
Citizens v. Dep't of Corrections
Cite as 6 *N.J.A.R.* 140

**CONCERNED CITIZENS
OF NORTH CAMDEN,**
Petitioners,
v.
DEPARTMENT OF CORRECTIONS,
Respondent.

Decided July 15, 1983

Initial Decision

SYNOPSIS

In preparation for construction of a medium security prison in the City of Camden, the Department of Corrections prepared an environmental assessment statement, pursuant to *Exec. Order* No. 53 (1973). After review of the assessment, the Department of Environmental Protection advised the Department of Corrections that a full environmental impact statement would not be necessary but that it must receive a Waterfront Development benefits from the Division of Coastal Resources. During construction of the project, petitioners advised that pursuant to the Environmental Rights Act, it intended to file suit over the project and subsequently requested a hearing on the approval of the Waterfront Development permit.

The administrative law judge assigned to the case determined that there is nothing in *Exec. Order* No. 53 which permits the Department of Environmental Protection to insist that the Department of Corrections obtain a Waterfront Development permit. The judge noted that an executive order could not be used as a method of creating a legal obligation which the legislature had not seen fit to impose on executive agencies. While the Executive Order provides for a recommendation by the Department of Environmental Protection, neither it nor any statute permit the Department to require a permit.

Since the Department of Corrections needed no permit to build the issuance of one could not reasonably give rise to an action by a third party to overturn the permit in a proceeding before the Department of environmental Protection.

Accordingly, the administrative law judge dismissed the action.

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Herbert O. Brock, Esq., for petitioners (Morris and Brock, attorneys)

Howard B. Epstein, Deputy Attorney General, for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney)

MASIN, ALJ:

The Department of Corrections ("Corrections") is in the process of constructing a 400 bed medium security prison in the City of Camden. The project is located on a site which abuts the Delaware River just north of the Benjamin Franklin Bridge. Pursuant to *Exec Order No 53* (1973), issued by Governor Cahill, Corrections prepared an Environmental Assessment Statement and submitted it to the Department of Environmental Protection ("DEP"). The Executive Order requires State departments and agencies which are in the process of constructing projects which have a total cost greater than one million dollars to make such a submission to DEP so that a determination can be made as to the environmental impact of the project. Pursuant to paragraph three of the Executive Order, DEP is authorized to review the assessment and, where it determines that the project will "not have a substantial adverse environmental impact," the DEP may "make recommendations concerning the project's design or location to reduce environmental impact." Paragraph five of the Order specifies that the proposing agency is required to notify the State Planning Task Force of its "recommendations concerning the Department of Environmental Protection's analysis of the environmental impact statement." The proposing agency must determine which of DEP's recommendations it will adopt and where it does not choose to adopt a recommendation, it must file a written statement of its reasons for not adopting a recommendation. The State Planning Task Force then "shall consider and reconcile the differences between" the Departments. "The project shall not proceed until the procedures outlined above have been completed."

Following review of the assessment submitted by Corrections, DEP, through Lawrence Schmidt, Assistant Director, Planning Group, issued to Corrections a letter of September 2, 1982, which stated that DEP had completed its review of the assessment and had determined that the document "satisfactorily describes the project and addresses the potential impacts." After indicating that a full environmental impact statement would not be necessary, the letter proceeds to state the following:

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In order to minimize adverse environmental effects, we have developed a set of recommendations as well as several conditions which the approval will be contingent upon. The conditions for approval under Executive Order No 53 are as follows:

(1) The applicant or its agent must receive DEP permits from the Division of Coastal Resources (Waterfront Development Permit)

....

Following the issuance of the September 2 letter from Mr. Schmidt, DEP issued a Waterfront Development Permit on September 20, 1982. Construction on the project began in October 1982 and has progressed since that time.

During the planning of the prison, a group of citizens of North Camden, known as Concerned Citizens of North Camden ("CCNC"), expressed interest in the project. These interests were directed to a number of matters, many of which were not related to environmental issues. However, on July 26, 1982, then counsel for the CCNC sent a letter to the Commissioners of DEP and Corrections advising that, pursuant to the requirements of *N.J.S.A.* 2A:35A-11, the Environmental Rights Act, the CCNC was giving notice of its intention to file suit:

if contracts are let for any phase of the construction of the medium security prison in Camden, New Jersey prior to the following:

1. Submission of the environmental impact statement required under Executive Order 53 and completion of all procedures outlined in that Order.
2. The granting of all required permits which include, but are not necessarily limited to, permits for coastal and waterfront development. . . .

Following the issuance of the Waterfront Development Permit in September 1982, the CCNC requested a hearing pursuant to *N.J.A.C.* 7:1C-1.9. CCNC claimed that it had been aggrieved by the decision to approve the Waterfront Development Permit. The application for hearing also contained a request for a stay of the issuance of the permit. On November 23, 1982, after having been advised by the Attorney General's Office of its position opposing the grant of a hearing on a number of legal grounds, the Commissioner of DEP determined to grant the request for a hearing. At the same time, he denied the request for the stay as being not timely and as not appear-

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ing to meet the test for the issuance of interim relief. The matter was then transferred to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.* A prehearing conference was held before Administrative Law Judge Jeff S. Masin on April 29, 1983, and a Prehearing Order was issued on May 10, 1983. In the Prehearing Order, CCNC indicated that it intended to establish that Corrections had failed to satisfactorily meet the Coastal Resource and Development Policies contained in *N.J.A.C.* 7:7E-1.1 *et seq.* and that therefore the permit was improperly granted. Corrections argued that the petitioner had been guilty of laches and should be barred from obtaining any relief. The matter was scheduled for hearing in late June 1983.

On June 24, 1983, several days before the scheduled start of the hearing, respondent filed a motion seeking an order dismissing the appeal. Respondent replied to the motion during oral argument held at the Camden County Courthouse on June 27, 1983.¹ The argument continued on June 28 by telephone conference call.

Having considered the arguments of counsel, as well as the relevant statutes and Executive Orders, I have concluded that the respondent's motion to dismiss should be granted for the reasons set forth below.

DISCUSSION

The Waterfront Development Act

In connection with the motion to dismiss, it is first necessary to examine the Waterfront Development Act, *N.J.S.A.* 12:5-1 *et seq.* Section three of the act requires that:

- a. All plans for the development of any waterfront upon any navigable water or stream of this State or bounding thereon, which is contemplated by any person or municipality, . . . shall be first submitted to the Department of Environmental Protection. No such development or improvement shall be commenced or executed without the approval of the Department of Environmental Protection first had and received, . . .

¹Counsel had consented to reply at that time despite the short notice of the application. This issue had not been raised by the Attorney General in his earlier correspondence with the Commissioner concerning the decision on whether to grant a hearing.

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The approval process which results from a submission to the DEP of a proposed waterfront development leads to the issuance of a Waterfront Development Permit. It is such a permit which DEP granted to Corrections and which the CCNC challenges as being improperly granted. The respondent here contends that there is no legal requirement that it obtain such a permit prior to constructing the Camden prison and that therefore there is no standing for the petitioner to challenge the action of the DEP. Respondent points to the language of section three, which indicates those who must apply for approval. As noted above, the requirement for approval extends to "any person or municipality." Respondent argues that the State is obviously not a municipality and that it does not fall within the definition of "person" for purposes of this act. In support of its contention, respondent cites the decision of the Appellate Division in *Leonard v. State Highway Dept. of N.J.*, 29 *N.J. Super.* 188 (App. Div. 1954). *Leonard* was a proceeding on a motion by riparian owners to have a grant of riparian rights set aside. In the course of its discussion of the matter, the court dealt with the question of whether the State, or the State highway commissioner as its agent, was required to give notice to the riparian owner of an application for a riparian grant. The applicable statute at the time, *N.J.S.A.* 12:3-7, required that notice be given by "any person or persons, corporation or corporations, or associations." Referring to *N.J.S.A.* 1:1-2, the then as now existing definition of "person" as that term is generally used in the statutes, the court noted that the term included "corporations, companies, associations, societies, firms, partnerships and joint stock companies as well as individuals." The definition further states that when the word is "used to designate the owner of property which may be the subject of an offense, it includes this State. . . ." The word "state" is separately defined in *N.J.S.A.* 1:1-2. The Court concluded that neither the State nor the State highway commissioner were included within the meaning of the word "person" in *N.J.S.A.* 12:3-7.

Respondent argues that in the present case, as in *Leonard*, the term "person," contained in *N.J.S.A.* 12:5-3, does not include the State and therefore there is no obligation on the part of the State, and therefore Corrections, to obtain a Waterfront Development Permit. Since there is no law which requires the agency to obtain a permit, the respondent contends that CCNC cannot challenge DEP's action in granting a document which Corrections did not need in order to construct the prison.

I am convinced that the respondent is correct in its contention that

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the Waterfront Development Act does not require corrections to obtain a Waterfront Development Permit. There is absolutely no support for the position that the term "person" used in the statute includes the State. The language is similar to that reviewed in the *Leonard* decision and I **FIND** that decision to foreclose any argument that the State is included in the definition of "person."

Petitioner argues that the portion of the definition of "person" which mentions that the term does include the State where the word is "used to designate the owner of property which may be the subject of an offense" indicates that in this particular matter the term does include the State, since an offense may occur on the property if the permit is improperly granted. The term "offense" is not defined in *N.J.S.A.* 1:1-2. The same language was present in the definition at the time that it was reviewed by the *Leonard* court, and I **FIND** no basis for concluding that this is the type of situation where the exception applies. It would appear that the type of offense referred to is most likely one of a criminal or quasi-criminal nature, such as a trespass or other property related crime, where the statutes may speak of a person's property and where the definition is intended to assure that the State's property will be considered to fall within the protections of the statute. I **CONCLUDE** that the word "person", as used in *N.J.S.A.* 12:5-3, does not include the State of New Jersey and that therefore there is no statutory requirement that the Department of Corrections obtain the approval of the DEP prior to constructing the prison on the waterfront.

Executive Order No. 53 (1973)

Given the above, it is now necessary to consider the affect of the Executive Order No 53 (1973) process and determine whether a hearing may appropriately occur pursuant to that Executive Order in connection with the permit award.

In his letter of September 2, 1982, Assistant Director Schmidt referred to a "set of recommendations" which the DEP was making in connection with the proposed prison project. These are listed on the second page of the letter. The first page contained a list of five "conditions." It seems that the implication of the letter is that the conditions are mandatory, while the recommendations are not. It is necessary to analyze exactly what the impact of these conditions and recommendations is in order to determine whether the condition that a Waterfront Development Permit be obtained has any significance as a basis for creating the right to the present proceeding.

It is to be noted that paragraph three of Executive Order No 53 provides that the DEP, after reviewing the project description and identification statement (in this matter the document submitted was called an assessment statement), is authorized to request the submission of a full environmental impact statement. The September 2 letter from Assistant Director Schmidt indicates that DEP was satisfied that no such full environmental impact statement was necessary. Where the project is determined to have no substantial adverse environmental impact, as apparently was the case in connection with the prison, DEP is authorized to "make recommendations concerning the project's design or location to reduce environmental impact." There is nothing in the language of section three that indicates that DEP has any authority, outside of the authority which it possesses from statutes, to *order* the proposing agency to do anything.

Paragraph four of the Executive Order states that DEP is to review the environmental impact statement where that full document is required. In this matter such a document was not submitted, as it was not required.

Paragraph five provides for the proposing agency to determine whether it will adopt the "steps recommended" by the DEP. A procedure is then set up for reconciling disputes between executive agencies where the proposing agency does not wish to adopt the "course recommended" by the DEP. Nowhere in the Executive Order is there any reference to any authority for DEP to *order* an executive agency to conform to its recommendations. There is nothing stated which purports to authorize DEP to condition its approval of the project. Indeed, the wording of the Executive Order does not ever state that DEP must approve the project. It merely indicates that the Department must review it so that it can *recommend* how best to avoid adverse environmental impacts. Other portions of the Executive Order provide for the Department to "issue guidelines to assist proposing agencies in determining if a project . . . may have a potential or substantial environmental impact." On the whole, it is clear that while DEP was to have a significant role in reviewing large agency projects it was not given the authority to *order* or *direct* the proposing agency to do anything, short of some action on the part of the State Planning Task Force which might compel the proposing agency to adopt DEP's recommendations. Thus, given the lack of any mandatory authority, it would appear that the phraseology used by Assistant Director Schmidt in his September 2 letter was misleading. The letter should properly have termed the conditions as additional recommendations.

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Further, since the only statutory authority which DEP has for requiring anyone to obtain a Waterfront Development Permit is the Waterfront Development Act, a statute which does not require the State or its agencies to obtain such a permit, it is unclear at best under what authority the Department ordered Corrections to obtain such a permit. Indeed, neither the statute nor the Executive Order provides DEP with the authority to order the obtaining of a permit by Corrections.

Given the lack of authority to *require* its fellow agency to obtain a Waterfront Development Permit, it appears that the true affect of Assistant Director Schmidt's letter was merely to advise Corrections that DEP recommended that Corrections attempt to conform to the spirit of the Waterfront Development Act and the regulations issued pursuant thereto. If Schmidt's letter had merely stated that as a recommendation the Department suggested that Corrections comply with the spirit of the act, no permit would have been issued even if DEP was satisfied from its review of the project that such conformity had been achieved. Had no permit been issued it is clear that CCNC could not have challenged the determination of DEP, since there would be no permit issuance to object to. However, this is not to say that CCNC would not have had an avenue in which to pursue its claims that the proposed project might violate applicable statutes or regulations related to environmental concerns. It is precisely such a claim which would be cognizable in an action brought pursuant to the Environmental Rights Act, *N.J.S.A.* 2A:35A-1. That legislation provides that:

Any person may maintain an action in a court of competent jurisdiction against any other person to enforce, or to restrain the violation of, any statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment. *N.J.S.A.* 2A:35A-4a.

The definition of "person" contained in section three of the Environmental Rights Act specifically defines the term as including the State or any political subdivision, or agency or instrumentality thereof.

Thus, had the DEP recommended to Corrections that the prison project comply with the spirit of the Waterfront Development Act and then determined that Corrections had complied with that recommendation and issued no permit, CCNC could have filed suit in Superior Court, or even conceivably in a federal court, to attempt

to bar what it saw as potential violations of applicable environmental laws. It seems that at one time the petitioners did indeed intend to file such a suit, but after having given notice of that intention, they did not follow through by filing any action. It is certainly not inconceivable that CCNC may have been diverted from such a course by the issuance by DEP of a permit, the issuance of which was apparently open to challenge in the administrative process. However, there is nothing to indicate that the judicial remedy could not then, or for that matter now, be pursued.

It is important to consider the potential scenarios which might arise were this litigation to be permitted to continue. If the matter were tried on the substantive issues and ultimately the Commissioner of DEP determined that the permit had been issued in violation of regulations because the project did not satisfy the various applicable environmental policies arising under the Waterfront Development Act, the Commissioner could, at best, advise Corrections that he was voiding the permit. Since the law does not require that Corrections have a permit and since the purported condition of DEP approval, that is, the obtaining of the permit, has no significance as anything more than a recommendation that such a permit be obtained, Corrections could conceivably determine to disagree with the DEP Commissioner's determination and abandon the permit process. At that point, having rejected the recommendation of DEP, it would appear that the proposing agency, along with DEP, would proceed to the State Planning Task Force in an attempt to reconcile their differences. The outcome of that reconciliation certainly could not be predicted, although the omnipresent public interest in the rapid construction of additional prison facilities is amply evident, as witnessed by the report of the Governor's Task Force.

Given all of the above, I **CONCLUDE** that there is nothing in the Executive Order No 53 (1973) process which permits the DEP to insist that Corrections obtain a Waterfront Development Permit. The executive order process cannot be used as a method of creating a legal obligation which the Legislature has not seen fit to impose on executive agencies. While the Executive Order procedure provides for DEP to *recommend*, neither it nor the statute permit DEP to *require* a permit. Therefore, it seems that the permit issued by DEP serves merely as superfluous evidence of DEP's conclusion that Corrections was acting within the spirit of the Waterfront Development regulations. Had the *permit* not been issued the project could still have proceeded. The mere issuance of a piece of paper called a permit to

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an agency which was not obligated to obtain the permit cannot reasonably give rise to an action by a third party to overturn the permit and thus bring the project to a halt. Since Corrections needed no permit, the issuance of one to it was an unnecessary action and not one which permits a third party to challenge the issuance in an administrative forum. If the DEP incorrectly assessed the compliance of the project with any applicable State or Federal statutes or regulations the objectors had every right to pursue litigation in courts of competent jurisdiction to prevent the project from being built. Given the statutory context, the DEP is not the appropriate forum for such a challenge.

For the reasons expressed, the appeal is **DISMISSED**.

**After reviewing this Initial Decision,
the Department of Environmental Protection on August 29, 1983,
issued the following Final Decision:**

Having reviewed the initial decision and the complete file in this matter, I hereby affirm the initial decision rendered by the Office of Administrative Law as the Final Decision in this matter.