



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

ON SUMMARY DECISION

CROSS MOTIONS

OAL DKT. NO. ELU 11439-19

AGENCY DKT. NO. 0505-04-0013.1

CZM180001, WFD180001

KEITH LAUDEMAN,

Petitioner,

v.

**NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
LAND USE REGULATION,**

Respondent.

Robert S. Baranowski, Jr., Esq., for petitioner (Hyland Levin Shapiro, LLP,
attorneys)

Jason Kane, Deputy Attorney General, for respondent (Gurbir S. Grewal,
Attorney General of New Jersey, attorneys)

Record Closed: February 28, 2020

Decided: May 8, 2020¹

BEFORE JEFFREY R. WILSON, ALJ

¹ Executive No. Order 127, executed by Governor Philip D. Murphy on April 14, 2020, extended the time for issuing initial decisions and final agency decisions. Any decision that was due anytime from March 9, 2020, (when the Governor declared a State of Emergency) until thirty days after the emergency ends, now has an automatic ninety-day extension. Accordingly, here, the decided date was extended to May 8, 2020.

STATEMENT OF THE CASE

Petitioner, Keith Laudeman, (petitioner) appeals from an adverse action taken by the New Jersey Department of Environmental Protection, Division of Land Use Regulation (NJDEP). Acting under the provisions of N.J.A.C. 7:7-1.1, NJDEP did not approve the petitioner's applications for Coastal Zone Management General Permit #5 (DLUR0505-04-0013.1 CZM180001) and Waterfront Development – Zane Exemption (DLUR0505-04-0013.1 WFD180001).

PROCEDURAL HISTORY

After an unsuccessful organizational conference on March 21, 2019, this matter was transmitted to the Office of Administrative Law (OAL) on August 16, 2019, by the NJDEP for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The petitioner filed a motion for summary decision on October 29, 2019. The NJDEP filed its opposition to the petitioner's motion for summary decision and a cross motion for summary decision on November 18, 2019. The petitioner filed a reply brief on December 4, 2016, and the NJDEP file its reply brief on December 13, 2019. Oral argument was heard by the undersigned on February 28, 2020, and the record closed.

STATEMENT OF UNDISPUTED FACTS

1. The petitioner owns property at Block 763 / Lot 13.01, commonly known as 1285 Wilson Drive, Township of Lower Township, Cape May County (The Property).
2. The Property contains approximately twenty-five linear feet of frontage along Wilson Drive. It is in a built-out residential neighborhood and is adjacent to residential dwellings, which exist to the north, east and west of The Property. To its south, is Schellenger Creek.

3. The Property is located in the Cape May Watershed Management Area, the Cape May Bays & Tributaries East Watershed and within the Cape May Harbor & Bays Watershed. No wetlands are mapped on or immediately adjacent to The Property, and the site investigations confirmed no wetlands are located on-site or within 150 feet of the proposed project.
4. Prior to January 1, 1981, The Property included a single-family dwelling. The petitioner removed the structure sometime between 2007 and 2010, but never commenced reconstruction. In its present condition, the waterfront site is composed of a graveled driveway, piles, stringers and an associated dock.
5. Permits were issued by NJDEP on December 11, 2005, and February 25, 2013, sanctioning the same activities proposed in the present application which is the subject of this appeal.
6. On December 11, 2005, NJDEP issued a Coastal General Permit #8, a Waterfront Development Individual Permit and a Water Quality Certificate for the reconstruction of a 15' x 55' single-family dwelling as shown on the NJDEP 1977 Tidelands Base Map #035-1926.
7. On February 25, 2013, NJDEP issued a Coastal Permit #9, a Waterfront Individual Permit and a Water Quality Certificate for reconstruction of the previously existing single-family within the same footprint shown on the NJDEP Tidelands Base Map #035-1926. The permit also legalized the 5.5' x 8' fixed pier, a 3' x 16.5' ramp and an 8' x 20' floating dock.
8. On September 25, 2018, the petitioner submitted the present application which is the subject of this appeal for Coastal Zone Management General Permit #5 (DLUR0505-04-0013.1 CZM180001) and a Waterfront Development – Zane Exemption (DLUR0505-04-0013.1 WFD180001).

9. In an email, dated November 13, 2018, NJDEP indicated that it had conducted a preliminary review of the petitioner's application and that approval was unlikely because "based upon the Department's most recent legal guidance the Department cannot issue authorization (via Zane or WFD) for a structure over water that is not currently existing."
10. On or about December 20, 2018, NJDEP issued its formal notice denying the petitioner's application for a Coastal General Permit #5 and a Zane Exemption.
11. The petitioner requested Alternative Dispute Resolution in an effort to resolve the matter amicably. The petitioner also requested an adjudicatory hearing before an Administrative Law Judge to formally appeal the denial.
12. An organizational conference was conducted by the NJDEP Office of Dispute Resolution on March 21, 2019. In a letter, dated April 3, 2019, the Office of Dispute Resolution determined that it did not see a path towards resolution and referred the matter to the Office of Legal Affairs for transmittal to the OAL for a hearing.

SUMMARY OF ARGUMENTS

The petitioner argues that the denial of his application for a General Permit #5 and his request for a Zane Exemption constitutes unreasonable, arbitrary and capricious agency action as: (1) the proposal comports with the requirements and evident purposes of the Waterfront Development Law, the Coastal Area Facilities Review Act and the Coastal Zone Management Rules; (2) the NJDEP previously approved the same application in 2005 and 2013; and (3) the NJDEP's novel position relies upon unexplained "recent legal guidance" and an untenable misapplication of the law.

The petitioner argues that the NJDEP's denial of the General Permit #5 bears the classic hallmarks of an unreasonable, arbitrary and capricious agency action. In

diametric contract to its 2005 and 2013 decisions. The NJDEP denied the same application in 2018 when interpreting the same law as applied to the same set of circumstances for the same property. Arriving at the opposite conclusion, the NJDEP indicated that its “most recent legal guidance” furnished the basis for the 2018 denial. This purported justification was offered absent any further information concerning the supposed guidance, and nothing else in the NJDEP’s cursory reference to “recent legal guidance” constitutes any explanation for its deviation from the previous decisions granting the permits. Intervention is therefore warranted as the action is unsupported and unaccompanied by reasonable explanation. Accordingly, the petitioner contends that the NJDEP’s view in the first instances must be deferred to and its practical interpretation of the statute must be applied so as to permit for the proposed development on The Property.

The NJDEP argues that undisputed material facts have been presented for this tribunal’s consideration. The disputed legal issue is whether the NJDEP properly interpreted the Zane Exemption and urges this ALJ to grant its cross motion for summary decision and deny the petitioner’s motion. NJDEP contends that they correctly denied the petitioner’s application to reconstruct a single-family dwelling on The Property as it did not qualify for a Zane Exemption or meet the rules for a General Permit #5.

Pursuant to NJDEP’s interpretation of the Zane Exemption requirement, reconstruction cannot apply to a dwelling that was removed approximately one decade ago. In sum, NJDEP’s position is that a preexisting structure that no longer exists, cannot be reconstructed. Because the petitioner removed the structure on The Property sometime between 2007 and 2010, and never commenced reconstruction, the NJDEP’s denial of the Zane Exemption was appropriate.

The NJDEP further argues that they correctly determined that the petitioner did not qualify for a General Permit #5 that is required for work done landward of the mean high-water line. The NJDEP contends that applicable regulations allow for the “reconstruction” of a “habitable single-family home.” For reasons relied upon above,

there is no structure to existing to reconstruct, therefore the petitioner's application was appropriately denied. Furthermore, the NJDEP argues that "habitability" cannot be established.

The NJDEP argues that General Permit #5 cannot authorize a dwelling partially over water without a Zane Exemption or a Waterfront Development Permit. A General Permit #5 can only authorize development landward of the mean high-water line. Here a portion of the proposed structure is waterward of the mean high-water line. Therefore, even if a structure did currently exist on The Property, the entire proposed structure could not be approved.

Finally, the NJDEP argues that the petitioner is essentially requesting that the NJDEP extend an authorization he received in 2005, and again in 2013, for an additional five years. For the ten years that the petitioner was authorized to reconstruct the dwelling, the petitioner voluntarily removed the structure, and then did nothing, allowing authorization to expire twice.

LEGAL ANALYSIS AND CONCLUSIONS

The petitioner and NJDEP agree that the case at hand can be resolved by summary decision without discovery. The sole legal issue is whether NJDEP properly denied the petitioner's requests for a Zane Exemption and a Coastal General Permit #5.

The above-recitation of the undisputed facts together with a reading of the legal submissions of the parties makes it clear that the only issue pending determination on these cross motions for summary decision is the applicability and interpretation of the regulations to the subject property. It is well established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public and private litigation resources. Here, both parties have moved for a

determination, as a matter of law, that the application of the regulations entitles each to a favorable decision.

First, it must be determined whether the language of the regulations is ambiguous. Ordinarily, intent is to be gleaned from the words used in the provision, and they are to be given their ordinary and well understood meaning in the absence of an explicit indication to the contrary, and only if an ambiguity exists is it necessary to go beyond the words of the statute itself. State v. Gelman, 195 N.J. 475, 482 (2008). Even when the language is ambiguous and the legislature has not addressed the precise question of statutory meaning, a court may not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. TAC Assocs. v. New Jersey Dept. of Env'tl. Protection, 2010 N.J. Lexis 592, 18-19 (N.J. Sup. Ct. 2010). Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. Id.

Zane Exemption

The Waterfront Development Law, N.J.S.A. 12:5-3(b)(1), provides that the following are exempt from the requirement for a Waterfront Development Permit:

The repair, replacement or renovation of a permanent dock, wharf, pier, bulkhead or building existing prior to January 1, 1981, provided the repair, replacement or renovation does not increase the size of the structure and the structure is used solely for residential purposes or the docking or servicing of pleasure vessels.

This clause is commonly referred to as the "Zane Exemption" as it was introduced by Senator Raymond Zane, amending N.J.S.A. 12:5-3 in 1981. The regulation applicable to this provision is found at N.J.A.C. 7:7-2.4 and states in pertinent part:

(d) A permit shall be required for the construction, reconstruction, alteration, expansion, or enlargement of any structure, or for the excavation or filling of any area, any portion of which is in the waterfront area as defined in (a) above, with the exceptions listed below:

6. The repair, replacement, renovation, or reconstruction, in the same location and size, as determined in accordance with (d)6i and ii below of the preexisting structure, of any dock, wharf, pier, bulkhead, or building, legally existing prior to January 1, 1981, that appears on the applicable Tidelands Map or that appears on the applicable coastal wetlands map identified pursuant to N.J.A.C. 7:7-2.3(c) and chapter Appendix D or that received a waterfront development permit subsequent to the date of the Tidelands Map or coastal wetlands map, as applicable, provided that the repair, replacement, renovation, or reconstruction is in the same location as the preexisting structure, and does not increase the size of the structure and the structure is used solely for residential purposes or for the docking of or servicing of pleasure vessels.

(f) Development that is exempt from the Waterfront Development Law requires no certification or approval from the Department, except as may be required by other programs administered by the Department. Any person who wishes may request from the Department a written determination of a development's exemption from the requirements of this chapter.

Here, it is undisputed that the building in question existed prior to January 1, 1981. It is further undisputed that the proposed size and location will remain unchanged and that it will be used solely for residential purposes. What is in dispute are the parties' interpretations of the term "reconstruction" as included in the pertinent regulations.

N.J.A.C. 7:7-1.5 clearly defines the term "reconstruction" as follows:

'Reconstruction' means the repair or replacement of a building, structure, or other parts of a development, provided that such repair or replacement does not increase or change the location of the footprint of the preexisting development,

does not increase the area covered by buildings and/or asphalt or concrete pavement, and does not result in a change in the use of the development.

There is nothing vague or ambiguous relative to the regulation's definition of the term "reconstruction." The NJDEP denied the petitioner's application for a Zane Exemption "based upon the Department's most recent legal guidance." However, that "recent legal guidance" was never articulated, nor were any changes made to the relevant regulations to support a change in the NJDEP's previous position.

Here, the petitioner seeks to replace the structure in question. It is undisputed that the replaced structure will not increase or change the location of the footprint of the preexisting structure and like the preexisting structure, the replaced structure will be used solely for residential purposes. Accordingly, I **CONCLUDE** that the NJDEP inappropriately denied the petitioner a Zane Exemption relative to The Property.

Coastal General Permit #5

As to a General Permit #5, N.J.A.C 7:7-6.5(a) reads in pertinent part:

This general permit authorizes the expansion, or reconstruction (with or without expansion), of a legally constructed, habitable single-family home or duplex . . . provided the single-family home or duplex and accessory structures are located landward of the mean high water line, and provided the single-family home or duplex is not located on a bulkheaded lagoon lot.

First, similar to its argument relative to the Zane Exemption, the NJDEP asserts that a preexisting structure that no longer exists, cannot be reconstructed. As discussed above, that argument fails

Second, the NJDEP argues that a General Permit #5 cannot authorize a dwelling partially over water without a Waterfront Development Permit or Zane Exemption. However, above, I **CONCLUDED** that the NJDEP inappropriately denied the petitioner a

Zane Exemption relative to The Property. This argument fails because the NJDEP should have granted a Zane Exemption to the petitioner.

Third, the NJDEP contends that it properly denied the petitioner a General Permit #5 because the proposed reconstruction is not of a “legally existing, habitable” structure. This is a misrepresentation of the regulation’s language. N.J.A.C. 7:7-6.5(a) authorizes the reconstruction of “a legally *constructed*, habitable” structure. (Emphasis added). The regulation does not require the structure to be “legally existing” and “habitable.” Rather the regulation required that the structure be “legally constructed” and “habitable.” It is not disputed that the preexisting structure was legally constructed. The NJDEP argues that that “habitability” cannot be established.

As to habitability, N.J.A.C. 7:7-1.5 states in pertinent part:

‘Habitable’ with reference to structures or development means a structure or development that has been or could have been legally occupied in the most recent five-year period.

It is undisputed that the preexisting structure was removed some time prior to 2010. It is also undisputed that the preexisting structure was a single-family dwelling and that the proposed structure is intended to be a single-family dwelling. Furthermore, it is undisputed that both the preexisting structure was habitable and that the proposed structure is intended to be a habitable single-family dwelling. Therefore, I **CONCLUDE** that habitability has been established.

Finally, the NJDEP contends that the uplands portion of the proposed dwelling does not comply with the Flood Hazard Area Control Act (FHACA). The General Permit #5 regulations require compliance with the NJDEP’s FHACA regulations. N.J.A.C. 7:7-6.5(c). The Property is within a flood hazard area. N.J.A.C. 7:7-9.25(a). The NJDEP identifies flood hazard areas delineated as an “A” zone by the Federal Emergency Management Agency (FEMA). N.J.A.C. 7:7-9.25(a)FEMA delineated The Property as Zone “AE”. N.J.A.C. 7:7-9.25(b)(1) requires development proposed in a flood hazard

area to comply with the FHACA and its promulgated regulations. Habitable buildings in a flood hazard area must have a finished floor one foot above the flood elevation. N.J.A.C. 7:13-12.5(i)(1).

Here, the NJDEP determined that the flood elevation is 10.3 feet as measured by the National Geodetic Vertical Datum (NGVD). The NJDEP's regulations require use of the NGVD when measuring flood elevation. N.J.A.C. 7:13-1.2. The petitioner's proposal states that the flood elevation for The Property is ten feet as measured by the North American Vertical Datum (NAVD). The NJDEP referenced a more recent FEMA map that shows that the flood elevation is nine feet NAVD or 10.3 feet NGVD. Pursuant to N.J.A.C. 7:13-12.5(i)(1), the finished floor of the proposed dwelling must be one foot higher than 10.3 feet, or 11.3 feet NGVD. The petitioner concedes that the ten-foot proposed elevation of the dwelling does not strictly satisfy the rule based upon the new FEMA map. Therefore, I **CONCLUDE** that the NJDEP appropriately denied the petitioner's application for the Coastal General Permit #5. Furthermore, I **CONCLUDE** that the NJDEP's determination to deny the petitioner's application is based upon FEMA requirements and is not unreasonable, arbitrary or capricious.

Although the petitioner agrees to modify his plans to satisfy the NJDEP's recent flood elevation requirement, in the NJDEP's formal notice denying the petitioner's application for a Coastal General Permit #5 and a Zane Exemption issued on or about December 20, 2018, it was noted:

1. The single-family dwelling would appear to meet the requirements of a General Permit #4, provided the dwelling was relocated landward of the mean high water and all other requirements of the Coastal General Permit #4 are met. If the dwelling is closer than 15 feet to the bulkhead, an engineering certificate would be required. The engineering certificate would need to confirm that, after construction, the existing bulkhead could be replaced in-place and in the same footprint as the existing bulkhead.
2. It appears the existing docking structures do not correspond to those depicted in the 1970 Coastal Wetlands map, the 1977 Tidelands Base Map, or the footprint of the docks

legalized under prior authorization, DLUR 0505-04-0013.1 WFD 120001. Therefore, the Applicant will be required to redesign the docks to reflect the 1970 Coastal Wetlands map or 1977 Tidelands Base Map condition or reapply for structures which comply with the applicable Rules.

3. The existing docking structure appears to extend beyond the Tidelands claim line. the Applicant will be required to reduce the length of the docking structure to fit inside the prior area provided under the existing Tidelands authorization – or – submit new Waterfront Development permit application to legalize the location of the existing docks and submit an application for Tidelands authorization for the additional area.

ORDER

For the reasons set forth above, the motion for summary decision filed by the petitioner is hereby **DENIED**. The cross motion for summary decision filed by the respondent, New Jersey Department of Environmental Protection, is hereby **GRANTED**.

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, PO 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.



May 8, 2020

DATE

JEFFREY R. WILSONM, ALJ

Date Received at Agency:

Mailed to Parties:

JRW/tat

APPENDIX

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

For Petitioner:

- P-1 Aerial Map, Block 763 / Lot 13.01, Lower Township, Cape May County, NJ (R-1 at DEP033)
- P2 1977 Aerial Photograph, Block 763 / Lot 13.01, Lower Township, Cape May County, NJ (R-1 at DEP035)
- P-3 Petitioner's Motion for Summary Decision, file with the OAL on October 29, 2019
- P-4 Petitioner's Reply Brief, filed with the OAL on December 4, 2019

For Respondent:

- R-1 Respondent's cross motion for summary decision and opposition to petitioner's motion for summary decision, filed with the OAL on November, 2019
- R-2 Respondent's reply brief, filed with the OAL on December 13, 2019