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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0001-16T3

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, COASTAL AND LAND USE COMPLIANCE AND ENFORCEMENT,

Petitioner-Respondent,

v.

JOHN BLEIMAIER and MARINA PUSHKAREVA,

Respondents-Appellants.

Argued December 12, 2017 – Decided March 28, 2018

Before Judges Fisher, Sumners and Moynihan.

On appeal from the Department of Environmental Protection.

John Kuhn Bleimaier argued the cause for pro se appellant.

Aaron A. Love, Deputy Attorney General, argued the cause for respondent (Gurbir S. Grewal, Attorney General, attorney; Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Aaron A. Love, on the brief).

PER CURIAM

Appellants John Bleimaier and Marina Pushkareva appeal the July 20, 2016 final decision of the Commissioner of the Department of Environmental Protection (DEP) adopting the administrative law judge's grant of the DEP's cross-motion for summary decision and denial of appellants' motion for summary decision. The DEP issued an Administrative Order and Notice of Civil Administrative Penalty Assessment – after appellants filled and graded their delineated-flood-hazard-area property in Lawrence Township without a permit – directing appellants to restore the property to its prior condition and pay a $16,000 civil penalty.

Appellants contend in their merits brief:

> POINT I: THE DECISION OF THE DEP COMMISSIONER WAS UTTERLY ARBITRARY, CAPRICIOUS, [AND] UNREASONABLE.
>
> POINT II: IN ACCORDANCE WITH N.J.A.C. 7:13-2.4(a)(1) ONLY AN ALTERATION OF TOPOGRAPHY IS A REGULATORY EVENT REQUIRING AN APPLICATION TO [THE] DEP.
>
> POINT III: THE DEP MADE NO TECHNICAL FINDINGS AND PRESENTED NO TOPOGRAPHIC OR ENGINEERING EVIDENCE. [THE] DEP HAS NOT BORNE ITS BURDEN OF PROOF.
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> POINT IV: [THE] DEP BROUGHT NO EXPERTISE OR SPECIALIZED KNOWLEDGE TO BEAR IN THIS CASE.
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> POINT V: THE REPORT PREPARED BY THE HOMEOWNERS' LICENSED SURVEYOR SHOWS THAT THERE WAS NO CHANGE IN TOPOGRAPHY AS A RESULT OF THE HOMEOWNERS['] EROSION REMEDIATION AND THUS NO REGULATORY EVENT.

> POINT VI: IT IS IMPROPER TO IMPOSE A PENALTY IN THE ABSENCE OF CULPABILITY. THE DEP PENALTY HERE IS ARBITRARY, CAPRICIOUS [AND] UNREASONABLE.

> POINT VII: THE CONDUCT OF [THE] DEP IN THIS CASE HAS REPRESENTED A DENIAL OF CONSTITUTIONALLY MANDATED DUE PROCESS.

And they argue in their reply brief:

> POINT I: IN ORDER TO PUNISH A HOMEOWNER FOR THE PLACEMENT OF FILL WITHOUT A PERMIT THE DEP MUST SHOW THAT THERE HAS BEEN AN ALTERATION OF TOPOGRAPHY.

> POINT II: THE DEP EXERCISE OF DISCRETION HAS BEEN ARBITRARY AND CAPRICIOUS IN VIOLATION OF CONSTITUTIONAL PROTECTIONS.

> POINT III: THE APPELLANTS' OPPOSITION TO SUMMARY JUDGMENT BEFORE THE DEP COMMISSIONER WAS SUPPORTED BY AN AFFIDAVIT SIGNED BY THE HOMEOWNERS.

> POINT IV: THE APPELLATE DIVISION REVIEWS THE DECISION OF THE DEP COMMISSIONER DE NOVO. IT IS APPROPRIATE TO VACATE THE JUDGMENT IN THE AGENCY'S FAVOR AND GRANT THE APPELLANTS' MOTION FOR SUMMARY JUDGMENT IN LIGHT OF THE FACTS PRESENTED.

> POINT V: THE INTRODUCTION OF FILL DOES NOT REQUIRE A PERMIT IN THE ABSENCE OF [AN] ALTERATION OF TOPOGRAPHY, EVEN WITHIN A FLOOD HAZARD AREA OR A RIPARIAN ZONE.

> POINT VI: FEDERAL LEGISLATION PREEMPTS AND IS INCONSISTENT WITH THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION'S POSITION IN THIS CASE (NOT RAISED BELOW).

We disagree with appellants' arguments and affirm.

The standard governing review of an agency's summary decision "under N.J.A.C. 1:1-12.5 is 'substantially the same as that governing a motion under Rule 4:46-2 for summary judgment in civil litigation.'" L.A. v. Bd. of Educ. of Trenton, 221 N.J. 192, 203 (2015) (quoting Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995)). "[A] court must ascertain 'whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.'" Id. at 204 (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995)). "A court is 'in no way bound by [an] agency's interpretation of a statute or its determination of a strictly legal issue.'" Ibid. (alteration in original) (quoting N.J. Div. of Youth & Family Servs. v. T.B., 207 N.J. 294, 302 (2011)). "Because an agency's determination on summary decision is a legal determination, our review is de novo." Ibid.

Appellants do not dispute that their property lies within a regulated flood hazard area – Shipetauken Creek. Nor do they dispute that they did not have a permit. Appellants argue they did not engage in a regulated activity because N.J.A.C. 7:13-2.4(a)(1) – which defines regulated activity, in pertinent part

as "[a]ny action that includes or results in . . . [t]he alteration of topography through . . . placement of fill" – does not prohibit homeowners from remediating erosion if they do not alter the preexisting topography. We reject that argument recognizing that although we are not bound by the agency's legal conclusions, Levine v. State, Dep't of Transp., 338 N.J. Super. 28, 32 (App. Div. 2001), "[a]n administrative agency's interpretation of statutes and regulations within its implementing and enforcing responsibility is ordinarily entitled to our deference," In re Appeal by Progressive Cas. Ins. Co., 307 N.J. Super. 93, 102 (App. Div. 1997).

When it was proposed, the comment to N.J.A.C. 7:13-2.4(a)(1) indicated the intention was "to clarify which activities are and are not regulated under" the rules promulgated pursuant to the Flood Hazard Area Control Act[1] (the Act), N.J.A.C. 7:13-1.1 to 19.2. 38 N.J.R. 3966 (Oct. 2, 2006). The comment specified regulated activities requiring a permit included "any topographic alteration, such as excavation, grading or the placement of fill." Ibid. (emphasis added) (commenting on N.J.A.C. 7:13-2.4). Under N.J.A.C. 7:13-1.2, "'fill' means to deposit or place material on the surface of the ground and/or under water. 'Fill' also means

[1] N.J.S.A. 58:16A-50 to -103.

the material being deposited or placed," and includes "earth" and "soil." N.J.A.C. 7:13-7.1, which permits "[n]ormal property maintenance," specifically excludes "[g]rading and other changes in topography" and "placement of fill." Another section of the rules authorizes "placement of no more than five cubic yards of landscaping material," which includes "stone, topsoil, woodchips, or other landscaping material." N.J.A.C. 7:13-7.7. Appellants' actions do not fall within these permitted activities.

The DEP's interpretation of the regulation – that any fill above the five-yard-limit that changes the existing topography requires a permit – is consistent with the rule's stated purpose and with the State's public interest declared when the Act was adopted, "that legislative action be taken to empower the [DEP] to delineate and mark flood hazard areas [and] to authorize the [DEP] to adopt land use regulations for the flood hazard area." N.J.S.A. 58:16A-50(b). The DEP sought to further those objectives by adopting regulations "governing human disturbance to the land and vegetation in . . . flood hazard area[s]," N.J.A.C. 7:13-1.1(a), in order to "minimize damage to life and property from flooding caused by development within flood hazard areas, to preserve the quality of surface waters, and to protect the wildlife and vegetation that exist within and depend upon such areas for sustenance and habitat," N.J.A.C. 7:13-1.1(c).

We therefore reject appellants' argument that they did not need a permit to remediate erosion if they did not alter the preexisting topography. Under appellants' theory, a landowner could place fill in a flood hazard area without a permit by picking an arbitrary period and claiming she or he was simply restoring the topography that existed at that time. That interpretation contravenes both the logical agency interpretation and the purpose of the Act. Further, we agree with the ALJ's finding that appellants' "claim that the fill did not change the topography from what it may have been prior to [the date fill was first observed being placed in the flood zone] is unsupported by any meaningful evidence."

We also reject appellants' contention that the DEP's proofs failed due to the lack of expert testimony. The signed certifications of Lawrence Township Engineer James F. Parvesse[2] and DEP Senior Environmental Specialist Michael D. Palmquist[3] provided sufficient evidence.

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[2] Parvesse set forth his education and experience in his certification: he received a Bachelor of Science degree in civil engineering and – as of February 2012 – was a licensed professional engineer, a certified municipal engineer, and had served as the township engineer for four years.

[3] Palmquist's February 2012 certification recited that he received a Bachelor of Science degree in geo-environmental science, and had been a senior environmental specialist in the Bureau of Coastal and Land Use Compliance & Enforcement since July 2007.

Parvesse visited the property on April 8, 2010, and observed "multiple piles of fill around the front, sides, and rear of the residence that appeared to have been recently dumped, but not yet spread or graded" and "a layer of fill covering a large area in the rear yard" the depth of which he estimated to be at least twelve inches at the center; truck-tire ruts – approximately eight inches deep – were visible in one of the loads of "newly-spread fill" in the rear yard. He also noticed "fill had been spread back into the woods adjacent to a tributary to . . . Shipetaukin Creek." A bulldozer was present on the property. He saw "two double-axle dump trucks" – estimated by Parvesse to have an approximate ten-cubic-yard capacity – empty their full loads onto the rear of the property in his presence. Parvesse also spoke with a woman who claimed to be "the [property] owners' daughter," who stated "it was her idea to have the fill delivered and spread on the property, and that she 'had no idea' that she needed a permit."

During Palmquist's site inspection on November 30, 2010, he measured a "largely bare and unvegetated" filled area behind the residence – approximately 175 feet by 180 feet – which he estimated to be twelve inches deep. He calculated the volume of that fill to be 1166 cubic yards; his calculation did not include areas of fill in the front and side yards of the residence because the

volume of fill in the rear yard exceeded the "maximum threshold for fill volume in the 'seriousness' matrix."

This competent evidence proved that well over the five-cubic-yard maximum of fill was placed and graded without a permit in the flood zone, altering the topography of appellants' property, justifying the summary decision in favor of the DEP.

We see no merit to appellants' claim that the penalty imposed was arbitrary and capricious because it was based on an "almost unconstitutionally vague formula." "[A]ppellate review of an agency's choice of sanction is limited." In re License Issued to Zahl, 186 N.J. 341, 353 (2006). "Courts generally afford substantial deference to the actions of administrative agencies . . . ." Ibid. "Deference is appropriate because of the 'expertise and superior knowledge' of agencies in their specialized fields and because agencies are executive actors." Ibid. (quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)).

> In exercising . . . authority to alter a sanction imposed by an administrative agency, the [c]ourt can do so only when necessary to bring the agency's action into conformity with its delegated authority. The [c]ourt has no power to act independently as an administrative tribunal or to substitute its judgment for that of the agency. It can interpose its views only where it is satisfied that the agency has mistakenly exercised its discretion or misperceived its own statutory authority.

[In re License of Polk, 90 N.J. 550, 578 (1982).]

"[T]he test in reviewing administrative sanctions is 'whether such punishment is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness."'" Ibid. (quoting Pell v. Bd. of Educ., 313 N.E.2d 321, 327 (N.Y. 1974)).

The penalty – sanctioned by statute, N.J.S.A. 58:16A-63 – followed the established penalty matrix and considered the type of violation, the conduct of appellant, the seriousness of the violation and the duration of the violation.[4] The DEP determined appellants did not, by filling without a permit, intend to violate the Act; but found it foreseeable that appellants' actions would require a permit. The amount of fill – not including that placed in the rear and side yards – exceeded the maximum volume of that part of the matrix assessing the seriousness of the violation. The DEP, in its discretion, decided not to sanction appellants for each of the 322 days of noncompliance; rather, it imposed a penalty for four days of violations, and imposed a total penalty of $16,000. We conclude the DEP was not arbitrary or capricious in imposing the penalty. We need not reach appellants' constitutional

[4] Palmquist's certification sets forth the method of calculation.

argument,[5] which, in any event, we deem without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). The penalty was not excessive – especially considering the maximum possible fine of $25,000 per day, N.J.S.A. 58:16A-63(d) – and thus did not offend the Eighth Amendment as argued by appellants.

We also determine the balance of appellants' arguments are similarly meritless. R. 2:11-3(e)(1)(E).

Appellants' expert's uncertified report and survey were correctly rejected. N.J.A.C. 1:1-12.4(a). The Commissioner also noted the expert's report

> was not based on knowledge of fill placed on the property and in fact stated that any amount of additional fill between 1997 and 2013 "could not be determined in the field due to the period of time which has elapsed since the fill was introduced." Even assuming that the report and survey had been authenticated, they do not controvert [the] DEP's visual and documentary evidence.

Appellants' unsigned affidavit was, likewise properly disallowed. N.J.A.C. 1:1-12.4(a).

The DEP did not impose a penalty for any violations related to the Freshwater Wetlands Protection Act (FWPA), N.J.S.A. 13:9B-

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[5] See Randolph Town Ctr., LP v. Cty. of Morris, 186 N.J. 78, 80 (2006) (stating, "[c]ourts should not reach a constitutional question unless its resolution is imperative to the disposition of litigation").

1 to -30, only the Flood Hazard Area Control Act — so the lack of evidence relating to the FWPA is of no consequence.

The DEP played no role in causing any delay in the resolution of this case; the delay was caused by the illness of the ALJ initially assigned to the case. In fact, during that time, the deputy attorney general, for the DEP, submitted several letters requesting a disposition on the motions. Appellants, who were not deprived of the use of their property and did not sustain any proven financial burden during the delay, have not shown a due process violation.

That the trucking company that delivered the fill was not charged is of no moment. Summary decision against appellants was still appropriate; the trucking company's actions did not abrogate appellants' liability.

Finally, we will not consider appellants' federal preemption argument raised for the first time in their reply brief. See Borough of Berlin v. Remington & Vernick Eng'rs, 337 N.J. Super. 590, 596 (App. Div. 2001) (stating, "[r]aising an issue for the first time in a reply brief is improper").

Affirmed.

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

CLERK OF THE APPELLATE DIVISION