W. BRYCE THOMPSON, IV, Petitioner, v. PINELANDS COMMISSION, STATE OF NEW JERSEY, Respondent.

Decided October 10, 1980

Initial Decision

SYNOPSIS

Petitioner sought approval for construction of a single family dwelling on a 10 acre lot within the Protection Area of the Pinelands. The application was denied by the Executive Director of the Pinelands on the basis that development of the lot was not consistent with the Pinelands Protection Act since the project would constitute scattered and piecemeal developments. Petitioner requested a hearing and the matter was heard by an administrative law judge.

The administrative law judge noted that the agency had not asserted that the petitioner’s development would substantially impair the resources of the Pinelands nor did the petitioner assert any compelling public need for the development. The sole question to be decided was whether the proposal is consistent with the purpose of the Pinelands Protection Act.

The judge noted that on the consistency question, petitioner’s proposal did not violate any of the twelve adopted standards contained in the agency’s interim regulations set out at N.J.A.C. 7:16-1.1 et seq. The judge rejected the argument that the petitioner would have to meet not only these standards but also the standards set out in N.J.S.A. 13:18A-18B, the Pinelands Petition Act, as well. The judge reasoned that the scheme of the act requires that the agency undertake two distinct rule-making tasks, first the development of interim regulation and second, a long range management plan. While the judge did not disagree with the argument that the goals of the act were to be weighed in considering interim period approvals, he felt that the Legislature had created the exclusive means by which application were to be measured in the interim period when it directed that the agency adopt, after public hearing, rules which specify the standards of the act. The judge reasoned that every standard to be applied during the
interim period should pass through the scrutiny of the required public meaning.

Accordingly, the administrative judge concludes that since petitioner did not violate any of the “consistency” standards of the regulations and that since no “substantial impairment” allegation had been made, the application should be approved.

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Thomas Norman, Esq., for petitioner

Robert Grabowski, Deputy Attorney General, for respondent (John J. Degnan, Attorney General of New Jersey, attorney)

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METZGER, ALJ:

This matter arises out of the recommended denial of an application for development approval in the Pinelands by the Executive Director of the Pinelands Commission pursuant to the Pinelands Protection Act, N.J.S.A. 13:18A-1, et seq. and regulations promulgated thereunder. A hearing was requested and the matter transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1, et seq. Petitioner has filed a Motion for Summary Decision pursuant to N.J.A.C. 1:1-13.1, et seq. asserting his entitlement to development approval as a matter of law.

Petitioner’s property is located in Plumstead Township, Ocean County, which falls within the Protection Area of the Pinelands. He is seeking to construct a single family dwelling on one lot consisting of ten acres. The basic reasons for the denial are set forth in a letter of May 23, 1980, from the Agency to Petitioner indicating that:

... the proposed development of this lot is not consistent with the Pinelands Protection Act... [in that] this property is located in an undeveloped area. There are only three other homes within 1.4 miles of this site. There is a church adjacent to this site. This property is being subdivided from a farm. The development of this lot constitutes scattered and piecemeal development.

There is some dispute concerning the number and types of uses in the area of petitioner's proposed site. However, if petitioner's initial arguments concerning the legal foundations of the agency position are correct, the matter may be disposed of without regard to the factual questions.

The Pinelands Protection Act was adopted and became effective on June 28, 1979. The purpose of the act is set forth in legislative findings,
N.J.S.A. 13:18A-2. The act seeks to protect the unique and significant resources of the Pinelands within established boundaries, N.J.S.A. 13:18A-10. The act divides the Pinelands area into what is generally an outer ring, or Protection Area, and an inner core or Preservation Area. This inner core is seen as most environmentally sensitive while the outer ring has been deemed somewhat less so. The act creates a separate Pinelands Commission, N.J.S.A. 13:18A-4, which has as its primary function to put into operation a long-range regional planning apparatus consistent with the Legislature’s determination to maintain and protect the resources of the area. Out of a recognition that development could not be permitted to go on unchecked, however, and indeed to anticipate the plan, and at the same time being unwilling to simply impose a temporary freeze on construction, the Legislature provided certain broad standards for granting approvals during the interim period before the plan actually went into effect. In the Protection Area these standards require that an applicant establish that he will suffer “extraordinary hardship” if he is not permitted to go forward, or that there exists a “compelling public need” for his particular type of development or that his proposal is “consistent” with the purposes of the act, and that the development would not result in “substantial impairment of the resources of the Pinelands area,” N.J.S.A. 13:18A-13.

The Legislature specifically directed that these concepts be more fully developed during the interim period in N.J.S.A. 13:18A-13e, as follows:

The Commission shall within ninety (90) days of the effective date of this Act, and after public hearing thereon, adopt rules and regulations which specify the Standards for determining such extraordinary hardship, compelling public need, consistency and substantial impairment for the purposes of this Section.

Pursuant to this section, the Commission has adopted twelve standards and further defined these statutory terms in interim regulations, N.J.A.C. 7:1G-1.1, et seq. In order to prevail in the protection area an applicant must, thus, satisfy one of the first three standards of the act and the fourth, as these are detailed in the regulations.

The agency does not assert here that petitioner will “substantially impair the resources of the Pinelands area” nor does petitioner advance any “compelling public need” argument. Further for purposes of this decision, his “extraordinary hardship” arguments are not considered. The sole question here is whether petitioner has established
that his proposal is consistent with the purposes of the act as a matter of law, thereby entitling him to approval as having met one of the three tests in the contested prong of his burden.

There is no assertion by the agency that petitioner violates any of its twelve adopted standards, whether as a matter of consistency or substantial impairment. As implied by the agency's letter of denial, and as developed in its brief, it bases the denial on section 8B of the act, N.J.S.A. 13:18A-8B, which sets forth the goals of the Comprehensive Management Plan for the Protection Area. These are as follows:

The goals of the Comprehensive Management Plan with respect to the Protection Area shall be to:

(1) Preserve and maintain the essential character of the existing Pinelands environment, including the plant and animal species indigenous thereto and the habitat therefor;

(2) Protect and maintain the quality of surface and ground water;

(3) Promote the continuation and expansion of agricultural and horticultural uses;

(4) Discourage peacemeal and scattered development; and

(5) Encourage appropriate patterns of compatible residential, commercial and industrial development, in or adjacent to areas already utilized for such purposes, in order to accommodate regional growth influences in an orderly way while protecting the Pinelands environment from the individual and cumulative adverse impacts thereof.

The question then is whether petitioner having met the Commission's twelve adopted standards, may also be required to comply with the Section 8B goals.

The scheme of the act requires that the agency undertake two distinct rule making tasks. The first requires that it develop interim regulations, the second a long range management plan. I have no disagreement with the agency's position that these Section 8B goals which are to form the underpinnings of the plan, ought to be weighed in considering interim period approvals. No doubt each of the twelve standards adopted to date reflects some aspect of one or more of these goals. But in directing that the agency "shall . . . after public hearing . . . adopt rules which specify the Standards . . . for purposes of this section", the Legislature has, in my view, created the exclusive means by which applications are to be measured, during the interim period.
The words are clear and require little construction. If the agency had wished to develop further standards highlighting different aspects of the section 8B goals it was and is free to do so. Additionally, there is a public hearing process mandated by section 13, which goes beyond the rulemaking requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-4. It is thus not merely a question of notice and publication with which we are concerned, but also with the lost opportunity for public discussion. I see no basis for concluding that the legislature did not expect every standard applied during the interim period, to pass through this sort of scrutiny.

It restates the point somewhat differently to say that in establishing broad outlines for the Comprehensive Management Plan, at section 8B of the act, which plan is itself subject to public hearing prior to adoption, the Legislature gave no indication that it expected these goals to be applied as is, during the interim period. For that purpose it separately provided standards for the interim period.

The Legislature was under no compulsion to so specifically direct the development of interim regulations. Had it not done so, the agency's reliance on the broad goals of Section 8B, whatever guidance they might provide, might be acceptable. 1 The appellate courts have certainly been receptive to the idea that agencies to which responsibility for broad environmentally based planning efforts are delegated are entitled to limit growth during an interim period, and to rely upon broad statutory language without reference to detailed regulations, Toms River Affiliates v. Department of Environmental Protection, 140 N.J. Super. 135, 150 (App. Div. 1976). Yet in specifically requiring that interim rules be adopted, and further that public hearings be held on these, the Legislature has distinguished this situation.

It appearing that petitioner does not violate any of the "consistency" standards of the regulations, and that no "substantial impairment" allegation having been made, petitioner has met both prongs of his interim period burden, and it is ordered that his application be approved.

1Petitioner raised the argument as well that these goals are overly broad and cannot in their existing state be applied. That issue is not reached here and appears to require some reference to a record.
After reviewing this Initial Decision, the Pinelands Commission, on December 8, 1980, issued the following Final Decision.

The Pinelands Commission adopted a resolution vacating the initial decision of the administrative law judge and dismissing the contested case in the above captioned matter on December 5, 1980 on the basis of the Executive Director’s recommendation that the application now be approved with conditions and the applicant’s acceptance of those conditions.