

HARRY BRENNER,
Petitioner,
v.
PINELANDS COMMISSION,
Respondent.

Decided December 20, 1979

Initial Decision

SYNOPSIS

Petitioner requested *de novo* consideration of his application to construct a single family residence on land located in a portion of the Pinelands designated as the Protection Area after a denial of that application by the Pinelands Review Board. The administrative law judge noted that approval of construction may be granted if there is a finding of extraordinary hardship to the petitioner *and* no substantial impairment to the natural resources of the Pinelands. Although the petitioner was found to be in poor health due to a heart condition and in need of a change of life style and environment, the evidence presented did not demonstrate that he could live only in the Pinelands. In addition, the petitioner failed to present any proofs as to the issue of substantial impairment, even though the burden of persuasion was upon him. A potential for substantial impairment was demonstrated by the agency. Finding that no extraordinary hardship existed and that the possibility of substantial impairment to the environment was present, the application was denied.

Harry Brenner, Pro se

Mary Jacobson, Deputy Attorney General for Respondent (John J. Degnan, Attorney General of New Jersey, Attorney)

MASIN, ALJ:

This case arises as a result of a denial by the Pinelands Review Board of an application filed by Harry Brenner seeking to construct a single family residence in the Ocean Acres subdivision located in Stafford Township, New Jersey. The subject land is located in a portion of the Pinelands designated as the Protection Area in the Governor's Executive Order No. 71, subsequently superseded by the Pinelands Protection Act. The property is also within the area designated as the Central Pine Barrens Critical Area for water resource purposes under provisions of the New Jersey

Administrative Code, specifically *N.J.A.C.* 7:9-10.1(b).

Shortly after Governor Brendan T. Byrne issued Executive Order No. 71, commonly referred to as the Pinelands Moratorium, on February 8, 1979, the petitioner, an owner of property located in Section 8, block 95, lot 10, Stafford Township, applied to the Pinelands Review Board for approval of construction. After a review of the application by the Review Board staff, the Review Board issued a denial of the application on or about June 26, 1979. By letter, dated July 6, 1979, the petitioner appealed to the Commissioner of the Department of Environmental Protection seeking review of the Review Board's determination. The case was then transferred to the Office of Administrative Law on October 13, 1979 as a contested matter, pursuant to *N.J.S.A.* 52:14F-1 *et seq.* In the interim, the Pinelands Protection Act was enacted by the Legislature, which superseded Executive Order No. 71 and established the Pinelands Commission, which is charged with the supervision of both interim and long range planning and control of the designated areas collectively referred to as the Pinelands. The act places the responsibility for final administrative action upon the Commission and, thus the appeal by the petitioner in this case from the decision of the Review Board is in essence, not an appeal but a request for *de novo* consideration by the Commission. A prehearing conference was held on October 22, 1979 and the hearing was held before Administrative Law Judge Jeff S. Masin on November 14, 1979.

STATUTORY AND REGULATIVE FRAMEWORK

As noted above, the statute which controls the determination whether the petitioner may construct a home on his land is the Pinelands Protection Act. As the name indicates, this legislation seeks to protect and preserve the natural resources of the Pinelands area for the benefit of the people of this State and the Nation. The act provides for the comprehensive review of planning and construction and more fundamentally, requires a comprehensive plan to be developed to govern future development within the Pinelands. The act establishes two zones within the Pinelands; one being the Protection Area and the other the Preservation Area. Pursuant to the act, specifically section 13(e), the Commission may grant approval for construction in the protection area where it finds that such approval is necessary: (1) to alleviate extraordinary hardship or (2) to satisfy a compelling public need or (3) is consistent with the purposes and provisions of the Pinelands Protection Act and the Federal Act and would not result in a substantial impairment of the natural resources of the Pinelands area. As directed by section 13(e) of the act, the Commission has adopted standards for review of applications for development and construction,

known as the Interim Rules and Regulations. These rules and regulations detail various considerations to be considered in determining whether the proposed development is permitted within the legislative scheme. It is in the light of these statutory provisions and Interim Regulations that this petitioner's appeal must be considered. The Interim Regulations, adopted after the original denial by the Review Board, established guidelines for determining whether the proposed construction will be consistent with the act and whether it will lead to substantial impairment. In this connection, the standards originally referred to the impact of the proposed construction on water quality as a major consideration in determining whether substantial impairment would occur if the proposed development is allowed. Subsequently, Standard 2 of the Interim Rules was amended to provide for denial of applications where water quality standards adopted by the Department of Environmental Protection will be violated.

In the present case, the specific reasons for the denial of the petitioner's request revolve around the determination by the Review Board that the applicant did not qualify for an exemption on hardship grounds and that the proposed construction, which involved a septic system, was likely to contravene the existing water quality and potable water standards adopted by the Department of Environmental Protection due to the predicted existence of an average nitrate-nitrogen level in the ground above the acceptable level of 10 parts per million (ppm).

THE BRENNERS' TESTIMONY

At the hearing, the petitioner presented proofs intended to demonstrate the existence of an extraordinary hardship. In this vein, the testimony of Harry Brenner indicated that he is a 69 year old tool and die maker, presently residing with his wife in Paterson, New Jersey. In 1972, he suffered a heart attack and was advised to retire and move to a more open, cleaner area such as South Jersey. While Mr. Brenner originally testified that he had been told to move to the Pinelands, he later indicated that the direction was a more general one, with South Jersey indicated as a preferred area. The Brennens purchased a lot in Manahawkin, Stafford Township, Ocean County in the development known as Ocean Acres. The purchase price was \$4,100. Mr. Brenner described the property as being approximately 60 feet by 120 feet. Mr. Brenner continued to work until 1977 when he suffered a second heart attack and was then told by his physician to retire immediately and get out of Paterson. The Brennens intend to build a single family home on the lot in Ocean Acres, which contains eight thousand lots.

Mr. Brenner described his home in Paterson as being in a declining area with falling property values. His home is worth approximately \$35,000 and

is his only real asset. He receives a pension of \$96 a month and \$514 a month from Social Security. His wife receives approximately \$3,000 a year from occasional office work. The Brenners have about \$5,000 in the bank. Mr. Brenner described his present condition as drained, both emotionally and physically.

The petitioner stated that he had received no formal notice of the oncoming moratorium. He did admit he had heard of certain environmental controls being issued concerning the critical area. He was aware of "dozens" of homes which had been started in Ocean Acres just before the building ban had gone into effect.

Mrs. Brenner testified that her husband's health was the reason for seeking to build in the Ocean Acres area.

THE EXECUTIVE DIRECTOR'S EVIDENCE

The Executive Director of the Pinelands Commission then presented evidence seeking to establish the reasons for its contention that the proposed construction would be in violation of water quality standards and thus could not be permitted under the Interim Rules and Regulations. The first witness was William Harrison, Assistant Director in charge of Development Review for the Commission. Mr. Harrison noted that prior to his involvement with the Pinelands Review Board he had been involved in the adoption of water quality standards by the Department of Environmental Protection for the critical area of the Central Pinelands. In 1977, the Department determined that the ground and surface waters of the Pinelands area were in a near pristine state. After extensive public hearings, regulations were adopted in January 1978. Prior to the adoption of the 1978 water quality regulations, many land owners in the Ocean Acres area, having become aware of the impending rules due to leaks, rushed to obtain permits for construction.

On February 8, 1979, Governor Byrne issued Executive Order No. 71. His intention to do so had first been indicated in his State of the State message delivered to the Legislature some three or four weeks before the issuance of the moratorium and was widely reported in the newspapers.

Mr. Harrison then testified as to his role in reviewing applications for the Pinelands Review Board and the Commission. He also testified concerning the adoption of an amendment to Standard 2 of the Interim Regulations. This change was made in order to formalize the use of the water quality standards as a guideline for review of applications in order to avoid situations where approvals for construction would be granted by the Pinelands Commission and then would be denied by the Water Resources Division of the Department of Environmental Protection.

Mr. Harrison detailed the standards used in determining the existence of

hardship by the Division of Water Resources for purposes of approval of construction in the critical areas. He stated that where a piece of property was surrounded by existing developments such as homes or streets and no vacant land was available to allow the petitioner to expand the size of his lot, construction had been permitted. From his review of the Brenner application, the petitioner would not qualify for approval under this policy because the property was not land locked. Further, the proposed construction would violate water quality standards. This determination was based on information received from the Division of Water Resources, which had undertaken a review of the application at his request and found that the proposed construction with its standard septic system would produce a level of nitrates of 22.62 ppm's at the property line.

Mr. Harrison testified that the Pinelands Commission has consistently applied standards for determining the existence of extraordinary hardship. These include such situations as where a party sells his home and has no place to live except in the proposed construction and situations where construction had begun prior to February 8, 1979.

The witness then testified that studies done by the Division of Water Resources of the Department of Environmental Protection concerning the Ocean Acres area had developed information with respect to the size of lots required in order to comply with water quality standards, specifically those relating to the control of nitrate pollution from septic systems. The agency had determined that a one acre lot size would generally permit sufficient dilution of the septic levels. A copy of the Ocean Acres study detailing information regarding the nitrate pollution problem and the options available for the disposal of waste in the Ocean Acres area was marked in evidence.

On cross-examination, Mr. Harrison stated that Mr. Brenner's health status had been considered in determining whether he had an extraordinary hardship. In Mr. Harrison's experience, the Commission viewed the health exemption as intended to alleviate serious health or safety problems. In Mr. Brenner's case, although he had had two heart attacks in the past, the Review Board had determined that there had been no showing of sufficient urgency and immediacy of need as well as no indication that Mr. Brenner's health required a move to the Pinelands, and only to the Pinelands.

On inquiry by the petitioner concerning the substantial building in the area near their property, Mr. Harrison acknowledged that had the Brennens begun construction prior to January 1978, as had others, they could have built free of the critical areas or Pineland's restrictions. However, at this time, the Commission, in considering additional development in the area, could not view each single family home in isolation and had to take into

account the total effect of construction of many single family residences.

Ms. Susan Hullings, a staff employee of the Pineland's Commission, testified that in preparation for the hearing, on November 12, 1979, she had gone to the Brenners' lot in Ocean Acres to observe the area. She described the vegetation on the lot and surrounding area. The lot measured approximately 70 by 120 feet. She noted the existence of homes in the area but there was no construction on either Mr. Brenner's lot or the adjoining ones. Ms. Hullings prepared a map of the area showing homes, vegetation and utilities and this map was admitted into evidence.

Robert Canece was the agency's final witness. Mr. Canece holds a bachelor's degree in geology from Rutgers University and is a geologist trainee for the Bureau of Water Quality and Management working under the supervision of senior staff personnel. He has been employed for one month and during that time he has reviewed approximately 40 applications, of which 20 were for single family homes. He has received training in the use of the mathematical computations used by the Bureau to determine nitrate levels in the soil. He is familiar with the Brenners' application and reviewed it for the Pineland's staff.

Mr. Canece testified concerning the physical setup and operation of a standard septic system of the type envisioned for use on the proposed Brenner development. In so doing, he related his knowledge concerning the chemical and biological processes resulting from the operation of such a system. Essentially, he explained that nitrogen leaves the body in the form of ammonium contained in feces and urea which upon entering the soil changes from organic ammonium to inorganic nitrate and nitrite. This process, called nitrification, occurs under aerobic conditions (in the presence of oxygen) in the soil. Bacteria found in the soil is responsible for this process.

In the functioning of a standard septic system waste materials are sent through a pipe from the house to a septic tank in the soil. Solid wastes separate out through gravity and through bacterial action which minimally denitrifies the ammonium. From a large septic tank, the materials pass through a distribution box and then through a pvc pipe into a disposal area, either linear (trench) or rectangular (field). In the field, the material passes through coarse gravel into the subjacent soil. Clean sands or mason soil are used as filter material in the disposal field.

Mr. Canece testified that numerous studies have shown that a septic disposal field produces nitrates a level of 40 ppm. The Department of Environmental Protection relies on these studies in setting up the water quality standards. Mr. Canece explained that after the nitrates leave the disposal area they are subjected to the action of nitrifying bacteria, although

in the sandy soil of the Pine Barrens this process was of minimal effect. The nitrate levels are further diluted by the effects of the approximately 20 inches of rain per year (out of 41 inches which falls) which actually infiltrates the soil in the subject area. By use of a mathematical calculation, known within the Bureau as the "model," the Bureau determines whether an application will violate the water quality standards for potable water.

In his testimony, Mr. Canece referred to several factors in the calculation which aided the property owner. First, the use of the average figure of four persons per household is based on the actual calculated figure of 3.5 rounded off for convenience. The Division uses the figure of 100 gallons of septic discharge per day per person in its calculations. Thus, the use of four as the average number of persons increases the waste water total per household. This aids the owner because this waste water, which comes either from the toilet (known as black water), or the sinks, showers, etc., (known as grey water) mixes with the solid waste and aids in the dilution of the nitrates. Thus, the more water in the calculation, the greater the dilution factor. Secondly, the Division assumes that the septic tank will be located in the center of the property, thus enabling the property owner to have the full benefit of his lot size for dilution purposes. Essentially, the amount of dilution which will occur after the nitrates leave the disposal area is affected by the level of rain, the percolation rate, and the size of the lot. The slower the percolation rate and/or the larger the lot, the more time the nitrates have to be subjected to the dilution processes which will reduce the nitrate-nitrogen level at the property line.

Mr. Canece stated that in determining to use the property line as the appropriate place to fix the nitrate-nitrogen level the Bureau relied on the philosophy that one is responsible for what one produces. Nitrates which exist after leaving the property line can enter ground or surface waters and pollute wells, streams, etc. The danger here is that an excessive level of nitrates in well waters can lead to health hazards, most importantly nitrate poisoning. This is a particularly serious hazard to infants who suffer adverse reactions due to the nature of their developing systems and the effect of bacteria in their bodies. During testimony, the agency offered in evidence Mr. Canece's memorandum report to Mr. Harrison, Appendix A of the Drinking Water Regulations of the National Interim Primary Drinking Water Regulations, and the New Jersey Department of Environmental Protection, Division of Water Resources, Bureau of Water Quality Planning and Management, Ground Water Management Unit's booklet detailing the mathematical calculations and methodology used by the DEP in its nitrate level calculations.

Mr. Canece based his testimony on his educational background,

knowledge of various publications in the environmental field, on-the-job training, including conversations with John Trella and Wayne Saunders, Bureau personnel responsible for the Ocean Acres study and authors of the "model," and discussions with others in the field. Mr. Canece's prior work experience has largely been as a resource researcher in the environmental field.

On cross-examination by the Brenners, Mr. Canece stated that the Bureau used a standard of 3.5-4 person per property because even where, as in the case of the Brenners, only two persons were intending to live in the home, the subsequent number of future occupants could not be predicted nor could it be limited unless the property was subject to the existence of deed restrictions. He also asserted that the effect of two persons upon the environment could be detrimental and could affect the quality of the water. He noted that the provisions of Chapter 199 of the Realty Improvements Law mandated the use of the 400 gallons of waste water per day figure.

FINDINGS AND CONCLUSIONS

This case must be determined with due regard for the strong legislative commitment to the protection of the Pineland's area expressed in the preamble to the Pinelands Protection Act. The findings of the Legislature as to the uniqueness of the area, the significance of the water resource, the dangers posed by the "pressures of development" and the need for protection in order to preserve the benefits of the area for the people of New Jersey and the Nation clearly justify the imposition of significant restrictions on the ability of property owners to do as they please with their property. Added impetus to this recognition arises from the action of Congress in enacting Section 502 of the "National Parks and Recreation Act of 1978" (*P.L.* 95-625). At the same time, the State, in its zeal to preserve and protect its precious resources, must tread carefully so as to be sure that its action does not unjustly deprive property owners of the use of the land and endanger the health and safety of citizens. It is this balancing that must take place in every determination made by the agency on applications for approval of construction and development. In order to provide fair and consistent guidelines to aid in this balancing, the Legislature required, and the Commission has adopted, Interim Rules and Regulations governing the review of applications submitted. In the present case, the Review Board had determined that the balance weighed in favor of a denial of the application. After examining the testimony and evidence presented to me, I must agree, both because of the failure of the petitioner to demonstrate the existence of extraordinary hardship and the further failure to show that the proposed construction would not substantially impair the Pinelands.

Where land is located in the Protection Area, the act required that no approval of construction or development be granted unless there be a finding of the existence of extraordinary hardship (or other grounds not presented herein) and no substantial impairment. The finding of an extraordinary hardship alone is not enough. The Legislature believes, as clearly implied by the wording and scope of the act, that the area's protection is so vital to the future of the State and its people that even where severe hardship is established, no development can be allowed unless there is also no serious danger of harm to the land. In fact, the very use of the term "extraordinary," coupled with hardship, connotes the extreme care desired by the Legislature. Mere hardship alone is not enough. It must be "extraordinary," thus, being unusual, extreme and out of the ordinary. In the present case, the proofs presented by the petitioner, while certainly demonstrating that Mr. Brenner is in poor health and needs a change of life style and environment, do not rise to the level of the heavy burden of proving unusual, extraordinary need. One can imagine that there may well be persons whose illnesses are such that they can only live in an area having the physical and environmental characteristics of the Pinelands, but on the record before me, I cannot say that Mr. Brenner's condition is such. I **FIND** that he has suffered two acute myocardial infarctions; the first on May 1, 1972 and the second on March 12, 1977. I believe him when he says that he has been advised that it is necessary to move out of Paterson and relocate in a more healthful environment such as in South Jersey, although no documentary proofs to this effect were submitted. (A letter from Dr. Robert Levy, M.D. was submitted and marked in evidence. This letter supports the testimony as to the myocardial infarctions.) I **FIND** that such advice was given to him both in 1972 and again after the 1977 incident. However, as even he admits, the advice given to him was not that he must move to the Pinelands, only that South Jersey, an area much larger than the Pinelands, was a suitable site for his relocation. While the Brennens chose to buy land in the Pinelands, a choice which was certainly reasonable in light of the advice given, the proofs do not demonstrate that they must live there and nowhere else. In spite of a feeling of sincere sympathy for the predicament which the Brennens find themselves in, I cannot **FIND** that their proofs satisfy the statutory requirements.

Although the failure to establish the existence of an extraordinary hardship alone defeats the petitioner, determination of the substantial impairment question is also appropriate. Initially, it should be noted that the petitioners submitted no proofs whatsoever on this issue. The burden of persuasion was upon them. However, the agency presented its proofs in order to demonstrate that there was a potential for substantial impairment.

This evidence consisted of substantial background information, technical data and opinion testimony. Mr. Harrison's review of the application, aided by the Division of Water Resources analysis conducted by using the "model," led him to a conclusion that there would be a violation of water quality standards and thus substantial impairment under the guidelines. The potential impact on water quality is a major consideration in determining the likelihood of substantial impairment and has now been incorporated more specifically in the amendment to Standard 2. Mr. Harrison's view was supported by the testimony of Mr. Canece. This witness presented a great deal of technical testimony on the operation of the septic system, the chemical and biological processes and the formulation of the model. Mr. Canece is new to the Bureau but appears well versed in these areas through work experience, reading, discussions and educational training. His testimony was clear, detailed and believable. The material submitted in support of it, while hearsay in nature, generally confirms his statements and calculations. After review of this testimony and evidence, I **FIND** as follows:

(1) The nitrate level for the Brenners' property using the computations developed by the Division of Water Resources is 22.62 ppm's.

(2) This level is substantially in excess of the accepted level of nitrates of 10 ppm's as determined by the Department of Environmental Protection and supported by the research data.

(3) Construction of a home producing waste at a level of 22.62 ppm's of nitrate would violate the Water Quality Standards established by the Bureau, relied on by the Commission and now incorporated in the Interim Rules and Regulations. The excessive nitrate level which would result if construction occurred as proposed would cause impairment of the Pinelands and such impairment would be substantial in view of the potentially serious effect of excessive nitrates on the ground and/or surface waters and the health hazard with such excessive levels pose. In this connection, I agree that each individual home cannot be viewed in isolation. A cumulative effect can only arise from the construction of a series of homes creating smaller, less substantial hazards. This is particularly possible in a situation such as Ocean Acres with its massive number of lots.

I **CONCLUDE** that the petitioner has failed to prove the existence of extraordinary hardship and has further failed to submit any evidence establishing that no substantial impairment will occur. In addition, I **CONCLUDE**, on the basis of the evidence presented to me by the Commission staff, that substantial impairment would result if the proposed construction occurred.

At the prehearing conference the Brenners stated that they had received

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no notice of the imposition of the moratorium and other restrictions. At the hearing the deputy attorney general noted that the water quality standards had been the subject of notice in the New Jersey Register. Subsequently, a copy of the notice of adoption, published in the New Jersey Register on Thursday, February 9, 1978, was submitted to me. That notice refers to the original notice of proposal as having been published February 10, 1977 at 9 New Jersey Register 68(b). I **FIND** that sufficient notice of the intention to impose these water quality standards was given prior to their adoption by the Department of Environmental Protection. As for the moratorium itself, Mr. Harrison referred to the Governor's having made reference to such a ban in his 1979 State of the State address, which was extensively reported in the press. Furthermore, the moratorium has been superseded by the Pinelands Protection Act, a legislative enactment which was adopted after extensive public debate and amid substantial controversy. While it is true that the Brennens did not receive any personal notice sent directly to them of either the water quality standards or the moratorium and the legislation, I **FIND** no requirement for such a form of notice. The publication of the notices of intention and adoption in the New Jersey Register is the statutorily mandated procedure for giving notice to the citizenry of governmental regulatory action, a requirement contained in the New Jersey Constitution (1947), Art. V, § IV, par. 6. I **CONCLUDE** that proper notice was given of the government's actions. (*See, N.J.S.A. 52:14B-5*).

After reviewing this Initial Decision, the Pinelands
Commission on April 15, 1980 issued the following Final
Decision:

The Pinelands Commission has adopted without modification the initial decision of the administrative law judge.