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Dragon et al. v. Department of Environmental Protection et al.

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Dragon v. Department of Environmental Protection, A-5743-06T2; Appellate Division; opinion by Parrillo, J.A.D.; decided and approved for publication March 6, 2009. Before Judges Parrillo, Lihotz and Messano. On appeal from the Department of Environmental Protection, 0103-02-0046. DDS No. 01-2-2982 [26 pp.]

Appellants Albert and Barbara Dragon are objectors to a settlement agreement between their neighbor, respondent Edward W. Kelly Jr., and the New Jersey Department of Environmental Protection (DEP), which authorized Kelly to tear down and reconstruct his oceanfront home — expanding its size, height and footprint — without a permit otherwise required under the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 to -21, and its Coastal High Hazard Areas Rule (Coastal Rule), N.J.A.C. 7:7E-3.18(b).

The DEP's Coastal Rule prohibits residential development in coastal high hazard areas unless all of the "infill development" standards in N.J.A.C. 7:7E-7.2(e) or (f) are satisfied. Kelly's property was entirely located within the CAFRA Coastal High Hazard Area and did not meet one of the exceptions to complying with the Coastal Rule, namely that a house or building be located within 100 feet of each of its northerly and southerly lot lines that run roughly perpendicular to the mean high water line. Kelly's proposed project thus did not meet the standards necessary for an exemption to the Coastal Rule.

After initially denying a CAFRA coastal general permit for the tear down and reconstruction of appellants' oceanfront home, the DEP, finding a "litigation risk," settled the homeowner's challenge to the agency's denial by issuing a letter of authorization "in lieu of permit" (LOA), approving the development subject to conditions designed to meet the environmental concerns underlying the regulation's development ban.

The Dragons appeal from the DEP's final decision upholding the settlement agreement, contending that the settlement agreement and LOA are ultra vires, arbitrary and capricious because the DEP exceeded its authority under CAFRA by waiving Kelly's compliance with the agency's substantive CAFRA regulations.

Held: Given the express language of the exception to the regulatory development ban, which the homeowner clearly did not meet, the DEP did not correctly assess its "litigation risk," and, in any event, the agency could not use its settlement process to circumvent CAFRA's substantive permitting requirements to allow regulated development in a coastal region governed exclusively by CAFRA and its implementing regulations.

Our Supreme Court has established limitations on an administrative agency's waiver of its own regulations. To that end, in distinguishing between waiveable procedural regulations and nonwaiveable substantive regulations, the Appellate

Division previously identified Chapter 7 and Chapter 7E as separate chapters of CAFRA's Title 7. Chapter 7 (N.J.A.C. 7:7) contains the Coastal Permit Program (CPP) rules, and Chapter 7E (N.J.A.C. 7:7E) contains the Coastal Zone Management (CZM) rules. The CPP rules contain the procedures for reviewing coastal permit applications and for enforcing violations. The CZM rules contain the substantive standards for determining development acceptability and the environmental impact of projects for which coastal permits are submitted.

N.J.A.C. 7:7-1.10 allows for waiver of the substantive CZM rules, such as N.J.A.C. 7:7E-3.18 and 7:7E-7.2, only if strict guidelines are met and the waiver is necessary to avoid an unconstitutional taking of property. Here, there is no claim that the DEP's permit denial was a takings and no hardship. Consequently, the DEP could not waive application of the infill requirements of the CZM rules to Kelly's proposed development during the permitting process.

The DEP nevertheless argues that it has the inherent authority to deviate from strict compliance with its own regulations in order to avoid "litigation risks," pointing to New Jersey's strong public policy of favoring settlements. It cites to the specific litigation risk here of a court finding that the infill development rules of N.J.A.C. 7:7E-3.18(b) and 7:7E-7.2(e) and (f) do not apply to "reconstruction" or to lots already containing structures, such as Kelly's, but only to vacant, undeveloped oceanfront property.

The appellate panel was not persuaded that the DEP was faced with a "litigation risk." Despite Kelly's insistence that the infill development rules do not apply, his proposed project fails to meet the express language of the exceptions in N.J.A.C. 7:7E-7.2(e) or (f), and his permit application was denied twice on that basis.

In any event, the issue is not the agency's power to enter into settlement negotiations, but whether the DEP's use of the settlement process to circumvent CAFRA's substantive permitting requirements and to allow regulated development in a coastal region governed by CAFRA is authorized by that governing statute.

CAFRA does not grant such authority to the DEP. Pursuant to CAFRA's express language and any implied authority conferred on the DEP thereunder, there are only two avenues open to an applicant for development governed by CAFRA: (1) apply for and receive a permit pursuant to N.J.S.A. 13:19-5 or -5.1; or (2) propose development that is expressly exempted or excluded from the statutory scheme or will have minimal impact to the environment, such as rebuilding in the same footprint pursuant to N.J.S.A. 13:19-5.2 or -5.3.

Here, the settlement agreement and LOA, both in lieu of a coastal general permit that was denied by the agency as not meeting the requisite regulatory requirements, do not satisfy either of those categories, and are therefore statutorily unauthorized. The DEP lacked the authority, express or implied, to issue a LOA based on an executed settlement agreement in lieu of a CAFRA permit.

— By Debra McLoughlin

For appellants — Stephen Hankin (Hankin, Sandman & Palladino). For respondents: Department of Environmental Protection — Lisa G. Dagleis, Deputy Attorney General (Anne Milgram, Attorney General; Lewis A. Scheindlin, Assistant Attorney General, of counsel); Edward W. Kelly Jr. — John F. Spinello Jr. (K&L Gates).