STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: JUNE 14, 2012)

EAGLE OF THE NORTH REALTY TRUST, ET AL.	:	
V.	:	**C.A. No. PC 07-1426**
STATE OF RHODE ISLAND, ET AL.	:	

DECISION

CLIFTON, J. Appellant, Eagle of the North Realty Trust and the MacLean Family Trust (collectively "the Trust"), appeals the February 19, 2007 Final Agency Decision and Order of the Rhode Island Department of Environmental Management ("DEM"), denying the application for variances to install an individual sewage disposal system ("ISDS") on real property located in the Town of South Kingstown, Rhode Island. Jurisdiction is pursuant to R.I. Gen. Laws 1956 § 42-35-15.

I

Facts and Travel

The instant case involves two lots of land, identified as Lot 60 and 61 on assessor's plat 95-1 of the Town of South Kingstown. Both lots are held in trust for the benefit of the MacLean family. The MacLeans live on Lot 60 that is owned by the MacLean Family Trust. Both lots are located adjacent to Green Hill Pond, which has been designated a critical resource area by the DEM.

The home on Lot 60 is currently serviced by an existing cesspool. The home that used to be on Lot 61 was destroyed in the Great Hurricane of 1938. When the MacLeans acquired the property, their intent was to build on Lot 61 in order to provide a home for the MacLean children. To that end, in 2003, the MacLeans submitted an application for the right to install an ISDS on Lot 61. The application was denied.

Following the 2003 denial, the Trust submitted the instant Application for a permit to install an ISDS to service two single-family residences, the current residence on Lot 60 and another residence to be constructed on Lot 61. See DEM Final Agency Decision, No. 05-017/ISA (February 19, 2007) ("Agency Decision") at 1. The Trust requested several variances from the existing Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction, and Maintenance of Individual Sewage Disposal Systems ("ISDS Regulations"). Specifically, the Trust requested the following variances from the ISDS Regulations: (1) SD 2.14 (requiring that an ISDS be located no closer than 100 feet from any existing well); (2) SD 19.02 (outlining special requirements for an ISDS in a critical resource area, such as Green Hill Pond); (3) SD 19.02.4 (requiring that an ISDS be at least 150 feet away from the Pond; and (4) SD 19.02.5 (requiring that an ISDS shall not be placed in any area where the groundwater table is within five (5) feet of the original ground surface.

The application and variances were denied by the DEM Office of Water Resources ("OWS") on August 29, 2005. See Agency Decision at 2. The denial letter stated that the Trust had failed to provide convincing evidence to demonstrate that the public interest and the public health could be adequately protected as required by the ISDS Regulations. See Agency Decision at 2-3.

Following the August 2005 denial, the Trust timely appealed to the DEM Administrative Adjudication Decision ("AAD") and a hearing on the appeal was conducted on December 13, 2005. See id. at 3. At the hearing, the Trust asserted that conditions on the site had changed since the August 2005 denial and requested permission to amend the Application to reflect existing site conditions. The request was granted. See id.

The revised Application was resubmitted to the OWS that denied it on July 28, 2006. On August 15, 2006, the Trust appealed the denial of the revised Application to the AAD. See id. On appeal to the AAD, the Trust, as the Applicant, bore the burden of proof to demonstrate through clear and convincing evidence that: (1) a literal enforcement of the ISDS Regulations will result in unnecessary hardship to the Applicant; (2) that the system will function as proposed in the Application; and (3) that permitting variances from the requirements of the ISDS Regulations will not be contrary to the public interest, public health, and the environment. See id. at 4. In order to demonstrate that the proposed ISDS will not be contrary to the public interest, public health, and the environment, the Applicant must introduce clear and convincing evidence that:

1. The waste from the proposed system will not be a danger to public health;
2. The proposed ISDS will be located, operated, and maintained so as to prevent the contamination of any drinking water supply;
3. The waste from the proposed system will not pollute any body of water;
4. The waste from the proposed system will not interfere with the public use and enjoyment of any recreational resource; and
5. The waste from the proposed ISDS will not create a public or private nuisance. See Agency Decision at 4.

In accordance with AAD procedures, the hearing on the appeal of the denial of the revised Application was convened on October 16, 2006. At the hearing, the AAD Hearing Officer heard testimony from Mr. William D. Dowdell, Mr. Mohammed J. Freij, and from Mr. MacLean.

Mr. Dowdell, an expert civil engineer and an expert in ISDS installation and design, testified on behalf of the Trust. Mr. Dowdell explained that the revised Application was submitted as an "alteration" application because it altered an existing cesspool serving an existing residence. See Hearing Tr., December 13, 2005, at 18. Mr. Dowdell further explained that the Application proposed replacing the existing cesspool with a "bottomless sand filter septic system" to service both the existing house and the house to be constructed. See id. at 18-19. Mr. Dowdell asserted that the Application was submitted specifically as an alteration because it was increasing by one bedroom the net number of bedrooms on both properties which were serviced by the proposed ISDS and because the Trust believed that the OWS would not deny an alteration. See id.

Mr. Dowdell gave as his expert opinion that the proposed system would be an improvement over the existing cesspool because the proposed system would improve the setback to Green Hill Pond by doubling the setback distance to the Pond from twenty-five (25) feet to fifty (50) feet, increasing the setback distance from any wells in the area to seventy (70) feet, and because the new system would pre-treat the effluent. See id. at 20-22. Mr. Dowdell further stated that it would be impossible for any improvement to the existing cesspool or any new septic system to be installed in compliance with the ISDS Regulations because both lots abut Green Hill Pond. See id. at 25-29.

Mr. Freij, a Principal Engineer in the OWS who had reviewed the Application and recommended that it be denied, also testified. Mr. Freij acknowledged that it would be impossible for any system to comply with the ISDS Regulations given the size of the lots. See Hearing Tr., Dec. 13, 2005, at 52. Mr. Freij explained that in his view, the Application could not be classified as an alteration because it was proposing a new house on a separate lot. See id. at 55. Mr. Freij further explained that two separate dwellings with two bedrooms each will produce more effluent than a single dwelling with four bedrooms. See id. Mr. Freij testified that because each of the requested variances reduces the minimum setbacks required by the ISDS Regulations, he believes that as a whole, the proposed system would not be as protective of public health and the environment. Mr. Freij admitted, however, that the proposed system would still improve existing conditions. See id. at 81.

Mr. MacLean testified that he wanted two independent structures on the two lots because he planned to give the two lots to his two daughters. See Hearing Tr., Dec. 13, 2005, at 112. He further testified that aside from construction, there were no uses of Lot 61 that were available to him except as parking for a car or boat. See id.

The AAD Hearing Officer issued the DEM Final Agency Decision on February 19, 2007. The Decision made twenty-nine (29) findings of fact. The Hearing Officer found that the Trust had not proven by clear and convincing evidence that the proposed system would not harm the public health and the environment, and denied the Application.

The Trust timely filed the instant appeal with this Court pursuant to G.L. § 42-35-15.

II

Standard of Review

This Court "sits as an appellate court with a limited scope of review" when reviewing the decisions of an administrative agency such as the DEM. Mine Safety Appliance Co. v. Berry, 620 A.2d 1255, 1259 (R.I. 1993). Appellate review of agency actions is governed by the Rhode Island Administrative Procedures Act, § 42-35-1, et seq. See Islein v. Retirement Bd. of Employees' Retirement System of Rhode Island, 943 A.2d 1045, 1048 (R.I. 2008) (citing Rossi v. Employees' Retirement System of Rhode Island, 895 A.2d 106, 109 (R.I. 2006)). The applicable standard of review codified at § 42-35-15(g) provides:

> "(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inference, conclusions or decisions are:
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> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

"In essence, if 'competent evidence exists in the record, the Superior Court is required to uphold the agency's conclusions.'" Auto Body Ass'n of Rhode Island v. State of Rhode Island Dep't of Bus. Regulation et al., 996 A.2d 91, 95 (R.I. 2010). Accordingly, this Court defers to the administrative agency's factual determinations provided that they are supported by legally competent evidence. Arnold v. Rhode Island

Dep't of Labor and Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003). Additionally, when examining the certified record, this Court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Interstate Navigation Co. v. Div. of Pub. Utils. & Carriers of R.I., 824 A.2d 1282, 1286 (R.I. 2003) (citations omitted).

The DEM in this case utilizes a two-tier review process in which grievances are heard first by a hearing officer, who issues a written decision that is submitted to the Director of the DEM. The Director considers the decision, along with any further briefs or arguments, and renders his or her own decision. This two-step procedure has been likened to a funnel. Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 207-08 (R.I. 1993). The hearing officer, at the first level of review, "sits as if at the mouth of the funnel" and analyzes all of the evidence, opinions, and issues. Id. The DEM Director, stationed at the "discharge end" of the funnel, the second level of review, does not receive the information considered by the hearing officer first hand. Id. Our Supreme Court has held, therefore, that the "further away from the mouth of the funnel that an administrative official is . . . the more deference should be owed to the fact finder." Determinations of credibility by the hearing officer, for example, should not be disturbed unless they are "clearly wrong." Id. at 206.

Accordingly, this Court will "reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record." Baker v. Dep't of Employment Training Bd. Of Review, 637 A.2d 360, 363 (quoting Milardo v. Coastal Res. Mgmt. Council, 434 A.2d 266, 272 (R.I. 1981)). Because most agencies are presumed to have knowledge and expertise in their respective

fields, they have wide discretion in determining the weight or probative value to be given the testimony of the expert witness. Stein, ADMINISTRATIVE LAW § 28.03. The Court also reviews an agency decision to determine whether it was "otherwise occasioned by error of law." Tierney v. Dep't of Human Services, 793 A.2d 210, 213 (R.I. 2002).

III

Analysis

The Trust asserts three grounds on which the DEM's decision should be reversed. The Trust contends that the Hearing Officer made an error of law in finding that the Application did not meet the definition of an "alteration" as defined by the ISDS Regulations. The Trust emphasizes that the definition of "alteration" refers to a modernization, modification, or change in an existing ISDS but does not refer to the structures which will be serviced by that system. Secondly, the Trust contends that the Hearing Officer's Decision was not supported by competent evidence on the record because the Hearing Officer relied solely on the testimony of Mr. Freij regarding the problems with the proposed system and ignored the testimony from both Mr. Dowdell and Mr. Freij that the proposed system was an improvement on the existing one. Lastly, the Trust argues that the denial of the Application will result in unnecessary hardship by prohibiting any structure from being built on Lot 61.

A

Definition of "Alteration"

The Trust argues that the Application was properly classified as an "alteration" because it proposed a modernization of the cesspool that is currently servicing the

residence located on Lot 60. The Trust asserts that the DEM's objection to the Application was improperly based on the new structure to be built even though the definition of an "alteration" nowhere refers to the structures to be serviced by an ISDS. Accordingly, the Trust contends that the Hearing Officer erred as a matter of law in finding that the Application was not an "alteration."

At the outset, the Court notes that whether the Application fit the definition of an "alteration" requires an interpretation of an administrative regulation. The interpretation of a regulation is a question of law that is reviewed de novo. See Lara v. Secretary of Interior of U.S., 820 F.2d 1535, 1538 (9th Cir. 1987). Nevertheless, the Court emphasizes that an agency's interpretation of its own regulations is accorded substantial deference. See In re Advisory Opinion to the Governor, 732 A.2d 55, 76 (R.I. 1999); see also Auto Body Ass'n of R.I. v. State Dep't of Bus. Regulation, 996 A.2d 91, 97 (R.I. 2010) ("[D]eference will be accorded to an administrative agency when it interprets a statute [or regulation] whose administration and enforcement have been entrusted to the agency . . . even when the agency's interpretation is not the only permissible interpretation that could be applied."). Our Supreme Court has explained that proper deference to an agency's interpretation of its own regulations requires a court "to presume the validity and reasonableness of that construction until and unless the party challenging its interpretation prove[s] otherwise." State v. Cluley, 808 A.2d 1098, 1104 (R.I. 2002).

The ISDS Regulations define an "alteration" as:

> "any modernization, modification, or change in the size or type of an existing individual sewage disposal system, including, but not limited to, any and all work performed in relation to a *building renovation* and/or change of use, or work performed to accommodate any increase in sewage

> flow to the system." ISDS Regulations, SD 1.00 Definitions (emphasis added).

The ISDS Regulations provide for other requirements when someone is seeking to "construct a new structure from which sewage will be disposed of by means of an individual sewage disposal system." ISDS Regulations, SD 2.00(1).

The Hearing Officer concluded that the Application did not meet the definition of an "alteration" as defined in the ISDS Regulations. In particular, the Hearing Officer noted that Mr. Freij had concluded that the Application was for a "new construction" because an entirely new house was being built on a separate lot and the Application was not merely upgrading an existing structure.

The Court notes that the definition of an "alteration" in the ISDS Regulations does make reference to the structure serviced by the ISDS in specifically including "any and all work performed in relation to a building renovation." Because of the reference to a "building renovation," the Court finds that the regulation is ambiguous as to whether or not the structure(s) to be serviced by an ISDS may be considered by the DEM in determining whether an application is for an "alteration." Accordingly, this Court will give deference to the DEM's interpretation of the definition of an "alteration" and will not overturn it unless it is clearly erroneous or unauthorized. See Auto Body Ass'n of R.I., 996 A.2d at 97.

The Hearing Officer's conclusion that the Application was not for an "alteration" was not clearly erroneous because the Application did not involve merely a modification of the existing cesspool that presently services the residence on Lot 60 but is for an entirely new ISDS to be built in a different location of the lot. This Court cannot find that the Hearing Officer made an error of law in determining that the Application did not

meet the definition of an "alteration." The Hearing Officer did not err as a matter of law in considering the fact that the new ISDS would service the existing house as well as the new house on Lot 61 in concluding that the Application was for a new construction. Furthermore, the Court notes that broad deference to the DEM's interpretation is particularly appropriate here where the regulations necessarily concern a highly technical regulatory program. See Genesis Health Ventures, Inc. v. Sebelius, 798 F. Supp. 2d 170 (D.D.C. 2011) (holding that broad deference to an agency's interpretation of its regulations is all the more warranted when the regulation concerns a complex regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns). Accordingly, the Court finds that the Hearing Officer's interpretation of the ISDS Regulations was not unreasonable or clearly erroneous. Giving appropriate deference to the DEM's interpretation, the Court affirms the decision of the Hearing Officer that the Application was for a new construction and not an alteration of an existing ISDS.

B

Credibility Determinations and the Weight of the Evidence

The Trust argues that the Hearing Officer's Decision was erroneous and patently biased because it was based solely on the testimony of Mr. Freij and did not give weight to the evidence in the record that the proposed new system was not a danger to the public health and would not pollute any body of water or interfere with the public use of any recreational resource. In contrast, the DEM emphasizes that the issue is not whether the proposed system is an improvement over the existing cesspool but whether the proposed

system will provide the degree of environmental protection required under the ISDS Regulations. The DEM contends that the Trust failed to satisfy the burden of proof to produce clear and convincing evidence to justify granting variances to the requirements of the ISDS Regulations.

As stated earlier, when reviewing the decisions of an agency hearing officer, this Court will not disturb the hearing officer's determinations of credibility or the weight of the evidence unless they are clearly wrong. See Environmental Scientific Corp., 621 A.2d at 206. Furthermore, the Court emphasizes that because agencies are presumed to have knowledge and expertise in their respective fields, they have wide discretion in determining the weight or probative value to be given the testimony of expert witnesses. Stein, ADMINISTRATIVE LAW § 28.03. Accordingly, this Court will not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. See Interstate Navigation Co. v. Div. of Pub. Utils. & Carriers of R.I., 824 A.2d at 1286.

The Hearing Officer specifically noted that Mr. Freij's testimony was found to be more credible because "Mr. Freij was candid in answering questions and provided a logical and detailed basis for his conclusions." See Agency Decision at 10. The Hearing Officer emphasized that while both Mr. Dowdell and Mr. Freij agreed that the proposed system was an improvement on the existing cesspool, both also agreed that the proposed system would still have an impact on Green Hill Pond. This Court cannot find that the Hearing Officer's determinations of credibility were clearly wrong. There is competent evidence in the record to support the Hearing Officer's determination that the proposed system would pollute Green Hill Pond because of the increase in flow of effluent to the system. The Court notes in particular that Mr. Dowdell conceded that reducing the flow

to the system would have less impact on Green Hill Pond. See Hearing Tr., Dec. 13, 2005, at 48-49. The Court finds that the Hearing Officer's decision was supported by the evidence in the record and there was no error in the Hearing Officer's determinations of credibility.

C

Unnecessary Hardship

The Trust's final argument is that denial of the proposed alteration has resulted in unnecessary hardship to the MacLeans by depriving them of beneficial use and enjoyment of their property. The Trust argues that in denying the Application, the DEM is acting in excess of its statutory authority by acting as a super zoning board to prevent the construction of any structure on Lot 61. The DEM maintains that the Application was properly denied because the Trust had not met the burden of proof to show that the proposed system would not be contrary to the public interest and the environment, making it unnecessary to address unnecessary hardship.

The ISDS Regulations state that a variance may be granted if it is found that "a literal enforcement of such provisions will result in unnecessary hardship to the applicant" *and* "that the permit or variance sought will not be contrary to the public interest, public health and the environment." ISDS Regulations SD 21.02(c). Our Supreme Court has held that where the DEM finds that the applicant had not proven that the proposed system would not harm the public health or interest, it is not necessary to reach the unnecessary hardship issue. See Strafach v. Durfee, 635 A.2d 277, 283 (R.I. 1993). In that case, the Supreme Court upheld the DEM and expressly declined to make

a ruling on the proper standard for unnecessary hardship in the context of a DEM variance. See id.

In the instant case, the Hearing Officer found that the Trust had failed to prove by clear and convincing evidence that issuance of the requested variances would not be contrary to the public interest, public health, and the environment. See Agency Decision at 15. As stated earlier, this Court will not substitute its judgment for that of the agency concerning questions of fact. See Guarino v. Dep't of Soc. Welfare, 122 R.I. 583, 410 A.2d 425 (1980). Moreover, this Court finds that the evidence in the record supports the Hearing Officer's conclusion that the proposed system would be a danger to the public health and interest. For example, Mr. Dowdell testified that the proposed system has a water table depth of only nine (9) inches, although he stated that he believed the treatment of the effluent would be no better than if the water table depth had met the requirement of two (2) feet. See Hearing Tr., Dec. 13, 2005, at 45-46. However, Mr. Freij testified that there would be less treatment of the effluent because of the nine (9) inch water table. See id. at 70. While the Court notes the contradictions in the assertions made by Mr. Dowdell and Mr. Friej, the Court cannot find that the Hearing Officer's decision to accord greater weight to the testimony of Mr. Freij was clearly erroneous. The Court notes that the ISDS Regulations expressly state that variances would not be granted where the depths of the water table were less than two (2) feet, as in the proposed system at issue here. See ISDS Regulations SD 20.02, Table 20.1. The Court finds that the Hearing Officer's conclusion that the proposed system would be contrary to the public interest and the environment was supported by competent evidence in the record.

Because the Hearing Officer had competent evidence on the record to find that the Trust had not proven that the proposed ISDS would not be contrary to the public health and environment, this Court must uphold the agency's decision. See Rhode Island Pub. Telecomm. Authority, et al. v. Rhode Island Labor Relations Board, et al., 650 A.2d 479, 485 (R.I. 1994). Accordingly, the Court finds that the Trust's argument that the denial of the variance will result in unnecessary hardship is unavailing. An analysis of the "unnecessary hardship" standard is not required, because the Hearing Officer had substantial evidence for his decision on public health and environmental grounds. See Strafach, 635 A.2d at 283.

IV

Conclusion

After careful review of the entire record, the Court is satisfied that the DEM's Decision was supported by reliable, probative, and substantial evidence. Furthermore, the Hearing Officer did not make an error of law in deciding that the Application did not fit the definition of an "alteration." The Court is further satisfied that the DEM did not act in excess of its statutory authority. The Trust's substantial rights have not been prejudiced. Accordingly, this Court affirms the Decision of the Department of Environmental Management denying the Trust's Application.

Counsel shall submit an appropriate judgment for entry.