

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
OF THE STATE OF DELAWARE**

**THE LEWES BOARD  
OF PUBLIC WORKS**

**Appellant,**

**v.**

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

**Appellee.**

**EAB Appeal No. 2020-05**

**DECISION AND FINAL ORDER**

Pursuant to due and proper notice of time and place of hearing served on all parties in interest and to the public, the above-stated cause of action came before the Environmental Appeals Board (“Board”) on September 22, 2020, by remote videoconferencing of all participants.

Members of the Board present and constituting a quorum were: Dean Holden (Chair), Michael Horsey, Robert Mulrooney, Randall Horne, Frances Riddle and Guy Marcozzi. No Board Members disqualified themselves or were otherwise disqualified. Deputy Attorneys General Kevin P. Maloney represented the Board.

Daniel F. McAllister, Esquire, represented Appellant Lewes Board of Public Works (“Appellant”). Deputy Attorney General Kayli H. Spialter represented Appellee Delaware Department of Natural Resources and Environmental Control (“DNREC”).

## **STATEMENT OF THE CASE AND PROCEEDINGS**

The parties filed a Joint stipulation of Facts which is summarized below.

Jerry Peter (the “Applicant”) applied for permits to construct a supply well (permit no. 267708) and recharge well (permit no. 267709) (collectively, the “Permits”) on Sussex County tax parcel number 3-35-08.00-0009.00 (the “Property”). The wells are geothermal and the supply well will also be used to supply potable water. The Property is located on New Road in eastern Sussex County, within an enclave surrounded entirely by the City of Lewes. The enclave, however, is not within the incorporated limits of the City of Lewes. Within the enclave that is surrounded on four sides by the City of Lewes, the Property itself borders the City of Lewes on three sides and is therefore within two miles of Lewes’s municipal boundary.

The Property is undeveloped and located in the BPW’s water, sewer, and electric service areas. See, Joint Exhibit 1. As designed, the house footprint will be approximately 300 feet from the water main on New Road. The BPW has approved the provision of water, electric, and sewer service to the Property.

On November 7, 2019, Darrin Gordon (“Gordon”), the General Manager of the BPW, wrote to DNREC at DNREC’s request advising that the BPW opposed issuance of the Permits because of the well’s threat to the municipal water supply and because the applicant, Jerry Peter, could connect to the municipal water supplied by the BPW. Joint Exhibit 2. On January 7, 2020, DNREC denied the Permits on the basis that the BPW declined to issue a statement of approval as required for a well permit application by 7 Del. Admin. C. § 7301, subsection 3.12.7. Joint Exhibit 3. The Applicant appealed the initial denial to the EAB on February 3, 2020. During the pendency of the first appeal, DNREC reversed course and issued both Permits on April 7, 2020, after seeking legal advice from the Delaware Department of Justice.

On October 12, 2016, DNREC wrote to the BPW's then-president, Wendell Alfred, advising him of legislative changes to the well permit approval process. Joint Exhibit 5. On July 20, 2020 Gordon wrote to the Applicant reminding him that he is required to receive water service from the BPW. Joint Exhibit 6. In the alternative, Gordon advised the Applicant that the Property would not be eligible to receive sewer service if the Applicant elected not to receive water service from the BPW.

The Water Supply Section (WSS) revoked the denial and issued the permits on April 7, 2020. Shortly after the permits were issued, Lewes BPW appealed to the EAB. The parties to this Appeal have agreed that the issue in this appeal is strictly a question of law and have submitted a Joint Stipulation of Facts and competing Motions for Summary Judgment. The parties agreed that there would be no need for an evidentiary hearing and agreed to proceed by means of legal argument only.

### **APPELLANT'S ARGUMENT**

Appellant argues that the permits were incorrectly issued because: 1) the Applicant failed to submit written approval from the BPW as required by Well Permit Regulation 3.12.7 thus DNREC has violated its own regulations by approving the well permit applications and that the Board should overturn the issuance of the permits; 2) the BPW's Charter at Section 4.12.2 requires the applicant to receive municipal water from the BPW because public water is available to the applicant's property; and 3) the applicant must accept water service from the BPW in order to receive sewer service, and the provision of sewer service is a necessary condition for DNREC to consider the well permit as mandated by Well Permit Regulation 3.5.7.

## **DNREC'S ARGUMENT**

DNREC argues that 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. Thus DNREC reasons, by the plain language of the statute and regulations, DNREC has no discretion to deny a permit unless one of the exceptions applies.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

At the conclusion of legal argument by the parties, and in light of the parties agreement stipulating facts, the Board entered into executive session as permitted by 7 Del. C. §6008(a) to deliberate. After deliberation and careful review of the parties' arguments, their written submissions, and the evidence presented, the Board finds, by a vote of 6 to 0, that DNREC had adequate legal authority to issue the permits.

The Board finds that 7 Del. C. §6075(a)(3) is unambiguous and that the plain language of §6075 required DNREC to issue the permits. The Board concludes specifically that the BPW is not a municipality. The Board rejects Appellants argument that: 1) the BPW's service area is a municipality as that term is used in 7 Del. C. §6075(a)(3); 2) the BPW's service area is a county water district authority; and 3) the BPW's service area is a recorded development where public water is available. Despite reaching the legal conclusion that DNREC had no choice but to issue the permits under these circumstances the Board encourages DNREC to revisit its well permit regulations in order to better coordinate them with 7 Del. C. §6075(a).

On appeal to the Board, the appellant bears the burden of proving that the “the Secretary's decision is not supported by the evidence on the record before the Board.” When making factual determinations, the Board “shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted.” 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.” See, *Div. of Soc. Servs. v. Burns*, 438 A.2d 1227, 1229 (Del.1981). DNREC’s determination is not unreasonable or clearly wrong. Here, the Board finds from the evidence presented and the law that Appellant has failed to carry its burden of demonstrating that the Secretary’s decision is not supported by the evidence on the record before the Board.

After deliberate and careful review of Parties’ respective arguments and evidence, the Board, by a vote of 6 to 0, affirms the Secretary’s decision in EAB Appeal 2020-05.

**IT IS SO ORDERED**, this 16<sup>TH</sup> day of December, 2020.

/s/ Dean Holden  
Dean Holden, Chairperson

The following four Board members concur in this decision:

Date: \_\_\_\_\_  
Robert Mulrooney  
Board Member

Date: \_\_\_\_\_  
Michael Horsey  
Board Member

Date: \_\_\_\_\_  
Frances Riddle  
Board Member

Date: \_\_\_\_\_  
Randall Horne  
Board Member


Date: \_\_\_\_\_  
Guy Marcozzi  
Board Member

Date: 12/14/2020

  
\_\_\_\_\_  
Robert Mulrooney, Board Member

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Date: 12/16/2020

  
\_\_\_\_\_  
Michael Horsey, Board Member



EAB Appeal No. 2020-05 Decision and Final Order

Date: 12/9/20

FR Riddle  
Frances Riddle, Board Member


EAB Appeal No. 2020-05 Decision and Final Order

Date: 12/11/20

*Randall J. Horne*  
Randall Horne, Board Member

EAB Appeal No. 2020-05 Decision and Final Order

Date: 12-09-2020

  
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Guy Marcozzi, Board Member