SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0316-21

IN THE MATTER OF
RAMSHORN DRIVE, LLC
CAFRA INDIVIDUAL PERMIT
NO. 1352-05-0013.1 LUP210001.

Argued May 17, 2023 – Decided June 6, 2023

Before Judges Vernoia, Firko and Natali.

On appeal from the New Jersey Department of Environmental Protection.

Brittany W. DeBord argued the cause for appellants Phillip Abbott and Robert Picone (Lieberman, Blecher & Sinkevich, PC, attorneys; Stuart J. Lieberman, of counsel; Brittany W. DeBord, on the briefs).

Jason T. Stypinski, Deputy Attorney General, argued the cause for respondent New Jersey Department of Environmental Protection (Matthew J. Platkin, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Jason T. Stypinski, on the brief).

Timothy B. Middleton argued the cause for respondent Ramshorn Drive, LLC (Jeff E. Thakker, of counsel).

PER CURIAM

Appellants Phillip Abbott and Robert Picone challenge an individual permit re-issued by the New Jersey Department of Environmental Protection (DEP) pursuant to the Coastal Area Facility Review Act, N.J.S.A. 13:19-1 to -51 (CAFRA) to respondent Ramshorn Drive, LLC (Ramshorn) necessary for the construction of a mixed-use development. Appellants live in a residential community abutting the western boundary of the proposed development.

Before us, appellants raise the following substantive arguments for our consideration:[1]

> I. The [DEP] violated [a]ppellants' statutory and procedural due process rights by deeming the Ramshorn application as "technically complete" on April 21, 2021, and by failing to provide the public with a complete application pursuant to N.J.A.C. 7:7-26.3 to 7:7-26.4.
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> II. Ramshorn's notice to neighbors within 200 feet of the [p]roperty and related lots was noncompliant.
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> III. The [p]roposed [d]evelopment [v]iolates [CAFRA] and associated regulations.
>
> A. [Ramshorn] Failed to Comply with Soil Testing Pursuant to the NJ Stormwater Management Rules (N.J.A.C. 7:8) and Stormwater [Best Management Practices] Manual.

[1] We have reorganized appellants' point headings to facilitate our discussion of their substantive arguments.

B. [Ramshorn] Failed to Comply with Minimum Required Separation Between Infiltration Basins and Seasonal High Groundwater.

C. [Ramshorn] Failed to Comply with CAFRA Exemption for Manmade Channels.

Based on our review of the record against the parties' arguments and the applicable law, we are convinced the DEP correctly re-issued the CAFRA permit. We are convinced the DEP properly notified appellants and the public and otherwise afforded them all the process due under the applicable statute and related regulations. We further conclude Ramshorn's development is fully consistent with CAFRA and all associated regulations. We accordingly affirm.

I.

On June 2, 2011, the DEP issued Ramshorn a CAFRA individual permit, a freshwater wetlands general permit, and a freshwater wetlands transition area waiver for tax lot 108 of block 893, lot 108.01 in Wall Township. The property has 524 feet of frontage along State Highway 70 to the east and 787 feet of frontage along Old Bridge Road to the southwest. The location's westerly boundary abuts a residential development where appellants reside.

The permits related to the construction of a mixed-use development that included three single-family dwellings on the western portion of Ramshorn's property and two two-story medical buildings with 235 parking spaces on the

eastern portion of the area. Although Ramshorn constructed the single-family dwellings, it did not construct the medical buildings and parking spaces prior to the expiration of the original permit in 2016.

On February 1, 2021, Ramshorn submitted a new CAFRA application for the property, seeking "reauthorization of the previously approved development." On February 25, 2021, the DEP found Ramshorn's permit application administratively and technically complete and, after a public comment period, the DEP re-issued Ramshorn's CAFRA individual permit. Ramshorn's engineer, Peter Ritchings of Environmental Management Group, applied for the CAFRA permit on Ramshorn's behalf.

The permit application filed by Ritchings, entitled "Preliminary and Final Major Site Plan Application," sought to modify the transition waiver area to accommodate the project, which would result in a reduction of 2,580 square feet of transition area on the property and an addition of 7,045 square feet of transition area off-site. The application also included: a "Final Major Site Plan" prepared by KBA Engineering Services, LLC; a "Pre & Post Development Storm Water Management Report" prepared by Joseph Kociuba, P.E.; and a Traffic Impact Study prepared by McDonough & Rea Associates. All property owners

within 200 feet of block 893, lot 108.01, including appellants, were provided with notice of the application.

Dana Galbreath and Chingwah Liang of the DEP were assigned as the project engineers. As noted, the DEP deemed Ramshorn's permit application administratively and technically complete on February 25, 2021, before previously adopted amendments to the stormwater management rules became effective on March 2, 2021.

Ramshorn's project was deemed to be a "major development" for purposes of the stormwater management rules because the "proposed project disturbs 4.48 acres of land and increases impervious cover by 2.5 acres." The DEP therefore had jurisdiction to review the project's stormwater management controls. To address these issues, Ramshorn proposed the project include stormwater management elements, including a drainage basin called "Drainage Basin B," and an infiltration pipe.

As part of its 2021 application, Ramshorn resubmitted proof concerning its consultant's 2011 excavation of eighteen test pits for its initial permit application. Appellants submitted public comments during the process at both the state and municipal levels. As set forth in those public comments, appellants'

> primary concern regarding the proposed development of this property is the fact that during and after every

> rain event there is a considerable discharge of stormwater runoff from this undeveloped tract unto the back yards of the properties owned by [appellants] . . . .

To address the flooding issue, appellants retained Princeton Hydro, an environmental engineering firm, which submitted reports to the DEP dated February 26, 2021, and June 28, 2021. The February 26, 2021 report opined that soil testing performed by Ramshorn in 2007 in Drainage Basin B was not compliant with the DEP's 2009 Best Management Practices (BMP) Manual's Appendix E.[2] According to Princeton Hydro, test pit numbers 8, 12, 15, and 16 were not excavated at least eight feet deep, as the BMP required. Princeton Hydro also asserted that, although test pit number 7 met the BMP eight-foot depth requirement, the testing was inadequate because it was not performed in "the most restrictive horizon observed," meaning the most impermeable layer, see N.J.S.A. 7:9A-5.8, which Princeton Hydro said was the "clayey silt" at that depth. Princeton Hydro's June 28, 2021 report reiterated these comments.

[2] The BMP Manual, promulgated by the DEP, provides guidance for achieving stormwater management compliance. N.J. Dep't of Env't Prot., N.J. Stormwater Best Mgmt. Pracs. Manual, https://dep.nj.gov/stormwater/bmp-manual/ (last visited May 24, 2023). However, an applicant can propose alternative stormwater management practices, so long as it comports with regulatory standards. See N.J. Dep't of Env't Prot., N.J. Stormwater Best Mgmt. Pracs. Manual ch. 3 at 6 (Feb. 2004) https://dep.nj.gov/wp-content/uploads/stormwater/bmp/nj_swbmp_3-print.pdf (last visited May 24, 2023).

On March 30, 2021, Liang responded, by way of email, to four individual stormwater-related public comments. After a response to each comment was provided to Kociuba, Ramshorn excavated seven new test pits in the area of the proposed project stormwater facilities in April 2021 and amended the infiltration pipe design to comply with the seasonal high groundwater table (SHGT) separation requirement, per the BMP Manual.

In June 2021, in response to Princeton Hydro's comments, Ramshorn excavated additional test pits and changed the design of the infiltration basin. In an updated stormwater report, Ramshorn submitted calculations demonstrating that its altered stormwater systems met the stormwater regulatory requirements for reducing stormwater quantity and exceeded what was required for ameliorating the total suspended solids (TSS) for water quality.

On August 12, 2021, the DEP issued an engineering report which addressed Ramshorn's application, Princeton Hydro's comments, Ramshorn's responses, and all other information received. The DEP engineering report found that Ramshorn's April 2021 soil test pits adequately showed that Drainage Basin B would function as designed. It noted the "basin's" SHGT was acceptable as a result of groundwater observations, and the basin would have at least two feet of separation between the SHGT and the bottom of the basin's six-inch sand

layer. The DEP further found that Ramshorn conducted percolation tests in the new test pits above the SHGT and below the bottom of the basin, which comported with the stormwater management rules.

On August 16, 2021, the DEP approved and re-issued Ramshorn its CAFRA permit, which, as noted, authorized the construction of two, two-story medical office buildings with 235 parking spaces, a stormwater management system, and "associated activities" on the location. The permit was authorized "under and in conditional compliance with the Coastal Zone Management Rules, N.J.A.C. 7:7-1.1 [to -29.10], as amended on July 8, 2021, and in compliance with Sections 10 & 11 of the CAFRA statute (N.J.S.A. 13:19-1 [to -51])[,]" as well as "the Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A-1.1 [to -22.20]." This appeal followed.

II.

We will not reverse an administrative agency decision, unless: "(1) it was arbitrary, capricious, or unreasonable; (2) it violated express or implied legislative policies; (3) it offended the State or Federal Constitution; or (4) the findings on which it was based were not supported by substantial, credible evidence in the record." Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dep't of Env't Prot., 191 N.J. 38, 48 (2007). In addition, we generally will not

consider issues not previously raised before an administrative agency. In re Stream Encroachment Permit, Permit No. 0200-04-0002.1 FHA, 402 N.J. Super. 587, 602 (App. Div. 2008). Accord Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

Finally, we will not reverse an agency decision "because of doubt as to its wisdom or because the record may support more than one result." In re N.J. Pinelands Comm'n Resol., 356 N.J. Super. 363, 372 (App. Div. 2003). A reviewing court is also required to extend substantial deference to an agency's interpretation and application of its own regulations, particularly on technical matters within the agency's special expertise. In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488-89 (2004).

"While [a court] must defer to the agency's expertise, [the court] need not surrender to it." N.J. Chapter of Nat'l Ass'n of Indus. & Office Parks v. N.J. Dep't of Env't Prot., 241 N.J. Super. 145, 165 (App. Div.1990). A court is never bound by an agency's determination of a purely legal issue which we review de novo. Stream Encroachment Permit, 402 N.J. Super. at 597 (citing Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)); Klawitter v. City of Trenton, 395 N.J. Super. 302, 318 (App. Div. 2007).

III.

In Points I and II of their merits brief appellants claim, for the first time on appeal, that they and their neighbors were deprived of various procedural and substantive due process rights during Ramshorn's CAFRA permit application and approval process. Specifically, appellants argue they were deprived of both the procedural and substantive process they were due when: the DEP purportedly deemed Ramshorn's application technically complete on April 21, 2021; the DEP did not provide the public with a complete copy of the permit application; and Ramshorn provided deficient notice of the application.

As a preliminary matter, because appellants failed to raise these arguments below, they are not properly before us. We generally decline to consider questions or issues not presented below when an opportunity for such a presentation is available unless the questions raised on appeal concern jurisdiction or matters of great public interest. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). We are satisfied neither exception applies here. Although we reject appellants' arguments on that basis alone, for purposes of completeness we consider and reject their contentions on the merits.

A.

In Point I, appellants contend the DEP violated their due process rights when purportedly deeming Ramshorn's application "technically complete" on

April 21, 2021. Appellants maintain DEP should have applied the requirements in the new BMP Manual—effective March 2, 2021—to Ramshorn's application. Second, they argue the DEP did not review the application until after the public comment period began, and even then, the record does not reveal why the DEP determined the application was technically complete. Appellants also contend the DEP failed to provide the public with a complete application, pursuant to N.J.A.C. 7:7-26.3 and -26.4, after receiving updated reports in response to appellants' comments. We are not persuaded by any of their arguments.

The Legislature enacted CAFRA in 1973 "to protect the unique and fragile coastal zones of the State." In re Egg Harbor Assocs. (Bayshore Ctr.), 94 N.J. 358, 364 (1983). Except for certain activities expressly exempted, CAFRA requires that any proposed development within a coastal area must meet certain construction and development thresholds and have a permit from the DEP before commencing construction. In re Protest of Coastal Permit Program Rules, 354 N.J. Super. 293, 310 (App. Div. 2002) (citing N.J.S.A. 13:19-5.1, -5.2, and -5.3). "Development" is defined by CAFRA as "the construction, relocation, or enlargement of any building or structure and all site preparation therefor . . . ." N.J.S.A. 13:19-3. The Legislature delegated the DEP with the authority to

promulgate regulations "to effectuate the purposes of" CAFRA. N.J.S.A. 13:19-17(a).

The DEP's Coastal Zone Management (CZM) Rules, N.J.A.C. 7:7-1.1 to -29.10, provide "the procedures for reviewing coastal permit applications" and "the substantive standards for determining development acceptability and the environmental impact of projects for which coastal permits are submitted." Protest of Coastal Permit Program Rules, 354 N.J. Super. at 312. The DEP also uses the CZM Rules to evaluate coastal wetlands permits, waterfront development permits, and water quality certificates. N.J.A.C. 7:7-1.1.

The CAFRA statute provides the public with procedural due process through a: (1) "hearing to afford interested parties the opportunity to present, orally or in writing, their position concerning the filed application and any data they may have developed in reference to the environmental or other relevant effects of the proposed development[;]"or (2) "[i]f no hearing is held, the department shall provide for a 30-day comment period and shall provide sufficient public notice as to the commencement of the comment period." N.J.S.A. 13:19-9(a); see also In re Riverview Dev., LLC, Waterfront Dev. Permit No. 0908-05-0004.3 WFD 060001, 411 N.J. Super. 409, 424-25 (App. Div. 2010) ("[T]he Legislature . . . recognized the importance of respecting

constitutionally or statutorily protected property rights of third parties that can be infringed by the issuance of a permit.").

Against the aforementioned standards of review and legal principles, we are satisfied appellants and the public received all the process due. In order for the public comment period to be triggered, the DEP had to first determine that the CAFRA permit application was complete. That is, within twenty days of receiving an application, the DEP was required to take one of the following actions: (1) "[d]etermine that the application [was] both administratively and technically complete;" (2) "[d]etermine the application is administratively complete but technically incomplete;" and specify a deadline for additional information; or (3) "[d]etermine the application is administratively incomplete" and specify a deadline for additional information. N.J.A.C. 7:7-26.3(b).

"Administratively complete" means that "every item required on the application checklist for the coastal permit being sought is included in the application." N.J.A.C. 7:7-1.5. "Technically complete" means that "each item included in an application for a coastal permit other than a CAFRA individual permit provides sufficient information for the [DEP] to declare the application complete for review . . . ." N.J.A.C. 7:7-1.5. However, "[f]or an application for a CAFRA individual permit, technically complete means that each item included

in the application provides sufficient information for the Department to determine the application is complete for public comment or complete for public hearing." Ibid.

The DEP correctly found Ramshorn's application administratively and technically complete in this case. Contrary to appellants' arguments, the DEP deemed Ramshorn's permit application technically complete on February 25, 2021, not April 21, 2021. The date upon which the DEP deemed appellants' application technically complete is significant as a new BMP Manual became effective on March 2, 2021, approximately one month after Ramshorn submitted its permit application.

For that reason, appellants' contention that the DEP acted unreasonably in reviewing the application under the pre-March 2, 2021 manual is, simply put, factually incorrect. See N.J.A.C. 7:8-1.6(c)(6) (where a CAFRA permit application includes a stormwater report and is deemed technically complete after March 2, 2021, the application is subject to the new stormwater regulations, which became effective on that date); see also Citizens for Equity v. N.J. Dep't of Env't Prot., 252 N.J. Super. 62, 76 (App. Div. 1990) ("retroactive application of an administrative rule is not favored"). Because the pre-March 2, 2021 rules

applied to this application, appellants' assertion that the DEP acted unreasonably by utilizing those rules is without merit.

We also disagree with appellants' argument that a March 30, 2021 email from Liang indicated the application was incomplete. Although that email identified issues with the proposal and asked Ramshorn to address them, the DEP did not issue a deficiency letter indicating that the permit application was technically incomplete as N.J.A.C. 7:7-26.4(b)(2) would have required, a point to which appellants do not disagree.

We further reject appellants' argument the DEP did not review the application "at all until after the commencement of the public comment period" and even then, did not provide a basis for "how and why" it deemed the application technically complete, as appellants apply an interpretation of the phrase "technically complete" contrary to its statutory definition. As previously noted, the Legislature has defined "technically complete" as meaning that "each item included in an application for a coastal permit other than a CAFRA individual permit provides sufficient information for the Department to declare the application complete for review[,]" and "[f]or an application for a CAFRA individual permit, technically complete means that each item included in the application provides sufficient information for the Department to determine the

application is complete for public comment or complete for public hearing." N.J.A.C. 7:7-1.5 (emphasis added). Under N.J.A.C. 7:7-26.3(b), the DEP was tasked with determining whether Ramshorn's CAFRA application was administratively and/or technically complete within twenty days of receiving the individual permit application. Ibid.

There was nothing improper about the DEP's determination the permit application was technically complete. That preliminary determination simply moved the application to the public comment phase. Appellants' suggestions that the DEP is required to provide justification for moving the application to the public comment period is devoid of support in the statutory administrative code or case law.

We are also unpersuaded by appellants' claim the stormwater component of the application was deficient because it contained outdated soil samplings. Ramshorn addressed appellants' complaint by providing an updated June 2021 Stormwater Report, which also appended the new soil samplings report. Appellants maintain that it was improper for the DEP to consider the application technically complete under the pre-March 2, 2021 rules, since Ramshorn did not submit new soil samplings until well after March 2, 2021. We reject this argument for the same reason we have rejected claims that "public hearings were

inadequate because the DEP relied partially upon information given to it by the consultants after the public comment period had concluded." In re NJDPES Permit No. NJ 0055247, 216 N.J. Super. 1, 18 (App. Div. 1987) (footnote omitted). Instead, the standard is whether the "salutatory purpose underlying the requirement of public hearings and public comments was materially advanced." Ibid. That purpose was clearly met here.

Once the DEP determined Ramshorn's application was technically complete, the application was moved to the public comment phase, which began on April 20, 2021, and ended on June 19, 2021. Appellants were permitted to submit their objections to the DEP before, and even after the public comment period.

Appellants also assert the DEP failed to notify them that Ramshorn had submitted the stormwater report, updated June 2021, during the public comment period. They argue that the DEP should have notified them of the submission during their extensive back-and-forth communications and that its failure to do so denied them an adequate opportunity to respond to that particular report. Appellants, however, fail to identify any changes in the June 2021 stormwater report that would have materially altered the outcome of the proceedings. As

such, we discern no basis to disturb the DEP's decision to grant Ramshorn the permit on this basis.

We also reject appellants' claim the DEP exclusively relied on older soil samples submitted prior to the June 2021 stormwater report when approving the application. On this point, we have reviewed the record and find no support for their claim that the DEP failed to consider the newer soil samples when granting Ramshorn's permit application. Nor do they explain how the newer soil samples, or the June 2021 stormwater report as a whole, would have altered the DEP's overall determination to grant Ramshorn's permit application in any event.

In sum, the record shows the DEP considered appellants' comments and interacted with them, relaying their concerns to Ramshorn in many instances. For example, in a June 28, 2021, report, Geoffrey Goll, P.E., asserted that: (1) more than fifty acres drained to the subject property and a Flood Hazard Area Control Act (FHACA) permit was thus required; (2) in the alternative, even if less than fifty acres drained to the property, a riparian buffer would be required around the manmade ditch. On July 16, 2021, Galbreath relayed these issues to Ritchings, Ramshorn's representative. On July 16, 2021, Ritchings responded to Galbreath that less than fifty acres drain to the site. That same day, July 16, 2021, Ritchings emailed Galbreath again and said that the manmade ditch did

not meet the definition of a regulated water and therefore did not require a riparian buffer. Galbreath prepared an environmental report and concluded, upon reviewing the evidence, that less than fifty acres flowed to the site and the manmade ditch did not meet the definition of a riparian buffer. She found:

> A riparian zone is the land and vegetation within and adjacent to a regulated water. The subject site is not located within the riparian zone of any nearby waterways. A public comment was received on June 28, 2021, regarding the manmade drainage ditch onsite. After review, said ditch drains less than [fifty] acres and is not connected to any regulated waters, and it is therefore not a regulated water that would have a riparian zone pursuant to N.J.A.C. 7:13-2.2(a)3ii and iii. Therefore, compliance with this rule is not necessary.

Additionally, after receiving Goll's June 28, 2021 opinion that Ramshorn's proposed berm along the manmade swale showed there would be flooding for adjacent neighbors, Ritchings emailed Liang on July 16, 2021, stating that a third-party had voiced concerns about the berm and asking Ritchings to address it. Liang then asked Ritchings to address the concern. Liang reached out to Kociuba about the issue on July 28, 2021. Kociuba responded that the Wall Township Planning Board recommended the berm be included because they thought it would benefit neighbors (i.e., the appellants) and it would not substantially impact the design.

Goll also voiced concerns regarding groundwater infiltration into the basement at 1582 Horseshoe Drive in his June 28, 2021 report and his initial February 26, 2021 submission. Liang asked Kociuba if he had information on the elevations of the basements to the north of the site, and Kociuba responded that the elevation of the basement was between elevation thirty-eight and forty feet, which is above the bottom of Basin B—which has an elevation of thirty-two feet—and wrote a letter to the DEP. On June 16, 2021, Ritchings addressed a letter to Galbreath, which stated that after reviewing an email sent on behalf of appellants, "[t]he infiltration/detention BMP was amended slightly to comply with the separation of the seasonal high water table."

Simply stated, applicants and the public were not deprived of the process due by virtue of the DEP's determination that the application was technically complete or by the public comment process itself. Moreover, to the extent appellants claim they were not notified of Ramshorn's submission of the June 2021 stormwater report, they fail to show harm, such as inability to comment and achieve a substantive DEP response.

B.

In Point II, appellants claim Ramshorn's notice of the permit application was incomplete because the notice should have encompassed a broader radius—

200 feet from block 893, lots 108.03 and 108.04, as well. According to appellants, Ramshorn was not only required to provide notice to property holders within 200 feet of block 893, lot 108.01, but also within 200 feet of lots 108.03 and 108.04 of that block. Because Ramshorn exclusively provided notice to neighbors within a 200-foot radius of block 893, lot 108.01 via certified mail, appellants argue Ramshorn violated notice requirements, and hence, procedural due process. We disagree with these arguments because Ramshorn did not seek to develop lots 108.03 and 108.04.

Pursuant to N.J.A.C. 7:7-24.3(b), notice of a CAFRA permit application must be sent to all required stakeholders, including but not limited to "[a]ll owners of real property, including easements, located within 200 feet of the property boundary of the site in the manner set forth in the Municipal Land Use Law at N.J.S.A. 40:55D-12b[.]" The "site" is defined as "the lot or lots upon which a proposed development is to be constructed." N.J.A.C. 7:7-1.5. The "development" refers to "the construction, relocation, or enlargement of any building or structure and all site preparation therefore, the grading, excavation or filling on beaches or dunes, and shall include residential development, commercial development, industrial development and public development." N.J.S.A. 13:9-3. That public notice must include "[a] brief description of the

proposed project" and "[a] site plan, showing the location and boundaries of the project site[.]" N.J.A.C. 7:7-24.3(d).

Here, the proposed development was for block 893, lot 108.01. To be clear, no development is proposed for lot 108.03 or lot 108.04, which are residential lots that were previously subdivided and sold by Ramshorn. Ramshorn properly provided notice to stakeholders with property within 200 feet of block 893, lot 108.01.

Appellants' notice argument is founded on the faulty premise that block 893, lots 108.03 and 108.04 were part of the site on which the proposed "development" would take place. They were not. Instead, block 893, lots 108.03 and 108.04, were "transition areas," for which Ramshorn had previously been granted a freshwater wetlands transition area waiver permit.

A transition area is a buffer between freshwater lands and the immediate upland area, created primarily to protect a habitat for freshwater wetlands fauna. N.J.S.A. 13:9B-16. An applicant can obtain a transition area waiver averaging plan if the proposed project will encroach in a transition area. N.J.S.A. 13:9B-17 and -18; N.J.A.C. 7:7A-8.1.

Here, the re-issued permit that is the subject of this appeal states, in bold: "[p]lease be advised that this [conservation] restriction shall apply to both the

compensation area on [l]ot 108.03 being authorized under this permit and the compensation area on [l]ot 108.04 authorized under the previous 2016 Transition Area Waiver Averaging Plan." It is therefore clear from the record that Ramshorn sought to utilize block 893, lots 108.03 and 108.04, as transition areas and not for "development" as defined in N.J.S.A. 13:9-3.

Additionally, appellants rely on N.J.S.A. 40:55D-12(b) of the Municipal Land Use Law (MLUL), which states that notice "shall be given to the owners of all real property as shown on the current tax duplicates, located in the State and within 200 feet in all directions of the property which is the subject of such hearing." However, appellants fail to cite to persuasive authority standing for the proposition that the MLUL overrides CAFRA which, as noted, cross-references the MLUL and requires applicants to provide notice only to owners of real property "located within 200 feet of the property boundary of the site." N.J.A.C. 7:7-24.3(b)(6) (emphasis added). Accordingly, we reject appellants' claim that Ramshorn was required to provide notice of its CAFRA permit application to property holders within 200 feet of lots 108.03 and 108.04.

IV.

Appellants next argue in Point III that the DEP committed reversible error in approving Ramshorn's CAFRA permit because the proposed development is

inconsistent with the CAFRA statute and its associated regulations. Specifically, they assert the DEP's decision to approve the CAFRA permit was arbitrary and capricious because: (1) Ramshorn failed to comply with soil and porous pavement testing requirements; (2) Ramshorn did not meet the minimum required separation between infiltration basins and seasonal highwater tables; and (3) the DEP impermissibly allowed Ramshorn to circumvent the CAFRA exemption for manmade channels. We address each argument separately.

A.

In Point III.A, appellants contend the DEP acted arbitrarily and capriciously by granting Ramshorn's permit application because Ramshorn allegedly failed to comply with soil and porous pavement testing requirements. We are not persuaded.

Turning first to soil testing, N.J.A.C. 7:8-5.2(i)(1) states, in pertinent part:

> Stormwater management measures shall be designed to take into account the existing site conditions, including, but not limited to, environmentally critical areas; wetlands; flood-prone areas; slopes; depth to seasonal high water table; soil type, permeability, and texture; drainage area and drainage patterns; and the presence of solution-prone carbonate rocks (limestone).
>
> [Ibid. (emphasis added).]

Infiltration basins, including "small-scale," surface, and subsurface basins, as well as permeable pavement, are considered "stormwater management measure[s]." N.J.A.C. 7:8-5.2(f) tbls. 5-1 and -2.

Relying on the BMP,[3] appellants claim that soil profile pits and soil borings performed for designing an infiltration basin are required to be at least eight feet deep under both the pre-March 2021 BMP Manual and the post-March 2021 BMP Manual.[4] Appellants submit the report filed by Carlin Simpson demonstrates that Ramshorn failed to comply with this ostensible eight-foot testing requirement because it does not include soil borings extending eight feet deep in the location of Basin B. They observe that soil logs for test pit (TP) 101 to 105 instead show boring depths from 4'6" to 6'0".

Appellants argue that borings for the subsurface infiltration trench in front of the proposed building are also inadequate for similar reasons. The basin

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[3] N.J. Dep't of Env't Prot., N.J. Stormwater Best Mgmt. Pracs. Manual ch. 12, at 16 (April 2022), https://dep.nj.gov/wp-content/uploads/stormwater/bmp/nj_swmp_12.pdf (last visited May 24, 2023).

[4] Both the pre-March 2021 Stormwater BMP Manual and March 2, 2021, Stormwater BMP Manual recommend the same eight-foot depth. Compare ibid. to N.J. Dep't of Env't Prot., N.J. Stormwater Best Mgmt. Pracs. Manual app. E, at 7 (Sept. 2009), https://rucore.libraries.rutgers.edu/rutgers-lib/44586/PDF/1/play/ (last visited May 24, 2023).

bottom is marked on the site plans as "Bot Ston Elev.," which appellants note likely reflects "Bottom Stone Elevation," measured at 39.90 feet. Appellants therefore extrapolate that soil borings taken along the infiltration trench should have extended eight feet below 39.90 feet (31.90 feet). Yet, the soil boring logs for TP 106 and 107 begin at elevations of 45 and 45.5 feet, extending 9'3" and 8'6", so they did not reach the elevation of 31.90 feet. Appellants claim that TP 106 and 107 accordingly violated the ostensible eight-foot testing "requirement."

Contrary to appellants' contention, the BMP Manual does not require that an applicant submit a soil pit and soil boring at least eight feet deep. The BMP Manual provides mere recommendations, not requirements. See In re Stormwater Mgmt. Rules, 384 N.J. Super. 451, 457 (App. Div. 2006) ("Guidance for these strategies can be found in the New Jersey Stormwater [BMP] Manual 2002.") (emphasis added). As set forth in N.J.A.C. 7:8-5.9, "[t]echnical guidance for stormwater management measures can be found in the documents listed . . ." (emphasis added). N.J.A.C. 7:8-5.9(a)(1) similarly explains that "[g]uidelines for stormwater management measures are contained in the [BMP] Manual . . ." (emphasis added). Appellants' claim that the BMP Manual imposes an inflexible requirement that all applicants submit a soil pit and soil boring at

least eight feet deep in order to be eligible for a permit is misplaced. Because the BMP Manual does not impose requirements, but instead, recommendations, the DEP's decision to grant Ramshorn's permit application, absent the eight-foot soil tests, was not arbitrary and capricious.

In addition, although Ramshorn's tests did not reach the eight-foot depth, Ramshorn's engineer determined the SHGT based upon direct observation of mottling, pursuant to N.J.A.C. 7:9A-5.8(a)-(b). "Mottling" is defined as "a color pattern observed in soil consisting of blotches or spots of contrasting color [and] is an indication of seasonal or periodic and recurrent saturation." N.J.A.C. 7:9A-2.1.

With respect to appellants' argument pertaining to porous pavement testing, they submit that after Ramshorn submitted the CAFRA permit application, it added porous pavement to the plan in response to the DEP's request. Appellants add that the record is devoid of valid infiltration testing in support of the porous pavement, which they argue the BMP Manual requires.[5] More specifically, they observe that the subgrade below the permeable pavement

[5] See N.J. Dep't of Env't Prot., N.J. Stormwater Best Mgmt. Pracs. Manual ch. 9.7, at 12 (Nov. 2016), https://web.archive.org/web/20201019204910/https://www.nj.gov/dep/stormwater/pdf/2016-11-07-pervious-paving-final.pdf (last visited May 24, 2023).

section is to be "thoroughly compacted," and argue that the porous pavement can provide little, if any, infiltration benefit. Appellants conclude that the absence of such permeability tests rendered the DEP's approval of the permit arbitrary and capricious.

The porous pavement for the parking lots was not required to satisfy infiltration testing, however, because Drainage Basin B and the underground infiltration recharge trench met the stormwater rules' requirements. Ramshorn established its stormwater management design, which was comprised of Drainage Basin B and the infiltration pipe, complied with the stormwater rules for issuing a permit by showing post-construction runoff rates for the two-, ten- and one-hundred-year storm events to be fifty, seventy-five and eighty percent of the pre-construction peak runoff rates, respectively. N.J.A.C. 7:8-5.4(a)(3) (2010).

B.

In Point III.B, appellants assert Ramshorn did not comply with the minimum two-foot "requirement" between the underground recharge trench and the Seasonal High Water Table (SHWT), which is the highest elevation in a specific location to which groundwater elevates during the year. N.J. Dep't of Env't Prot., N.J. Stormwater Best Mgmt. Pracs. Manual ch. 12, at 10 (April

2022), https://dep.nj.gov/wp-content/uploads/stormwater/bmp/nj_swmp_12.pdf (last visited May 24, 2023). Instead, it is separated by 1.9 feet. Appellants claim Tables 5-1 and 5-2 of N.J.A.C. 7:8 require a vertical separation of two feet between infiltration basins and the SHWT. In conjunction with this argument, they point out the proposed subsurface infiltration basin for the parking lot in front of the buildings, which consist of subsurface perforated pipe and gravel recharge trench, is separated by 1.9 feet, rather than the two feet—the threshold they claim to be required by law.

We reject appellants' arguments, as the two-foot directive is not a prescriptive requirement but, rather, a recommended method to demonstrate that the applicant's design was sufficient to handle and remove excess stormwater runoff. Additionally, we are satisfied the DEP did not abuse its discretion in approving Ramshorn's permit application based on the 1.9 feet between the recharge trench and the SHWT.

The purpose of Tables 5-1 and 5-2 is expressly delineated in N.J.A.C. 7:8-5.2(f), which states the tables "summarize the ability of stormwater best management practices identified and described in the [BMP Manual] to satisfy the [. . .] groundwater recharge, stormwater runoff quality, and stormwater runoff quantity standards specified in th[at] chapter." Further, "[w]hen designed

in accordance with the [BMP] Manual and th[at] chapter, the stormwater management measures listed in Tables 5-1, 5-2, and 5-3 shall be presumed to be capable of providing stormwater controls for the design and performance standards . . . ." Ibid. Contrary to appellants' arguments, we do not read Tables 5-1 and 5-2 as setting forth mandatory requirements.

Additionally, as previously noted, the BMP Manual does not provide mandatory requirements, but represents only recommendations. Stormwater Mgmt. Rules, 384 N.J. Super. at 457; N.J.A.C. 7:8-5.9. A permit applicant can use means other than the BMP Manual to demonstrate compliance with the stormwater management rules. The BMP Manual is only a technical guidance document. In fact, section (g) of the "Notes" that follow the Tables in N.J.A.C. 7:8-5.2 provides: "[a]n alternative stormwater management measure, alternative removal rate, and/or alternative method to calculate the removal rate may be used if the design engineer demonstrates the capability of the proposed alternative stormwater management measure and/or the validity of the alternative rate or method to the review agency."

Because the Tables do not mandate, but merely suggest that there be two feet between an infiltration basin and an SHWT, an "alternative stormwater management measure, alternative removal rate, and/or alternative method to

calculate the removal rate [could] be used if the design engineer [was able to] demonstrate[] the capability of the proposed alternative stormwater management measure and/or the validity of the alternative rate or method to the review agency"—here, the DEP. N.J.A.C. 7:8-5.2(g).

The DEP notes that its engineer, Liang, found that "the trench and any collected water volume within the trench will overflow towards Drainage Basin B, the primary stormwater management mechanism." DEP adds, "[s]ince the infiltration trench intentionally overflows to the much larger Drainage Basin B and the regulatory concerns are groundwater recharge and water quantity, [the] DEP exercised its engineering and technical expertise to find sufficient separation between the SHGT and the trench." In this regard, the DEP explains, "[i]comparing the 1.9-foot separation between the SHGT and the infiltration basin to the effective [design] depth of 0.5-feet within the trench, [the] DEP concluded, based on Ramshorn's engineering report, that the trench will be able to evacuate stormwater and not jeopardize the basin's function."

Since N.J.A.C. 7:8-5.2(f) tbls. 5-1 to -2 merely suggest that there be two feet between an infiltration basin and an SHWT, and the infiltration trench here is designed to overflow into the larger Drainage Basin B, the DEP exercised its technical expertise to find there was sufficient separation between the trench and

the SHWT. We are satisfied the DEP did not act arbitrarily and capriciously in finding the distance between the distance between the trench and SHWT to be sufficient and approving the permit application on these grounds.

C.

In Point III.C, appellants rely on its written communications which purportedly show the DEP acted impermissibly when agreeing to classify a body of water on the property as exempt from the riparian zone regulation under the FHACA, rather than applying the exceptions under the CZM. Appellants argue those exchanges establish the DEP improperly "relied on the riparian zone exceptions" under FHACA at N.J.A.C. 7:13-2.2(a)(3)(ii)- (iii), rather than applying the riparian zone exceptions under the CZM. Further, they contend these written communications show the DEP permitted appellants to choose the FHACA exception's applicability to suit its purposes. Appellants also claim that, in relying on the FHACA for a body of water that does not qualify for the exception, the DEP circumvented the regulatory requirements under the CZM, N.J.A.C. 7:7-9.26(b). We are not persuaded.

Pursuant to the CZM Rules, "if a term is defined in [the CZM Rules] and in the Flood Hazard Area Control Act, N.J.A.C. 7:13, the definition in N.J.A.C. 7:13 shall govern." N.J.A.C. 7:7-9.26(j). In addition, for "any term used in" the

riparian buffer regulation "that is not defined or otherwise described" in the CZM Rules but is defined in the FHACA, the flood hazard definition applies. Ibid.

The term "regulated water" is not defined in the CZM Rules. See N.J.A.C. 7:7-1.5 (definitions). However, N.J.A.C. 7:13-2.2 is a CZM rule, and it defines waters that are "regulated" to be all those not named in its list of exceptions. Specifically, N.J.A.C. 7:13-2.2(a) provides that "[e]very regulated water possesses a flood hazard area and/or a riparian zone as set forth at N.J.A.C. 7:13-2.3[,]" and "[a]ll waters in New Jersey are regulated under this chapter except" those delineated by statutory exceptions.

Among others, the CZM rules list "any manmade canal" and "any water-filled depression created in dry land incidental to construction" as exceptions to the bodies of water subject to regulation under that chapter. N.J.A.C. 7:13-1.2(a)(1); N.J.A.C. 7:13-1.2(4). Here, Galbreath found the body of water at issue to be a "manmade drainage ditch" that fell under the exceptions in N.J.A.C. 7:13-2.2(a). That determination was not an abuse of discretion as the body of water "is confined within a lawfully existing, manmade conveyance structure or drainage feature," and it "is not connected to a regulated water by a channel or pipe." N.J.A.C. 7:13-2.2(a)(3)(ii)-(iii). As such, we are satisfied the DEP

applied the correct definition and appropriately determined the manmade canal did not require a riparian buffer, and it did not act arbitrarily and capriciously in agreeing to classify a body of water as exempt from the riparian zone regulation under the FHACA exception.

Affirmed.