SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4547-15T4

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, WATER COMPLIANCE AND ENFORCEMENT,

Petitioner-Respondent,

v.

CHEYENNE CORPORATION and CAYUSE, LLC, t/a WILD WEST CITY,

Respondents-Appellants.

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CHEYENNE CORPORATION and CAYSE, LLC, t/a WILD WEST CITY,

Petitioners-Appellants,

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, WATER ALLOCATION,

Respondent-Respondent.

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Submitted October 17, 2017 – Decided October 27, 2017

Before Judges Fisher and Fasciale.

On appeal from the New Jersey Department of Environmental Protection, Docket Nos. 130001-1904320 and 171221186.

Mary K. Benson, attorney for appellant.

Christopher S. Porrino, Attorney General, attorney for respondent (Mellisa H. Raksa, Assistant Attorney General, of counsel; Susan Savoca, Deputy Attorney General, and Melissa P. Abatemarco, Deputy Attorney General, on the brief).

PER CURIAM

Cheyenne Corporation (Cheyenne) and Cayuse, LLC (Cayuse), trading as Wild West City (WWC), a seasonal western theme park, appeals from a May 12, 2016 final agency decision by the New Jersey Department of Environmental Protection (NJDEP). The decision adopted an initial opinion by an administrative law judge (ALJ) granting NJDEP's motion for summary decision and directing WWC to re-designate or decommission its original water well; and denied WWC's motions for summary decision and a waiver request. We affirm.

Cayuse operates WWC, which is located on property owned by Cheyenne. WWC is open from May through mid-October. Since the 1950s, a well has provided potable water to employees and patrons. The well is located in a building on the highest point of the property and is five feet long, five feet wide, and five feet deep. The well casing is approximately one to three inches above

the cement floor.[1] The well is located approximately two-hundred feet from a septic system. WWC manages animal waste on site from livestock in the park. According to the NJDEP, little is known about the construction or structural integrity of the well, and WWC agrees that because "the well was constructed before well construction details were required[,] there are no records for this well on file with the State of New Jersey."

WWC monitored the well for total coliform each calendar quarter that the system provided water to the public. On October 21, 22, and 23, 2010, the well water tested positive for E. coli. In October 2010, NJDEP issued WWC a Notice of Non-Compliance, citing violations of the New Jersey Safe Drinking Water Act (SDWA), N.J.S.A. 58:12A-1 to -37. The notice required WWC to detail proposed or completed remedial measures.

WWC suggested several reasons for the October 2010 positive tests. WWC believed an animal may have burrowed into the well pit area and covered the bottom of the well pit with four to six inches of dirt. WWC also considered that the contamination might be due to nearby road construction, which may have contaminated the aquifer where the well is located.

[1] Current standards require well casings to be at least twelve inches above grade. N.J.A.C. 7:9D-2.3(b)(1).

In March 2011, WWC communicated with NJDEP about a corrective action plan. WWC agreed to: (1) extend the well casing, repair the leak in the distribution manifold, and replace the well seal; and (2) shock chlorinate the system to kill the E. coli bacteria. If the water samples were still positive for E. coli at that point, WWC stated it would "seek financing to dig a new well."

NJDEP approved the corrective action plan and required that two rounds of water samples be collected five days apart showing no chlorine residual in the well. NJDEP stated further that the conditions must be met by the time WWC opened for its 2011 season on April 30, 2011, or WWC would be required to "provide a new source of water or install [four-]log virus inactivation."

In April 2011, WWC repaired the leak in the distribution manifold and replaced the sanitary seal. WWC did not extend the well casing. In April 2011 and May 2011, WWC sampled the water, which tested negative for total coliform and E. coli. From March 2011 to May 2011, the water tested negative for total coliform and E. coli.

On May 2011, NJDEP permitted WWC to resume using the well for potable water. However, NJDEP required that WWC provide additional information on how it improved the well, on chlorination procedures, and NJDEP directed bi-weekly testing. NJDEP also implemented procedures to follow if the water tested positive for

E. coli, including the option to either install a new well or install permanent four-log disinfection treatment within 120 days. WWC agreed to these conditions.

In September 2011, a water sample from the well tested positive for total coliform and for E. coli. Less than two weeks later, another water sample tested negative for total coliform and E. coli, but a sample from the distribution system tested positive for both. As a result, WWC made available a temporary alternative water source (a water truck). WWC then asked NJDEP to consider the positive raw water sample as an "anomaly" because it had previously obtained negative testing samples, and Hurricane Irene may have affected the water sample. WWC suggested it could test the water weekly in lieu of other corrective actions.

In late September 2011, NJDEP rejected WWC's request and required WWC to comply with the imposed conditions, including either installing a new well or installing permanent four-log disinfection treatment. NJDEP further directed WWC to consult with NJDEP within thirty days as to whether to install a new well or to install four-log treatment on the existing well within 120 days.

In November 2011, WWC asked NJDEP to reconsider. NJDEP denied the request and required WWC to complete the necessary corrective action by January 2012. WWC also requested a variance pursuant

to N.J.S.A. 58:12A-5, so that it would not have to drill a new well or install the permanent four-log disinfection treatment in the original well. In February 2012, NJDEP issued WWC a Notice of Non-Compliance for failure to timely complete the corrective action.

In April 2012, WWC submitted a corrective action plan. WWC again requested the September 2011 positive water samples be invalidated, citing negative water samples and the storms occurring in that time period. NJDEP denied the repeated request to invalidate the September 2011 test results, directed WWC to disconnect the well within twenty-four hours and provide another source of potable water, and instructed WWC to submit a corrective action plan, as they agreed by April 13, 2012. WWC stated it had "no intention at present of disconnecting or discontinuing the use of our current well until we resolve this matter." WWC agreed to post at all bathrooms and sinks not to use the water, and stated it would make bottled water available.

In June 2012, WWC completed construction of a new well. That month, NJDEP informed WWC it could take steps to re-designate the original well for non-potable use. NJDEP informed WWC that if it did not complete the steps within thirty days, the original well would need to be decommissioned.

On September 25, 2012, WWC submitted a request pursuant to N.J.A.C. 7:1B to waive the decommissioning requirements in N.J.A.C. 7:9D-3.1. On the same day, NJDEP informed WWC its waiver request was incomplete and therefore would not be considered. WWC renewed its request to waive the requirements to decommission the original well, and in October 2012, NJDEP deemed the request complete. In April 2013, NJDEP denied the waiver request because it did not meet the requirements under N.J.A.C. 7:1B. WWC appealed the waiver denial and requested a hearing, and the matter was transmitted to the Office of Administrative Law (OAL).

On April 26, 2013, NJDEP issued an administrative order requiring WWC re-designate or decommission the original well. WWC then requested a hearing on the administrative order, and the matter was transmitted to the OAL. In June 2014, the OAL consolidated the matters.

The parties filed motions for summary decision. On December 31, 2015, the ALJ issued an initial decision granting NJDEP's motion for summary decision, and upholding NJDEP's denial of WWC's waiver request. The ALJ stated, "[t]he undisputed facts detail [a] series of events, which culminated in two instances of positive test samples for E. coli. . . . The preponderance of the credible evidence established no basis for concluding that [NJDEP] deviated from requiring the necessary corrective action consistent with its

legal obligation." The ALJ also found that WWC should re-designate the original well for non-potable use or decommission it, and that WWC's waiver request was properly denied. On May 12, 2016, the NJDEP Commissioner issued a final twenty-five page opinion adopting the ALJ's initial decision.

On appeal, WWC argues that (1) the findings of the ALJ and NJDEP are unsupported by the evidence; (2) NJDEP acted arbitrarily by ordering WWC to cease testing the original well, ignoring WWC's negative water-test results, and by concluding the original WWC well was unsafe; (3) NJDEP's strict interpretation of the corrective action plan was arbitrary, and violated WWC's right to due process of law; (4) the finding that WWC's well endangers the public health is unsupported by substantial evidence, and NJDEP arbitrarily denied WWC's waiver request; and (5) NJDEP violated the administrative procedure act.

We have "a limited role in reviewing a decision of an administrative agency." Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). "A strong presumption of reasonableness attaches to [an agency decision]." In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993), aff'd, 135 N.J. 306 (1994). We reverse an agency's decision only where it is arbitrary, capricious, unreasonable or unsupported by credible evidence in the record. Henry, supra, 81 N.J. at 579-80.

In reviewing whether an agency's action was arbitrary, capricious, or unreasonable, we consider:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [Mazza v. Bd. of Trs., Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995).]

An ALJ may grant a motion for summary decision "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). "Once the moving party presents sufficient evidence in support of the motion, the opposing party must proffer affidavits setting 'forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.'" Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995), (quoting N.J.A.C. 1:1-12.5(b)), certif. denied, 145 N.J. 372 (1996). The standard is essentially the same as the standard "governing a motion under Rule 4:46-2 for summary judgment in civil litigation." Ibid.

The SDWA, N.J.S.A. 58:12A-1 to -37, declares that "it is a paramount policy of the State to protect the purity of the water we drink and that [NJDEP] shall be empowered to promulgate and enforce regulations" related to drinking water. N.J.S.A. 58:12A-2. NJDEP accordingly adopted primary drinking water regulations that apply to public water systems and identify contaminants that may adversely affect public health, specify a maximum contaminant level (MCL) for each contaminant, and set criteria to ensure drinking water complies with the MCL. N.J.A.C. 7:10-5.3. NJDEP adopted the national primary drinking water regulations, 40 C.F.R. § 141, which includes analytical requirements for total coliform and E. coli. 40 C.F.R. § 141.21.

The SDWA authorizes NJDEP to enforce the drinking water requirements. N.J.S.A. 58:12A-4(c). N.J.S.A. 58:4A-4.2 also authorizes NJDEP to direct a well be sealed that is "not in use . . . or if it endangers life." NJDEP may order that any well be decommissioned which is abandoned, "has not been maintained in a condition that ensures protection from contamination for the subsurface and percolating waters of the State," is damaged, has been replaced by another well, or is contaminated, among other reasons. N.J.A.C. 7:9D-3.1(a).

Here, the undisputed credible evidence shows WWC's original well had two positive tests for E. coli over a one-year period.

NJDEP repeatedly tried to work with WWC, and allowed WWC to resume use of the well after the first E. coli incident. WWC never definitively found the cause of either incident. The record shows NJDEP repeatedly directed WWC to submit a corrective action plan after the second incident. Pursuant to the parties' agreement after the first incident, WWC was to drill a new well or install the permanent four-log disinfection system in the original well after a second incident of E. coli. WWC eventually chose to install a new well.

WWC argues that because most of the test results have been negative for total coliform and E. coli, and because the second E. coli incident could have been affected by Hurricane Irene, it should be able to resume use of the original well for potable use. WWC does not provide any credible proof that its well was submerged or otherwise directly affected by Hurricane Irene, but simply states that other nearby wells tested positive for E. coli and storms can cause these positive results. WWC's argument fails. NJDEP has the discretion to regulate public drinking water and to act in the interest of public safety. Although most of WWC's water sample tests were negative for E. coli, NJDEP had the discretionary power to require corrective action after the positive results. After two separate incidents of positive E. coli, NJDEP gave WWC options of installing a new well or installing

the necessary disinfection system. WWC does not dispute the two separate E. coli incidents.

We conclude NJDEP did not act arbitrarily or capriciously when denying the waiver request for decommissioning the well. NJDEP may "waive the strict compliance with any of its rules" in the case of "(1) [c]onflicting rules; (2) [t]he strict compliance with the rule would be unduly burdensome; (3) [a] net environmental benefit; or (4) [a] public emergency." N.J.A.C. 7:1B-2.1. The record shows that WWC failed to demonstrate any of these conditions. Although WWC argues the corrective action is expensive, it does not rise to the level to be unduly burdensome. It was within NJDEP's discretion to deny such a waiver request. NJDEP is charged with protecting public drinking water and there is substantial evidence that NJDEP acted appropriately when adopting the ALJ's decision granting NJDEP's motion for summary decision and upholding NJDEP's denial of WWC's waiver request.

As the ALJ stated, the "preponderance of the credible evidence established no basis for concluding that [NJDEP] deviated from requiring the necessary corrective action consistent with its legal obligation." The ALJ found that WWC should re-designate the original well for non-potable use or decommission it, and that WWC's waiver request was properly denied. The NJDEP Commissioner filed a comprehensive twenty-five page opinion adopting the ALJ's

decision. The decision was not arbitrary, capricious, or unreasonable and it was supported by credible evidence in the record.

We conclude that WWC's remaining arguments are without sufficient merit to discuss in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.