



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

BOB MARTIN
Commissioner

KIM GUADAGNO
Lt. Governor

RAJESHWAR SINGH YADAV AND
ROOPA YADAV,¹

ADMINISTRATIVE ACTION
FINAL DECISION

Petitioner,

OAL DKT NO.: ELU 0842-15
AGENCY DKT NO. 1113-11-0003.1

v.

FWW-LI14-120001

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION –
LAND USE REGULATION,

Respondent.

This matter concerns a challenge by Rajeshwar Singh Yadav and Roopa Yadav (referred to collectively as “Petitioner”) to the cancellation by the New Jersey Department of Environmental Protection, Division of Land Use Regulation (Department), pursuant to N.J.A.C. 7:7A-12.6, of an application for a Letter of Interpretation (LOI) to verify the location of freshwater wetlands, transition areas, and State-open waters in accordance with the Freshwater Wetlands Protection Act (the Act), N.J.S.A. 13:9B-1 et seq., on property owned by Petitioner at 376 North Post Road, West Windsor, Mercer County (the Property). Also identified as Block 11.06, Lot 20, on the Tax Map of the Township of West Windsor, the property totals approximately 4.99 acres.

¹ Rajeshwar Singh Yadav and Roopa Yadav were both listed as applicants for the Letter of Interpretation under review in this matter and both were named in the request for hearing to challenge the LOI cancellation. The caption above is therefore corrected to reflect the proper petitioners. Rajeshwar Singh Yadav appeared pro se in the OAL on his and Roopa Yadav’s behalf. For ease of reference, this Final Decision will continue to refer to Petitioner in the singular throughout.

Based upon my review of the record as explained below, I find that the cancellation of Petitioner's LOI application was proper under the facts presented. I therefore ADOPT the ALJ's Initial Decision.

FACTUAL BACKGROUND

On August 30, 2012, the Petitioner submitted an application for a wetlands line verification LOI for the Property. The Department reviewed the application materials, the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands" (Federal Manual), the Soil Survey of Mercer County originally issued in 1972 by the U.S. Department of Agriculture Soil Conservation District, and the New Jersey Geological Survey, Atlas of New Jersey, Map No. 8 Vicinity of Trenton, *circa* 1888. The Department also conducted an inspection of the Property. Following its review of all documentation and the results of the site inspection, the Department determined there were deficiencies in the application as there were more wetlands on the Property than delineated in the application. As directed by N.J.A.C. 7:7A-3.1(h), the Department shall not issue an LOI if the Department determines that the information submitted in the LOI application is inaccurate. In that event, the applicant may provide corrected information at the Department's request, or may apply for a permit without obtaining an LOI. Ibid.

Accordingly, on October 11, 2012, the Department issued a deficiency letter, requesting that the Petitioner re-evaluate the Property, remove and correct references on Petitioner's site plan to denote "streams" instead of "ditches," and submit corrected data sheets.

On January 28, 2013, the Petitioner submitted a revised LOI application to the Department, which the Department determined was also deficient because the site plan was

unsigned and was not surveyed. On January 29, 2013, Department staff conducted a site inspection during which soil borings were taken. The results of those borings confirmed the Department's earlier determination that hydric soils were present on the Property and indicated a greater extent of wetlands than was shown in Petitioner's LOI application. As a result, the Department issued a second deficiency letter to the Petitioner on January 30, 2013.

In response, Petitioner submitted additional letters to the Department with other information, including contentions about why wetlands were present on the Property and legal arguments as to why the wetlands should not be regulated. However, Petitioner's additional information did not contain the required revisions to the wetland line and did not contain an updated survey. Accordingly, the Department issued the Petitioner a pre-cancellation notice letter on May 10, 2013, again requesting the updated information be submitted and alerting Petitioner that the LOI application would be cancelled if such information was not submitted. The requested information again was not supplied and the deficiencies remained unaddressed. Thereafter, on July 22, 2013, pursuant to N.J.A.C. 7:7A-12.6, the Department sent a letter to Petitioner advising that the Department had cancelled the Petitioner's LOI application. By its terms, N.J.A.C. 7:7A-12.6 provides that the Department "shall cancel an application if the Department requests additional information regarding the application, and the information is not submitted within 30 days after the date of the request." As noted above, the Department first sent a deficiency letter to the Petitioner in October 2012, which was never addressed by the Petitioner in advance of the July 2013 cancellation, a period of time well longer than the 30 days required in the regulation.

On September 5, 2013, Petitioner submitted an Adjudicatory Hearing Request, contesting

the Department's cancellation of the LOI application. In January 2015,² the matter was transferred to the OAL where it was assigned to Administrative Law Judge (ALJ) John F. Russo, Jr. The parties engaged in discovery and exchanged interrogatories. Thereafter, on June 22, 2015, the Department filed a motion for summary decision on the basis that no material fact was in dispute concerning the Department's cancellation. In its motion, the Department relied upon the Certification of Patrick Ryan, an Environmental Specialist with the Department who reviewed the application materials, conducted site inspections at the Property, and reviewed the Petitioner's answers to the Department's interrogatories.

On November 17, 2015, Petitioner filed a "Brief in Opposition to DEP's Motion for Summary Decision and In Support of Yadav's Motion for Exemptions in Totality from NJDEP's Regulations." In the cross-motion, Petitioner argued that the Department's actions vis-a-vis the Property amounted to a "taking" in violation of Petitioner's constitutional rights. Further, Petitioner pointed to earlier local subdivision approvals for the Property that had been granted by the Township as a reason why the Property should be "exempt" from regulation under the Act and rules. Finally, the Petitioner argued that any wetlands in existence at the Property resulted from a drainage system related to a residential development adjacent to the Property. On November 19, 2015, the Department filed a reply in further support of its motion and in opposition to Petitioner's cross-motion, and on December 1, 2015, Petitioner submitted a sur-reply.

On December 17, 2015, the matter was reassigned to ALJ Jeff S. Masin, t/a, who, on January 19, 2016, issued an Initial Decision granting the Department's motion for summary decision and affirming the cancellation of the LOI application. The ALJ noted that it is within

² In 2014, the parties participated in an unsuccessful mediation before the DEP's Office of Dispute Resolution.

the power of the transmitting agency to limit the issues in a matter transmitted to OAL for hearing and, accordingly, the single issue before the OAL was the validity of the cancellation of the LOI. The ALJ acknowledged that the Petitioner disagrees with the Department regarding the presence, extent, and/or regulation of any wetlands that may exist on the Property, and that Petitioner continues to rely on an expired local subdivision approval as a basis for asserting that the Property is exempt from the freshwater wetlands rules. However, the ALJ also determined that the Department requested that Petitioner provide corrected data and revisions to the LOI application on two occasions, and the Petitioner did not do so. Based on these facts, the ALJ concluded there was no dispute that the Department acted within the applicable regulatory framework in cancelling the LOI application, and that the cancellation was appropriate.

Concerning Petitioner's potential takings claim, the ALJ noted that neither the agency nor the OAL has jurisdiction to adjudicate such a claim, "which is a function reserved to the judicial branch." Regarding the long history of the Yadavs' attempts to subdivide the Property, including receiving preliminary approval from the Township in 1983, 1985, and 1989, that approval was no longer in place. As the Department noted in its papers, a 2006 Appellate Division decision rejected Petitioner's claims and made clear that the approval no longer exists. Yadav v. Township of West Windsor, 2006 N.J. Super. Unpub. LEXIS 185, Docket No. A-2329-04T3 (App. Div. 2006). In light of that judicial decision limiting the significance of the pre-1989 approval, the ALJ determined that the Petitioner's reliance on any prior subdivision approval was not viable.

Finally, the ALJ rejected the Petitioner's contention that an exemption from regulation is warranted because the Property's wetlands are created by a man-made condition, i.e., the drainage systems from the houses at the neighboring Benford Estate residential community,

because that issue does not have a bearing on whether and to what extent wetlands are located at the Property. The ALJ noted that the matter under review is whether the cancellation of the LOI application was appropriate pursuant to N.J.A.C. 7:7A-12.6, and, in that regard, Petitioner has not disputed that the required revisions and corrections to the original LOI application were not submitted. Accordingly, the ALJ concluded that summary decision in the Department's favor was appropriate and the LOI application was properly cancelled.

Petitioner filed exceptions to the Initial Decision on February 18, 2016, reiterating the arguments made in the OAL. The Department filed a response to the exceptions on February 24, 2016. Petitioner and the Department each filed further replies on March 1, 2016, and March 8, 2016, respectively, reiterating arguments previously made.

DISCUSSION

In rendering a final decision in this matter, I am required to give "attentive consideration" to the Initial Decision, and I must address key items of evidence "which were critical" to that decision. B.C. ex rel C.C. v. Bd. of Educ., Cumberland Reg. Sch. Dist., 220 N.J. Super. 214, 230 (App. Div. 1987). In doing so, agencies are required to limit their consideration to the record made before the ALJ. N.J. Dept. of the Public Advocate v. N.J. Bd. of Public Utilities, 189 N.J. Super. 491, 500 (App. Div. 1983) (citing N.J.S.A. 52:14B-9). In this matter, I find that there is ample support in the record for the Department's cancellation of Petitioner's LOI application and for the ALJ's conclusions, and that summary decision was appropriate under the governing standards. Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995).

Pursuant to the Act and freshwater wetlands rules, N.J.A.C. 7:7A-1.1 et seq., the Department identifies and delineates wetlands in accordance with the Federal Manual. For municipal tax lots larger than one acre, the boundaries of any freshwater wetlands can only be delineated pursuant to a line verification LOI prepared by the applicant. N.J.A.C. 7:7A-3.3 and -3.4. An LOI is “a document issued by DEP under N.J.A.C.7:7A-3, indicating the presence or absence of wetlands, State open waters, or transition areas; verifying or delineating the boundaries of freshwater wetlands, State open waters, and/or transition areas; or assigning a wetland a resource value classification.” Intellect Real Estate Development v. N.J. Dept. of Env’tl Prot., OAL Dkt. No. ELU-0286-14, 2014 N.J. AGEN LEXIS 466 at *29-30 (citing N.J.A.C. 7:7A-1.4, -3.1). An LOI does not grant approval to conduct any regulated activities; rather, its sole function is to provide or confirm information about the presence or absence, boundaries, and/or resource value classification of freshwater wetlands, transition areas, and/or State open waters. Id. at *30 (citing N.J.A.C. 7:7A-3.1(b)).

Here, the Department reviewed the Federal Manual and other historical information and determined that Petitioner’s LOI application materials did not delineate the full extent of wetlands on the Property; nor were streams appropriately depicted on the site plan. The Department confirmed its findings through two inspections of the Property, as noted in the Certification of Environmental Specialist Patrick Ryan. During the second inspection, the Department took soil borings, the results of which showed hydric soils at a greater extent than was reflected in Petitioner’s LOI application. Accordingly, the Department was required to request corrected information prior to issuing an LOI, pursuant to N.J.A.C. 7:7A-3.1(h). When the Petitioner failed to provide the information necessary to address the deficiencies, it was appropriate to cancel the LOI application pursuant to N.J.A.C. 7:7A-12.6(b). The Department’s

technical review, as described in Mr. Ryan's Certification, supports those regulatory actions and has not been directly challenged by the Petitioner. Moreover, the Petitioner's answers to the Department's interrogatories in this matter confirm that the Petitioner has not deviated from the position that the information submitted in initial application "[wa]s correct and needs no amendment." Accordingly, I CONCLUDE there is ample support in the record below to support the Department's cancellation of the LOI application and I ADOPT the Initial Decision.

With respect to the arguments Petitioner raised in opposition to the Department's motion and before me now in its exceptions, i.e., those concerning a taking of property; exemption from regulation based on a pre-1988 subdivision approval for the property; and the "man-made" source of wetland conditions, I concur with the ALJ that these issues were not before OAL. As found by the ALJ, these issues have no bearing on whether or not the LOI application was properly cancelled.

Petitioner's argument that the 1989 subdivision approval issued by West Windsor Township provides an exemption from regulation was properly not considered by the ALJ as it is beyond the scope of the subject matter of this appeal, i.e., appropriateness of the LOI cancellation. Moreover, as was noted by the Department below and by the ALJ, the Appellate Division has determined that the Yadavs "may no longer rely upon the preliminary approval or any of the previous court orders [that were issued from 1983 to 1989] to subdivide their property. Should they choose to pursue their interest [in developing the Property], they must comply with the current zoning regulations and return to the planning board to apply for the appropriate permits and to seek approval." Yadav v. Township of West Windsor, *supra*, 2006 N.J. Super. Unpub. LEXIS 185, Slip Op. at *2-3. Consideration of this issue was properly rejected. Moreover, it would be inappropriate for the Department to intrude on the prior order of the

Appellate Division. An agency's determination that it does not have jurisdiction over a particular dispute is entitled to considerable weight, and such a determination should not be disturbed unless "plainly unreasonable." In re Complaint of Five-Mile Beach Electric Railway Co., Inc., 342 N.J. Super. 52, 63 (App. Div. 2001), citing Muise v. GPU Inc., 332 N.J. Super. 140, 158 (App. Div. 2000) (quoting Merin v. Maglaki, 126 N.J. 430, 437 (1992); accord National Waste Recycling, Inc. v. Middlesex County Improvement Auth., 150 N.J. 209, 228 (1997)). Where no regulatory agency has jurisdiction over the dispute, the claimant's recourse is in the courts. Id. at 64.

Petitioner's claim that a taking has occurred, even if ripe, would not properly be before the OAL or the Department. A potential claim that the applicable regulations excessively interfered with Petitioner's property rights, such that all economic and viable use of the Property was deprived, i.e., inverse condemnation, may be properly brought in the Law Division, but the OAL lacks jurisdiction to conduct fact finding on such a claim. Orleans Builders & Developers v. Byrne, 186 N.J. Super. 432, 446 (App. Div.), certif. denied, 91 N.J. 528 (1982); see also, Winans v. N.J. Dept. of Env't'l Prot., OAL Dkt. No. ESA 8172-03, 2005 N.J. AGEN LEXIS 192; Rivkin v. N.J. Dept. of Env't'l Prot., 96 N.J.A.R. 2d 353 (App. Div. 1996); MFH Holding Co. v. N.J. Dept. of Env't'l Prot., 314 N.J. Super. 87 (Law. Div. 1976). While no constitutional question should be decided in a "vacuum" by a reviewing court, thereby requiring development of a full factual record in the administrative process and/or the lower courts when appropriate, any constitutional question that is not necessary to complete the resolution of contested case issues may not be addressed in the administrative process. Jones v. Dept. of Community Affairs, 395 N.J. Super. 632, 637 (App. Div. 2007). Instead, such issues should be reserved for resolution in the judicial review phase or independently, thereafter, in a declaratory judgment proceeding.

Ibid. Under those principles, review of Petitioner's potential takings claim is not only unnecessary for the resolution of this administrative issue, but beyond the Department's authority in this matter. As such, it was appropriate for the ALJ to disregard Petitioner's arguments sounding in takings.

Finally, I agree with the ALJ that Petitioner's argument that the source of hydric/wet conditions on the Property are the result of man-made conditions is not germane to the requirements for wetlands delineation and the LOI cancellation under review. I therefore conclude that the grant of summary decision, on the limited issue of the LOI cancellation, was appropriate.

CONCLUSION

After careful review of the record, I conclude that the Department's decision to cancel Petitioner's LOI application was proper and was supported by the material facts in the record. I therefore ADOPT the ALJ's Initial Decision granting summary decision in favor of the Department for the reasons set forth therein and above.

IT IS SO ORDERED.

DATE April 14, 2016

A handwritten signature in blue ink, appearing to read "Bob Martin", is written over a horizontal line.

Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

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