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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0660-11T2

PAULSBORO REFINING COMPANY,
LLC f/k/a VALERO REFINING
COMPANY - NEW JERSEY,

Plaintiff-Appellant,

v.

TOWNSHIP OF GREENWICH,

Defendant-Respondent.

Submitted October 29, 2012 - Decided December 11, 2012

Before Judges Fasciale and Maven.

On appeal from the Superior Court of New
Jersey, Law Division, Gloucester County,
Docket No. L-479-10.

Holston, MacDonald, Uzdavinis, Ziegler &
Lodge, P.A., attorneys for appellant (Ronald
J. Uzdavinis, on the brief).

Ward Shoemaker, LLC, attorneys for
respondent (Mark B. Shoemaker, on the
brief).

PER CURIAM

Plaintiff Paulsboro Refining Company appeals from an August
25, 2011 Law Division order declaring that "foundations for
manufacturing, production[,] and process equipment" are not
exempt from the Uniform Construction Code (UCC), N.J.S.A.

52:27D-119 to -141, and are therefore subject to municipal permitting and inspections. We hold that the DCA did not exempt foundations from the UCC in general – only the specific type of foundation noted in subsection N.J.S.A. 5:23.9.7(b)13. We remand and direct the judge to make additional findings of fact.

Plaintiff attempted to install a foundation for its process equipment at one of its refineries without obtaining a construction permit.¹ As a result, a municipal code official from defendant Township of Greenwich issued a stop-work order for failing to obtain the permit, in violation of N.J.A.C. 5:23-2.14(a), which provides that

[i]t shall be unlawful to construct, enlarge, repair, renovate, alter, reconstruct[,] or demolish a structure, or change the use of a building or structure, or portion thereof, or to install or alter any equipment for which provision is made or the installation of which is regulated by this chapter without first filing an application with the construction official, or the appropriate subcode official where the construction involves only one subcode, in writing and obtaining the required permit therefor[e].

In April 2003, plaintiff filed a verified complaint seeking to enjoin defendant from enforcing the stop-work order. On April 15, 2003, the parties entered into a consent order lifting

¹ The testimony refers to a "monolithic" concrete foundation approximately sixty feet wide, eighty feet long, and eight feet thick.

the stop-work order, and plaintiff agreed to "submit an application for a building permit for foundations at the [refinery] facility for other than pipe rack foundations, exempt [from the UCC] under N.J.A.C. 5:23-9.7(b)13." Thereafter, the parties submitted to the New Jersey Department of Community Affairs (DCA) the question of "whether . . . processing equipment foundations, other than pipe rack foundations, as set forth in N.J.A.C. 5:23-9.7(b)13, shall be [exempt from the UCC]."

The parties expected that the DCA would conduct an arbitration proceeding to resolve the dispute. Before the proceeding began, however, defendant's construction official contacted the DCA and obtained two DCA letters addressing the merits of the dispute. Plaintiff objected to the DCA contending that the construction official improperly contacted the DCA unilaterally. Defendant then consented to the matter returning to the court for disposition.

In September 2010, defendant moved for summary judgment. The parties agreed that the judge would resolve the question of whether or not the processing equipment foundation at issue was exempt from the UCC. In May 2011, the judge conducted a two-day plenary liability hearing. Before the hearing began, the judge indicated, with the consent of the parties, that she bifurcated

the issue of damages "pending the outcome of [her liability] factual determination." The judge then heard testimony from four witnesses and considered written post-hearing submissions by the parties' counsel. Plaintiff argued primarily that the foundation at issue is exempt from the UCC because it is an integral part of the processing structure and is therefore considered process equipment.

In August 2011, the judge issued an oral decision and concluded that plaintiff was required to obtain permits because the foundation was not exempt from compliance with the UCC. Interpreting N.J.A.C. 5:23.9.7(b)13, the judge acknowledged that foundations for equipment such as pipe racks and hangers that support process piping and storage racks for raw materials and finished products are exempt from the UCC; however, she determined that the Legislature intentionally omitted the term "foundation" from the exemptions other than from subsection (b)13. As a result, the judge concluded that the foundation at issue is subject to municipal permitting and inspections in accordance with the UCC. The judge did not substantively address plaintiff's main factual contention that the foundation

is an integral part of the processing structure.² This appeal followed.

On appeal, plaintiff argues that the judge erred by (1) determining that a foundation for process equipment is subject to the UCC; and (2) considering the UCC's public protection purposes in her interpretation of N.J.A.C. 5:23-9.7(a) and (b). Plaintiff contends further that municipal code enforcement and construction code officials lack the qualifications to inspect plaintiff's foundation for processing equipment.

The parties agree that, pursuant to subsection (a), "[m]anufacturing, production[,] and process equipment is not under the jurisdiction of the [UCC]." They dispute whether the foundation, other than pipe rack foundation, is exempt from the application of the UCC under subsection (b) of the regulation. If the UCC applies, then the foundation at issue is subject to municipal permitting and inspections. We accord no deference to the judge's conclusions on issues of law, Manalapan Realty, L.P., v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995), which we review de novo, Spring Creek Holding Co. v. Shinnihon

² In commenting on plaintiff's contention that its foundation is integral to the processing structure, the judge only stated that "the same could be said of all foundations that are required to be inspected under the UCC."

U.S.A. Co., 399 N.J. Super. 158, 180 (App. Div.), certif. denied, 196 N.J. 85 (2008).

We begin by summarizing the law governing interpretation of the administrative code. "We interpret a[n administrative] regulation in the same manner that we would interpret a statute." US Bank, N.A. v. Hough, 210 N.J. 187, 199 (2012). In determining "legislative intent, we 'look first to the plain language of the statute, seeking further guidance only to the extent that the Legislature's intent cannot be derived from the words that it has chosen.'" Headen v. Jersey City Bd. of Educ., ___ N.J. ___, ___ (2012) (slip op. at 19) (quoting Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251 (2008)). In so doing, "we take into consideration the entire scheme of which a provision is a part." Id. at 19-20 (internal quotation marks omitted).

"We cannot rearrange the wording of the regulation, if it is otherwise unambiguous, or engage in conjecture that will subvert its plain meaning." Hough, supra, 210 N.J. at 199. Moreover, we look to extrinsic evidence "[o]nly when a fair 'reading of the enactment leads to more than one plausible interpretation.'" Ibid. (quoting Bedford v. Riello, 195 N.J. 210, 222 (2008)). Last, "[a]s a general rule, when the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where

excluded." Twp. of W. Orange v. 769 Assocs., LLC, 198 N.J. 529, 540 (2009) (internal quotation marks omitted); see State v. Scott, ___ N.J. Super. ___, ___ (2012) (slip op. at 8) (stating that "[c]ourts read every word in a statute as if it was deliberately chosen and presume that omitted words were excluded purposefully").

I.

With these principles in mind, we turn to N.J.A.C. 5:23-9.7, which provides in pertinent part:

(a) Manufacturing, production[,] and process equipment is not under the jurisdiction of the [UCC]. Manufacturing, production, and process equipment is defined as all equipment employed in a system of operations for the explicit purpose of the production of a product.

(b) Manufacturing, production, and process equipment shall include, but is not limited to, the following:

. . . .

13. Pipe racks, hangers, and the like that support the process piping and the storage racks for the raw materials and finished products. Building structural systems supporting the racks, hangers, storage loads, and the like are excluded from the definition of process equipment, except that pipe support units that include a foundation and support steel shall be included as process equipment when they do not transfer loads to structures whose main function is other than supporting process pipe.

[(Emphasis added).]

We agree with the judge that the regulation's plain meaning is clear; the DCA did not exempt foundations in general – only the specific type of foundation noted in subsection (b)13 -- that which does "not transfer loads to structures whose main function is other than supporting process pipe." Headen, supra, slip. op. at 19.

The regulatory history supports our interpretation. In 1993, the DCA adopted N.J.A.C. 5:23-9.7, 25 N.J.R. 1512 (Apr. 5, 1993), to replace two earlier DCA process equipment interpretations, 24 N.J.R. 3458 (Oct. 5, 1992).³ The DCA explained in Interpretation 6 that "[p]rocess equipment is not under the jurisdiction of the [UCC]." In Interpretation 6A, the DCA defined "[m]anufacturing, production, and process equipment." Neither interpretation addressed foundations.

In adopting N.J.A.C. 5:23-9.7, the DCA noted that "[h]ighly specialized . . . 'process equipment[]' is often unique to its function and designed beyond the referenced standards in the UCC." 24 N.J.R. 3458. The DCA explained that "[t]his makes it impractical or impossible for code officials to review it in an appropriate way." Ibid.

³ On August 15, 1979, the DCA issued Interpretations 6 and 6A.

In response to an unrelated binding arbitration,⁴ the DCA proposed several additional exemptions from the UCC, which are enumerated in N.J.A.C. 5:23-9.7(b)11 to 16. Ibid. After the DCA proposed the exemptions, but before they were adopted, the DCA further proposed adding to (b)13 the following language that is at issue: "except that pipe support units that include a foundation and support steel shall be included as process equipment when they do not transfer loads to structures whose main function is other than supporting process pipe." 25 N.J.R. 1513 (emphasis added). The DCA included the foundation clause in subsection (b)13 in response to a public comment that process equipment should include pipe support unit foundations.

The DCA stated that "[a]s part of the equipment, [pipe support units] are not part of the building, and are therefore not regulated by [N.J.A.C. 5:23], since [chapter 23] contains only requirements pertaining to buildings and structures." Id. at 1512. The DCA did not propose amending any other proposed language to include foundations as an exemption. As a result, we conclude that the term "foundation" is not implied elsewhere in N.J.A.C. 5:23-9.7(b). 769 Assocs., LLC, supra, 198 N.J. at 540. Rather, we interpret the absence of the term "foundation"

⁴ In re State Uniform Constr. Code as it applies to Mobil Oil Corp., Borough of Paulsboro & Twp. of Greenwich, Dep't of Cmty. Affairs (Aug. 20, 1991).

as an intentional omission, Scott, supra, slip op. at 8, and hold that a foundation, other than as articulated in subsection (b)13, is not exempt under N.J.A.C. 5:23-9.7.

Nevertheless, we conclude that the judge made insufficient findings regarding whether the main function of the foundation at issue receives loads from other than process equipment. This determination goes to the heart of plaintiff's contention that the foundation is considered process equipment because it is an integral part of the processing structure. Plaintiff's forensic engineer testified on direct examination as follows:

Q: Is there an exception t[hat] pipe racks . . . do not require construction permits?

A: [I]t's pipe racks that are attached to the building structure itself and supported by the building structure whose loads are then transferred to the soil.

Q: [W]hat do you mean by building structure components?

A: I'll use [plaintiff's facility] as an example. It's a large framed structure. . . . There's no separate pipe rack structure to hold them. Those . . . foundations that support those pipes through the building are not exempt from the [UCC].

. . .

Q: But other types of pipe racks and their supporting structures are not subject to the [UCC]; is that correct?

A: That is correct.

. . . .

Q: Where do the loads on process equipment piping . . . go? Do they go to the building structures?

A: No sir. They go directly to the foundation . . . or the concrete structure that supports the entire process equipment.

. . . .

Q: At [plaintiff's facility], can you estimate . . . the percentage of piping and process units that fall into the category of being attached to buildings?

A: [M]y estimation is less than one percent.

. . .

. . . .

Q: So the rest of those . . . process units[] have what kind of foundations underneath them, building foundations?

A: Oh, no, sir. These are the detailed design foundations that are designed by engineers to receive the loads placed on them by the process equipment and the piping [that is] associated with that equipment.

The witness estimated, therefore, that the loads from approximately ninety-nine percent of the "piping and process units" go to the foundation, not the building. In other words, his testimony tended to support plaintiff's argument that the foundation is an integral part of the processing structure.

Although the judge listened to the testimony about certain foundations that are either exempt or not exempt from the UCC,

she did not determine what type of foundation exists here. The distinction is important because foundations, as defined by subsection (b)13, are exempt from the UCC, but other foundations are not. The judge stated that

[s]ubsection 13 of 9.7(b) does talk about pipe racks, hangers[,] and the like, and indicates that the foundations are part of the definition of process equipment and, therefore, exempt, except when they transfer loads to other structures. . . .

Plaintiff is asking the [c]ourt to graft that provision and that reasoning concerning foundations of pipe racks to the situation at hand in this case which has to do with foundations of the process equipment, not pipe racks.

The judge determined that plaintiff's foundation pertains to "process equipment, not pipe racks." Subsection (b)13, however, classifies pipe racks as process equipment. In determining whether the foundation at issue is exempt from the UCC we direct the judge to address whether the pipe support units "transfer loads to structures whose main function is other than supporting process pipe," as that term is used in N.J.A.C. 5:23-9.7(b)13. In so doing, the judge will resolve whether the main purpose of the foundation at issue is to transfer loads from other than process equipment, and, as a result, she will be able to determine whether the foundation at issue is exempt from the UCC.

II.

Next, we briefly address plaintiff's contention that the judge erred by considering the UCC's public protection purposes in her interpretation of N.J.A.C. 5:23-9.7(a) and (b).

A court's interpretation of an administrative regulation must be "consistent with the intent and purpose of the statute" that the regulation implements. Calco Hotel Mgmt. Grp., Inc. v. Gike, 420 N.J. Super. 495, 504 (App. Div.) (holding that the regulation at issue "echoed" the statute's policy to protect the health, safety, and welfare of the public), certif. denied, 208 N.J. 600 (2011). The Legislature enacted the UCC, in part, "[t]o insure adequate maintenance of buildings and structures . . . and to adequately protect the health, safety[,] and welfare of the people." N.J.A.C. 5:23-1.3(a)5; Parks v. Rogers, 176 N.J. 491, 496 n.1 (2003).

Here, the judge noted that the UCC's "emphasis on . . . the health, safety[,] and welfare of the community" applied where the municipal inspector acted as a "second pair of eyes," or the only pair of eyes, to ensure "compliance with the drawings." We conclude that consideration of the UCC's public protection purposes is appropriate if the foundation at issue is other than a foundation as defined by N.J.S.A. 5:23-9.7(b)13.

III.

Finally, we address plaintiff's argument that municipal code enforcement and construction code officials lack the qualifications to inspect plaintiff's foundation for processing equipment. In general, a municipal inspector's duty involves reviewing whether the construction at issue complies with the design plans that an engineer provides to the inspector prior to commencing construction. As the judge stated:

Clearly in the testimony, the municipal inspector did not presume to put himself in the shoes of an engineer or to know more than the engineers or to subsume the[ir] work . . . , but outlined this more in terms of observing the construction and looking at it vis-à-vis the plans so that it was more . . . [about] the method of determining that there was compliance with the drawings.

Plaintiff's forensic engineer testified as follows:

Q: Do you have any knowledge as to what a municipal construction code official's role is in inspecting a foundation of a large apartment building like I described?

A: [H]is role is there to inspect and . . . review in order to ensure public safety.

Q: Is his role also, based on his inspections and observations, to make sure that what is built in the field conforms to the fully engineered plans that have been submitted?

A: I believe so.

. . . .

Q: So . . . [plaintiff's] engineer was looking over the shoulder of a municipal code official who had jurisdiction to be inspecting, correct?

A: I wouldn't use the term looking over the shoulder. Our field coordinators and engineers have drawings and they are making sure the contractor conforms to those drawings.

Q: Would you agree that that's exactly what a municipal code official does, looks at sealed . . . engineering drawings and makes observations to make sure that what is actually constructed in the field complies with those drawings?

A: I believe they do that, yeah.

Additionally, defendant's construction code official testified that

Q: How do you know what you're looking for in terms of [specification] details?

A: The signed and sealed drawings. . . . [W]hen I go to the job site[] . . . I am there to verify that the contractor is following what the design professional designed.

. . . .

Q: Do you have any formal training in terms of plan review?

. . . .

A: Yes

Q: Okay. D[id your licensure courses] involve instruction on how to review and interpret plans?

A: It did.

Construction code officials are tasked with ensuring compliance with design plans. Presuming that the UCC applies, there is no credible evidence on this record to suggest that they were unable to do so.

We remand for further proceedings consistent with this opinion. The judge may, in her discretion, re-open the plenary hearing to make the necessary findings of fact and conclusions of law regarding the type of foundation at issue and whether it is exempt under the UCC. Either party may file a new appeal from the developed record if warranted. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION