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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1771-20

IN THE MATTTTER OF PETITION
FOR RULEMAKING TO AMEND
COASTAL ZONE MANAGEMENT
RULES, N.J.A.C. 7:7-4.16

Argued March 7, 2023 – Decided April 19, 2023

Before Judges Messano, Rose and Gummer.

On appeal from the New Jersey Department of
Environmental Protection.

Michael G. Sinkevich argued the cause for appellant
BaySide Shellfish, LLC (Lieberman Blecher &
Sinkevich, PC, attorneys; Stuart J. Lieberman, of
counsel; Michael G. Sinkevich and Zoe N. Ferguson,
on the briefs).

Kathrine M. Hunt, Deputy Attorney General, argued
the cause for respondent New Jersey Department of
Environmental Protection (Matthew J. Platkin,
Attorney General, attorney; Melissa H. Raksa,
Assistant Attorney General, of counsel; Kathrine M.
Hunt, on the brief).

PER CURIAM

BaySide Shellfish, LLC (BaySide) is a "green," sustainable shellfish aquaculture business located in Middle Township. The Water Supply Management Act defines aquaculture as

the propagation, rearing and subsequent harvesting of aquatic species in controlled or selected environments, and the subsequent processing, packaging and marketing, and shall include, but need not be limited to, activities to intervene in the rearing process to increase production such as stocking, feeding, transplanting, and providing for protection from predators. "Aquaculture" shall not include the construction of facilities and appurtenant structures that might otherwise be regulated pursuant to any State or federal law or regulation.

[N.J.S.A. 58:1A-3(i).]

BaySide's land-based operation consists of a hatchery and a nursery, generally accepted as the two initial necessary, symbiotic operations in shellfish aquaculture. BaySide conducts the third and final phase, known as the "grow-out phase," in the waters of the Great Sound in close proximity to its land-based operations pursuant a lease with the State of New Jersey.

In 2015, the Middle Township Zoning Board of Adjustment granted BaySide's principal variances pursuant to N.J.S.A. 40:55D-70(c) and (d) that permitted the construction of a building for "aquaculture operation[s] and retail use along with a residential second floor." The approval required BaySide to

secure all necessary permits from government agencies, including the New Jersey Department of Environmental Protection (DEP), before construction commenced.

N.J.A.C. 7:7-4.16, known as "permit-by-rule 16" (PBR 16), is a provision of DEP's Coastal Zone Management Rules, N.J.A.C. 7:7-1.1 to -29.10 (CZM Rules). As DEP explained in its final agency determination which we now review, the agency adopted emergency amendments to the CZM Rules in 2013 "in view of the significant adverse social, economic, and environmental impacts associated with Superstorm Sandy . . . and in support of the rebuilding and economic recovery of New Jersey's coastal areas in an expeditious and resilient manner." The 2013 amendments focused on New Jersey's hard clam and oyster aquaculture industry. To facilitate restoration of this industry and to encourage shellfish aquaculture activities, DEP amended the CZM Rules "to streamline the permitting process through the addition of three new permits-by-rule," including PBR 16, "and two new general permits-by-certification and other modifications to specifically address shellfish aquaculture."

In general, "[a]n activity that meets the requirements of a permit-by-rule may be conducted without prior [DEP] approval." N.J.A.C. 7:7-3.3(a).¹ With certain limitations not relevant here, PBR 16 presently authorizes only the "placement of land-based upwellers and raceways," structures used in the nursery stage of aquaculture.² N.J.A.C. 7:7-4.16(a). Other structures used in the initial "hatchery" phase of aquaculture, or that may serve other purposes consistent with the statutory definition of "aquaculture," such as structures associated with "the subsequent processing, packaging and marketing" of shellfish, however, are not within PBR 16's purview. N.J.S.A. 58:1A-3(i).

¹ DEP will issue permits-by-rule if the proposed "regulated development will cause only minimal adverse environmental impacts . . . and is in keeping with the legislative intent to protect and preserve the coastal area from inappropriate development." N.J.A.C. 7:7-3.2(b)(1). DEP requires a more rigorous process, an application for and issuance of an individual permit (IP) pursuant to the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 to -51, before approving regulated development that may cause more significant environmental impacts in DEP's opinion. See N.J.A.C. 7:7-23.6 (listing requirements for issuance of an IP).

² In its brief, DEP cites generally accepted secondary sources that describe an upweller as "cylinders or boxes in which seawater circulates and rises through the seed-mass, which is suspended in the cylinder, to provide a continuous source of plankton on which the seed clams or oysters feed," and, "[w]hen seeds reach a larger size, they can be placed in raceways that consist of shallow trays through which salt water flows horizontally, providing nutrients to the seeds."

We need not detail the enforcement proceedings DEP brought against BaySide for alleged violations in 2019. In January 2020, BaySide agreed to apply for an IP conditioned on a determination that its aquaculture operation was exempt from CAFRA's impervious cover limits. See N.J.A.C. 7:7-13.1(d)(5) (exempting aquaculture activities as defined in N.J.S.A 58:1A-3(i) from CAFRA's impervious cover and vegetative cover limits). DEP concluded BaySide's proposed construction did not fall within the aquaculture exemption and therefore was regulated by CAFRA's impervious cover limits. DEP reasoned that because BaySide's proposed structures, including its hatchery structures, were "regulated pursuant to . . . State . . . regulation," they were not within the definition of aquaculture pursuant to N.J.S.A. 58:1A-3(i).

BaySide applied for an IP and other permits to bring its aquaculture facility into compliance. DEP denied the application but granted BaySide's request for an adjudicatory hearing. We were advised that the matter is presently pending in the Office of Administrative Law.

In the interim, because PBR 16 permits structures used only in nursery operations, BaySide filed a petition to amend the regulation. BaySide contended it was financially unfeasible to conduct an existing, or establish a new, shellfish aquaculture business after CAFRA's enactment because owners

needed to obtain an IP to construct the hatchery portion or other aspects of their operation. In BaySide's case, its hatchery operation required two large sheds, two small sheds, and one 5,000-gallon water tank. BaySide's petition sought to amend PBR 16 to permit placement of "structures necessary" for all aquaculture activities, "including hatchery and nursery related operations combined with a single-family dwelling unit." Because of the need to closely monitor the hatchery operation at all hours, BaySide asserted permitting a small one-family residence atop the hatchery was reasonable.

DEP denied the petition, explaining it promulgates a PBR if it determines "the proposed activity will cause only minimal adverse environmental impacts when performed separately" and have "only minimal cumulative adverse environmental impacts." According to DEP, BaySide's proposed amendment "would add covered structures and single-family homes that reduce the pervious area of the site, effectively sealing the ground and preventing water absorption," and the "addition of other structures" beyond those permitted by PBR 16 "create[d] a high level of variability in both the individual and cumulative environmental impacts." DEP therefore "limited the activities authorized under PBR 16 to small-scale operations to ensure that

. . . operations authorized under the PBR would have minimal individual and cumulative impacts on the environment."

Although DEP acknowledged "it [was] generally possible to accommodate other structures as part of a shellfish aquaculture business with appropriate planning," it noted "[DEP's] review of site-specific conditions and the particular plan for siting of the proposed structures is necessary to enable [DEP] to determine whether the activities can be conducted, as proposed, without an inappropriate impact on the environment."

On appeal, BaySide argues DEP's denial of its rulemaking petition was arbitrary, capricious, and unreasonable because it violated CAFRA's express and implied legislative policies, and DEP's findings were not supported by substantial evidence in the record. In response, DEP generally argues the denial was reasonable, consistent with CAFRA and the CZM Rules, and supported by substantial evidence in the record.

Our review of an agency's denial of a rulemaking petition is generally limited to determining whether the agency's inaction is "arbitrary or capricious." In re State Bd. of Educ.'s Denial of Petition to Adopt Reguls. N.J. High Sch. Voter Registration Law, 422 N.J. Super. 521, 539 (App. Div. 2011) (citing In re Petition for Rulemaking N.J.A.C. 10:82-1.2 & 10.85-4.1, 117 N.J.

311, 324–28 (1989)). "Judicial review of agency regulations begins with a presumption that the regulations are both 'valid and reasonable.'" N.J. Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535, 548 (2012) (quoting N.J. Soc'y for Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 196 N.J. 366, 385 (2008)); see also Gillespie v. Dep't of Educ., 397 N.J. Super. 545, 549 (App. Div. 2008) ("In considering whether the regulation is ultra vires, we are guided by the well-established principle that a regulation adopted by an administrative agency pursuant to authority granted by the Legislature is entitled to a presumption of validity." (citing T.H. v. Div. of Developmental Disabilities, 189 N.J. 478, 490 (2007))).

"[W]e must give great deference to an agency's interpretation and implementation of its rules enforcing the statutes for which it is responsible." In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488–89 (2004) (citing In re Distrib. of Liquid Assets, 168 N.J. 1, 10–11 (2001)). "Such deference is appropriate because . . . 'agencies have the specialized expertise necessary to enact regulations dealing with technical matters and are "particularly well equipped to read . . . and to evaluate the factual and technical issues that . . . rulemaking would invite.'" Id. at 489 (quoting N.J. State League of Muns. v. Dep't of Cmty. Affs., 158 N.J. 211, 222 (1999)); see

also Equitable Life Mortg. & Realty Invs. v. N.J. Div. of Tax'n, 151 N.J. Super. 232, 238 (App. Div. 1977) ("Agency rulemaking is not a ministerial function but rather a highly discretionary undertaking."). "Courts can intervene only in those rare circumstances in which it is clear that the agency action is inconsistent with its mandate." In re Petition for Rulemaking, 117 N.J. at 325.

The Legislature enacted CAFRA "to protect the unique and fragile coastal zones of the State." In re Egg Harbor Assocs. (Bayshore Centre), 94 N.J. 358, 364 (1983). "[T]he Legislature intended to limit potential adverse environmental impacts while encouraging development of compatible land uses in the coastal zone." Hackensack Riverkeeper, Inc. v. N.J. Dep't of Env't Prot., 443 N.J. Super. 293, 309 (2015) (citing Seigel v. N.J. Dep't of Env't Prot., 395 N.J. Super. 604, 615 (App. Div. 2007)). "Thus, '[e]ach agency decision involving an application for development under CAFRA invokes these "competing policy considerations."'" Ibid. (alteration in original) (quoting Seigel, 395 N.J. Super. at 615).

PBR 16, which permits "the placement of land-based upwellers and raceways, including intakes and discharges," N.J.A.C. 7:7-4.16(a), is entirely

consistent with CAFRA and the regulatory authority granted to DEP. BaySide does not contend otherwise.

DEP's refusal to issue permits-by-rule for activity on regulated land that would potentially increase adverse environmental impacts is entirely within the enforcement authority delegated to the agency by the Legislature, which charged DEP to ensure "adequate environmental safeguards for the construction of any developments in the coastal area." N.J.S.A. 13:19-2. BaySide's proposed regulation, if approved as submitted, would permit without DEP approval the placement of "structures necessary for aquaculture activities including hatchery and nursery related operations combined with a single-family dwelling unit." DEP reasoned that not only could the proposed regulation result in the placement of structures with a range of potentially greater adverse environmental impacts, but also that it would "create a high level of variability."

Individual requests submitted under a revised PBR 16 could include not just hatchery operations but also shellfish retail and packaging operations, and not just a small single-family dwelling above a hatchery, as BaySide proposed, but also larger dwellings. Revising PBR 16 as proposed by BaySide would mean the regulation would apply to all submissions involving "aquaculture

activities." Although we might agree that BaySide's proposed regulation was consistent with some of DEP's goals expressed in the CZM Rules and CAFRA generally, the agency's decision to keep such a Pandora's Box closed was not an arbitrary or capricious violation of CAFRA's express or implied policies.

We also reject BaySide's corollary contention that DEP's decision lacked support in the record because neither CAFRA nor the CZM Rules permits DEP to require uniformity or lack of variability in the structures allowed by a PBR. BaySide essentially argues that any two upwellers or raceways may not be identical or have the same environmental impact on a site, and the adverse consequences of a small hatchery structure may be less than a nursery structure currently permitted under PBR 16. We acknowledge the point; during oral argument, we questioned whether DEP's decision to permit the placement of only nursery structures, and no other aquaculture structures, via a PBR was consistent with N.J.S.A. 58:1A-3(i). But BaySide fails to address how its proposed rule, which contained no limit on the number or size of "structures necessary for aquaculture activities" that could be placed on a site pursuant to a PBR, was consistent with CAFRA's goals.

We are in no position to second-guess DEP. We "recognize[] that 'agencies have the specialized expertise necessary to enact regulations dealing

with technical matters and are "particularly well equipped to read . . . and to evaluate the factual and technical issues that . . . rulemaking would invite.""

In re Freshwater Wetlands Prot. Act Rules, 180 N.J. at 489 (quoting N.J. State League of Muns., 158 N.J. at 222). We have "no power to act independently . . . or to substitute [our] judgment for that of the agency." Div. of Alcoholic Beverage Control v. Maynards, Inc., 192 N.J. 158, 183 (2007) (citing In re License Issued to Zahl, 186 N.J. 341, 354 (2006)).

We affirm DEP's denial of BaySide's rulemaking petition.

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



CLERK OF THE APPELLATE DIVISION