UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0399

September Term, 2015

CARL T. KIRK

v.

MARYLAND DEPARTMENT OF NATURAL RESOURCES

Kehoe,
Nazarian,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: August 5, 2016

This case stems from the Department of Natural Resources' ("DNR") proposal to grant a lease for aquaculture in St. George's Creek, St. Mary's County. Carl Kirk, an interested party whose shoreline property is adjacent to the proposed lease, filed a petition of protest with DNR, and eventually requested that his claim be transmitted to the Office of Administrative Hearings ("OAH") for a contested case hearing before an Administrative Law Judge ("ALJ"). He conceded that the license was lawful under Md. Code Title 4, Subtitle 11A (2000, 2012 Repl. Vol., 2015 Supp.) of the Natural Resources Article ("NR") but argued nevertheless that the license should not be granted because DNR violated the Open Meetings Act, Title 3 of the General Provisions Article ("GP") of the Md. Code, in its dealings with stakeholders to the leasing process. DNR moved for summary decision, arguing that Mr. Kirk failed to allege any material facts that required DNR to deny the lease application, and the ALJ granted its motion, finding that the Open Meetings Act was irrelevant to the proposed lease's validity. Mr. Kirk appealed that decision to the Circuit Court for Prince George's County, then to this Court. We affirm.

I. BACKGROUND

In June 2012, Robert Lumpkins applied to DNR for an aquaculture lease for 5.7 acres of submerged land, along with the water column above it, in St. George's Creek. After reviewing the application, DNR concluded that the application complied with the applicable statutes governing submerged land and water column leases, and proposed to approve it. DNR then advertised notice of the lease application on its website and in a local publication as required by NR § 4-11A-09(g)(1).

Thirteen stakeholders, or as DNR calls them, "protestants," submitted petitions of protest in response to the proposal, Mr. Kirk among them. He took particular exception to the project because the proposed lease was located in front of his shoreline property. He believed the lease would impair his navigational rights and his property values, and he anticipated leasing that land for an aquaculture project himself.

On December 12, 2013, DNR hosted a public information session about the proposed lease pursuant to NR § 4-11A-09(g)(2)(iii). Mr. Kirk attended and voiced his objections to the proposal, along with other protestants. In response to the ongoing concerns about project, DNR also facilitated an informal mediation meeting between the protestants and Mr. Lumpkins on January 17, 2014. Mr. Kirk was unable to attend, and would later testify before the circuit court that although he requested that DNR provide a call-in number so that he could phone into the meeting, none was ever provided. And when Mr. Kirk requested that DNR provide him with meeting minutes, it was unable to do so because none existed.

As a result of the mediation, the group of protestants in attendance agreed to withdraw their objections in exchange for Mr. Lumpkins's agreement to reduce both the submerged land lease area and the water column lease area, and to limit the maximum height allowed for oysters planted on shells on the bottom of the lease area.[1] These

[1] Specifically, Mr. Lumpkins revised his proposed lease area to: (1) reduce the submerged land lease to 3.78 acres; (2) reduce the water column lease area to 1.91 acres; (3) in the submerged land lease area southeast of the water column lease area, grow oysters on the bottom on shells placed up two inches high; and (4) in the submerged land lease area beneath the water column lease area, grow oysters on the bottom on shells placed up to six inches high.

concessions didn't satisfy Mr. Kirk, though, and he maintained his objection to the project. On April 1, 2014, DNR facilitated another informal mediation meeting between Mr. Lumpkins and Mr. Kirk, and when the two could not come to an agreement, DNR transmitted Mr. Kirk's protest to the OAH for a contested case hearing. DNR then filed a motion for summary decision, arguing that OAH should dismiss Mr. Kirk's protest without a hearing. Supported by an affidavit from Karl Roscher, the director of its Aquaculture Division, DNR argued that the undisputed facts established that the proposed leases met all the applicable requirements set out by NR § 4-11A.

In response, Mr. Kirk conceded that the leases met the governing statutory requirements, but argued that DNR violated the Open Meetings Act, GP § 3-101 *et seq.*,[2] when it failed to provide him with minutes of the January 17 mediation meeting that he was unable to attend. The ALJ concluded that the Open Meetings Act was "irrelevant in the context of [the contested case] proceeding," however, and dismissed the case without a hearing. The ALJ found that DNR correctly proposed to approve Mr. Lumpkins's lease application since there was no genuine dispute that the statutory requirements for the leases, contained in NR §§ 4-11A-06 and 4-11A-08, had been met. Nor was DNR required

[2] Maryland's Open Meetings Act is aimed at fostering open government by ensuring that public business is performed in a public manner and accessible to interested citizens. *City of Balt. Dev. Corp. v. Carmel Realty Ass.*, 395 Md. 299, 320 (2006); *Handley v. Ocean Downs, LLC*, 151 Md. App. 615, 633 (2003). When it applies, it includes, among other things, requirements that public bodies prepare written minutes of their meetings. GP § 3-306.

(or even allowed) to consider Mr. Kirk's competing recreation, navigation, or commercial fishing rights when considering whether to grant an aquaculture lease application.

Mr. Kirk petitioned for judicial review in the Circuit Court for Prince George's County, which affirmed the ALJ's decision after a hearing on April 10, 2015. The court agreed that the record established DNR's compliance with the statutory factors for submerged land and water column leases, and since Mr. Kirk conceded that the statutory factors had been met, there was sufficient evidence to support the ALJ's decision. Moreover, the court concluded that Mr. Kirk's Open Meetings Act claim was not properly before the ALJ or the circuit court, but even if it were, the Act would not apply to DNR or to the January 17 meeting. Mr. Kirk timely appealed.

II. DISCUSSION

The sole question for us on appeal is whether the decision to grant DNR's motion for summary decision was legally correct and supported by substantial evidence.[3] We find that it was, and in doing so, look through the circuit court's decision to review the ALJ's decision itself. *Diffendal v. Dep't of Nat. Res.*, 222 Md. App. 387, 404 (2015). Our review is narrow and deferential, "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised on an erroneous conclusion of law." *Assateague Coastkeeper v. Md. Dep't of the Env't*, 200 Md. App. 665, 690 (2011) (quoting *Najafi v. MVA*, 418 Md. 164, 173-74 (2011)). In other words, "[w]e apply a limited standard of

[3] Mr. Kirk asks in his brief: "Was the Circuit Court's refusal to apply the tenets of the Open Meetings Act correct with respect to Maryland aquaculture leasing proceedings?"

review and will not disturb an administrative decision on appeal if substantial evidence supports its factual findings and no error of law exists." *Long Green Valley Ass'n v. Prigel Family Creamery*, 206 Md. App. 264, 274 (2012) (quoting *Tabassi v. Carroll Cty. DSS*, 182 Md. App. 80, 86 (2008)).

An ALJ may grant a motion for summary decision if "there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." COMAR 28.02.01.12D(4). "A material fact is a fact the resolution of which will somehow affect the outcome of the case." *Jones v. Mid-Atlantic Funding Co.*, 362 Md. 661, 675 (2001) (quoting *King v. Bankerd*, 303 Md. 98, 111 (1985)). The material facts in this context are whether the statutory criteria for approving an aquaculture lease, set out by NR § 4-11A, have been met. *Diffendal*, 222 Md. App. at 210.

This Court recently described the lease application process in *Diffendal*: after a lease application is filed, "DNR, in conjunction with the MDE, other internal agencies, and the United States Army Corps of Engineers ("USACE"), conducts an extensive review to determine if the relevant statutory criteria are satisfied." *Id.* at 392. Relevant here is NR § 4-11A-06, which governs submerged land leases for shellfish cultivation in the Chesapeake Bay. NR § 4-11A-06(b)(2) provides that a submerged land lease may not be located:

> (i) Within a minimum of 50 feet of shoreline or any pier without the written permission of the riparian owner at the time of initial application for the lease;
> (ii) Within 150 feet of the public shellfish fishery or a registered pound net site;

> (iii) Within 150 feet of an oyster reserve or any Yates Bar located in an oyster sanctuary;
> (iv) Within 150 feet of a federal navigational channel;
> (v) …[I]n any creek, cove, bay, or inlet less than 300 feet wide at its mouth at mean low tide; or
> (vi) In an SAV protection zone.

NR § 4-11A-08 mandates almost identical requirements for water column leases, but adds that water column leases may not be located in any creek, cove, bay, or inlet less than 300 feet wide at its mouth at mean low tide, or in a setback or buffer from the Assateague Island National Seashore. § 4-11A-08(c)(v),(vii).

> For both water column leases and submerged land leases, if the DNR determines that all the statutory criteria are met and the proposed lease is not within an area preapproved for leasing, the proposed lease area must be staked and notice of the proposed lease must be advertised. NR § 4–11A–09(g). At that time, interested persons may file to protest the issuance of the lease. A protestant may request a contested case hearing. *Id.* If no protest is filed or if a final decision is issued dismissing the protest, the DNR shall issue the lease, with or without conditions, unless it finds the lease application should be denied "for reasonable cause" in order to protect "the public health, safety, or welfare." NR § 4–11A–09(d)(4). Once a lease is issued, it may be terminated by the DNR at any time for a violation of the subtitle.

Diffendal, 222 Md. App. at 393.

Mr. Kirk seeks to add an additional requirement to the lease application process: he urges us to apply the Open Meetings Act, and to find that DNR violated the Act by failing to prepare minutes of the January 17 meeting. And although we understand Mr. Kirk's frustration in missing the meeting, NR § 4-11A does not require DNR to facilitate mediation meetings, much less ensure that the meetings are compliant with the Open

Meetings Act. Put another way, even if the Open Meetings Act applied to the mediation, and we offer no views on whether it did, DNR's failure to comply with the Act wouldn't affect the merits of the proposed lease application. Mr. Kirk might or might not have an Open Meetings Act remedy elsewhere,[4] but that remedy wouldn't include an ability to block these leases.

The ALJ found that Mr. Lumpkins's proposed leases satisfied all the applicable governing sections of NR § 4-11A. Mr. Roscher's affidavit formed the basis for this conclusion, and the record contains no indication otherwise. We hold that the ALJ's conclusion is supported by substantial evidence, and given that Mr. Kirk concedes that the proposed lease complies with all relevant sections of NR § 4-11A, we likewise discern no genuine dispute as to a material fact that would warrant a hearing. Absent such a finding, we have no basis upon which we could reverse the agency's approval of Mr. Lumpkins's leases.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[4] We can, and do, take judicial notice of the fact that Mr. Kirk filed in the Open Meetings Compliance Board a complaint alleging the same violations he alleges here, and that the Board dismissed his complaint on the grounds that the mediation did not constitute a meeting of a public body, as those terms are defined in the Act.