Bi-County Development Corp. v. New Jersey Dep't of Environmental Protection

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Submitted September 28, 2010

Before Judges Carchman, Messano, and Waugh.

Bi-County Development Corporation (Bi-County) appeals the administrative action of the Department of Environmental Protection (DEP) declining to amend certain regulations previously adopted by DEP pursuant to the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 to -30 (Wetlands Act). We affirm.

I.

Among its many provisions, the Wetlands Act regulates activities within an "area of land adjacent to a freshwater wetland which minimizes adverse impacts on the wetland or serves as an integral component of the wetlands ecosystem." N.J.S.A. 13:9B-3; N.J.S.A. 13:9B-17. Known as "transition areas," these lands serve as "habitat area[s] for activities such as breeding, spawning, nesting and wintering for migrating, endangered, commercially and recreationally important wildlife." N.J.A.C. 7:7A-2.5(b)(2). They also provide a "buffer area to keep human activities at a distance from freshwater wetlands, thus reducing the impact of noise, traffic, and other direct and indirect human impacts on freshwater wetlands species." N.J.A.C. 7:7A- 2.5(b)(5). The amount of land designated as a transition area varies depending on the classification of the adjacent wetlands, which can be characterized as of "exceptional resource value," "intermediate resource value," or "ordinary resource value."

N.J.A.C. 7:7A-2.5(c)-(e).

In July 2009, Bi-County submitted a petition for rulemaking pursuant to N.J.S.A. 52:14B-4(f) and N.J.A.C. 1:30-4.1, requesting four amendments to three sections of the Wetlands Act regulations pertaining to how the agency determines the classification of wetlands. Through the proposed amendments, Bi-County sought to require DEP to consider potential future developments adjacent to wetlands, specifically whether such potential future development plans predicted whether the areas being classified would remain a suitable habitat for threatened or endangered species for the foreseeable future. Bi-County asserted that DEP's failure to take future development into account burdened developers with additional costs and infringed on the ability of municipalities to comply with their constitutionally mandated affordable housing obligations.

Bi-County first requested that DEP amend the definition of "[d]ocumented habitat for threatened or endangered species,"

N.J.A.C. 7:7A-1.4, by adding the following underlined text:

2. The Department makes the finding that the area remains suitable for use by the specific documented threatened or endangered species during the normal period(s) the species would use the habitat. The phrase "remains suitable for use" shall mean that the area is suitable for breeding, resting or feeding by the specific documented threatened or endangered species during the normal period a species would use the habitat and will remain suitable for such uses taking into consideration and assuming development of adjacent and surrounding lands consistent with applicable zoning.

Bi-County next requested that N.J.A.C. 7:7A-2.4,

"[c]lassification of freshwater wetlands by resource value," be amended to add further specifications to section (b), which governs the determination of whether a wetland would be deemed an "exceptional resource value." The proposed language is underlined:

3. Is a documented habitat for threatened or endangered species, and which remains suitable for breeding, resting or feeding by the species during the normal period these species would use the habitat. In making a determination of whether a documented habitat for threatened or endangered species remains suitable for breeding, resting or feeding by the species during the normal period the species would use the habitat, [DEP] shall evaluate the future viability of the documented habitat taking into consideration existing development of the surrounding area, potential future development of adjacent and surrounding lands consistent with applicable zoning, and potential future development of adjacent and surrounding lands consistent with valid development approvals. The documented habitat shall not remain suitable for breeding, resting, or feeding by the documented threatened or endangered species if [DEP] determines that the factors identified in the preceding sentence are likely to result in the long term loss of one or more habitat requirements of the specific documented threatened or endangered species.

Bi-County's third proposed addition was to "clarify[] factors that may be used by an applicant to demonstrate the long term loss of one or more habitat requirements of a specific documented threatened or endangered species." N.J.A.C. 7:7A- 2.4(c) states that DEP "identifies present or documented habitat for threatened or endangered species . . . using the Landscape Project method, which focuses on habitat areas required to support local populations of threatened or endangered wildlife species." The regulation allows individuals to "request that a documented habitat not result in the classification of a freshwater wetland as a freshwater wetland of exceptional resource value." Individuals making such a request must demonstrate the long-term loss of one or more habitat requirements of the threatened or endangered species. Bi-County sought to have the following

language added:

In the context of this review, the [DEP] shall take into consideration, among other things, existing development of the surrounding area, potential future development of the adjacent and surrounding lands consistent with applicable zoning, and potential future development of adjacent and surrounding lands consistent with valid development approvals.

Finally, Bi-County sought to add language to N.J.A.C. 7:7A- 3.6, concerning the "[e]ffect, duration, and extension of a letter of interpretation," that would allow DEP to amend a freshwater wetland Letter of Interpretation (LOI) resource value classification. N.J.A.C. 7:7A-3.6(a) permits an individual to rely on a LOI for a five-year period following its issuance, unless that LOI was based on inaccurate or incomplete information. The rule authorizes DEP to correct the resource classification when additional wetlands are identified or a threatened or endangered species is discovered. Bi-County sought the inclusion of additional circumstances that would warrant a correction, suggesting the following language:

[O]r if it is determined after the LOI was issued that a threatened or endangered species habitat no longer or will no longer remain suitable for use for the documented threatened or endangered species based on development that has taken place, development approvals that have been issued for development adjacent to the freshwater wetland that is the subject of the LOI, or potential future development of adjacent and surrounding lands consistent with applicable zoning, the [DEP] may correct the LOI resource value classification by changing the resource value classification from exceptional resource value to intermediate resource value or ordinary resource value.

The petition argued that the proposed amendments were "consistent with the Legislature's intent under the [Wetlands Act] of not only protecting wetlands, but also of balancing those protections with the public's interest in development activity," as set forth in N.J.S.A. 13:9B-2. The petition also argued that "an exceptional resource value classification significantly impacts the design of a development proposal" and "has ramifications in the context of the State's effort to satisfy the constitutional mandate of providing housing for low and moderate income families," as construed in the Mount Laurel cases,[1] the Fair Housing Act of 1985, N.J.S.A. 52:27D-301 to - 329.19, and regulations adopted by the Council on Affordable Housing.

DEP published a notice of receipt of the petition in the New Jersey Register. 41 N.J.R. 3319(b) (Sept. 8, 2009). It denied the petition on September 18, 2009. 41 N.J.R. 3964(a) (Oct. 19, 2009).

DEP concluded that adding language requiring the consideration of potential future development for the purposes of classifying wetlands is essentially asking that the rule redefine the statutory term "remains suitable" as "will remain suitable." The [Wetlands Act] contemplates determining, for purposes of wetlands resource value classification, whether a wetland is present habitat for a particular threatened or endangered species or whether the wetland is a documented habitat that

remains suitable for breeding, resting, or feeding by the species during the normal period the species would use the habitat. The statute requires that, in order for a habitat to be considered a documented habitat, the Department must make a finding that the habitat remains suitable for use by the specific documented species. See N.J.S.A. 13:9B-7a(2). These statutory provisions are framed in the present tense and necessarily require the evaluation of threatened or endangered species habitat to be made based on conditions existing at the time the classification determination is made. The [Wetlands Act] does not require a finding that the habitat will remain viable into the future. Rather, the statute intends that the integrity of an existing wetland classified as exceptional resource value, and by implication also the suitability as habitat of that wetland, will be protected into the future by imposition of a 150-foot-wide transition area around the wetland. See N.J.S.A. 13:9B-16. Consequently, consideration of the potential impact(s) to the wetland habitat of future development in accordance with applicable zoning and whether those potential impacts will cause "long-term" losses of the required wetland habitat features for breeding, resting, or feeding is irrelevant and inconsistent with the mandate of the [Wetlands Act].

It would not be useful to evaluate the viability of documented habitat by taking into consideration potential future development of adjacent and surrounding lands consistent with applicable zoning and development approvals because current zoning is not necessarily an accurate predictor of future development. Pursuant to the Municipal Land Use Law, Master Plans and development regulations are to be reexamined every six years (N.J.S.A. 40:55D-89). In addition, zoning and local review may result in overlay zones (areas zoned for a certain density but allowing an alternative density if certain design criteria are met), variances, clustering provisions, conditional uses, and other tools used by local governments to provide flexibility to property owners. Also, State and local open space programs can result in conservation of property previously zoned for development. In determining the resource classification of a wetland based on threatened and/or endangered species habitat, the Department does consider the impacts of existing development in the surrounding area when it assesses the suitability of documented habitat but it does not try to predict potential future development or the impacts to habitat that may result from it as they are too uncertain.

[41 N.J.R. 3964(a) (Oct. 19, 2009).]

While acknowledging Bi-County's concerns with respect to landowners and developers, DEP found that

The [Wetlands Act] establishes a public policy to protect freshwater wetlands from random or unnecessary disturbance, provides that the [Wetlands Act] shall be the only State law for wetland regulation, and in certain instances requires an applicant to demonstrate that it cannot reasonably obtain a municipal zoning change to pursue a development proposed to disturb freshwater wetlands. Relying on current municipal zoning to establish freshwater wetland classifications would not be consistent with these goals and standards.

[Ibid.]

With respect to affordable housing DEP concluded that

[t]he existing rules reflect a balancing of the need to protect the health and welfare of current and future residents of the State through a clean and safe environment, with the need to provide infrastructure, housing and services for those residents. Townships use a variety of mechanisms to satisfy their affordable housing obligations. . . . The "Substantive Rules of the New Jersey Council on Affordable Housing for the Period Beginning June 2, 2008," state that "[s]ites designated to produce affordable housing shall conform to the State Development and Redevelopment Plan and shall be in compliance with the rules and regulations of all agencies with jurisdiction over the site including . . . sites within the areas of the State regulated by the . . . Land Use Regulation Division of the DEP . . ." (See N.J.A.C. 5:97-3.13(b)(3).) Further, the [Wetlands Act] rules contain several wetland transition area provisions, for example, averaging of wetland transition area widths, to help an applicant accommodate housing on a site (see N.J.A.C. 7:7A-6, Transition Area Waivers).

[Ibid.]

DEP noted that

[t]he phrase "remains suitable" is used in the context of ascertaining whether existing areas that are documented by the Department as habitats, using the Landscape Map methodology, continue to contain the components of suitable habitat at the time of review. This analysis is required because the landscape mapping is based on conditions at a given point in time, whereas habitats are dynamic and change over time. The FWPA states that a habitat shall be considered documented if the Department makes a finding that the habitat remains suitable for use by the specific documented threatened or endangered species. (See N.J.S.A. 13:9B-7a(2).) The Department considers that documented habitat is habitat designated as 3, 4 or 5 on the landscape maps because of past evidence of use for breeding, nesting or feeding, and that such habitat remains suitable if it presently contains the required habitat features for breeding, nesting or feeding. Department staff perform a habitat assessment to determine whether, under current conditions, the habitat remains suitable for the particular species documented by the landscape mapping. The petitioner is essentially asking the Department to assume that any future development contemplated adjacent to the currently identified habitat will necessarily render the habitat unsuitable and so the wetland should not be classified or protected as exceptional resource value at the present time. However, as explained above, this is inconsistent with the [Wetlands Act].

With respect to the proposal concerning the amendment of LOIs in light of development, DEP concluded that

the paramount objective of the [Wetlands Act] is protection and conservation of existing wetlands,

and in particular exceptional resource value wetlands. Consequently, the Department cannot base its determination of habitat suitability on speculative future impacts. The LOI process affords applicants the opportunity to provide all relevant information related to endangered and/or threatened species at the time of application, as well as subsequently should conditions change such that the applicant can demonstrate the wetlands classification is no longer accurate because the habitat has in fact been rendered not suitable.

[Ibid.]

This appeal followed.

II.

"The judicial capacity to review administrative agency decisions is limited." Brady v. Bd. of Review, 152 N.J. 197, 210 (1997). Generally, we will "intervene only in those rare circumstances in which an agency action is clearly inconsistent with its statutory mission or with other State policy." George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 27 (1994). Only if the agency's action was arbitrary, capricious, or unreasonable should it be disturbed. Brady, supra, 152 N.J. at 210.

"It is well-settled that '[a]dministrative regulations cannot alter the terms of a legislative enactment nor can they frustrate the policy embodied in [a] statute.'" N.J. Ass'n of Realtors v. N.J. Dep't of Envtl. Prot., 367 N.J. Super. 154, 159 (App. Div. 2004) (quoting In re Freshwater Wetlands Prot. Act Rules, N.J.A.C. 7:7A-1.1 et seq., 238 N.J. Super. 516, 526, (App. Div. 1989) (citation omitted)).

When an appellate court reviews an "agency's interpretation of statutes within its scope of authority and its adoption of rules implementing its enabling statutes, [it] afford[s] the agency great deference." N.J. Soc'y for the Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 196 N.J. 366, 385 (2008); In re Agric., Aquacultural & Horticultural Water Usage Certification Rules, N.J.A.C. 7:20A-1.1 et seq. 410 N.J. Super. 209, 222 (App. Div. 2009); see also TAC Assocs. v. N.J. Dep't of Envtl. Prot., 202 N.J. 533, 541 (2010) ("[I]nterpretations of the statute and cognate enactments by agencies empowered to enforce them are given substantial deference in the context of statutory interpretation.").

The Supreme Court has found that "[s]uch deference is appropriate because it recognizes 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. 478, 489 (2004) (internal quotation marks and citations omitted).

After reviewing the record and the arguments presented by the parties, we conclude that DEP's reasons for denying Bi- County's petition for rulemaking are consistent with the purposes of the Wetlands Act and that the agency's action was not arbitrary, capricious, or unreasonable. We affirm

essentially for the reasons set forth by DEP in its decision denying the petition, adding only the following.

The gravamen of Bi-County's argument before DEP and on appeal is that the regulations at issue should be amended to require DEP to consider potential future development based upon local zoning. The Wetlands Act itself contains no specific requirement to that effect. Bi-County nevertheless argues that such was the Legislature's intent. It purports to find that intent articulated in the following language from N.J.S.A. 13:9B-7(a)(2):

A habitat shall be considered a documented habitat if the department makes a finding that the habitat remains suitable for use by the specific documented threatened and endangered species, based upon information available to it, including but not limited to, information submitted by an applicant for a freshwater wetlands permit.

DEP correctly interprets the statutory language as speaking to the present and not the future.

The weakness of Bi-County's argument is demonstrated by its own proposed amendment. It seeks to amend the definition of "[d]ocumented habitat for threatened or endangered species" in N.J.A.C. 7:7A-1.4 by adding the statutory language quoted in the previous paragraph and the phrase "and will remain suitable for such uses taking into consideration and assuming development of adjacent and surrounding lands consistent with applicable zoning." The additional language, which specifically speaks to the future, would not be needed if the statutory language itself spoke to the future, as Bi-County argues.

We also find no merit in Bi-County's argument that the proposed regulatory amendments are required to satisfy New Jersey's constitutionally mandated requirements concerning low- and moderate-income housing. See S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel I), 67 N.J. 151, appeal dismissed and cert. denied, 423 U.S. 808, 96 S.Ct. l8, 46 L. Ed. 2d 28 (l975), and S. Burlington NAACP v. Twp. of Mount Laurel, 92 N.J. 158, 218, 285 (1983) (Mount Laurel II). The Mount Laurel cases expressly recognize the importance of balancing the competing interests of preservation and development, but do not require departure from the requirements of the Wetlands Act. Mount Laurel I, supra, 67 N.J. at 186 (noting the Court's decision should not be read to "say that land use regulations should not take due account of ecological or environmental factors or problems"); Mount Laurel II, supra, 92 N.J. at 219 (reassuring that Mount Laurel is not designed to "sweep away all land use restrictions" and "[m]unicipalities consisting largely of conservation, agricultural, or environmentally sensitive areas will not be required to grow because of Mount Laurel.").

Affirmed.

1. Southern Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel I), 67 N.J. 151, appeal dismissed and cert.

denied, 423 U.S. 808, 96 S.Ct. l8, 46 L.Ed. 2d 28 (l975) and Southern Burlington County NAACP v. Twp. of Mount Laurel, 92 N.J. 158, 218, 285 (1983) (Mount Laurel II).