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April 21, 2024

Via eCourts
Heather Joy Baker, Clerk
Supreme Court of New Jersey
R.J. Hughes Justice Complex
PO Box 970
Trenton, NJ 08625-0970

Re: In re Appeal of the New Jersey Department of Environmental Protection's September 6, 2022 Denial of Request for Adjudicatory Hearing Under N.J.A.C. 7:26C-9.10, dated May 12, 2022, Concerning the Department's April 20, 2022 Notice of Remediation in Progress Waiver Rescission
Docket No. 089182

On Petition for Certification from the Superior Court of New Jersey, Appellate Division
Docket No. A-000511-22

Sat Below:
Hon. Mary Gibbons Whipple, P.J.A.D.
Hon. Jessica R. Mayer, J.A.D.
Hon. Catherine I. Enright, J.A.D.

Letter Brief on Behalf of the New Jersey Department of Environmental Protection in Opposition to Petition for Certification

Dear Ms. Baker:

Please accept this letter brief in lieu of a formal brief on behalf of Respondent, New Jersey Department of Environmental Protection ("DEP") in opposition to the petition for certification. Respondent relies primarily on its brief filed below, four copies of which are being filed simultaneously with the Court.

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

Respondent relies on and incorporates by reference the facts and procedural history set forth in its merits brief filed in the Appellate Division, supplemented as follows.

The Industrial Site Recovery Act ("ISRA"), N.J.S.A. 13:1K-6 to -14, governs the responsibilities of the owner or operator of an industrial establishment upon the termination of operations or the transfer of an industrial establishment. On May 31, 2006, Delphi Automotive Systems, LLC ("Delphi") triggered ISRA's environmental investigation and remediation obligations when it sold the industrial establishment located at 760 Jersey Avenue, New Brunswick, Middlesex County, also known as Block 598, Lot 3.03 on the New Brunswick tax maps ("Property") to Petitioner-Appellant, Clarios LLC (formerly Johnson Controls Battery Group, Inc.)[2]. (Pa2-3).[3] DEP assigned ISRA case number E20060211 to this transaction. (Pa3).

As an ISRA responsible party, Delphi entered into a remediation

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[1] Because the procedural history and facts are closely related, they are combined to avoid repetition and for the Court's convenience.

[2] As Clarios has done in its brief, we generally refer to the two entities as "Clarios," unless otherwise necessary to distinguish between the two entities.

[3] "Pa" refers to Clarios's appendix to the Appellate Division and "Pb" refers to Clarios's brief with this petition.

agreement ("Remediation Agreement") with DEP to put in a place a plan for Delphi's remediation of the industrial establishment E20060211, which enabled the sale of the Property to Clarios. (Pa3). Delphi established a remediation funding source ("RFS") in the amount of $535,000, which eventually increased to $1,829,600.37 by January 2013. (Pa3).

In January 2007, Clarios announced its plan to cease operations at the Property, triggering its statutory obligations under ISRA. (Pa3). Clarios began its compliance with those obligations by submitting to DEP a general information notice ("GIN"), which DEP received on February 5, 2007. (Pa3). DEP assigned ISRA case number E20070027 to Clarios's termination of operations at the industrial establishment. (Pa3). Clarios then submitted a Remediation in Progress ("RIP") waiver application to DEP, dated January 9, 2007. (Pa3). Because remediation under the Delphi ISRA case number E20060211 was active at the time, and with a RFS in place, DEP approved Clarios's RIP waiver on March 12, 2007, pursuant to N.J.S.A. 13:1K-11.5. (Pa3).

On August 5, 2011, Clarios conveyed the Property to DeNovo New Brunswick, LLC ("DeNovo"). (Pa3). DeNovo then conveyed the Property to Intervenor and current owner of the Property, 760 New Brunswick Urban

Renewal LLC[4] on December 22, 2011. (Pa3). However, since at least 2019, Delphi ISRA case number E20060211 has fallen out of compliance, and the RFS required by the Remediation Agreement was not maintained. (Pa2-4).

Consequently, Respondent rescinded Clarios's RIP waiver on April 20, 2022, after having determined that the Property was out of compliance for: 1) failure to submit the required remedial investigation report by the regulatory timeframe; 2) failure to complete the required remedial action by the regulatory timeframe; and 3) failure to maintain the required RFS. (Pa2–4).

On May 12, 2022, Clarios requested an administrative hearing on DEP's rescission of the RIP waiver, but cited no dispute as to the material facts set forth by DEP in its rescission letter. (Pa5-12). However, DEP found that Clarios raised no contested issues of material fact, and failed to demonstrate an established property interest in the RIP waiver that would otherwise necessitate an administrative hearing. Therefore, on September 6, 2022, DEP denied Clarios's request for a hearing. (Pa33-34). Clarios appealed DEP's denial of the administrative hearing request to the Appellate Division on October 14, 2022. (Pa35-42).

[4] At the time of the transfer, Intervenor was known as 760 New Brunswick LLC.

On February 5, 2024, in a published opinion, the Appellate Division affirmed DEP's decision to deny Clarios's request for an administrative hearing. In Re Appeal Of The New Jersey Department Of Environmental Protection's September 6, 2022 Denial Of Request For Adjudicatory Hearing Under N.J.A.C. 7:26c-9.10, ____ N.J. Super. ____, ____ (App. Div. 2024) (slip. op. at 2). The Appellate Division considered whether the RIP waiver conveyed a constitutionally protected property interest to Clarios, such that DEP had denied Clarios's due process. Id. at slip. op. 1-14. The panel concluded that the only "benefit conferred by the RIP waiver is that the owner or operator may effect [the] close of operations or transfer of ownership prior to 'obtaining departmental approval of a remedial action workplan or a negative declaration or without the approval of a remediation agreement'" pursuant to N.J.S.A. 13:1K-11.5(a). Id. at slip. op. 11. The court determined that "[o]nce that closure or transfer is complete, the recipient of the RIP waiver has received the benefit of that waiver." Ibid. It explained that because Clarios, in fact, ceased operations, and later conveyed the Property to the subsequent owner DeNovo on August 5, 2011, Clarios received the benefit provided by the RIP waiver. Id. at slip. op. 11-12. Importantly, the court recognized that the RIP waiver does not suspend the need to remediate the industrial establishment. Id. at slip. op. 12.

The Appellate Division noted that "[a]lthough Clarios relied for upwards of fifteen years upon the suspension of their remediation obligation, this reliance has only been based on their unilateral expectation that the prior remediation agreement would remain compliant. It has not been based on any regulatory or statutory provisions." Id. at slip. op. 12. Ultimately, the Appellate Division held that "Clarios has no legitimate grounds for relying on any further benefit—namely, the continued delay of their responsibility for remediation of the industrial establishment. Without lawful grounds for reliance on a benefit, Clarios has neither a legitimate claim to entitlement nor a property interest associated with that benefit." Id. at slip. op. 13.

Clarios's petition followed on February 26, 2024.

ARGUMENT

THE PETITION SHOULD BE DENIED BECAUSE THE APPELLATE DIVISION CORRECTLY RESOLVED THE MATTER, AND THIS CASE PRESENTS NO SPECIAL REASONS FOR THIS COURT'S REVIEW.

Review of a final order of the Appellate Division is not a matter of right. Rule 2:12-4 sets forth the grounds upon which this Court may grant certification to review a final decision of the Appellate Division:

> Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is

> similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons.
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> [Ibid.]

Thus, certification is not warranted where the Appellate Division's decision is essentially an application of settled principles of law to the facts of the case, does not present a conflict among judicial decisions requiring clarification or supervision by the Supreme Court, and does not raise issues of general importance. N.J. Div. of Youth & Family Servs. v. R.D., 207 N.J. 88, 122 n.13 (2011); Fox v. Woodbridge Twp. Bd. of Educ., 98 N.J. 513, 516 (1985) (O'Hern, J., concurring); In re Route 280 Contract, 89 N.J. 1 (1982). Further, if a decision "is not palpably wrong, unfair or unjust," Bandel v. Friedrich, 122 N.J. 235, 237 (1991), certification is not warranted.

The court below correctly applied settled principles, and Clarios satisfies none of the criteria for this Court's further review.

> A. The Appellate Division Applied Well-Settled Principles of Law to the Facts in Making the Determination That No Property Interest Exists.

It is a well-settled principle of law that "'[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He [or she] must have more than a unilateral expectation of it.'" Thomas Makuch, LLC v. Tp. of Jackson, 476 N.J. Super. 169, 185 (App. Div. 2023) (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)). Accordingly, because a RIP waiver does not confer the benefit of eliminating remediation responsibilities for the affected property, the Appellate Division correctly determined that Clarios can have no expectation of it, and no property interest exists in a RIP waiver.

Clarios's assertion that its petition presents a question of "general public importance" confirms its ongoing misunderstanding of the RIP waiver benefit. Clarios claims that this Court must clarify if the RIP waiver applies to the "remediation of transferred industrial properties." (Pb6-9). However, Clarios cites no statutory or regulatory provision to support its assumption that an ISRA-responsible party is relieved of its duty to remediate an industrial property after the property is transferred. (Pb6-9). Clarios asserts, without authority, that where a responsible party "may have agreed to remediate a property under ISRA, and a later owner/developer triggers ISRA with a sale or closure of operations, knowing that the responsible party has agreed to continue the remediation," the "RIP waiver allows the later owner to buy, sell, or close the property without

further complications under ISRA." (Pb8). Hence, Clarios effectively argues that when a remediation agreement is in place and a RIP waiver is later granted, the RIP waiver imparts the additional benefit of suspending the need for remediation of the industrial site, in contravention of the statute or regulations.

No authority suggests that the RIP waiver confers such a benefit. Accordingly, the Appellate Division properly found that the RIP waiver does not discharge a RIP waiver recipient's obligation to remediate the industrial establishment. In Re NJDEP Denial at slip. op. 12. To the contrary, the Appellate Division held that the RIP waiver "waives only the requirement to provide for remediation before the close of operations or the transfer of ownership." Ibid. Thus, Clarios presents no genuine question of public importance for this Court to answer, and Clarios's petition for certification should be denied.

B. There is No Conflict Between the Published Decision in this Matter and the Appellate Division's Prior Unpublished Decision Relating to a Different ISRA Waiver.

Next, Clarios attempts to manufacture a conflict between the Appellate Division's unpublished decision in Frederick Gumm Chemical Co. v. NJDEP, No. A-1056-05 (App. Div., June 1, 2007) and the Appellate Division's published decision in this case. Foremost, there can be no genuine conflict between an

unpublished and non-binding decision and a precedential published decision. Under Rule 1:36-3, "[a]n unpublished opinion does not constitute precedent nor is it binding upon [the Appellate Division] unless it is required to be followed by reason of res judicata, collateral estoppel, the single controversy doctrine, or similar principle of law. Nat'l Union Fire Ins. Co. of Pittsburgh v. Jeffers, 381 N.J. Super. 13, 18 (App. Div. 2005) (citing R. 1:36-3).

Here, Clarios argues that the lower court's decision is in "direct conflict" with Gumm. (Pb10). But that case does not even apply here because it concerned an entirely different waiver under ISRA – the Underground Storage Tank (UST) Waiver. Gumm is distinguishable because the effects of rescinding the two waivers are not similar. The court in Gumm found that the rescission of the UST Waiver threatened the viability of a stock sales transaction, and based on that fact alone, determined the party holding the rescinded waiver had a protected property interest. Gumm, No. A-1056-05 slip op. at 12-13. No such circumstances exist here. Clarios applied for a RIP waiver in order to properly cease its operations at the industrial establishment. A cessation of operations that occurred seventeen years ago could not be voided by the rescission of the RIP waiver. In its opinion, the Appellate Division addressed whether the mere possibility of prior transactions under the RIP waiver creates a property interest. In Re NJDEP Denial at slip. op. 14. Though the Appellate Division did not cite

Gumm, the court did address the premise of Clarios's reliance on Gumm and position that ISRA waivers also raise property interests:

> Notably, under this record, the RIP waiver's rescission only implicates Clarios's duty to remediate the Site and does not pose any apparent threat to the continuing viability of the sales transaction from 2011. In the April 20, 2022 rescission letter, NJDEP outlined the processes by which the RIP waiver was granted and then rescinded; the letter also stated when the RIP waiver is rescinded, NJDEP may "require Clarios to complete the remediation pursuant to N.J.A.C. 7:26b-3.3(a)." There is no mention of interfering with the prior completed benefits of the waiver—only of requiring Clarios to fulfill obligations that were never removed by the waiver in the first place.
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> [Ibid.]

It is clear that the Appellate Division appropriately addressed the question raised by Clarios's reliance on Gumm, and distinguished the holdings without ever having to cite to the case, in contravention of R. 1:36-3. This Court need not be tasked with re-covering the same ground, and this Court should deny certification.

CONCLUSION

For these reasons, Clarios's petition for certification should be denied.

Respectfully submitted,

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