State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

BOB MARTIN
Commissioner

D.R. MULLEN CONSTRUCTION CO.,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAND USE MANAGEMENT,

Respondents.

ADMINISTRATIVE ACTION
FINAL DECISION

OAL DKT NO. ELU-HE 05573-12
AGENCY DKT. NO. CSD090077-435442

This Order addresses the appeal by D.R. Mullen Construction Co. (Petitioner) of the Highlands Applicability Determination and Water Quality Management Plan Consistency Determination (the HAD) issued by the New Jersey Department of Environmental Protection (Department) denying Petitioner's requested exemption from the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 to -35 (Highlands Act) and implementing rules, N.J.A.C. 7:38. Petitioner requested the exemption for the construction of a crushed stone storage area and extension of a paved access drive on Lot 1, Block 201,[1] in the Borough of Oakland, Bergen County, which is located in the Highlands Preservation Area. Lot 1 is zoned Industrial Park and, together with adjacent lots 2, 4, 5 and 6, Block 201, is situated between Route I-287 to the north and Edison Avenue and the New York Susquehanna and Western Railroad to the east. Lot 1 contains no structures. Lots 2, 4 and 5 contain buildings and Lot 6 is a driveway to the rear of

[1]Both parties and the ALJ at times erroneously refer to the parcel as Lot 1, Block 102. The site plan submitted (J-2) refers to the site as Lot 1, Block 201, as does the parties' joint exhibit 1 (J-1).

Lot 2. Lots 1, 2, 4, 5 and 6 of Block 201, are part of the West Oakland Industrial Park, and share common infrastructure, including drainage, utilities, and an access drive off the Edison Avenue cul-de-sac. Petitioner is the owner of Lot 2, and the contract purchaser of Lot 1. Lots 4, 5 and 6 are not under common ownership with the applicant, although the owners of those parcels signed the application for exemption.

Petitioner's HAD application, dated December 16, 2009, relied on Exemption 4, which is an exemption for reconstruction for any reason of any building or structure within 125 percent of the footprint of the lawfully existing impervious surfaces on the site on August 10, 2004, provided that the reconstruction does not increase the lawfully existing impervious surface by one-quarter acre or more. See N.J.S.A. 13:20-28(a)(4) and N.J.A.C. 7:38-2.3(a)4. In its summary of the project, Petitioner described the "overall site or 'Property as a Whole'" as including adjacent Lots 1, 2, 4, 5 and 6 of Block 201, with existing impervious cover of 259,730 square feet and consisting of 11.3 acres. The application proposed to construct new impervious surface of 23,710 square feet for the 650 linear foot extension of the access drive and 15,163 square feet for the gravel storage area, for a total new impervious surface area of 39,186 square feet, which the Petitioner calculated to be 15.1 percent of the existing 259,730 square feet of impervious surface on the five lots, or a net increase of 536 square feet.[2]

On April 15, 2011, the Department issued the HAD, denying the requested exemption. The Department noted that the lawfully existing footprint of impervious surfaces on Lot 1 (the existing portion of the access drive) consisted of 1,115 square feet, or 0.026 acres, and that the

[2]The Initial Decision does not address Petitioner's claim that the calculation of impervious surface must be reduced by 38,656 square feet to account for the quantity of shot rock placed on Lot 1 by the Department of Transportation in connection with the construction of Route I-287, which area, according to Petitioner's site plan, is to be restored with forest vegetation. In light of the conclusion that the proposed construction on Lot 1 is not reconstruction for purposes of the exemption, this assertion need not be further addressed.

amount of proposed new impervious surface on that lot consisted of 38,873 square feet, or 0.89 acres. The Department determined that the project did not meet the requirements of the exemption because the proposed increase in impervious surfaces of 0.89 acres amounted to a 342 percent of the existing footprint of impervious surfaces on Lot 1 and exceeded one-quarter acre of new impervious surfaces on that lot.

On May 6, 2011, Petitioner requested an administrative hearing. The Department granted the hearing and transmitted the matter to the Office of Administrative Law where it was assigned to Administrative Law Judge (ALJ) Leland S. McGee. In the OAL, the Department filed a motion for summary decision, supported by the certification of Jeffrey Olawski, Environmental Specialist in the Department's Office of Coastal and Land Use Planning, who had reviewed Petitioner's application. Petitioner filed a cross-motion for summary decision supported by the certification of Professional Engineer Tibor Latincsics, who had represented Petitioner in the preparation and submittal of the application. The ALJ considered the certifications and briefs filed as well as oral argument of counsel on August 4 and 11, 2015.

In both its hearing request and the motion for summary decision, Petitioner argued that the Department incorrectly failed to treat Lots 1, 2, 4, 5 and 6 as the "property as a whole" and incorrectly failed to take into account lawfully existing impervious surfaces and the removal of shot rock on the rest of the other lots in calculating the percentage of existing and net total amount of the increase in the impervious footprint. The Department argued that the project did not qualify for the exemption because: (1) it was not the "reconstruction" of a structure previously existing on Lot 1, (2) it was not within 125 percent of the footprint of any existing impervious surface, and (3) it was an increase in impervious surface of more than one-quarter acre. The Department also argued that Lots 1, 2, 4, 5 and 6 could not be considered as the

"property as a whole" as defined at N.J.A.C. 7:38-1.4 because the lots were owned by different entities, were not being assembled as a single investment or development, and had not been formed from a single lot.

In an Initial Decision dated April 4, 2015, the ALJ found that Petitioner's proposed project did not meet the requirements of the exemption for reconstruction at N.J.S.A. 13:20-28(a)(4) and N.J.A.C. 7:38-2.3(a)4 because the proposed storage area was not a rebuilding of or addition to any lawfully existing structure on Lot 1 but rather was the construction of a new development. In so determining, the ALJ noted that "no outdoor storage area exists or existed on [Lot 1] before the Highlands Act, and the project involves the 'install[ation] of a storage yard.'" (second alteration in original). Relying on the Appellate Division's analysis of a "reconstruction" project in In re the Aug. 16, 2007 Determination of the NJDEP ex. Rel. Christ Church, Block 22203, Lots 2 and 3, Rockaway Township, Morris County, 414 N.J. Super. 592, 604 (App. Div.), certif. denied, 205 N.J. 16 (2010), and the definitions of "reconstruction" in the Merriam-Webster Dictionary and Black's Law Dictionary, the ALJ found that Petitioner's proposed activity did not fall within the plain meaning of the term "reconstruction" because it involved new construction rather than "the rebuilding of or addition to a previously existing structure." Neither Petitioner nor the Department filed exceptions to the Initial Decision.

For the reasons set forth therein and above I ADOPT the Initial Decision granting summary decision in favor of the Department and denying summary decision on Petitioner's cross-motion for summary decision. [3] Since Lot 1 has no existing storage area or structures on it, the proposed project, could not be considered reconstruction within the plain meaning of that

[3] Although it is not necessary for this Final Decision because the project is not exempt under the Highlands Act, I note also that the Department found in the HAD that the project did not meet the requirements of the Water Quality Management Planning Act, N.J.S.A. 58:11A-10, and implementing rules, N.J.A.C. 7:15.

term; the proposal is to create new impervious surface area for a new outdoor storage area. However, I MODIFY the initial decision as follows to address the "property as a whole" issue raised by Petitioner. Although the ALJ did not address Petitioner's assertion that Lots 1, 2, 4, 5 and 6 should have been analyzed as one property, I note that Petitioner submitted no evidence or certifications to establish that the lots were assembled or previously sold or developed as one investment. The lots are not in common ownership; rather, they are separate industrial businesses. There is no indication that the parcels are anything more than lots adjacent to one another in the West Oakland Industrial Park complex. In conclusion, because the proposed activity constitutes new construction and not the reconstruction of a previously existing structure, and because Lots 1, 2, 4, 5, and 6 cannot be considered as the "property as a whole," the Department's HAD denying Petitioner's application for exemption from the Highland Act pursuant to N.J.S.A. 13:20-28(a)(4) is affirmed.

IT IS SO ORDERED.

July 1, 2016
DATE

Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

D.R. MULLEN CONSTRUCTION CO. v.
NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
LAND USE MANAGEMENT

OAL DKT. NO. ELU-HE 05573-12
AGENCY DKT. NO. CSD090077-435442

SERVICE LIST

Jason T. Stypinski, DAG
Division of Law
R. J. Hughes Justice Complex
P.O. Box 093
25 Market Street
Trenton, N.J.
Email: jason.stypinski@dol.lps.state.nj.us

Ben R. Cascio, Esq.
684 Route 208
Franklin Lakes, NJ 07417
Email: bencascio@aol.com