



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

BOB MARTIN
Commissioner

KIM GUADAGNO
Lt. Governor

MICHAEL BARRY,)	<u>ADMINISTRATIVE ACTION</u>
)	FINAL DECISION
Petitioner,)	
)	OAL DKT NO. ELU 02205-14
v.)	AGENCY REF. NO. 1517-11-0023.1
)	CAF 110001
NEW JERSEY DEPARTMENT OF)	
ENVIRONMENTAL PROTECTION,)	
LAND USE REGULATION,)	
)	
Respondent.)	

This Order addresses a challenge by Michael Barry (Petitioner) to a condition of the general permit that the Department of Environmental Protection (Department) issued him on November 18, 2011 under the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 to -21, and implementing coastal rules, to “demolish an existing single family dwelling and construct a new single family dwelling with associated structures” on Block 18.107, Lot 2, in Long Beach Township, Ocean County. In his March 6, 2012 hearing request, Petitioner sought to challenge Administrative Condition 4 of the permit, which required him to file a conservation restriction “for the area waterward of the eastern facade of the proposed single family home” prior to site preparation. Petitioner sought relief in the form of a modification of the conservation restriction that would protect a smaller area beginning several feet further waterward at the municipal building line rather than at the façade of the

home. The Department granted Petitioner's hearing request¹ and the matter was transmitted to the Office of Administrative Law (OAL) where it was assigned to Administrative Law Judge (ALJ) Elia A. Pelios.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner applied to the Department on September 1, 2011, for a CAFRA permit to reconstruct and expand an existing single family dwelling. The Department's Division of Land Use Regulation conducted a site inspection and determined that the entire project site met the regulatory definition of a dune. Consequently, the permit issued on November 11, 2011, included Administrative Condition 4, which required Petitioner to record a conservation restriction for the area waterward of the home's eastern façade that would prohibit development within the dune area.² Thereafter, Petitioner wrote the Department suggesting that the conservation restriction should cover the area of the property waterward of the municipal building line and not include the area between the eastern façade of the home and the building line because that area, according to Petitioner, is not a dune. In a letter dated March 6, 2012, Petitioner notified the Department that he intended to record the conservation restriction required by Administrative Condition 4, but would also request a hearing to challenge the extent of the area that the conservation restriction was required to cover. The

¹ Although Petitioner's hearing request was filed more than 30 days after notice of the permit decision was published in the DEP Bulletin, the record reflects that the Department was satisfied that the Petitioner had established good cause for his untimely request. See N.J.A.C. 7:7-28.1(b) (formerly N.J.A.C. 7:7-5.1(a)) (a person must submit a hearing request within 30 days after notice of the permit decision is published in the DEP Bulletin); see also D.R. Horton, Inc.-New Jersey v. New Jersey Dept. of Environmental Protection, 383 N.J. Super. 405, 409 (App. Div. 2006) (untimely hearing request may be granted if challenger provides a reasonable explanation for failure to strictly comply with the regulatory deadline).

² To qualify for a general permit to reconstruct a single-family home on property that includes a dune, the property owner must record "a conservation restriction for the dune areas waterward of the existing and/or approved single-family home." N.J.A.C. 7:7-6.5(d)3vi (recodified from N.J.A.C. 7:7-7.9(d)3vi, effective July 6, 2015).

conservation restriction was recorded with the Ocean County Clerk on April 4, 2012. It is undisputed that Petitioner began reconstruction of the house in the fall of 2012.

In the OAL, the Department filed a motion on March 3, 2015, seeking summary decision on the basis that, by constructing the house, Petitioner had accepted the terms of the permit and had therefore waived his right to challenge it. In support of its position, the Department cited Administrative Condition 2 of the permit, which states that “if you begin any activity approved by this Permit, you thereby accept this document in its entirety.... If you do not accept or agree with this document in its entirety, do not begin construction.” Further, the Department argued that the OAL could not direct the Commissioner to release the conservation restriction after it had been recorded, as requested by Petitioner, without initiating the process set forth in the New Jersey Conservation Restriction and Historic Preservation Act (Conservation Restriction Act), N.J.S.A. 13:8B-1 to -9. Petitioner opposed the motion, arguing that he had completed construction in full compliance with the permit and that there was no legal basis to preclude him from challenging the permit condition. Petitioner claimed that the Department erred in finding that the entire project site consisted of a dune and thus could not impose the condition that he record a conservation restriction for all of the area waterward of the dwelling. Petitioner urged the OAL to “exercise its power to Order the Commissioner to proceed to release the restriction” in accordance with the Conservation Restriction Act.

The ALJ heard oral argument on the motion on May 18, 2015. On May 19, 2015, the Department submitted a letter citing N.J.A.C. 7:7-5.1(d), a provision in the CAFRA rules then in effect that provided that “[i]f a permittee submits a hearing request contesting any condition of a permit, construction shall not commence until the adjudicatory hearing is resolved.”

The ALJ issued an Initial Decision on October 6, 2017, concluding that, pursuant to Administrative Condition 2 of the permit, Petitioner had accepted the terms of the permit when he began construction and thus had forfeited his right to challenge Administrative Condition 4. In support of his determination, the ALJ cited a coastal permitting case decided by the California Supreme Court, Lynch v. California Coastal Com., 3 Cal. 5th 470, 478 (2017), in which the Court ruled that where permit-holders had constructed a seawall “before obtaining judicial determination on their objections,” they had accepted the benefits of a permit and forfeited the right to maintain their objections to conditions of the permit. As noted by the ALJ, the California Supreme Court reasoned that “[r]equiring that parties seek to invalidate permit conditions . . . before proceeding with a project ‘serves the salutary purpose of promptly alerting the [agency] that its decision is being questioned’ and allows the government to mitigate potential damages.” Id. at 480, quoting California Coastal Com. v. Superior Court, 210 Cal. App. 3d 1488, 1496 (1989). Further, the ALJ concluded that the OAL has no role in the process for the release, in whole or in part, of a conservation restriction pursuant to the Conservation Restriction Act, and thus the OAL cannot direct the Commissioner to modify the recorded conservation restriction as requested by the Petitioner. For these reasons, the ALJ granted summary decision to the Department and dismissed Petitioner’s appeal.

Petitioner argues in his exceptions that the Court’s reasoning in the Lynch case was flawed, and that because Petitioner formally invoked his right to challenge the permit condition prior to construction, he could not be deemed to have accepted the permit condition when he did commence construction. Petitioner also contends that it is unfair to deny him a hearing on the merits of the appeal because if he had waited for the litigation to end before constructing the house, he would still be waiting and that such a delay constitutes an unfair exercise of governmental power.³ Finally,

³ Petitioner also argues that the Initial Decision should have examined his challenge on the merits of Administrative

Petitioner urges that the Commissioner could, as part of the Final Decision, release the conservation restriction in accordance with the Conservation Restriction Act. The Department filed a reply urging the Commissioner to reject Petitioner's exceptions and affirm the Initial Decision in its entirety for the well-founded reasons stated therein. The Department maintains that to allow Petitioner to challenge the permit following construction would undermine the permitting process mandated by the Legislature.

DISCUSSION

Summary decision is appropriate where “the pleadings, discovery and affidavits ‘show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.’” E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010) (quoting N.J.A.C. 1:1-12.5(b)). A genuine issue of material fact exists only “when ‘the competent evidential materials . . . are sufficient to permit a rational fact[-]finder to resolve the alleged disputed issue in favor of the non-moving party.’” Ibid. (alterations in original) (quoting Piccone v. Stiles, 329 N.J. Super. 191, 194 (App. Div. 2000)).

Based on facts in the record that are not in dispute, the ALJ decided that, as a threshold matter, the Petitioner was not entitled to pursue the appeal because he had already accepted the permit conditions by complying with them and constructing the house. Although the parties submitted opposing expert reports on the issue of the extent of the dune on the property, which is at the heart of Petitioner's appeal as to the merits, the ALJ did not need to reach that issue since, under the terms of the permit and of the applicable Department regulation, the Petitioner effectively accepted the permit

Condition 4 of the permit. Because, as explained herein, the ALJ properly determined that Petitioner is not entitled to a hearing on the merits of his appeal, there is no need to address this argument.

by commencing and completing construction in compliance with it. His challenge, therefore, must fail.

The Petitioner was on notice by Administrative Condition 2 of the permit, entitled “Acceptance of permit,” that if he began construction of the house, he would be deemed to have accepted all terms of the permit. His right to challenge the permit would thus be extinguished.

Condition 2 provides:

If you begin any activity approved by this permit, you thereby accept this document in its entirety, and the responsibility to comply with its terms. If you do not accept or agree with this document in its entirety, do not begin construction.

This permit provision aligns with the requirement of the coastal rules in effect at the time the permit was issued and when the Petitioner submitted his hearing request. Former N.J.A.C. 7:7-5.1(d) stated:

If a permittee submits a hearing request contesting any condition of a permit, construction shall not commence until the adjudicatory hearing is resolved, unless the Commissioner issues a stay of the condition pursuant to N.J.A.C. 7:7-5.3(c).

Thus, once Petitioner requested a hearing to contest the permit, he was precluded from commencing construction, absent a stay from the Commissioner, until his challenge was resolved.

Under the current coastal rules, when a hearing request is submitted, “the operation of the permit or authorization shall be automatically stayed in its entirety ... and all permitted activities shall stop ... and shall not be started again until the matter is resolved, unless the Department grants an exception in writing.” N.J.A.C. 7:7-28.3(a).⁴ Although slightly different in approach, both the former and current coastal rules implement the clear requirement that a permit dispute must be resolved before a project proceeds. Indeed, when the requirement at former N.J.A.C. 7:7-5.1(d) was first

⁴ N.J.A.C. 7:7-5 was recodified as N.J.A.C. 7:7-28, with amendments, effective July 6, 2015.

proposed, the Department noted that “this subsection is being added to prevent a permittee from proceeding with construction while contesting a condition of a permit which is integral to the Department’s finding that the application is in conformance with the [coastal rules]. 32 N.J.R. 872 (March 20, 2000).

As with the current coastal rule, under the former rule, a permit holder had the opportunity to request relief from the Department in order to proceed with construction before the permit dispute was resolved. In fact, the Department acknowledged in response to comments on the former rule that “...under appropriate factual situations the Department agrees that it may be possible for construction to begin pending resolution of the administrative hearing provided appropriate conditions are in place.” 32 N.J.R. 3788 (October 16, 2000). Since the Petitioner did not attempt to seek from the Commissioner a stay of the application of N.J.A.C. 7:7-5.1(d), he cannot be heard to complain that it is unfair to expect him to have waited to construct his house.

The reasoning of the California Supreme Court in Lynch, cited in the Initial Decision, illuminates the rationale the Department provided when it promulgated the rule regarding acceptance of a permit at N.J.A.C. 7:7-5.1(d). As the Court in Lynch noted, “[i]n general, permit holders are obliged to accept the burdens of a permit along with its benefits. Lynch v. California Coastal Comm’n, supra, 3 Cal. 5th at 478. Allowing a permittee “to challenge a permit’s restrictions after taking all of its benefits would change the dynamics of permit negotiations and would foster litigation.” Id. at 479. Moreover, the Court recognized that land use decisions involve “a delicate balancing of interests” and that “[a]fter a project has been built, it may be too late for agencies to propose alternative mitigation measures. They may be left with no practical means of addressing a project’s significant impacts.” Id. at 480.

The policy behind the Department's rule is integral to effective land use planning and regulation and the prompt resolution of disputes. Thus, since Petitioner received the full benefit of the permit, he may not now challenge the permit condition requiring the conservation restriction as mandated by the rule. Because Petitioner is not entitled to a hearing on the merits of his appeal, there is no need for me to address Petitioner's request for relief under the Conservation Restriction Act. I note, however, that Petitioner may seek the release or modification of a conservation restriction pursuant to the process prescribed in the Conservation Restriction Act, which includes a public hearing and consideration of the "public interest in preserving the restricted lands in their natural state." N.J.S.A. 13:8B-5 & -6.

CONCLUSION

For the reasons set forth therein and above, I ADOPT the ALJ's Initial Decision granting the Department's motion for summary decision. Petitioner's appeal is dismissed.

IT IS SO ORDERED.

December 21, 2017
DATE



Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

MICHAEL BARRY v.
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LAND USE REGULATION
OAL DKT NO. ELU 02205-14
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