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Governor

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Lt. Governor

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State of New Jersey
Department of Environmental Protection
P.O. Box 402
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JOSEPH E. COLEN, III, Petitioner v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAND USE REGULATION, Respondent	ADMINISTRATIVE ACTION FINAL DECISION OAL DOCKET NO. ELU 16274-18 AGENCY REF. NO. 1517-16-0008.1 CZM 160001

This Order addresses the challenge by Joseph E. Colen, III (Petitioner), of the Department of Environmental Protection's (Department) denial, dated June 30, 2016, of an application for a permit to demolish and reconstruct an expanded single-family dwelling in Long Beach Township, Ocean County (the Property), pursuant to the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 to -51, and its implementing Coastal Zone Management rules (CZM Rules), N.J.A.C. 7:7. On November 25, 2019, Administrative Law Judge Sarah G. Crowley (ALJ Crowley) issued an initial decision (Initial Decision) finding that the Department was entitled to summary decision because the undisputed facts showed Petitioner cannot meet the infill exception under CZM's coastal high

hazard rules at N.J.A.C. 7:7-15.2(f)4.i.(3). For the reasons set forth below, I ADOPT the Initial Decision.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner's property, located at 3207 Ocean Boulevard, Long Beach Township, Ocean County, and designated as Block 15.156, Lot 1 on the township's tax map (the Property), fronts the Atlantic Ocean to the east with Ocean Boulevard to the west. A single-family dwelling is located 100 feet north of the Property. To the south, a single-family dwelling is located 135 feet from the Property, separated by a small undeveloped lot and a fifty-foot right of way that provides public access to the beach from nearby East 33rd Street.

The Property is currently developed with a single-family dwelling, decks, and a driveway and lies largely within a high-water velocity zone, or high hazard "V zone" as designated by the Federal Emergency Management Agency (FEMA). V zones are coastal high hazard areas prone to flooding and high velocity waters. N.J.A.C. 7:7-9.18. Under the Department's coastal high hazard area rules, residential and commercial development is prohibited in a V zone, with only limited exceptions.

In February 2016, Petitioner applied for a general permit 5 (GP5) under the CZM Rules, to demolish the existing single-family dwelling on the Property and construct a new single-family dwelling with a proposed expansion extending oceanward of the existing footprint. N.J.A.C. 7:7-6-5 (allowing for the expansion or reconstruction of a single-family home). To qualify for a GP5 the CZM Rules require, and the Petitioner acknowledges, that the Property must satisfy the standards for the coastal high hazard area exception under the infill rule at N.J.A.C. 7:7-15.2(f)4.i.(3). The infill rule allows for development on a property in the coastal high hazard area

if, among other criteria, a house or commercial building is located within 100 feet of boundaries of the property that run perpendicular to the mean high-water line.

In June 2016, the Department denied Petitioner's application because the nearest dwelling to the south lies 135 feet from the Property boundary and therefore does not meet the infill rule's 100-foot requirement.

On August 18, 2018, Petitioner submitted a request for an adjudicatory hearing to challenge the Department's denial. After an unsuccessful attempt at alternative dispute resolution, on November 13, 2018, the Department transferred the matter to the Office of Administrative Law (OAL). In proceedings before ALJ Crowley, the Department moved for summary decision and Petitioner filed a cross motion for the same. ALJ Crowley heard oral arguments on October 21, 2019 and issued an Initial Decision granting the Department's motion for summary decision on November 25, 2019.

INITIAL DECISION

In the Initial Decision, ALJ Crowley first examined whether the language of the infill rule exception at N.J.A.C. 7:7-15.2(f)4.i.(3) is ambiguous. The ALJ concluded that the regulation is not ambiguous as it plainly states that the 100 feet shall be measured "from the lot line" and until reaching an edifice, specifically a "house or commercial building." The ALJ further found the regulation is mandatory and does not grant the Department "leeway in determining where the measurement shall begin or how it must be measured." ALJ Crowley also found that the language of the regulation anticipated measuring "strict, numeric distance" not excluding rights of way. The ALJ concluded that the Department had no authority to waive or circumvent the plain

language of the infill rule, and that the Department's interpretation to not exclude the right of way was therefore not arbitrary, capricious, or unreasonable.

EXCEPTIONS

Petitioner filed exceptions to the Initial Decision on December 17, 2019. First, Petitioner asserted that the ALJ erred by granting the Department's motion for summary decision and denying the Petitioner's cross motion. Second, Petitioner argued that the Department's interpretation of the infill rule, and resulting denial of the CAFRA permit, is arbitrary and capricious. Petitioner disputes that the Department must include the 50-foot right of way in its measurement. Petitioner pointed to other environmental regulations and argued that the Department has clarified such regulations to soften their application. In Petitioner's third exception, Petitioner asserted that the applicable case law, Dragon v. NJDEP, 405 N.J. Super. 478 (App. Div. 2009) was limited to the prohibition of a waiver of substantive rules under settlement and does not extend to the 100-foot requirement in the infill rule. Similarly, Petitioner's fourth exception argues that granting summary decision in his favor would not constitute a waiver of the infill rule, as prohibited by Dragon, but rather would merely avoid unreasonable application of that rule. Lastly, in Petitioner's fifth exception, Petitioner asserted that ALJ Crowley afforded inappropriate deference to the Department in the ALJ's application of the arbitrary and capricious standard.

The Department responded to Petitioner's exceptions on December 23, 2019. The Department responded to Petitioner's first exception by asserting that the ALJ's Initial Decision was not in error. The Department noted that Petitioner has conceded the home expansion does not qualify for an exception under the infill rule. In response to Petitioner's second exception,

the Department argued that the rule limits development in coastal high hazard areas to areas with houses or commercial buildings and does not provide an exception for intervening streets or rights of way. The Department argued that a re-interpretation of the infill rule as suggested by Petitioner would constitute a change in policy and a subversion of the Department's substantive rules.

The Department responded to Petitioner's third exception by asserting that the Dragon decision applies to Department permitting decisions and limits its authority to circumvent its substantive rules, preventing the Department from applying the interpretation suggested by Petitioner in this case. The Department contends that it does not have the discretion to exclude the right of way in its measurement under the plain language of the regulations as explained in the decision in Dragon.

The Department responded to Petitioner's fourth and fifth exceptions by emphasizing that the regulation is clear on its face and that the ALJ properly applied the arbitrary and capricious standard and the standard for summary decision. Finally, the Department asserted that its interpretation is consistent with the objective of the infill rule and the rule is clear and unambiguous.

DISCUSSION

The Department's CZM rules restrict construction in coastal high hazard areas with limited limited exceptions to allow for limited construction in highly developed areas. Among these exceptions is the infill rule, N.J.A.C. 7:7-15.2(f)4, which allows "[d]evelopment that is located on a site partially or completely within a coastal high hazard area or erosion hazard area," if, among other criteria, "[a] house or commercial building is located within 100 feet of each of the lot lines

that run roughly perpendicular to the mean high-water line." The construction or expansion of a single-family dwelling is acceptable under these limited circumstances because such development, in a coastal high hazard area where extensive developments have already occurred, will not alter the existing need for public expenditure in shore protection at these locations. N.J.A.C. 7:15.2(h).

Because of the orientation of the Property on Long Beach Island, both parties agree that the lot lines running roughly perpendicular to the mean high-water line are the northern and southern lot lines of the Property. The infill rule directs that the 100 feet be measured "outward from each lot line, along a line generally parallel to the mean high-water line." N.J.A.C. 7:7-15.2(f)4.i.(3). Therefore, here the Department measured the 100 feet outward and parallel to the mean high-water line (roughly the shoreline) from the northern and southern lot lines of the Property. In doing so, the Department found that a single-family dwelling is located within 100 feet of the Property's northern lot line, but no building is located within 100 feet of the Property's southern lot line. The closest building to the Property's southern lot line is a single-family dwelling located 135 feet away. Accordingly, the Department correctly found that the infill rule does not apply because Petitioner's southern property line lies 135 feet from the nearest residential structure.

For the following reasons, I do not find any of Petitioner's exceptions to the ALJ's decision persuasive and ADOPT ALJ Crowley's findings of fact and conclusions of law as made in the Initial Decision.

Petitioner's first three exceptions disagree with the ALJ's findings in the Initial Decision and are addressed together. Taken together, Petitioner argues that the Department had

discretion to exclude the intervening right-of-way from its measurement under the infill rule and the failure to exercise of such discretion is arbitrary, capricious and unreasonable. However, as the ALJ identified, Petitioners' arguments are flawed in several ways

First, the ALJ correctly found that the plain language of the infill exception is not ambiguous and therefore Department's application of the language to include the 50-foot right of way is not arbitrary, capricious, or unreasonable. In reviewing the Department's application of the rule, the reviewing court must consider whether the infill exception should properly be applied to Petitioner's proposed development. As ALJ Crowley noted in her Initial Decision, the intent of the drafters is to be understood from the plain language of the provision and the words chosen are to be given their ordinary meaning absent an explicit indication to the contrary. The text of the infill rule read, in relevant part:

> (i) Development that is located on a site partially or completely within a coastal high hazard area or erosion hazard area need not comply with the coastal high hazard areas rule, N.J.A.C. 7:7-9.18, or erosion hazard areas rule at N.J.A.C. 7:7-9.19 if:
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> . . .
>
> (3) A house or commercial building is located within 100 feet of each of the lot lines that run roughly perpendicular to the mean high-water line. The 100 feet shall be measured outward from each lot line, along a line generally parallel to the mean high-water line;
>
> [N.J.A.C. 7:7-15.2(f)4.i.(3)]

As the rule plainly states, the neighboring building must be "within 100 feet" of the lot lines and that "the 100 feet shall be measured outward from each lot line." N.J.A.C. 7:7-15.2(f)(4). The rule mentions neither a street, right of way or other intervening area as being excluded from this measurement. Therefore, ALJ Crowley correctly examined the rule and found that its language is

"clear and unambiguous." While it is correct that If the measurement excluded the width of the right of way, the neighboring house would be 85 feet from Petitioner's property, neither Petitioner's exceptions nor his previous arguments point to language in the rule that is contrary to the Department's determination.

Moreover, the Department does not have discretion to expand the meaning of the infill exception beyond the rule as promulgated. As stated in Dragon, the Department cannot disregard its regulations or impose conditions that conflict or contravene the regulations. See Dragon v. N.J. Dep't of Envtl. Prot., 405 N.J. Super. 478, 492 (App. Div. 2009) (concluding CAFRA does not authorize DEP to circumvent CAFRA's substantive permitting requirements through settlement). Accordingly, where the plain language of the rule is unambiguous, the Department does not have discretion to modify the substantive requirements of the rule by exclude the 50-foot right of way in its measurement of the infill exception without promulgating a change to the rule. Dragon, 405 N.J. Super. at 497.

Therefore, I ADOPT the ALJ's finding that the infill rule is not ambiguous and that the language supports the interpretation that the Department's measurement is to begin at the lot line and extend 100 feet outward. I likewise ADOPT ALJ Crowley's finding that a house or commercial building must fall within those designated 100 feet and that no house or commercial building does so here and that the Department's interpretation of the plain language of the infill rule was reasonable. I further ADOPT ALJ Crowley's finding that the infill rule is substantive and cannot be reconsidered or waived under Dragon.

Petitioner argues in his fourth and fifth exceptions that the ALJ misunderstood her role and misapplied the proper standards of review. Under N.J.A.C. 1:1-12.5, a party is entitled to

summary decision when the moving party demonstrates that there is no genuine issue of material fact and that it should prevail as a matter of law. Contini v. Bd. of Educ., 286 N.J. Super. 106, 121 (App. Div. 1995). ALJ Crowley correctly applied the arbitrary and capricious standard to the Department's interpretation of the infill rule. She examined the plain language of the rule as it compared to the Department's interpretation. She found, after detailed analysis of the rule's language, that the Department's interpretation was not unreasonable. Her recommendation was based on that analysis. Petitioner's fourth and fifth exceptions are therefore unpersuasive.

CONCLUSION

For the foregoing reasons, I ADOPT the ALJ's findings as contained in the November 25, 2019 Initial Decision. IT IS SO ORDERED.

DATE: 2/12/20

Catherine R. McCabe, Commissioner
New Jersey Department of Environmental Protection

JOSEPH E. COLEN, III
v.
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
OAL DOCKET NO. ELU 16274-18
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