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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4016-15T4

PEG LEG WEBB, LLC,

Petitioner-Appellant,

v.

NEW JERSEY PINELANDS  
COMMISSION,

Respondent-Respondent.

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Submitted September 11, 2017 – Decided October 11, 2017

Before Judges Messano and O'Connor.

On appeal from New Jersey Pinelands  
Commission, Docket No. 1984-0454.003.

Gasiorowski & Holobinko attorneys for  
appellant (Mr. R.S. Gasiorowski, on the  
brief).

Christopher S. Porrino, Attorney General,  
attorney for respondent (Melissa Dutton  
Schaffer, Assistant Attorney General, of  
counsel; Timothy P. Malone, Deputy Attorney  
General, on the brief).

PER CURIAM

The Jackson Township Planning Board granted preliminary site plan approval on the application of petitioner Peg Leg Webb, LLC to build a resource extraction facility on its property. Respondent New Jersey Pinelands Commission (the Commission) "called up" or challenged that approval. An Administrative Law Judge approved the Commission's action and in its final decision, the Commission adopted the ALJ's decision. Petitioner appeals from the Commission's final decision. We affirm.

I

A

In 1978, Congress established the Pinelands National Reserve (Pinelands) in order to protect the ecology within the Pinelands. See Gardner v. N.J. Pinelands Comm'n, 125 N.J. 193, 198-200 (1991). The New Jersey Legislature enacted the Pinelands Protection Act (Act), N.J.S.A. 13:18A-1 to -29, which created the Pinelands Commission to regulate all development activity within the Pinelands. N.J.S.A. 13:18A-4 to -9, -27, -29; N.J.A.C. 7:50-8.1. The Commission is a political subdivision of the State. N.J.S.A. 13:18A-41.

As mandated by the National Parks and Recreation Act of 1978, 16 U.S.C. § 471i, the Commission developed a Comprehensive Management Plan (CMP or Plan), which is a set of regulations

that provide the minimum standards for development within the Pinelands. See N.J.A.C. 7:50-1.1 to -7:50-10.35. The objective of the CMP is "to promote orderly development of the Pinelands so as to preserve and protect the significant and unique natural, ecological, agricultural, archaeological, historical, scenic, cultural and recreational resources." N.J.A.C. 7:50-1.3. The Commission "bears the ultimate responsibility for implementing and enforcing the provisions of the [Act and the CMP]." N.J.A.C. 7:50-1.11.

No development can be approved within the Pinelands unless it conforms with the CMP.<sup>1</sup> In fact, it "shall be unlawful for any person to carry out any development in the Pinelands Area which does not conform to the minimum standards of [the] Plan." N.J.A.C. 7:50-1.4. Although the Commission retains the ultimate responsibility for enforcing the Act and the CMP, see N.J.A.C. 7:50-1.11, the Commission designated local governments as the "principal management entities" of the CMP. N.J.A.C. 7:50-3.1(a).

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<sup>1</sup> The Commission is authorized to waive strict compliance if such waiver is necessary to alleviate extraordinary hardship or to satisfy a compelling public need, is consistent with the purposes of the enabling legislation, and would not result in substantial impairment of the resources of the Pinelands. N.J.S.A. 13:18A-10(c).

Consistent with this task, local governments are not permitted to approve any application for development within the Pinelands that does not conform to the provisions of the CMP. N.J.S.A. 13:18A-10. In addition, each municipality with jurisdiction over land located within the Pinelands must ensure its ordinances conform to the minimum standards set forth in the CMP. N.J.A.C. 7:50-3.31. Moreover, the Commission must review such ordinances and certify those that are in compliance with the Plan. N.J.A.C. 7:50-3.1.

A municipality may grant an approval for development for any area in the municipality that is in the Pinelands, provided such approval is in "strict conformance" with the CMP and the certified ordinance. N.J.A.C. 7:50-3.38. If a municipality amends an ordinance, it shall not go into effect until the Commission either certifies the ordinance or determines the amendment does not affect its prior certification. N.J.A.C. 7:50-3.45(a). Further, no development is permitted in the Pinelands unless the municipality's approval of the development plan is reviewed by the Commission and found to be in conformance with the CMP. N.J.S.A. 13:18A-10(c); N.J.A.C. 7:50-4.2.

Briefly, the commission's executive director reviews an application for development and, if the application is complete,

issues a certificate of filing. At that point, an applicant may file and a municipality may consider an application for development. If a municipality approves a preliminary site plan, the municipality must notify the Commission. N.J.A.C. 7:50-4.35(d).

The executive director then reviews the preliminary site plan. N.J.A.C. 7:50-4.37(a), -4.38(a), and -4.40(a). If the "the grant of preliminary approval raises substantial issues with respect to the conformance of the proposed development with the minimum standards of [the] Plan", the executive director shall "call up" the municipality's approval for a review by the Commission. N.J.A.C. 7:50-4.37(a), -4.38(a); see also Matter of Petition of South Jersey Gas Co., 447 N.J. Super. 459, 476 (App. Div. 2016). If the Commission disapproves of a preliminary approval, the municipality must revoke such approval and deny the application. N.J.A.C. 7:50-4.38 (d)(1).

B

The facts are undisputed. In 2003, a task force within the Commission recommended portions of Jackson Township be rezoned from "Rural Development" (RD) to "Forest Area" (FA). Resource extraction operations are not permitted in the FA zone but are permitted, as a conditional use, in the RD zone.

Consistent with the task force's recommendation, in 2005, Jackson Township adopted zoning ordinance 06-05, which rezoned certain property within the municipality from RD to FA. The property that was rezoned is also located in the Pinelands. The Commission subsequently certified this ordinance as conforming to the CMP; this action was not appealed.

The owner of certain property rezoned as FA filed an action in lieu of prerogative writs in the Law Division, challenging the rezoning of his property from RD to FA. The Commission was not a party to this action. While that matter was pending in the Law Division, in 2006, petitioner acquired the property. In 2007, the court found the ordinance procedurally defective as applied to such property, invalidating the rezoning of such property from RD to FA.

Specifically, the court found petitioner's predecessor in interest had not been afforded notice of the proposal to rezone his property, and the Jackson Township Planning Board (Planning Board) had not properly considered whether the rezoning of such property was substantially consistent with the municipality's master plan, see N.J.S.A. 40:55D-62. The court ordered the municipality and its Planning Board to determine whether to rezone the property and, if they determined to do so, to provide proper notice to all interested parties. The municipality did

not take any action until 2013, when it adopted ordinance 14-13, which readopted ordinance 06-05. In the interim, the local zoning map continued to show the property was in the FA zone.

In 2009, petitioner, determined to build a resource extraction facility on its property, provided the Commission with a copy of the application it intended to file with the Planning Board for site plan approval. The Commission issued a certificate of filing, but advised petitioner the property on which it planned to build the extraction resource operation was in the Forest Area of the Pinelands and was not a permitted use.

Notwithstanding, in 2011, petitioner submitted an application for preliminary major site plan approval for the proposed operation to the Planning Board. In 2012, the Planning Board, which assumed the property was in the RD zone as a result of the court's decision, granted preliminary approval. However, the Planning Board conditioned its approval upon petitioner not receiving a call up letter from the Commission.

The executive director promptly reviewed and determined to call up the approval, notifying petitioner the approval raised substantial issues whether the proposed operation conformed to the CMP, and further advised the Commission would be reviewing the proposed development. Petitioner requested a hearing, and

the matter was transferred to the Office of Administrative Law and assigned to an ALJ.

After the parties filed competing motions for summary decision, the ALJ issued an initial decision finding in favor of the Commission. In a lengthy opinion, the Commission adopted the ALJ's initial decision, finding the executive director's determination to call up the preliminary approval was correct because the approval raised substantial issues about the approval's conformance with the CMP.

Citing N.J.S.A. 13:18A-10(c), the Commission concluded the executive director's determination was governed by the CMP and not a local ordinance, which cannot modify the CMP. The Commission further observed the "land capability map," which depicts the different areas of land use within the Pinelands and is deemed part of the CMP, cannot be altered except in accordance with the regulations governing the Pinelands, which did not occur in this matter.

The Commission acknowledged the court's decision invalidated ordinance 06-05, but determined such decision did not change the designation of the subject property from RD to FA on the CMP's land capability map. Accordingly, the Commission continued to recognize the subject area as being in the FA zone.



Further, as the ordinance was inconsistent with the land capability map, the court's invalidation of 06-05 put the municipality out of compliance with the CMP. Thus, the municipality was obligated to take the steps necessary to correct its non-compliance by either passing an ordinance readopting 06-05 or applying to the Commission for certification of the ordinance that governed the subject property before 06-05 was adopted.

In conclusion, because the subject property was within the Forest Area of the land capability map and resource extraction operations are not a permitted use in such area, the Commission found the executive director correctly determined the municipality's preliminary approval of the proposed site plan did not conform to the minimum standards of the CMP. The director was required to determine whether a municipality's approval is in compliance with the CMP, not a local ordinance. Thus, it was appropriate for the executive director to find the municipality's preliminary approval "raised substantial issues whether the proposed operation conformed to the CMP," and to refer the matter to the Commission for review of the proposed development.

II

On appeal, petitioner's principal contention is the subject property was, by virtue of the court's decision, in the RD zone when petitioner submitted and the municipality issued its preliminary approval for the application, because the ordinance in effect after 06-05 was invalidated put the subject property in this zone. Thus, petitioner maintains, it was improper for the executive director to call up the municipality's approval.

In support of its premise, petitioner relies upon N.J.S.A. 40:55D-10.5 of the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163. N.J.S.A. 40:55D-10.5 provides:

Notwithstanding any provision of law to the contrary, those development regulations which are in effect on the date of submission of an application for development shall govern the review of that application for development and any decision made with regard to that application for development. Any provisions of an ordinance, except those relating to health and public safety, that are adopted subsequent to the date of submission of an application for development, shall not be applicable to that application for development.

[Ibid.]

Our role in reviewing an administrative agency's decision is limited. Pub. Serv. Elec. & Gas Co. v. N.J. Dep't of Env'tl. Prot., 101 N.J. 95, 103 (1985). We will not reverse the agency's decision unless: (1) it was arbitrary, capricious, or

unreasonable; (2) it violated express or implied legislative policies; (3) it offended the State or Federal Constitution; or (4) the findings upon which the decision was based were not supported by substantial, credible evidence in the record. Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dep't of Env'tl. Prot., 191 N.J. 38, 48-49 (2007).

Having considered the record and petitioner's arguments on appeal, we affirm the Commission's final decision essentially for the same reasons set forth in its thorough and comprehensive opinion. R. 2:11-3(e)(1)(D). We make only the following brief comments.

Our Legislature has made clear the Act and the regulations promulgated under it supersede the MLUL. See N.J.S.A. 13:18A-27; see also Uncle v. N.J. Pinelands Comm'n, 275 N.J. Super. 82, 90 (App. Div. 1994). To the extent the Act and these regulations are inconsistent with the MLUL, the former prevail. Petitioner argues its property was in the RD zone when it submitted and the Planning Board issued its decision on application. However, that ordinance was not in compliance with the CMP, and the CMP trumps the ordinance. Therefore, it was appropriate for the executive director to call up the municipality's approval of petitioner's application.

We have considered petitioner's remaining arguments and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION