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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2017-05T1

SARA A. VOGEL,

Petitioner-Appellant,

v.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
LAND USE REGULATION,

Respondent.

Argued January 24, 2007 – Decided: June 25, 2007

Before Judges A. A. Rodríguez and Collester.

On appeal from a final administrative action of New Jersey, Department of Environmental Protection, Land Use Regulation, ESA-6376-04.

Kevin J. Coakley argued the cause for appellant (Connell Foley, attorneys; Mr. Coakley, of counsel; Agnes Antonian, on the brief).

Lisa G. Daglis argued the cause for respondent (Stuart Rabner, Attorney General, attorney; Patrick DeAlmeida, Assistant Deputy Attorney General, of counsel; Randall Pease, Deputy Attorney General, on the brief).

PER CURIAM

Petitioner, Sara A. Vogel, applied for a general permit pursuant to the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 to -21, to construct a single-family home on property that she owns in Long Beach Township, which is designated as Lot 1.05, Block 20.121. The staff of New Jersey Department of Environmental Protection (NJDEP) denied the permit application.

Petitioner requested that the matter be referred to an Administrative Law Judge (ALJ) for a contested case hearing. ALJ Joseph F. Fidler presided over the hearing. He heard the testimony of petitioner and her expert witnesses, David C. Roth, an environmental consultant, employed by Taylor, Weissman and Taylor as a Principal Soil Scientist and John L. Yoden, a Professional Engineer and Planner, who prepared the General Permit application. The NJDEP presented as its expert, Christopher Pike, an Assistant Geologist for NJDEP's Land Use Regulation Program. Judge Fidler issued an initial opinion upholding NJDEP's denial of the CAFRA General Permit application. Judge Fidler found that, in spite of the flat nature of the property, it is located entirely within a dune pursuant to N.J.A.C. 7:7E-3.16. The judge noted that the property "is not surrounded by dunes topography; rather, it is

surrounded by flat topography." Notwithstanding, the judge found that the entire property constituted a dune because,

> the property has a relatively constant slope from east to west and there is a steeper slope on the southern half of Lot 1.05 with the contour lines of this slope running from east to west and roughly perpendicular to the beach.

Petitioner filed timely exceptions. However, the NJDEP Commissioner adopted the findings and conclusion of Judge Fidler. The Commissioner wrote:

> N.J.A.C. 7:7E-3.16(a) defines a dune as follows:
>
> A dune is a wind or wave deposited or man-made formation of sand (mound or ridge), that lies generally parallel to, and landward of, the beach and the foot of the most inland dune slope. 'Dune' includes the foredune, secondary or tertiary dune ridges and mounds, and all landward dune ridges and mounds, as well as man-made dunes, where they exist.
>
> The regulations further clarify the definition of a dune as follows: "Formation of sand immediately adjacent to beaches that are stabilized by retaining structures, and/or snow fences, planted vegetation, and other measures are considered to be dunes regardless of the degree of modification of the dune by wind or wave action or disturbance by development." N.J.A.C. 7:7E-3.16(a)(1). Development is prohibited on dunes pursuant to N.J.A.C. 7:7E-3.16(b).
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> Petitioner argues in her exceptions that her property is not a dune under the definition set out in N.J.A.C. 7:7E-3.16. In support

> of this assertion, petitioner cites the definitions set out in N.J.A.C. 7:7-7.8(d). However, these definitions are limited "[f]or the purpose of this subparagraph" to define and distinguish different classes of dunes, some of which may be exempt from the dune regulations (N.J.A.C. 7:7E-3.16) when certain conditions are met. Petitioner does not argue and there is no evidence in this case that she is entitled to an exemption under N.J.A.C. 7:7-7.8(d)(1). Thus, the definition of a dune set out at N.J.A.C. 7:7E-3.16(a) applies in this case.
>
> ALJ Fidler correctly held that the subject lot is located entirely within a dune. The dune runs parallel to the ocean, and the landward slope entirely crosses the subject lot. This dune crests on the adjacent lot known as Lot 1.06, which is eastward and oceanward of Lot 1.05, and then slopes downward toward the ocean.
>
> A steeper slope exists on the southern edge of the subject lot. This slope initially runs roughly perpendicular to the ocean, but then curves to be roughly parallel to the beach a short distance to the south of the subject lot. Petitioner objects to ALJ Fidler's finding that this sand formation is a dune since it runs perpendicular to the ocean on the subject lot. However, a dune is defined as a sand formation that lies "generally parallel" to the beach. N.J.A.C. 7:7E-3.16(a). This definition does not require the sand formation to always run in a strictly uniform parallel line to the beach and does not limit examination of the dune to the portion which lies on a particular property. The record supports ALJ Fidler's finding that the lot is located entirely within a primary dune system.

Petitioner appeals to us contending that the findings and conclusions of the ALJ and the Commissioner's final decision are

arbitrary, capricious and unreasonable. Specifically, Vogel argues that "the ALJ's and the Commissioner's findings are contrary to the definition of a dune" because: (1) there is no mound or ridge that is generally parallel to the beach on the property; (2) there is no relatively steep landward slope on the property; (3) the property is not "immediately landward of an adjacent to the beach"; and (4) the property is not subject to "erosion and overtopping from high tides and waves during major coast storms." We are not persuaded by these arguments and, therefore, affirm.

When error is alleged in the factfinding of an administrative agency, the scope of appellate review is limited. We will only decide whether the findings made could reasonably have been reached on "sufficient" or "substantial" credible evidence present in the record, considering the proof as a whole. In re Taylor, 158 N.J. 644 (1999). We will not upset the ultimate determination of an agency unless shown that it was arbitrary, capricious or unreasonable, or that it violated legislative policies expressed or implied in the Act governing the agency. Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963); see Prado v. State, 186 N.J. 413, 427 (2006). The fundamental consideration "is that a court may not substitute its judgment for the expertise of an agency so long as that

action is statutorily authorized and not otherwise defective because arbitrary or unreasonable [or not supported by the record]." In re Distribution of Liquid Assets Upon Dissolution of the Union County Reg'l High Sch. Dist. No. 1, 168 N.J. 1, 10 (2001) (citations omitted). We give "due regard" to the ability of the factfinder to judge credibility. Ibid. Credibility is always for the factfinder to determine. Ferdinance v. Agric. Ins. Co. of Watertown, 22 N.J. 482, 492 (1956). Where an agency's expertise is a factor, we defer to that expertise. In re Taylor, supra, 158 N.J. at 659. We will defer to an agency's expertise, particularly in cases involving technical matters within the agency's special competence. See, e.g., In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 489 (2004). This deference is even stronger when the agency, like the NJDEP, "has been delegated discretion to determine the specialized and technical procedures for its tasks." Newark v. Natural Res. Council of Dep't of Envtl. Prot., 82 N.J. 530, 540, cert. denied, 449 U.S. 983, 101 S. Ct. 400, 66 L. Ed. 2d 245 (1980). Moreover,

> [w]hen an administrative agency interprets and applies a statute it is charged with administering in a manner that is reasonable, not arbitrary or capricious, and not contrary to the evident purpose of the statute, that interpretation should be upheld, irrespective of how the forum court

> would interpret the same statute in the absence of regulatory history.
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> [Blecker v. State, 323 N.J. Super. 434, 442 (App. Div. 1999) (citation omitted) (quoted in Reck v. Dir. Div. of Taxation, 345 N.J. Super. 443, 449 (App. Div. 2001), aff'd, 175 N.J. 54 (2002)).]

Applying that standard here, we conclude that an affirmance is warranted. The factfinder is the Commissioner whose expertise in this matter is entitled to deference. It is not our function to substitute our independent judgment on the facts for that of an administrative agency. In re Grossman, 127 N.J. Super. 13, 23 (App. Div.), certif. denied, 65 N.J. 292 (1974).

Affirmed.