

BEFORE THE ENVIRONMENTAL APPEALS BOARD

LEWES BOARD OF PUBLIC WORKS,)
)
)

Appellant,)

v.)

DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,)
)
)

Appellee.

EAB Appeal No. 2020-05

DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL’S MOTION FOR SUMMARY JUDGMENT

Defendant Delaware Department of Natural Resources and Environmental Control (“DNREC”) hereby moves for summary judgment:

NATURE AND STAGE OF THE PROCEEDINGS¹

In October 2019, Jerry Peter, through his contractor, submitted two applications for permit to construct a well - geothermal potable supply and geothermal non-potable recharge. The Water Supply Section (WSS) requested approval from Lewes BPW. Lewes BPW opposed the applications, and accordingly, the potable well application was denied. Mr. Peter appealed this decision to the Environmental Appeals Board (“EAB”). Upon review of the statute and regulations by counsel, WSS revoked the denial and issued the permits on April 7, 2020. Shortly after the permits

¹ See Joint Stipulated Facts for more information.

were issued, Lewes BPW appealed to the EAB.

The Parties generally concur that the question before the EAB is strictly a matter of law. Accordingly, the Parties submitted Joint Stipulated Facts and are each submitting dispositive motions. This is DNREC's Motion for Summary Judgment.

STANDARD OF REVIEW

Summary judgment is appropriate if the “undisputed facts entitle[] the movant to judgment as a matter of law.”² When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party, and make all reasonable inferences in favor of the non-moving party.³

RELEVANT STATUTES AND REGULATIONS

7 *Del. C* § 6075(a):

The Department may not withhold a permit for a potable water well within the service territory served by a water utility under a certificate of public convenience and necessity, or require an applicant for a potable water well permit in an area served by a water utility to utilize the services of the utility, unless:

- (1) The Delaware Geological Survey or the Department of Health and Social Services certifies that the ground water supply is inadequate or

² *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

³ *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996).

unsuitable for the intended use for which the permit is being sought;

(2) The water utility demonstrates to the satisfaction of the Department that it can provide service of equal or better quality at lower cost; or

(3) The permit applicant is a resident of a municipality, a county water district authority, or a recorded development where public water is available.

7 Del. Admin. C § 7301:

3.12.4 The Department may not withhold an application for a permit for a potable well within the service territory served by a water utility under a CPCN or require an applicant to utilize the services of the utility in the CPCN area unless:

3.12.4.1 The Delaware Geological Survey or the Division of Public Health certifies that groundwater supply is inadequate or unsuitable for the intended permitted use; or

3.12.4.2 The water utility demonstrates that it can provide service of equal or better quality at lower cost; or

3.12.4.3 The permit applicant is a resident of a municipality, county water district authority, or a recorded development where public water is available.

A public water supply is deemed reasonably available when a public water distribution line is located within 200 feet of the foundation of the structure or building being served.

3.12.7 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.

3.12.8 When a proposed potable, agricultural, heat pump, or miscellaneous well is to be located within the CPCN of a private public water provider, the Department shall notify the public water provider in writing.

ARGUMENT

The goal of statutory interpretation is to “ascertain and give effect to the intent of the legislature.”⁴ Where the statute’s plain language is clear and unambiguous, that plain meaning controls. A statute is ambiguous if it is reasonably susceptible to different conclusions or interpretations.⁵ Regulations are reviewed under the same process. It is well established that courts defer to an agency’s judgment “as to the meaning or requirements of its own rules, where those rules require interpretation or are ambiguous.”⁶ Substantial weight is granted to an agency’s construction of its own rules, such that the agency’s construction will only be reversed if it is “clearly wrong.”⁷

⁴ *Ingram v. Thorpe*, 747 A.2d 545, 547 (2000).

⁵ *Leatherbury v. Greenspun*, 939 A.2d 1284, 1288 (Del. 2007).

⁶ *Couch v. Delmarva Power & Light Co.*, 593 A.2d 554, 562 (Del. Ch. 1991).

⁷ *Div. of Soc. Servs. of Dep’t of Health & Soc. Servs. v. Burns*, 438 A.2d 1227, 1229 (Del. 1981).

7 *Del. C* § 6075(a) requires DNREC to issue a well permit unless one of three exceptions applies: 1) the ground water supply is inadequate or unsuitable for the intended use, 2) the water utility demonstrates that it can provide service of equal or better quality at lower cost, or 3) the permit applicant is a resident of a municipality, a county water district authority, or a recorded development where public water is available. By the plain language of the statute and regulations, DNREC has no discretion to deny a permit unless one of the exceptions applies. To the extent the EAB finds any ambiguity in the phrase “where public water is available,” the 7 *Del. Admin. C* § 7301-3.12.4.3 specifies public water supply is deemed reasonably available when a public water distribution line is located within 200 feet of the foundation of the structure or building being served.

The following facts are undisputed: Neither of the first two exceptions apply to this circumstance, Mr. Peter’s property is within the CPCN of Lewes BPW, but not within the city limits of Lewes, and the structure to be served is more than 200 feet from the nearest public water distribution line. Accordingly, Mr. Peter is not a resident of a municipality, county water district authority, or recorded development where public water is available. Therefore, the proposed well does not fall within any of the exceptions of 7 *Del. C* § 6075(a) and DNREC has no discretion whether to grant the permit or not.

The regulations cited above appear to impose additional obligations on an applicant. WSS initially understood these additional obligations to control and denied the permits pursuant to 7 *Del. Admin. C* § 7301-3.12.7 as Lewes BPW did not approve the application. Where a regulation and statute conflict, however, the statute controls and any additional restrictions imposed by a regulation are invalid.⁸ Here, the additional restriction requiring a written statement of approval is not applicable for an applicant who does not fall under one of the exceptions to 7 *Del. C* § 6075(a). Therefore, again, DNREC had no discretion to withhold the potable water permit.

WHEREFORE, DNREC respectfully requests that the Board grant Appellee's Motion for Summary Judgment and affirm the Secretary's Decision to issue Well Permits 267708 and 267709.

**STATE OF DELAWARE
DEPARTMENT OF JUSTICE**

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⁸ *Cantinca v. Fontana*, 884 A.2d 468, 473 (Del. 2005).