State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON SUMMARY DECISION
CROSS-MOTIONS
OAL DKT. NO. ELU 16274-18
AGENCY DKT. NO. 1517-16-0008.1 CZM160001

JOSEPH E. COLEN, III,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAND USE REGULATION,
Respondent.

John M. Van Dalen, Esq., for petitioner (Van Dalen Brower, LLC, attorneys)

Michael J. Schuit, Deputy Attorney General, for respondent (Gurbir S. Grewal, Attorney General of New Jersey, attorneys)

Record Closed: October 21, 2019 Decided: November 25, 2019

BEFORE **SARAH G. CROWLEY,** ALJ:

STATEMENT OF THE CASE

Petitioner, Joseph E. Colen, III, (petitioner) appeals from an adverse action taken by the New Jersey Department of Environmental Protection (DEP) on its application for a Coastal Zone Management General Permit on June 30, 2016, to remove and reconstruct a single family dwelling pursuant to N.J.A.C. 7:7-15.2. The existing dwelling was not within 100 feet of another building, and thus, did not meet the requirements of the exception for the proposed expansion. After unsuccessful mediation, the matter was transmitted to the Office of Administrative Law as a contested case on November 13, 2016, by the DEP for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The DEP filed a motion for summary decision, and the petitioner filed a cross motion. Oral Argument was heard by the undersigned on October 21, 2019, and the record closed at that time.

STATEMENT OF UNDISPUTED FACTS

1. Petitioner owns beach from property 13207 Ocean Boulevard, Block 15.146, Lot 1 in Long Beach Township, Ocean County, New Jersey (Property).

2. The Property fronts the Atlantic Ocean and is designated as Block 15.146, Lot 1 on the official Long Beach Township tax map.

3. Petitioner applied for a permit from the state in or about February 2016 to remove and reconstruct or alternatively expand oceanward the single-family dwelling east of its existing footprint on the Property.

4. Petitioner is subject to the Costal Area Facility Review Act, N.J.S.A. 13:19-1, et seq. (“CAFRA”) and the Coastal Zone Management Rules, N.J.A.C. 7:7 et seq. (“CZM Rules”).

5. Petitioner’s property is entirely, or at least mostly, within a “V-Zone,” as designated by the Federal Emergency Management Agency (“FEMA”).

6. The Property is within a Coastal High Hazard Area per CAFRA.

7. New Jersey Department of Environmental Protection ("NJDEP") denied petitioner's February 2016 CAFRA permit application in or around June 2016.

8. The Property has a right of way that is about fifty feet wide adjacent and parallel to its southern lot line.

9. There is a house 135 feet south of the petitioner's lot line.

10. The Property would fall within the exclusion's 100-foot distance if the street were excluded from the measurement.

SUMMARY OF ARGUMENTS

Petitioner argues NJDEP's reading of N.J.A.C. 7:7-15.2(f) is arbitrary, capricious, and unreasonable because the use of a right of way in the measurement of distance to a house or commercial building to the north or south of a property is irrational and unfair. Petitioner argues that the infill rule exists to deal with highly developed areas where virtually all lots are developed. Infill in such highly developed areas, petitioner argues, will not add to the need for shore protection. Petitioner argues that the NJDEP's choice to include streets within the measurement of the infill rule is arbitrary because it makes the application of the rule random depending on whether the house sits north or south of a road. Petitioner points out that the undeveloped lot south of the Property likely would meet the requirements of the infill rule, and so the owner of that lot could construct a house of whatever size they would like. Petitioner argues that this interpretation of the infill rule is arbitrary and unreasonable.

Petitioner further argues that the NJDEP can and should interpret N.J.A.C. 7:7-15.2(f) to exclude rights-of-way in the measurement of the distance because NJDEP has employed such an "interpretive gloss" in the past, and the interpretation is

reasonable in light of the policy and practicalities of the permitting scheme. Petitioner argues that the NJDEP has used an "interpretive gloss" to its reading of N.J.A.C. 7:7-15.2(f) and other regulations and statutes in the past, and should do so here, due to the fact that the regulation that is unclear or seemingly unfair as applied according to its plain language.

The respondent argues that any such interpretation is prohibited by Dragon v. New Jersey Dep't of Environmental Protection, 405 N.J. Super. 478 (App. Div. 2009), as the regulation that is clear and unambiguous. They argue that Dragon stands for the notion that NJDEP cannot waive the infill rule. Petitioner argues that here, petitioner is not asking for a waiver of the infill rule. Instead, petitioner wants DEP to interpret the infill rule to exclude streets from the measurement of whether there is a house or commercial building within 100 feet of the lot lines. The DEP counters that the rules are very clear, and they do not exclude streets. Moreover, Dragon prevents any interpretation contrary to the clear language of the regulations which does not exclude streets.

LEGAL ANALYSIS AND CONCLUSIONS

The above-recitation of the undisputed facts together with a reading of the legal submissions of the parties makes it clear that the only issue pending determination on these cross-motions for summary decision is the applicability and interpretation of the regulations to the subject property. It is well established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public and private litigation resources. Here, both parties have moved for a determination, as a matter of law, that the application of the regulations entitles each to a favorable decision.

The first issue is whether the language of the regulation is ambiguous. Ordinarily, intent is to be gleaned from the words used in the provision, and they are to

be given their ordinary and well understood meaning in the absence of an explicit indication to the contrary, and only if an ambiguity exists is it necessary to go beyond the words of the statute itself. State v. Gelman, 195 N.J. 475, 482 (2008). Even when the language is ambiguous and the legislature has not addressed the precise question of statutory meaning, a court may not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. TAC Assocs. v. New Jersey Dept. of Envtl. Protection, 2010 N.J. Lexis 592, 18-19 (N.J. Sup. Ct. 2010). Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. Id.

The language of the disputed regulation is as follows:

> (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;
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> [N.J.A.C. 7:7-15.2(f)4.i.(3)]

The foregoing regulation sets forth the requirements for a property to be excepted from the coastal high hazard areas rule or erosion hazard areas rule. If there is a house or commercial building within 100 feet of a property's northern and southern lot lines, it does not need to meet the requirements of the coastal high hazard areas rule or erosion hazard areas rule. The language of this provision is clear and unambiguous. As the respondent points out, the regulation specifically uses the language "house or commercial building," and not "development," as the object which needs to be within 100 feet of the lot lines. The use of "house or commercial building"

clearly contemplates the required existence of an edifice, not merely any form of development, like a street. The regulation also requires a building be "located within 100 feet of each of the lot lines that run roughly perpendicular to the mean high-water line." In this case, both parties agree "the lot lines that run roughly perpendicular to the mean high-water line" unambiguously refers to the northern and southern lot lines of this property. For those reasons, I find and conclude that the first sentence of the provision is not ambiguous.

The next sentence provides that "[t]he 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). First, it should be noted, this is a mandatory provision. ("The 100 feet **shall** be measured outward . . ."). Accordingly, the provision likely did not consider granting NJDEP leeway in determining where the measurement shall begin or how it must be measured. Furthermore, the language is very clear "[t]he 100 feet shall be measured outward from each lot line" unambiguously means that the measurement should begin at the lot line and extend 100 feet out in the direction parallel to the high-water line. First, "outward" is followed by "from the lot line," clearly intending that the lot line is the point the regulation intended the measurement begin. Additionally, this reading is supported because the preceding sentence requires that the building be "within" 100 feet of each lot line. The measurement should begin at the lot line and extend 100 feet out in the direction parallel to the high-water line. A building or house must fall inside of that measured area to meet the exception. It does not, and the language is very clear.

Lastly, the petitioner argues that the "100 feet" measured should not be read to include streets or rights of way. However, the regulation is silent as to whether "100 feet" includes the measurement of streets. The regulation does not speak to whether the 100 feet should consider the types of property it crosses or who owns the adjoining properties. Even assuming, you could read this language as being ambiguous, the court should not inject its own interpretation where an agency has spoken. See TAC Assocs. 2010 N.J. Lexis 592, 18-19 (N.J. Sup. Ct. 2010). Here, NJDEP has taken the position that the "100 feet" does not exclude streets but should be read as a strict,

numeric distance. Accordingly, unless that reading is "arbitrary, capricious, or unreasonable," the court should not upset the agency's discretion.

The final issue is whether the decision of the DEP being challenged is arbitrary, capricious or unreasonable. A reviewing court does not vacate an administrative agency decision unless it is arbitrary, capricious, without support in the record, or contravenes the legislative policy behind the authorization of the regulation. Krupp v. Board of Educ. of Union County Regional High School Dist. No. 1, Union County, 278 N.J. Super. 31, 37-8 (App. Div. 1994); Campbell v. Civil Serv. Dep't, 39 N.J. 556, 562, (1963); Dore v. Bedminster, 185 N.J. Super. 447, 453, (App.Div.1982). The court should defer to an agency's construction of a regulation it is charged with enforcing. See In re Academy Bus Tours, Inc. v. New Jersey Transit Corp., 263 N.J. Super. 353, 365-366, (App. Div.1993); Allen v. Board of Trustees, Police & Fireman's Retirement Sys., 233 N.J. Super. 197, 207, (App. Div.1989).

An administrative agency, in construing its regulations, must apply the same rules of construction as those guiding statutory construction by the courts. In re N.J.A.C. 14A:20-1.1, 216 N.J. Super. 297, 306-307, (App. Div.1987). "The polestar of statutory and regulatory construction is the intent of the body which created the statute or regulation." Krupp, 278 N.J. Super. 31, 38 (App. Div. 1994) (citing Lesniak v. Budzash, 133 N.J. 1, 8, (1993)). Generally, the first place the court should look to determine the intent of the body which created the statute or regulation is the plain language of the provision. Bedford v. Riello, 195 N.J. 210, 221 (2008).

Both parties address the seminal case on the infill rule, Dragon v. New Jersey Dep't of Environmental Protection, 405 N.J. Super. 478 (App. Div. 2009). Petitioner argued that Dragon should not apply because the request is not a waiver. Respondent argues that Dragon should apply because petitioner requested a waiver and because Dragon stands for the proposition that NJDEP cannot circumvent the application of its substantive rules, like the infill rule, either by waiver or interpretation.

In Dragon, a third-party challenged the NJDEP's discretion to settle a permit challenge. 405 N.J. Super. 478, 484 (App. Div. 2009). Appellants objected to a settlement agreement between their neighbor and the NJDEP authorizing the neighbor to tear down and reconstruct his home without a permit otherwise required under CAFRA and the Coastal High Hazard Areas Rule. Id. The neighbor owned an oceanfront home on the most easterly block of its street, encroaching oceanward further than any of the neighbors. Id. There existed a right of way, a public beach access, along the southern lot line of the neighbor's property. Id. at 483.

The neighbor first applied for a general coastal permit to demolish and rebuild his house to three stories and increase the footprint from 1944 to 3480 square feet. Id. The footprint under this application extended oceanward nine feet and landward eleven feet. Id. NJDEP told the neighbor that the application would not be approved because there were no buildings within 100 feet of each of his north and south lot lines to qualify for the exemption from development ban under N.J.A.C. 7:7E-7.2(e) and (f) ("the infill rule"). Id. (N.J.A.C. 7:7E-7.2(e) and (f) were re-codified in 2015 to N.J.A.C. 7:7-15.2(e) and (f), respectively, for an update to citations and terminology and to amend for consistency with proposed amendments to general permit 4, N.J.A.C. 7:7-6.4. 46 N.J.R. 1051(a). No change or clarification was made to the provisions at issue.

The neighbor then applied under a different coastal general permit. Id. NJDEP again rejected granting the permit because the property still did not meet the requirement of the infill rule. The neighbor appealed and NJDEP opted for NJDEP's Office of Dispute Resolution. Id. at 486. NJDEP and the neighbor reached a resolution which allowed for the reconstruction of the property subject to several conditions. Id. at 487. The appellants challenged the resolution and the matter was transmitted to the OAL as a contested case. Id. at 488. The ALJ set aside the resolution as invalid and ultra vires because it waived the infill development rule without any express statutory authority. Id. The Commissioner rejected the ALJ's conclusion that the resolution was ultra vires. Id. The Commissioner agreed that the neighbor did not meet the substantive requirements, but to deny the permit would constitute a litigation risk, which granting the resolution would avoid. Id.

Upon appeal to the Appellate Division, appellants contended that the resolution in lieu of a permit was ultra vires, arbitrary and capricious because it impermissibly allowed NJDEP to waive the neighbor's compliance with substantive CAFRA regulations. Id. The Court noted that an agency cannot waive its substantive regulations without first adopting a regulation pertaining to any such waiver and setting forth appropriate standards to govern decision-making. Id. at 489. The Court analyzed the two provisions in the CPP Rules that permitted waiver and relaxation of rules. Id. at 490. The first, N.J.A.C. 7:7-1.10(b)[1], allows for relaxation of procedural CPP rules. Id. The other, 7:7-1.10(c)[2], allowed for waiver of the substantive CZM Rules, such as N.J.A.C. 7:7E-3.18, only if strict guidelines were met and the waiver was necessary to avoid an unconstitutional taking. Id. The Court concluded that NJDEP could not "reconsider" application of the CZM Rules of N.J.A.C. 7:7E-3.18 and 7:7E-7.2, the infill requirements. Id. at 491.

Additionally, the Court found that the neighbor clearly failed to meet the express language of the exception in the infill rule. Id. at 492. The Court found that the "litigation risk" was nonexistent because the Commissioner found the neighbor did not meet the requirements of the infill rule and the facts showed that the neighbor did not meet the "express language" of the exception. Id. The Court found that CAFRA authorizes NJDEP to either grant a permit pursuant to the statutory scheme or grant an exemption pursuant to the substantive rules of the statutory scheme. Id. at 496. The Court held that NJDEP lacked the authority, express or implied, to issue a letter of authorization based on an executed settlement agreement in lieu of a CAFRA permit. Id. at 498.

The facts of this case are similar to the facts of Dragon. First, here, as in Dragon, the property does not meet the requirements of the express language of the infill rule. Next, as in Dragon, the property has a right of way adjacent to its southerly lot line. Also, as in Dragon, there is no building within 100 feet of the southerly lot line.

[1] Now recodified at N.J.A.C. 7:7-19.1.
[2] Now recodified at N.J.A.C. 7:7-19.2.

Finally, as in Dragon, the NJDEP cannot "reconsider" its substantive CPP Rule unless there is a takings issue presented and the petitioner meets the requirements set forth in N.J.A.C. 7:7-19.2. I **CONCLUDE** that the infill rule here is a "substantive rule" which cannot be "reconsidered," and so waived, without alleging a takings challenge and meeting the requirements of N.J.A.C. 7:7-19.2. Accordingly, even assuming this is a request for a waiver, which I find it is not, I **CONCLUDE** that the NJDEP does not have the authority to waive the provision.

Petitioner's final argument is that the "chance" of being placed on a lot adjoining a road harmed the lot owner and made the NJDEP's plain language application of "100 feet" arbitrary and capricious as compared to other owners. However, petitioner did not show that the effect of this interpretation was "without consideration and in disregard of circumstances." The respondent "considers the circumstances" of the street being south of petitioner's southern lot line in its denial of the permit and chose to remain with its plain language interpretation of "100 feet." Petitioner also made no contention that the action was not "exercised honestly" or was made without "due consideration." Respondent repeatedly noted that NJDEP has consistently refused to waive the infill rule since Dragon. Accordingly, I **CONCLUDE** that NJDEP's interpretation of the infill rule's "100 feet" as not excluding roads and rights-of-way was not arbitrary, capricious, or unreasonable.

ORDER

For the reasons set forth above, the Motion for Summary Decision filed by the respondent New Jersey Department of Environmental Protection is and the same is hereby **GRANTED**, and the Cross-Motion for Summary Decision filed by the petitioner, is hereby **DENIED**.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 25, 2019
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency:

Mailed to Parties:

SGC/cb