SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0315-21

KEITH LAUDEMAN,

Plaintiff-Appellant,

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAND USE REGULATION,

Defendant-Respondent.

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Argued January 25, 2023 – Decided March 22, 2023

Before Judges Currier, Enright and Bishop-Thompson.

On appeal from the New Jersey Department of Environmental Protection.

Robert S. Baranowski, Jr. argued the cause for appellant (Hyland Levin Shapiro LLP, attorneys; Robert S. Baranowski, Jr. and Natalia P. Teekah, on the briefs).

Jason Brandon Kane, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Donna Arons, Assistant Attorney

General, of counsel; Jason Brandon Kane, on the briefs).

Obermayer Rebmann Maxwell & Hippel, LLP, attorneys for amicus curiae Southern New Jersey Development Council (Brett Wiltsey, on the brief).

PER CURIAM

Plaintiff Keith Laudeman appeals from the September 1, 2021 final agency decision of respondent Department of Environmental Protection (DEP), denying his application for a Zane Exemption[1] under the Waterfront Development Act (WDA), N.J.S.A. 12:5-1 to -11, and denying his request for a Coastal General Permit #5 (GP5) under the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 to -51. We affirm.

I.

To give context to our decision, we briefly explain the underlying authority for DEP's action in this matter. In New Jersey, development in a coastal area or "any waterfront upon any navigable water" requires a DEP permit, unless a statutory or regulatory exemption applies. N.J.S.A. 12:5-3; 13:19-5. The Legislature's "principal objective" in enacting the WDA "was to

[1] The Zane Exemption, a 1981 statutory amendment to the WDA, is named after its sponsor, Senator Raymond Zane. The nature of the exemption is explained below.

facilitate navigation and commerce." Last Chance Dev. P'ship v. Kean, 232 N.J. Super. 115, 128 (App. Div. 1989). CAFRA, however, was enacted "to protect the unique and fragile coastal zones of the State." In re Egg Harbor Assocs. (Bayshore Ctr.), 94 N.J. 358, 364 (1983).

"[T]he powers delegated to DEP" under CAFRA "extend well beyond protection of the natural environment" and require the agency "to regulate land use within the coastal zone for the general welfare." In re Protest of Coastal Permit Program Rules, 354 N.J. Super. 293, 309 (App. Div. 2002) (quoting Egg Harbor Assocs., 94 N.J. at 364). Pursuant to CAFRA, any proposed development within a coastal area that meets certain construction and development thresholds "must obtain a permit from DEP before commencement of that construction unless otherwise expressly exempted." Id. at 310 (citing N.J.S.A. 13:19-5, 13:19-5.2, and 13:19-5.3).

In part, "DEP exercises its statutory authority under CAFRA through the . . . Coastal Zone Management [(CZM)] Rules, N.J.A.C. [7:7-1.1 to -29.10]." Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 185 N.J. 40, 61 (2005) (citation omitted). CZM rules "are founded on . . . broad coastal goals" including: protecting "[h]ealthy coastal ecosystems"; "[s]afe, healthy and well-planned coastal communities and regions"; and maintaining "[m]eaningful

public access to and use of tidal waterways and their shores." N.J.A.C. 7:7-1.1(c). The regulations contain "the procedures for reviewing coastal permit applications" and "the substantive standards for determining development acceptability and the environmental impact of projects for which coastal permits are submitted." In re Protest of Coastal Permit Program Rules, 354 N.J. Super. at 312. Ultimately, DEP's decision making on any given permit application "involves examining, weighing, and evaluating complex interests using the framework provided by" the rules. N.J.A.C. 7:7-1.1(e).

II.

Laudeman owns waterfront property in Lower Township in Cape May County (the Property). Prior to January 1, 1981, there was a dwelling on the Property on both the land and over the tidal waters of Schellenger Creek. In 2005, Laudeman filed an application for the reconstruction of a single-family home on the Property. DEP issued him a Coastal General Permit #8, a Waterfront Development Individual Permit, and a Water Quality Certificate. Although a building existed on the Property when these permits were issued, Laudeman removed the structure sometime between 2007 and 2010. He did not begin construction on the Property before the 2005 reconstruction permit expired in 2010.

In February 2013, Laudeman filed an application for additional construction permits. DEP issued him a Coastal General Permit #9, a Waterfront Individual Permit, and a Water Quality Certificate for the reconstruction of the previously existing single-family dwelling, and to legalize an existing pier, ramp, and floating dock. The permits expired before the authorized work was completed.[2] Notably, Laudeman never sought a Zane Exemption for his 2005 or 2013 application.

In September 2018, Laudeman applied for a Coastal GP5 "to authorize the reconstruction of a single-family dwelling" on a section of the Property landward of the mean high water line (MHWL),[3] and a Zane Exemption "for the portion of the dwelling [to be built] waterward of the [MHWL]" (the Project). By then, the Property consisted of a graveled driveway, piles, stringers, and a dock.

A Coastal GP5 authorizes "reconstruction . . . of a legally constructed,

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[2] According to DEP, its regulations for permits for the reconstruction of a dwelling were the same in 2013 as they were in 2005.

[3] Mean high water line is defined as "the line on a chart or map which represents the intersection of the land with the water surface at the elevation of mean high water." Dep't of Transp., Mean High Water Manual § 2.1, at 8 (2008). "Mean high water" is defined as "[t]he average of all the high water heights observed over the National Tidal Datum Epoch." Ibid.

habitable single-family home . . . , provided the single-family home . . . [is] located landward of the [MHWL]." N.J.A.C. 7:7-6.5(a) (emphasis added). "Reconstruction" is defined as:

> 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.
>
> [N.J.A.C. 7:7-1.5.]

A "habitable" structure or development is one "that has been or could have been legally occupied in the most recent five-year period." N.J.A.C. 7:7-1.5. (emphasis added).

A Zane Exemption authorizes 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….
>
> [N.J.S.A. 12:5-3(b)(1).]

The corresponding regulation for the Zane Exemption provides, in part:

> (d) A permit shall be required for the construction, reconstruction, alteration, expansion, or enlargement of

> any structure, . . . any portion of which is in the waterfront area . . . with the exceptions listed below:
>
> . . .
>
> (6) The repair, replacement, renovation, or reconstruction, in the same location and size . . . of the preexisting structure, of any . . . building, legally existing prior to January 1, 1981, . . . 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 . . . .
>
> [N.J.A.C. 7:7-2.4.]

In November 2018, the agency emailed Laudeman advising approval of the Project was unlikely because DEP could not issue a Zane Exemption "for a structure over water that is not currently existing." The agency suggested alternative plans for development on the landward section of the Property but Laudeman declined to modify or withdraw his application.

In December 2018, DEP formally denied Laudeman's application, finding he was ineligible for the Coastal GP5 because "the site d[id] not support a legally constructed, habitable single-family home . . . and the proposed activities d[id] not include reconstruction of an existing habitable single-family home" pursuant

to N.J.A.C. 7:7-6.5(a).[4] The agency also found the Property did not qualify for a Zane Exemption because the "previously existing structure over water . . . [did] not currently exist on site" and had "been vacant since at least 2010." Additionally, DEP determined "[t]he proposed single-family building include[d] a finished floor . . . which [did] not meet the minimum of one foot above the flood hazard area requirement at N.J.A.C. 7:13-12.5(i)(1)." Further, it stated its engineer concluded the Project failed to satisfy certain engineering standards, which "result[ed] in non-compliance with N.J.A.C. 7:7-6.5(c) of the Coastal [GP5] requirements." Finally, the December 20 denial included confirmation the single-family dwelling could meet the requirements for a different type of permit if "the dwelling was relocated landward of the [MHWL] and all other requirements of [the proposed permit were] met."

Laudeman timely requested a hearing before the Office of Administrative Law (OAL). After the parties were unable to resolve the matter in alternative dispute resolution, it was referred to the OAL. In October 2019, Laudeman moved for summary decision on all issues, and the following month, DEP cross-

[4] Under the CZM regulations, a Coastal GP5 is applicable to development landward of the MHWL and the "reconstruction . . . of a legally constructed, habitable single-family home or duplex and/or accessory development." N.J.A.C. 7:7-6.5(a).

moved for summary decision.[5] Neither party pursued discovery.

Following the filing of DEP's cross-motion, Laudeman responded with a two-page certification from Christopher Dolphin, a former DEP employee. The certification stated, in part,

> it was uniform DEP policy that so long as a structure appeared on an aerial photo dated prior to January 1, 1981, the structure could be reconstructed in the same footprint and location as appears in the aerial photo pursuant to a Zane Exemption, even if the structure no longer existed, and even if the structure had been destroyed or demolished prior to the application being submitted. DEP did not require[] that a structure, or part of a structure, must be existing at the time a Zane Exemption is requested in order to be eligible for a Zane Exemption.

Dolphin's certification did not address DEP's denial of the Coastal GP5.

On February 28, 2020, the administrative law judge (ALJ) heard argument on the parties' cross-motions. During argument, DEP's counsel objected to the

[5] Summary decision in an administrative proceeding 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." N.J.A.C. 1:1-12.5(b). No genuine issue of material fact exists if "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

Dolphin certification, contending it "was not prepared during discovery" or "vetted through discovery," and "involve[d] facts that are not proper for summary decision." He stressed the parties agreed there were "only issues of the matter of law for [the ALJ] to resolve." Alternatively, DEP's counsel argued that if the ALJ opted to consider Dolphin's certification, the parties' motions for summary decision "should be denied and there should be discovery and . . . a hearing."

On May 8, 2020, the ALJ issued an order denying Laudeman's motion for summary decision and granting DEP's cross-motion. In his accompanying fourteen-page initial decision, the ALJ stated the parties agreed "the case [could] be resolved by summary decision without discovery" and "the only issue pending determination . . . for summary decision [was] the applicability and interpretation of the regulations to the subject property."[6]

The ALJ cited N.J.S.A. 12:5-3(b)(1) and N.J.A.C. 7:7-2.4 to explain the nature of the Zane Exemption. He concluded a dwelling existed on the Property "prior to January 1, 1981," the proposed dwelling for the Project would "be used solely for residential purposes" and it was "undisputed . . . the replaced structure

[6] Because neither the ALJ nor the Commissioner referred to or relied on the Dolphin certification in their respective decisions, no further discussion of the certification is warranted.

[would] not increase or change the location of the footprint of the preexisting structure." Finding "[t]here [was] nothing vague or ambiguous" about the term "reconstruction," as defined under N.J.A.C. 7:7-1.5, the ALJ concluded DEP "inappropriately denied [Laudeman] a Zane Exemption relative to [t]he Property."

Next, regarding Laudeman's request for a Coastal GP5, the ALJ determined that under N.J.A.C. 7:7-6.5(a), Laudeman only had to show the proposed structure was "legally constructed" and "habitable," not "'legally existing' and 'habitable.'" The ALJ added, "[i]t is not disputed that the preexisting structure was legally constructed" and because "the preexisting structure was habitable and . . . the proposed structure is intended to be a habitable single-family dwelling . . . habitability has been established." Nonetheless, the ALJ found DEP properly denied Laudeman a Coastal GP5 because the Property was in a flood hazard area and Laudeman admitted the height of his proposed dwelling's finished floor did "not strictly satisfy" DEP's flood elevation requirement under N.J.A.C. 7:13-12.5(i)(1).[7] Thereafter, both parties filed exceptions to the initial decision.

[7] Approximately two months before the ALJ issued his opinion, the parties agreed Laudeman's proposal "to modify [his] plan and elevate the dwelling['s] finished floor to 11.3 feet would satisfy the Flood Hazard Area Rule."

On September 2, 2021, DEP's Commissioner issued a final decision adopting the initial decision: (1) denying Laudeman's motion for summary decision; (2) granting DEP's cross-motion for summary decision; and (3) finding DEP properly denied Laudeman a Coastal GP5. But the Commissioner rejected the ALJ's interpretation of the terms, "reconstruction" and "habitable," as well as the determination that DEP improperly denied Laudeman a Zane Exemption.

The Commissioner explained "the Zane Exemption was not intended to allow new construction in water areas to escape regulatory review," considering "N.J.A.C. 7:7-15.2(b)(1) provides, in pertinent part, '[n]ew housing . . . is prohibited in water areas.'" Further, he concluded "the Zane Exemption must have limited application to those otherwise regulated activities that are intended to repair or replace currently existing structures in water areas where the original construction of the subject structure predates the legislative amendment that created the exemption."

The Commissioner supported his conclusion with the legislative history of the Zane Exemption. He noted that in 1981, Governor Byrne conditionally vetoed the bill to amend N.J.S.A. 12:5-3, stating,

> I agree with the content of this bill that repairs to existing waterfront structures be freed from a burdensome regulatory process and I am convinced that no damage to the environment will result. I note,

> however, that the bill exempts the new construction of floating docks. These projects should continue to be reviewed by the [DEP].
>
> [Governor's Conditional Veto Statement to S. 3231 (Nov. 12, 1981) (emphasis added).]

Thus, the Legislature had to remove "construction" from the proposed language for the Zane Exemption before it could become law. Under these circumstances, the Commissioner found "[t]he minimum eight-year gap between [Laudeman's] voluntary removal of the preexisting Zane-eligible structure and his 2018 permit application preclude[d] DEP from considering this wholly new construction as the type of repair or replacement intended to be exempt from compliance with the [WDA]."

Regarding DEP's denial of the Coastal GP5, the Commissioner interpreted N.J.A.C. 7:7-6.5(a) to "authorize only the expansion or reconstruction of a habitable single-family dwelling," and because the Project "did not fall within the meaning of the term 'reconstruction,'" it "could not be authorized under [Coastal GP5]." Referring again to the definition of "reconstruction" under N.J.A.C. 7:7-1.5, the Commissioner found the ALJ's conclusion "that a structure that no longer exists can nonetheless be reconstructed" was "erroneous."

Next, the Commissioner also concluded it was appropriate for DEP to deny the Coastal GP5 "based upon the location of the proposed activity relative

to the MHW[L] of Schellenger Creek." The Commissioner explained that "N.J.A.C. 7:7-6.5(a) authorizes reconstruction of a structure provided the structure is located landward of the MHW[L]" yet in this instance, Laudeman also sought "to construct partially waterward of the MHW[L]." Therefore, the Commissioner found, "in the absence of the proposed activity qualifying for a Zane Exemption or having obtained a Waterfront Development Permit, neither of which was present here, the activity does not qualify for approval under a Coastal GP5."

Moreover, the Commissioner concluded the ALJ's analysis and conclusion regarding the Coastal GP5 "failed to account for the full definition of 'habitable' in accordance with DEP regulations" because "in order to be considered to be habitable[,] the structure must have been or could have been legally occupied '<u>in the most recent five-year period</u>.'" Because Laudeman admitted he removed the structure on the Property between 2007 and 2010, "a minimum of eight years prior to the application," the Commissioner found:

> [a]pplication of the complete definition of habitability as set forth in N.J.A.C. 7:7-1.5 to the undisputed facts in this case leads to only one conclusion: both at the time of DEP's decision and at the time of [Laudeman's] application, the requisite habitable structure necessary to be considered for approval under a Coastal GP5 did not exist. Accordingly, DEP's denial on this basis was not only an appropriate exercise of its discretion under

> the rules, but was also the only possible determination that could be arrived at under the explicit terms of the applicable rules.

III.

On appeal, Laudeman argues: DEP's denial of both a Zane Exemption and a Coastal GP5 was arbitrary, capricious, and unreasonable, inconsistent with its prior decisions, and in violation of the Administrative Procedure Act (APA). Further, he newly argues that DEP did not turn "square corners"[8] in its dealings with him, violated his vested rights in the Property, and the denial constitutes an unlawful taking of his property.

In its amicus brief, the Southern New Jersey Development Council (SNJDC) concurs with Laudeman that DEP's denial of a Zane Exemption and the Coastal GP5 is "inconsistent with a legislative exemption expressly provided by the [WDA]." It also agrees with Laudeman that DEP's "final decision violated the [APA] by impermissibly applying a new interpretation of the Zane Exemption without engaging in rulemaking."[9]

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[8] The square corners doctrine requires the government to deal fairly with its citizens, eschewing inequitable practices. See CBS Outdoor, Inc. v. Borough of Lebanon Plan. Bd./Bd. of Adjustment, 414 N.J. Super. 563, 586-87 (App. Div. 2010).

[9] The SNJDC represents it "is a 501(c)(6) nonprofit organization comprised of

We are not persuaded by any of these arguments. Also, to the extent Laudeman raises issues for the first time on appeal, we do not address them. See State v. Robinson, 200 N.J. 1, 19 (2009) ("Appellate review is not limitless. The jurisdiction of appellate courts rightly is bounded by the proofs and objections critically explored on the record before the trial court by the parties themselves."); see also Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (citation omitted).

Our role in reviewing an administrative agency's final decision is limited. Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dep't of Env't Prot., 191 N.J. 38, 48 (2007). We will not reverse an agency's decision unless it was arbitrary, capricious, or unreasonable; it violated express or implied legislative policies; it offended the State or Federal Constitution; or the findings on which it was based were not supported by substantial, credible evidence in the record. Ibid. The party challenging the administrative action bears the burden of showing they are entitled to relief from the agency decision. Lavezzi v. State, 219 N.J. 163, 171 (2014) (citations omitted).

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members from various industries in the southern eight counties of New Jersey" and "functions as a government liaison and economic development advocate for its members."

Reviewing courts "do not reverse an agency's determination 'because of doubt as to its wisdom or because the record may support more than one result.'" In re Freshwater Wetlands Gen. Permits, 372 N.J. Super. 578, 593 (App. Div. 2004) (quoting In re N.J. Pinelands Comm'n Resol., 356 N.J. Super. 363, 372 (App. Div. 2003)). Also, where an agency's expertise is a factor, we will defer to that expertise, particularly in cases involving technical matters within the agency's special competence. See Allstars Auto Grp. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 158 (2018). This deference is even stronger when the agency, "has been delegated discretion to determine the specialized and technical procedures for its tasks." Newark v. Nat. Res. Council, Dep't of Env't Prot., 82 N.J. 530, 540 (1980).

We also afford particular deference to agency interpretation of the regulations it is charged with enforcing unless such interpretation is "plainly unreasonable." US Bank, N.A. v. Hough, 210 N.J. 187, 200 (2012). However, we are "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue." Ibid. (quoting Univ. Cottage Club, 191 N.J. at 48). We also interpret regulations de novo. Id. at 198-99 (citing Bedford v. Riello, 195 N.J. 210, 221-22 (2008)).

When construing a statute, our primary goal is to discern the meaning and

intent of the Legislature. State v. Hudson, 209 N.J. 513, 529 (2012). Determining the Legislature's intent, "begins with the language of the statute, and the words chosen by the Legislature should be accorded their ordinary and accustomed meaning." Ibid. (citation omitted). Where a statute's language "leads to a clearly understood result, the judicial inquiry ends without any need to resort to extrinsic sources." Ibid. (citations omitted). Courts may "resort to extrinsic evidence" if the legislation is ambiguous and susceptible to more than one interpretation. DiProspero v. Penn, 183 N.J. 477, 492-93 (2005) (citations omitted). However, a court should not "rewrite a plainly-written enactment . . . or presume that the [drafter] intended something other than that expressed by way of the plain language." Id. at 492 (citation omitted). "Administrative regulations are subject to the same rules of construction as a statute and should be construed according to the plain meaning of the language." Calco Hotel Mgmt. Grp., Inc. v. Gike, 420 N.J. Super. 495, 503 (App. Div. 2011) (citations omitted).

Governed by these principles, we perceive no basis to disturb the final agency decision affirming DEP's denial of a Coastal GP5 for the Project. Because Laudeman removed the structure at issue from the Property sometime between 2007 and 2010, i.e., at least eight years before his application, the

structure "could not have been legally occupied in the most recent five-year period prior to [Laudeman's 2018] application" for the Coastal GP5. Thus, as the Commissioner stated, the "requisite habitable structure necessary to be considered for approval under a Coastal GP5 did not exist."

Additionally, because Laudeman was ineligible for a Coastal GP5 and thus, unable to complete the Project, we need not reach the issue of whether DEP correctly found Laudeman was ineligible for a Zane Exemption.

We also need not discuss at length Laudeman's contention DEP "hid[] the ball" and did not deal "fairly and honestly" with him when denying his applications for a Zane Exemption or a Coastal GP5. In advancing this argument, he points to the fact DEP previously issued permits for construction on the Property. This argument fails.

The record shows Laudeman did not seek a Zane Exemption in 2005 or 2013. He was granted the necessary permits to proceed with projects similar to the one implicated on appeal but he failed to seek an extension for those permits or commence building on the Property before the permits expired. Furthermore, Laudeman removed an existing structure on the Property at least eight years before he filed his 2018 application, causing DEP to reject the Coastal GP5 for the reasons we have discussed. In short, the status of the Property and the nature

of Laudeman's application in 2018 were not comparable to the circumstances that existed in 2005 and 2013. Moreover, the record shows DEP worked with Laudeman throughout the permit process, offering him options to proceed with a modified Project, and participating in alternative dispute resolution to resolve the matter.

To the extent we have not addressed any remaining arguments advanced by Laudeman, they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(D) and (E).

Affirmed.