

STATE OF DELAWARE ENVIRONMENTAL APPEAL BOARD

APPEAL OF WELL PERMIT
APPLICATION #267708 and #267709

APPEAL NO. EAB ~~2020-02~~

BOARD OF PUBLIC WORKS OF THE CITY OF LEWES'S
MOTION FOR SUMMARY JUDGEMENT

Appellant Board of Public Works of the City of Lewes (“BPW”), by and through its undersigned counsel, hereby moves the Environmental Appeal Board (“EAB”) for summary judgment in its favor and requests that the EAB overturn and reverse the issuance of well permits 267708 and 267709 (the “Permits”). In support thereof, the BPW states as follows:

I. Factual Background.

1. The facts necessary to decide this straightforward case are contained in the Joint Stipulation of Facts filed by both parties concurrently with this motion and in the Chronology submitted by DNREC. J. Frank Peter (the “Applicant”) applied for the Permits in order to construct a geothermal potable supply well and geothermal recharge well on a property located on New Road in Sussex County (the “Property”). Joint Stipulation of Facts at ¶¶ 2 and 3. The Property sits outside of the municipal

boundary of the City of Lewes but it is in an enclave surrounded on four sides by the City of Lewes.¹ *Id.* at ¶ 3. Three sides of the Property border the Lewes municipal boundary. *Id.* The Property is undeveloped and located within the BPW’s service area for water, sewer, and electric. *Id.* at ¶ 4. The BPW is the municipal utility for the City of Lewes. *Id.* at ¶ 1.

2. DNREC initially denied the Permits after the BPW, as the municipal utility, objected to the Applicant drilling wells on the Property. *Id.* at ¶ 7; JX 3. The Applicant appealed the initial denial, and during the pendency of the appeal, DNREC reversed course and issued the Permits at the direction of the Delaware Department of Justice. Joint Stipulation of Facts at ¶ 9.

3. DNREC’s initial denial of the Permits was correct for the reasons stated in DNREC’s denial letter of January 7, 2020 (JX 3). The EAB should reverse DNREC’s reversal of DNREC’s earlier action because the issuance of the Permits violates several of DNREC’s own Regulations Governing the Construction and Use of Wells (“Well Permit Regulations”).

¹ The enclave can be seen in the map of the BPW’s coverage area at Joint Exhibit (“JX”) 1: the municipal boundary of the City is a red line on the map, and the small red squares within the City of Lewes are enclaves of unincorporated areas that were never annexed by the City but are entirely surrounded by the City.

II. The Permits were incorrectly issued because the Applicant failed to submit written approval from the BPW as required by Well Permit Regulation 3.12.7.

4. “It is well settled law that once an agency adopts regulations governing how it handles procedures, the agency must follow them. If the agency does not, then any action taken by the agency is invalid.” *Mumford & Miller Concrete, Inc. v. Delaware Dep’t of Labor*, 2011 WL 2083940, at *6 (Del. Super. Apr. 19, 2011).

5. In this case, DNREC has adopted the Well Permit Regulations, and must follow them. Well Permit Regulation 3.12.7 reads as follows:

When a proposed potable, agricultural, heat pump, or miscellaneous well is to be located within the jurisdiction or service area of a municipality serving public water, **the applicant shall include a written statement of approval from said municipality with the well permit application.** (emphasis added)

6. In this case, the Applicant seeks to place a potable well on the Property, which is within the BPW’s service area. Because the BPW is the municipal utility for the City of Lewes, the Applicant must submit a statement of approval from the BPW in order to comply with Well Permit Regulation 3.12.7. In this case, no such statement of approval has been submitted by the Applicant as required by DNREC’s own regulations (because no such approval exists) and therefore DNREC was required to deny the Permit applications.

7. On November 7, 2019, the BPW wrote to DNREC at DNREC’s request advising that the BPW opposed the well permit application because of the well’s

threat to the municipal water supply and because the Applicant could easily connect to the municipal water supplied by the BPW. Stipulation of Facts at ¶ 6; JX 2. (DNREC presumably requested the letter as part of its efforts to comply with Well Permit Regulation 3.12.7.)

8. DNREC has promulgated a regulation requiring municipal approval in order to drill a potable well within the municipality's water service area and has failed to follow it. Lewes is a municipality serving public water and the BPW has not approved the application for the Permits. In fact, the BPW has explicitly opposed issuance of the Permits, and the City Council has written to the EAB in support of the BPW's position. DNREC has violated its own regulations by approving the well permit applications. DNREC's actions are therefore invalid and the EAB should deny and/or overturn the issuance of the Permits.

III. The Permits were incorrectly issued because the BPW's Charter requires the Applicant to receive municipal water from the BPW.

9. Under apparent pressure from the Applicant, DNREC reversed course on its earlier correct decision to deny the application for the Permits. Well Permit Regulation 3.12.4 prohibits DNREC from withholding an application for a potable well permit within the service territory of a water utility unless at least one of three criteria is applicable. DNREC appears to have issued the Permits based on the criteria contained in Well Permit Regulation 3.12.4 without regard to the existence of 3.12.7. However, DNREC was not free to disregard Well Permit Regulation

3.12.7, which must be read in conjunction with 3.12.4 and which creates additional requirements when a well permit application is within the service area of a municipal utility serving water.

10. However, even if DNREC were permitted to ignore Well Permit Regulation 3.12.7, DNREC still issued the Permits incorrectly because public water is available to the Applicant's Property.

11. Section 4.12.2 of the BPW's Charter states, in part:

The BPW shall have the authority to require any or all premises within the corporate limits of the City or Service Area, to be and to remain connected to the municipal utility systems. In any instance in which the owner has refused or failed to make the connection within one hundred twenty (120) days after formal notice from the BPW ordering the property to be connected, the BPW shall have the authority to cause the said connection or connections to be made and to assess all of the expense thereof upon the premises in question.

Section 4.20 of the BPW's Charter states,

The BPW is hereby authorized and permitted to supply utility services of any utility system to those properties which are located within two (2) miles of the corporate limits of the City as presently constituted or hereafter extended under such terms and conditions as the Board shall deem proper. The Board is hereby authorized and permitted to enact and adopt such rules and regulations as the said Board may deem proper in order to supply said utility services.

12. The Property is located within an enclave surrounded entirely by the City of Lewes, is within two miles of the corporate limits of the City, and is within the BPW's service area. Stipulation of Facts at ¶ 4; JX 1. Indeed, the Property itself borders the Lewes municipal boundary on three sides. Therefore, the BPW's Charter

authorizes the BPW to provide water service to the Property and to require the Property to receive water service. That is, the General Assembly has chosen to allow the BPW to determine whether the Property will receive water from the BPW or from another source. In this case, the BPW has required the Applicant to receive water service from the BPW, as its charter authorizes it to do.

13. A public water supply is not just available to the Applicant, the Applicant is *required* to receive public water. To the extent that Well Permit Regulation 3.12.4.3 deems a public water supply to be “reasonably available” only when a public water distribution line is located within 200 feet of the foundation of the structure being served, this portion of the regulation conflicts with the BPW’s charter when applied within the BPW’s service area. The BPW’s Charter, which was enacted by the Delaware General Assembly, give the BPW authority to determine when water is available to properties located within its service area. As an act of the General Assembly, the BPW’s Charter preempts Well Permit Regulation 3.12.4.3.

14. DNREC may “establish and promulgate such rules and regulations governing the administration and operation of the Department as may be deemed necessary by the Secretary and which are not inconsistent with the laws of this State.” 29 *Del. C.* § 8003(7). Regulations that are inconsistent with state law are invalid and outside the scope of DNREC’s authority. *Bridgeville Rifle & Pistol*

Club, Ltd. v. Small, 176 A.3d 632, 661 (Del. 2017). Where inconsistent with state statute, the state statute preempts the DNREC regulation. *Delaware State Sportsmen's Ass'n v. Garvin*, 196 A.3d 1254, 1278 (Del. Super. Ct. 2018).

15. In this case, the General Assembly has authorized the BPW to decide when water is available to properties—such as the Property—within two miles of the municipal boundary, as well as how it will be supplied. The BPW, acting pursuant to its authority, has determined that the Applicant *must* receive water from the BPW because he has elected to receive sewer. See JX 4 and JX 6. As an act of the General Assembly, the BPW's Charter preempts Well Permit Regulation 3.12.4.3. Therefore, it does not matter whether the Applicant's house is within 200 feet of the sewer line. The Applicant will be receiving water pursuant to the BPW's authority, and DNREC should have denied the Permits pursuant to Well Permit Regulation 3.12.4 in addition to 3.12.7 because the third criterion supporting denial, the availability of public water, is applicable.

IV. The Permits were incorrectly issued because the Applicant must accept water service from the BPW in order to receive sewer service, and the receipt of sewer service is a necessary condition for DNREC to consider the well permit.

16. Well Permit Regulation 3.5.7 prohibits DNREC from considering a well permit application for an undeveloped parcel unless sewer service is available. The Property is undeveloped. Joint Stipulation of Facts at ¶ 4. Therefore, Well Permit Regulation 3.5.7 prohibits DNREC from even considering the Permit

applications unless a permit has been issued for on-site wastewater treatment and disposal, central sewer is available to the Property, or if a showing has been made that no sewer service or on-site wastewater treatment and disposal is necessary. None of these things have occurred, and therefore DNREC incorrectly considered the application for the Permits.

17. The applications themselves state that the Property is on public sewage. *See* Chronology at Exhibit 1. However, in 2013 the BPW duly adopted resolution 13-004, which requires that properties receiving any utility service from the BPW connect to all utility services. JX 4. Therefore, the Applicant cannot elect to receive only sewer service from the BPW; sewer service is available to the Applicant only if he accepts water service from the BPW. The BPW has advised the Applicant that if he does not accept water service for the Property, he will not be eligible to receive sewer service. *See*, JX 6. However, accepting water service would create a basis for denying the well permit application.

18. Well Permit Regulations 3.5.7 and 3.12.4 together create a Catch-22 for the Applicant: he either refuses to accept water and sewer from the BPW, thereby foreclosing DNREC's ability to review his well permit applications pursuant to 3.5.7, or he agrees to accept both water and sewer from the BPW, and therefore creates a basis for denying his permit because public water is available. Given the Property's location and that DNREC should have denied the Permits pursuant to

Well Permit Regulation 3.12.7, it is hardly surprising that DNREC's regulatory scheme would create a Catch-22 situation here. It means the regulations are well written and effective. This is, quite simply, not an appropriate place for a well; the Property is surrounded by a City with a municipal utility that is ready to serve the Applicant.

V. Conclusion.

19. DNREC has always correctly recognized the BPW's status as the municipal utility for the City of Lewes. In 2016, DNREC wrote to then-BPW President C. Wendall Alfred to advise him regarding legislative changes to the issuance requirements for non-potable well permits. JX 5. In that letter, DNREC advised Alfred that DNREC provides municipalities the opportunity to object to potable well permit applications within the municipality's jurisdiction, pursuant to DNREC's regulations. *Id.* DNREC continued to follow that policy (enshrined in its regulations) right up through the current application until the Department of Justice stepped in and ordered DNREC to reverse course.

20. DNREC would have had no reason to write to Alfred in 2016 regarding the subject matter of municipal approval of well permit applications if DNREC did not regard the BPW as the municipal utility for the City of Lewes. Nor would DNREC have initially denied the Permits in January for the reasons it did if DNREC did not believe (correctly) that the BPW is the municipal utility for the City of

Lewes. DNREC's inexplicable reversal of course on this straightforward legal issue poses a substantial threat to the City of Lewes because Lewes's fresh water source sits between two bodies of salt water that make it susceptible to saltwater intrusion and the BPW's efforts to protect the aquifer will be substantially hobbled. *See* Affidavit of Darrin Gordon and ¶¶ 3 and 4.

21. DNREC's newfound position is all the more problematic because Lewes has within it enclaves situated outside of its municipal boundaries yet surrounded entirely by the City. The Applicant's Property is in an enclave that, for inexplicable reasons, sits outside of the Lewes municipal boundary while being surrounded on all sides by the City of Lewes. The Property is, for all intents and purposes, within the City of Lewes, except on paper. A traveler on New Road, whether in a car or on foot, would likely be surprised to learn that he or she had exited and reentered the City while passing the Property. Given this reality, the Property substantially impacts the City in numerous ways, including environmentally, while sitting beyond the reach of any municipal regulatory efforts, including the enactment of legislation regulating the drilling of wells.

22. DNREC's reversal of course on Well Permit Regulation 3.12.4 has put these enclaves dangerously beyond the control of the BPW's ability to protect its aquifer, and made them susceptible to extensive and destructive drilling within an area that is effectively within the City of Lewes and totally inappropriate for well

service. (As DNREC’s 2016 letter to the BPW pointed out, municipalities can regulate wells within their territory.) Fortunately, DNREC’s regulations recognize and anticipate this very type of situation: Well Permit Regulation 3.12.7 applies whether a “well is to be located within the jurisdiction **or service area** of a municipality serving public water...” (emphasis added) That is, the proposed well does not need to be in the actual municipal limits for 3.12.7 to apply so long as it is in the service area. DNREC drafted this regulation with foresight. Now it should be required to follow it.

23. The BPW is the municipal utility for the City of Lewes and DNREC has always correctly regarded it as such. Therefore, under DNREC’s own regulations, any applicant for a well permit within the BPW’s service area must submit a written statement of approval from the BPW. This is true as a straightforward matter of law, logical as a matter of common sense, and necessary as a matter of public policy so that Lewes can protect itself and its water supply. For this reason alone, the Permits must be denied and the EAB should reverse the Permits’ issuance.

24. However, the Permits should be denied for two independent additional reasons. First, the BPW’s Charter authorizes the BPW to determine whether the Applicant will receive water from the BPW, and therefore the Permits should have been denied pursuant to Well Permit Regulation 3.12.4.3. Second, because the

Property is undeveloped and does not have established sewer or a permit for on-site waste water treatment and disposal, and no finding has been made that these things are not necessary, DNREC should not have even considered the Permits, pursuant to Well Permit Regulation 3.5.7.

WHEREFORE, the Board of Public Works of the City of Lewes respectfully requests that its motion for summary judgment in this appeal be granted, and that well permits 267708 and 267709 be denied, overturned, and/or withdrawn.

TARABICOS GROSSO, LLP

/s/ Daniel F. McAllister, Esq.
Daniel F. McAllister, Esquire (#4887)
Michael J. Hoffman, Esquire (#5349)
100 Commons Blvd, Suite 415
New Castle, DE 19720
Tel: (302) 757-7816
Fax: (302) 757-7801
dan@tarabicosgrosso.com
*Attorneys for Board of Public Works
of the City of Lewes*

Dated: September 11, 2020