



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. ELU 16371-16

AGENCY DKT. CSD090007-435442

KENNETH AND ELLEN COSH,

Petitioners,

v.

**NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION –
DIVISION OF COASTAL AND LAND USE
PLANNING,**

Respondent.

Kenneth and Ellen Cosh, petitioners, pro se

Jennifer L. Moriarty, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: March 1, 2017

Decided: April 6, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

Petitioners, Kenneth and Ellen Cosh, requested an adjudicatory hearing with the Department of Environmental Protection (DEP/Department) based on a denial of

petitioners' request of Exemption 1 for the New Jersey Highlands Water Protection and Planning Act Rules. The DEP granted the request and transmitted the matter to the Office of Administrative Law (OAL) where it was filed on October 27, 2016.

PROCEDURAL HISTORY

The issue in dispute for a hearing in the OAL is an "Appeal of a(n) Denial of Exemption." The OAL is a forum for litigation involving disputes with Executive Branch agencies that arise within the agency's regulatory functions and it draws its jurisdiction regarding contested cases only from the agencies themselves and only where the agency head does not choose to personally sit on any element of the contested case but chooses to transmit the case, or any part thereof, to the OAL. N.J.S.A. 52:14B-10(c); N.J.S.A. 52:14F-8(b).

It is the above issue that is the subject of the DEP's current motion seeking summary decision in its favor, seeking dismissal of petitioners' appeal of the DEP's Land Use Regulation Unit's denial of the petitioners' request for an exemption from the provisions of the New Jersey Highlands Water Protection and Planning Act Rules (N.J.A.C. 7:38) (Highlands Rule/Act). The parties have exchanged their legal and factual positions and the DEP submitted a Motion for Summary Decision on January 27, 2017, and petitioners submitted their opposition on February 22, 2017. The DEP then submitted its reply brief on March 1, 2017, at which time the record was closed.

FACTUAL BACKGROUND

Petitioners own property located in Jefferson Township, Morris County, New Jersey. The property is on Block 477, Lot 10 as set forth on the municipal tax map. Petitioners acquired their ownership of this property, which is 3.94 acres, via a deed, dated June 28, 1976. There is an existing dwelling on the lot which has been and is the petitioners' residence. The property is located within the Highlands Preservation Area that is designated by the Highlands Act at N.J.S.A. 13:20-7(b) and its regulations. (Highlands Rules at N.J.A.C. 7:38-2.1.)

By resolution, dated February 12, 2007, petitioners obtained a subdivision approval from the Jefferson Township Board of Adjustment to subdivide into two additional lots (i.e., Lots 10.03 and 10.04) from Lot 10. As per the applicable resolution, the petitioners' existing residence would occupy the easterly 2.01 acres of Lot 10 and the westerly part of Lot 10 would be subdivided so that two additional lots (Lot 10.03 and 10.04) would be created, approximately equal in size, which would each be developed with one single-family dwelling.

On February 10, 2009, the DEP received petitioners' Highlands Applicability and Water Quality Management Plan Consistency Determination (HAD) Application, dated January 5, 2009. In the petitioners' HAD application, they proposed to construct two four-bedroom single-family dwellings on Lots 10.03 and 10.04 for their children's use. The current dwelling on Lot 10 and the proposed development on Lots 10.03 and 10.04 are shown on uncertified plans as prepared by Alfred A. Stewart, Jr., P.E., P.L.S., dated June 28, 2006, and last revised on January 27, 2009, which is entitled "Existing Conditions Lot 10, Block 447, Township of Jefferson, Morris County, New Jersey, sheet 2 of 3, and Subdivision Plan of Lot 10, Block 447, Township of Jefferson, Morris County, N.J.," sheet 3 of 3.

Petitioners applied for one of the Highlands Act's Exemptions (Exemption #1), which provides for an exemption from the Act's requirements for the construction of a single-family dwelling "for an individual's own use or the use of an immediate family member." N.J.S.A. 13:20-30(a)(1); N.J.A.C. 7:38-2.3(a)(1). The dwelling must be on a lot owned by the individual on August 10, 2004, 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.

On March 12, 2009, the DEP sent to petitioners, a Notice of Technical Incompleteness in which DEP explained the project did not qualify for an Exemption 1 because the petitioners did not legally own Lots 10.03 and 10.04 on August 10, 2004, as required under N.J.A.C. 7:38-2.3(a)(1), since Block 477, Lot 10 was not subdivided to establish Lots 10.03 and 10.04 until 2007. This Notice of Technical Incompleteness also noted that the property under consideration for the HAD would be Block 447, Lot

10, the entire 3.94-acre lot containing the existing dwelling and which was legally owned by petitioners on August 10, 2004.

The DEP denied the petitioners' application for Exemption 1 on December 21, 2009, and that the proposed project is subject to the Highlands Rules. The basis for the denial was the fact that in order to qualify for an exemption under N.J.A.C. 7:38-2.3(a)(1), for the construction of a single-family dwelling, for an individual's own use or the use of an immediate family member, the lot must have been in existence on August 10, 2004, and had to be legally owned by the individual on or before August 10, 2004. This requirement was not met because Block 477, Lots 10.03 and 10.04 did not exist on August 10, 2004, as Block 477, Lots 10.03 and 10.04 were created through a minor subdivision by a resolution of the Jefferson Township Board of Adjustment memorialized on February 12, 2007. Accordingly, the DEP found that the petitioners did not satisfy the requirements set forth in and required to be eligible for Exemption 1. Petitioners maintain their appeal herein to overturn the denial by the DEP for its application for Exemption 1, which was filed on February 8, 2010.

The factual basis for this case is generally not in dispute. Petitioners in their brief claim that there remains a dispute as to material facts, yet when there is a deeper analysis of the facts claimed to be disputed, the submission by the petitioners appear to be based more on legal issues and not a factual dispute. What remains is a legal question as to the application of Exemption 1 of the Highlands Act and its applicability to the petitioners' application in this case.

There is no dispute as to the relevant facts in this case. The DEP denied the application for Exemption 1 because Block 447, Lots 10.03 and 10.04, on which the petitioners propose to construct dwellings for their children, did not exist on August 10, 2004. Thus, the lot did not exist because the variance was not started and/or completed by that date. The approval to subdivide this lot was granted by the Township of Jefferson on February 12, 2007.

Summary Decision

The Uniform Administrative Procedure Rules, N.J.A.C. 1:1-12.5, which govern the conduct of contested cases, specifically authorize a party to file a motion for summary decision as a means of determining the outcome of a contested case. Summary decision is the administrative law equivalent of a summary judgment motion in the judicial branch. The standards for deciding such a motion were first established in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954) and more recently illuminated in Brill v. The Guardian Life Insurance Company of America, 142 N.J. 520 (1995). Under the Brill standard, as before, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether "genuine" disputes of "material fact" exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact. The facts upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ," Judson, supra, 17 N.J. at 75 (citations omitted). The Brill decision focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." Brill, supra, 142 N.J. at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.'" Id. at 536 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214).

In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that is the

preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that “reasonable minds could differ” as to the material facts, then the motion must be denied and a full evidentiary hearing held. Again, it is not merely any dispute of fact that must be shown to exist. Only the existence of disputed facts the resolution of which can have legal significance in the particular case and under the applicable law can defeat the motion.

LEGAL DISCUSSION

The Highlands Act (N.J.S.A. 13:20-1 et seq.) was enacted in 2004 in order to protect the Highlands Region’s unique environmental and ecological characteristics, including being an “essential source of drinking water . . . contiguous forest lands, wetlands, pristine watersheds and habitat for fauna and flora[.]” N.J.S.A. 13:20-2. This Act applies a “comprehensive approach” to protect these resources, imposing “stringent standards governing major development in the Highlands preservation area[.]” Ibid. Accordingly, at the direction of the New Jersey Legislature, DEP adopted environmental regulatory standards and implements a permitting review program to reduce the impact of “Major Highlands Development.” N.J.S.A. 13:20-33; N.J.A.C. 7:38, subchapter 3.

Although “Major Highlands Development” is generally subject to DEP’s permitting review program, the Legislature carved out a number of exemptions from the Act and DEP codified those exemptions in its implementing regulations. N.J.S.A. 13:20-28; N.J.A.C. 7:38-2.3. In order to determine whether a proposed activity is subject to the Highlands Act, applicants must apply for a Highlands Applicability Determination, pursuant to which DEP issues exemption decisions. N.J.A.C. 7:38-2.4. In an application for Exemption 1, the petitioners filed for same on or about February 10, 2009.

The Legislature in providing for Exemption 1, wrote that: “the construction of a single-family dwelling, for an individual’s own use or the use of an immediate family member, on a lot owned by the individual on the date of enactment of this act or on a lot for which the 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).

An Exemption 1 exempts from the Highlands regulations:

[c]onstruction of a single-family dwelling, for an individual’s own use or the use of an immediate family member, on a lot owned by the individual **on August 10, 2004 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.A.C. 7:38-2.3(a)(1) (emphasis added).]

As stated by the respondent, the purpose of the Highlands Exemption 1 was and is to ensure that any property owner retains the right to build a home on their piece of land for themselves or their immediate family members so long as they meet the additional requirements. This ensures that no person who owned a legally existing lot on August 10, 2004, would be left without the opportunity to build a home for themselves on that land.

In this case, petitioners contend that the respondent failed to respond to them in a timely manner and thus caused their inability to meet the requirements of the Exemption. Petitioners stated that their first request for a hearing was dated January 15, 2010, and the DEP did not get back to them until November 21, 2016, for a period of over five years. The problem with this argument is that even if the DEP got back to petitioners on January 16, 2010, this would have absolutely no effect on the fact that the lot in question was not in existence on or before August 10, 2004, as required by regulation.

In addition, petitioners argued that when Mr. Cosh attended a town hall meeting regarding the Highlands Water Protection Act, “the citizens of this state were promised a family exemption to the Act.” Petitioners do not say as to who made this promise and

under what circumstances the exemption would be given. There is, in fact, a family exemption in the Act as stated by the State of New Jersey.

Petitioners also argued that the way the exemption is written, it is impossible for a family member to obtain such an exemption because the lot must be owned and subdivided prior to August 10, 2004. This argument does not take into account the fact it is not impossible for a family member to obtain such an exemption so long as the lot meets the other factual requirements of the exemption.

Petitioners further ask for a repeal of the Highlands Water Protection Act and described it as a flawed law. This argument must also be rejected as the Law is a validly passed law by the New Jersey Legislature and there is no specific argument by the petitioners as to why or how the law is flawed. Petitioners also seem to argue that they are entitled to compensation for the loss of their property as a result of the Highlands Water Protection Act. I agree with the respondent that such an argument must be presented to the Superior Court and not in the venue here in the OAL. N.J.S.A. 20:3-5; In re Jersey Central Power and Light Co., 166 N.J. Super. 540, 544 (App. Div. 1979).

Petitioners have also failed to exhaust the administrative procedures required before an inverse condemnation claim would become ripe. In addition, the petitioners must apply for a Highlands Protection Act Approval and/or Highlands Takings Waiver pursuant to N.J.S.A. 13:20-33(b)(3) and N.J.A.C. 7:38-6.8, which are needed to be done before filing an inverse condemnation complaint against the DEP. A landowner must “pursue the available regulatory process to its conclusion” before a court can determine whether a taking occurred. United Sav. Bank, 360 N.J. Super. 527 (2003) (citing Griffith v. DEP, 340 N.J. Super. 596, 611 (App. Div.), certif. denied, 170 N.J. 85 (2001)). These steps have not been taken by the petitioners in this case.

Despite petitioners’ argument that the denial of the application for Exemption 1 was based on an unfairness of the law or a misinterpretation of the Highlands Acts, I **FIND** that the denial was based on a clear reading of the facts and a correct interpretation of the law and the statute.

I **CONCLUDE** that the DEP did not err when reaching its decision to deny the petitioners' application because of allegedly failing to properly consider the totality of the circumstances and pertinent relevant factors. I further **CONCLUDE** that the DEP properly interpreted the statute when it found that the subject lot was clearly not in existence on or before August 10, 2004.

Based upon the submissions of the parties, I **CONCLUDE** that there can be no question with reference to the narrow issue now before the OAL, that is, the Exemption 1 is not applicable to the petitioners and thus when the DEP denied the application filed by the petitioners for Exemption 1 that there is no genuine dispute of material fact and the Exemption 1 is not applicable to the petitioners in this case. And as such, summary decision is granted to respondent.

ORDER

Based on the foregoing, I **ORDER** that summary decision is appropriately **GRANTED** in favor of the DEP and the application for Exemption 1 under the Highlands Act by the petitioners is properly **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, P.O. 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.

April 6, 2017
DATE


MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency:

Date Mailed to Parties:

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