



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. ELU 09271-15

AGENCY DKT. CSD130014-

435442

PEPPERIDGE TREE REALTY CORP.,

Petitioner,

v.

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

Respondent.

John M. Mills, III, Esq., for petitioner (Mills & Mills, attorneys)

John E. Doyle, Deputy Attorney General, for respondent (Christopher S. Porrino,
Attorney General of New Jersey, attorney)

Record Closed: July 15, 2016

Decided: August 29, 2016

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 22, 2015, the Department of Environmental Protection (DEP/Department) transmitted to the Office of Administrative Law (OAL) an

administrative appeal involving the Department and Pepperidge Tree Realty Corp. (petitioner/PTR) after the petitioner filed for an Adjudicatory Hearing. The transmittal form identified the issue in dispute for a hearing in the OAL as “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 Pepperidge Tree Realty Corp.’s appeal of the DEP’s Land Use Regulation Unit’s denial of the petitioner’s 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 June 15, 2016, and the PTR submitted its opposition on July 5, 2016. The DEP submitted its reply brief on July 11, 2016. Oral argument was entertained before the undersigned on July 15, 2016.

FACTUAL BACKGROUND

PTR is a New Jersey Corporation with Dennis Lam serving as its President. PTR obtained ownership of the subject property in March 1981. PTR seeks to construct a home in the Highlands Preservation Area without being subject to the environmental standards and permitting review process which is part of the Highlands Act. The property in question is located in the “Smoke Rise” section of the Highlands. In order to avoid such procedures, PTR 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 DEP denied PTR's application for this exemption. The basis for the denial was the fact that PTR is a corporate entity and is not a natural person. As such, the DEP found that a corporation is not an "individual" and also has no immediate family members. Accordingly, the DEP found that PTR did not satisfy the requirements set forth in and required to be eligible for Exemption 1. Thereafter, PTR applied for and obtained a Highlands Act Exemption 2, which permits the construction of a single-family dwelling, but limits the extent of the disturbance and impervious cover that can occur on the lot. PTR maintains its appeal herein to overturn the denial by the DEP for its application for Exemption 1.

The factual basis for this case is generally not in dispute. Petitioner, in its brief, claims 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 petitioner appears 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, the interpretation of the term "individual," its applicability to corporate entities and in this case, specifically, its application to PTR.

There is no dispute that PTR is a corporation of the State of New Jersey. As a corporation, it has multiple shareholders (all of whom are related in some way). In March 1981, PTR purchased more than 1000 acres of property on West Shore Drive (in the "Smoke Rise" section) in the Borough of Kinnelon, Morris County, New Jersey. Subsequently, PTR subdivided this property into 70 smaller lots and sold 67 of the 70 lots. One of the lots not sold is Block 30, Lot 1.62, which is an 8.4 acre parcel of land located on Lake Kinnelon.

On or about May 17, 2013, PTR submitted an application for a Highlands Act (Highlands Applicability and Water Quality Management Plan) Exemption 1, pursuant to N.J.S.A. 13:20-30(a)(1) and N.J.A.C. 7:38-2.3(a)(1) for the one unsold property lot referenced herein above. The exemption sought by PTR permits the construction of a dwelling for an individual's own use or the use of an immediate family member. As part of the application for the exemption, there was a certification from Dennis Lam

(President of PTR) stating that the proposed residence “is intended for use by an immediate family member or other shareholder of the corporation.”

On August 2, 2013, the DEP denied PTR’s application with the finding that PTR does not qualify for Exemption 1 by stating

The requested exemption, N.J.A.C. 7:38-2.3(a)(1) – construction of a single-family dwelling, for an individual’s own use or the use of an immediate family member – requires the proposed construction take place on a lot owned by that individual on August 10, 2004, or on a lot that, on or before May 17, 2004, was under binding contract of sale to that individual. The supplied tax records, however, indicate a corporation, Pepperidge Tree Realty Corporation, as the entity owning the subject lot on or before August 10, 2004. Further, the required certification of use indicates the proposed single-family dwelling, the construction of which is subject to this determination, is for the use of an immediate family member of the Pepperidge Tree Realty Corporation or other shareholder of the “Pepperidge Tree Realty Corporation.”

Thereafter, PTR applied for and received an Exemption 2 from the Highlands Act for the subject property (approved in a letter of March 28, 2014). Exemption 2 permits the construction of a single-family dwelling on a lot in existence on the date of enactment of this act, provided that the construction does not result in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more. N.J.S.A. 13:20-30(a)(2); N.J.A.C. 7:38-2.3(a)(2). Despite this action, PTR has proceeded with this appeal in order to dispute the denial of its application for Exemption 1. PTR opines in its submission that the subject property is “special” in nature and location and as such justifies and calls for a special home (including a swimming pool or tennis court) which would not be feasible under Exemption 2 and thus it wishes to proceed with this appeal for its application for Exemption 1.

The DEP argues that the material facts that relate to the legal propriety of this denial are not in dispute; therefore, they seek an Order dismissing this appeal on summary decision and the petitioner seeks a denial of that summary decision

application and a ruling that it is entitled to an approval of its application for Exemption 1 under the Highlands Act.

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, PTR filed for same on or about May 17, 2013.

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).

The DEP interpreted “individual” to mean a natural person and PTR interprets “individual” to include its corporate form or existence. However, case law has found that “exceptions in a legislative enactment are to be strictly but reasonably construed, consistent with the manifest reason and purpose of the law.” Service Armament Co. v. Hyland, 70 N.J. 550, 558-59 (1976); see also Wright v. Vogt, 7 N.J. 1, 6 (1951), which stated that “the general rule [is] that exceptions in a legislative enactment are to be strictly but reasonably construed”; and In re Stemark Assoc., 247 N.J. Super. 13, 18-19 (App. Div. 1991), which stated the “exemptions from statutes are generally strictly construed.” Such strict construction also applies to environmental statutes. M. Alfieri Co. v. State, 269 N.J. Super. 545, 554 (App. Div. 1994).

In this case, PTR contends that the term “individual” is undefined in the Act or in the DEP regulations and should therefore apply to all entities, both natural and artificial. As stated by the respondent, the meaning of the term “individual” is discernible from the Act’s definition of “immediate family member” and the definition of “person” in the DEP’s implementing regulations. Both of those definitions use “individual” in a manner that is separate and distinct from a corporate entity like PTR. Petitioner further argues that PTR, as a corporation, pays taxes “just like any other person” and is, for all intents and purposes, treated by the New Jersey Statutes as an individual.

The definition of “person” in the Highlands Rules is consistent with and supports the DEP’s decision that “individual” does not apply to corporate entities such as PTR. “Person” is defined as “an individual, corporation, corporate official, partnership association, the Federal government, the State, municipality, commission or political subdivision of the State or any interstate body.” N.J.A.C. 7:38-1.4. Thus, it can be plainly reasoned that by including the term “individual” in a list of entities that also

includes “corporation” it is clearly apparent that “individuals” are separate and distinct from “corporations” as argued by the DEP.

“Person” is also defined in the Rules for Agency Rulemaking as “any natural individual, association, board, venture, partnership, corporation, organization, institution and governmental instrumentality recognized by law for any purpose whatsoever.” N.J.A.C. 1:30-12. This more broad definition of “person” also distinguishes an “individual” as separate and distinct from a “corporation.”

In addition, the Highland Act’s own definition of “immediate family member” provides guidance on the limited meaning of “individual.” In the Act, it defines “immediate family member” as: “spouse, child parent, sibling, aunt, uncle, niece, nephew, first cousin, grandparent, grandchild, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepparent, stepchild, stepbrother, stepsister, half-brother, or half-sister, whether the individual is related by blood, marriage or adoption.” N.J.S.A. 13:20-3. Pointedly, the use of individual refers to a list of natural persons which would have no application with reference to a corporation. There can be no dispute that a corporation is incapable of having any immediate family members, although petitioner advocates that the shareholders of the corporation are all family, including Mr. Lam, his brother, his mother, and his father, and thus shareholders qualify as an immediate family member as set forth in its application.

During oral argument, the petitioner took the position that Exemption 1 had no limitation and embodied virtually all entities. Such an interpretation would render Exemption 1, with its delineated limitations meaningless, as would the petitioner’s interpretation of immediate family member as set forth above. It is a standard rule of construction to interpret laws to give meaning to all of the statutory text. In re N.B., 222 N.J. 87, 101 (2015); In re Civil commitment of J.M.B., 197 N.J. 563, 573 (2009).

Furthermore, Webster’s primary definition of “individual” is “[a] human being regarded separately from a group or from society.” Webster’s II New Riverside University Dictionary 623 (1988). In addition Black’s Law Dictionary 773 (6th Ed. 1990) defines “individual” as follows:

as a noun, this term denotes a single person as distinguished from a group or class and also, very commonly, a private or natural person as distinguished from a partnership, corporation or association; but it is said that this restrictive signification is not necessarily inherent in the word and that it may, in proper cases, include artificial persons.

PTR's proposed interpretation is uncommonly expansive and contrary to the well-settled principle that statutory exemptions should be narrowly construed. Service Armament Co., supra, 70 N.J. at 558-59; Wright, supra, 7 N.J. at 6; In re Stemark Assoc., supra, 247 N.J. Super. at 18-19.

Respondent's interpretation of "individual" is also consistent with New Jersey's jurisprudence. See Main Inv. Co. of Passaic v. U.S. Fidelity and Guar. Co., 29 N.J. Super. 221, 225-26 (Ch. Div. 1953) (which rejected the plaintiff's argument that the use of "individual" in an insurance policy includes a corporation because "[a] mere reading of the [policy] is sufficient to demolish the contention"). As explicitly, in the PTR application for Exemption 1, the President of the Corporation avers that the dwelling to be built on the property would not be used for the corporation, but attempts to argue that it would be used for a shareholder, who he claims is the corporation's immediate family member. This argument defies logic and clear reasoning.

Petitioner also argues that the respondent's denial of the application for Exemption 1 was arbitrary and patently unjust. PTR cites Baumann v. Marinaro, 95 N.J. 380 (1984) for the holding that relief may be had if enforcement would be oppressive, unjust, or inequitable. In presenting this position, the petitioner often refers to itself as "Lam and his family" rather than directly, and more accurately, as a corporation. However, the enforcement of a statute which is clear and unambiguous and has a justifiable purpose cannot be found to be oppressive, unjust or inequitable. In fact, PTR had a direct role in the final factual situation which leads to this result, i.e., "Lam wanted to hold back the sale of this property until the right time because of the unique characteristics of the lot" as stated by the petitioner. The subdivision took place in 2000 and the Highlands Act was passed on the year 2004, almost four years later. Despite

PTR's argument that the denial of the application for Exemption 1 was based on an alleged technical distinction or interpretation 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 cannot support the petitioner's position that the Highlands Act's definitions imply the terms "individual" and "corporation" are interchangeable in the application of the provisions. I **CONCLUDE** that the DEP did not err when reaching its decision to deny PTR's application because of allegedly failing to properly consider the totality of the circumstance and pertinent relevant factors. I further **CONCLUDE** that the DEP properly interpreted the statute when it found that the term individual was not applicable to a corporate entity.

Based upon the submissions of the parties, I **CONCLUDE** that there can be no question that in regard to the narrow issue now before the OAL, that is, the interpretation and applicability of the term "individual" within the applicable regulatory framework when DEP denied the application filed by PTR for Exemption 1 that there is no genuine dispute of material fact.

ORDER

And as such, I **ORDER** that summary decision is appropriately **GRANTED** in favor of the DEP and the application for Exemption 1 under the Highlands Act by PTR was 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.

August 29, 2016

DATE



MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency:

Date Mailed to Parties:

jb

EXHIBITS

Respondent's Brief in Support of Motion for Summary Decision with attached Exhibits

Petitioners' Brief in Opposition to Respondent's Motion for Summary Decision

Respondent's Letter Brief in Support of Motion for Summary Decision