
EAST RUTHERFORD TWO, LLC,
Appellant,

v.

**NEW JERSEY SPORTS AND
EXPOSITION AUTHORITY,**
Respondent.

**SUPERIOR COURT OF
NEW JERSEY**

APPELLATE DIVISION

DOCKET NO. A-002660-23

Civil Action

ON APPEAL FROM FINAL ACTION
OF:

NEW JERSEY SPORTS AND
EXPOSITION AUTHORITY

BRIEF OF APPELLANT EAST RUTHERFORD TWO, LLC

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Date: September 30, 2024

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED	ii
TABLE OF AUTHORITIES	ii
TABLE OF APPENDIX	vi
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY	2
STATEMENT OF FACTS	7
ARGUMENT	16
 NJSEA'S CONCLUSION THAT PETITIONER'S APPLICATION IS INCONSISTENT WITH THE MASTER PLAN WAS ARBITRARY, CAPRICIOUS, UNREASONABLE AND INCORRECT AS A MATTER OF LAW (Aa0004-005).	
I. NJSEA’S DECISION IS NOT CONSISTENT WITH THE PLAIN MEANING OF THE PHRASE “NO OR MINIMAL IMPACT” IN THE MASTER PLAN (Aa0005).....	16
A. The Plain and Ordinary Meaning of “Minimal to No Impact”.....	18
B. Purpose of the Master Plan and Consistency with the Authorizing Statutes.....	22
II. NJSEA DID NOT SUFFICIENTLY ARTICULATE ITS BASIS FOR ISSUING A DECISION THAT IS INCONSISTENT WITH NJDEP’S CONCLCUSION OR NJSEA PERMITTING PRECEDENT (Aa0005)....	25
A. Inadequate Reasoning for Reaching a Conclusion Inconsistent with NJDEP’s Determination Regarding Water Quality Impacts.....	25

B. Inconsistency with NJSEA Permitting Precedent (American Dream)....	28
III. IN THE ALTERNATIVE, THIS COURT SHOULD REMAND FOR A PLENARY HEARING TO CLARIFY AND SUPPLEMENT THE ADMINISTRATIVE RECORD WITH RESPECT TO MIXED QUESTIONS OF FACT AND LAW THAT ARE MATERIAL TO THIS DISPUTE BUT WERE NOT ADDRESSED BELOW (Aa005).....	29
CONCLUSION.....	33

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

March 28, 2024 Final Decision of the Board of Commissioners of the New Jersey Sports and Exposition Authority adopting the November 14, 2023 Initial Decision in <u>East Rutherford Two, LLC v. New Jersey Sports and Exposition Authority</u> , OAL Docket No. HMD 03152-21 (Aa0001-005).....	2, 6, 32, 33
November 14, 2023 Initial Decision Granting New Sports and Exposition Authority’s Motion for Summary Decision issued by Administrative Law Judge Nanci G. Stokes, OAL Docket No. HMD 03152-21 (Aa0647-667).....	6, 32

TABLE OF AUTHORITIES

Case Law

<u>Bedford v. Riello</u> , 195 N.J. 210 (2008).....	17
<u>Brill v. Guardian Life Insurance Co.</u> , 142 N.J. 520 (1995).....	30
<u>Citizens to Preserve Overton Park, Inc. v. Volpe</u> , 401 U.S. 402 (1971).....	32
<u>Cruz v. Trotta</u> , 363 N.J. Super 353 (App. Div. 2004).....	19
<u>Cruz-Diaz v. Hendricks</u> , 409 N.J. Super. 268(App. Div. 2009), <u>certif. denied</u> , 200 N.J. 548 (2009).....	17
<u>Darel v. Pennsylvania Mfrs. Asso. Ins. Co.</u> , 114 N.J. 416 (1989).....	18

<u>D’Annunzio v. Prudential Ins. Co. of Am.</u> , 192 N.J. 110 (2007).....	18
<u>E.S. v. Div. of Med. Assistance & Health Servs.</u> , 412 N.J. Super. 340 (App. Div. 2010).....	30
<u>Essex Cnty. Welfare Bd. v. Klein</u> , 149 N.J. Super. 241 (App. Div. 1977).....	17
<u>Fedor v. Nissan of N. Am., Inc.</u> , 432 N.J. Super. 303 (App. Div. 2013).....	16
<u>In re Attorney Gen.’s “Directive on Exit Polling: Media & Non-Partisan Pub. Int. Grps.”</u> , 200 N.J. 283 (2009).....	22
<u>In re Eastwick Coll. LPN-to-RN Bridge Program</u> , 225 N.J. 533 (2016).....	17
<u>In re Election Law Enf’t Comm’n Advisory Op. No. 01-2008</u> , 201 N.J. 254 (2010).....	17, 25, 26
<u>In re Freshwater Wetlands General Permits</u> , 372 N.J. 578 (App. Div. 2004)...	26, 27
<u>In re Renewal Application of TEAM Acad. Charter Sch.</u> , 247 N.J. 46 (2021).....	32
<u>J.H. v. R&M Tagliareni, LLC</u> , 239 N.J. 198 (2019).....	18
<u>Macysyn v. Hensler</u> , 329 N.J. Super. 476 (App. Div. 2000).....	18, 19
<u>Meadowlands Regional Development Agency v. State</u> , 63 N.J. 35 (1973).....	7
<u>Medford Convalescent & Nursing Ctr. v. Div. of Med. Assistance & Health Servs.</u> , 218 N.J. Super. 1 (App. Div. 1985).....	18
<u>N.J. Soc. for Prevention of Cruelty to Animals v. N.J. Dept. of Agric.</u> , 196 N.J. 366 (2008).....	16, 17
<u>Paff v. Galloway Twp.</u> , 229 N.J. 340 (2017).....	17
<u>Seacoast Builders Corp. v. Jackson Tp. Bd. of Educ.</u> , 363 N.J. Super. 373 (App. Div. 2003).....	17
<u>Seigel v. N.J. Dep’t of Env’tl. Prot.</u> , 395 N.J. Super. 604 (App. Div. 2007).....	22

<u>State in Interest of K.O.</u> , 217 N.J. 83 (2014)	22
<u>State v. Shackelford</u> , 2015 N.J. Super. Unpub. LEXIS 842 (App. Div. 2015).....	32
<u>Tannock v. N.J. Bell Telephone Co.</u> , 223 N.J. Super. 1 (App. Div. 1988)..	30,31, 32

Statutes

16 <u>U.S.C.</u> 1451 <u>et seq.</u>	10
<u>N.J.S.A.</u> 5:10A-1 <u>et seq.</u>	7, 23, 29
<u>N.J.S.A.</u> 5:10A-10.....	7, 23, 24
<u>N.J.S.A.</u> 12:3 <u>et seq.</u>	10
<u>N.J.S.A.</u> 12:5-3 <u>et seq.</u>	10
<u>N.J.S.A.</u> 13:9A-1 <u>et seq.</u>	10
<u>N.J.S.A.</u> 13:9B-1 <u>et seq.</u>	10, 20
<u>N.J.S.A.</u> 13:9B-6.....	11
<u>N.J.S.A.</u> 13:9B-9.....	12
<u>N.J.S.A.</u> 13:17-1 to -86.....	7, 23, 29
<u>N.J.S.A.</u> 13:17-9.....	7, 23, 24, 27
<u>N.J.S.A.</u> 58:10A <u>et seq.</u>	10

Court Rules

<u>R.</u> 4:46.....	30
---------------------	----

Other Authorities

Collins Dictionary.....	20, 21
-------------------------	--------

N. Singer, 2A Sutherland Statutory Construction § 47.28 (4th ed. 1985).....	18
Merriam-Webster Dictionary.....	21
New Jersey Meadowlands Commission, District Master Plan (2004).....	1, 5, 8, 9, 10, 14, 18, 25
New Jersey Meadowlands Commission, Redevelopment Plan for the Route 3 East Redevelopment Area (2004).....	<i>passim</i>
New Jersey Sports and Exposition Authority, District Master Plan Update (2020).....	8
U.S. Fish & Wildlife Serv., <i>Wetland Status and Trends for the Hackensack Meadowlands</i> (2002).....	27

Regulations

<u>N.J.A.C. 1:1-12.5(b)</u>	30
<u>N.J.A.C. 7:7-1 et seq.</u>	10
<u>N.J.A.C. 7:7-7.29(b)(1)</u>	11
<u>N.J.A.C. 7:7-9.27</u>	11
<u>N.J.A.C. 7:7-43</u>	10, 11
<u>N.J.A.C. 7:7A et seq.</u>	4, 20
<u>N.J.A.C. 7:7A-5</u>	12
<u>N.J.A.C. 7:7A-7</u>	12
<u>N.J.A.C. 7:7A-9</u>	12

TABLE OF APPENDIX

March 28, 2024 Final Decision of the New Jersey Sports and Exposition Authority.....	Aa0001
January 2004 Redevelopment Plan for the Route 3 East Redevelopment Area adopted by the New Jersey Meadowlands Commission.....	Aa0006
2004 District Master Plan adopted by the New Jersey Meadowlands Commission on January 8, 2004, effective date February 17, 2004....	Aa0037
October 4, 2004 application for Zoning Certificate submitted by Group@Route 3 LLC to the New Jersey Meadowlands Commission..	Aa0250
May 4, 2005 Zoning Certificate, File No. 04-241, issued by the New Jersey Meadowlands Commission.....	Aa0276
September 21, 2010 Settlement Agreement.....	Aa0279
October 25, 2011 Project Impact Assessment and application for Zoning Certificate submitted by Group@Route 3 LLC to the New Jersey Meadowlands Commission for modified project design.....	Aa0301
March 8, 2012 Second Settlement Agreement.....	Aa0365
June 8, 2012 Zoning Certificate, File No. 11-249, issued by the New Jersey Meadowlands Commission.....	Aa0379
May 17, 2016 application for Water Quality Certificate submitted by East Rutherford Two to the New Jersey Department of Environmental Protection.....	Aa0385
September 19, 2016 letter from New Jersey Department of Environmental Protection denying East Rutherford Two's May 24, 2016 application for a Water Quality Certificate.....	Aa0387
October 6, 2016 Administrative Hearing Request letter submitted by East Rutherford Two to the New Jersey Department of Environmental Protection.....	Aa0399

February 28, 2017 letter from New Jersey Department of Environmental Protection to East Rutherford Two granting October 6, 2016 Administrative Hearing Request.....	Aa0402
March 7, 2017 letter from East Rutherford Two to New Jersey Department of Environmental Protection requesting Alternative Dispute Resolution.....	Aa0403
August 31, 2017 East Rutherford Two report <u>Response of East Rutherford Two, LLC, to NJDEP September 18, 2016 Denial of Water Quality Certificate, File # 0212-04-0003.1 CDT 16001 – On Appeal for Settlement Purposes Only - Route 3 Service Road Redevelopment Project, Block 108.04, Lots 1 and 5, Borough of East Rutherford, Bergen County, New Jersey, August 31 2017</u>).....	Aa0405
November 2, 2017 letter from East Rutherford Two to the New Jersey Sports and Exposition Authority requesting a determination that proposed multi-family development was consistent with the District Master Plan.....	Aa0484
November 24, 2017 letter from the New Jersey Sports and Exposition Authority to the New Jersey Department of Environmental Protection recommending the denial of the Water Quality Certificate requested by East Rutherford Two.....	Aa0486
February 22, 2018 New Jersey Sports and Exposition Authority staff memorandum.....	Aa0488
March 14, 2018 letter from the New Jersey Sports and Exposition Authority to Neil Yoskin, Esq.....	Aa0492
August 9, 2018 ADR Term Sheet.....	Aa0494
July 29, 2020 application for Zoning Certificate submitted by East Rutherford Two to the New Jersey Sports and Exposition Authority.....	Aa0496
January 26, 2021 letter from the New Jersey Sports and Exposition Authority to the New Jersey Department of Environmental Protection denying July 29, 2020 application for Zoning Certificate.....	Aa0626

January 27, 2021 letter from the New Jersey Sports and Exposition Authority to Frank X. Regan explaining basis for January 6, 2021 letter from Authority to New Jersey Department of Environmental Protection....	Aa0629
February 10, 2021 Administrative Hearing Request letter submitted by East Rutherford Two to the New Jersey Sports and Exposition Authority...	Aa0633
March 25, 2021 transmission of East Rutherford Two’s Administrative Hearing Request from the New Jersey Sports and Exposition Authority to the Office of Administrative Law.....	Aa0640
November 14, 2023 Initial Decision granting the New Jersey Sports and Exposition Authority’s Motion for Summary Decision and denying East Rutherford Two’s Motion for Summary Decision.....	Aa0647
November 27, 2023 Exceptions to the November 14, 2023 Initial Decision filed by East Rutherford Two.....	Aa0668
<u>State v. Shackelford</u> , 2015 N.J. Super. Unpub. LEXIS 842 (App. Div. 2015).....	Aa0674
Collins Dictionary, “Minimal,” collinsdictionary.com/us/dictionary/english/minimal.....	Aa0682
Merriam-Webster Dictionary, “De minimis,” merriam- webster.com/dictionary/de%20minimis.....	Aa0689
U.S. Fish & Wildlife Serv., <i>Wetland Status and Trends for the Hackensack Meadowlands</i> (2002).....	Aa0695

PRELIMINARY STATEMENT

At issue in this matter is whether a proposal to construct a multi-family building on a property located on Route 3 Eastbound in East Rutherford, Bergen County, is consistent with the Hackensack Meadowlands District Master Plan (“the Master Plan”). The New Jersey Sports and Exposition Authority (“NJSEA” or “the Authority”) contends that, because the project calls for the disturbance of 1.8 acres of degraded wetlands, it is inconsistent with a provision of the District Master Plan which states that the goal of the Master Plan in the zone in which is the property is located is to allow development with “minimal to no impact to existing wetlands.” Appellant East Rutherford Two, LLC (hereinafter “Appellant” or “ER2”) is the prospective developer of the project in question. ER2 contends that the project is in fact consistent with the Master Plan, as confirmed by a determination made by the New Jersey Department of Environmental Protection (“NJDEP”) that the project has minimized wetlands impacts to the maximum extent practicable, thereby complying with the requirements of the New Jersey Coastal Zone Management Rules and the Freshwater Wetlands Protection Act.

As discussed herein, the Master Plan provision relied upon by NJSEA is unacceptably vague, as it offers no guidance with respect to wetlands other than providing that development projects should involve “no or minimal wetlands impacts,” without offering a definition of “minimal.” Furthermore, NJSEA’s interpretation of the Master Plan provision upon which it relies in this case directly

contradicts the more expert analysis conducted by NJDEP in reaching its conclusion that the project minimized wetlands impacts to the maximum extent practicable.

Although ER2 maintains that genuine issues remain as to material facts in this matter, there is no dispute as to the central question of law before this Court: namely, whether NJSEA's denial of a Zoning Certificate for the proposed project on the basis that it is not consistent with the Master Plan was arbitrary, capricious, or otherwise not in accordance with law. Because the Master Plan does not define "minimal" wetlands disturbance, and because NJSEA's denial was directly contrary to the findings made by NJDEP that the proposed wetlands impacts are consistent with the State's Water Quality Standards and Coastal Zone Management Program, this inquiry must be answered in the affirmative. Consequently, this Court should set aside NJSEA's March 28, 2024 Final Decision. In the alternative, the Court should remand this matter for a plenary hearing to supplement and clarify the administrative record with respect to the mixed questions of fact and law that are material to this dispute but were not addressed in the proceedings below.

PROCEDURAL HISTORY

Appellant offers the following procedural history with references to its Appendix as appropriate ("Aa ____").

On October 4, 2004, Group@Route 3 LLC (hereinafter "Group3") submitted an application for a zoning certificate to the New Jersey Meadowlands Commission (since reconstituted as the NJSEA) to obtain confirmation that the construction of

two high-rise buildings containing 614 dwelling units on a 4.25-acre portion of what was then an approximately 42 acre tract of land located on the eastbound side of Route 3 in the Borough of East Rutherford, Bergen County, was consistent with the Master Plan. Aa0250-275. On May 4, 2005, the Meadowlands Commission issued the requested Zoning Certificate, File Number 04-241. Aa276-278.

In or about October 2011, the market conditions for high-rise, multi-family condominium buildings were such that the project as approved by the Commission was no longer financially viable. In response to the changed market conditions, Group3 applied for a Zoning Certificate from the Commission for a modified design consisting of one mid-rise building with 316 rental units, rather than the 614 for-sale units approved in 2005. Aa0301-364. On June 8, 2012, the Meadowlands Commission approved the revised development plan. Aa0379-384. That building, now known as “The Monarch,” was subsequently constructed and opened to the public. Then, in or about 2012, Group3 sold its interest in the current project to ER2. The two LLCs are unaffiliated entities, although they do share members in common.

In or about early 2016, ER2 began planning for a project that would allow it to recover some of the density that was lost when the plan for the Monarch was downsized from 614 for-sale units to 316 rental units. It was determined that approximately 2.62 acres of wetlands would need to be disturbed in order to construct a building of sufficient size to be financially viable. To that end, in March 2016, ER2 submitted an application to the United States Army Corps of Engineers

(hereinafter “the Corps”) for approval under Section 404 of the federal Clean Water Act, 33 U.S.C. § 1344, to disturb those wetlands and construct a 197-unit mid-rise building,¹ 10% of which would be set aside as affordable housing.

On May 17, 2016, ER2 applied to NJDEP for approval of a Water Quality Certificate (hereinafter “WQC”), as required by Section 401 of the federal Clean Water Act.² Aa0385-386. On September 19, 2016, NJDEP denied the requested WQC, finding that the proposed wetland disturbance did not conform to the standard found in its Coastal Zone Management Rules (N.J.A.C. 7:7 et seq.) and Freshwater Wetland Protection Act Rules (N.J.A.C. 7:7A et seq.). Aa0387-398. On October 6, 2016, ER2 appealed NJDEP’s decision by filing an Administrative Hearing Request with NJDEP. Aa0399-401. On October 13, 2016, the Corps, having been advised that DEP had denied the WQC, denied ER2’s Section 404 application without prejudice. Aa402-403 On February 28, 2017, NJDEP granted ER2’s Administrative Hearing Request. Aa404.

On March 7, 2017, ER2 submitted a request with NJDEP to participate in the Department’s Alternative Dispute Resolution (“ADR”) program. Aa405-406. On September 6, 2017, in furtherance of the ADR process, ER2 submitted a report to NJDEP entitled Response of East Rutherford Two, LLC, to NJDEP September 18,

¹ Section 404 of the federal Clean Water Act, 16 U.S.C. § 1344, requires a permit for the placement of dredged or fill materials into the waters of the United States, a term of art which included wetlands.

² Section 401 of the federal Clean Water Act, 16 U.S.C. § 1341, prohibits a federal agency from issuing any permit, including a Section 404 permit, until the State in which the activity is located first certifies that the activity complies with all applicable state water quality standards and requirements.

2016 Denial of Water Quality Certificate, File # 0212-04-0003.1 CDT 16001 – On Appeal for Settlement Purposes Only - Route 3 Service Road Redevelopment Project, Block 108.04, Lots 1 and 5, Borough of East Rutherford, Bergen County, New Jersey, August 31 2017 (hereinafter the “Settlement Report”). Aa0407-485.

On October 25, 2017, ER2 and NJDEP met in furtherance of the ADR process, at which time NJDEP indicated that it was satisfied that the Settlement Report “adequately addressed and responded to the concerns expressed in the Denial and agreed to enter into a settlement agreement, contingent upon receipt of a determination from the New Jersey Sports and Exposition Authority that the applicant’s project is consistent with the Hackensack Meadowlands District Master Plan.” Aa0494.

On November 2, 2017, in order to satisfy the terms of its settlement with NJDEP, ER2 requested a determination from NJSEA that the proposed multi-family development was consistent with the Master Plan. Aa0486-487. By letter dated November 24, 2017, NJSEA advised NJDEP that, notwithstanding NJDEP’s determination that the project complied with the requirements of the New Jersey Coastal Zone Management Program and the Freshwater Wetlands Act, the proposed project did not comply with the intent and propose of the Master Plan, and consequently recommended that NJDEP not issue a determination that the project is consistent with the State’s Water Quality Standards and Coastal Zone Management Program. Aa0486-487.

On July 29, 2020, ER2 applied to NJSEA for a Zoning Certificate for a building with a reduced wetland disturbance footprint of 1.8 acres and a reduced unit count of 170 units. Aa0496-625. By letter dated January 26, 2021, NJSEA denied the requested Zoning Certificate. Aa0626-628. In response to NJSEA's denial of the Zoning Certificate, ER2 filed an Administrative Hearing Request by letter dated February 10, 2021. Aa0633-639.

On March 25, 2021, NJSEA transmitted ER2's request for an adjudicatory hearing to the Office of Administrative Law. Following motions for Summary Decision by both parties, Administrative Law Judge Nanci G. Stokes issued an Initial Decision on November 14, 2023 granting NJSEA's motion for Summary Decision and denying ER2's motion for same. Aa0647-667. On November 27, 2023, ER2 filed its exceptions to the November 14, 2023 Initial Decision.³ On March 28, 2024, NJSEA issued a Final Decision adopting the November 14, 2023 Initial Decision. Aa0001-005. ER2 subsequently filed a timely appeal of NJSEA's Final Decision to the Appellate Division of the Superior Court, which assigned the matter to the Civil Appeal Settlement Program ("CASP"). The CASP session before Judge Paulette Sapp-Petersen on July 11, 2024 proved unsuccessful, and Judge Sapp-Petersen referred the proceedings back to this Court for creation of a briefing schedule.

³ Appellant's Exceptions to the November 14, 2023 Initial Decision are reproduced in the Appendix at Aa0668-673.

STATEMENT OF FACTS

Development in the Hackensack Meadowlands District which involves the filling of wetlands is subject to a complex regulatory scheme, and particularly so in this case. ER2 offers the following as a guide for the convenience of the Court.

The District Master Plan

The Hackensack Meadowlands District (“the District”) was created in 1968 through the enactment of the Hackensack Meadowlands Reclamation and Development Act, N.J.S.A. 13:17-1 to -86. The District is comprised of a 30.4 square mile area encompassing portions of 14 municipalities in Bergen and Hudson counties. The enabling legislation represented “a legislative plan for the reclamation and development of the Hackensack Meadowlands on a regional basis by a commission constituting a political subdivision of the State, with intermunicipal sharing of the respective tax benefits and tax burdens resulting from the planned development.” Meadowlands Regional Development Agency v. State, 63 N.J. 35, 39 (1973).

The Meadowlands Commission was subsequently merged into NJSEA by way of the Hackensack Meadowlands Agency Consolidation Act, N.J.S.A. 5:10A-1 et seq. Both the original Act and the Consolidation Act direct the Commission (and subsequently the NJSEA) to prepare a master plan to achieve the goals and objectives of the legislation. See N.J.S.A. 5:10A-10; N.J.S.A. 13:17-9. The District’s first master plan was adopted in 1972, and the Meadowlands Commission

adopted a new master plan in 2004. Aa0037-249. That plan was updated in or about February 2020.⁴

The Master Plan includes numerous zoning districts and redevelopment areas. The subject property and project is located in the “Route 3 East Redevelopment Area”. The Redevelopment Plan for that area (Aa0006-036) explains that

The goal of the redevelopment plan is to allow development of the upland portion of the subject properties with minimal to no impact to the existing wetlands. Given the sensitivity of the environment, a less intensive development [then that proposed by the previous “Berry's Creek Center”] that addresses the wetland conditions of these properties would be more appropriate for the redevelopment area.

Aa0012. Emphasis added.

The Redevelopment Plan does not define the term “minimal,” but it offers some guidance with respect to development in wetlands. This includes a statement that the redeveloper (in this case, ER2) must provide a wetland delineation to determine the amount and location of any uplands on the site, and must also secure approval from the Corps and any other relevant governmental agencies for the proposed wetlands disturbance. Aa0016. It further explains that smart growth principles shall be incorporated into the project design “in accordance with the goals

⁴ Both NJSEA’s denial of the Zoning Certificate requested by ER2 and NJSEA’s recommendation that DEP deny the Water Quality Certificate requested by ER2 are based on its interpretation of the 2004 Redevelopment Plan and, in turn, the 2004 District Master Plan. None of the modifications to the 2004 District Master Plan promulgated by the 2020 District Master Plan Update affected the subject matter of this litigation. Consequently, Appellant has omitted the 2020 District Master Plan Update from the Appendix to this brief. The 2020 District Master Plan Update is available to the public on NJSEA’s website at njsea.com/master-plan/. Appellant will submit a copy of the 2020 Master Plan Update to the Court upon request.

of the State of New Jersey, including the creation of a sense of place, mixed land uses, cluster development, pedestrian scale traffic calming devices, multi-modal passenger transportation access and usable public spaces.” Id.

Furthermore, with respect to wetlands, the Redevelopment Plan explains that “all water quality standards contained in the NJMC Zoning Regulations shall apply,” and that the Project Impact Assessment required for all development projects must include (i) a delineation of existing wetlands and open water areas; (ii) a discussion of off-site and on-site alternatives to any proposed wetland fill; and (iii) a discussion of the compensatory program for the loss of wetland function in conjunction with the proposed development. Aa0024-025.⁵ Not only do none of these provisions of the Redevelopment Plan lend themselves to an understanding of what is meant by “minimal” impacts, they actually imply that some level of wetlands disturbance is contemplated by the Redevelopment Plan—otherwise there would be no need for an alternatives analysis or a discussion of wetlands compensation.

**The New Jersey Coastal Zone Management Program,
the Freshwater Wetland Protection Act, and Their
Relationship to the District Master Plan**

As noted above, the Route 3 East Redevelopment Plan indicates that all water quality standards contained in NJMC zoning regulations shall apply. It is through this requirement that the interaction between the Master Plan and the New Jersey

⁵ The project impact assessments for the subject property are found in the Appendix at Aa0301 and Aa0496.

Coastal Zone Management Program arises.

The Coastal Zone Management Rules

New Jersey's Coastal Zone Management Program (“CZMP”) is a composite of several statutes; namely: the Coastal Area Facilities Review Act, N.J.S.A. 13: 19-1 et seq.; the Waterfront Development Law, N.J.S.A. 12:5-3 et seq.; the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.; the Coastal Wetlands Act, N.J.S.A. 13:9A-1 et seq.; the Water Pollution Control Act, N.J.S.A. 58:10A et seq.; as well as the Meadowlands Act and the State's various riparian statutes at N.J.S.A. 12:3 et seq. The CZMP also includes an overarching set of regulations, the Coastal Zone Management Rules, N.J.A.C. 7:7-1 et seq. (the “CZMR”). The CZMR include the substantive standards by which the statutes listed above are administered.

The CZMP was created in response to the enactment of the federal Coastal Zone Management Act, 16 U.S.C. 1451 et seq., in 1972, which offered various financial and programmatic incentives to states which adopted programs that would adequately manage and protect the various resources of their coastal zones. With respect to applying the CZMP to the facts at hand, two different CZMR provisions address the regulation of wetland impacts in the Meadowlands District.

First, N.J.A.C. 7:7-43, the “Meadowlands District Special Area Rule,” provides in relevant part that NJSEA is the lead planning and management agency for the District and that the Master Plan is adopted as a component of New Jersey's Coastal Management Program. N.J.A.C. 7:7-43(h). The Rule further provides that

“[a] coastal activity or development for which a zoning certificate is required from the NJSEA shall be consistent with the Master Plan, as evidenced by receipt of a zoning certificate.” N.J.A.C. 7:7-43(b).

Second, N.J.A.C. 7:7-9.27 (“Wetlands”) clarifies the relationship between the CZMP and the Master Plan. It explains that although activities under the jurisdiction of the NJSEA are exempt from the requirement for a Freshwater Wetland Protection Act permit (see N.J.S.A. 13:9B-6), any activity that requires a wetland fill permit from the Corps under Section 404 of the federal Clean Water Act will also require a Water Quality Certification from DEP under the same statute, and that DEP “shall use the conditions, limits, and requirements governing activities or development in wetlands set forth in the Freshwater Wetlands Protection Act Rules [...]” N.J.A.C. 7:7-7.29(b)(1).

DEP’s Analysis

ER2’s wetland application process began with the submittal of a Section 404 application to the U.S. Army Corps of Engineers in March 2016 seeking approval for the filling of 2.62 acres of wetlands in connection with the 197-unit project. ER2 filed a concurrent application for a Section 401 WQC with NJDEP. Aa0385-386. The WQC application addressed the various requirements of the Freshwater Wetland Rules, as explained above. On September 19, 2016, DEP denied the WQC application on September 19, 2016. Aa0387-398. The denial stated in relevant part that the Department was

not able to make the applicable findings required by the Coastal Zone Management Rules (N.J.A.C. 7:7) and the Freshwater Wetland Protection Act Rules (N.J.A.C. 7:7A) for the approval of a Hackensack Meadowlands Water Quality Certificate for this project.

Aa0389.

ER2, after initiating the administrative hearing and ADR process, submitted the Settlement Report (Aa0407-485) to DEP. The Report, which was prepared by an interdisciplinary team of attorneys, ecologists, planners, and housing consultants, responded in detail to DEP's WQC denial, and addressed each and every requirement of the Freshwater Wetlands Protection Act and its implementing regulations. The Report included the following:

- A detailed discussion of “project purpose,” which is an essential element of the wetlands permitting process. Section 9 of the Freshwater Wetlands Protection Act (N.J.S.A. 13:9B-9) and its implementing regulations at N.J.A.C. 7:7A-5, -7 and -9, generally provide that NJDEP shall issue an Individual Permit only if a project has no practicable alternative that avoids or minimizes wetland impacts. Section 10 of the Act provides that an alternative shall be considered practicable if it is “available and capable of being carried out after taking into consideration cost, existing technology and logistics in light of overall project purposes.” Section 10 also provides that practicable alternatives are presumed to exist unless the applicant can demonstrate that the basic project purpose cannot reasonably be accomplished utilizing a location other than the one requiring wetland impacts.

The Settlement Report addressed these requirements in detail, and made it abundantly clear that there were no practicable and available alternatives to the proposed wetland filling that would accomplish the project's purpose.

- A detailed analysis of the manner in which the requirements for Individual Wetland Permits apply to the project.
- An exhaustive alternatives site analysis prepared by the firm of Cushman and Wakefield documenting the lack of practicable alternative locations.
- A separate section documenting the fact that the cost of construction is such that wetland impacts could not be minimized by increasing building heights (thereby reducing the building footprint).
- A planning evaluation which further addressed the requirements for Individual Wetland permits in a local and regional planning context.
- An analysis of the Project in the context of the 1995 Interagency Special Area Management Plan ("SAMP"). The SAMP, which was never adopted, nevertheless formed the basis for many of the provisions of the Master Plan. That analysis documents the fact that the Project is consistent with the goals and methods of the SAMP.

NJDEP, recognizing that ER2 had adequately addressed and responded to the concerns expressed in the Denial, agreed to issue the WQC, contingent only on a determination of master plan consistency from the NJSEA.

The NJSEA Decision

NJSEA, when it conducted the same analysis, came to a different conclusion. By letter dated November 24, 2017, NJSEA advised NJDEP that the proposed project did not, in its view, comply with the intent and purpose of the District Master Plan, and consequently recommended that NJDEP not issue a determination that the project was consistent with the State's Water Quality Standards and CZMP. Aa0486-0487. The letter explained the basis for the NJSEA's decision as follows:

A principal goal of the District Master Plan is to preserve and enhance wetlands and other valuable natural resources. The Hackensack River Preserve Area [within which the subject property is located] is planned to permit uses consistent with the preservation of open space and habitat protection and enhancement in the District. The Master Plan also recognizes the presence of upland areas within the preserve areas.

The subject property is located within the Route 3 East Redevelopment area, and is subject to the standards of the Route 3 East Redevelopment plan dated January, 2004. Although multifamily residential uses are permitted uses within the redevelopment plan, the plan specifically states that "the goal of the redevelopment plan is to allow development of the upland portion of the subject properties with *minimal to no impact to existing wetlands.*"

The scope of the project, including the location of the proposed development footprint and the placement of fill within the delineated environmentally sensitive wetlands contained on the site is not consistent with the goals and objectives for the development in the Hackensack Meadowlands district. The NJSEA, therefore, recommends that the NJDEP issue a determination that the subject proposal is not consistent with the State's CZMP.

Aa0487. Emphasis added.

NJSEA expanded on its decision in three subsequent items of correspondence either to NJDEP or to ER2. First, on March 14, 2018, NJSEA wrote to counsel for ER2 in response to two letters asking that the Authority reconsider its decision. Aa0492-493. The Authority's letter essentially memorializes the findings made in a February 22, 2018 staff memorandum. That memorandum, Aa0488-491, expanded upon NJSEA's November 24, 2017 recommendation letter by attempting to address and rebut the arguments made in Counsel's letter. Then, on January 26, 2021, the Authority wrote to NJDEP (Aa0626-628), this time in response to ER2's July 20, 2020 request for a Zoning Certificate (Aa0496-625). The Authority's letter reiterates the reasons cited in its November 2017 letter to NJDEP, and once again concludes that the Project, even with a reduced wetland footprint, is not consistent with the Master Plan.

Finally, on January 27, 2021, NJSEA wrote to the attorney who filed ER2's July 2020 Zoning Certificate application. Aa0629-632. The letter explains the basis for its January 26, 2021 letter to NJDEP in somewhat more detail. All of those letters, however, relied on a flawed interpretation of an isolated provision in the Route 3 East Redevelopment Area Plan that allows for "minimal to no" wetland disturbance as part of a development project. NJDEP applied its far more rigorous standards and expertise to ER2's application and arrived at the opposite conclusion.

Had NJSEA’s decision been based on provisions of the Master Plan other than this one isolated phrase, that outcome might have made more sense; however, in this context, it does not.

ARGUMENT

NJSEA'S CONCLUSION THAT PETITIONER'S APPLICATION IS INCONSISTENT WITH THE MASTER PLAN WAS ARBITRARY, CAPRICIOUS, UNREASONABLE AND INCORRECT AS A MATTER OF LAW (Aa0004-005).

I. NJSEA’S DECISION IS NOT CONSISTENT WITH THE PLAIN MEANING OF THE PHRASE “NO OR MINIMAL IMPACT” IN THE MASTER PLAN (Aa0005).

Simply stated, in the absence of any guidance as to the meaning of the term “minimal,” DEP’s determination that the Project meets the standards of the Freshwater Wetlands Protection Act should control the Authority's November 24, 2017 decision, which applied standards that were promulgated by another agency with greater expertise in the field. NJSEA’s conclusion to the contrary on the basis it has provided was clearly arbitrary, capricious and unreasonable, and should be set aside by this Court.

New Jersey appellate courts generally afford substantial deference to an agency’s interpretation of its own regulations. See Fedor v. Nissan of N. Am., Inc., 432 N.J. Super. 303, 320 (App. Div. 2013). However, this deference is not without limits. First, agency action must be consistent with the authorizing legislation. See N.J. Soc. for Prevention of Cruelty to Animals v. N.J. Dept. of Agric., 196 N.J. 366,

385-86 (2008). Additionally, akin to the canons of statutory construction, see Essex Cnty. Welfare Bd. v. Klein, 149 N.J. Super. 241, 247 (App. Div. 1977), appellate courts must ensure that the agency action taken pursuant to an ambiguous regulatory provision is reasonable in light of the plain meaning of the regulation’s language and intent or purpose. See Cruz-Diaz v. Hendricks, 409 N.J. Super. 268, 275-76 (App. Div. 2009), certif. denied, 200 N.J. 548 (2009); see also Seacoast Builders Corp. v. Jackson Tp. Bd. of Educ., 363 N.J. Super. 373, 378-79 (App. Div. 2003).

New Jersey courts must give the words of a regulation “their ordinary and commonsense meaning.” In re Election Law Enf’t Comm’n Advisory Op. No. 01-2008, 201 N.J. 254, 263 (2010). Moreover, courts should presume that the drafter “intended the words it chose and the plain and ordinary meaning ascribed to those words.” Paff v. Galloway Twp., 229 N.J. 340, 353 (2017). If a regulation’s language is clear, “the interpretative process will end without resort to extrinsic sources.” Bedford v. Riello, 195 N.J. 210, 222 (2008). On the other hand, if “the plain language analysis yield[s] more than one plausible interpretation of the regulation, a reviewing court may consider extrinsic sources.” In re Eastwick Coll. LPN-to-RN Bridge Program, 225 N.J. 533, 542 (2016).

A plain language analysis of the phrase “minimal to no impact” reveals that the proposed project is consistent with the Redevelopment Plan and, thus, the Master Plan. Moreover, to the extent that the Court finds this phrase to be ambiguous, careful consideration of the intent and purpose of the Redevelopment Plan and the

Master Plan yields the same conclusion. As such, NJSEA acted arbitrarily, capriciously, unreasonably or otherwise not in accordance with law by denying the Zoning Certificate requested by ER2.

A. The Plain and Ordinary Meaning of “Minimal to No Impact”

New Jersey law requires appellate courts to interpret regulations by giving effect to their plain language. See J.H. v. R&M Tagliareni, LLC, 239 N.J. 198, 214 (2019) (“A regulation should be construed in accordance with the plain meaning of its language”) (quoting Medford Convalescent & Nursing Ctr. v. Div. of Med. Assistance & Health Servs., 218 N.J. Super. 1, 5 (App. Div. 1985)). Moreover, when interpreting a regulation, New Jersey courts “endeavor to give meaning to all words and to avoid an interpretation that reduces specific language to mere surplusage.” D’Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 129 (2007).

Notably, neither the Redevelopment Plan nor the District Master Plan defines or otherwise characterizes the meaning of the phrase “minimal to no impact.” When a popular or common word is used not defined, the word should be given its common meaning. Darel v. Pennsylvania Mfrs. Asso. Ins. Co., 114 N.J. 416, 425 (1989) (quoting N. Singer, 2A Sutherland Statutory Construction § 47.28 (4th ed. 1985)).⁶ To this end, “[i]n determining the common meaning of words, it is appropriate to

⁶ N. Singer, 2A Sutherland Statutory Construction § 47.28 (4th ed. 1985) is omitted from Appellant’s Appendix because Appellant has not been able to obtain an electronic or paper copy of this resource from which a copy of § 47.28 could be reproduced. Appellant relies on this authority vis-à-vis its incorporation by reference into the Darel decision by the New Jersey Supreme Court, 114 N.J. at 425.

look to dictionary definitions.” Macysyn v. Hensler, 329 N.J. Super. 476, 485 (App. Div. 2000). ER2 and NJSEA are in agreement that the meaning of the word “minimal” in particular forms the crux of this dispute.

In addition to the Redevelopment Plan and the Master Plan failing to define “minimal,” NJSEA offered neither a definition of the term nor any analysis as to what constitutes “minimal” impacts in its 2021 denial of the Zoning Certificate requested by ER2. In fact, NJSEA did not offer a definition for or otherwise attempt to identify the parameters of “minimal” until its Motion for Summary Decision before the ALJ, where NJSEA suggested—without reference to any sort of dictionary or objective resource—that the term should be read to mean “the smallest amount or a negligible amount.”⁷ NJSEA proceeded to extrapolate from this unsupported and self-serving definition that the Redevelopment Plan intended for any impacts to wetlands from development in the designated redevelopment area to be “de minimis, if not avoided altogether.” However, upon closer scrutiny, both the definition upon which NJSEA relies and the logic upon which it reached its conclusion are deeply flawed and must be rejected by this Court.

Collins Dictionary defines “minimal” as “smallest or least possible; of or constituting a minimum.”⁸ Consequently, a more reasonable reading of the

⁷ NJSEA, in support of the definition for “minimal” provided in its Motion for Summary Decision, cites to Cruz v. Trotta, 363 N.J. Super 353, 358-59 (App. Div. 2004). However, Cruz never addresses the definition of “minimal,” but rather stands only for the underlying legal principle that courts should interpret undefined terms according to their ordinary and popular meaning.

⁸ collinsdictionary.com/us/dictionary/english/minimal (last visited Sept. 13, 2024). Aa0683.

Redevelopment Plan’s requirement that there be “minimal to no impact” on wetlands is that the impacts in question must be the least possible in light of the project’s purpose. This is particularly true in the context of wetlands impacts, as “project purpose” is a critical concept in New Jersey’s Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq., and its implementing regulations at N.J.A.C. 7:7A et seq.⁹ Here, ER2 and NJSEA agree that the basic purpose of the project proposed here is the construction of the residential apartment building will assist in alleviating the need for residential accommodations and low to moderate income housing in the vicinity of the project area. This project purpose is further underscored by the fact that the Borough of East Rutherford intends to rely upon the project proposed by ER2 to satisfy its affordable housing component, as evidenced by the agreements to this effect executed between the Borough and ER2. Aa0279-300, 0365-378.

The August 31, 2017 Settlement Report, which was prepared in response to NJDEP’s initial denial of the WQC requested by ER2, thoroughly addressed how the project purpose cannot be accomplished through any alternatives, including alternatives with fewer impacts on the affected wetlands. NJDEP was sufficiently persuaded by the analysis offered therein that it agreed to rescind its earlier denial and enter into a settlement agreement, contingent upon NJSEA’s determination that

⁹ Section 10 of the Act provides that an alternative shall be considered practicable if it is “available and capable of being carried out after taking into consideration cost, existing technology and logistics *in light of overall project purposes.*” Emphasis added. Section 10 also provides that practicable alternatives are presumed to exist unless the applicant can demonstrate that the basic project purpose cannot reasonably be accomplished utilizing a location other than the one requiring wetland impacts.

the proposed project is consistent with the Master Plan. By doing so, NJDEP—the agency with the foremost expertise on and responsibility for protecting New Jersey wetlands—recognized that there is no alternative design of this project that would further avoid wetlands impacts. Accordingly, ER2 has fully demonstrated that the project proposed will have the minimal impact on wetlands that can be achieved in light of the project’s purpose, thereby satisfying its burden under the most reasonable interpretation of the term “minimal to no impacts” as it relates to anticipated wetlands impacts under the Redevelopment Plan and, in turn, the Master Plan.

Had the drafters of the Redevelopment Plan intended for impacts to wetlands from redevelopment at this location to be nonexistent or *de minimis*, as NJSEA has proposed, then they would have said so. Instead, they required “minimal to no” impacts, thereby signaling that a certain degree of impact from redevelopment is acceptable for purposes of the Master Plan. Plus, by allowing for “minimal” impacts, rather than “*de minimis*” impacts (which are different and distinguishable from “minimal” impacts),¹⁰ the drafters of the Redevelopment Plan ensured that the document subtly but conclusively permits a developer in the Meadowlands to impact wetlands only to the minimum extent required to achieve the purpose of their project, rather than forbidding any and all impacts from such development. This reading of

¹⁰ Whereas “minimal” means “smallest or least possible; of or constituting a minimum,” *see* Collins Dictionary, *supra*, “*de minimis*” is defined as “lacking significance or importance; so minor as to merit disregard.” *See* Merriam-Webster, [merriam-webster.com/dictionary/de%20minimis](https://www.merriam-webster.com/dictionary/de%20minimis) (last visited Sept. 30, 2024). Aa0689. Put simply, as the drafters of the Redevelopment Plan recognized, proposed development may be acceptable when it is projected to have the least possible impact to achieve its project purpose, rather than when these impacts are projected to be so minor as to merit disregard.

the Redevelopment Plan is consistent with the Court’s obligation to presume that every word in a regulation has meaning, and to avoid interpreting the Redevelopment Plan in a manner that would render the term “minimal” surplusage or a nullity. See State in Interest of K.O., 217 N.J. 83, 91 (2014); In re Attorney Gen.’s “Directive on Exit Polling: Media & Non-Partisan Pub. Int. Grps.”, 200 N.J. 283, 298 (2009); see also Seigel v. N.J. Dep’t of Env’tl. Prot., 395 N.J. Super. 604, 618-19 (App. Div. 2007).

In sum, a plain language analysis of the phrase “minimal to no impact” as used in the Redevelopment Plan yields the conclusion that the Redevelopment Plan allows for the smallest amount of wetland impacts necessary to achieve the purpose of the proposed project, which would be consistent with the analysis that DEP must normally perform for proposed development under the Freshwater Wetlands Protection Act. ER2 provided ample analysis to DEP on this issue, and it convinced the agency that no potential alternatives could achieve the project’s purpose while producing less impact on wetlands. As a result, ER2 has demonstrated the compliance of the proposed project with the “minimal to no impact” requirement as it relates to anticipated wetlands impacts under the Redevelopment Plan and, therefore, its consistency the Master Plan.

B. Purpose of the Master Plan and Consistency with the Authorizing Statutes

However, should this Court find that a plain language analysis of “minimal to

no impact” yields more than one plausible interpretation of the Redevelopment Plan, then consideration of extrinsic sources also suggests that the most reasonable interpretation of this language is that the drafters of the Redevelopment Plan intended to allow for development activities that produced the smallest amount of wetlands impacts necessary to achieve a project’s purpose, rather than allow for only those development activities which produce absolutely no or de minimis wetlands impacts. As noted above, beyond engaging in a plain language analysis, New Jersey courts tasked with reviewing an agency’s interpretation of its own regulation must also ensure the interpretation’s consistency with the authorizing statutes and the purpose or intent of the regulatory scheme in question. Since the purpose of the Master Plan under which ER2 is seeking a Zoning Certificate from NJSEA is explicitly addressed by the authorizing statutes, these factors are analyzed jointly below.

To begin, the authorizing statutes underlying the dispute in this matter are the Hackensack Meadowlands Reclamation and Development Act, N.J.S.A. 13:17-1 to -86, and the Hackensack Meadowlands Agency Consolidation Act, N.J.S.A. 5:10A-1 et seq.). As noted above, both statutes expressly require the preparation of a master plan for the Meadowlands District, and both statutes likewise explicitly describe the purpose of the Master Plan. The original Act explains that the master plan is “for the physical development of all lands lying within the district [...]” N.J.S.A. 13:17-9. The Consolidation Act and the statutes’ promulgating regulations contain nearly

identical language. See N.J.S.A. 5:10A-10; N.J.S.A. 13:17-9(a). In fact, N.J.S.A. 13:17-9(a) reinforces this emphasis on development by mandating that “[t]he master plan shall [...] recommend[] the physical development of the lands within its jurisdiction[,] either in its entirety or a portion thereof.”

With respect to redevelopment plans in particular, the statute that provides NJSEA with the authority to prepare and adopt redevelopment plans, N.J.S.A. 13:17-21, does not speak directly to their purpose. However, some helpful context can be gleaned from N.J.S.A. 13:17-21(b)(8), which states:

In undertaking projects pursuant to any redevelopment plan, [NJSEA] may [...] [p]repare and adopt from time to time a workable program, representing an official plan of action for effectively dealing with the problem of urban renewal areas within the district and for the establishment and preservation of well-planned communities with well-organized residential neighborhoods of decent homes and suitable living environment for adequate family life; for utilizing appropriate private and public resources to eliminate and prevent the development or spread of blight and deterioration; to encourage needed conservation or rehabilitation; to provide for the redevelopment of renewal areas; or to undertake such of the aforesaid activities or other feasible activities as may be suitably employed to achieve the objectives of such a program.

Meanwhile, the Redevelopment Plan itself explains that its goal “is to allow development of the upland portion of the property with minimal to no impact to the existing wetlands.” Aa0012. The Redevelopment Plan goes on to note that the objective for the redevelopment area “is to encourage positive development of the area that will contribute to the economy and environment.” Id. To this end, as

further discussed below, the Redevelopment Plan indicates that it “will obtain a public objective of creating orderly development while protecting the public health, safety and welfare.” Id.

The statutory language concerning the purpose of the District Master Plan and the Redevelopment Plan’s description of its objectives, read jointly, are unambiguous in making clear that NJSEA is obligated to consider not only the potential environmental consequences of proposed projects when determining their consistency with the Master Plan, but also their impact on the area’s economy and the encouragement of positive development more generally. By interpreting “minimal” impacts in the manner it now offers, NJSEA myopically focuses on potential environmental impacts while disregarding its equally important development-related analytical obligations. As such, the Court should set aside NJSEA’s flawed conclusion that the project proposed by ER2 is not consistent with the Redevelopment Plan and, in turn, the Master Plan.

II. NJSEA DID NOT SUFFICIENTLY ARTICULATE ITS BASIS FOR ISSUING A DECISION THAT IS INCONSISTENT WITH NJDEP’S CONCLUSION OR NJSEA PERMITTING PRECEDENT (Aa0005).

A. Inadequate Reasoning for Reaching a Conclusion Inconsistent with NJDEP’s Determination Regarding Water Quality Impacts.

The substantial deference typically afforded to an agency’s interpretation of its regulations by New Jersey courts is rooted in the belief that “a state agency brings experience and specialized knowledge to its task of administering and regulating a

legislative enactment within its field of expertise.” See In re Election Law Enf’t, 201 N.J. at 262. As made most clear by the November 24, 2017 NJSEA letter identified in the Procedural History, NJSEA’s refusal to confirm the consistency of ER2’s proposed project with the Master Plan arises from NSJEA’s unsupported belief that the project is not consistent with the State’s Water Quality Standards and Coastal Zone Management Program. Aa0486-487. But it is NJDEP, not NJSEA, that is the agency with the foremost responsibility of administering, and thus has the most expertise in, the State’s Water Quality Standards and Coastal Zone Management Program. In this context, NJSEA’s denial of the WQC sought by ER2 as inconsistent with the Master Plan is not entitled to deference by this Court.

As noted above, Route 3 East Redevelopment Plan states as follows: “This redevelopment plan will obtain a public objective of creating orderly development while protecting the public health, safety and welfare.” The conclusion reached by NJDEP is the product of more relevant expertise, and thus is entitled to more deference, as to what constitutes protection of the public health, safety and welfare in connection the filling of wetlands than the unsupported analysis offered by NJSEA, which myopically relies on an isolated phrase from the Master Plan without looking to the phrase’s plain meaning or addressing the context in which it arises.

This Court has previously recognized that wetlands impacts are within the scope of NJDEP’s special competence and expertise, and NJDEP’s determinations concerning wetlands impacts are generally entitled to deference from New Jersey

courts. See In re Freshwater Wetlands General Permits, 372 N.J. 578, 593 (App. Div. 2004). Consequently, it is NJDEP’s conclusion concerning the project’s anticipated effects on freshwater wetlands and the minimization of its impact thereupon that is entitled to deference from this Court, rather than NJSEA’s inadequately supported Zoning Certificate decision to the contrary.

This conclusion is particularly valid in light of the requirement at N.J.S.A. 13:17-9(c) that “[i]n preparing the master plan or any portion thereof or amendment thereto, the commission shall consult with any Federal or State agency having an interest in the district.” The Legislature clearly recognized the valuable perspective that other agencies with more technical expertise would bring to the development of the area subject to the District Master Plan and NJSEA’s redevelopment plans. Here, however, NJSEA does not explain why the geographic expertise that it is conferred by statute should supersede the environmental conclusions provided to it by the State’s Department of Environmental Protection. Instead, NJSEA asks this Court for an exemption from the need for any further analysis once it determines that a proposed project would entail any degree of wetlands impacts—a low bar to clear in the Meadowlands, which the United States Fish & Wildlife Service has described as “the largest urban wetland complex in the northeastern United States.”¹¹ This request is even more audacious under the circumstances presented by this matter,

¹¹ U.S. Fish & Wildlife Serv., *Wetland Status and Trends for the Hackensack Meadowlands* 1 (2002), fws.gov/sites/default/files/documents/Wetland-Status-And-Trends-For-The-Hackensack-Meadowlands.pdf?bcs-agent-scanner=7148d143-9470-1241-87ef-1527cbd82443. Aa0699.

where the determination concerning wetlands impacts upon which NJSEA hangs its hat directly contradicts the findings of NJDEP, the agency with specialized wetlands-related expertise.

B. Inconsistency with NJSEA Permitting Precedent (American Dream)

The 1995 SAMP, which was never adopted, played an important role in informing many provisions of the Master Plan and the Redevelopment Plan. Notably, under the SAMP, the wetlands at the property at which development is proposed by ER2 were not identified for preservation, while wetlands located directly across Route 3 from this property were flagged as wetland area worthy of preservation. The latter property at which preservation-worthy wetland area was identified has nevertheless since been developed into American Dream Meadowlands (“American Dream”), one of the largest shopping malls in the world—all with NJSEA’s approval that the wetlands impacts from American Dream are “minimal,” and thus that American Dream is consistent with the Redevelopment Plan and the Master Plan. Yet NJSEA continues to deny that ER2’s proposed project is consistent with the Redevelopment Plan and the Master Plan, despite (i) the project having a significantly smaller impact on the affected wetlands than American Dream and (ii) the affected wetlands themselves being of lower quality, and thus of lower priority for preservation, than those impacted by American Dream.

When presented with the opportunity to reconcile these conflicting decisions, NJSEA instead replied: “The subject review does not involve a comparison to other

projects. Each property is unique and is reviewed subject to its particular characteristics.” Aa0490. This defense of NJSEA’s decision with respect to the Zoning Certificate requested by ER2 is inexcusably cursory and without substance. Even though the SAMP was not adopted, which ER2 readily concedes, it was developed based on science, analysis and on-the-ground conditions that remained valid after the SAMP was no longer considered for adoption and instead began being consulted by NJSEA and its predecessors in a strictly advisory capacity. Against this backdrop, NJSEA’s inability to reconcile its approval of the Zoning Certificate and related authorizations for American Dream while denying the same for an affordable housing project with fewer wetlands impacts, especially when the few resulting impacts would involve wetlands of lower ecological priority than those disturbed by American Dream, gives way to the inescapable conclusion that NJSEA acted arbitrarily, capriciously, unreasonably or otherwise not in accordance with law by issuing the Zoning Certificate denial to ER2 that is now under appeal.

III. IN THE ALTERNATIVE, THIS COURT SHOULD REMAND FOR A PLENARY HEARING TO CLARIFY AND SUPPLEMENT THE ADMINISTRATIVE RECORD WITH RESPECT TO MIXED QUESTIONS OF FACT AND LAW THAT ARE MATERIAL TO THIS DISPUTE BUT WERE NOT ADDRESSED BELOW (Aa0005).

This is a matter of first impression concerning the interpretation and administration of the Hackensack Meadowlands Reclamation and Development Act, N.J.S.A. 13:17-1 to -86, and the Hackensack Meadowlands Agency Consolidation Act, N.J.S.A. 5:10A-1 et seq., as promulgated through the Master Plan and the

Redevelopment Plan. This is also a matter of first impression concerning the agency to which a court should defer when an agency undertakes final action according to an interpretation of the law and of the facts presented here that is at odds with that of a consulted agency with more relevant subject matter expertise.

Under N.J.A.C. 1:1-12.5(b), summary decision is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. This standard is substantially similar to the standard governing civil motions for summary judgment under R. 4:46. See E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010). The New Jersey Supreme Court set forth the standard governing motions for summary judgment in Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995). There, the Court held:

[A] determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The judge’s function is not [...] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

Brill, *supra*, 142 N.J. at 540 (citation omitted).

To this end, mixed questions of fact and law “should not be decided in a summary fashion unless there is no genuine dispute” as to the material facts upon which the

summary decision is based. See Tannock v. N.J. Bell Telephone Co., 223 N.J. Super. 1, 9 (App. Div. 1988).

Tannock is particularly illustrative precedent for this matter. There, the plaintiff entered into a contract with the defendant telephone company to run an advertisement for his professional photography services in the telephone directory of two counties. Both advertisements contained errors and, after the plaintiff subsequently experienced a decline in business, he filed an action against the defendant. Plaintiff ultimately filed a motion for summary judgment, which was granted on the issue of liability, but the issue of damages went to trial. Upon the conclusion of the trial, the plaintiff's damages case was dismissed, and both parties proceeded to seek review of the decision. On appeal, the court affirmed the order of the trial court and dismissed plaintiff's complaint.

In reaching that decision, the Appellate Division observed that one of the central questions under review—namely, whether the remedy provided by the underlying contract was “substantively reasonable”—was a mixed question of fact and law, as it entailed both a legal inquiry into the conscionability of the contract and a review of the monetary damages sought thereunder. See id. Therefore, having recognized that a genuine factual question remained as to the nature of damages sought by the plaintiff in that case, the Appellate Division concluded that summary judgment was not appropriate.

Akin to the trial court in Tannock, in the proceedings below NJSEA was

presented with a mixed question of fact and law: namely, (i) as a matter of law, what constitutes “minimal to no impacts” to wetlands for purposes of activity subject to the Redevelopment Plan and the Master Plan, and (ii) as a question of fact, whether the impacts anticipated from the proposed project meet or exceed the threshold for “minimal impact” yielded by the preceding legal analysis. But neither the Final Decision appealed here nor the Initial Decision it adopted provided any clarification with respect to any sort of objective quantitative metric for distinguishing “minimal” impacts from those that exceed the qualitative limit prescribed by the Redevelopment Plan.

Under New Jersey law, the NJSEA must demonstrate that its denial of the Zoning Certificate “(a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment.” See State v. Shackelford, 2015 N.J. Super. Unpub. LEXIS 842, at *7 (App. Div. 2015), citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Moreover, the basis for the agency's action “must be discernible from the record,” and where “the absence of particular findings hinders or detracts from effective appellate review, the court may remand the matter to the agency for a clearer statement of findings and later reconsideration.” In re Renewal Application of TEAM Acad. Charter Sch., 247 N.J. 46, 75 (2021).

The administrative record now before the Court, which lacks any discussion

as to whether the impacts anticipated from ER2's proposed project meet or exceed the quantitative standard through which the NJSEA can objectively and consistently administer the relevant portion of the Redevelopment Plan, is wholly inadequate in this regard. Therefore, if the Court is not satisfied that ER2 is entitled to the requested Zoning Certificate under a plain-language analysis of the Redevelopment Plan, the Court should remand the matter for further proceedings to supplement and clarify the record below so as to ensure that the effectiveness of its appellate review.

CONCLUSION

For all of the foregoing reasons, Appellant East Rutherford Two, LLC respectfully submits that NJSEA's denial of the requested Water Quality Certificate was arbitrary, capricious, unreasonable, or otherwise not in accordance with law. As such, East Rutherford Two respectfully requests that this Court vacate NJSEA's March 28, 2024 Final Decision and remand for proceedings consistent with this Court's instructions.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-002660-23T1

EAST RUTHERFORD TWO,
LLC

Appellant,

v.

NEW JERSEY SPORTS AND
EXPOSITION AUTHORITY

Respondent.

:
: CIVIL ACTION
:
: ON APPEAL FROM
: FINAL ACTION OF NEW JERSEY
: SPORTS AND EXPOSITION
: AUTHORITY
:
:

BRIEF OF RESPONDENT NEW JERSEY SPORTS AND
EXPOSITION AUTHORITY

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT.....	1
PROCEDURAL HISTORY AND STATEMENT OF FACTS	2
A. Background of the District and Relationship Between the Agency Authorities	2
B. History of Development on the Property	7
ARGUMENTS	14
POINT I	
NJSEA PROPERLY DETERMINED THE PROPOSED DEVELOPMENT WAS INCONSISTENT WITH THE MASTER PLAN. (Responding to Appellant’s Point I.A).....	14
A. NJSEA’s determination was reasonable and supported by the substantial, credible evidence in the record.	16
B. “Minimal to no impact” as used in the Redevelopment Plan means a preference for developing uplands with a very small impact to no impact to wetlands.	22
POINT II	
NJSEA CANNOT APPLY THE FRESHWATER WETLANDS PROTECTION ACT TO A CONSISTENCY DETERMINATION. (Responding to Appellant’s Point I.B and II).....	26
POINT III	
THERE ARE NO GENUINE DISPUTES OF MATERIAL FACT WARRANTING A REMAND. (Responding to Appellant’s Point III).....	31
CONCLUSION	33

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>Cases</u>	
<u>Allstars Auto Group, Inc. v. N.J. Motor Vehicle Comm’n</u> , 234 N.J. 150 (2018)	15, 29
<u>Atkinson v. Parsekian</u> , 37 N.J. 143 (1962)	16
<u>Boyle v. Riti</u> , 175 N.J. Super. 158 (App. Div. 1980)	16
<u>Circus Liquors, Inc. v. Governing Body of Middletown Twp.</u> , 199 N.J. 1 (2009)	15
<u>Cruz v. Trotta</u> , 363 N.J. Super. 353 (App. Div. 2003)	23
<u>Germann v. Matriss</u> , 55 N.J. 193 (1970)	24
<u>Hackensack Riverkeeper, Inc. v. N.J. Dept. of Env’t Prot.</u> , 443 N.J. Super. 293 (App. Div. 2015)	29
<u>In re Distribution of Liquid Assets</u> , 168 N.J. 1 (2001)	15
<u>In re Freshwater Wetlands Prot. Act Rules</u> , 180 N.J. 478 (2004)	15
<u>In re Petition for Rulemaking</u> , 117 N.J. 311 (1989)	14, 15
<u>In re Proposed Xanadu Redevelopment Project</u> , 402 N.J. Super. 607 (App. Div. 2008)	14, 15
<u>Jersey Cent. Power & Light Co. v. Melcar Utility Co.</u> , 212 N.J. 576 (2013)	29
<u>Kelly v. Hackensack Meadowlands Dev. Com.</u> , 172 N.J. Super. 223 (App. Div. 1980)	15
<u>Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.</u> , 189 N.J. 436 (2007)	32
<u>Mayflower Sec. Co. v. Bureau of Sec., Div. of Consumer Aff.</u> , 64 N.J. 85 (1973)	15
<u>Mazza v. Bd. of Trs.</u> , 143 N.J. 22 (1995)	15
<u>Morton Int’l, Inc. v. Gen. Accident Ins. Co. of Am.</u> , 266 N.J. Super. 300 (App. Div. 1991)	32
<u>N.J. Coalition of Healthcare Professionals, Inc. v. N.J. Dep’t of Banking & Ins.</u> , 323 N.J. Super. 207 (App. Div. 1999)	30
<u>State v. Afanador</u> , 134 N.J. 162 (1993)	24
<u>U. Cottage Club of Princeton New Jersey Corp. v. N.J. Dept. of Env’t Prot.</u> , 191 N.J. 38 (2007)	14

Statutes

16 U.S.C. § 1454	6
33 U.S.C. § 1341	5
33 U.S.C. § 1341(a)	5
33 U.S.C. §§ 1251 to -1389	5

N.J.S.A. 12:3-5.....	28
N.J.S.A. 13:17-1 to -56.....	2
N.J.S.A. 13:17-1 to -86.....	2
N.J.S.A. 13:17-12.....	27
N.J.S.A. 13:17-20.....	27
N.J.S.A. 13:17-21.....	4, 18, 27
N.J.S.A. 13:17-9.....	3
N.J.S.A. 13:9B-1 to -30.....	6, 26
N.J.S.A. 13:9B-10.....	30
N.J.S.A. 13:9B-11.....	30
N.J.S.A. 13:9B-27.....	6
N.J.S.A. 13:9B-6.....	29
N.J.S.A. 13:9B-6(a).....	6
N.J.S.A. 13:9B-9.....	29, 30
N.J.S.A. 5:10-1 to -38.....	2
N.J.S.A. 5:10A-10.....	3
N.J.S.A. 5:10A-10(b).....	3
N.J.S.A. 5:10A-10(c).....	3
N.J.S.A. 5:10A-10(d).....	3
N.J.S.A. 5:10A-10(e).....	3, 27
N.J.S.A. 5:10A-10(f).....	3
N.J.S.A. 5:10A-13.....	27
N.J.S.A. 5:10A-19.....	18, 27
N.J.S.A. 5:10A-24.....	4
N.J.S.A. 5:10A-6.....	2

Regulations

40 C.F.R. § 233.71.....	6
N.J.A.C. 19:3-5.1 to -5.16.....	18
N.J.A.C. 19:3-5.9.....	18, 27
N.J.A.C. 19:4-2.1(d).....	24
N.J.A.C. 19:4-5.123.....	18, 27
N.J.A.C. 7:7-1.1 to -29.10.....	6
N.J.A.C. 7:7-9.27(b)(1).....	28
N.J.A.C. 7:7-9.43.....	6
N.J.A.C. 7:7-9.43(b).....	27
N.J.A.C. 7:7A-1.1 to -22.20.....	6
N.J.A.C. 7:7A-10.2.....	28
N.J.A.C. 7:7A-10.2(b)(1).....	28
N.J.A.C. 7:7A-10.2(c).....	28

N.J.A.C. 7:7A-13..... 30

N.J.A.C. 7:7A-9.1..... 28

Other Authorities

Minimal, Merriam-Webster’s Collegiate Dictionary (11th ed. 2003)..... 24

State v. Shackelford, 2015 N.J. Super. Unpub. LEXIS 852 (App. Div. 2015) 16

PRELIMINARY STATEMENT

Appellant, East Rutherford Two, LLC (ER2), proposed development at a plot of land within the Borough of East Rutherford inside the Hackensack Meadowlands District. Respondent, New Jersey Sports and Exposition Authority (NJSEA), denied the proposal because it found it would be inconsistent with the Hackensack Meadowlands District Master Plan and the applicable Redevelopment Plan because it: 1) involved a significant impact on environmentally sensitive wetlands in the District contrary to the Redevelopment Plan; and 2) was inconsistent with the Coastal Zone Management Program (CZMP) and its rules. In proceedings before the Office of Administrative Law (OAL), Appellant focused on the first of those findings.

Then and now, Appellant argues that the New Jersey Department of Environmental Protection's (NJDEP) freshwater wetlands statute and standards should apply instead of the NJSEA's. However, Appellant still cannot meet its burden of showing the NJSEA's decision was arbitrary, capricious, and unreasonable. The extensive, credible evidence in the record supports NJEA's determination that filling the wetlands in this environmentally sensitive location is not consistent with the Master Plan, Redevelopment Plan, or the CZMP. That determination should be affirmed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

This matter involves the New Jersey Sports and Exposition Authority's (NJSEA) decision related to the development, zoning, and overall management of the Hackensack Meadowlands District, as laid out in the District Master Plan. Due to the unique environmental and natural resources within the District, a number of agencies are involved in its management. For the court's convenience, a brief discussion on the different agencies and their authorities within the district is included along with a description of the property's history.

A. Background of the District and Relationship Between the Agency Authorities

The Hackensack Meadowlands District was created by the New Jersey Legislature in 1968 with the enactment of the Hackensack Meadowlands Reclamation and Development Act, N.J.S.A. 13:17-1 to -86. The District has an irreplaceable heritage of natural resources, including wetlands, waterways, and tidal waters. The Legislature created the New Jersey Meadowlands Commission (NJMC) as the lead planning agency tasked with protecting and managing the District's vital natural resources.²

¹ Because they are closely related, these sections are combined for efficiency and the court's convenience.

² In 2015 the Legislature dissolved the NJMC and vested NJSEA with the NJMC's powers, authorities, and purposes pursuant to N.J.S.A. 13:17-1 to -56 and N.J.S.A. 5:10-1 to -38. See N.J.S.A. 5:10A-6. Consequently, any references

To effectuate this mandate, the NJMC adopted the Hackensack Meadowlands District Master Plan (the Master Plan). N.J.S.A. 5:10A-10; N.J.S.A. 13:17-9. The Master Plan is the “primary policy and planning document for the Hackensack Meadowlands District [It] guides future decision-making [and] serves as the basis for the implementation of policies, including future amendments to the NJSEA’s regulations.” (Ra06).³ The Legislature requires the Master Plan to include, among other things, provisions on the zoning codes and standards covering land use; housing and residential standards; and “water, soil conservation, flood control, and other like matters.” N.J.S.A. 5:10A-10(e), (f). In creating a Master Plan the NJSEA must consult with any federal or State agency with an interest in the matter. Id. at (b), (c). The NJSEA must also review and revise the Master Plan every ten years. Id. at (d).

In January 2004, the NJMC adopted a new landmark Master Plan, its first since 1970, to preserve the remaining 8,400 acres of wetlands in the District, many of which had previously been slated for development. Subsequently, in early 2020, the NJMC adopted the 2020 Master Plan Update (as an update to the

to the NJMC should also read as applying to NJSEA.

³ Throughout, “Aa” refers to Appellant’s appendix, “Ab” refers to Appellant’s brief, and “Ra” refers to Respondent’s appendix.

2004 Master Plan) to carry forward and enhance the goals and objectives of the 2004 plan, such as further protecting the District's irreplaceable natural resources. (Ra07).

The Master Plan⁴ also focuses on floodplain management, which depends on wetland and marsh preservation to absorb floodwaters, reduce the effects of sea level rise, and alleviate the impact of storm events like Hurricane Sandy. (Ra195). It also includes NJSEA's responses to predicted climate change impacts because sea level rise rates are higher in New Jersey than the global average, and the Meadowlands are a particularly vulnerable location for sea level rise and flood events. (Ra204-05).

In addition to the Master Plan, development decisions are guided by any applicable redevelopment plans. See N.J.S.A. 13:17-21; N.J.S.A. 5:10A-24 (requirements in creating redevelopment areas and plans). Here, the property at issue falls under the Route 3 East Redevelopment Plan, adopted in 2004. (Aa06). The goal of the Redevelopment Plan is "to allow development of the upland portion of the subject properties with minimal to no impact to the existing wetlands. [And,] [g]iven the sensitivity of the environment, a less intensive

⁴ Unless specified otherwise, "Master Plan" refers to the 2020 Master Plan Update.

development that addresses the wetland conditions of these properties would be more appropriate for the redevelopment area.” (Aa12).

Development decisions in the District are not solely made by the NJSEA. Any developments that impact wetlands, waterways, or tidal waters of the United States, in addition to requiring approval from the NJSEA, must seek approval from the New Jersey Department of Environmental Protection (NJDEP) and the United States Army Corps of Engineers (USACE).

Two elements of the Clean Water Act (CWA), 33 U.S.C. §§ 1251 to - 1389, apply here. First, any development or actions that involve the dredge or fill of wetlands or other protected waters of the United States require a permit from the Corps, i.e., a Section 404 CWA permit. 33 U.S.C. 1344. Second, as the CWA is a cooperative federalism regime, if the federal government plans to take an action that may impact a State’s water quality, the federal government must first obtain a Water Quality Certificate (WQC) from the State per Section 401 of the CWA. 33 U.S.C. § 1341. Per the CWA, the USACE can only issue a Section 404 permit if the state has issued a Section 401 permit, and any conditions attached to the Section 401 permit are incorporated into the Section 404 permit. 33 U.S.C. § 1341(a).

New Jersey has assumed the federal government’s Section 404 permitting authority, and issues freshwater wetlands permits under the Freshwater

Wetlands Protection Act (FWPA), N.J.S.A. 13:9B-1 to -30, across the state as appropriate. N.J.S.A. 13:9B-27; 40 C.F.R. § 233.71. However, within the District the USACE retained Section 404 permitting authority. N.J.S.A. 13:9B-6(a) (activities under the NJSEA “shall require a permit issued under” the CWA rather than the FWPA). As the Army Corps’ wetlands permit constitutes a federal action that may impact New Jersey’s waters, it requires a Section 401 WQC before the USACE may issue a Section 404 permit for a proposed project. NJDEP has incorporated its 401 WQC considerations into either the Coastal Zone Management Rules, N.J.A.C. 7:7-1.1 to -29.10, or the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A-1.1 to -22.20, depending on the proposed project.

However, due to the unique features of the District, in 2005, NJDEP and the NJMC entered into a Memorandum of Agreement (MOA), see also N.J.A.C. 7:7-9.43, which modified the existing New Jersey Coastal Management Program (NJCMP) document. (Ra237). The NJCMP is New Jersey’s plan for managing its coastal areas pursuant to the federal Coastal Zone Management Act of 1972, and was approved by the National Oceanic and Atmospheric Administration (NOAA) in September of 1980. See 16 U.S.C. § 1454 (coastal states with management programs must submit the program to the Secretary for review and approval). (See also Ra245).

Under the 2005 MOA, the NJMC is the lead agency for planning and regulating development in the District. Further, the NJDEP cannot issue a Waterfront Development permit, Federal Consistency Determination (i.e., a Section 401 permit), nor a Water Quality Certificate (WQC), without first receiving a statement of consistency, zoning certificate, or resolution from the NJMC that the development is consistent with the District's Master Plan. In addition, the 1980 NJCMP and 2005 MOA provide that the NJMC and NJDEP will work together to preserve wetlands and other open space, and that this goal is supported by the NJMC's Master Plan.

Consequently, any dredge or fill of wetlands within the District first requires the NJSEA's approval that the activity is consistent with the Master Plan. Next, the NJDEP reviews the proposal and issues a Section 401 permit, as it deems appropriate. Finally, the USACE, upon reviewing the State's decisions, may issue a Section 404 dredge and fill permit as it deems appropriate.⁵

B. History of Development on the Property

The property in question is located at Block 108.04, Lot 5.01, of the tax map for the Borough of East Rutherford, Bergen County. The property covers a total of 32.90 acres (4 acres of uplands and 29 acres of wetlands). The adjacent

⁵ A portion of the District known as the Meadowlands Sports Complex is owned by the NJSEA and is statutorily exempt from many of the laws that otherwise govern development within the District. N.J.S.A. 5:10A-2(k).

property, Lot 5.02, is the site of an existing development project called the Monarch, a multi-family residential mid-rise apartment complex with 316 rental units, first proposed as a high-rise residential development with 614 rental units in 2004 by Group @ Route 3, LLC. Prior to 2016, both lots were part of the same tract of land, Block 108.04, Lot 5, which was later subdivided with the Monarch taking approximately 15.8 acres (as the new Lot 5.02) and the remaining tract of Lot 5 combining with the neighboring Lot 1 to make the new Lot 5.01 at approximately 25.9 acres. (Ra246).

In the initial 2004 proposal, the Monarch's development footprint was 4.25 acres, which included 0.898 acres of wetlands that were filled to "square off" the otherwise upland footprint, to meet other compliance requirements. (Aa257-58). The NJMC found the Monarch plan was consistent with the goals of the Master Plan and the CZMP because it protected the wetlands ecosystem, while also encouraging development, thus achieving the necessary balance under the Master Plan; especially as the developer had initially stated the remaining wetlands on the property would be preserved as open space. (Ra249-50; Aa491; Aa629-32). Group @ Route 3 subsequently received all necessary permits from the NJMC, NJDEP, and the USACE. (Aa276; Ra253). Sometime prior to May 2007, Group @ Route 3 completed the approved wetland fill for the Monarch.

In October 2011, Group @ Route 3 amended the plans for the Monarch by reducing the building height to a four-story mid-rise apartment complex containing 316 rental units. (Aa302). The amendment reduced the building's height and number of rental units, but the development footprint remained the same and required no additional wetland fill. (*Ibid.*). For this reason, the NJMC granted a CZC recommendation and NJDEP deemed no further action was necessary to remediate the site. (Aa379). The Monarch development was subsequently completed and occupied.

In March 2016, NJSEA approved Equinox 360, Associates, LLC and ER2's request for a minor subdivision of Block 108.04, Lots 1 and 5, into Block 108.04, Lots 5.01 and 5.02. (Ra246). Around the same time, ER2 applied for an Individual Wetlands Fill Permit with the USACE, which included supporting documents for the proposed five-story mid-rise residential development with 197 units on the new Lot 5.01, next to the Monarch (now located on the new Lot 5.02). (Ra263-64). The 2016 proposal would involve a substantially greater impact to wetlands than the Monarch, as it involved filling 2.62 acres of wetlands, or—for context—around 80% of the proposed 3.28-acre developmental footprint would involve filled wetlands. (*Id.* at 264).

In May 2016, USACE published notice of ER2's permit application and requested public comments. (Ra266). The United States Environmental

Protection Agency's (EPA) Regional Administrator submitted two responsive comments opposing the application. (Ra276-82). EPA objected to the application noting that the area is designated as an aquatic resource of national importance (ARNI). (Ra276, Ra278). And, as the District had historically experienced significant wetland losses due to development and degradation, the value of any existing aquatic resources and their functions was increased, especially in light of the increasing threats from climate change. (Ibid.) EPA also stated that the application "lacked sufficient documentation concerning alternatives to the project and minimization of unavoidable impacts," especially as it was not a water-dependent project. (Ra277-78).

In addition, NOAA's Assistant Regional Administrator submitted a comment objecting to the proposal. (Ra283). One of NOAA's objections stemmed from how the developments were proposed. Namely, when Group @ Route 3 proposed the Monarch, they did not disclose there would be multiple phases or that the project may have been segmented "to avoid a full evaluation of the impacts of the entire development including impacts to wetlands." (Ibid.). In addition, NOAA determined that the proposal would have adverse effects to an essential fish habitat (EFH) contrary to the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and thus it recommended denying a permit for the proposal. (Ra284-85).

Finally, the Field Supervisor from the United States Fish and Wildlife Service (USFWS) also objected to the proposal for a number of reasons, such as that: 1) the Meadowlands are considered an ARNI; 2) the project is not water-dependent; 3) practicable alternatives that do not involve special aquatic sites must be considered; and, 4) the applicant did not provide sufficient support to demonstrate that no alternative location exists. (Ra289-90). USFWS was also concerned that the proposed wetlands fill would exacerbate a known flooding issue in the Meadowlands due, in part, to the historical loss of wetlands in the region. (Ra291). Finally, similar to NOAA, USFWS found further support was needed to confirm the viability of the proposed mitigation plan of purchasing mitigation bank credits.⁶ (Ra283, Ra291).

In October 2016, NJDEP denied ER2's application for a WQC for the proposed development. (Aa387-88). Subsequently, USACE also denied ER2's Individual Wetlands Fill Permit application. (Ra293). ER2 appealed NJDEP's denial requesting an administrative hearing, however the two parties chose to participate in the NJDEP's Alternative Dispute Resolution (ADR) program

⁶ Wetland mitigation bank credits are purchased from approved banks, where the funds are used to compensate for the impact of regulated wetland activities. This compensation may include restoring, creating, or enhancing other regulated wetlands throughout the state. Wetland mitigation is often required under the FWPA, and may also involve the applicant contributing funds, preserving or creating wetlands on the property in question, or donating land.

instead of proceeding immediately to litigation. (Aa494). On November 2, 2017, ER2 requested a Statement of Consistency from NJSEA regarding its 2016 proposed development. In response, NJSEA issued a CZC recommendation to NJDEP that the project was not consistent with the District's Master Plan and, thus, at odds with the State's CZMP. (Ra296).

In January 2018, ER2 requested NJSEA reconsider its CZC recommendation, and included additional supporting documents. (Ibid.) NJSEA reviewed the additional documents and, in March 2018, again determined that the project was not consistent the District's Master Plan. (Aa488-91; Aa492).

On or about August 9, 2018, the NJDEP and ER2 agreed to ADR Terms. Under these terms, NJDEP agreed to "enter into a settlement agreement contingent upon receipt of a determination from [NJSEA] that [ER2's] project is consistent with the Hackensack Meadowland's District Master Plan." (Aa494). If such a determination was issued, and absent any comments that issuing a WQC is based on incomplete or inaccurate information, the NJDEP would issue ER2 a WQC. (Ibid.) The ADR Terms will only be finalized in a settlement agreement if the NJDEP receives a consistency determination from NJSEA. (Aa495).

In July 2020, ER2 updated its proposed project and reapplied to NJSEA for a Zoning Certificate and CZC recommendation. (Aa496). The updated plan proposed a development footprint of 2.4 acres, consisting of 1.8 acres of wetlands and 0.6 acres of uplands. (Aa631-32). Though it reduced both total development footprint and acres of wetland fill from the 2016 proposal, the 2020 proposal still exhibited the same issues that made the 2016 version inconsistent with the Master Plan. Namely, the proposal still used little upland property and would effectively create the development footprint by filling wetlands because the amount of fill would be three times the acreage of uplands on the site. (Aa632). Consequently, NJSEA determined this was not consistent with the Master Plan, and thus not consistent with the State's CZMP. (Ibid.) Therefore, on January 26, 2021, and January 27, 2021, NJSEA sent copies of its determination to NJDEP and ER2 respectively.

ER2 appealed NJSEA's January 2021 CZC recommendation in February 2021. (Aa633). The matter was transmitted to the Office of Administrative Law for an adjudicatory hearing on March 25, 2021. Both parties agreed the dispute was a legal one and would be decided on cross-motions for summary decision. (Aa656). In support of the motions, the parties provided a joint stipulation of fact and identified thirty-three documents from the extensive record which were most relevant to the decision before the ALJ.

The ALJ issued their initial decision on November 14, 2023, granting NJSEA's motion for summary decision and denying Appellant's, finding that this matter was ripe for summary decision, and concluding that: (1) NJDEP's decision did not dictate the NJSEA's; (2) NJSEA considered the word "minimal" in its ordinary meaning; and (3) ER2 did not sustain its burden of proving by a preponderance of the evidence that NJSEA's determination was arbitrary, capricious, or unreasonable. (Aa660-62). On March 28, 2024, the NJSEA issued a final decision. ER2 appealed on May 9, 2024.

ARGUMENTS

POINT I

NJSEA PROPERLY DETERMINED THE PROPOSED DEVELOPMENT WAS INCONSISTENT WITH THE MASTER PLAN. (Responding to Appellant's Point I.A).

In New Jersey, judicial review of a final agency decision is limited. In re Proposed Xanadu Redevelopment Project, 402 N.J. Super. 607, 640 (App. Div. 2008). Courts may only reverse an agency decision if it is arbitrary, capricious, or unreasonable; meaning the decision (1) violates express or implied legislative policies; (2) offends the State or Federal Constitutions; or (3) is based on findings not supported by substantial, credible evidence in the record. In re Petition for Rulemaking, 117 N.J. 311, 325 (1989); U. Cottage Club of Princeton New Jersey Corp. v. N.J. Dept. of Env't Prot., 191 N.J. 38, 48 (2007); Mazza v.

Bd. of Trs., 143 N.J. 22, 25 (1995). In other words, courts intervene only when “it is clear that the agency action is inconsistent with its mandate.” In re Petition for Rulemaking, 117 N.J. at 325.

Although a court may review an NJSEA master plan action, where there is a claim of arbitrariness or unreasonableness, as there is here, Kelly v. Hackensack Meadowlands Dev. Com., 172 N.J. Super. 223, 228 (App. Div. 1980), there is a strong presumption of reasonableness accompanying an agency’s exercise of its statutorily delegated responsibility. Xanadu, 402 N.J. Super. at 632 (internal quotes omitted).

Although courts are not bound by an agency’s interpretation of a statute or of a purely legal issue, Mayflower Sec. Co. v. Bureau of Sec., Div. of Consumer Aff., 64 N.J. 85, 93 (1973), an administrative agency is afforded deference in interpreting and implementing the statutes it is responsible for enforcing. In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488-89 (2004) (citing In re Distribution of Liquid Assets, 168 N.J. 1, 10-11 (2001)). That deference recognizes the agency’s specialized expertise and superior knowledge in the particular field it regulates. Allstars Auto Group, Inc. v. N.J. Motor Vehicle Comm’n, 234 N.J. 150, 158 (2018) (quoting Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 10 (2009)).

Appellant's rely on the incorrect standard and point to an unpublished decision, State v. Shackleford, to shift the burden to the NJSEA to demonstrate that its decision was (a) not premised upon consideration of all relevant factors, (b) based on considering irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment. (Ab32, citing State v. Shackleford, 2015 N.J. Super. Unpub. LEXIS 852 (App. Div. 2015); Aa674). However, precedential caselaw dictates that the Appellant has the burden to prove that the NJSEA's decision was arbitrary, capricious, or unreasonable. See Atkinson v. Parsekian, 37 N.J. 143, 149 (1962) (in administrative agency proceedings "it is only necessary to establish the truth of the charges by a preponderance of the believable evidence"); Boyle v. Riti, 175 N.J. Super. 158, 166 (App. Div. 1980) (there is a well-established presumption of reasonableness to an administrative agency action and the challenging party has the burden of showing that it was arbitrary, capricious, or unreasonable). (Aa662). Appellant has failed to meet that burden because the preponderance of the credible evidence supports the NJSEA's decision.

A. NJSEA's determination was reasonable and supported by the substantial, credible evidence in the record.

NJSEA's decision is fully consistent with the Master Plan because in balancing the various interests this decision protects vital natural resources, a

significant goal of the Master Plan. The first stated goal in the 2020 Master Plan is to safeguard and restore the District’s “irreplaceable heritage of natural and historic resources.” (Ra16).⁷ The District is currently the largest remaining area of brackish tidal wetlands in the New York and New Jersey Harbor Estuary, and the restoration of the District is an ongoing process after the historic misuse of the land from development and dumping. (Ra17). Moreover, considering the current and predicted effects of climate change, it is undeniable that every parcel of wetlands in the District contains value for wildlife habitat, floodwater storage, and projected marsh migration. (Ra20). Consequently, when evaluating proposed developments, the NJSEA must first determine whether the proposal is consistent with the Master Plan’s goal of preserving the District’s remaining wetlands and waterways. (Ra17, Ra20). The Master Plan recognizes the need to strike the right balance between competing priorities.

For example, the Master Plan strives seeks to “facilitate the creation of housing opportunities in suitable locations to accommodate the needs of the region’s population,” and to increase housing opportunities and affordable units. (Ra19). But it stresses the importance of “balance[ing] the need for housing

⁷ Appellant mistakenly claims the NJSEA’s decision—issued in January 2021—was based on its interpretation of the 2004 Master Plan not the 2020 Master Plan. This is incorrect as the 2020 Master Plan was adopted and in effect in February 2020.

with other needs, particularly the needs for environmental preservation.” (Ibid.). See also N.J.S.A. 5:10A-19 (requiring the NJSEA to “safeguard the environmental resources of the district” and encouraging the NJSEA to “[p]reserve wetlands to protect wildlife, water quality, and flood storage value.”).

NJSEA’s determination is also consistent with the goals and policies in the applicable redevelopment plans. See generally N.J.S.A. 13:17-21 (statutory authority to designate redevelopment areas and adopt redevelopment plans). See also N.J.A.C. 19:3-5.1 to -5.16 (rules governing redevelopment plans). Redevelopment plans act as criteria in making land use decisions, and will supersede other NJSEA zoning regulations unless specified otherwise. N.J.A.C. 19:4-5.123. However, “[a]ll provisions of the redevelopment plan shall be either substantially consistent with the NJMC Master Plan, or designed to effectuate the Master Plan.” N.J.A.C. 19:3-5.9.

The property at issue here is within the Route 3 East Redevelopment Area, adopted by the NJMC in 2004. (Aa06). The goal of this plan is “to allow development of the upland portion of the redevelopment area with minimal to no impact to the existing wetlands, which constitute the majority of the redevelopment area.” (Aa12. See also Ra71). The redevelopment plan also provides that, considering the sensitive environment, less intensive

developments that address the wetland condition of the area are more appropriate. (Aa12). The purpose of the redevelopment plan is to provide opportunities for mixed-use developments, including residential housing. However, developments “shall be directed to upland sites, not environmentally sensitive areas.” (Aa20).

In its determination letter, the NJSEA first noted that the proposed activity would take place and involve fill of property within an area of delineated tidal wetlands per the USACE’s Jurisdictional Determination from January 2004. (Aa627). And, that the majority of the proposal involved filling these wetlands. Next, the letter discussed the 2020 Master Plan, and its principal goal of safeguarding and restoring the Hackensack Meadowlands’ irreplaceable heritage as a natural resource. Ibid. This included preserving the District’s remaining wetlands and waterways.

Further, the NJSEA identified the property as being within the Master Plan’s “Preserve Planning Area” land use designation on the District’s Land Use Plan. Ibid. The Preserve Planning Area promotes the preservation of open space, habitat protection and enhancement within the District. The letter then quoted the Master Plan’s recognition of the presence and value of upland areas, in addition to wetland areas within the Preserve Planning Areas, and that “[e]very remaining parcel of wetlands in the District, in many cases inclusive of

adjoining upland areas, incontrovertibly contains value, not only for wildlife habitat, but also for their functionality to accommodate floodwater storage and projected marsh migration.” (Aa627 (quoting Ra195)).

Finally, the letter notes that while residential uses are permitted in the redevelopment area, the plan specifically states that the goal is to allow development of the upland portion of the subject properties with minimal to no impact to existing wetlands.” (Aa628).

In its brief, ER2 argues that NJSEA found the proposed development inconsistent with the Master Plan and Redevelopment Plan because it included wetlands fill, in general. Rather, NJSEA found it was inconsistent because—among other things—a significant majority of the development footprint was wetlands fill, thus the proposal effectively created a development footprint from filling environmentally-sensitive wetlands. (See Aa627-28).

Each land use decision is highly fact-sensitive, but the NJSEA’s reasoning in considering another proposal provides a helpful contrast in explaining why its decision here was reasonable. Unlike ER2, the Monarch proposal clearly met the goals of the Redevelopment Plan and Master Plan. The latter developed the upland portion of the area with only minimal and unavoidable impacts to existing wetlands necessary to “square off” the upland footprint in order to comply with other requirements that may necessitate a footprint of that size.

The current proposal, on the other hand, would develop only little more than half an acre of upland area while filling almost two acres of wetland in return. This proposed development includes little of the upland portion of the lot, instead involving significant fill of wetlands which would cause significant impacts to these environmentally sensitive wetlands.

In the case of the 2004 proposal, the NJSEA balanced the need for residential housing and development of the area under the Redevelopment Plan with the need to protect the District's wetlands. (See Aa632). There was no indication that a second development phase was planned at the location, and the proposal involved a relatively small amount of fill to develop the upland area of the Lot, consequently the NJMC determined that this was an acceptable balance of interests. In the present case, there is no balance in interests. The property is in an ARNI and the property's existing land use, and future land use per the Master Plan's Land Use Plan, is categorized as wetlands. (Ra219). Due to the historic treatment of this vital natural resource, the NJSEA's 2004 and 2020 Master Plans stressed the importance of preserving and improving the existing wetlands. Which is of special importance considering the current and predicted impacts from climate change, such as increased flooding.

Appellant claims the limited basis for NJSEA's denial was its determination that the proposed development would not meet the

Redevelopment Plan's requirement for "minimal to no impact" to wetlands. (Ab15, Ab25-27). Appellant ignores the other reasons for why the application was being denied, as discussed further below. (Aa627-28).

Therefore, as the record clearly shows, NJSEA's determination that the proposal is not consistent with the Master Plan and Route 3 East Redevelopment Plan was not arbitrary, capricious, or unreasonable.

B. "Minimal to no impact" as used in the Redevelopment Plan means a preference for developing uplands with a very small impact to no impact to wetlands.

ER2 relies extensively on the use of the word "minimal" in the Redevelopment Plan. According to ER2, "minimal" should be read as the "least possible in light of the project's purpose," a standard taken from an NJDEP statute and thus not applicable to the decision before the NJSEA.

However, that word, and the oft cited corresponding phrase ("minimal to no impact") is found only within the Route 3 East Redevelopment Plan. (Aa12). And, as it is not a technical term, should be understood using its ordinary and common-sense meaning. Further, ER2's focus on and interpretation of this word not only misunderstands the phrase it is qualifying but ignores the other support for NJSEA's determination as highlighted above, namely the inconsistency with the Master Plan.

The Redevelopment Plan covers the prior Block 108.04, Lots 1, 5, and 6 and includes 42.85 acres. (Aa10). The land is directly adjacent to the Berry's Creek Canal and located nearby to the NJSEA's Sports Complex. (Aa10-11). This area was originally part of the Berry's Creek Center (BCC) a Specially Planned Area created under the original agency, the Hackensack Meadowlands Development Commission in the 1970s. (Aa11). However, this area was mostly undeveloped since the BCC was first developed. Thus, the NJMC's goal in creating this redevelopment plan was

to allow development of the upland portion of the subject properties with minimal to no impact to the existing wetlands. Given the sensitivity of the environment, a less intensive development that addresses the wetland conditions of these properties would be more appropriate for the redevelopment area. The [NJMC]'s objective for this redevelopment area [was] to encourage positive development of the area that will contribute to the economy and environment. This redevelopment plan will obtain a public objective of creating orderly development while protecting the public health, safety[,] and welfare.

[Aa11-12.]

See also (Aa20) (discussing recommended land use for the area and providing growth should be directed at upland sites). NJSEA has not prescribed a technical meaning to the word "minimal" and so only the ordinary and popular meaning the word is normally given would apply. See Cruz v. Trotta, 363 N.J. Super. 353, 358 (App. Div. 2003) (the plain meaning is the law "unless its spirit

is inconsistent with the literal sense of its terms” or unless it is evident the term is used in a technical sense).

To the extent there is any dispute as to the common understanding of the word “minimal,” the Redevelopment Plan provides that any undefined words should have the definition provided in the NJMC Zoning Regulations, which in turn provide that any word or phrase not defined in the regulations “shall have the meaning as defined in the most recent edition of the Merriam-Webster’s Collegiate Dictionary.” N.J.A.C. 19:4-2.1(d). (Aa12). Currently, as well as at the time the Redevelopment Plan was adopted, the most recent edition of the Merriam-Webster Collegiate Dictionary is the 11th edition, published in 2003, which defines “minimal” as (a) the least possible (b) barely adequate (c) very small or slight. Among these definitions the NJSEA interprets the word “minimal” in the Redevelopment Plan to most closely resemble the third definition, i.e., “very small or slight.” Consequently, the Redevelopment Plan’s goal should be read as encouraging development to the upland portions of the area with a “very small or slight” or no impact to wetlands.

To the extent further analysis is necessary, the word should be examined in the context of the phrase with which it is associated. See State v. Afanador, 134 N.J. 162, 172 (1993) (citing Germann v. Matris, 55 N.J. 193, 200 (1970)) (analyzing “organizer” in context of other terms denoting one’s authority to

direct the acts of others as indicating that the word must have similar connotations, “namely, the primary meaning of ‘organizer’ in common usage”). The word appears in the following sentence: “The goal of the redevelopment plan is to allow development of the upland portion of the subject properties with minimal to no impact to the existing wetlands.” (Aa12 (emphasis added); Aa20). Therefore, if there is any ambiguity in the term “minimal,” when viewed in the context of its associated terms it is clear the Redevelopment Plan intended that any development in the redevelopment area would be on upland portions, with any development or impact to existing wetlands to fall on a scale from a very small impact to no impact.

ER2’s proposed development would not meet this standard. It involves filling almost two acres of wetland, with only a little more than a quarter of the total development footprint including uplands. Thus, in keeping with both the Redevelopment Plan, and the Master Plan’s goal of preserving and protecting wetlands, it was not arbitrary, capricious, or unreasonable for NJSEA to determine that the proposal was inconsistent with the Redevelopment Plan or Master Plan in light of their stated purposes.

POINT II

NJSEA CANNOT APPLY THE FRESHWATER WETLANDS PROTECTION ACT TO A CONSISTENCY DETERMINATION. (Responding to Appellant's Point I.B and II).

ER2 claims NJSEA's decision was arbitrary, capricious, and unreasonable because NJSEA did not make its decision based on the standards within the Freshwater Wetlands Protection Act (FWPA), N.J.S.A. 13:9B-1 to -30, or otherwise defer to the NJDEP's approval as indicated in the ADR term sheet between ER2 and NJDEP. Appellant's arguments fail because NJSEA made a CZC recommendation under its statutes. A consistency determination under the Master Plan considers different factors than those under the FWPA. Moreover, the FWPA does not apply within the tidal areas of the District.

First and foremost, the narrow question on appeal is whether the NJSEA correctly found the proposed activity to be inconsistent with the NJSEA's Hackensack Meadowlands District Master Plan. Appellant argues that the impacts to wetlands are "the least possible in light of the project's purpose," referencing the FWPA and its regulations. (Ab19-20). The NJDEP's decision to issue a WQC is not at issue and ER2 is conflating the NJDEP's WQC with NJSEA's wholly separate CZC recommendation.

NJSEA's CZC recommendation evaluates whether the use of coastal and marine resources is consistent with the District's Master Plan and the State's

CZMP. See N.J.S.A. 5:10A-13; N.J.S.A. 13:17-12; N.J.A.C. 7:7-9.43(b).⁸ As such, the NJSEA’s project review relies on the District’s Master Plan, regulations, and any adopted Redevelopment Plans, which regulate the comprehensive development of the District, consistent with the carrying capacity of the land and the preservation of critical wetlands and waterways and the ecological balance between natural open areas and development. See N.J.S.A. 5:10A-19; N.J.S.A. 13:17-20, -21; N.J.A.C. 19:3-5.9; N.J.A.C. 19:4-5.123. Notably, the NJSEA does not evaluate whether a proposal has no “practicable alternatives.” NJSEA’s project review incorporates different considerations than the NJDEP’s WQC, including but not limited to: public utilities; housing; transportation, including parking and public transit lines above and below ground; public and semi-public facilities such as schools, playgrounds, libraries, and hospitals; distribution and density of the population; community appearance; and, facilities for tourism, sports, and entertainment. N.J.S.A. 5:10A-10(e); N.J.A.C. 19:3-5.9. In contrast, NJDEP’s WQC evaluates whether the proposed activity will impact the water quality.

⁸ As the Master Plan and CZMP must be consistent with each other (N.J.A.C. 7:7-9.43(b)), a determination by the NJSEA that a proposed activity is inconsistent with the Master Plan means the activity is likewise inconsistent with the CZMP.

Here, the project is located in the coastal zone, but proposed filling wetlands, so the NJDEP must apply portions of the FWPA Rules to this 401 WQC application. N.J.A.C. 7:7-9.27(b)(1) (CZM rule instructing NJDEP to apply sections 5, 7, 9 and 10 of the FWPA Rules to WQC in the Meadowlands). Due to the scope of the proposed project, NJDEP applied subchapter 10 of the FWPA in the WQC analysis. N.J.A.C. 7:7A-9.1. Thus, DEP applied N.J.A.C. 7:7A-10.2's provisions to ER2's application and issued a WQC, apparently finding the project met the provision's requirements including considering any "practicable alternatives" once the "cost, existing technology, and logistics" were taken into account. N.J.A.C. 7:7A-10.2(b)(1), (c). But, again, NJDEP's decision is not before this court.

Appellant also argues that NJDEP has more expertise in wetlands under the State's Water Quality Standards and CZMP, and thus should be deferred to over the NJSEA for this agency action by the NJSEA. (Ab26). This court need not decide which agency has more expertise in wetlands generally, as each agency has expertise in wetlands as they apply to their respective governing laws. As seen in the MOA between the NJDEP and NJSEA, the NJDEP cannot issue certain approvals, including WQCs and Waterfront Development Act permits under N.J.S.A. 12:3-5, without first receiving a positive determination

of consistency from NJSEA.⁹ This arrangement between the agencies recognizes the special nature of the area, which requires NJSEA to evaluate proposed developments according to different standards than the NJDEP when determining whether a permit may be issued. NJSEA's expertise regarding development decisions in the Meadowlands is owed deference, Allstars Auto Group, 234 N.J. at 158, and NJSEA appropriately made its CMZ decision independently from NJDEP's WQC.

Finally, the FWPA and its regulations do not apply in the District. N.J.S.A. 13:9B-6. The USACE retained freshwater wetlands permitting jurisdiction in the District. Moreover, only the NJDEP can issue permits under the FWPA. N.J.S.A. 13:9B-9. Consequently, if the NJSEA applied the FWPA or its regulations without Legislative approval, it would have been acting in an arbitrary, capricious, and unreasonable manner. See e.g., Jersey Cent. Power & Light Co. v. Melcar Utility Co., 212 N.J. 576, 600 (2013) (holding an agency can only act reasonably within the scope of its delegated authority); Hackensack Riverkeeper, Inc. v. N.J. Dept. of Env't Prot., 443 N.J. Super. 293, 311-12 (App. Div. 2015) (invalidating two NJDEP regulations as they were adopted outside of the agency's statutory authority); N.J. Coalition of Healthcare Professionals,

⁹ NJDEP met that requirement here by issuing a WQC that was explicitly conditioned upon ER2 receiving NJSEA's approval. (Aa494-95).

Inc. v. N.J. Dep't of Banking & Ins., 323 N.J. Super. 207, 269 (App. Div. 1999) (rejecting a challenge that are fundamentally disagreements with the policies of a statute and its implemented regulations).

However, even if the NJSEA could apply the FWPA, and that the statute applied in the District, ER2's reliance, and interpretation of the phrase "in light of the project's purpose," is mistaken. This standard arises as part of the initial step in a review where the DEP determines—as part of a freshwater wetlands individual permit approval—whether the proposed activity is water dependent. N.J.S.A. 13:9B-9. Notably, residential development is not water dependent. N.J.A.C. 7:7A-13. If the activity is not water dependent, the applicant must then show that the activity has no practicable alternative (as defined in the statute and regulations) and there is a "compelling public need for the proposed activity greater than the need to protect the freshwater wetland that cannot be met by essentially similar projects in the region." N.J.S.A. 13:9B-10. The "compelling public interest" standard also adds numerous statutory requirements to consider which ER2 ignores. N.J.S.A. 13:9B-11. Thus, the "project purpose" would only be one piece of a much broader inquiry rather than the sole question as ER2 now mistakenly posits.

As the NJSEA's final agency decision is well-grounded in NJSEA's Plans and regulations and the FWPA is inapplicable to the Project, NJSEA's determination should be upheld.

POINT III

THERE ARE NO GENUINE DISPUTES OF MATERIAL FACT WARRANTING A REMAND. (Responding to Appellant's Point III).

Appellant argues in the alternative that this matter should be remanded for a plenary hearing to consider unaddressed mixed question of law and fact as to what "minimum to no impacts" means as a matter of law, and as a question of fact whether the proposal meets or exceeds a threshold for "minimum impacts." (Ab31-32). This new position is at complete odds with their conduct below.

During briefing at the OAL and in their exceptions filed with the NJSEA's Board the Appellant did not raise this issue as being a material disputed fact, nor otherwise raise any claim of mixed question of fact and law which would limit summary decision. As noted by the ALJ in their initial decision, the record transmittal included an extensive record that the parties reviewed and together chose the documents they believed most relevant to the case as the parties also both agreed that the case was a legal dispute, rather than a factual one. (Aa656). Towards that end, the parties filed a joint stipulation of facts and included thirty-three of the most relevant documents from the record in preparation for their

cross-motions for summary decision. (Ibid.; Aa04). This, in turn, led the ALJ to find that there were no material facts and summary decision was proper, which was later adopted in full by the Board. (Aa658, Aa05).

“When both parties to an action ‘move[] for summary judgement, one may fairly assume that the evidence was all there and the matter was ripe for adjudication.’” Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 450 (2007) (quoting Morton Int’l, Inc. v. Gen. Accident Ins. Co. of Am., 266 N.J. Super. 300, 323 (App. Div. 1991) (alteration in original)). As both parties cross-moved for summary decision, and did not claim that there was a material fact in dispute, or a mixed question of law and fact, the ALJ and Board were correct in deciding the matter was ripe for summary decision and the Appellant cannot now claim there is a material factual dispute warranting a remand for a plenary hearing.

CONCLUSION

For the above reasons this court should uphold the NJSEA Board of Commissioner's final decision.

Respectfully submitted,

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DATE: February 3, 2025

EAST RUTHERFORD TWO, LLC,

Appellant,

v.

**NEW JERSEY SPORTS AND
EXPOSITION AUTHORITY,**

Respondent.

**SUPERIOR COURT OF
NEW JERSEY**

APPELLATE DIVISION

DOCKET NO. A-002660-23T1

CIVIL ACTION

**ON APPEAL FROM FINAL
ACTION OF:**

**NEW JERSEY SPORTS AND
EXPOSITION AUTHORITY**

REPLY BRIEF OF APPELLANT EAST RUTHERFORD TWO, LLC

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

TABLE OF APPENDIX.....iii

I. PRELIMINARY STATEMENT.....1

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS.....1

III. ARGUMENT.....1

The NJSEA’s interpretation of the term “minimal” wetland disturbance is arbitrary, capricious, and unreasonable.....1

A. The NJSEA’s interpretation of the term “minimal” wetland disturbance is inconsistent with the existing meaning of this term under New Jersey jurisprudence (Replying to Respondent’s Points I and II).....1

1. The Freshwater Wetlands Protection Act applies to wetlands in the Hackensack Meadowlands through the Water Quality Certification process, and the NJSEA contradicted NJDEP’s Water Quality Certificate analysis without adequate justification.....1

2. Appellant has satisfied its burden of showing that the NJSEA’s decision was arbitrary, capricious, and unreasonable, but the NJSEA has not satisfied its burden of adequately justifying its denial of a Zoning Certificate for this project.....6

B. The interpretation of “minimal” upon which the NJSEA relied in denying Appellant’s application is inconsistent with the NJSEA’s past interpretation of “minimal” in the context of other development proposals (Replying to Respondent’s Point I).....8

- C. The interpretation of the term “minimal” upon which the NJSEA relied in denying Appellant’s application is incompatible with the agency’s affordable housing obligations under New Jersey law and under NJSEA’s planning documents (Replying to Respondent’s Point I).....9
- D. This Court should remand this matter to the NJSEA for further fact-finding because material mixed questions of fact and law remain unresolved (Replying to Respondent’s Point III).....12

IV. CONCLUSION.....15

TABLE OF AUTHORITIES

Case Law

Atkinson v. Parsekian, 37 N.J. 143 (1962).....7

In re Flood Hazard Area Verification and Flood Hazard Area Individual Permit, 1113-22-0002.1 LUP220002, No. A-1639-22 (App. Div. Dec. 27, 2024).....12, 13, 14

In re Issuance of Permit by Dep’t of Env’tl. Prot., 120 N.J. 164 (1990).....3, 7

In re N.J.A.C. 7:1B-1.1 et seq., 431 N.J. Super. 100 (App. Div. 2013).....14

Lower Main St. Assocs. v. N.J. Hous. & Mortgage Fin. Agency, 114 N.J. 226 (1989).....5

Tannock v. N.J. Bell Telephone Co., 223 N.J. Super 1 (App. Div. 1988).....12

Statutes

33 U.S.C. § 1251 et seq.....2

33 U.S.C. § 1341.....2

N.J.S.A. 13:9B-1 et seq.....1, 3

N.J.S.A. 13:9B-6.....2

N.J.S.A. 13:9B-10.....5

N.J.S.A. 52:18A-196 et seq......19

Regulations

N.J.A.C. 7:7-7.29(b)(1).....2

N.J.A.C. 7:7A-1 et seq......2

Other Authorities

Minimal, Merriam-Webster's Collegiate Dictionary (11th ed. 2003).....5, 6

New Jersey Meadowlands Commission, Redevelopment Plan for the Route 3 East Redevelopment Area (2004).....4, 11

New Jersey State Planning Commission, The New Jersey State Development and Redevelopment Plan (2001).....9

New Jersey State Planning Commission, The Preliminary Draft of the New Jersey State Development and Redevelopment Plan (2004).....9

United States Environmental Protection Agency, et al., Draft Environmental Impact Statement on the Special Area Management Plan for the Hackensack Meadowlands District, NJ (1995).....8

TABLE OF APPENDIX

In re Flood Hazard Area Verification and Flood Hazard Area Individual Permit, 1113-22-0002.1 LUP220002, No. A-1639-22 (App. Div. 2024).....Arba001

I. PRELIMINARY STATEMENT

Appellant East Rutherford Two, LLC (hereinafter “Appellant”) offers this reply brief in response to the Brief of Respondent New Jersey Sports and Exposition Authority (the “NJSEA”). The case at bar involves the NJSEA’s denial of a Zoning Certificate in connection with the construction of multi-family building with an affordable housing component along Route 3 Eastbound in the Borough of East Rutherford, Bergen County. Appellant respectfully directs the Court to its discussion of the issues at bar in its September 30, 2024 brief.

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS

Appellant relies upon the procedural history and statement of facts as set forth in its September 30, 2024 brief.

III. ARGUMENT

THE NJSEA’S INTERPRETATION OF THE TERM “MINIMAL” WETLAND DISTURBANCE IS ARBITRARY, CAPRICIOUS, AND UNREASONABLE.

A. *The NJSEA’s plain-language interpretation of “minimal” wetland disturbance is inconsistent with the accepted meaning of this term under New Jersey jurisprudence (Replying to Respondent’s Points I and II).*

1. The Freshwater Wetlands Protection Act applies to wetlands in the Hackensack Meadowlands through the Water Quality Certification process, and the NJSEA contradicted NJDEP’s Water Quality Certificate analysis without adequate justification.

The Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq. (“FWPA”), which regulates activities impacting wetlands impacts under New Jersey law, does

not apply to the areas under the NSJEA’s jurisdiction. See N.J.S.A. 13:9B-6. However, the considerations identified by the FWPA *do* apply to projects proposed in the Meadowlands through the requirements of Federal and State law. Stated briefly, the filling of wetlands in the Meadowlands District requires a permit from the U.S. Army Corps of Engineers under § 404 of the Federal Clean Water Act, 33 U.S.C. § 1251 et seq. The granting of this permit is conditioned of the issuance of a “Water Quality Certificate” (“WQC”) from the State in which the wetlands are located. See 33 U.S.C. § 1341; N.J.A.C. 7:7-7.29(b)(1). NJDEP, in turn, assesses WQC applications based on the criteria set forth in the Freshwater Wetlands Protection Act regulations (N.J.A.C. 7:7A-1 et seq.). See Aa390.¹

Appellant, consistent with this framework, sought a WQC from NJDEP for the proposed project. NJDEP’s initial denial of this request for a WQC (Aa0387), and its subsequent reversal of that denial (Aa0494), are of the utmost importance to understanding and resolving the dispute at bar. NJDEP initially denied a WQC for this project due to alleged inadequacies in Appellant’s analysis of alternatives that would result in less impairment of the affected wetland and aquatic ecosystem. See Aa0391-398.

¹ “Rb__” refers to Respondent’s brief, “Ab__” refers to the brief that Appellant submitted to this court on September 30, 2024, “Aa__” refers to the appendix to Appellant’s September 30, 2024 brief, and “Arba__” refers to the appendix to this reply brief.

Appellant appealed NJDEP's denial of the WQC. In the course of the proceedings before the Office of Administrative Law, Appellant submitted a report that thoroughly addressed all of NJDEP's stated reasons for denying the WQC. See Response of East Rutherford Two, LLC, to NJDEP September 18, 2016 Denial of Water Quality Certificate, File # 0212-04-0003.1 CDT 160001, Aa0405-483. Thereafter, NJDEP concluded that it was satisfied that this report "adequately addressed and responded to the concerns expressed in the Denial" and agreed to enter into a settlement agreement to issue the requested WQC. Aa0494. NJDEP, in doing so, agreed that the project's location and design were such that it would result in minimal impairment to wetlands while achieving the project's goal of providing housing, including affordable housing, as contemplated by the Hackensack Meadowlands District Master Plan. NJDEP's issuance of the WQC was, however, contingent on Appellant's receipt of a determination from the NJSEA that the project is consistent with the Hackensack Meadowlands District Master Plan. See Aa0494. Appellant then applied to the NJSEA for a Zoning Certificate.

New Jersey law does not compel the NJSEA to acquiesce to NJDEP determinations concerning proposed wetlands impacts. However, the FWPA represents the clearest articulation of the standards against which proposed wetlands disturbances are measured. With this in mind, New Jersey law is clear that whenever an agency issues a final agency action, it must sufficiently explain the basis for that

action. See In re Issuance of Permit by Dep't of Env'tl. Prot., 120 N.J. 164, 173 (1990). This obligation is especially pronounced where, as here, the decision in question directly contradicts findings made by another agency with greater expertise. The lack of an adequate explanation for the NJSEA's decision here is particularly problematic because it concludes that Appellant's project would have more than a "minimal to no impact" to wetlands, even though NJDEP—which has relevant expertise with respect to wetlands—expressly concluded that there is nothing more than Appellant can do attain fewer wetlands impacts in connection with this project. In sum, the NJSEA's denial of Appellant's application for a Zoning Certificate was arbitrary, capricious and unreasonable because the agency failed to articulate any basis for reaching a conclusion concerning wetlands impacts that directly contradicts the conclusion at which NJDEP arrived from the exact same factual record.

The NJSEA's denial of Appellant's Zoning Certificate application rests exclusively on one single phrase from the Route 3 East Redevelopment Plan:

The goal of the redevelopment plan is to allow development of the upland portion of the subject properties with minimal to no impact to the existing wetlands.

Aa0012; see Aa0628.

While the NJSEA is not bound by NJDEP's regulations or the definitions set forth therein, it cannot ignore the longstanding meaning and numerous interpretations of the term "minimal" that have evolved in the context of NJDEP

wetlands permitting. To the extent that the NJSEA wishes to depart from the well-understood meaning of “minimal” wetlands disturbance in favor of the novel interpretation adopted here, it must generally provide the public with notice to this effect. See Lower Main St. Assocs. v. N.J. Hous. & Mortgage Fin. Agency, 114 N.J. 226, 235-36 (1989). The NJSEA’s inaction in this respect, however, means that its interpretation of “minimal” wetlands disturbance should not enjoy the presumption of reasonableness to which the NJSEA claims it is entitled. See Rb15.

The Legislature has identified numerous factors that color the threshold for “minimal” wetlands disturbance at N.J.S.A. 13:9B-10, which allows wetlands permits to be issued only upon a finding of “minimal feasible impairment,” “minimal feasible interference,” and “minimal practicable degradation,” among other requirements. N.J.S.A. 13:9B-10 evidences the Legislature’s intent for “minimal” wetlands impacts to be interpreted as “the least possible”—i.e., the first definition of “minimal” provided by Merriam-Webster’s Collegiate Dictionary (11th ed.), rather than the third definition (“very small or slight”) upon which the NJSEA summarily relies. See Rb24.

Accordingly, the existing legal treatment of the term “minimal” demonstrates that, contrary to the NJSEA’s position, “minimal” has a widely understood meaning in the context of wetlands impact. Moreover, this treatment confirms that, to the extent this court might be prepared to consider a plain-language dictionary meaning

of “minimal,” the definition adopted by the NJSEA here (“very small or slight”) is not reasonable given the term’s existing meaning and the context in which it arises.

Appellant agrees that a dictionary may be the best source for ascertaining a term’s *plain-language* meaning, but the NJSEA’s brief merely offers that, among the three definitions listed in the dictionary, “the NJSEA interprets the word ‘minimal’ in the Redevelopment Plan to most closely resemble the third definition, i.e., ‘very small or slight,’” without providing any justification for this position. The NJSEA’s underlying decision is likewise silent in this regard. Instead, especially given the term’s existing meaning in the context of wetlands impacts, the best and in fact the only plausible meaning of “minimal” in this instance is the first definition offered by Merriam-Webster’s Collegiate Dictionary—i.e., “the least possible.” Accordingly, the NJSEA’s denial of Appellant’s Zoning Certificate application was arbitrary, capricious and unreasonable because it relied on a definition of “minimal” that was not based on all relevant factors, including the existing meaning of the term in connection with wetlands impacts.²

2. Appellant has satisfied its burden of showing that the NJSEA’s decision was arbitrary, capricious, and unreasonable, but the NJSEA has not satisfied its burden of adequately justifying its denial of a Zoning Certificate for this project.

² Although not suggested in Appellant’s September 30, 2024 brief, an obvious path for NJSEA to adopt a definition of “minimal” wetlands disturbance for Zoning Certificate purposes would be agency rulemaking to this effect.

Briefly, the NJSEA mischaracterizes Appellant's position with respect to the burden of proof in this dispute. See Rb16. Appellant fully recognizes that it bears the burden of demonstrating that agency action is arbitrary, capricious and unreasonable. See Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). However, the allocation of this burden to Appellant does not absolve the NJSEA of its equally legitimate obligation to articulate a sufficient justification for its decision. Decades of case law are unambiguous in requiring administrative agencies to provide sufficient justification for their actions to allow for a court to meaningfully review their basis and integrity. See, e.g., In re Issuance of a Permit by Dep't of Env't., 120 N.J. 173 (1990) (explaining that agencies must articulate the basis of their decisions to a degree that is sufficient to ensure they have "act[ed] within the scope of their delegated authority" and to "facilitate[] appellate review").

Thus, even with Appellant bearing the burden of showing that the NJSEA's action was arbitrary, capricious, or unreasonable, the NJSEA cannot escape its obligation to demonstrate that the challenged decision was issued pursuant to legitimately delegated statutory authority, considered all relevant factors (and did not consider any irrelevant factors), and did not amount to a clear error in judgment. The attention that the NJSEA devoted to this issue in its brief must not distract the court from recognizing that the NJSEA's denial of the Zoning Certificate sought by Appellant falls short with respect to these standards.

B. The interpretation of “minimal” upon which the NJSEA relied in denying Appellant’s application is inconsistent with the NJSEA’s past interpretation of “minimal” in the context of other development proposals (Replying to Respondent’s Point I).

The NJSEA’s insistence that its denial of Appellant’s application for a Zoning Certificate was proper because the term “minimal” here should be understood to mean “very small or slight” is not consistent with its previous interpretations. Most glaringly, the NJSEA concluded that “minimal” impacts would result from, and issued all necessary approvals for, the American Dream Meadowlands Project, formerly known as the Meadowlands Xanadu Redevelopment Project. See Appellant’s September 30, 2024 Brief at 28-29 for a more detailed discussion. The application for that project called for permanent disturbance to more than 10 acres of high-quality wetlands in the Meadowlands, which dwarves the 2.62 acres of disturbance to degraded, minimally functional wetlands proposed by Appellant’s application in the matter at bar. See Aa0418. The precedent set by the NJSEA’s approvals for the American Dream Project is further underscored by the fact that the American Dream Project was proposed, and ultimately built, in an area that was deemed preservation-worthy by the NJSEA’s 1995 Special Area Management Plan (“SAMP”). See id. at 0415-416.³

³ The NJSEA’s failure to adopt the 1995 SAMP does not invalidate the science upon which its conclusions and suggestions was based. Plus, even if this Court is not persuaded that the wetlands impacted by the American Dream Project were of higher quality than those that would be affected by Appellant’s proposed project, it remains incumbent on the NJSEA to explain how its denial of this Zoning Certificate application—on the basis of 2.62 acres of proposed wetlands disturbance

C. The interpretation of the term “minimal” upon which the NJSEA relied in denying Appellant’s application is incompatible with the agency’s affordable housing obligations under New Jersey law and under NJSEA’s planning documents (Replying to Respondent’s Point I).

The State Planning Act, N.J.S.A. 52:18A-196 et seq., mandates the creation of a State Plan to help foster sound and integrated planning statewide, and the use of the State Plan as a guide by agencies at all levels of government for agency planning and decision-making.⁴ To this end, all state agencies are required by the State Plan to strike an appropriate balance with respect to authorizing development activities, and the development of affordable housing in particular. This is true under the active State Development and Redevelopment Plan, which was adopted in 2001, as well as under the Draft State Development and Redevelopment Plan Update that was formally proposed in December 2024.⁵ Here, the NJSEA has not made any effort to honor these obligations, nor to meaningfully describe the extent to which it considered them, in reaching its decision to deny Appellant’s proposal to construct a residential development with a major affordable housing component.

being more than “minimal”—is consistent with its determination that more than 10 acres of disturbance was “minimal” for purposes of the American Dream Project. The NJSEA has repeatedly been asked to reconcile these two outcomes, and it has repeatedly failed to do so.

⁴ See New Jersey State Planning Commission, The New Jersey State Development and Redevelopment Plan 278 (2001) [hereinafter “2001 State Plan”]; New Jersey State Planning Commission, The Preliminary Draft of the New Jersey State Development and Redevelopment Plan 61 (2024) [hereinafter “2024 Draft Plan”]. The 2001 State Plan and 2024 Draft Plan have been omitted from the appendix to this reply brief due to their voluminous nature, but Appellant will provide a copy of the 2001 State Plan and the 2024 Draft Plan to the Court upon request.

⁵ See 2001 State Plan, supra n. 4 at 84; 2024 Draft Plan, supra n. 4 at 23-26.

Even if the NJSEA is entitled to reject NJDEP's conclusions without directly addressing the criteria upon which NJDEP based its decision, the analysis offered by the NJSEA is wholly inadequate even when viewed strictly through the lens of its own internal criteria. To this end, the NJSEA's brief identifies various considerations that it allegedly must balance when assessing applications for Zoning Certificates, such as public utilities, housing, transportation, and community appearance. See Rb27. Indeed, the NJSEA recognizes that the applicable District Master Plan requires it to balance the need for "the creating of housing in suitable locations" in the Meadowlands District with preservation the District's remaining wetlands. Rb17. Nevertheless, housing and these other aforementioned considerations were left entirely unaddressed in the NJSEA's denial of Appellant's application. One would think that the proposal of an inclusive affordable housing project in one of New Jersey's most expensive residential markets would warrant an analysis of housing considerations in the NJSEA's denial of Appellant's application, especially where the Appellant offered an exhaustive alternatives analysis explaining that are no other locations for this affordable housing-inclusive project that would result in fewer impacts to the wetlands under NJSEA's jurisdiction. See Aa405.

The NJSEA further argues that because too much development has already occurred in the Meadowlands District's wetlands areas (a position for which it never

offers any data or specifics in support), it is effectively no longer able to approve any proposals that would result in any impacts to the wetlands in the Meadowlands District. See Rb17 (“[W]hen evaluating proposed developments, the NJSEA must first determine whether the proposal is consistent with the Master Plan’s goal of preserving the District’s remaining wetlands and waterways.”); cf. Rb19-20 (“Every remaining parcel of wetlands in the District, in many cases inclusive of the adjoining uplands area, incontrovertibly contains value.”); Rb25 (“The goal of the redevelopment plan is to allow development of the upland portion of the subject properties with minimal to no impact to the existing wetlands.” Emphasis retained from original.). In practice, this would inhibit nearly all future development in the Meadowlands District, which includes large areas of wetlands. See Aa0695.

In brief, the NJSEA asks this court to approve a summary determination that “there is no balance in interests” presented by Appellant’s proposed project, see Rb 21, despite the absence of any quantitative comparison or qualitative discussion of the many factors that the NJSEA claims it balanced in reaching its decision to deny the Zoning Certificate application at issue. The “balance” that the NJSEA silently struck here likewise contradicts the agency’s obligations to facilitate responsible development and to meet the area’s housing needs, thereby yielding an outcome that is not only unfair to Appellant, but unsustainable with respect to meeting the Meadowlands District’s evolving housing and development needs in the long-term.

D. This Court should remand to the NJSEA for further fact-finding because material mixed questions of fact and law remain unresolved (Replying to Respondent's Point III).

In its brief, the NJSEA claims that a remand is not necessary or appropriate in this matter because there are no genuine disputes of material fact between the parties. See Rb31. However, the NJSEA's brief ignores the arguments for a remand that Appellant set forth in its initial brief. The NJSEA does not dispute the parallels between the circumstances presented by this case and those of Tannock v. N.J. Bell Telephone Co., 223 N.J. Super 1, 9 (App. Div. 1988), nor the controlling precedent that Tannock represents with respect to the need for a remand here to assess a mixed question of fact and law. See Ab31-32. Furthermore, consistent with the above-identified deficiencies of the record below, Appellant's initial brief raised concerns about the adequacy of the record below with respect to its facilitation of effective appellate review. See Ab32. These concerns are left entirely unacknowledged and unrebutted in the NJSEA's brief.

Further support for a remand can be found in persuasive authority recently issued by this Court. More specifically, the Appellate Division's recent unpublished decision in In re Flood Hazard Area Verification and Flood Hazard Area Individual Permit, 1113-22-0002 .1 LUP220002, No. A-1639-22 (App. Div. Dec. 27, 2024), is

particularly instructive for these purposes.⁶ There, a nonprofit organization challenged NJDEP's issuance of a Flood Hazard Area Verification and a Flood Hazard Area Individual Permit for a warehouse development project. The appellant argued in part that NJDEP erroneously permitted the construction of a culvert, rather than a bridge, in violation of a regulatory requirement that the applicant demonstrate that construction of a bridge was neither "practicable" nor "feasible." See In re Flood Hazard Area Verification at 20-21.

There, NJDEP's approval of the permit was based on its acceptance of the applicant's analysis that the project complied with the aforementioned regulatory requirement because the construction of a bridge was impracticable due to cost. The Appellate Division, in turn, agreed with the appellant's argument that NJDEP's permitting record failed to adequately explain how the project application satisfied the "infeasibility" requirement. The court rejected NJDEP's argument that its interpretation of "feasible" was reasonable and entitled to deference by the Court. The Court instead observed that the agency's decision conflated the concepts of "feasible" and "practical," despite the regulation mandating that a bridge be used instead of a culvert unless proven to not be feasible, as opposed to merely not practical. Of particular relevance to the matter at bar, the merits brief that NJDEP

⁶ A copy of this decision is included as an appendix to this brief, as require by R. 2:6-11(d) and 1:36-3.

submitted in In re Flood Hazard Area Verification offered various hypotheticals as to why a bridge at the location in question would not be feasible, but the Court emphasized that the reasoning offered in the brief could not cure NJDEP's inadequate justification for granting the permit in the record below. Id. at 23; see In re N.J.A.C. 7:1B-1.1 et seq., 431 N.J. Super. 100, 139 (App. Div. 2013) (stating “[a]n appellate brief is no place for an agency to try and rehabilitate its actions”).

The In re Flood Hazard Area Verification court ultimately remanded that matter to NJDEP so the agency could reconsider the application and articulate its findings concerning the project's compliance with the infeasibility requirement at N.J.A.C. 7:13-11(c)(2)(ii) in terms of feasibility. In the matter now under consideration, this court should similarly find that the scant justification offered by the NJSEA in support of its determination that the proposed project will result in more than “minimal” impacts is not adequate, particularly vis-à-vis the relevant factors that were omitted from the NJSEA's analysis. As such, consistent with the Appellate Division's decision in In re Flood Hazard Area Verification, this court should remand the matter to NJSEA with instructions so the NJSEA can reconsider, clarify, and/or supplement the record below on the basis that material issues remain in dispute before the parties, and—either in addition or in the alternative—that the reasoning offered by NJSEA below is inadequate.

CONCLUSION

New Jersey law requires that state agencies “turn square corners” in their dealings with the public, and agencies must conduct themselves such that they do not achieve any sort of advantage over a private property owner. By denying Appellant’s application here, the NJSEA acted arbitrary, capriciously and unreasonably. Specifically, the NJSEA, without explanation, contradicted NJDEP’s conclusion as to whether the proposed project will result in “minimal” wetland disturbance, failed to offer an adequate justification for its novel interpretation of “minimal” wetland disturbance, and departed from its own permitting precedent from the American Dream Project without offering any explanation as to why.

For the foregoing reasons, the NJSEA’s denial of the application for a Zoning Certificate submitted by Appellant on July 29, 2020 was arbitrary, capricious, and unreasonable. As such, Appellant respectfully asks this Court to set aside the NJSEA Final Decision dated March 28, 2024.

Respectfully submitted,

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Dated: February 18, 2025

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