 405 N.J. Super. at 484-85. The neighboring property owners (the "*Dragons*") objected to the application. Id. at 484. The Department denied the permit because the applicant's property was in a coastal high hazard area where residential development was prohibited, and the project did not meet any exception to this rule, specifically, the infill development rule. Id. at 485-86. The applicant administratively appealed from the denial. Id. at 486. The applicant and Department then entered into a "Mediation & Settlement Agreement In Lieu of Permit" and the Department ultimately issued a "Letter of Authorization" "authorizing the reconstruction and expansion of the applicant's home" (the "*LOA*"). Id. at 487. "The LOA expressly stated that it was 'in lieu of a Coastal General Permit, pursuant to the rules on Coastal Zone Management.'" Ibid.

The Dragons administratively appealed from the LOA, and the Administrative Law Judge (the "*ALJ*") concluded that the Department improperly "waived the infill development rule without any express statutory or regulatory authority," and "set aside the settlement agreement and LOA as

invalid and *ultra vires*." Id. at 487-88. The Commissioner of the Department in her final decision "rejected the ALJ's conclusion that the settlement agreement and LOA were invalid." Id. at 488. Notably, the Commissioner acknowledged that the applicant failed to meet the criteria necessary for issuance of a permit under the applicable CZM Rules, but "she nevertheless found a 'litigation risk' inherent in the denial of a permit, and therefore concluded that the settlement was a fair and reasonable exercise of [the Department]'s discretion to resolve litigation." Ibid.

The Appellate Division reversed and concluded that CAFRA did not give the Department the power to authorize the proposed development in a settlement agreement or authorizing letter "in lieu of" a formal permit. Id. at 489. The Court found that the "proposed project clearly fail[ed] to meet the express language" of the applicable rules, and the Department did not have the express or implied authority under CAFRA to use the settlement process "to circumvent CAFRA's substantive permitting requirements." Id. at 492, 497. The Court further noted that even the Commissioner found that the proposed project did not comply with the infill development rule. Id. at 492.

Essential to the decision in Dragon was that the Department allowed the project even though it determined that it did not comply with applicable regulations. Id. at 492. In stark contrast here, the Department determined that

the SRD Rule does not apply to the Project at all, and the Project complied with all applicable provisions of the CZM Rules. Aa34; 2Ra202-03. Moreover, the basis for this determination was set forth in detail in the Settlement Agreement and the Environmental Report. Aa30-34; 2Ra202-03; 2Ra205-06. Manifestly, there can be no waiver (unlawful or otherwise) when there is nothing to waive. Appellant's reliance on Dragon is misplaced, as its holding does not apply here.

POINT III

THE DEPARTMENT'S DECISION TO ISSUE THE PERMIT TO 290 OCEAN FOR THE PROJECT DOES NOT RESULT IN DUE PROCESS OR EQUAL PROTECTION VIOLATIONS.

Appellant argues that the Department's "waiver" of the SRD Rule as to the Project violates its due process rights and the Equal Protection Clause. Ab19-20. Appellant's main point of contention is that it was required to comply with the SRD Rule when it built an apartment building on the Blackridge Property, and it is unfair that 290 Ocean, its "direct economic competitor for apartment rentals," is being allowed to construct a "a much taller and wider building with substantially more interior space, closer to the ocean." Ab19-20. Appellant's generalized and vague constitutional arguments are without merit.[11]

[11] Appellant does not set forth an argument in its brief challenging the Department's denial of its request for an adjudicatory hearing pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. Ab19-20. Accordingly,

A. No Due Process Violation Occurred.

The only discernible due process argument set forth in Appellant's brief are its assertions that "[f]undamental fairness is an integral part of due process," and that:

> there is nothing fair about allowing an economic competitor the rental advantages that come with a taller, wider, more spacious apartment building located closer to the water than what was allowed for its neighbor, when to do so violates the [CZM] Rules and established case law prohibiting the ad hoc waiver of those rules.
>
> [Ab20.]

Foremost, as discussed in Points I and II, supra, the Project does not violate the CZM Rules and no waiver, much less an unlawful waiver, of the CZM Rules occurred. In addition, even if allowing for the Project was somehow contrary to the CZM Rules (which 290 Ocean maintains it is not), no due process violation occurred, whether based on fundamental fairness, procedure, substance, or otherwise.

Appellant has waived any such argument. Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2024) ("It is, of course, clear that an issue not briefed is deemed waived."); see New Jersey Dep't of Envtl. Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015). Even if an argument was presented, the denial of the hearing request should be affirmed because the Department correctly determined that Appellant did not have a statutory or constitutional right to an administrative hearing. Aa71-75; see 2Ra213-17.

As stated in the Supreme Court decision cited by Appellant in its brief, the doctrine of fundamental fairness "protects against unjust and arbitrary governmental action, in particular, government procedures that operate arbitrarily." Matter of Cong. Districts by New Jersey Redistricting Comm'n, 249 N.J. 561, 575-76 (2022) (citations omitted) (emphasis added); see In re Pub. Serv. Elec. & Gas Co.'s Rate Unbundling, Stranded Costs & Restructuring Filings, 330 N.J. Super. 65, 105 (App. Div. 2000) ("New Jersey's doctrine of fundamental fairness protects against unjust and arbitrary governmental actions, and specifically against governmental procedures that tend to operate arbitrarily."). "[C]ourts apply the doctrine sparingly -- in those rare cases where not to do so will subject the defendant to oppression, harassment, or egregious deprivation." Matter of Cong. Districts, 249 N.J. at 576 (citations omitted).

Appellant does not allege any deficiencies in the procedures leading to the issuance of the Permit. Indeed, Appellant was provided notice and the opportunity to be heard at every step in the underlying permitting process. Aa1-4; 2Ra80; 2Ra81-82; 2Ra88-93; 2Ra169-77; 2Ra178-83; 2Ra187-91. Appellant had the opportunity to and did in-fact submit objections to Petitioner's Application, objections to the Settlement Agreement, and filed an adjudicatory hearing request to challenge the Permit. Aa5-12; Aa41-53; Aa63-70. It is also

evident from the record that the Department considered Appellant's comments and objections. 2Ra205-06.

Furthermore, Appellant's substantive due process rights were not violated. "The substantive due process doctrine does not protect individuals from all governmental actions that infringe on liberty or injure property in violation of some law." Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352, 366 (1996) (citations omitted) (alterations in original). "[S]ubstantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that shock the conscience or otherwise offend . . . judicial notions of fairness . . . [and that are] offensive to human dignity." Ibid. (citations omitted) (alterations in original).

The Department's decision to issue the Permit was based on its review of the information presented to it and application of same under the CZM Rules. Appellant's disagreement with the Department's ultimate decision does not equate to a due process violation.

B. No Equal Protection Violation Occurred.

Appellant argues that "the Equal Protection Clause requires a rational basis for different treatment" and it "was required per force of the [SRD] Rule to construct a relatively smaller building than [the Department] has allowed 290 Ocean without a valid rationale for the disparate treatment." Ab20. Appellant's

argument is essentially that it was required to comply with the SRD Rule in the past, and therefore, its neighbor and "direct economic competitor" should be required to comply with it too. Ab19. However, what may have occurred during the permitting process for the Blackridge Property should not undermine the well-founded decision reached by the Department in this case nor does it result in an equal protection violation.

Under the Equal Protection Clause, "states are required to generally treat alike all persons who are similarly situated." Thomas Makuch, LLC v. Twp. of Jackson, 476 N.J. Super. 169, 191 (App. Div. 2023) (citation omitted). Appellant does not "allege[] discrimination on the basis of membership in a protected class." Ibid. Accordingly, in such a "class-of-one" claim, the alleging party is required to "show that he or she was (1) intentionally treated differently from other people who are similarly situated, and (2) there is no rational basis for the difference in treatment." Ibid.

The issues raised by Appellant in this case relate to the Department's treatment of Respondent, not Appellant. To the extent Appellant can even claim an equal protection violation based on how it may have been treated in the past by way of another's treatment at a later time, Appellant fails to show that the difference in treatment was "intentional" or that there was "no rational basis" for same.

It must foremost be recognized that the permitting decisions related to Appellant's existing development on the Blackridge Property and the conditions Appellant was required to comply with are not in-fact at issue in this case. Moreover, there is nothing in the record that even suggests that the Department acted in any way to intentionally treat 290 Ocean differently than it may have treated Appellant in the past.

Furthermore, the record establishes a "rational basis" for the Department's conclusion that the SRD Rule should not apply to the Project. As discussed in Point I, supra, development of the Project is explicitly subject to the standards under the Redevelopment Ordinances, which do not require an open view corridor or setback. The reasoning for the Department's decision to issue the Permit was set forth in detail in the Settlement Agreement and the Environmental Report. Aa29-34; 2Ra202-03; 2Ra205-06.

CONCLUSION

For the reasons set forth above, the Court should affirm the Department's decision to issue the CAFRA Permit to Respondent 290 Ocean LLC.

Respectfully submitted,

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Attorneys for Respondent 290 Ocean LLC

By: */s/ Michael J. Gross*
MICHAEL J. GROSS

Dated: August 7, 2024

	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-246-23
IN THE MATTER OF CHALLENGE BY BLACKRIDGE REALTY, INC. TO CAFRA PERMIT ISSUED TO STEVEN SILVERMAN, 290 OCEAN LLC, FILE NO. 1325-16-0007.1, LUP 210001	CIVIL ACTION ON APPEAL FROM A FINAL DECISION OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEF OF RESPONDENT
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Date Submitted: Friday, August 2, 2024

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PRELIMINARY STATEMENT

This case arises from a Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 to -45, permit that the Department of Environmental Protection (DEP) issued to 290 Ocean, LLC (290 Ocean) to build a residential development in Long Branch, Monmouth County. Appellant, Blackridge Realty, Inc. (Blackridge), is 290 Ocean's neighbor and challenges the permit arguing that the project does not comply with DEP's Coastal Zone Management (CZM) Rules, N.J.A.C. 7:7-1.1 to -29.10, particularly the Scenic Resources and Design Rule, N.J.A.C. 7:7-16.10. However, that rule does not apply.

Because 290 Ocean's development is located within the Long Branch Redevelopment Zone, the project design aspects are governed by the Long Branch Redevelopment Plan and Design Guideline Ordinances pursuant to N.J.A.C. 7:7-7. The DEP's finding that the Scenic Resources and Design Rule does not apply and that the project complies with the actually applicable rules was a reasonable exercise of its expertise and thus, the court should affirm its decision to issue the permit.

Blackridge also appeals on other assorted grounds. It claims it was entitled to an adjudicatory hearing, denied due process and treated differently than 290 Ocean. Those arguments all lack merit. Blackridge was not entitled to a hearing because it cannot demonstrate a statutory or constitutional interest

in 290 Ocean's permit. Blackridge also meaningfully participated in DEP's administrative process by submitting multiple public comments. In short, it received all the process it was due.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

A. CAFRA And DEP's CZM Rules.

The relevant regulations in this appeal were promulgated under CAFRA which is "a comprehensive environmental design strategy" intended to ensure that any development in the coastal area is limited to "uses which promote the public health, safety and welfare, protect public and private property, and are reasonably consistent and compatible with the natural laws governing the physical, chemical and biological environment of the coastal area." N.J.S.A. 13:19-2. To effectuate those goals, DEP promulgated CZM regulations to guide permitting decisions in the coastal area.

Those rules include guidelines that regulate the design elements of a project and place limits on "developments which by their singular or collective size, location and design could have a significant adverse effect on the scenic resources of the coastal zone." N.J.A.C. 7:7-16.10(g). The regulated design elements include visual compatibility, height, view corridor, and setback

[1] Because they are closely related, the procedural history and facts relevant to this motion are combined for efficiency and the court's convenience.

requirements. N.J.A.C. 7:7-16.10(b-d). Those same rules also include rules that recognize that Long Branch identified its Redevelopment Zone as an area "critical to the economic well-being of the City and would benefit the most from a comprehensive plan for revitalization and redevelopment, as well as" specific guidelines that regulate the design elements of projects proposed in the Redevelopment Zone. 29 N.J.R. 3920(a) (Sept. 15, 1997).

The Scenic Resources and Design Rule was adopted in 1978 to ensure that new development would be visually compatible with its surroundings. 10 N.J.R. 184(a) (May 4, 1978); 10 N.J.R. 384(a) (Sept. 7, 1978). That standard remains in the rules. N.J.A.C. 7:7-16.10(b). In 1994, DEP amended the rule to add view corridor and setback requirements. 26 N.J.R. 943(a) (Feb. 22, 1994); 26 N.J.R. 1561(c) (Apr. 18, 1994). These requirements are the same in the current CZM rules, that requires "new coastal development adjacent to a bay or ocean or bayfront or oceanfront, beach, dune, or boardwalk and higher than 15 feet in height measured from the existing grade of the site or boardwalk" to "[p]rovide an open view corridor perpendicular to the water's edge in the amount of 30 percent of the frontage along the waterfront where an open view currently exists" and "[b]e separated from either the beach, dune, boardwalk, or waterfront, whichever is further inland, by a distance of equal to two times the height of the structure." N.J.A.C. 7:7-16.10(d)(1-2). This "ensure[s] that

proposed developments do not adversely affect existing views of and access to beaches and waterfront areas" by respectively requiring open view corridors of the waterfront between buildings and a setback to avoid crowding the waterfront. 26 N.J.R. at 949.

Three years after those requirements were placed in the Scenic Resources and Design Rule, the DEP adopted the Long Branch Redevelopment Plan and Design Guideline Ordinances in 1997 to specifically address a "Long Branch Redevelopment Zone Permit." 29 N.J.R. 3920(a) (Sept. 15, 1997).[2] The Long Branch rules "provide the City with the flexibility to redevelop its oceanfront in accordance with a complex design scheme" to create a "diverse landscape" anticipated to "make the Redevelopment Zone more appealing to the general population as well as to visitors to the City" by providing "developers with greater flexibility in design," to "attract additional developments into the Redevelopment Zone." Ibid. The process creates efficiency by "minimiz[ing] the resources that permit applicants will need to expend on the permit process," because DEP and "Long Branch have agreed on the types of development which may be permitted in this area," thus "potential developers will know

[2] DEP did not receive substantive comments to its CZM Long Branch Redevelopment Zone rules when adopted in 1997 or during subsequent amendments. 30 N.J.R. 645(a) (Feb. 17, 1998); 47 N.J.R. 1392(a) (July 6, 2015).

developments which are designed in accordance with the Redevelopment Plan Ordinance and Design Guidelines Ordinance will be acceptable." Ibid.

A project in the Redevelopment Zone can get a Long Branch Redevelopment Zone Permit from Long Branch, or alternatively, get a CAFRA permit. Ibid.; N.J.A.C. 7:7-7.1(g). DEP explained that the Design Guidelines Ordinance has standards for each section of the Redevelopment Zone, which DEP found consistent with the CZM rules. 29 N.J.R. 3920(a). The Design Guidelines Ordinance "contains a new approach to ensuring that the visual and physical access to the waterfront is not compromised and that the redevelopment benefits associated with oceanfront orientation are shared throughout the City's redevelopment area." Ibid. This Ordinance thus "contains setback, bulk, height and building line requirements which all contribute to addressing the objective of providing visual and physical access to the waterfront from several vantage points without reducing the presence of the shoreline." Ibid.

Projects outside the Long Branch Redevelopment Area follows the CZM Scenic Resources and Design Rule, if not specifically excluded otherwise by that rule within Northern Waterfront Region, the Delaware River Region and Atlantic City. N.J.A.C. 7:7-16.10(d).

B. DEP Initially Denied 290 Ocean's Permit Application, Finding It Did Not Meet The CZM Scenic Resources And Design Rule.

On January 26, 2021, 290 Ocean applied for a CAFRA Individual Permit to construct an eight story, 109 residential unit building with 234 parking spaces on property it owns at Block 216, Lots 11, 12, and 24, on Ocean Avenue in the City of Long Branch, Monmouth County (the Property). (Aa1; Ra17).[3] The Property is presently vacant and undeveloped. (Ra17-19; Ra22; Ra73-79). It is surrounded by Ocean Avenue to the east, residential development to its immediate north and south, and Ocean Boulevard to the west. (Ra19; Ra73-79). A boardwalk and then the beach fronting the Atlantic Ocean are east of Ocean Avenue. (Ra19; Ra73-79). 290 Ocean's Project is within the statutorily-designated CAFRA area, N.J.S.A. 13:19-4; N.J.S.A. 13:19-5, where DEP's CZM rules apply.

On April 7, 2021, DEP published notice in the DEP Bulletin, which initiated a thirty-day comment period on the application. (Ra80).[4] During the comment period, Blackridge objected to the Project on the basis that it did not

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[3] "Aa" refers to Blackridge's appendix. "Ra" refers to DEP's appendix. "Ab" refers to Blackridge's merits brief.

[4] Although the applicant-developer's name is "290 Ocean Ave, LLC," the Property is located at the addresses of 290 Ocean Avenue, 276 Ocean Avenue, and 355 Ocean Boulevard, in Long Branch. The DEP Bulletin uses 276 Ocean Avenue when describing street address of the Property. (Ra80).

comply with the Scenic Resources and Design and Buffers and Compatibility rules' requirements. (Aa5-12). More specifically, it claimed that the Project was incompatible with the surrounding buildings and does not meet view corridor and setback requirements. Ibid.

DEP asked 290 Ocean to provide additional information on how the Project complies with the CZM Scenic Resources and Design and Stormwater Management rules,[5] and why 290 Ocean had not pursued a Long Branch Redevelopment Zone Permit, N.J.A.C. 7:7-7. (Aa14-15; Ra92). 290 Ocean responded that the Project complied with the Scenic Resources and Design Rule because Ocean Avenue and the associated sidewalk would separate the Project from the boardwalk and other coastal features. (Ra81-82). It also clarified that the Project did not qualify for DEP's Long Branch Redevelopment Zone Permit as it did not meet Long Branch's Redevelopment Plan Ordinance and the Design Guidelines Ordinance. (Ra18; Ra92; Ra161-172). Long Branch subsequently amended its Redevelopment Plan and Ordinance in 2020 specifically as to the

[5] After DEP received additional information as to stormwater management (Ra82), 290 Ocean's application continued to not comply with DEP's stormwater management rules and a basis for DEP's June 22, 2021 permit denial, (Aa16-18). DEP and 290 Ocean addressed stormwater management as part of the August 5, 2022 settlement, which included plan revisions and an additional notice and comment period. (Aa33-36). Blackridge received copies of the revised plans (Ra182-188), and did not challenge stormwater management compliance in this appeal.

Property (Ra161), but at this time, 290 Ocean did not submit a copy of the amended Redevelopment Plan to DEP and DEP did not approve of the amendment prior to the subject permit application.

On June 22, 2021, DEP denied the Project permit application because the Project did not comply with the Scenic Resources and Design Rule. (Aa16-18). DEP rejected 290 Ocean's explanation, finding that the Project was adjacent to the "bay or ocean or bayfront or oceanfront, beach, dune or boardwalk," and thus had to comply with N.J.A.C. 7:7-16.10(d). (Aa18). Applying the rule, DEP determined the Project provided a 25% open view corridor, which is less than the 30% requirement set forth in N.J.A.C. 7:7-16.10(d)(1), and that the 99-foot tall Project, set back at 88 feet, failed to meet the setback requirement of 198 feet. Ibid. DEP issued notice of the denial in the DEP Bulletin. (Ra96).

C. DEP And 290 Ocean Intended To Settle The Permit Denial Because The Scenic Resources And Design Rule Is Inapplicable Within The Long Branch Redevelopment Zone.

On June 24, 2021, 290 Ocean ask DEP to reconsider its denial, arguing that the Scenic Resources and Design Rule does not apply to the Project because: a) other nearby buildings did not meet the setback requirement and b) the view corridor and setbacks normally applicable to developments next to a boardwalk were inapplicable because Ocean Avenue would separate the proposed building from the boardwalk. (Ra97-115). On July 13, 2021, 290 Ocean sent DEP a copy

of "Design Guidelines Handbook 6" of the "Long Branch Design Guidelines for the Beachfront South Area," where the Project is located, but not the 2020 Design Guidelines amendment. (Ra116-125). 290 Ocean then argued that DEP approved the guidelines and the Scenic Resources and Design Rule was not applicable to that part of Long Branch. (Ra116). In further support of its reconsideration request and to demonstrate visual compatibility, 290 Ocean submitted a height and setback survey of Long Branch properties similarly situated to the Project along Ocean Avenue. (Ra126-141). On August 3, 2021, DEP declined to reconsider its denial (Ra142), and on August 5, 2021, 290 Ocean requested an adjudicatory hearing on the permit application denial. (Ra144).

290 Ocean and DEP began negotiating a potential settlement, and after about a year, they memorialized an August 5, 2022 settlement. (Aa29). During settlement discussions, 290 Ocean, for the first time, sent the amendment to the Redevelopment Plan and Design Guidelines to DEP. (Aa32). In the amendment, Long Branch noted that the Property is one of the "last remaining undeveloped parcels in the portion of the Beachfront South Redevelopment area." (Ra164). Long Branch, thus, sought to redevelop the vacant parcel as a multi-family building that would "benefit from the proximity to the ocean, boardwalk, open space and public transit opportunities" through, in part,

"[e]stablishing site and building design standards that foster a visually pleasing streetscape and inviting, high-quality construction." Ibid. The amendment specifically set a fifty feet setback from Ocean Avenue, a minimum distance of sixty feet from adjoining buildings, and a maximum building height of 100 feet, among other requirements. (Ra166). Long Branch chose not to require a maximum density or a building envelope bulk placement standard. Ibid.

DEP concluded that because the Project is proposed within the Long Branch Redevelopment Zone, it need not comply with the Scenic Resources and Design Rule, N.J.A.C. 7:7-16.10. (Ra31-33). Specifically, the parties agreed that Long Branch amended the Design Guidelines for the relevant section of the Redevelopment Zone in 2020, and that those amended standards apply to the Project, thus making the Scenic Resources and Design Rule inapplicable. (Aa32; Ra161-172). Bolstering that finding, the settlement agreement noted that eighteen out of twenty-one buildings over forty-feet tall did not comply with the rule's setback requirement. (Aa33). Because the majority of the buildings in the area do not comply with the rule, DEP found that the "Project's design will not have a significant adverse effect on the scenic resources of the coastal zone." (Aa34). Finally, DEP agreed to change its decision – after reviewing public comments for additional concerns – and issue 290 Ocean the permit, and then 290 Ocean would withdraw its adjudicatory hearing request. (Aa35-36).

On October 3, 2022, DEP provided Blackridge and other commenters and nearby property owners with notice of DEP's intent to settle with 290 Ocean and a copy of revised site plans (Aa35; Ra173-179), and on October 5, 2022, initiated a sixty-day comment period by publishing notice of its intent to settle in the DEP Bulletin, (Ra181). Between October 12 to 31, 2022, DEP sent Blackridge the settlement agreement and additional documents at Blackridge's request. (Ra182-187). Blackridge objected to the Project again by letter on December 2, 2022. (Aa41-53). It recognized DEP's explanation that the Long Branch Redevelopment Zone's Design Guidelines supersedes the Scenic Resources and Design Rule, but characterized it as an improper "waiver" and argued the Project did not comply with the rule. (Aa41; Aa42; Aa46). Blackridge also claimed that the settlement agreement violated principles of administrative law. (Aa43-47). On January 11, 2023, DEP forwarded all public comments to 290 Ocean, who responded to the comments on March 2, 2023. (Ra195; Ra198-202).

D. DEP Issued A Permit To 290 Ocean And Blackridge Appeals.

On June 30, 2023, DEP issued 290 Ocean the CAFRA permit as well as an environmental report and response to comments. (Aa54; Ra1-12). DEP found that the Project complied with the CZM rules. (Ra3-7).

Relevant here, DEP analyzed 290 Ocean's compliance with the Scenic Resources and Design Rule. (Ra6-7). First, DEP noted that the Project did not need to meet the Scenic Resources and Design Rule because it is located in the Redevelopment Zone, and instead needed to follow the Redevelopment Plan's October 15, 2020 amendment for the subject property. Ibid. Since the Project is located within the Long Branch Redevelopment Zone, the corresponding Long Branch Redevelopment Plan and Design Guidelines Ordinances – which DEP had previously approved as "consistent" with the CZM rules – do not require the open view corridor or the setback N.J.A.C. 7:7-16.10(d)(1-2) usually requires. Ibid. Indeed, DEP found that the rule's setback requirement has not been applied within the Long Branch Redevelopment Zone, in furtherance of comprehensive redevelopment planning. Ibid. Finally, DEP noted that the Project provides a 25% view corridor to the shoreline, even though a "significant portion" of the viewshed westward of Ocean Avenue is blocked by preexisting development. Ibid.

On July 19, 2023, DEP noticed issuance of the permit in the DEP Bulletin. (Aa62). On August 9, 2023, Blackridge requested an adjudicatory hearing and also a petition demanding that DEP rule on the request within thirty days. (Aa63-70). Blackridge argued that it was entitled to an adjudicatory hearing because the Project will block sunlight and cause aesthetic damages to the public and Blackridge and DEP violated Blackridge's right to equal protection. (Aa70). On August 28, 2023, 290 Ocean opposed Blackridge's hearing request, arguing that Blackridge failed to identify a statutory or constitutional right to a hearing. (Aa72).

On August 28, 2023, DEP denied Blackridge's hearing request. (Aa71-75). DEP provided background of the DEP's permit decision, and explained that a third-party, like Blackridge, must demonstrate either a statutory or a "particularized property interest" of constitutional significance. (Aa72-73). DEP found that CAFRA "does not grant statutory hearing rights to third party objectors," and thus Blackridge did not identify "a statute entitling it to a hearing." (Aa73). DEP also found that Blackridge's equal protection rights were not violated as Blackridge did not apply for this permit, so could not make an equal protection claim. (Aa74). Further, DEP explained that "speculative damages" to Blackridge or the public do not amount to particularized property interest. Ibid. DEP noted that Blackridge availed itself of its Administrative

Procedure Act opportunity to submit public comments for DEP's consideration. Ibid. Thus, DEP denied the hearing request. Ibid.

This appeal of both 290 Ocean's permit and DEP's hearing request denial followed. (Aa76).

ARGUMENT

POINT I

DEP PROPERLY DETERMINED THAT THE SCENIC RESOURCES AND DESIGN RULE IS NOT APPLICABLE TO THE PROJECT BECAUSE THE PROJECT IS LOCATED IN THE LONG BRANCH REDEVELOPMENT ZONE. (Responding To Blackridge's Brief Points I And II)

Blackridge offers two challenges to the permit. In point I, Blackridge argues that the DEP should have denied the permit because the project design do not comply with the requirements of the Scenic Resources and Design Rule. (Ab14-16). It builds further on that argument in point II, where it argues that DEP's approval of 290 Ocean's permit constitutes an illegal waiver of Scenic Resources and Design rule. (Ab17-19). Both arguments fail because, as discussed further below, they share the same faulty premise—namely, that the Scenic Resources Design Rule applies at all.

Appellate review of an administrative agency's final determination is limited and deferential. In re Herrmann, 192 N.J. 19, 27-28 (2007); In re Taylor, 158 N.J. 644, 656-57 (1999). "The 'fundamental consideration' in reviewing

agency actions is that a court may not substitute its judgment for the expertise of an agency 'so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable.'" In re Distrib. of Liquid Assets, 168 N.J. 1, 10 (2001) (quoting Williams v. Dep't of Human Servs., 116 N.J. 102, 107 (1989) (internal citation omitted)). The burden of proving arbitrary, capricious or unreasonable action is upon the challenger. Bueno v. Bd. of Trs., Teachers' Pension & Annuity Fund, 422 N.J. Super. 227, 234 (App. Div. 2011). Moreover, an agency's "interpretation of statutes and regulations within its implementing and enforcing responsibility" is entitled to deference. Ibid. (internal punctuation and citation omitted); see also Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 70-71 (1985) ("[T]he grant of authority to an administrative agency is to be liberally construed to enable the agency to accomplish the Legislature's goals." (internal punctuation and citation omitted)). Substantial deference must be extended to an agency's interpretation and application of its own regulations, particularly on technical matters within the agency's special expertise. In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488-89 (2004). See In re Kenneth Nicosia Flood Hazard General Permit By Certification 5 No. 1519-23-002.1 FHC230001, ___ N.J. Super. ___ (App. Div. 2024) (slip op. at 24) ("[W]e construe the agency's regulation in the manner it

has interpreted it. We do so mindful of the agency's expertise within the zone of its statutory responsibilities.").

There is no dispute that the Project is subject to CAFRA and thereby regulation through DEP's CZM rules. In issuing 290 Ocean the permit, DEP followed the requisite CZM regulations, applying them to the substantial credible evidence in the record. Tlumac v. High Bridge Stone, 187 N.J. 567, 573 (2006); In re N.J. Dep't of Env't Prot. Conditional Highlands Applicability Determination, Program Interest No. 435434, 433 N.J. Super. 223, 235 (App. Div. 2013). DEP's decision to issue the permit should be afforded great deference. In re Freshwater Wetlands Prot. Act Rules, 180 N.J. at 488-89.

Here, the Property is within the Redevelopment Zone's Beachfront South Sector. (Ra18; Ra161). If 290 Ocean had proposed the Project with standards consistent with the Redevelopment Plan and Design Ordinance, 290 Ocean would have been eligible for the Long Branch permit. N.J.A.C. 7:7-7.1(a-c). But in 2020, Long Branch amended its Redevelopment Plan and Ordinance specifically to address the Property. (Ra18; Ra161-172). Since Long Branch amended the DEP-approved Redevelopment Plan, and DEP did not previously approve of the amendment, 290 Ocean was not eligible for the Long Branch

Redevelopment Zone Permit. (Ra92); N.J.A.C. 7:7-7.1(b). 290 Ocean instead applied for a CAFRA permit, as the regulations direct. N.J.A.C. 7:7-7.1(g).[6]

Because the Design Guidelines control "setback, bulk, height and building line requirements" in the Redevelopment Area, 29 N.J.R. 3920(a), DEP ultimately determined it could not apply the standard of its Scenic Resources and Design Rule, N.J.A.C. 7:7-16.10. In its environmental report, DEP acknowledged that the design standards in the Design Ordinance and the Scenic Resources and Design Rule differ, but the Ordinance supersedes DEP's rule in the Long Branch Redevelopment Zone. (Ra6-7). This makes sense – otherwise the Redevelopment Zone design standards along the waterfront would all conform to the Statewide standard and not have any greater "flexibility in design" as the rest of the State. 29 N.J.R. 3920(a).

DEP's resolution between the Long Branch rule and the Scenic Resources and Design Rule is owed deference. Del. Riverkeeper Network v. N.J. Dep't of Env't Prot., 463 N.J. Super. 96, 113 (App. Div. 2020) ("A reviewing court 'must give . . . some deference to [an agency's] interpretation of statutes and

[6] Moreover, the individual permit review allowed DEP to review many aspects of its CZM rule that may not be reviewed by DEP if 290 Ocean was eligible for the Long Branch Redevelopment Zone Permit, including assessing impacts to endangered or threatened wildlife or vegetation species habitat, stormwater management, air quality, and traffic, and requiring adherence to CZM impervious cover limits.

regulations within its implementing and enforcing responsibility." (quoting Utley v. Bd. of Rev., Dep't of Labor, 194 N.J. 534, 551 (2008) (internal quotation omitted))).

Blackridge ignores the substance of DEP's analysis and insists that the Project does not comply with the Scenic Resources and Design Rule. (Ab14-16).[7] In fact, Blackridge does not address DEP's rationale[8] at all even though Blackridge previously acknowledged DEP's reasoning in a public comment (Aa46) and its adjudicatory hearing request (Aa64-65). With that limited framing of the issues as its starting point, Blackridge argues by not applying the Scenic Resources and Design Rule to the Project, DEP impermissibly waived one of its own regulations, as discussed in Dragon v. N.J. Dep't of Env't Prot., 405 N.J. Super. 478, 492 (App. Div. 2009). (Ab17-19). Blackridge claims this permit issuance is the same as Dragon because there was a settlement and "blatant non-compliance with applicable regulations, . . . no regulations exists

[7] If the court does not defer to its interpretation of the CZM rules and instead determines that the Scenic Resources and Design Rule, N.J.A.C. 7:7-16.10 applies to 290 Ocean's development, the court should remand the matter to DEP to review 290 Ocean's permit application's compliance with that rule.

[8] Blackridge should not be permitted to resurrect arguments regarding the Long Branch rule applicability for the first time in court in its reply brief. Bacon v. N.J. State Dep't of Educ., 443 N.J. Super. 24, 38 (App. Div. 2015) ("By failing to raise their original jurisdiction argument in their initial brief, plaintiffs have waived this contention.").

governing waivers, and . . . no justifying litigation risk." (Ab19). But this case differs from Dragon as only one rule was at issue there.

Here DEP explained the Long Branch Redevelopment Zone rules rendered the Scenic Resources and Design Rule inapplicable. This is not a waiver, but rather, a logical application of the CZM rules in the narrow set of circumstances where the Long Branch rules apply. Said differently, DEP could have not waived a regulatory requirement that never applied to begin with, therefore, Dragon does not apply.

The court should thus affirm DEP's issuance of the CAFRA permit.

POINT II

BLACKRIDGE ABANDONED ITS ADJUDICATORY HEARING REQUEST DENIAL APPEAL, BUT TO THE EXTENT IT DID NOT, DEP CORRECTLY DENIED THE REQUEST BECAUSE BLACKRIDGE DOES NOT HAVE A STATUTORY OR CONSTITUTIONAL INTEREST IN THE PERMIT. (Responding To Blackridge's Brief Point III)

Blackridge listed DEP's denial of its adjudicatory hearing request in its Notice of Appeal. (Aa76). While Blackridge does not address the hearing request denial in its brief, it does argue that DEP allegedly violated Blackridge's equal protection rights, (Ab19-20), which it raised in its adjudicatory hearing request, (Aa70). As Blackridge failed to challenge the adjudicatory hearing request, any issues about the adjudicatory hearing request are deemed waived

and abandoned. Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2024); Gormley v. Wood-El, 218 N.J. 72, 95 n.8 (2014); N.J. Dep't of Env't Prot. v. Alloway Tp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015). Even if the court finds that Blackridge did not waive its arguments on the issue, there is no basis to disturb the result below because Blackridge was not entitled to an adjudicatory hearing request.

A. Blackridge Failed To Demonstrate A Statutory Right Or A Particularized Property Interest Of Constitutional Significance To Entitle It To An Adjudicatory Hearing.

As noted above, the court's review of agency decisions is limited. Capital Health Sys., Inc. v. N.J. Dep't of Banking & Ins., 445 N.J. Super. 522, 535 (App. Div. 2016) (citing In re Stallworth, 208 N.J. 182, 194 (2011)). It is a "firmly settled" rule that a "trial-type adjudicatory hearing is not allowed . . . except to an appellant who can show a statutory right or a constitutionally protected property interest." In re Riverview Dev., 411 N.J. Super. 409, 434 (App. Div. 2010). In fact, the Administrative Procedure Act ("APA") prohibits state 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." N.J.S.A. 52:14B-3.1 and -3.3(a).

Here, DEP correctly assessed that CAFRA, which governs the Permit, does not and cannot provide Blackridge a statutory right to an adjudicatory

hearing. N.J.S.A. 13:19-1 to -45. (Aa73). Moreover, consistent with the APA mandate, the CZM rules do not entitle a third party to an adjudicatory hearing to challenge a permitting decision. N.J.S.A. 52:14B-3.3; N.J.A.C. 7:7-28.1(e). (Aa73). Therefore, Blackridge does not have a statutory right to a hearing in this case.

Blackridge also lacks a constitutional right to a hearing. Third parties to a permitting decision "generally are not able to meet the stringent requirements for constitutional standing in respect of an adjudicatory hearing." In re NJPDES Permit No. NJ0025241, 185 N.J. 474, 482 (2006). It would need to articulate a particularized property interest to entitle it to an adjudicatory hearing. In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. 452, 470 (2006).

Blackridge has no particularized property interest in 290 Ocean's permit or Property. Blackridge's hearing request asserted damages concerning proposed development's aesthetics and potential to block sunlight. (Aa70). DEP reasonably found that fear of damage to a "recreational interest or generalized property rights" does not amount to a particularized property right or special interest. Spalt v. N.J. Dep't of Env't Prot., 237 N.J. Super. 206, 212 (App. Div. 1989). (Aa219). The Appellate Division previously ruled that a project's purported adverse impacts on "views," as well as "the light and air available" do not amount to a property right. In re Riverview Dev., 411 N.J.

Super. at 437-38 (citing G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., 958 F.2d 896, 903 n.12 (9th Cir.1992) ("The air we breathe, scenic views, the night sky . . . cannot be reduced to possession and therefore cannot be the basis of property rights." (emphasis omitted)). See also In re Waterfront Dev. Permit No. WD88-0443-1, Lincoln Harbor Final Dev., Weehawken, Hudson Cty., 244 N.J. Super. 426, 428, 437-38 (App. Div. 1990) (obscuring of "scenic view of the Hudson River and New York City skyline" not a particularized property interest).

In fact, landowners generally do not have a particularized property interest warranting an adjudicatory hearing on their neighbors' development. In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. at 470. This includes when a neighbor alleges that his or her property will be adversely impacted. See, e.g., Spalt, 237 N.J. Super. at 212 (close residency, fear of resultant injury to property, damage to recreational interest or shared generalized property rights, and leaseholds in shellfish bottoms are not particular property rights); 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 due to car wash did not entitle neighboring residents to a hearing); Normandy Beach Improvement Ass'n v. Comm'r, Dep't of Env't Prot., 193 N.J. Super. 57 (App. Div. 1983) (claim of adverse effect on quality of life by

proposed pumping station did not entitle neighboring residents to a hearing). This proposition has been upheld, even when the damage speculation is bolstered by an expert report. See In re Orban/Square Props., 461 N.J. Super. 57, 61, 70, 78-79 (App. Div. 2019) (affirmed denial of adjudicatory hearing for an appellant who alleged a permit that authorized wetlands disturbance would cause flooding trespass in residential neighborhood) (citing In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. at 471). See also Musconetcong Watershed Ass'n v. N.J. Dep't of Env't Prot., 476 N.J. Super. 465, 486 (App. Div. 2023) ("speculative damages to neighboring properties do not amount to a particularized interest conferring a right to an administrative hearing.").

Since DEP reasonably applied the facts of this matter to long-standing law, DEP's denial of Blackridge's adjudicatory hearing request, if not dismissed as abandoned, should be affirmed.

B. DEP Treated Blackridge Equally In Accordance With The Equal Protection Clauses Of The N.J. Constitution And The U.S. Constitution.

Contrary to Blackridge's allegations here and in its adjudicatory hearing request, DEP did not violate Blackridge's rights to equal protection. Blackridge seems to be arguing that there is a "class-of-one" issue in this case because it claims that it and 290 Ocean own similarly-situated adjacent properties. (Ab19-20). That legal theory allows a plaintiff to bring an equal protection claim in

cases by alleging that they were "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Radiation Data, Inc. v. N.J. Dep't of Env't Prot., 456 N.J. Super. 550, 561 (App. Div. 2018) (citing Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)). To prevail, a plaintiff must prove that "(1) the defendant intentionally treated him differently from others similarly-situated; and (2) there was no rational basis for the difference in treatment." Id. at 562. (citing Startzell v. City of Philadelphia, 533 F.3d 183, 203 (3d Cir. 2008)) (emphasis added) (quoting Nordlinger v. Hahn, 505 U.S. 1, 10 (1992)). People are "similarly-situated when they are alike in all relevant aspects." Ibid. When the government's regulatory action is based on "multi-dimensional" factors and "varied decision-making criteria", it is harder for a plaintiff to establish a class-of-one equal protection claim. Ibid. (quoting Griffin Indus. v. Irvin, 496 F.3d 1189, 1203-04 (11th Cir. 2007)).

Blackridge fails to establish an equal protection claim under a class-of-one theory analysis. As to the first prong, Blackridge has not shown that DEP's issuance of the Permit to 290 Ocean intentionally treated 290 Ocean differently. Blackridge has provided no evidence that DEP intentionally treated Blackridge differently when DEP issued 290 Ocean the permit here. Thomas Makuch, LLC v. Tp. of Jackson, 476 N.J. Super. 169, 192 (App. Div. 2023) (plaintiff did not

provide "sufficient data, statistics, or examples" or certifications of other parties in the same class indicating intentionally different treatment by defendant). Further, Blackridge fails to allege that it is similarly situated to 290 Ocean in all respects, which, here, would include demonstrating that Blackridge was also governed by the Long Branch Design Guidelines and sought to make the Scenic Design Rule inapplicable, only to be denied by DEP. Blackridge simply argues that it complied with that rule, which, as noted above, has no bearing. (Ab19-20). Finally, Blackridge similarly fails to allege sufficient facts to demonstrate DEP lacked a rational basis in issuing the Permit. Blackridge's citation to Engquist v. Or. Dep't of Agric. does not save it (Ab20), as that case sets forth the general standard, but held the class-of-once claims have "no place in the public employment context." 553 U.S. 591, 594 (2008). Nowhere does Engquist encourage an equal protection class-of-one claim on such a sparse record as Blackridge presents here.

C. Blackridge's Remaining Arguments Concerning Due Process And Fundamental Fairness Also Are Without Merit.

Blackridge similarly fails on its due process and fundamental fairness arguments. Blackridge was an interested party who has the right to provide comments on agency permitting decisions under the APA. N.J.S.A. 52:14B-3.1(b). Here, Blackridge availed itself of that opportunity and submitted multiple comments in addition to receiving significant information about the

Project from both 290 Ocean and DEP and received the all the process it was due.

As to fundamental fairness, the doctrine is applied sparingly to "'those rare cases where'" government procedures that operate arbitrarily "'will subject the defendant to oppression, harassment, or egregious deprivation.'" In re Congressional Dists. by N.J. Redistricting Comm'n, 249 N.J. 561, 575-76 (2022) (quoting Doe v. Portiz, 142 N.J. 1, 108 (1995)). But similar to the equal protection claim above, Blackridge identified no facts to establish that DEP treated it – Blackridge – in a way that was less fundamentally fair while Blackridge was obtaining its development permits than 290 Ocean or any other developer in the relevant portion of Long Branch. Bare allegations cannot suffice.

Ultimately, Blackridge has not shown that DEP treated it in a fundamentally unfair or an unequal manner from the other Long Branch developers. Its constitutional claims otherwise fail here and cannot be grounds to overturn either the permit or DEP's hearing request denial.

CONCLUSION

For those reasons, the court should affirm DEP's decisions to issue 290 Ocean a CAFRA permit and deny Blackridge an adjudicatory hearing.

Respectfully submitted,

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Dated: August 2, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000246-23-T4

IN RE CHALLENGE BY BLACKRIDGE REALTY, INC. TO CAFRA PERMIT ISSUED TO STEVEN SILVERMAN AND 290 OCEAN L.L.C.

FILE NO. 1325-16-0007.1,
LUP 210001

Civil Action

On Appeal from a Final Determination of the Commissioner of the Department of Environmental Protection

REPLY BRIEF AND APPENDIX FOR APPELLANT, BLACKRIDGE REALTY, INC.

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Filed 8/29/24

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PRELIMINARY REPLY STATEMENT

This brief replies to the responding briefs of both the Department of Environmental Protection (DEP) and 290 Ocean, whose briefs spent 68 pages with convoluted explanations why DEP dispensed with compliance with the Scenic Resources and Design Rule (the "Rule") when it issued the CAFRA Individual Permit for 290 Ocean's towering block like building so close to the beach and boardwalk. Their main theses are that high rise buildings along the waterfront were never required to comply with the Rule in Long Branch so it doesn't matter that DEP waived compliance with the Rule when it issued the CAFRA permit. This argument is inaccurate. Such buildings were stepped back under Long Branch Design Guidelines prior to the amendment of its redevelopment ordinances in 2020. It was that change that DEP never approved, through rule making or otherwise, that triggered the need for a regular CAFRA permit and compliance with the Scenic Resources and Design Rule.

Long Branch knew that the 290 Ocean building did not comply with its ordinances and in 2020 specifically spot rezoned the site so it would fit. And as 290 Ocean and DEP stated multiple times, this amendment made the project ineligible for a Long Branch Redevelopment Zone permit issued by Long Branch. The Long Branch zoning amendment, which was not approved by DEP, thus

required a regular CAFRA Individual permit. This is the permit that DEP issued and is the subject of this appeal. Such a permit is governed by various Coastal Zone Management rules including the Scenic Resources and Design Rule. But instead of requiring 290 Ocean to comply with the Rule which is applicable (with the exception of Atlantic City) to CAFRA permits for high rise waterfront development up and down the Jersey Shore, DEP decided not to apply the Rule. It waived the Rule contrary to well established case law.

CAFRA rules for high rise buildings adjacent to the waterfront are required to be stepped back twice their height from the water, beach or boardwalk and leave a 30% view shed from the site to the waterfront. DEP permit review staff recognized that these mandatory requirements were plainly not met and denied the permit and later denied 290 Ocean's request that the denial be reconsidered. Somehow DEP higher ups decided later to play ball with Long Branch and found "reasons" to waive the Rule for the 290 Ocean building and settle 290 Ocean's administrative appeal. In doing so DEP relied on a meaningless survey about the setback of existing buildings **of unknown age** in Long Branch, which has had high rise buildings along the waterfront for well over 100 years. But when were the buildings in the survey built? The setback and view shed requirements of the Scenic Resources Rule were only adopted in 1994. DEP also relied on Long Branch's spot zoning amendment limited to only the 290 Ocean site (hardly a good

basis for comprehensive coastal zone decision making under CAFRA). And DEP relied on a road separating the proposed apartment building from the boardwalk, a consideration irrelevant under the Rule. DEP wanted an end result (pleasing Long Branch) and had to find some way to explain why is was disregarding its own rules. DEP is not legally empowered to do so.

290 Ocean claims that Appellant Blackridge Realty is simply trying to stop competition. **NO.** What Blackridge is challenging is competing on an unlevel playing field that Long Branch heavily tilted in favor of 290 Ocean through an ordinance change for that site alone and which DEP officials bought into despite staff rejections and clear non-compliance with the key CAFRA rule for high rise development along the New Jersey Coast. This Court should reject such unequal application of law and re-level the playing field, forcing 290 Ocean to redesign a building that meets the Rule. This Court should tell DEP, as multiple Courts have told it before, to apply its rules as written and not to waive them in ad hoc fashion.

REPLY STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Long Branch knew that the 290 Ocean project did not meet the Redevelopment Plan and Design Ordinance (Design Guidelines) in effect at the time the project was first proposed (the 1996 Design Guidelines). So, in October 2020 it decided to change "the Design Guidelines to permit construction of the [290] Project…." (2Ra0068).

Measured against the 1996 Design Guidelines, the proposed 290 Ocean building would be too dense (109 dwelling units versus 60), too tall (approx. 100' versus 80'), cover too much of the site (approximately 50% of site versus 35%), not be separated far enough from buildings on both sides (approx. 40' separation versus 100'). (See 1996 Guidelines, Ra118-Ra123). The proposed hulking building would also not be stepped back from the waterfront as envisioned by the 1996 Design Guidelines which contain multiple provisions promoting a stepped back design. The Guidelines stated, "A building type that provides terraces and balconies stepping towards the ocean is encouraged," and, "When buildings have stepped profile[s] the setback between each stepped portion of adjacent buildings…" should be equal or greater. (Ra0123). Moreover, the Guidelines contained pictorials showing various examples of how the Long Branch South

[1] The Facts and Procedural History are intertwined and have been combined.

Redevelopment Area would look in the future. Those pictorials show an abundance of stepped back buildings. (Ra123-Ra128).

Equally important, the 1996 Guidelines were understood to require a stepped back design. That is how the area around the 290 Ocean site developed. (ARa1).[2] Blackridge Realty's building (to the north of 290) is fully stepped back (ARa2), not because Blackridge didn't want a bigger building with more units closer to the waterfront like 290 Ocean wants, but because its designers understood that was what was required. The second building to the north is an older building which was designed before the step back and view shed requirements of the Scenic Resources and Design Rule were adopted in 1994.[3] Turning to the south, the building next to the 290 Ocean site is not fully compliant but is partially stepped back. (2Ra0064). The second building to the south of that is fully set back, and the third building to the south is stepped back with slight discrepancies. (ARa3). [4] The fourth building is fully stepped back. The 290 Ocean building would be the only immense slab-

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[2] Appellant's Reply Appendix is cited as ARa.

[3] 290 Ocean's step back analysis which claims that most tall buildings on the Long Branch ocean front are not stepped back proves nothing because it does not distinguish between buildings constructed before 1994 and those built after. Long Branch has had a well-developed ocean front since before 1870 (Ra70-71)

[4] 290 Ocean's building step back analysis claims that the third building to the south is not stepped back sufficiently, saying in part that its height on Ocean Avenue (35.34') should be stepped back 70.68' whereas it is only 69.90' from the boardwalk. (2Ra151). This appeal would not have been filed if the proposed 290 Ocean building only missed the mark so ever slightly.

sided apartment building to crowd this part of Long Branch's ocean front constructed after 1994.

The Long Branch Redevelopment Zone Permit, *N.J.A.C.* 7:7-7.1, was adopted by DEP as a rule on September 15, 1997. 29 N.J.R. 3920(a). (Rb4). It was adopted after finding that "the Design Guidelines Ordinance complies with the Rules on Coastal Zone Management such that development constructed in accordance with Design Guidelines Ordinance and Redevelopment Plan Ordinance will be in compliance with the Rules on Coastal Zone Management and also… maintain and in some cases enhance the physical and visual access to the waterfront." 29 N.J.R. 3920(a). See also the discussion of the rule adoption in Respondent DEP's brief at Rb4-5. Long Branch's 2020 amendments to the Design Guidelines to allow the 290 Ocean project have not been approved by DEP via rulemaking. The application of the amended Design Guidelines to the 290 Ocean project is simply the creature of an ad hoc waiver as part of the settlement of an administrative appeal, nothing more.

290 Ocean concedes that adoption of the 2020 Design Guidelines amendments removed the project from eligibility for a Long Branch Redevelopment Zone Permit and that a regular CAFRA permit was needed (Ra18; Ra92; Ra 161-172; see also Rb7). DEP repeatedly stated the same. (see e.g., Ra6). Under the Coastal Zone Management Rules, the Scenic Resources and Design

Rule and its step back and view shed requirements are standards that an applicant must meet in order to obtain a CAFRA permit. DEP's brief best describes why the 290 Ocean permit was twice denied:

> On June 22, 2021, DEP denied the Project permit application because the Project did not comply with the Scenic Resources and Design Rule. (Aa16-18). DEP rejected 290 Ocean's explanation, finding that the Project was adjacent to the "bay or ocean or bayfront or ocean front, beach, dune or boardwalk" and thus had to comply with *N.J.A.C.* 7:7-16.10(d). (Aa18). Applying the rule, DEP determined the Project provided a 25% open view corridor, which is less than the 30% requirement set forth in *N.J.A.C.* 7:7-16.10(d)(1), and that the 99-foot tall Project, set back at 88 feet, failed to meet the setback requirement of 198 feet. *Ibid.* DEP issued notice of the denial in the DEP Bulletin. (Ra96). [Rb8].

290 Ocean administratively appealed the denial. DEP, without going through rulemaking to approve the amended Design Guidelines and in reliance on a meaningless step back survey, gave in and approved a settlement and issued a CAFRA permit for a building completely at odds with the Scenic Resources and Design Rule, a building which will dominate the ocean front as no other building in the area has since the Rule was adopted.

ARGUMENT
POINT I

THE LONG BRANCH REDEVELOPMENT DESIGN GUIDELINES ENCOURAGED AND WERE UNDERSTOOD TO REQUIRE STEPPED-BACK BUILDINGS PRIOR TO THE 2020 AMENDMENTS (REPLYING TO DEP'S BRIEF POINT I AND 290 OCEAN'S BRIEF POINTS I AND II)

The Long Branch Design Guidelines in effect prior to the 2020 Amendments resulted in a pattern of stepped-back buildings surrounding the 290 Ocean site. (ARa1-3). The developers did not throw away the opportunity to build a tall, block-like slabbed sided building with more dwelling units and closer to the ocean out of the goodness of their hearts. The designers of these buildings to the north and south of the 290 Ocean site understood that a stepped back design with a proper view shed was required. Blackridge Realty's building on the north side is fully stepped back. (ARa2). The next tall building to the North is an old building designed before the stepped-back view shed requirements were adopted in 1994. The first building on the south side of the 290 Ocean site is partially stepped back, the second is fully set back, the third is very close to being fully stepped-back, and the partially visible fourth building is fully stepped back. (ARa1; ARa3).

DEP and 290 Ocean want us to believe otherwise, but the pattern of development since 1994 and the language of the pre-2020 Design Guidelines prove them wrong.

POINT II

DEP ARBITRAILY AND CAPRICIOUSLY CONCLUDED THAT THE STEP-BACK REQUIREMENTS OF THE SCENIC RESOURCES AND DESIGN RULE WERE NOT APPLIED BY LONG BRANCH OR DEP IN THE REDEVELOPMENT ZONE (Replying to DEP's Brief Point I and 290 Ocean's Brief Points I and II).

DEP relied on the faulty set back analysis produced by 290 Ocean in concluding that the requirements of the Scenic Resources and Design Rule were not applied in the Redevelopment Zone. However, 290 Ocean's set back analysis proves no such thing because it does not differentiate between buildings constructed before the 1994 Rule and after. (Aa23 -Aa28). The Long Branch ocean front was heavily developed well over 100 years ago. (See 1870 and 1907 Sandborn maps of Long Branch – Ra70-71). Of course, all the old-style buildings in Long Branch were designed without reference to the Rule which did not come about until 1994.

DEP 's conclusion that it did not apply the Rule in Long Branch is not based on anything with probative value. DEP has not produced a single permit that allowed such a building, nor has a single Long Branch permit that allowed such a result been produced. Long Branch changed the Design Guidelines in 2020 in order to accommodate the proposed 290 Ocean building otherwise Long Branch had to reject it. (2Ra68).

DEP's conclusion also defies the facts on the ground. The parts of the Redevelopment Zone both north and south of the 290 Ocean site were developed, since 1994, with buildings that are completely, almost completely, or at least partially stepped-back from the waterfront. (ARa1-2). None are slab sided monoliths rising straight up and crowding the waterfront environment.

DEP's conclusion is not a scientific one requiring agency expertise. It is just plain wrong, as anyone can see.

POINT III

THE 290 OCEAN PROJECT REQUIRED A CAFRA INDIVIDUAL PERMIT ISSUED BY DEP UNDER THE COASTAL ZONE MANAGEMENT RULES, INCLUDING THE SCENIC RESOURCES AND DESIGN RULE; TO DO OTHERWISE WAS CONTRARY TO LAW, DEP'S RULES AND AN ILLEGAL AD HOC WAIVER (REPLYING TO DEP'S BRIEF POINT I AND 290 OCEAN'S BRIEF POINT I).

All participants in this appeal agree that the 290 Ocean building requires a CAFRA Individual Permit and does not qualify for a Long Branch Redevelopment Zone Permit. (Ra6; Ra18; Ra92; Ra161-172. See also Rb7). Meeting the Scenic Resources and Design Rule standards is part and parcel of obtaining a CAFRA Individual Permit. *N.J.A.C.* 7:7-16.10. This self-evident truth has nothing to do with what the Long Branch Design Guidelines do or do not require. A CAFRA permit is a separate legal requirement unto itself governed by its own rules. DEP must follow its rules. See e.g., *In re Waterfront Development Permit*, 244 N.J. Super 426 (App. Div. 1990)(Commissioner of DEP cannot supplant Division staff's permit denial and approve a Waterfront Development Permit).

Somehow DEP bought into the circular argument that because Long Branch amended the Design Guidelines to eliminate step-back, etc., thus requiring a regular CAFRA permit including compliance with the Rule, nonetheless DEP should not apply the Rule because Long Branch had decided not to. This nullified

the very reason that 290 Ocean did not qualify for a Long Branch Redevelopment Zone Permit in the first place. In this respect it is tantamount to DEP issuing a Long Branch Redevelopment Zone Permit rather than a CAFRA permit.

DEP approved the Long Branch Redevelopment Zone Permit through rulemaking in 1997. It never approved Long Branch's 2020 amended Design Guidelines through rule making or otherwise. DEP's ad hoc waiver of the application of the Scenic Resources and Design Rule in issuing a CAFRA permit was contrary to law, contrary to its own regulations, and contrary to well established case law. *In re CAFRA Permit No. 87-0959-5 Issued* to *Gateway Associates,* 152 N.J. 287 (1997); *Dragon v. New Jersey Dept. of Environmental Protection*, 405 N.J. Super. 478 (App. Div. 2009).

CONCLUSION

For all the reasons set forth in Appellate Blackridge Realty's Brief in Chief and this Reply Brief, it is respectfully requested that this Court reverse DEP's approval of the CAFRA permit it issued for the 290 Ocean project.

Respectfully submitted,

By: _____ 8/29/24

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