NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2491-20

MUSCONETCONG
WATERSHED ASSOCIATION,

Plaintiff-Appellant,

v.

NEW JERSEY DEPARTMENT
OF ENVIRONMENTAL
PROTECTION,

Defendant-Respondent,

and

HAMPTON FARM, LLC,

Third-Party Defendant-
Respondent.

APPROVED FOR PUBLICATION
August 3, 2023
APPELLATE DIVISION

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Argued June 6, 2023 – Decided August 3, 2023

Before Judges Gilson, Gummer, and Messano.

On appeal from the New Jersey Department of Environmental Protection.

Daniel A. Greenhouse argued the cause for appellant (Eastern Environmental Law Center, attorneys; Daniel A. Greenhouse, on the briefs).

Jason Brandon Kane, 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 Brandon Kane, on the briefs).

Guliet D. Hirsch argued the cause for respondent Hampton Farm, LLC (Archer & Greiner, PC, attorneys, join in the brief of respondent New Jersey Department of Environmental Protection; Guliet D. Hirsch, on the brief).

The opinion of the court was delivered by

GILSON, P.J.A.D.

On February 23, 2017, the New Jersey Department of Environmental Protection (DEP) issued a flood hazard area applicability determination (FHA Determination) to Hampton Farm, LLC (Hampton Farm). Shortly thereafter, appellant Musconetcong Watershed Association (MW Association) requested the DEP to conduct an adjudicatory hearing so it could challenge the FHA Determination. Four years later, on April 6, 2021, the DEP denied that request. MW Association timely appealed from the April 6, 2021 decision. It also sought leave to appeal from the February 23, 2017 FHA Determination, contending it had become final when the DEP denied MW Association's request for a hearing. On an interlocutory motion, a two-judge panel of this court denied leave. We now reconsider, reverse that interlocutory ruling, and grant leave to appeal.

We hold that the DEP's FHA Determination became a final agency decision subject to appeal when the DEP denied MW Association's request for an adjudicatory hearing to challenge the FHA Determination. At that time, all administrative remedies were exhausted. Accordingly, on this appeal, we address both (1) the DEP's April 6, 2021 decision denying MW Association's request for an adjudicatory hearing; and (2) the DEP's February 23, 2017 FHA Determination.

We hold that MW Association did not have a right to an adjudicatory hearing because no statute conferred that right to MW Association, which is a third-party objector, and MW Association did not have a particularized property interest warranting a hearing. Accordingly, we affirm the April 6, 2021 final agency decision.

Because we have reversed the ruling on the interlocutory motion, we give the DEP two options concerning its FHA Determination. The DEP can either (1) elect to address MW Association's challenges to its February 23, 2017 FHA Determination and a new briefing schedule will be issued; or (2) request a remand so it can expand and update the factual findings supporting its FHA Determination. The DEP is to select one of those options by submitting a letter to this court within thirty days from the issuance of this opinion.

I.

We discern the relevant facts and procedural history from the administrative record, which we had previously limited to the DEP's decision denying the adjudicatory hearing based on motions filed by the parties.

This appeal arises out of the long-running efforts of Hampton Farm to develop approximately seventy-seven acres of real property it owns in the Borough of Hampton (the Property). The Musconetcong River runs along the Property's northern and western boundaries, and Valley Road runs along its southern boundary. Hampton Farm also owns a separate parcel of approximately sixty-seven acres of land located on the southern side of Valley Road (the Southern Lot). The Southern Lot was not part of Hampton Farm's application for an FHA Determination.

In the early 1980's, Jacob Haberman, the predecessor in title to Hampton Farm, filed a builder's remedy action in the Law Division (the Builder's Remedy Action).[1] In the fall of 2015, the Borough of Hampton and Haberman executed

[1] Under the Mount Laurel doctrine, "municipalities have a constitutional obligation to use their zoning power in a manner that creates a 'realistic opportunity for the construction of [their] fair share' of the region's low- and moderate-income housing." In re Declaratory Judgment Actions Filed by Various Muns., 227 N.J. 508, 514 (2017) (alteration in original) (quoting In re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. N.J. Council on Affordable Hous., 221

an amended settlement agreement in the Builder's Remedy Action, which allowed the Property to be developed with 333 dwelling units, including forty-five units for low- and moderate-income households. Following a fairness hearing, on March 30, 2016, a final judgment was entered in the Builder's Remedy Action.

As part of the proceedings in the Builder's Remedy Action, MW Association objected to the proposed site plan for the Property, contending that it did not account for an onsite tributary of the Musconetcong River. To address that issue, a provision of the final judgment directed Haberman to file an application with the DEP for a flood hazard area "verification" for the Property.

Under the Flood Hazard Area Control Act (FHAC Act), N.J.S.A. 58:16A-50 to -103, and its regulations, N.J.A.C. 7:13-1.1 to -24.11, certain types of developments are regulated and require permits if the development is in the flood hazard area or the riparian zone of a regulated water. N.J.A.C. 7:13-2.1 to -2.4. Generally, all waters in this State are regulated. N.J.A.C. 7:13-2.2(a). The regulations promulgated under the FHAC Act, however, provide that a

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N.J. 1, 7 (2015)). "A builder's remedy provides a developer with the means to bring 'about ordinance compliance through litigation.'" In re Borough of Englewood Cliffs, 473 N.J. Super. 189, 197 n.1 (App. Div. 2022) (quoting In re Township of Bordentown, 471 N.J. Super. 196, 221 (App. Div. 2022)).

"segment of water that has a drainage area of less than [fifty] acres" is not regulated, provided it "has no discernible channel," "is confined within a lawfully existing, manmade conveyance structure or drainage feature," "and/or . . . is not connected to a regulated water." Ibid. A riparian zone exists along every regulated water, and a flood hazard area exists along every regulated water that has a drainage area of fifty acres or more. N.J.A.C. 7:13-2.3(a) and (b).

The FHAC Act and its regulations allow the DEP to determine, upon request, that a flood hazard area permit is not required if a water feature on a property is not a "regulated water." N.J.A.C. 7:13-2.2 and -2.5. If a regulated water has a drainage area of less than fifty acres, the water does not have a flood hazard area that is regulated under the FHAC Act. N.J.A.C. 7:13-2.3(b).

In August 2016, Hampton Farm applied to the DEP for an FHA Determination. In its application, Hampton Farm sought "to confirm that the man-made swale emanating near the culvert under Valley Road located on the south-east portion of the [P]roperty is not a [flood hazard area] regulated water and that the Musconetcong River is the only [f]lood [h]azard [a]rea . . . regulated water on the . . . [P]roperty." In the application Hampton Farm also stated:

> There is an S-shaped, approximately 350 foot long, man-made vegetated drainage feature that exists in the southwest corner of the [P]roperty emanating near the Valley Road culvert and extending to a point

> approximately 200 feet from the north-to-south tree line located between the cemetery property boundary and the Musconetcong River. This S-shaped, man-made vegetated feature has no direct surface connection to the Musconetcong River and we have calculated the drainage area to the end of this man-made feature to be 47.1 acres.

On October 6, 2016, the Friends of Musconetcong, an environmental group related to MW Association, submitted public comments to the DEP, consisting of a report challenging the sufficiency of Hampton Farm's FHA Determination application. According to the report, the drainage area of the water feature on the Property is greater than fifty acres and extends beyond the Property. In that regard, the report included graphic depictions and analysis contending that the water feature on the Property connects to and drains into the Musconetcong River. The Friends of Musconetcong thereafter submitted additional public comments, asserting that Hampton Farm's application failed to provide the DEP with the best available topographical mapping and aerial photographs as required by N.J.A.C. 7:13-2.5(d).

On February 23, 2017, the DEP issued an FHA Determination to Hampton Farm, stating that a "[f]lood [h]azard [a]rea [p]ermit is not required for the water feature crossing Valley Road." The DEP concluded "[t]he feature has a drainage area of less than [fifty] acres and it [is] not connected to a regulated water." The

DEP's FHA Determination did not address the information provided by the Friends of Musconetcong.

On March 28, 2017, MW Association filed a request with the DEP for an adjudicatory hearing to challenge the FHA Determination. In the hearing request, MW Association asserted that Hampton Farm's calculation of the drainage area was inaccurate and that the application included insufficient mapping and data to support the FHA Determination.

The DEP did not respond to MW Association's request for a hearing until four years later. On April 6, 2021, the DEP finally notified MW Association that it was denying its request for an adjudicatory hearing. The DEP did not explain why it had waited four years to respond to the request. Instead, it briefly addressed the FHA Determination:

> Although the [DEP] received maps from both Hampton Farm and the Friends of Musconetcong, the [DEP] made an independent investigation into the water feature in order to determine [FHAC Act] applicability. The [DEP] made several field inspections of the Property, under different weather conditions: on October 12, 2016, with dry, pre-frost conditions; on December 2, 2016, with colder temperatures; and before and after a rainstorm event on January 23, 2017, and January 26, 2017, respectively.
>
> Based on these field inspections and its review of the information submitted, on February 23, 2017, the [DEP] made the determination that the water feature

> has a drainage area of less than [fifty] acres and is not connected to a regulated water, in accordance with N.J.A.C. 7:13-2.2(3)iii, and therefore not regulated under the [FHAC] Act.

The DEP then determined that MW Association did not have a statutory or constitutional right to an adjudicatory hearing. In that regard, the DEP held that the FHAC Act "does not grant statutory hearing rights to third[-]party objectors." The DEP also found that MW Association did not have a particularized property interest sufficient to require an adjudicatory hearing. The DEP characterized MW Association's property interest as "a recreational interest" and concluded that such an interest does not reach the level of particularity that is constitutionally required for an adjudicatory hearing.

MW Association filed a timely appeal from the DEP's April 6, 2021 final agency decision. Simultaneously, on May 10, 2021, MW Association moved for leave to appeal the DEP's February 23, 2017 FHA Determination. MW Association contended that "[i]t would have been premature . . . to appeal . . . the February 23, 2017 FHA [Determination] while its administrative hearing request was pending a decision by [the] DEP." The DEP opposed that motion and argued that MW Association should have filed an appeal from the FHA Determination within forty-five days and that "[r]esolution of [MW

Association's] adjudicatory hearing request did not affect the finality of the FHA [Determination]."

On June 14, 2021, a motion panel of this court denied MW Association's motion for leave to appeal the February 23, 2017 FHA Determination. That order stated that the "appeal continues as to the April 6, 2021 decision." Thereafter, MW Association filed two motions for reconsideration of the decision precluding it from appealing the February 23, 2017 FHA Determination. This court denied both motions.

The parties subsequently filed additional motions concerning the settlement of the record and the scope of issues that could be briefed. On April 11, 2022, and May 23, 2022, we issued orders addressing those motions and directing MW Association to strike certain arguments and amend its merits brief so that it was limited to addressing the April 6, 2021 decision.

On May 4, 2023, after all the merits briefs and appendices had been filed, we issued a letter directing the parties to brief whether the court should reconsider the June 14, 2021, April 11, 2022, and May 23, 2022 orders concerning the scope of this appeal. The letter directed the parties to submit supplemental briefs addressing four issues:

> 1. Whether [the] DEP's FHA Determination was a final agency decision, reviewable as of right under our

> Court Rules, prior to [the] DEP's April 6, 2021 denial of plaintiff's request for an adjudicatory hearing?
>
> 2. Whether [the] DEP was required to respond to plaintiff's hearing request within forty-five days of its FHA Determination to permit plaintiff to timely file an appeal of [the] DEP's FHA Determination, and, if so, what should be the remedy for [the] DEP's failure to do so?
>
> 3. Whether there is any time limit within which [the] DEP must respond to a request for an adjudicatory hearing, and if there is no limit, whether one should be established?
>
> [4.] Additionally, [the] DEP and Hampton [Farm] may address the merits of the underlying February 23, 2017 FHA Determination.

In response, all parties, including Hampton Farm, filed supplemental briefs to address those issues.

II.

This appeal involves three related issues: (1) when the DEP's February 23, 2017 FHA Determination became final for purposes of appeal; (2) whether MW Association is entitled to an administrative adjudicatory hearing to challenge the FHA Determination; and (3) whether the DEP issuance of the FHA Determination to Hampton Farm was arbitrary, capricious, or unreasonable. The first and third issues involve a reconsideration of the interlocutory orders we issued on motions concerning the scope of this appeal.

A. The Finality of the FHA Determination.

The FHAC Act "confers broad authority" on the DEP "to protect the 'safety, health, and general welfare' of the public by 'deliniat[ing] and mark[ing] flood hazard areas' and subjecting them to 'land use regulations.'" Am. Cyanamid Co. v. State, Dep't of Env't Prot., 231 N.J. Super. 292, 297 (App. Div. 1989) (alterations in original) (quoting N.J.S.A. 58:16A-50(b)). The FHAC Act authorizes the DEP to

> adopt rules and regulations which delineate as flood hazard areas such areas as . . . the improper development and use of which would constitute a threat to the safety, health, and general welfare from flooding. These delineations shall identify the various subportions of the flood hazard area for reasonable and proper use according to relative risk, including the delineation of floodways necessary to preserve the flood carrying capacity of natural streams.
>
> [N.J.S.A. 58:16A-52(a).]

Regulations promulgated under the FHAC Act provide that "[a]ll waters in New Jersey are regulated . . . [and e]very regulated water possesses a flood hazard area and/or a riparian zone." N.J.A.C. 7:13-2.2(a). These regulated areas "generally overlap." N.J.A.C. 7:13-2.3(d). Anyone engaged in broadly defined "[r]egulated [a]ctivities," see N.J.A.C. 7:13-2.4, "in a regulated area shall do so

only in accordance with" permits or authorizations issued by the DEP. N.J.A.C. 7:13-2.1(b).

As already noted, the FHAC Act and its regulations also allow the DEP to determine that a flood hazard area permit is not required if it finds the water feature on a property is not a "regulated water." N.J.A.C. 7:13-2.2 and -2.5. The Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -31, as well as DEP regulations, allow applicants to request an adjudicatory hearing in connection with an FHA Determination application. N.J.S.A. 52:14B-2 and -9; N.J.A.C. 7:13-23.1. A third-party objector can also request an adjudicatory hearing to challenge an FHA Determination, if that party can demonstrate (1) a right to a hearing under an applicable statute; or (2) a "particularized property interest of constitutional significance that is directly affected by an agency's permitting decision." In re NJPDES Permit No. NJ0025241, 185 N.J. 474, 481-82 (2006); see also In re Riverview Dev., LLC, 411 N.J. Super. 409, 424 (App. Div. 2010) (explaining that the "APA strictly limits the situations in which third parties are entitled to" adjudicatory hearings). Consequently, the question becomes whether an FHA Determination is final when a third-party objector has a pending request for an adjudicatory hearing.

Rule 2:2-3(a)(2) "authorizes an appeal as of right to the Appellate Division from final decisions or actions of any state administrative agency or officer and to review the validity of any rule promulgated by a state administrative agency with the exception of certain tax matters." Silviera-Francisco v. Bd. of Educ. of Elizabeth, 224 N.J. 126, 136 (2016). Rule 2:4-1(b) provides that "[a]ppeals from final decisions or actions of state administrative agencies or officers . . . shall be filed within [forty-five] days from the date of service of the decision or notice of the action taken." Nevertheless, "an agency action does not become final until all avenues of internal administrative review have been exhausted." Bouie v. N.J. Dep't of Cmty. Affs., 407 N.J. Super. 518, 527 (App. Div. 2009) (first citing N.J.S.A. 52:14B-12; and then citing R. 2:2-3(a)(2)). Accordingly, "to decide whether a state agency action was [a] final action that had to be appealed within forty-five days, [a court] must determine whether there was any available avenue of internal administrative review." Ibid. That issue, in turn, requires us to consider the exhaustion-of-administrative-remedies doctrine.

"Exhaustion of administrative remedies before resort to the courts is a firmly embedded judicial principle. This principle requires exhausting available procedures, that is, 'pursuing them to their appropriate conclusion and,

correlatively . . . awaiting their final outcome before seeking judicial intervention.'" Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 558-59 (1979) (citation omitted) (quoting Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 767 (1947)). The exhaustion-of-administrative-remedies doctrine is "designed to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary interference from the courts." Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975); see also In re Request to Modify Prison Sentences, 242 N.J. 357, 379 (2020).

The Court has explained:

> [T]he doctrine of exhaustion of administrative remedies serves three primary goals: (1) the rule ensures that claims will be heard, as a preliminary matter, by a body possessing expertise in the area; (2) administrative exhaustion allows the parties to create a factual record necessary for meaningful appellate review; and (3) the agency decision may satisfy the parties and thus obviate resort to the courts.
>
> [City of Atlantic City v. Laezza, 80 N.J. 255, 265 (1979).]

See also Rosenstein v. State, Dep't of Treasury, Div. of Pension & Benefits, 438 N.J. Super. 491, 498 (App. Div. 2014). Nevertheless, the exhaustion doctrine "is not absolute and '[e]xceptions are made when the administrative remedies would be futile, when irreparable harm would result, when jurisdiction of the

agency is doubtful, or when an overriding public interest calls for a prompt judicial decision.'" Griepenburg v. Township of Ocean, 220 N.J. 239, 261 (2015) (alteration in original) (quoting N.J. Civil Serv. Ass'n v. State, 88 N.J. 605, 613 (1982)).

Applying these principles to the DEP's February 23, 2017 FHA Determination, we hold that the determination became final for purposes of a judicial appeal when the DEP denied MW Association's request for an adjudicatory hearing. When the DEP received the request for a hearing, it had to determine if MW Association had a statutory right or a particularized property interest entitling it to a hearing. Until the DEP made that determination, MW Association's administrative remedies were not exhausted because it might be accorded a hearing. In that regard, the DEP's FHAC regulations state:

> The [DEP] shall notify the requester that the request for hearing is granted or denied. If the hearing request is denied, the denial shall provide the reason(s) for the denial. If the hearing request is granted, the [DEP] shall refer the matter to the Office of Administrative Law for a contested case hearing in accordance with the [APA], N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.
>
> [N.J.A.C. 7:13-23.1(f).]

The regulations also state:

> A final decision issued by the Commissioner after the hearing in the Office of Administrative Law shall be considered final agency action for purposes of the [APA], and shall be subject to judicial review in the Appellate Division of the Superior Court, as provided in the Rules of Court.
>
> [N.J.A.C. 7:13-23.1(g).]

The DEP argues that MW Association did not have any administrative remedies to exhaust because MW Association did not have a right to an adjudicatory hearing. According to the DEP, a third-party request for an adjudicatory hearing and a direct appeal are distinct and separate processes and the request for a hearing is not an exhaustion requirement for a direct appeal. Thus, the DEP contends a third party can and should pursue both a request for an adjudicatory hearing and a direct appeal simultaneously. We reject that argument as a mischaracterization of the potential remedies available to third parties. Once it filed a request for an adjudicatory hearing, MW Association could not have pursued a direct appeal because further administrative remedies could have been available. In other words, while the request was pending, no one knew whether the DEP would determine that there was a statutory right or a particularized property interest warranting an adjudicatory hearing.

Moreover, MW Association's request for an adjudicatory hearing was not a remedy that fell within the ambit of any exception to the exhaustion doctrine.

Granting or denying the request for an adjudicatory hearing is not a pure question of law because, if granted, further administrative procedures would occur. No party has claimed that appealing the FHA Determination in 2017 was necessary to avoid irreparable harm or was futile. Indeed, MW Association did not seek to appeal in 2017, and Hampton Farm, knowing that there was a pending request for an adjudicatory hearing, never asked the DEP to rule on the hearing request. Instead, they both waited four years for the DEP to issue its decision on MW Association's request for an adjudicatory hearing. There is also no dispute that the DEP had jurisdiction to rule on the request for an adjudicatory hearing. Finally, no party contends an overriding public policy called for a prompt judicial decision, and no interested party sought an earlier judicial review.

We also point out that there was a practical and simple solution to resolve the timing issue. The DEP could have made its determination to reject the request for an adjudicatory hearing shortly after it was filed and not wait, as it did, for four years.

In making this point, we are aware of the large number of permits and related requests that the DEP receives and to which it must respond. It is, however, the DEP's responsibility to make the determination on whether a third-

party objector has the right to an adjudicatory hearing, and the underlying determination is not final until the DEP makes a ruling on a pending hearing request.

We acknowledge that we are reversing our interlocutory rulings concerning the scope of this appeal. We do so because, on a more complete review, we are convinced that our initial determinations to deny MW Association's motion for leave to appeal the FHA Determination and our subsequent determinations on the scope of the appeal were mistaken. Rule 4:42-2 allows courts to revise interlocutory orders any time before the entry of a final judgment "in the sound discretion of the court in the interest of justice." Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021) (quoting R. 4:42-2). Accordingly, because the FHA Determination became final when the DEP denied MW Association's request for a hearing, MW Association also had the right to appeal the February 23, 2017 FHA Determination.

B. Whether the DEP Had a Time Limit to Issue its Decision.

In directing supplemental briefing on the scope of this appeal, we also directed the parties to address whether there was any time limit for the DEP to rule on a request for an adjudicatory hearing. The DEP responded by taking the position that there is no time limit. In that regard, it points out that neither the

FHAC Act nor the regulations promulgated under that act establish a time within which the DEP must respond. See N.J.A.C. 7:13-23.1. Instead, the DEP explained that its regulations set a time frame only for a party to request an adjudicatory hearing. N.J.A.C. 17:13-23.1(b). That regulation directs that any person requesting an adjudicatory hearing must do so within thirty days "after public notice of the decision is published in the DEP Bulletin." Ibid. Accordingly, the DEP argues that we should not establish a time frame for its decision because to do so would effectively promulgate an agency regulation without legislative authority.

We agree that we do not have the authority to create a new administrative rule imposing a time frame for the DEP's decision. Nevertheless, we clarify that an existing rule gives any interested party the right to petition for a timely ruling by the DEP. N.J.A.C. 1:1-4.1(a), which is part of the Uniform Administrative Procedure Rules, states:

> After an agency proceeding has commenced, the agency head shall promptly determine whether the matter is a contested case. If any party petitions the agency head to decide whether the matter is contested, the agency shall make such a determination within [thirty] days from receipt of the petition and inform all parties of its determination.

When any party, including a third-party objector, requests an adjudicatory hearing, that party is effectively contending that the administrative matter is a contested matter. See In re Xanadu Project at Meadowlands Complex, 415 N.J. Super. 179, 193 (App. Div. 2010) (explaining a contested case is a proceeding in which the Constitution or a statute requires an adjudicatory hearing); N.J.S.A. 52:14B-2 (defining "contested case"). Therefore, we hold that any party, including a third-party objector, has the right to petition the DEP to rule on a pending request for an adjudicatory hearing under N.J.A.C. 1:1-4.1(a). The DEP will then have thirty days from receipt of the petition to "inform all parties of its determination" regarding that request. N.J.A.C. 1:1-4.1(a).

Several considerations support our holding that N.J.A.C. 1:1-4.1(a) is applicable to a hearing request. First, the DEP itself stated that MW Association should have filed a petition under N.J.A.C. 1:1-4.1(a). Therefore, the DEP has conceded that rule applies to a request for an adjudicatory hearing.

Second, applying N.J.A.C. 1:1-4.1(a) to a hearing request is consistent with the APA. In crafting the APA, the Legislature explained that it wanted to avoid undue delay in economic development. Accordingly, the Legislature determined that third-party objectors should not have an automatic right to an administrative hearing because giving such a right would "give rise to a chaotic

unpredictability and instability that would be most disconcerting to New Jersey's business climate and would cripple economic development." N.J.S.A. 52:14B-3.1(c); see also Riverview, 411 N.J. Super. at 424 (explaining that the limits on third-party objectors were "intended to prevent the processing of permit applications by state agencies from being bogged down by time-consuming and costly formal hearings" that "consume substantial public and private resources"). Accordingly, by applying N.J.A.C. 1:1-4.1(a) to a pending request for an adjudicatory hearing, applicants, such as Hampton Farm, will be afforded the protection of petitioning for a timely determination and, thereby, avoiding undue delays that can bog down their efforts to develop property.

Finally, applying an existing rule that imposes a time frame for a DEP decision on a hearing request is consistent with well-established principles of how governmental agencies should act. The public should be able to count on the DEP to turn square corners by making timely determinations. See Klumpp v. Borough of Avalon, 202 N.J. 390, 413 (2010) (explaining that "[i]t should go without saying that turning . . . square corners is minimally what citizens should be able to expect from their government"). In short, applying N.J.A.C. 1:1-4.1(a) would avoid a four-year delay.

C. MW Association's Request for an Adjudicatory Hearing.

A third-party objector's right to an administrative hearing is defined and circumscribed by the APA. See N.J.S.A. 52:14B-3.1 and -3.3. The APA states that "[p]ersons who have particularized property interests or who are directly affected by a permitting decision have constitutional and statutory rights and remedies." N.J.S.A. 52:14B-3.1(b). A "[t]hird-party," however, is defined in the APA to be any person other than:

> (a) An applicant for any agency license, permit, certificate, approval, chapter, registration or other form of permission required by law;
>
> (b) A State agency; or
>
> (c) A person who has particularized property interest sufficient to require a hearing on constitutional or statutory grounds.
>
> [N.J.S.A. 52:14B-3.2.]

Accordingly, the APA "prohibit[s] State agencies from promulgating rules and regulations which would allow third[-]party appeals of permit decisions unless specifically authorized to do so by federal law or State statute." N.J.S.A. 52:14B-3.1(d); see also N.J.S.A. 52:14B-3.3 (repeating that prohibition).

The DEP concluded that MW Association had neither a statutory nor a constitutional right to a hearing because it determined that the FHAC Act does

not grant hearing rights to third-party objectors and MW Association does not have a particularized property interest requiring a hearing on constitutional grounds. We agree with the DEP's conclusions.[2]

The FHAC Act does not give a third-party objector an automatic right to an adjudicatory hearing. See N.J.S.A. 58:16A-50 to -103. Instead, consistent with the APA, the regulations promulgated by the DEP under the FHAC Act state: "Nothing in this subchapter shall be construed to provide a right to an adjudicatory hearing in contravention of the [APA], at N.J.S.A. 52:14B-3.1 through 3.3." N.J.A.C. 7:13-23.1(e).

MW Association essentially concedes that the FHAC Act and its regulations do not give it an express right to an adjudicatory hearing. Nevertheless, MW Association argues that the FHAC Act should be interpreted

[2] MW Association filed its request for an adjudicatory hearing on March 28, 2017, but the DEP did not receive that request until March 31, 2017, one day after MW Association's thirty-day deadline to request a hearing. N.J.A.C. 7:13-23.1(b). Accordingly, the DEP also found MW Association's request "[could] be considered untimely" and contends that it did, in fact, consider the request untimely. We disagree with that conclusion and do not find that the timeliness of MW Association's filing precluded its request. See D.R. Horton, Inc. v. N.J. Dep't of Env't Prot., 383 N.J. Super. 405, 408-09 (App. Div. 2006) (holding the doctrine of substantial compliance applies to a "time limitation on a party requesting an adjudicatory hearing"). Indeed, it is not clear what prejudice, if any, the DEP suffered by receiving the request one day after the deadline or why the DEP took four years to rule on a request it found untimely.

to accord the same right to an adjudicatory hearing as the Water Pollution Control Act (WPC Act), N.J.S.A. 58:10A-1 to -73. We reject that contention as inconsistent with the express language of the WPC Act.

The WPC Act expressly allows persons other than the permittee to seek and obtain an adjudicatory hearing. N.J.S.A. 58:10A-7(e). The WPC Act provides all interested persons an opportunity to contest a "determination to grant, deny, modify, suspend or revoke a permit," N.J.S.A. 58:10A-7(d), and then defines "permit" as a New Jersey Pollutant Discharge Elimination System (NJPDES) permit, N.J.S.A. 58:10A-3(k). The WPC Act does not reference an FHAC Act permit. In other words, the right to an adjudicatory hearing under the WPC Act is limited to challenges to an NJPDES permit and does not apply to a challenge to an FHA Determination.

MW Association also does not have a constitutional right to a hearing because it does not have a particularized property interest related to the FHA Determination given to Hampton Farm. Proximity to the permitted site and a general fear of future development are insufficient to trigger a right to an adjudicatory hearing. See, e.g., In re Thomas Orban/Square Props., LLC, 461 N.J. Super. 57, 61 (App. Div. 2019); Spalt v. N.J. Dep't of Env't Prot., 237 N.J. Super. 206, 212 (App. Div. 1989). For example, we have found that adjacent

property owners had no right to an adjudicatory hearing to contest a freshwater-wetlands general permit that allowed the property to be commercially developed. Orban, 461 N.J. Super. at 61. In Orban, the adjacent property owners claimed that the wetlands disturbance would cause their basements and backyards to flood if the site plan did not provide for stormwater management. The objectors supported their claim with expert reports. Id. at 62. Nevertheless, we found that the asserted interests were inadequate to confer a right to a hearing. Id. at 61.

MW Association contends it has a constitutionally cognizable interest because "it is a non-profit organization or 'person' and its primary goal is the protection of the Musconetcong River and its watershed from the threats of inappropriate development." MW Association also takes issue with the DEP's characterization of its interest as "recreational," asserting that its interests are beyond recreational and include "avoiding life-threatening flooding and water contamination both for [MW Association] and its individual members who live in the area of the Musconetcong River." We reject those contentions because speculative damages to neighboring properties do not amount to a particularized interest conferring a right to an administrative hearing. See In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. 452, 473 (2006). In Freshwater

Wetlands, the New Jersey Supreme Court ruled that the possible exacerbation of flooding conditions on nearby properties was too speculative of any injury to provide the neighboring landowners with a right to a contested hearing to challenge a wetlands permit. Id. at 456, 464.

Finally, MW Association contends that it was entitled to an adjudicatory hearing because Hampton Farm should have filed for a verification under the FHAC Act as directed by the final judgment in the Builders Remedy Action. MW Association points out that Hampton Farm sought an FHA Determination rather than a verification. We reject that argument because that contention should have been, and indeed was, submitted to the court that entered the judgment in the Builders Remedy Action. Hampton Farm has submitted an order from the Builders Remedy Action, which states that Hampton Farm's application for the FHA Determination "conform[ed] with the requirements of . . . the [j]udgment [of] compliance."

In summary, MW Association does not have a statutory right to a hearing, and it does not have a particularized property interest requiring a hearing. Accordingly, we affirm the DEP's April 6, 2021 decision denying the request for an adjudicatory hearing.

D. The FHA Determination.

On February 23, 2017, the DEP granted Hampton Farm's application and determined that "the water feature crossing Valley Road" is not regulated under the FHAC Act or its regulations. The DEP set forth its reasons in one paragraph that, in total, stated:

> Based on the review of the submitted information and field investigations as per [N.J.A.C.] 7:13-2.2(3)iii, of the [f]lood [h]azard [a]rea [r]egulations, the feature is not regulated. The feature has a drainage area of less than [fifty] acres and it [is] not connected to a regulated water.

That explanation did not address the comments or report submitted by the Friends of Musconetcong.

In the FHA Determination the DEP also stated: "Please note the Musconetcong River is a regulated stream [and] has a riparian zone." Finally, the DEP noted certain caveats by stating:

> This letter does not relieve the applicant [of] the responsibility of obtaining any other required State, Freshwater Wetlands, Federal or local permits and approvals as required by law [and] is based on a review of information submitted in accordance with the existing regulations. Pursuant to [N.J.A.C.] 7:13-2.5(g), this [FHA] [D]etermination is based on the rules in effect and the information provided in the application regarding the site conditions and the proposed activities as of the date of issuance.

MW Association challenges the DEP's FHA Determination, contending the determination was arbitrary, capricious, and unreasonable because (1) Hampton Farm and the DEP failed to properly calculate the drainage area of the water feature on the Property in accordance with DEP regulations; and (2) the water feature is not isolated from and connects to the Musconetcong River.

The DEP's permitting process is "best classified as a quasi-judicial procedure possessing some, but not all, of the elements of a traditional adjudicatory proceeding." In re Issuance of a Permit by Dep't of Env't Prot. to Ciba-Geigy Corp., 120 N.J. 164, 172 (1990). An agency performing quasi-judicial functions "must set forth basic findings of fact, supported by the evidence and supporting the ultimate conclusions and final determination, for the . . . purpose of informing the . . . parties and any reviewing tribunal . . . so that it may be readily determined whether the result is sufficiently and soundly grounded." In re Application for Med. Marijuana Alt. Treatment Ctr. for Pangaea Health & Wellness, LLC, 465 N.J. Super. 343, 375 (App. Div. 2020) (quoting Application of Howard Sav. Inst. of Newark, 32 N.J. 29, 52 (1960)). "An agency must engage in fact-finding to the extent required by statute or regulation, and provide notice of those facts to all interested parties." Ciba-Geigy Corp., 120 N.J. at 173.

When MW Association filed its appeal, we limited the appeal to the April 6, 2021 decision denying MW Association's request for an adjudicatory hearing. We also limited the record and the issues to be briefed to the April 6, 2021 decision.

Because we have now reversed the rulings on the scope of this appeal, we give the DEP two options. First, the DEP can elect to address MW Association's challenges to its February 23, 2017 FHA Determination. If the DEP makes that election, we will send out a new briefing schedule allowing all the parties to address the merits of the FHA Determination. Alternatively, the DEP can request a remand so that it can expand the factual findings concerning its FHA Determination and update those findings given that more than five years have passed since the determination was issued. The DEP is to select one of those options by submitting a letter to this court within thirty days from the issuance of this opinion.

III.

In summary, we hold that the February 23, 2017 FHA Determination became a final agency decision for purposes of appeal when the DEP issued its decision denying MW Association's request for an adjudicatory hearing. In making that holding, we clarify that any interested party can petition the

Commissioner of the DEP for a timely decision on a request for an adjudicatory hearing under N.J.A.C. 1:1-4.1(a). We also hold that MW Association was not entitled to an adjudicatory hearing to challenge the FHA Determination and we, therefore, affirm the DEP's April 6, 2021 decision. Finally, MW Association has the right to appeal the February 23, 2017 FHA Determination given to Hampton Farm.

Affirmed in part. Jurisdiction is retained over the appeal of the FHA Determination.