

January 8, 2015

PLEASE REPLY TO NEWARK

**Via NJ Lawyers Service**

Re: Cranford Development Associates, LLC, Flood Hazard Control Act Individual Permit No. 2003-08-0006.1 FHA 110001; Flood Hazard Are Verification No. 2003-08-0006.1 FHA 110002; and Freshwater Wetlands Transition Area Averaging Plan No.2003-08-0006.1 FWW 110001, Challenged by Township of Cranford  
Our File No. 4798.12175

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Clerk, Appellate Division  
Superior Court of New Jersey  
Hughes Justice Complex  
25 West Market Street  
Trenton, NJ 08625-0006

Dear Sir/Madam:

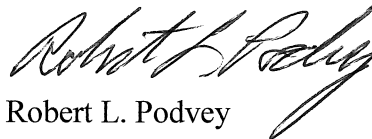
We represent the Township of Cranford in the above-referenced matter. Enclosed for filing are an original and five (5) copies of the following:

1. Notice of Appeal;
2. Civil Case Information Statement; and
3. Certificate of Service

Please file same and return a copy to me, stamped "filed" in the enclosed self-addressed, stamped envelope. Please charge the filing fee to our Superior Court Account No. 81000.

By copy of this letter, I am providing two copies of the enclosed documents to counsel of record in this matter. If you need any other information or documents, please advise.

Respectfully submitted,



Robert L. Podvey

Encs.

RLP:rk

#W0466460

cc: Bob Martin, Commissioner, NJDEP (via N.J. Lawyer's Service)  
Robert H. Crespi, Esq. (via N.J. Lawyer's Service)

**Podvey, Meanor, Catenacci, Hildner, Cocoziello & Chattman, P.C. | Counsellors at Law**

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**New Jersey Judiciary  
Superior Court - Appellate Division  
NOTICE OF APPEAL**

Type or clearly print all information. Attach additional sheets if necessary.

ATTORNEY / LAW FIRM / PRO SE LITIGANT

TITLE IN FULL (AS CAPTIONED BELOW):

Cranford Development Associates, LLC, C/O The S. Hekemian Group Flood Hazard Area Control Act Individual Permit No. 2003-08-0006.1 FHA 110001; Flood Hazard Verification No. 2003-08-0006.1 FHA 110002; and Freshwater Wetlands Transition Area Averaging Plan No. 2003-08-0006.1 FWW 110001, Challenged by Township of Cranford

NAME

Robert L. Podvey, Esq.

STREET ADDRESS

The Legal Center, One Riverfront Plaza, Suite 800

CITY

Newark

STATE

NJ

ZIP

07102

PHONE NUMBER

973-623-1000

EMAIL ADDRESS

rpodvey@podvey.com

ON APPEAL FROM

TRIAL COURT JUDGE

Bob Martin, Commissioner of the NJ DEP

TRIAL COURT OR STATE AGENCY

NJ Department of Environmental Protection

TRIAL COURT OR AGENCY NUMBER

Notice is hereby given that The Township of Cranford appeals to the Appellate Division from a ☐ Judgment or ☒ Order entered on November 20, 2014 in the ☐ Civil ☐ Criminal or ☐ Family Part of the Superior Court or from a ☒ State Agency decision entered on November 20, 2014.

If not appealing the entire judgment, order or agency decision, specify what parts or paragraphs are being appealed.

Order Denying The Township of Cranford's Request for a Hearing Appealing the Issuance of Permits Based on Lack of Standing and the Substantive Finding that the Granting of such Permits by the DEP was justified.

Have all issues, as to all parties in this action, before the trial court or agency been disposed of? (In consolidated actions, all issues as to all parties in all actions must have been disposed of.) ☒ Yes ☐ No

If not, has the order been properly certified as final pursuant to R. 4:42-2? ☐ Yes ☐ No

For criminal, quasi-criminal and juvenile actions only:

Give a concise statement of the offense and the judgment including date entered and any sentence or disposition imposed:

This appeal is from a ☐ conviction ☐ post judgment motion ☐ post-conviction relief.

If post-conviction relief, is it the ☐ 1st ☐ 2nd ☐ other \_\_\_\_\_  
specify

Is defendant incarcerated? ☐ Yes ☐ No

Was bail granted or the sentence or disposition stayed? ☐ Yes ☐ No

If in custody, name the place of confinement:

Defendant was represented below by:

☐ Public Defender ☐ self ☐ private counsel \_\_\_\_\_  
specify

Notice of appeal and attached case information statement have been served where applicable on the following:

	Name	Date of Service
Trial Court Judge		
Trial Court Division Manager		
Tax Court Administrator		
State Agency	NJ Department of Environmental Protection	January 8, 2015
Attorney General or Attorney for other Governmental body pursuant to <u>R. 2:5-1(a), (e) or (h)</u>		
Other parties in this action:		

Name and Designation	Attorney Name, Address and Telephone No.	Date of Service
Cranford Development Associates, LLC, Respondent	Robert H. Crespi, Esq., Wolff Samson, One Boland Dr., West Orange, NJ 07052 (973) 530-2060	January 8, 2015

Attached transcript request form has been served where applicable on the following:

	Name	Date of Service	Amount of Deposit
Trial Court Transcript Office			
Court Reporter (if applicable)			
Supervisor of Court Reporters			
Clerk of the Tax Court			
State Agency			

Exempt from submitting the transcript request form due to the following:

- ☒ No verbatim record. Request for Adjudicatory Hearing denied.
- ☐ Transcript in possession of attorney or pro se litigant (four copies of the transcript must be submitted along with an electronic copy).  
List the date(s) of the trial or hearing:
- ☐ Motion for abbreviation of transcript filed with the court or agency below. Attach copy.
- ☐ Motion for free transcript filed with the court below. Attach copy.

I certify that the foregoing statements are true to the best of my knowledge, information and belief. I also certify that, unless exempt, the filing fee required by N.J.S.A. 22A:2 has been paid.

January 8, 2015  
DATE

  
SIGNATURE OF ATTORNEY OR PRO SE LITIGANT



**New Jersey Judiciary**  
**Superior Court - Appellate Division**  
**CIVIL CASE INFORMATION STATEMENT**

Please type or clearly print all information.

**TITLE IN FULL**

**TRIAL COURT OR AGENCY DOCKET NUMBER**

Cranford Development Associates, LLC, C/O The S. Hekemian Group Flood Hazard Area Control Act Individual Permit No. 2003-08-0006.1 FHA 110001; Flood Hazard Verification No. 2003-08-0006.1 FHA 110002; and Freshwater Wetlands Transition Area Averaging Plan No. 2003-08-0006.1\*

None

\*FWW 110001, Challenged by Twp. of Cranford

■ **Attach additional sheets as necessary for any information below.**

**APPELLANT'S ATTORNEY**

EMAIL ADDRESS: [rpodvey@podvey.com](mailto:rpodvey@podvey.com)

☐ PLAINTIFF ☐ DEFENDANT ☒ OTHER (SPECIFY) Municipality Challenging Grant of DEP permits to Developer

**NAME**

Robert L. Podvey, Esq.

**CLIENT**

Township of Cranford

**STREET ADDRESS**

Legal Center, One Riverfront Plaza, Suite 800

**CITY**

Newark

**STATE**

NJ

**ZIP**

07102

**TELEPHONE NUMBER**

973-623-1000

**RESPONDENT'S ATTORNEY \***

EMAIL ADDRESS: [rcrespi@wolffsamson.com](mailto:rcrespi@wolffsamson.com)

**NAME**

Robert H. Crespi, Esq.

**CLIENT**

Cranford Development Associates, LLC

**STREET ADDRESS**

One Boland Drive

**CITY**

West Orange

**STATE**

NJ

**ZIP**

07052

**TELEPHONE NUMBER**

973-530-2060

\* Indicate which parties, if any, did not participate below or were no longer parties to the action at the time of entry of the judgment or decision being appealed.

**GIVE DATE AND SUMMARY OF JUDGMENT, ORDER, OR DECISION BEING APPEALED AND ATTACH A COPY:**

November 20, 1014 Order by Bob Martin (Commissioner, New Jersey Department of Environmental Protection) Denying Request for Adjudicatory Hearing.

Are there any claims against any party below, either in this or a consolidated action, which have not been disposed of, including counterclaims, cross-claims, third-party claims and applications for counsel fees?

☐ YES ☒ NO

If so, has the order been properly certified as final pursuant to R. 4:42-2? (If not, leave to appeal must be sought. R. 2:2-4,2:5-6)

☐ YES ☐ NO  
N/A

(If the order has been certified, attach, together with a copy of the order, a copy of the complaint or any other relevant pleadings and a brief explanation as to why the order qualified for certification pursuant to R. 4:42-2.)

Were any claims dismissed without prejudice?

☐ YES ☒ NO

If so, explain and indicate any agreement between the parties concerning future disposition of those claims.

Is the validity of a statute, regulation, executive order, franchise or constitutional provision of this State being questioned? (R. 2:5-1(h))

☐ YES ☒ NO

**GIVE A BRIEF STATEMENT OF THE FACTS AND PROCEDURAL HISTORY:**

See Rider A

TO THE EXTENT POSSIBLE, LIST THE PROPOSED ISSUES TO BE RAISED ON THE APPEAL AS THEY WILL BE DESCRIBED IN APPROPRIATE POINT HEADINGS PURSUANT TO R. 2:6-2(a)(5). (Appellant or cross-appellant only.):

- I. The DEP Commissioner's Denial of an Adjudicatory Hearing on Cranford's Challenge to the Permits Granted to CDA Constitutes An Abuse of Discretion.
- II. The DEP Commissioner Erred in Determining that the Township had No Standby to Challenge the Agency's Issuance of a Permit to CDA.
- III. The DEP Commissioner Erred in Determining the Permits Granted by the DEP Complied With the Substantive Requirements of the FHACA, the FWPA, and Their Implementing Rules.

IF YOU ARE APPEALING FROM A JUDGMENT ENTERED BY A TRIAL JUDGE SITTING WITHOUT A JURY OR FROM AN ORDER OF THE TRIAL COURT, COMPLETE THE FOLLOWING: N/A

1. Did the trial judge issue oral findings or an opinion? If so, on what date? \_\_\_\_\_ ☐ YES ☐ NO
2. Did the trial judge issue written findings or an opinion? If so, on what date? \_\_\_\_\_ ☐ YES ☐ NO
3. Will the trial judge be filing a statement or an opinion pursuant to R. 2:5-1(b)? ☐ YES ☐ NO

Caution: Before you indicate that there was neither findings nor an opinion, you should inquire of the trial judge to determine whether findings or an opinion was placed on the record out of counsel's presence or whether the judge will be filing a statement or opinion pursuant to R. 2:5-1(b).

DATE OF YOUR INQUIRY: \_\_\_\_\_

1. IS THERE ANY APPEAL NOW PENDING OR ABOUT TO BE BROUGHT BEFORE THIS COURT WHICH:

- (A) Arises from substantially the same case or controversy as this appeal? ☒ YES ☐ NO
- (B) Involves an issue that is substantially the same, similar or related to an issue in this appeal? ☐ YES ☐ NO

2. WAS THERE ANY PRIOR APPEAL INVOLVING THIS CASE OR CONTROVERSY? ☐ YES ☒ NO

IF THE ANSWER TO EITHER 1 OR 2 ABOVE IS YES, STATE:

Case Name:

Cranford Development Associates, LLC, et. al. vs. Twp. of Cranford

Appellate Division Docket Number:

A-005822-12T2

Civil appeals are screened for submission to the Civil Appeals Settlement Program (CASP) to determine their potential for settlement or, in the alternative, a simplification of the issues and any other matters that may aid in the disposition or handling of the appeal. Please consider these when responding to the following question. A negative response will not necessarily rule out the scheduling of a preargument conference.

State whether you think this case may benefit from a CASP conference. ☐ YES ☒ NO

Explain your answer:

The issues do not involve monetary damages but the right to an Adjudicatory Hearing, which only the Court can grant.

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

Township of Cranford

Name of Appellant or Respondent

January 8, 2015

Date

Robert L. Podvey

Name of Counsel of Record  
(or your name if not represented by counsel)



Signature of Counsel of Record  
(or your signature if not represented by counsel)

## **RIDER A**

Cranford Development Associates, LLC applied to the DEP for a Flood Hazard Area Individual Permit, a Flood Hazard Area Verification and for a Freshwater Wetlands Transition Area Averaging Plan. Because of letters received from area residents and at the request of the Township of Cranford, the DEP held a public hearing in Cranford on January 16, 2014.

On February 7, 2014, the DEP issued the Permits outlined above.

On March 18, 2014, The Township of Cranford requested an Adjudicatory Hearing. On November 20, 2014, the DEP Commissioner issued an Opinion stating that the Township of Cranford lacked standing to challenge the issuance of the Permits. The Commissioner also found that the DEP was justified in their issuing the Permits. The Township of Cranford challenges these findings.

#W0466463



# State of New Jersey

## DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE  
*Governor*

BOB MARTIN  
*Commissioner*

KIM GUADAGNO  
*Lt. Governor*

CRANFORD DEVELOPMENT )  
ASSOCIATES, LLC, C/O THE S. )  
HEKEMIAN GROUP FLOOD HAZARD )  
AREA CONTROL ACT INDIVIDUAL )  
PERMIT NO. 2003-08-0006.1 FHA 110001; )  
FLOOD HAZARD AREA VERIFICATION )  
NO. 2003-08-0006.1 FHA 110002; AND )  
FRESHWATER WETLANDS )  
TRANSITION AREA AVERAGING PLAN )  
NO. 2003-08-0006.1 FWW 110001, )  
CHALLENGED BY TOWNSHIP OF )  
CRANFORD )

### ORDER DENYING REQUEST FOR ADJUDICATORY HEARING

THIS ORDER concerns a Department of Environmental Protection (Department or DEP) flood hazard area individual permit, a flood hazard area verification, and a freshwater wetlands transition area averaging plan (the permits) issued to Cranford Development Associates, LLC, c/o The S. Hekemian Group (CDA) on February 7, 2014. Pursuant to the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 to -101 (FHACA), the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 to -30 (FWPA), and their implementing regulations, N.J.A.C. 7:13-1 et seq., and N.J.A.C. 7:7A-1 et seq., respectively, the permits verify the limits of the flood hazard area, floodway, and riparian zone and authorize the construction of 360 residential units within two mid-rise buildings, a retaining wall, an outfall structure, and associated utilities within the flood hazard area of a branch of the Rahway River on Block 291, Lot 15.01, and Block 292, Lot 2, along Birchwood Avenue, in the Township of Cranford, Union County (the Property). The permits also authorize the reduction of, and compensation for, intermediate resource value

transition areas on the Property. On March 18, 2014, the Township of Cranford (Cranford or Township), filed an adjudicatory hearing request challenging the permits. The Township owns 30.68 acres of property upstream from Birchwood Avenue. The Township utilizes 2.2 acres of its property for leaf storage and composting.

### BACKGROUND

The existing condition of the Property includes a vacant two-story building at 215 Birchwood Avenue with surface parking for 290 vehicles and a partially occupied office building at 235 Birchwood Avenue with surface parking for 65 vehicles. The Property also includes a large wooded area containing freshwater wetlands. As noted above, the permits authorize CDA to construct two mid-rise buildings on the Property, a retaining wall, and an outfall structure. The Property is located within the flood hazard area of the Rahway River Branch 10-24 and is bordered downstream from Birchwood Avenue by existing buildings, and upstream from Birchwood Avenue by property owned by the Township.

The Township challenges the permit on the grounds that (1) the Department ignored the requirements of N.J.A.C. 7:13-11.1(f) regarding impacts of flooding on land not owned by an applicant; (2) the Department should have treated an overland flow path located at Birchwood Avenue as a channel for purposes of reviewing the flood impacts of CDA's project; and (3) the Department did not consider the impact and location of facilities that must be constructed at the site in order to accommodate the power demands of CDA's project. According to the Township, these issues, properly considered, should have resulted in the denial of CDA's permit application. The Township thus requests a hearing in order to address these issues before an administrative law judge in the Office of Administrative Law (OAL).



Under the FHACA rules, regulated activities undertaken in a flood hazard area or a riparian zone of any regulated water require a permit from the Department. N.J.A.C. 7:13-2.1 through -2.4. CDA purchased the Property in 2008. CDA thereafter tried and failed to have the Property rezoned for inclusionary multifamily development. As a result, CDA filed suit in the Superior Court, alleging that Cranford had violated its constitutional obligation to create realistic opportunities for the provision of low-income housing. After a 15-day trial, which included extensive testimony and the presentation of expert reports on the issue of CDA's ability to comply with the Department's regulations, the Court entered an order finding the Property suitable for multifamily inclusionary development and ordering Cranford to rezone the Property. The Court further appointed a Special Hearing Examiner to conduct a hearing regarding whether CDA's application for site plan approval and its request to elevate a portion of Birchwood Avenue complied with DEP land use regulations.

This hearing took place in August 2012. Cranford and CDA again submitted testimony and expert witness reports regarding CDA's ability to comply with DEP regulations. The Special Hearing Examiner issued a report on November 10, 2012, recommending that the Court grant site plan approval to authorize CDA to elevate a portion of Birchwood Avenue. The Court entered an order on April 5, 2013, adopting the Special Hearing Examiner's report, with several modifications not relevant to the instant matter.

At the same time this litigation was proceeding in Superior Court, CDA filed its application to the Department for the permits. During the permit application review period, Cranford participated extensively as an objector. Residents of Cranford also presented objections to CDA's application. As a result of these various objections, the Department determined to hold a public hearing regarding the permits on January 16, 2014. Cranford attended the hearing, as did

100 members of the public. Cranford offered testimony at the hearing, but did not submit to the Department any transcripts of testimony from the litigation before the Superior Court or the Special Hearing Examiner. The Department thereafter issued the permits on February 7, 2014, and published notice of the issuance of the permits in the February 19, 2014, DEP Bulletin.

The Department received Cranford's adjudicatory hearing request on March 19, 2014. CDA submitted opposition to Cranford's request on April 3, 2014, alleging that Cranford lacks standing and arguing that there are no disputed issues of fact that need be addressed in an adjudicatory hearing. The parties submitted additional supporting papers on April 14, 2014, and April 17, 2014.

## DISCUSSION

### Petitioner's Right to a Hearing

N.J.A.C. 7:13-18.1(b) provides that, subject to the limitations on third party hearings, any party seeking an adjudicatory hearing shall submit a hearing request within 30 calendar days of publication of notice of the permit decision in the DEP Bulletin. N.J.A.C. 7:13-18.1(b). If not submitted within this timeframe "the Department shall deny the request." Id. The purpose of limiting the time to request a hearing is "to compel a party aggrieved by agency action to challenge that action promptly and to give finality to agency action that is not challenged in a timely manner." D.R. Horton, Inc.-New Jersey v. N.J. Dept. of Env't'l Prot., 383 N.J. Super. 405, 408 (App. Div. 2006).

Here, Cranford's hearing request was timely, as the Department had published notice of the permits on February 19, 2014, and the hearing request was received by the Department twenty-eight days later on March 19, 2014.

However, third party objectors to a decision by the Department do not have an automatic right to an adversarial, adjudicatory hearing before an administrative law judge. To avoid “chaotic unpredictability and instability,” the Administrative Procedure Act (APA) prohibits agencies from promulgating “any rule or regulation that would allow a third party to appeal a permit decision” unless specifically authorized to do so by federal law or State statute. See N.J.S.A. 52:14B-3.1; -3.3. The term “third party” includes any individual other than the applicant, a state agency or other individual with a “particularized property interest sufficient to require a hearing on constitutional or statutory grounds.” N.J.S.A. 52:14B-3.2. Accordingly, parties other than the applicant or an agency only have standing if they can demonstrate: (1) a right to a hearing under the applicable statute, or (2) a “particularized property interest” of constitutional significance. Id.; see also In re Freshwater Wetlands Statewide Gen. Permits, 185 N.J. 452, 463-4 (2006).

The FHACA does not grant statutory hearing rights to third party objectors. In re Riverview Dev., LLC, Waterfront Dev. Permit No. 0908-05-0004.3 WFD 060001, 411 N.J. Super. 409, 429 (App. Div.), certif. denied, 202 N.J. 347 (2010); In re Freshwater Wetlands, supra, 185 N.J. at 463-64; see also N.J.A.C. 7:13-18.1 (expressly limiting its procedure for granting an adjudicatory hearing request by the terms of the APA). Therefore, Cranford must demonstrate a “particularized property interest” of constitutional significance. N.J.S.A. 52:14B-2(b), -3.1(b) to (d), -3.2; see also In re Freshwater Wetlands, supra, 185 N.J. at 463-4.

As the Supreme Court has pointed out, “third parties generally are not able to meet ... this rigorous review standard.” In re NJPDES Permit No. NJ0025241, 185 N.J. 474, 482 (2006); see also In re Freshwater Wetlands, supra. Courts have consistently held that proximity or any type of generalized property right shared with other property owners such as recreational

interests, traffic, views, quality of life, and property values are insufficient to demonstrate a particularized property right required to establish third party standing for a hearing. See Spalt v. NJDEP, 237 N.J. Super. 206, 212 (App. Div. 1989), certif. denied, 122 N.J. 140 (1990); In re Amico/Tunnel Carwash, 371 N.J. Super. 199, 211 (App. Div. 2004); see also Normandy Beach Improvement Ass'n v. Comm'r, 193 N.J. Super. 57 (App. Div. 1983), certif. denied, 96 N.J. 305 (1984).

Here, Cranford does not have a particularized property interest sufficient to justify a hearing in the OAL. Cranford has produced substantial testimony and numerous expert reports which opine that construction on the Property, which is located adjacent to property owned by Cranford, could cause flooding to rise beyond what is statutorily permitted. See N.J.A.C. 7:13-11.1(f)3 and 5. However, this type of speculative concern is insufficient to require a hearing on constitutional grounds, especially where the objector has been afforded extensive opportunities to present argument to the Department and other authorities. See In re Freshwater Wetlands Statewide General Permits, 185 N.J. 452, 473-74 (2006).

In Freshwater Wetlands, a developer sought subdivision approval from a planning board in order to carry out certain construction plans. Extensive hearings on the developers' subdivision plan were conducted before the planning board, and the planning board ultimately denied subdivision approval. At the same time, the developer sought a freshwater wetlands permit in order to fill a portion of "isolated" wetlands on its property. Neighboring individuals objected to this permit, arguing, inter alia, that the filling would exacerbate flooding conditions on adjoining properties. The Department thereafter commenced a two-year review process. During that process, the Department considered the objectors' letters, testimony and environmental expert reports; conducted on-site inspections; and met with various property

owners, their experts and lawyers. At the end of this process, the Department issued the permit to the developer. Id. at 457-61. After the permit was issued, the objectors demanded a trial-type hearing, which was denied by the Department. The matter was ultimately appealed to the Supreme Court of New Jersey, which held that the objectors' due process rights were satisfied by the Department's administrative procedures, including a two-year review period consisting of a detailed review of letters, submissions and expert reports. The Court also found significant the fact that the objectors had participated intimately in hearings before a planning board, as well as the fact that the developer would be subject to civil liability if its development caused flooding on the objectors' property. Id. at 471-74.

The Court in Freshwater Wetlands ultimately held that the objectors did not have a particularized property interest because any threat to their property was speculative. Id. at 473-74. In this regard, the Court cited Cunningham v. Department of Civil Service, 69 N.J. 13 (1975), wherein certain civil service employees had lost their positions in an agency reorganization and were denied a right to a hearing. In Cunningham, the Court held that the employees were entitled to a hearing because, among other things, the employees had been subject to an actual deprivation of property rights through their unceremonious demotion. This was not the case in Freshwater Wetlands, and the Court held accordingly.

The instant matter is similar to Freshwater Wetlands. Here, Cranford participated in a 15-day trial before the Superior Court, where a central issue was CDA's ability to comply with DEP regulations. The trial included extensive cross-examination, inspection, and submission of reports and testimony. After the trial court ordered Cranford to rezone the Property, it appointed a Special Hearing Examiner to conduct hearings regarding CDA's application for site plan approval. These hearings were conducted over the course of five days and dealt primarily with

whether the CDA plan could comply with DEP regulations. Cranford again participated extensively, cross-examining CDA's experts, presenting expert reports, and submitting oral testimony of its own two experts. The Special Hearing Examiner ultimately recommended, in a detailed report to the trial court, that site plan approval be granted. Cranford submitted factual and legal objections to the Special Hearing Examiner's report. Nevertheless, the trial court adopted the report in full, with certain modifications not relevant to the instant discussion.

Contemporaneous with the hearings before the Superior Court and the Special Hearing Examiner, CDA submitted its application for the permits to the Department. Cranford participated in the permit application review process as an objector, submitting written objections and expert reports. Furthermore, Cranford participated in the public hearing on the permit application conducted by the Department on January 16, 2014. Cranford provided testimony at this hearing and submitted written comments afterward. Notwithstanding Cranford's objections, the Department approved the permits.

Thus, as in Freshwater Wetlands, Cranford's due process rights have been protected by the numerous opportunities afforded to not only present written objections and expert reports, but to cross-examine CDA's experts and provide oral testimony. Moreover, as in Freshwater Wetlands, and unlike in Cunningham, Cranford's property interest does not reach the level of particularity that is constitutionally required for an adjudicatory hearing. Unlike in Cunningham, wherein the civil service employees were subject to an actual deprivation of property rights, in this matter Cranford's flooding concerns are speculative. There has been no deprivation of Cranford's property rights. Nevertheless, any speculative concern for Cranford's property rights is mitigated by the fact that, should CDA's construction project result in flooding that causes

damage to Cranford's adjoining property, Cranford is not without a remedy at law. See Freshwater Wetlands, supra.

For these reasons, Cranford has not demonstrated a particularized property interest of constitutional significance to entitle it to a hearing to challenge the permit. Moreover, Cranford's due process rights have been sufficiently protected by the extensive public process that precipitated the issuance of the permits. Therefore, Cranford's request for a hearing is DENIED.

#### The Department's Permit Decision

Although Cranford's hearing request is denied, its objections the permits are reviewed below.

*The Department ignored the requirements of N.J.A.C. 7:13-11.1(f)*

Cranford asserts that the Department ignored N.J.A.C. 7:13-11.1(f), which directs that a permit for regulated activity that will adversely impact property not owned by the applicant may only be issued if the applicant demonstrates that one or more of the requirements of N.J.A.C. 7:13-9.2(f) are met. Regulated activity adversely impacts property not owned by the applicant if, inter alia:

[t]he regulated activity will cause a building situated on property not owned by the applicant to be subject to increased frequency or depth of flooding during any flood event up to and including the flood hazard area design flood; [or]  
[N.J.A.C. 7:13-11.1(f)3]

\* \* \*

[t]he applicant owns (or has development rights) on only one side of a regulated water, and the regulated activity will cause the flood hazard area design flood elevation to increase by more than 0.1 feet on any property not owned by the applicant.  
[N.J.A.C. 7:13-11.1(f)5].

N.J.A.C. 7:13-9.2(f) provides, in turn, for certain circumstances wherein a permit may be issued for regulated activity that would adversely affect property not owned by the applicant. Where the applicant is a public entity, will purchase the adversely impacted property, has obtained an easement on the adversely impacted property, and/or has obtained written permission from the owner of the adversely impacted property, the Department may approve a permit for activity that would adversely impact property not owned by the applicant. N.J.A.C. 7:13-9.2(f) is not applicable here because CDA will not adversely impact property it does not own.

During the course of this matter, Cranford has submitted several expert reports, and much expert testimony, opining that CDA's project will cause flooding to rise on property not owned by CDA, and beyond what is statutorily permitted by N.J.A.C. 7:13-11.1(f)(3) and (5). Cranford has argued extensively in its submissions that the project will cause the flood hazard area design elevation to increase by 0.17 feet in the areas surrounding the Property, thus adversely impacting flooding on property not owned by CDA in violation of N.J.A.C. 7:13-11.1(f)3 and 5. Cranford has further asserted that the Department's Engineering Report, justifying the issuance of the permits, provides no factual or analytical basis for concluding that CDA's project will not increase the flood elevations for adjoining and nearby properties and does not otherwise analyze N.J.A.C. 7:13-11.1(f). Therefore, Cranford contends that the Department's conclusion of no adverse impact is improper.

The Engineering Report generated by the Department indicates that the proposed construction will be located within the flood fringe, an area that is outside of the floodway. N.J.A.C. 7:13-1.2. Moreover, it is evident that the proposed project will not adversely impact flooding and that further consideration of N.J.A.C. 7:13-11.1(f) by the Department was not



necessary. N.J.A.C. 7:13-10.4 provides that if construction is proposed aboveground and within a flood fringe, certain flood storage volume displacement standards must be met by the applicant. This regulation recognizes that material placed aboveground in a flood fringe will necessarily occupy space that would otherwise be filled with floodwaters during a flood, thus reducing flood storage volume. Generally, any reduction of space within a flood fringe by construction activities must be compensated for in order to avoid any reduction in flood storage volume.

According to the Department's Engineering Report, the existing flood storage volume is 305,351 cubic feet between the flood hazard area design flood elevation level and the 10-year flood elevation level, and 180,901 cubic feet between the 10-year flood elevation and the ground surface. CDA's project, in turn, proposed 310,306 cubic feet of flood storage volume between the flood hazard area design flood elevation and the 10-year flood elevation level, and 200,524 cubic feet between the 10-year flood elevation and the ground surface. However, before a full picture of the flood storage volume that will result from CDA's project can be developed, the negative impact on flood storage volume from CDA's construction must be subtracted from CDA's proposed flood storage volume numbers.

As discussed in detail in the Department's Engineering Report, CDA's initial estimates of the negative impact of the construction on flood storage volume used a conservative flood hazard area design elevation estimate of 78.6 feet, when in fact the flood hazard area design elevation varies from 78.4 to 78.56 feet and the 10-year flood elevation varies from 77.6 to 77.7 feet. CDA's conservative estimates yielded the 0.17-foot increase in flood elevation that is cited by Cranford in its hearing request. However, when the actual flood elevations are used in the calculations, the proposed construction would result in 308,101 cubic feet of flood storage volume between the flood hazard area design flood elevation and the 10-year flood elevation,

and 199,016 cubic feet of flood storage volume between the 10-year flood elevation and the ground surface. When compared with the original flood storage volumes of 305,351 cubic feet and 180,901 cubic feet, it is evident that CDA's project will in fact improve flood storage volume on the Property.

Thus, it was appropriate for the Department to determine that CDA's construction will not adversely impact flooding on the Property or on properties not owned by CDA. This is especially so because CDA's project proposes to remove fill from the floodway, thus improving conditions. Therefore, because it was demonstrated that this project will not adversely impact flooding on the Property or on properties not owned by CDA, DEP was not required to further address compliance with N.J.A.C. 7:13-11.1(f), and the permits were properly approved in this regard. Based on the above, I am satisfied that it was also appropriate for the Department to determine that the proposed construction would not adversely impact flooding.

*An Overland Flow Path Located at Birchwood Avenue Should Have Been Treated as a Channel*

Cranford's next objection is that the Department should have treated an overland flow path located at Birchwood Avenue as a channel for purposes of reviewing CDA's permit application. A "channel" is defined as:

a linear topographic depression that continuously or intermittently confines and/or conducts surface water, not including transient erosional gullies and other ephemeral features that temporarily form after heavy rainfall. A channel can be naturally occurring or can be of human origin through excavation or construction. A channel includes both bed and banks.

[N.J.A.C. 7:13-1.2.]

When construction is proposed that will affect a channel, certain requirements must be met. See N.J.A.C. 7:13-10.1. Cranford contends that most of the flow from a severe storm

occurring near the Property crosses over Birchwood Avenue and into the area where CDA's proposed construction is set to take place. Cranford argues that this significant flow could affect upstream flooding and should thus be treated as a "channel." However, this assertion is contrary to the definition of "channel," which excludes "other ephemeral features that temporarily form after heavy rainfall." Cranford's objection pertains only to a situation wherein heavy rainfall has created a temporary overland flow path across Birchwood Avenue. Moreover, a "channel" must be a "linear topographic depression." Cranford has not contended, much less established, that the overland flow path constitutes any type of topographic depression. Accordingly, because the overland flow path that forms across Birchwood Avenue only after heavy rainfall does not comport with the regulatory definition of "channel," it was appropriate for the Department to decline to treat the overland flow path as a channel and to conclude that no channel work was proposed by CDA's application. The Department properly concluded that the provisions of N.J.A.C. 7:13-10.1 do not apply here.

*The Department Should Have Considered the Energy Needs of CDA's Proposed Construction*

Cranford sums up its argument concerning energy needs by reference to an email sent to the Department by Cranford's engineer on January 30, 2014:

The concern is that these large buildings will generate the need for large volumes of power. That means placing large structures on the site to control and regulate that power demand. Where are they going? Any placement of electrical, gas, etc., facilities need [sic] to be elevated out of the flood plain. Their slabs have to be included in the evaluation of impervious cover mitigation. Their volumes need to be considered in the mitigation of floodwater displacement. If they are in the floodplain, and they need to be brought up into a floor of Building "B" from the parking lot under it, it needs to be protected. Because of the public exposure of the project, the Township cannot overlook these issues.

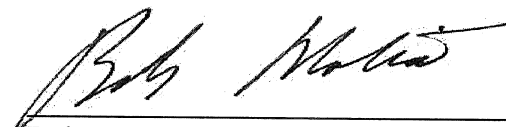
Issues related to the power demands of structures and/or buildings constructed in a flood hazard area are not addressed through an application for a flood hazard area permit. Energy demand issues are typically dealt with by the municipality. Indeed, other than the above referenced email, Cranford has pointed to no legal authority that required the Department to take into account these considerations before issuing the permits. Nevertheless, as noted in the Department's Engineering Report, no construction of a utility line has been proposed for this project, and therefore the requirements of N.J.A.C. 7:13-11.9 do not apply to the proposed project. Moreover, the design of the utility elements of CDA's project has already been approved by the Special Hearing Officer and the trial court. Finally, the vast majority of utility-related structures used will be located underground, and therefore will not affect flooding. Accordingly, Cranford has not sufficiently demonstrated why it was inappropriate for the Department to issue the permits under these circumstances. This argument is thus without merit.

### CONCLUSION

For the reasons set forth above, Cranford's hearing request is DENIED for lack of standing. I am also satisfied that the permits comply with the substantive requirements of the FHACA, the FWPA, and their implementing rules.

IT IS SO ORDERED.

Dated: November 20, 2014

  
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Bob Martin, Commissioner  
New Jersey Department of  
Environmental Protection

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*Attorneys for Township of Cranford*

Cranford Development  
Associates, LLC,  
Flood Hazard Control Act  
Individual Permit No.  
2003-08-0006.1 FHA 110001;  
Flood Hazard Are Verification  
No. 2003-08-0006.1 FHA  
110002; and Freshwater  
Wetlands Transition Area  
Averaging Plan No.2003-08-  
0006.1 FWW 110001, Challenged  
by Township of Cranford

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

Sat Below:

Bob Martin, Commissioner,  
New Jersey Department of  
Environmental Protection

1. I, Robert L. Podvey, Esq., hereby certify that on January 8, 2015, I sent, by New Jersey Lawyers' Service, an original and five (5) copies of a Notice of Appeal and Case Information Statement in this matter to the Appellate Division Clerk's Office (25 West Market Street, Trenton, New Jersey) for filing.

2. On January 8, 2015, I sent two copies of the Notice of Appeal and Case Information by New Jersey Lawyer's Service to counsel for Cranford Development Associates, LLC, Robert H. Crespi, Esq., Wolff & Samson, One Boland Drive, West Orange, New

Jersey, 07052. I also caused the aforementioned documents to be sent to Mr. Crespi via electronic mail on this date.

3. On January 8, 2015, I sent two copies of the Notice of Appeal and Case Information Statement to Bob Martin, Commissioner of the New Jersey Department of Environmental Protection via New Jersey Lawyer's Service.

I certify the foregoing statements to be true to the best of my knowledge and under penalty of perjury.



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DATED: January 8, 2015

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