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Dep't of Natural Res. v. Silverstone & Drakes Canal Inc., 674 N.W.2d 266 (Neb. 2004)

Benjamin M. Petre

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Dep't of Natural Res. v. Silverstone & Drakes Canal Inc., 674 N.W.2d 266 (Neb. 2004) (holding that the notice of hearing to cancel water appropriations for nonuse was adequate, and that the evidence was sufficient to support the findings of the Department of Natural Resources).

The Department of Natural Resources (“DNR”) entered an order on May 20, 2003, partially canceling the water rights on land owned by Silverstone and Dakes Canal Inc., Vance Dake, and Marcia Uehling (“Silverstone”). Silverstone appealed DNR’s order to the Supreme Court of Nebraska, which affirmed DNR’s order.

Water appropriation number A-5000 (“appropriation”) was a water right to divert 0.57 cubic feet per second (“cfs”) of water from the Sappa Creek at certain points for irrigation of 62.6 acres of land in Harlan County, Nebraska. Silverstone was the owner of the land covered by the appropriation, which had a priority date of July 30, 1952. On January 31, 2003, the DNR sent a notice to Silverstone stating that a hearing would take place to determine whether to cancel all or part of appropriation as a result of nonuse for more than three consecutive years.

DNR held the hearing on March 18, 2003. At the hearing, DNR presented a verified field investigation report regarding the irrigation of the land covered by the appropriation. Based on the report and the testimony of witnesses, DNR concluded that part of the land designated under the appropriation was not subject to irrigation for more than three consecutive years, thus cancellation of that part of the appropriation was therefore proper. DNR issued an order of cancellation in part on May 20, 2003.

Silverstone appealed DNR’s order partially canceling the water rights of Silverstone and other landowners. In doing so, Silverstone made a few key arguments. The court first addressed Silverstone’s arguments regarding the adequacy of the notice. Silverstone argued that the notice did not properly state the issues involved and that the notice failed to indicate properly the important phone numbers. The court held that the notice adequately informed Silverstone of the issues because it clearly stated the purpose of the hearing and the fact that interested persons should appear. The court also noted that the notice contained copies of relevant statutes. The court also rejected Silverstone’s argument regarding the notice’s statement of phone numbers, finding that the provision of the phone number was sufficient under the state statute.

The court then proceeded to Silverstone’s arguments regarding DNR’s findings. On this issue, Silverstone asserted that DNR erred in finding that irrigation did not occur on the canceled portion of the land for more than three consecutive years and, in the alternative, argued that DNR erred in not finding sufficient cause for nonuse. At the onset of its discussion of these issues, the court noted the limits on court’s ability to review the director’s factual determinations.

Specifically, the court stated it could only decide whether competent and relevant evidence supported such determinations, and whether the determinations were arbitrary, capricious, or unreasonable. In this case, the court held that both determinations were supported by sufficient evidence and were not arbitrary, capricious, or unreasonable. Consequently, the court rejected both arguments.

In conclusion, the court rejected all of Silverstone's arguments and affirmed DNR's order.

Benjamin M. Petre

NEW JERSEY

In re Adopted Amendments to N.J. Admin. Code tit. 7, § 7A-2.4, 365 N.J. Super. 255 (N.J. Super. Ct. App. Div. 2003) (holding that New Jersey Department of Environmental Protection's adoption of the Landscape Project method to classify wetlands was neither inconsistent with governing statute, unsupported by the record, nor arbitrary or capricious).

New Jersey Builders Association ("Builders") challenged as *ultra vires* the New Jersey Department of Environmental Protection's ("DEP") adoption of the Landscape Project method ("LPM") to classify wetlands. In 2002, DEP adopted the LPM to classify wetlands supporting the habitats of threatened or endangered species as wetlands of exceptional resource value. Prior to the adoption of LPM, DEP made wetlands determinations entirely on specific sightings of individual threatened or endangered species. Based on the assumption that species are located in the middle of their home range, DEP mapped a habitat for that species regardless of whether the entire mapped area contained features that the species actually used or required. LPM broadened the field of inquiry beyond "sighting-specific" areas. Using satellite imagery, LPM focuses on habitat areas required to support local populations of threatened or endangered wildlife species. By adopting LPM, DEP sought to establish a more population driven parameter of habitat protection that would best ensure the continued, long-term existence of a particular documented species or population in an identified wetland. Builders appealed DEP's decision to adopt the LPM in Superior Court of New Jersey, Appellate Division claiming LPM exceeded DEP's statutory mandate.

The court stated that judicial review of state agency regulations is restricted to three inquiries: (1) whether the agency's action violated the enabling act's express or implied legislative policies, (2) whether there was substantial evidence in the record to support the findings on which the agency based their action, and (3) whether in applying the legislative policies to the facts the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing