



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. ELU-HE 05573-12

AGENCY DKT. NO. CSD090077-435442

D.R. MULLEN CONSTRUCTION CO.,

Petitioner,

v.

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

Respondent.

Ben R. Cascio, Esq., for petitioner (Law Office of Ben R. Cascio, attorney)

Jason Stypinski, Deputy Attorney General, for respondent (Robert Lougy,
Acting Attorney General of New Jersey, attorney)

Record Closed: August 4, 2015

Decided: April 4, 2016

BEFORE **LELAND S. MCGEE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case arises out of the denial of an application for an exemption from the provisions and regulations of the Highlands Water Protection and Planning Act, N.J.S.A.

13:20-1 to -35 (the Highlands Act). The petitioner, D.R. Mullen Company, is the owner of Lot 2, Block 102, in the Borough of Oakland, Bergen County. Petitioner is also the contract purchaser of Lot 1, Block 102. Petitioner sought to contract an outdoor storage facility on Lot 1. The property at issue is located within the area designated as the Highlands Preservation Area. Therefore, a party seeking to develop property in the designated area must seek a permit from the New Jersey Department of Environmental Protection (NJDEP). However, projects that are “reconstruction of any building or structure for any reason within 125% of the footprint of the lawfully existing impervious surfaces on the site, provided that the reconstruction does not increase the lawfully existing impervious surface by one-quarter acre or more[]” are exempt from the provisions of the Act. N.J.S.A. 13:20-28(a)(4).

Petitioner filed an Application for an exemption from the Highlands Act, which was received by the NJDEP on December 18, 2009. NJDEP denied petitioner's application for an exemption from the Highlands Act on April 11, 2015, based on its determination that the project proposed an increase of greater than 125 percent from the impervious footprint and more than three-quarters of an acre of new impervious surface. On May 6, 2011, petitioner filed an Adjudicatory Hearing Request with the NJDEP Office of Land Use Planning. On April 24, 2011, the NJDEP transmitted this matter to the Office of Administrative Law (OAL) as a contested case.

On June 10, 2013, at the joint request of both parties, this matter was placed on the Inactive List for six months. A status conference was held on December 10, 2014, and hearings were scheduled for August 4, and 11, 2015. On July 6, and July 8, 2015, respectively, the parties filed cross-motions for summary decision. On July 15, 2015, the parties filed supplemental briefs. Oral argument was heard on August 4 and 11, 2015.

The issue to be determined on Summary Decision is whether petitioner's application is a “Reconstruction Project,” under Highlands Exemption #4, N.J.S.A. 13:20-28(a)(4) and N.J.A.C. 7:38-2.3(a): “*Reconstruction for any reason of any building or structure within 125 percent of the footprint of the lawfully existing impervious*

surfaces on the site, provided that the reconstruction does not increase the lawfully existing surface by one-quarter acre or more.”

FACTUAL DISCUSSION

On August 19, 2015, the parties submitted a Joint Stipulation of Facts. I **FIND** the following to be the **FACTS** of the case:

1. Petitioner’s, D.R. Mullen Construction Company (petitioner), application to install a storage yard on Lot 1, Block 102 (the Property), located in the West Oakland Industrial Park, Oakland New Jersey, was approved by the Oakland Planning Board, Bergen County Planning Board, and Bergen County Soil Conservation District in 2008. The West Oakland Industrial Park consists of Block 201, Lots 1-12, Block 202, Lots 1-4, and Block 203, Lots 1-2 in the Township of Oakland, Bergen County, New Jersey. Outdoor storage areas exist within the Oakland Industrial Park. Outdoor storage areas are a permitted use under municipal zoning.
2. No outdoor storage area exists or existed on the Property before the enactment of the Highlands Water Protection and Planning Act (Highlands Act or Act).
3. Petitioner filed an application for a Highlands Act Exemption #4, which was received by the NJDEP on December 18, 2009. A Notice of Administrative Incompleteness was issued on January 7, 2010, revised and resubmitted on January 14 2010, and subsequently deemed complete on January 22, 2010.
4. On April 15, 2011, the NJDEP issued a denial of the applicant’s request for a Highlands Act Exemption #4 for a storage yard on the Property. On May 6, 2011, the Petitioner filed an Adjudicatory Hearing Request with the NJDEP Office of Land Use Planning, which is the matter currently before this court.
5. For the purposes of the Highlands Applicability Determination Application, petitioner defined the “property as a whole” as contiguous lots 1, 2, 4, 5, and 6,

Block 102, located within the West Oakland Industrial Park, Oakland, New Jersey. All five property owners signed the application for an exemption.

6. The Property is owned by Dewey Electronics. It is the proposed location of an extended pavement and storage yard, and was part of the larger Dewey property to the north, before it was separated, and isolated, by the construction of Route I-287. The only existing impervious cover and structure on Lot 1 is the extension of paved roadway depicted on Exhibits J-1 and J-2.
7. Lot 2, Block 102, is owned by the petitioner, where it maintains its construction business. Petitioner is also the contract purchaser of the Property, where it proposes to construct a small storage yard for the storage of equipment, and provide access by extension of the existing driveway right-of-way. No building, septic system, well, or water supply is proposed. Petitioner proposes to extend the 650 sf driveway from the current paved-access drive/right-of-way, to access the proposed 2,660 sf crushed stone storage area to be constructed on Lot 1, thereby connecting and expanding petitioner's existing storage yard located on adjoining Lot 2. Upon final approvals and purchase, petitioner would own both Lots 1 and 2, which will be used as equipment storage in conjunction with its business.
8. The common infrastructure shared by the five properties making up the project site, and joining in the application as "Property as a Whole," are drainage, utilities, and the unnamed improved access drive-off the Edison Avenue cul-de-sac, which is the pavement/structure proposed to be extended. All lots have access and share the maintenance, including snow plowing of the paved access drive, which is a private right-of-way, not a public street. The Borough of Oakland does not own, clean, maintain, or plow the commonly shared access drive which services the five properties.
9. The Highlands Act was signed into law on August 10, 2004. The Highlands Act was adopted by the New Jersey State Legislature to preserve as much as practical of approximately 800,000 acres of land designated as the "Highlands

Region,” which serves as an essential source of drinking water for half of the population of the State. N.J.S.A. 13:20-7(a). The Act’s purposes also include protection of the “natural resources of the New Jersey Highlands against sprawl development,” discouraging “piecemeal, scattered and inappropriate development in order to accommodate local and regional growth and economic development in an orderly way,” and “maintenance of agricultural production and a positive agricultural business climate.” N.J.S.A. 13:20-2.

10. The Property is located within the area designated as the Highlands Preservation Area.
11. Generally, an owner seeking to develop property within the Preservation Area must obtain an exemption or a permit from the DEP.
12. The Act exempts, among other things, projects that involve the “reconstruction of any building or structure for any reason within 125% of the footprint of the lawfully existing impervious surfaces on the site, provided that the reconstruction does not increase the lawfully existing surface by one-quarter acre or more.” See N.J.S.A. 13:20-28(a)(4).

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

It is well-established that

[i]n statutory interpretation, a court’s role is to determine and effectuate the Legislature’s intent. The first step toward that end is to consider the plain language of the statute. Statutory language should be given its ordinary meaning and be construed in a common-sense manner In sum, our overriding goal is to discern and effectuate the legislative intent underlying the statutory provision at issue. Where the language is unclear or ambiguous, or if the Legislature’s intention is otherwise uncertain, resort may be had to extrinsic aids to assist us in our understanding of the Legislature’s will.

[Opderbeck v. Midland Park Bd. of Educ., 442 N.J. Super. 40, 56 (App. Div. 2015) (citing State in the Interest of K.O., 217 N.J. 83, 91-92).]

Further, “[w]here the statutory language is precise and unambiguous there is no room for judicial interpretation or for resort to extrinsic materials. The language speaks for itself In determining the common meaning of words, it is appropriate to look to dictionary definitions.” Macysyn v. Hensler, 329 N.J. Super. 476, 485 (App. Div. 2000) (internal citations omitted).

The term “reconstruction” is neither defined in the statute nor the regulations. The one case in which the Appellate Division has interpreted the statute is somewhat illuminating: whether a project constitutes a “reconstruction” may be gleaned from an examination of the architectural plans such that a reasonable observer could conclude that existing structures are dedicated to a new use, than a construction of a new development, without any meaningful ties to what previously existed. In re the Aug. 16, 2007 Determination of the NJDEP ex rel. Christ Church, Block 22203, Lots 2 and 3, Rockaway Twp., Morris Cty., 414 N.J. Super. 592, 604 (App. Div. 2010).

Here no outdoor storage area exists or existed on the property before the Highlands Act, and the project involves the “install[ation] of a storage yard.” This implies that the project would entail the construction of a new development, rather than one tied to structures that previously existed on the property. Moreover, the plain definition of reconstruction supports this interpretation. Merriam-Webster defines, in part, reconstruction as follows: “the act or process of building something that was damaged or destroyed again: the process of putting something (such as a country) back into a good condition.” <http://www.merriam-webster.com/dictionary/reconstruction> (last visited March 7, 2016). Black’s Law Dictionary defines it as “[t]he act of process of rebuilding, re-creating, or reorganizing something.” Black’s Law Dictionary (4th pocket ed. 1996). The project described in this case does not fit the plain definition of “reconstruction.”

Taken together, I **CONCLUDE** that the proposed project cannot be considered “reconstruction” because it does not entail the rebuilding of or addition to a previously existing structure. It involves new construction.

ORDER

It is hereby **ORDERED** that petitioner's Motion for Summary Judgment is hereby **DENIED**. I further **ORDER** that respondent's Motion for Summary Decision 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, 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.



April 4, 2016 _____
DATE

LELAND S. McGEE, ALJ

Date Received at Agency:

April 4, 2016 _____

Date Mailed to Parties:

lr

APPENDIX

List of Exhibits in Evidence

Jointly Submitted:

J-1 Joint Stipulations and Joint Exhibits