



# State of New Jersey

## DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE  
Governor

BOB MARTIN  
Commissioner

KIM GUADAGNO  
Lt. Governor

KENNETH AND ELLEN COSH, )  
)  
Petitioners, )  
)  
v. )  
)  
NEW JERSEY DEPARTMENT OF )  
ENVIRONMENTAL PROTECTION – )  
DIVISION OF COASTAL AND LAND )  
USE PLANNING, )  
)  
Respondent. )

### ADMINISTRATIVE ACTION FINAL DECISION

OAL DKT NO. ELU 16371-16  
AGENCY REF. NO. CSD 090007-435442

This Order addresses a challenge by Kenneth and Ellen Cosh (Petitioners) of the Highlands Applicability Determination and Water Quality Management Plan Consistency Determination (HAD) issued by the New Jersey Department of Environmental Protection (Department) on December 21, 2009, which denied Petitioners' application for an exemption pursuant to the Highlands Water Protection and Planning Act (Highlands Act), N.J.S.A. 13:20-1 et seq., and its implementing regulations, N.J.A.C. 7:38, to construct a residence on each of two lots located in the Highlands Preservation Area in Jefferson Township, Morris County. Petitioners applied for the exemption provided in N.J.S.A. 13:20-28(a)(1) and codified in the Department's rules at N.J.A.C. 7:38-2.3(a)1 (Exemption 1).

## FACTUAL AND PROCEDURAL BACKGROUND

Petitioners purchased a 3.94-acre lot located on Cozy Lake Road, Jefferson Township, Morris County, designated as Block 477, Lot 10, on the Tax Map of Jefferson Township (the Property), on June 28, 1976. The Property contains Petitioners' single-family home in which they live. Petitioners decided to subdivide the Property into three lots in order to construct a residence for their children on each of the two new lots. Petitioners obtained approval from the Jefferson Township Board of Adjustment (Township) on February 12, 2007, to subdivide the Property to create new Lots 10.03 and 10.04 (the Lots). The Township's subdivision approval was effective for one year. The Township granted Petitioners a six-month extension of the subdivision approval on February 11, 2008.

In 2009, Petitioners submitted an application for a HAD and Exemption 1 to the Department, for the proposed construction of a single-family dwelling on each of the Lots. Exemption 1 applies to construction of a single-family dwelling for an individual's own use, or the use of immediate family members, on a lot owned by the individual on August 10, 2004 (the effective date of the Highlands Act) or on a lot for which an individual has, on or before May 17, 2004, entered into a binding contract of sale to purchase that lot. N.J.S.A. 13:20-28(a)1; N.J.A.C. 7:38-2.3(a)1. On March 12, 2009, the Department sent Petitioners a Notice of Technical Incompleteness explaining that Petitioners did not qualify for Exemption 1 because the Lots did not exist until 2007, and therefore Petitioners could not have owned the Lots on August 10, 2004. The Department went on to note that the project might be allowable if it were not a major Highlands development, as defined at N.J.A.C. 7:38-1.4, and accordingly requested additional information from Petitioners demonstrating that the project would not require an environmental or land use permit or result in the disturbance of one acre or more of land or the cumulative increase in

impervious surface by one-quarter acre or more. On April 1, 2009, Petitioners requested and were granted a 120-day extension to respond to the Notice of Technical Incompleteness. On July 15, 2009, Petitioners contacted the Department to discuss the project and ultimately decided that the project could not be redesigned so as to not be regulated as a major Highlands development. Therefore, Petitioners requested that the Department proceed to make its determination based on the project as described in the HAD application.<sup>1</sup> The Department issued the HAD on December 21, 2009, denying the requested exemption based on its determination that the Lots were not in existence and therefore were not owned by Petitioners on August 10, 2004.

On February 8, 2010, Petitioners requested a hearing. The Department granted the hearing and the matter was transmitted to the Office of Administrative Law (OAL), where it was assigned to Administrative Law Judge (ALJ) Michael Antoniewicz. The Department moved for summary decision on January 26, 2017, seeking dismissal of Petitioners' appeal. On February 17, 2017, Petitioners filed opposition. On February 27, 2017, the Department filed a reply. The record closed on March 1, 2017, and the ALJ issued an Initial Decision on April 6, 2017, granting the Department's motion and affirming the Department's denial of Exemption 1. No exceptions were filed.

### DISCUSSION

In the OAL, summary decision may be granted when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. N.J.A.C. 1:1-12.5(b). This is the same standard applied to motions for summary judgment in the Superior Court of New Jersey. See R. 4:46-2(c). In Superior Court, as in OAL, "[w]hen the evidence is so one-sided that one party must prevail as matter of law, the [motion judge] should not hesitate to grant summary

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<sup>1</sup> The Initial Decision did not reflect these additional clarifying procedural facts; however, they are part of the record and are contained in the Department's moving papers.

judgment.” Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995) (internal citations omitted). Because Petitioners did not own the Lots until 2007, the ALJ agreed with the Department’s determination that Petitioners did not meet the requirements of Exemption 1 and granted the Department’s motion for summary decision. As explained below, I ADOPT the ALJ’s Initial Decision.

The Highlands Act protects the water supply underlying the New Jersey Highlands Region by imposing “stringent standards governing major development in the Highlands preservation area[.]” N.J.S.A. 13:20-2. The Department’s rules implementing the Highlands Act establish a strict permitting program aimed at protecting Highlands resources from the impacts of development. See, e.g., N.J.S.A. 13:20-2; N.J.S.A. 13:20-33; N.J.A.C. 7:38-3. All major developments are regulated under the Highlands Act and the Department’s rules unless the Department determines through a HAD that an applicant’s project qualifies for one of seventeen exemptions. See N.J.S.A. 13:20-28; N.J.A.C. 7:38-2.3.

In its motion for summary decision, the Department argued that, because Petitioners are seeking an exemption for the Lots that did not exist until 2007, they cannot satisfy the requirements of N.J.A.C. 7:38-2.3(a)(1) both as a matter of fact and law. In their hearing request and motion response, Petitioners asserted that they are entitled to Exemption 1 because they have owned the Property for 35 years and because at a town hall meeting regarding the Highlands Act the citizens of the State were promised a family exemption to the Highlands Act. Petitioners argued that the Highlands Act and its rules render it impossible to obtain an exemption unless a property was subdivided prior to August 10, 2004, and that they were harmed by the Department’s delay in transmitting the matter to OAL because their municipal approvals expired in the meantime.

Petitioners asserted that, if no exemption is granted, they should be entitled to compensation for the loss of the property.

With regard to the delay in transmitting the matter to OAL, the Department noted in its reply brief that Petitioners' application for a HAD was not submitted until 2009, one year after the Township's subdivision approval had expired, and therefore the delay had no impact on the outcome of this matter. The delay also did not change the fact that the Lots did not exist until nearly three years after the effective date of the Highlands Act. As to Petitioners' broad attacks on the fairness of the Highlands Act and their claim that a family member exemption was promised at the town hall meeting, the Department argued that these are outside the scope of the ALJ's review in this case. Finally, as to Petitioners' demand for compensation, the Department argued that only the New Jersey Superior Court has jurisdiction over inverse condemnation claims and that Petitioners must first exhaust all administrative remedies before filing such a claim.

There is no dispute that the Lots did not exist until February 12, 2007, when the Township granted Petitioners' request for subdivision approval. As a result, Petitioners did not own the Lots until February 2007. See In re Miller, 2006 N.J. Super. Unpub. LEXIS 2181 (App. Div. October 25, 2006) (discussing, in the context of a HAD, that an individual obtains ownership of a lot subdivided from a "mother" lot, at the earliest, on the date of subdivision approval). The Department therefore concluded in the HAD that Petitioners cannot satisfy the conditions required for Exemption 1 and appropriately denied their request. The Department's delay in transmitting the matter to the OAL did not alter this outcome, nor did it prejudice Petitioners. Petitioners' application for a HAD was filed on February 10, 2009, after the Township's subdivision approval had expired in 2008. Therefore, no prejudice resulted from the delay.

As to Petitioners' assertion that the citizens of the State were promised a family exemption in the Highlands Act, the law does include such an exemption. It is the one for which the Petitioners applied. N.J.A.C. 7:38-2.3(a)1. As discussed, however, Petitioners simply cannot satisfy its requirements. Petitioners' complaints about the fairness of the Highlands Act and its exemptions are beyond the scope of this matter, which was limited to whether the Department appropriately denied Petitioners' application for Exemption 1.


Finally, as to Petitioners' demand for compensation, only the New Jersey Superior Court has jurisdiction over inverse condemnation claims. N.J.S.A. 20:3-5; IMO Jersey Central Power and Light Co., 166 N.J. 540, 544 (App Div. 1979). The OAL is not the appropriate forum for such a demand. Before seeking relief, Petitioners must "pursu[e] the available regulatory process to its conclusion." United Savings Bank v. State, 360 N.J. Super. 520, 527 (2003) (citing Griffith v. DEP, 340 N.J. Super. 596, 611 (App. Div.), cert. denied 170 N.J. 85 (2001)). Petitioners did not apply for a Highlands Protection Act Approval or a Highlands Takings Waiver, N.J.S.A. 13:20-33(b)(3) and N.J.A.C. 7:38-6.8, both of which are prerequisites for an inverse condemnation claim. Because Petitioners did not exhaust all available administrative remedies, their demand for compensation is not ripe.

#### CONCLUSION

For the reasons set forth therein and above, I ADOPT the ALJ's initial decision affirming the Department's HAD and concluding that Petitioners are not entitled to Exemption 1.

IT IS SO ORDERED.

DATED: June 9, 2017

  
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Bob Martin, Commissioner  
New Jersey Department of  
Environmental Protection

KENNETH AND ELLEN COSH v.  
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL  
PROTECTION – DIVISION OF COASTAL AND  
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