STATE OF DELAWARE ENVIRONMENTAL APPEAL BOARD

APPEAL OF WELL PERMIT APPLICATION #267708 and #267709	APPEAL NO. EAB 2020-05

BOARD OF PUBLIC WORKS OF THE CITY OF LEWES'S RESPONSE TO DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL'S MOTION FOR SUMMARY JUDGEMENT

Appellant Board of Public Works of the City of Lewes ("BPW"), by and through its undersigned counsel, hereby responds to DNREC's Motion for Summary Judgment and states as follows:

I. DNREC is not free to ignore its own regulations, even if its attorney believes those regulations are preempted by state statute.

DNREC has taken the remarkable position that the very regulations DNREC itself promulgated are invalid. DNREC admits that it initially understood the obligations contained in Well Permit Regulations 3.12.7 to be controlling and denied the application on this basis. However, it now claims these restrictions are invalid, at least in certain situations, and that it will not follow its own regulations.

Despite DNREC's position, the law is clear: once an agency adopts procedural regulations, it must follow them or the agency's actions are invalid. *Mumford & Miller Concrete, Inc. v. Delaware Dep't of Labor*, 2011 WL 2083940, at *6 (Del. Super. Apr. 19, 2011). The applicable case law does *not* say, "an agency must follow its own regulations so long as the agency believes they are not preempted by state statute." If DNREC believes that Well Permit Regulation 3.12.7 is preempted by 7 *Del. C.* § 6075(a), DNREC's only option is to amend or repeal the regulation. Otherwise, it must follow the regulation, and failure to do so makes its actions—issuance of the Permits—invalid here. Because the Permits were issued in violation of Well Permit Regulations 3.12.7 and 3.5.7, their issuance is invalid and must be overturned. That, alone, should end the analysis. But even if DNREC were free to ignore is own regulations, reading 7 *Del. C.* § 6075(a) so as to give effect to the legislative intent, using the plain meaning of the words in the statute, makes clear that 3.12.7 and 3.5.7 do not conflict with state law.

DNREC should not be afforded any deference in its position that its own regulations are invalid. Besides being "clearly wrong," this position is not based on the construction and interpretation of the Well Permit Regulations themselves. DNREC does not appear to dispute the BPW's position that 3.12.7 requires a written statement of approval for wells within the BPW's coverage area. That is, DNREC seems to agree with the BPW that 3.12.7 supports denial of the Permits, consistent

with DNREC's initial position. Instead, DNREC's change in position is rooted in a recent belief that DNREC's regulations are preempted by state statute. Thus, the dispute is only over the meaning of that state statute—a dispute in which DNREC is not afforded any deference.

II. 7 *Del. C.* § 6075(a) and the applicable regulations must be read in conjunction with the BPW's Charter.

DNREC's unprecedented stance in claiming that its own regulations are preempted by state law and are inapplicable is all the more problematic because it ignores the BPW's charter, which is an act of the General Assembly carrying the same force as 7 *Del. C.* § 6075. Rather than shred its own duly enacted regulations (which, once enacted, DNREC is not authorized to ignore), DNREC should have attempted to reconcile 7 *Del. C.* § 6075 with the BPW's charter and other existing legislation governing the same subject matter—the authority to require property owners to connect to public water. DNREC is entitled to no deference here because its actions are not based on interpretation of its own regulations, but upon state law. *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 383 (Del. 1999). There is no disagreement as to what 3.12.7 says. Rather, DNREC's actions were based on an interpretation of state law that DNREC says invalidates its regulation.

The BPW's charter is easily reconciled with the applicable state statute, and the result leaves DNREC's regulations intact: the BPW, as a legislatively chartered municipal utility for the City of Lewes with the independent authority to require

properties to connect to water service, is a municipality for purposes of 7 *Del. C.* § 6075. Therefore, DNREC has the discretion to deny well permits to properties within the BPW's service area, something the drafters of the Well Permit Regulations correctly recognized.

Time-honored principles of Delaware statutory interpretation support this reading; the BPW is a municipality under the common dictionary definition of that word, and furthermore, this interpretation advances the clear legislative intent of the statute—that DNREC have discretion to deny potable well permits where the General Assembly has conferred local authority to force connection to public water, such as to a municipality through its charter (as in the case of the BPW) or to a county through a county water district.

a. The applicable statute—7 *Del. C.* § 6075.

7 *Del. C.* § 6075 governs when DNREC has discretion to withhold a well permit or to force an applicant to utilize the services of a water utility. DNREC may do so in three instances. The first two, contained in subsections 6075(a) and (b), relate to environmental, safety, and cost issues and place the onus on DNREC to make a final determination as to whether the applicant is required to connect to the water utility. The third instance—applicable when an applicant is a resident of a municipality or county water district—exists concurrently with other legislation by means of which the General Assembly has conferred on these localities the authority

to require utilization of water service. That is, where agencies *other than DNREC* have legislative authority to require service connection (the scope of which, in each case, is much broader than DNREC's).

b. The BPW's service area is a municipality under the statute.

If a statute is unambiguous, the language in the statute must be given its plain meaning. *Sussex Cty. Dep't of Elections v. Sussex Cty. Republican Comm.*, 58 A.3d 418, 422 (Del. 2013). Undefined terms are given their "commonly accepted meaning. Because dictionaries are routine reference sources that reasonable persons use to determine the ordinary meaning of words, [courts] often rely on them for assistance in determining the plain meaning of undefined terms." *Freeman v. X-Ray Assocs., P.A.*, 3 A.3d 224, 227–28 (Del. 2010).

Dictionary.com defines "municipality" in the first definition as "a city, town, or other district possessing corporate existence and usually its own local government."[1] Similarly, Merriam-Webster.com defines "municipality," in the first instance, as "a primarily urban political unit having corporate status and usually powers of self-government."[2]

By both of these definitions, the BPW falls into the plain meaning of "municipality" and its geographic service area should be treated as such when

[1] https://www.dictionary.com/browse/municipality?s=t, accessed September 12, 2020.
[2] https://www.merriam-webster.com/dictionary/municipality, accessed September 12, 2020.

interpreting 7 *Del. C.* § 6075. The BPW has corporate existence and the powers of self-government within its service area. It exists separately from and beyond the authority of either the City of Lewes or Sussex County. Within the area of utility service, the BPW has substantial powers of self-government, including the power to force properties to connect to the utility. Significantly, the same legislative body that drafted 7 *Del. C.* § 6075 also conferred upon the BPW the very features that place its service area within the definition of "municipality"—corporate existence and the power of self-government. The EAB should interpret § 6075(a)(3) so that it is applicable to any property within the BPW's service area, because such properties are located within a municipality as that word is used by the statute.

c. The clear legislative intent of 7 *Del. C.* § 6075(a)(3) is to allow DNREC to withhold potable well permits for any property where the General Assembly has delegated local authority to require property owners to connect to public water, such as in the case of the BPW.

The legislative intent of 7 *Del. C.* § 6075(a) is announced in its opening sentence: DNREC cannot withhold well permit applications *or* require an applicant to utilize the services of a water utility, except in three situations. The second portion of the opening sentence is important: § 6075(a) is directed with equal force at DNREC's ability require an applicant to connect to a water utility as it is to allowing DNREC to withhold a well permit. While the General Assembly has restricted DNREC's authority to require connection to water service only in certain instances,

it has conferred this authority to municipalities (including the BPW) and to county water districts on a much broader basis. The General Assembly has chosen, as a matter of policy, to vest authority to require utilization of water service with local jurisdiction and not with DNREC. Section 6075(a)(3) must be read so as to harmonize it with these concurrent legislative grants of authority.

7 *Del. C.* § 6075(a)(3) allows DNREC to withhold a potable well permit where the property owner is a resident of a municipality or a county water district. Municipalities furnishing public water in Delaware have in many cases been granted the authority to force connection to water service within their municipal limits. *See, e.g.*, City of Dover Charter § 26 ("The council may require any property in the city to be connected with the water and sewer mains and to compel the owner of such property to pay the cost of such connection and the tapping fee or charge therefore.") Similarly, Sussex County, "may, where it deems it necessary to the preservation of public health, order the owner of any lot or parcel of land within a … water district … to connect such building with such…water main." 9 *Del. C.* § 6517(a).

Because the General Assembly has conveyed local authority to force users to connect to water service in these instances, the General Assembly has in turn allowed DNREC to deny well permits for potable water in such cases. Allowing a city or county to require a property to connect to public water while also prohibiting

DNREC from denying those properties well permits would make no sense and would not further any purpose associated with requiring connection to public water.

The BPW, like Sussex County, has the authority to force users in its service area to connect to public water. Nothing about § 6075 suggests the General Assembly intended to single out the BPW and allow it to be the only instance where DNREC is prohibited from withholding well permits in an area where a local authority can require connection to the utility. It cannot be overlooked here that the General Assembly chose to separately charter the BPW and the City of Lewes. As such, unlike other municipalities within the state of Delaware, the BPW's authority to require properties to connect to its water is not limited by municipal boundaries but by the geographic boundaries of its service area, up to two miles outside the municipal boundary. The General Assembly chose to grant authority to the BPW it did not grant to other municipalities. Where other chartered municipalities operate the utilities pursuant to their municipal charters, their power to require connection, if it exists at all, stops at the municipal boundary. But the General Assembly chose in Lewes's case that the authority of its separately chartered BPW would not be bound by the municipal limits of the City itself.

Using the straightforward definition of "municipality" found in two separate dictionaries, the only reasonable way to read § 6075(a)(3) is that in the unique case of the BPW, any property owner within its service area is a resident of a municipality

for purposes of allowing DNREC to withhold a well permit. To read the statute otherwise undermines the General Assembly's intent to allow the BPW to force property owners to connect to its water service, an authority which is much broader than the county's analogous authority in a water district. Compare BPW Charter § 4.12.2, which allows the BPW complete and unfettered authority to require any property owner within its service area, for any reason, to connect to public water with 9 *Del. C.* § 6517(a). The latter only allows Sussex County to require connection with the County water district if the County deems it to be necessary for public health and if the property abuts a street containing a water main. It strains credulity that the General Assembly would confer such broad authority on the BPW but not give it the same protection as a county water district through § 6075(a)(3). DNREC's reading of the § 6075(a) would make the BPW the only instance where a local authority can require water connection but DNREC cannot withhold a well permit, and there is no reason to believe the General Assembly intended that.

If a property can obtain water from another source, such as a well, the authority to require the property to connect to public water is meaningless. If DNREC were prohibited from denying well permits to properties within an area where the General Assembly has allowed the local authority to require connection to water, then those properties can get their water from another source. 7 *Del. C.* § 6075(a)(3) must be read in harmony with the BPW's Charter. The only way to do

that is to conclude that property within the BPW's service area (which the BPW may require to connect to public water) is within a municipality for purposes of the statute. Therefore, the exception contained in § 6075(a)(3) applies here, and DNREC has discretion to deny potable well permits to those properties. DNREC's own regulations—3.5.7 and 3.12.5—in turn require DNREC to deny the Permits.

III. The BPW's interpretation of 7 *Del. C.* § 6075 preserves DNREC's regulations.

DNREC has taken the odd position that its own regulations are preempted by state law. DNREC comes before the EAB to argue against the validity of the very regulations governing wells that DNREC itself promulgated. As explained earlier, DNREC as the agency drafting the regulations cannot make this argument—it must follow its own regulations. DNREC's position is stranger still because the BPW's interpretation of 7 *Del. C.* § 6075, besides being correct under well-established principles of statutory interpretation, also saves DNREC's own regulations from preemption.[3]

The drafters of the Well Permit Regulations clearly intended them to incorporate the letter and intent of 7 *Del. C.* § 6075 into DNREC's well permit approval process. In order to capture the legislative intent of § 6075, described in

[3] Except, perhaps, to the extent that Well Permit Regulation 3.12.4.3 strays from the statutory language of § 6075 by creating a definition of "reasonably available" to mean within 200 feet of a water line. As the BPW argued in its initial submission, this conflicts with the BPW's Charter, which gives the BPW the authority to determine when water is available.

the preceding section, 3.12.7 correctly requires written approval from a municipality when the property is located within the jurisdiction *or* service area of a municipality. This amounts to a recognition of the fact that some municipalities, as that word is used in the statute, have jurisdictions, and some legislatively chartered municipal utilities, such as the BPW, have service areas in which they can require connection irrespective of the contours of the municipality. In both instances the chartered entity—the "municipality" under 7 *Del. C.* § 6075(a)(3)—can require connection with its water utility. The EAB should preserve this regulation and not find that it is preempted by the statute. It can easily be harmonized with the statute by reading the statute correctly—as the drafters of the regulations no doubt did. For purposes of § 6075(a), the BPW is a municipality, and applicants within its service area must submit written approval from the BPW before receiving a well permit from DNREC.

IV. Conclusion.

DNREC has impermissibly ignored its own regulations, regulations which can be harmonized with the applicable statute. As set forth more fully in the BPW's opening submission, Well Permit Regulation 3.12.7 requires DNREC to deny the Permits because the BPW has objected to their issuance. DNREC is not free to ignore this duly promulgated regulation just because it believes it is preempted by state law. The case law is clear that DNREC's actions are invalid if it does not

follow its procedural regulations, and therefore the issuance of the Permits should be denied.

In addition to violating its own regulations, DNREC's overly simplistic interpretation of 7 *Del. C.* § 6075 sidesteps time-honored principles of Delaware statutory interpretation, frustrates the legislative intent of the General Assembly in drafting § 6075(a)(3), and entirely ignores the BPW's Charter. As such, the EAB should find that Well Permit Regulations 3.7.5 and 3.12.7 are valid, that any applicant for a well permit in the BPW's service area as established by the Delaware General Assembly must obtain written approval from the BPW before being issued a permit for a potable well, and that the Permits in this case should be denied due to the absence of such written approval.

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.

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