



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

BOB MARTIN
Commissioner

KIM GUADAGNO
Lt. Governor

INTELLECT REAL ESTATE)	<u>ADMINISTRATIVE ACTION</u>
DEVELOPMENT,)	FINAL DECISION ON REMAND
)	
Petitioner,)	OAL DKT NO.: ELU 02864-14
)	AGENCY REF. NO.: 1601-02-0001.1
v.)	FWW020002
)	
NEW JERSEY DEPARTMENT OF)	
ENVIRONMENTAL PROTECTION,)	
)	
Respondent.)	

This matter is before me pursuant to a remand from the Appellate Division for further consideration of the Department of Environmental Protection's (Department or DEP) cancellation of Intellect Real Estate Development's (Intellect) application for a freshwater wetlands General Permit 11 (GP11) authorizing outfalls and intake structures, N.J.A.C. 7:7A-5.11. Intellect applied for the GP11 in connection with its efforts to construct a housing development in Bloomingdale Borough, Passaic County, which is located within the Highlands Preservation Area. See N.J.S.A. 13:20-7a(4).

FACTUAL AND PROCEDURAL BACKGROUND

On July 14, 2011, I issued a Final Decision adopting the March 1, 2011 Initial Decision of Administrative Law Judge (ALJ) Mumtaz Bari-Brown, upholding DEP's cancellation of

Intellect's GP11 permit application¹ as a result of the enactment of the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq. (Highlands Act or Act), prior to the Department's decision to approve or deny the permit application. In that Initial Decision, the ALJ held that even if the DEP had approved Intellect's permit application prior to enactment of the Highlands Act on August 10, 2004, the GP11 would not have benefited Intellect because Intellect had not obtained municipal approval on or before March 29, 2004 – an approval Intellect must also have been granted under the terms of the Highlands Act in order for Intellect to qualify for an exemption from the Act's development requirements for a "major Highlands development."² See N.J.S.A. 13:20-28a(3) and discussion below. Consequently, Intellect's challenge to DEP's cancellation of the application was moot because even if its challenge had been successful and DEP had been required to issue the GP11, the permit would have been of no benefit to Intellect in its pursuit of the development of the property after enactment of the Highlands Act because Intellect had not met the Act's exemption requirements. Id.

Intellect filed a Notice of Appeal from the July 14, 2011 Final Decision and the matter was briefed and heard in the Appellate Division on January 8, 2013. In an unpublished decision issued February 19, 2013, the Appellate Division affirmed the Commissioner's decision that Intellect was not entitled to an exemption under the Highlands Act because it had not obtained required municipal land use approval on or before March 29, 2004. See Intellect Real Estate Development v. New Jersey Department of Environmental Protection, 2013 N. J. Super. Unpub. LEXIS 372 (App. Div. 2013), at 1, 17. The Court, however, reversed the determination that cancellation of Intellect's GP11 application rendered moot the question of whether Intellect

¹ The OAL record in this matter upon which the ALJ's first Initial Decision was issued contained the Land Use Regulation Program Application Form indicating that the project was the "construction of an access road and two retention basin and outfall structures associated with proposed residential subdivision."

² Intellect does not dispute that its residential development project constitutes a "major" development as defined by the Act. See N.J.S.A. 13:20-3.

could have benefited from a favorable permit decision. Noting that the Deputy Attorney General representing the DEP “conceded that securing a [freshwater wetlands permit] might benefit Intellect,” ibid., the Court remanded the matter to the DEP to address whether Intellect could have benefited from issuance of a GP11 notwithstanding the enactment of the Highlands Act.

On February 6, 2014, Intellect made a Motion to Enforce Litigants’ Rights in the Appellate Division, seeking to compel the Department to complete the remand as directed by the Appellate Division’s decision of February 19, 2013. The Department filed its response on February 24, 2014. On March 4, 2014, the Appellate Division issued an Order directing the Department to conduct a remand hearing on the cancellation of Intellect’s GP11 application within 45 days. The Department transmitted the matter to OAL with the instruction that further proceedings be completed within that time.

On August 7, 2014, following submission of stipulated facts and initial and reply briefs by the parties, ALJ Bari-Brown issued an Initial Decision addressing the question on remand. The ALJ held that Intellect would not have benefited from the issuance of the GP11 in seeking either a Highlands Resource Area Determination (HRAD) under N.J.A.C. 7:38-9.4(c)1 or in seeking a Highlands Preservation Area Approval (HPAA) under N.J.A.C. 7:38-9.5(a)5 ii.1. The ALJ also held that Intellect would not have benefited from issuance of a GP11 because Intellect did not possess the requisite municipal approvals required by the Highlands Act to qualify for an exemption from the Act’s requirements. Additionally, the ALJ held that Intellect’s assertion of a waiver to avoid a taking of property without just compensation under the Highlands Act, N.J.S.A. 13:20-28a(3), was beyond the scope of the remand. The ALJ therefore held that

Intellect's challenge to DEP's cancellation of its GP11 application was moot, and dismissed the matter.

Neither Intellect nor the Department submitted exceptions to the Initial Decision.

For the reasons stated in the Initial Decision and as further discussed herein, I hereby ADOPT the Initial Decision.

DISCUSSION

There is no dispute that Intellect failed to obtain municipal approvals for the development on or before March 29, 2004 and thus did not qualify for an exemption under the Act. Therefore, the question of whether Intellect might have benefited from issuance of a GP11 for the purposes of exempting it from Highlands Act requirements is academic. As the Appellate Division held, to qualify for an exemption under the Highlands Act, Intellect would have had to obtain *on or before March 29, 2004* one of the required municipal approvals under N.J.S.A. 13:20-28a(3)(a) and a permit from DEP under either subparts (3)(b) or (3)(c), if applicable. Intellect Real Estate Development, 2013 N. J. Super. Unpub. LEXIS 372, supra, at 15-16. Because municipal approval was not obtained on or before March 29, 2004, even if Intellect had been issued a GP11, Intellect would have possessed only one of the two approvals upon which a Highlands Act exemption for a major development can be based. Because Intellect's development is not exempt from the Highlands Act pursuant to N.J.S.A. 13:20-28a(3)(a) through (c), its proposal is subject to all of the Act's requirements.

The question presented on remand requires a determination as to whether the issuance of a GP11³ would benefit Intellect in its pursuit of Highlands Act approval for the development. The answer to this question is no.

The Highlands Act provides that “all major Highlands development in the preservation area shall require a Highlands Preservation Area approval [HPAA] from the Department.” N.J.S.A. 13:20-30(a). An HPAA is “a permit to engage in regulated activity in the Highlands preservation area issued pursuant to the Highlands act and [its] regulations.” N.J.A.C. 7:38-1.4. “An HPAA issued under this chapter shall satisfy the requirements for and *constitute an approval* pursuant to the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq.; Flood Hazard Control Act, N.J.S.A. 58:16A-50 et seq.; Water Supply Management Act, N.J.S.A. 58:1A-1 et seq.; and the Safe Drinking Water Act, N.J.S.A. 58:12A-1 et seq., for any activity regulated by this chapter.” N.J.A.C. 7:38-2.2(d) (emphasis added). This latter provision is significant because it clearly indicates that an HPAA will be the only authorization issued for purposes of a major Highlands Act development, such as here. A GP11 would therefore be superfluous to an HPAA.

Further, although the record on remand does not describe in detail the particulars of Intellect’s GP11 application, it is clear from Intellect’s briefing on the issue that the Highlands Act development restrictions are more stringent than those applicable under the GP11 for which Intellect applied. See, e.g., Petitioner’s Initial Brief at p.1 (“new, much more stringent permitting regime”; “new, more stringent Highlands Act permitting regime.”), and p.2 (“materially more stringent and restrictive permitting requirements under the Highlands Act.”).

³ The ALJ’s Initial Decision correctly noted that a Department-issued and valid freshwater wetlands “letter of interpretation” (LOI) delineating wetland boundaries and resource classification might benefit Intellect in its HPAA application process by accelerating that process or avoiding additional costs, but noted that Intellect was not seeking an LOI at the time of its GP11 application and, at any rate, an LOI “does not grant approval to conduct any regulated activities” and is distinguishable from a GP11, “which is a permit.” Initial Decision at 17, 18.

Assuming that Intellect's GP11 had been issued, the permit would have been less stringent than what is required under the Highlands Act – see N.J.S.A. 13:20-30b – and the proposed project would still have to be reviewed for consistency with the Act through an HPAA application. If not compliant with the prohibitions on development in proximity to Highlands open waters, ibid., the development would either have to be modified to comply with the Act or Intellect would have to demonstrate that it meets the requirements for a waiver under N.J.S.A. 13:20-33b and N.J.A.C. 7:38-6.8. Simply put, Intellect's proposed "major Highlands development" in the Preservation Area requires an HPAA, which, as noted above, "shall satisfy the requirements for and constitute an approval pursuant to the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq...." N.J.A.C. 7:38-2.2(d). Thus, I must conclude that the GP11 would not have benefited Intellect.⁴

The ALJ also carefully reviewed Intellect's arguments as to the applicability of N.J.S.A. 13:20-33(b)(3) and N.J.A.C. 7:38-6.8, which authorize the Department to waive any requirement of an HPAA if necessary to avoid a taking of property without just compensation. The ALJ determined that Intellect's position reflected a misunderstanding of the waiver provision and its implementing regulations. See Initial Decision at 16. Specifically, a GP11 is not a prerequisite for obtaining a waiver under N.J.S.A. 13:20-33(b)(3) and the Department's regulations and would thus provide no advantage when seeking or after obtaining a waiver. The ALJ also held that the waiver argument was beyond the scope of the remand. I agree.

Particularly, Intellect's waiver argument is premature. N.J.A.C. 7:38-6.8 requires that Intellect exhaust its administrative remedies, i.e., that it apply for an HPAA and, upon doing so, its application be denied before it can seek a waiver:

⁴ Intellect is required to meet all the environmental standards set forth in N.J.A.C. 7:38-3.1, et seq., and -6.2. A favorable determination on a GP11 application would not derail the need for a demonstration with respect to these standards.

An applicant for an HPAA may request that the Department waive a requirement of this chapter ... *only after the Department has rendered a decision on an HPAA application under the rules as strictly applied, [and] all legal challenges to the decision that the applicant chooses to bring have concluded pursuant to [N.J.A.C. 7:38-6.8] (b)1.* . . .

N.J.A.C. 7:38-6.8(g) [emphasis added].

Nothing in the record suggests that Intellect has submitted an application under the Highlands Act or its implementing regulations. Until it does so and – in the event of a denial – has appropriately challenged the Department’s determination as provided above, its arguments as to waiver are not germane to this matter.

CONCLUSION

Accordingly, for the reasons discussed therein and above, I ADOPT the Initial Decision and dismiss the matter.

IT IS SO ORDERED.

DATE: November 3, 2014



Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

INTELLECT REAL ESTATE DEVELOPMENT

v.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION

OAL DKT. NO. ELU 02864-14

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