COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Department of Conservation,
and Recreation,
Petitioner
v.

J and K Ventures, LLC,
Respondent

Division of Administrative Law Appeals
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Boston, MA 02114
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Docket No. DCR-17-1035
Dated: April 26, 2018

Ruling on Motion for Summary Decision and Motion to Dismiss

J and K Ventures, LLC proposes to built a single family house on a 2.5 acre lot, most of which is within 200 feet of Edson Pond. The Department of Conservation and Recreation (DCR) determined that the project needs a variance under the Massachusetts Watershed Protection Act, M.G.L. c. 92A1/2. DCR denied J and K's request for a variance, which J and K has appealed.

DCR has filed a motion for summary decision contending that J and K has not established that it is entitled to a variance. J and K has filed a motion to dismiss DCR's decision to deny the variance claiming that DCR did not timely forward to the Division of Administrative Law Appeals J and K's request for a hearing and did not timely file an answer to J and K's hearing request. Both motions are denied for the reasons stated below.

A. *Motion for Summary Decision*

Summary decision is appropriate when the moving party establishes that "no genuine issue of fact relating to all or part of a claim or defense" exist and that it "is entitled to prevail as a matter of law." 801 C.M.R. § 1.01(7)(h). DCR's motion is denied because it

is not entitled to it as a matter of law and because there appear to be genuine issues of material fact in this case.

The Massachusetts Watershed Protection Act prohibits "[a]ny alteration, or the generation, storage, disposal, or discharge of pollutants . . . within those portions of the watersheds that lie within 200 feet of the bank of a tributary or surface waters or within 400 feet of the bank of a reservoir." M.G.L. c. 92A1/2(5)(a). A similar restriction is imposed by DCR regulations. *See* 313 C.M.R. § 11.04(3)(a)2. DCR may grant a variance from this prohibition if it "specifically finds that owing to circumstances relating to the soil conditions, slope, or topography of the land affected by such Structures, Uses or Activities, desirable relief may be granted without substantial detriment to the public good." 313 C.M.R. § 11.04(3)(a). However, DCR presumes that granting such a variance would be contrary to the achievement of the purposes of the Watershed Protection Act. This presumption "may be rebutted only by the submission of credible evidence by the Person submitting the application for variance that such variance may be granted without substantial detriment to the public good and without impairment of water quality in the Watersheds." 313 C.M.R. § 11.04(3)(b).

J and K filed a lengthy variance application noting that it did so because the project was within 200 feet of a tributary. The application proposed a single family house, a paved driveway, a septic system and a private well. J and K stated that the septic system had received a Title 5 approval from the Town of Rutland Board of Health. The bulk of the application was a stormwater report meant to show that the project complied with the Department of Environmental Protection's Stormwater Management Standards, even though such standards do not apply to single family house projects. DCR denied the

variance, listing nine reasons for doing so, the first of which was that J and K had not submitted credible evidence to rebut the presumption that "the effects of residential development entirely in close proximity to a surface drinking water supply will impair the water quality in the watershed." J and K filed an appeal, and put forth arguments attempting to rebut each of the nine reasons given for the denial.

DCR presents three arguments in favor of summary decision. It declares that:

> [t]he complete development of new construction on a newly created forested lot all within the 200' Primary Protection Zone cannot be accomplished without substantial detriment to the public good and without impairing the quality of water in the Watersheds. . . . No such variance request for full development of a newly-created lot within the Primary Protection Zone has ever been made in the Act's 25 year history.

As powerfully expressed as this is, it does not state a basis for summary decision. It may be nearly impossible for new construction on a new lot in a Primary Protection Zone to obtain a variance, but the variance regulation does not preclude a developer from trying.

DCR also maintains that the septic system cannot be approved. It points out that it received a letter from the Department of Environmental Protection (DEP) after the variance application was filed in which the DEP stated that the septic system not only needed local approval, but, because of its proximity to a tributary, also needed a variance that would ultimately have to be approved by DEP, which would grant it only if the applicant showed it would be "manifestly unjust" to deny it because that would deprive the lot owner of "substantially all beneficial use of the [p]roperty." DEP's letter alerted DCR and J and K to a significant roadblock to J and K's ultimate ability to obtain all the approvals need to proceed with its project, but DCR has not demonstrated that this roadblock necessarily precludes approval of a variance under the Watershed Protection Act. That is because DCR's regulations do not clearly require a variance applicant who

proposes a septic system to obtain final approval of the septic system before seeking a varaince. The regulations provide that an applicant must obey all other state and local requirements, but they do not require that the applicant demonstrate it obtained all other approvals needed before seeking a variance from DCR. 313 C.M.R. 11.08. Thus, while DEP's stated views may have an impact on the analysis for whether J and K's proposal warrants a variance, they do not automatically preclude the grant of a variance and thus are not a sufficient reason to issue a summary decision affirming DCR's denial of a variance.

Finally, DCR contends that J and K has not overcome the presumption that granting a variance would be contrary to the achievement of the purposes of the Watershed Protection Act. That is because:

> J&K's submittals only address potential stormwater. All other impacts within the 200' No-Build Primary Protection Zone that will result from this project are not mitigated. The cumulative short- and long-term impacts on water quality as a result of the proposed project are insurmountable.

DCR's variance regulations encourage variance applicants to submit proof that their projects comply with DEP's Surface Water Quality Standards. *See* 313 C.M.R. § 11.06(3)(d)4. J and K's submission of a report addressing DEP's Stormwater Management Standards seems a potentially viable way to address the project's impact on the water quality of Edson Pond. What impacts J and K ignored by relying exclusively on this report is not clear. J and K asserts that the report covers a wide range of potential impacts including untreated discharges, groundwater recharge, and erosion. DCR does not describe in its motion how its particular objections went unmet. It listed nine reason for its denial; J and K responded to each one of these in its appeal. Without a more

detailed presentation of how the variance application failed to be acceptable to DCR, the agency has not provide sufficient support for its motion. For example, one reason DCR gave for denying the projects was that the "site's slope, topography, and soils are typical of land with 200 feet of a surface water, and not particularly favorable for the granting of a variance." J and K responded that the slope was less that 5% and the sandy loam soils were ideal for septic systems. The motion does not address what otherwise appears to be a material factual dispute. The denial also objects to the impacts of construction of a well within 30 feet of the pond using heavy equipment; J and K responded that the well installation would take at most three days and safety precautions would be in place. The motion does not describe why this would be inadequate. Therefore, I cannot grant the motion for summary decision.

B. *Motion to Dismiss*

J and K's motion to dismiss asks that it prevail in this appeal because of delays attributable to DCR. J and K filed its appeal of the variance denial in May 2017; DCR requested in November 2017, six months later, that DALA conduct an adjudicatory proceeding in the appeal. In the transfer letter, DCR stated that it intended to file answer to the appeal within 21 days. The 21 day period conforms to the requirement of the Standard Adjudicatory Rules that answers to a notice of claim for a hearing be filed within 21 days. DCR's answer is dated February 2, 2018. It provides a far more detailed description of DCR's bases for denying the variance.

While there have been delays in this matter attributable to DCR, J and K has not shown that the remedy should be that it is granted a variance. There is nothing in the Watershed Protection Act or in DCR's regulations suggesting that any delays attributable

to DCR shall entitle an applicant to a variance. Rather, the statutory and regulatory scheme presume that a variance will not be granted unless the applicant meets various stringent criteria. While I sympathize with J and K's frustration at delays in this process, I cannot grant its motion and order that a variance be issued because of those delays. Accordingly, I deny the motion.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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James P. Rooney
First Administrative Magistrate

Notice sent to: Frank Hartig, Esq.
Karen Votruba