COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. **Division of Administrative Law Appeals**

Department of Conservation,
and Recreation,
Petitioner
v. Docket No. DCR-18-0648

J and K Ventures, LLC,
Respondent

Appearance for Petitioner:

Karen L. Votruba
J&K Ventures, LLC
153 East Hill Road
Oakham, MA 01068

Appearance for Respondent:

Francis Hartig, Esq.
Department of Conservation and Recreation
251 Causeway Street, Suite 600
Boston, MA 02114

Administrative Magistrate:

James P. Rooney

Summary of Decision

A Watershed Protection Act exemption allows the owner of a lot impacted by the passage of the Act to create one additional lot out of a lot in existence on July 1, 1992 and build a house on it without being subject to the strict land use limitations imposed by the Act. Those limitations do apply to a subsequent owner who wishes to build a house on a lot created after numerous subdivisions of a lot existing in 1992. *See* M.G.L. c. 92A1/2, § 5(h). Summary decision is therefore granted to the Department of Conservation and Recreation.

DECISION

J & K Ventures has proposed a single family house on a lot it owns at 296

Pommogussett Road most of which is within 200 feet of Edson Pond. This pond is part

of the Ware River Watershed, and thus the land adjoining the pond is subject to the Watershed Protection Act, M.G.L. c. 92A1/2. J & K sought a determination from the Department of Conservation and Recreation (DCR) that the project is exempt from the Watershed Protection Act and the restrictions it imposes on construction on land within 200 feet of a protected waterbody. DCR determined that the property was not exempt.

DCR has filed a motion for summary decision in which it asserts that the proposed lot does not qualify for an exemption from the Act. J & K opposed the motion.

Background

The underlying facts regarding the creation of the lot now owned by J & K and called Lot 1 are not in dispute.

On July 1, 1992, J & K's lot was not in existence. It was part of a 102 acre lot that completely surrounded the pond and was owned by McClintock and Wallace. (DCR Ex. F-4.) The 102 acre lot had an existing house that was not in the 200 foot restricted zone of the Watershed Protection Act. (J & K Surveyor Determination Plan, page 2, block 1.)

Over the next three decades, numerous lots were subdivided from the original 102 acre lot until Lot 1 was created in the final subdivision. Ownership of the land changed multiple times as well.

In 1999, the 102 acre lot was purchased by Blair Enterprises, Inc. This company subdivided three lots totaling 11 acres off of the original lot created and sold these lots before 2004. (DCR Ex. F-6.) Clealand Blair, Jr., the President of Blair Enterprises, created Edson Pond Estates LLC, and sold the remaining 91 acre lot to this entity on September 24, 2009. (DCR Ex. F-7.) In 2015, Edson Pond Estates subdivided two lots off of this 91 acre parcel: a 4.06 acre lot and a lot with the existing single family house at

66 Campbell Street that had been owned by McClintock and Wallace. (DCR Ex. F-8.; J & K Surveyor Determination Plan, p. 2, block 5.) In 2016, Edson Pond Estates subdivided what remained of the 102 acre lot into five lots, including Lot 1. That year, it sold Lot 1 to J & K. (DCR Ex. F-9.) Other than Lot 1, none of these subdivisions involved lots where construction in the 200 foot restricted zone was proposed. (J & K Surveyor Determination Plan, page 3.)

J & K sought a variance to build a house on Lot 1, which DCR denied. J & K appealed to the Division of Administrative Law Appeals, but later withdrew the appeal when, according to J & K, DCR refused to consider a revised design as a basis for settlement. *See Dept. of Conservation and Recreation v. J & K Ventures, LLC*, Docket No. DCR-17-1035. According to J & K, DCR staff then suggested that J & K seek an exemption from the Watershed Protection Act. (J & K brief.) On August 18, 2018, J & K submitted a determination of applicability to DCR asking the agency to determine that its house project on Lot 1 was exempt from the Act. (DCR Ex. A.) On October 15, 2018, DCR denied the exemption and determined that the proposed project was prohibited by the Act. (DCR Ex. B.)

Discussion

Whether Lot 1 and the house project proposed there is exempt from the Watershed Protection Act depends on whether the exemption set forth in the statute at M.G.L. c. 92A1/2, § 5(h) and the regulations at 311 CMR 11.05(3) applies. The Watershed Protection Act provides that in order to protect the public water supply, absent a variance:

> Any alteration, or the generation, storage, disposal, or discharge of pollutants is prohibited within those portions of the watersheds that lie within 200 feet of the bank of a tributary or surface waters.

M.G.L. c. 92A1/2, § 5(a). However:

> Nothing in this section shall prevent the construction of 1 single family dwelling, on any lot existing as such prior to July 1, 1992 within the areas regulated by this section. Nothing in this section shall prevent any owner occupied lot existing as such on July 1, 1992 from being subdivided into 1 additional lot. Wherever possible there shall be no alterations within the area regulated by subsection (a).

M.G.L. c. 92A1/2, § 5(h). The regulations implementing the Act essentially repeats the language of this statutory exemption. *See* 313 CMR 11.05(3)

The exemption just described has two parts. The first part grants an exemption for "the construction of 1 single family dwelling, on any lot existing as such prior to July 1, 1992 within the areas regulated by this section." M.G.L. c. 92A1/2, § 5(h). This provision is inapplicable here. The lot in existence on July 1, 1992 was the 102 acre lot that included what is now Lot 1. Lot 1 itself was not created until 2016, and hence this particular exemption cannot apply.

The second exemption involves the subdivision of a lot in existence in 1992. It allows "any owner occupied lot existing as such on July 1, 1992 [to be] subdivided into 1 additional lot." M.G.L. c. 92A1/2, § 5(h). While it does not explicitly allow a house to be built in an area regulated by the Act, as does the first exemption, it contemplates that possibility as it also provides that "[w]herever possible there shall be no alterations within the area regulated by subsection (a)." *Id.* It is the right to build a house without the imposition of the limits imposed by the Act that is the important feature of this exemption. Zoning laws may allow one or more subdivisions of a given lot, but only this

provision of the statute allows for a new lot to be created near a protected waterbody in which the strict limitations of the Act do not apply.

DCR sees this exemption as allowing only the owner of the land in 1992 to subdivide an existing lot into two lots. It thus argues that because ownership changed hands a few times before Lot 1 was created and because many lots had been created out of the 102 acre lot before Lot 1 was created, the exemption does not apply. J & K asserts that this exemption allows the original or subsequent landowners to create a lot in an area subject to the Act, and that any other intervening subdivision that were designed to allow construction outside of the areas protected by the Act do not remove this right, which it argues runs with the land.

Read literally, the second exemption contemplates an exemption only for one additional lot that could be created out of a lot as it existed on July 1, 1992. It does not set a time limit on the creation of the second lot, nor is it immediately obvious whether only the original landowner can take advantage of the exemption, but it mentions the allowance of only one additional lot out of the lot as it existed in 1992, i.e., the second lot must have been created as the initial subdivision of the existing lot.

J & K argues that the more expansive reading of the exemption it advocates better fits the legislative purpose, which was to protect the interests of property owners. No doubt the effect of this exemption was to protect property owners, but that begs the question of how much protection the legislature intended to grant property owners.

Presumably the answer is the minimum necessary to allow smooth implementation of the Watershed Protection Act and the protection it provides to waterbodies important to the provision of clean, safe drinking water. What is evident is that the legislature

recognized that the land use restrictions the Watershed Protection Act would impose might be so significant that, in order to accomplish its goals, DCR would occasionally have to purchase property in order to preserve it from development. Thus, the legislature authorized DCR to "take by eminent domain ..., or acquire by purchase or otherwise, lands in fee, easements, rights and other property that it deems necessary or desirable for carrying out the powers and duties [conferred upon it by the Act]." *See* M.G.L. c. 92A1/2, § 17. What the exemption appears designed to accomplish is to limit the occasions on which use of eminent domain will be necessary by allowing existing landowners to recover some portion of a previously reasonable expectation that they would be able to subdivide an existing large lot. Giving existing landowners an opportunity to profit from subdividing a lot into two lots might fend off any potential taking lawsuit and thus avoid a fiscally onerous need to take numerous properties by eminent domain.

This is consistent with the Supreme Judicial Court's jurisprudence on takings. In a case that involved another lot owned by Clealand Blair adjoining Edmond Pond, the Supreme Judicial Court rejected Mr. Blair's claim that DCR had affected a partial taking of his property by insisting that he replant trees in the 200 foot protected zone and otherwise restore the changes he had made to that portion of the lot. The Court ruled that the parcel to be considered in a takings analysis was the entire lot, not just the portion that was impacted by DCR's order. *Blair v. Dept. of Conservation and Recreation*, 457 Mass. 634, 642-644, 932 N.E.2d 267, 274-275 (2010). It held that the "eight to eleven per cent reduction in the amount of land that the plaintiffs can use may result in a

diminution in value of their property, but it does not interfere with the plaintiffs' use of the land to the extent that would represent a taking." 457 Mass. 645, 932 N.E.2d at 276.

What this means for the present dispute is that, if the legislature wished to avoid a takings claim by a landowner impacted by the Watershed Protection Act, it need not have taken steps to protect the maximum use the landowner previously could have made of the property. Some diminution in value of an existing lot does not necessarily amount to a taking. Thus, the legislature might reasonably have thought that allowing one new lot with the possibility of some building within the 200 foot restricted area might very well be sufficient in most instances to avoid a takings claim generated by the passage of the Watershed Protection Act. Thus, takings jurisprudence tends to support DCR's view of the exemption, not J & K's.

Here the original 102 acre lot was subdivided into eleven lots, ten of which included buildable areas not subject to the restrictions of the Watershed Protection Act. Even if this was not the maximum value that might have been obtained from this original lot before the Act was passed, creating nine new buildable lots out of the existing lot would seem to preserve enough of the economic value of the land to avoid a taking. And it is a takings claim from the original owner that the legislature would have been most concerned with because any owner who bought the property subsequent to the passage of the Watershed Protection Act could not have had the same reasonable expectation as to what land was buildable. That the initial subdivisions of the original lot were into buildable parcels does not mean that the final subdivision that created Lot 1 – a lot most of which is in the 200 foot restricted zone – permits owners of this last lot to take advantage of the exemption allowing construction in the restricted zone. The

legislature's concern that the original owner not be deprived unreasonably of the value of the property was satisfied by the ability of the original owner to subdivide the large lot into another lot, whether that lot included land in the restricted zone or not. Indeed, the manner in which the 102 acre lot was subdivided was an approach that the passage of the Act encouraged by making it more sensible to divide a large lot near a protected watershed into lots that allowed building outside the restricted zone. And since the legislature intended to discourage building in the restricted zone even on the one additional lot allowed as part of an initial subdivision following enactment of the Act, there is no reason to believe that it intended to allow this exemption to continue to exist after a large lot had been subdivided into multiple buildable lots leaving only one rump lot subject to the Act's restrictions. To allow such a lot to be exempt would run counter to the language of the exemption and the legislative purpose of limiting building in the restricted zone.

Accordingly, I grant summary decision to the Department of Conservation and Recreation because the lot on which J & K proposes to build a house is not a lot created from the 102 acre lot as that lot existed on July 1, 1992, as contemplated by the statutory exemption.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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James P. Rooney
First Administrative Magistrate

Dated: October 4, 2019