

HELENE PFEIFFER,
Petitioner,
v.
NEW JERSEY PINELANDS COMMISSION,
Respondent.

Initial Decision: June 28, 1985

Final Agency Decision: August 9, 1985

Approved for Publication by the Pinelands Commission:
August 14, 1985

SYNOPSIS

Petitioner appealed from a denial of a waiver of strict compliance from certain sections of the Pinelands Commission Comprehensive Management Plan.

In reviewing a motion to dismiss, the administrative law judge found that the property in question was .97 acre in size, was located in an agricultural production area and that while well and septic permits for development on the parcel had been secured in 1977, they expired in 1978. The judge determined that for petitioner to qualify for a waiver she must meet the requirements of *N.J.A.C. 7:50-4.55(a)1* which provides that the particular physical surroundings, shape or topographical conditions of the specific property involved would result in extraordinary hardship, rather than mere inconvenience if the Plan were literally enforced. The need to acquire additional land would not be considered a hardship unless there is no adjacent land immediately available. In this instance, the property failed to meet that criterion since there was a vacant adjacent lot. Nor could the property be considered unique since petitioner had failed to show that other properties in the area were not similarly situated. In addition, since applicant wished to develop one vacant lot which was part of a subdivision, it was the developer's costs and revenues which must be examined in order to determine whether the applicant could gain a reasonable rate of return and petitioner had submitted no evidence on that point.

Accordingly, the waiver of strict compliance was denied.

Upon review, this initial decision was adopted by the Pinelands Commission.

Herbert O. Brock, Jr., Esq., for petitioner (Morris & Brock, attorneys)
Debbie J. Thompson, Deputy Attorney General, for respondent (Irwin
I. Kimmelman, Attorney General of New Jersey, attorney)

Initial Decision

CAMPBELL, ALJ:

This is an appeal from a denial by the executive director of the Pinelands Commission of a waiver of strict compliance with certain sections of the Pinelands Commission Comprehensive Management Plan (CMP), *N.J.A.C.* 7:50-1 *et seq.*

The matter was transmitted to the Office of Administrative Law for disposition as a contested case pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F1 *et seq.* After notice, a prehearing conference was held on August 2, 1984. Among other things, it was determined that the issue to be tried was whether the petitioner was entitled to a waiver of strict compliance with *N.J.A.C.* 7:50-5.24 dealing with minimum lot size, *N.J.A.C.* 7:50-6.14 as to wetlands buffer requirements, and *N.J.A.C.* 7:50-6.84(c) dealing with seasonal high water table standards.

The matter was set down for hearing on November 20 and 21, 1984. At the request of the petitioner, based on the state of her health, the hearing dates were adjourned. On November 14, 1984, the deputy attorney general filed a notice of motion to dismiss, pursuant to *N.J.A.C.* 1:1-9.1 and *N.J.A.C.* 1:1-3.5(a)3. Pursuant to *N.J.A.C.* 1:19.2(b) and (c), the respondent was allowed 20 days to file answering papers. Three days were allowed for movement of the mails. By December 7, 1984, this office had received no papers responsive to the motion. Accordingly, the motion was treated as unopposed and was granted.

The Pinelands Commission received exceptions to the decision. The petitioner indicated that the interrogatories that were originally the subject of the motion to dismiss were subsequently answered. However, the deputy attorney general's response to the exceptions indicated that unresolved discovery issues remained. In consideration of that state of affairs, the Commission remanded for a reevaluation in light of the discovery issues raised by the exceptions and the response to the exceptions.

On May 23, 1985, the deputy attorney general representing the Commission filed a motion to dismiss. Responsive papers were received from the petitioner on June 4. The deputy attorney general filed a reply on June 11.

I.

The parties have stipulated the following:

1. The subject property is identified as Block 23B, Lot 18,

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Shamong Township, Burlington County.

2. The subject property comprises .97 acre.
3. The subject property lies in an agricultural production area.
4. Well and septic permits for development on this parcel were secured in 1977 but expired in 1978.

In the original case, the Pinelands Commission promulgated interrogatories upon the petitioner. The petitioner ultimately submitted answers on November 29, 1984. In order to obtain information not included in the answers, the Commission promulgated supplemental interrogatories upon petitioner on December 13, 1984. Incomplete answers to those interrogatories were submitted on April 18, 1985, although the answers bear no signature or date.

At a prehearing conference conducted on April 18, 1985, I ordered that all discovery in this matter be completed on or before May 20, 1985. The information provided by the petitioner through the discovery process indicates that no issue of material fact remains. This matter therefore is ripe for summary decision.

II.

The Commission argues that it is entitled to summary decision dismissing the present petition as a matter of law. The Pinelands Protection Act, *N.J.S.A.* 13:18A-1 *et seq.*, created the Pinelands Commission and directed it to prepare and implement a Comprehensive Management Plan (CMP) to protect the natural resources of the Pinelands region. *N.J.S.A.* 13:18A-8, 9. The CMP, which appears in the New Jersey Administrative Code as *N.J.A.C.* 7:50-1.1 *et seq.*, imposes detailed restrictions on construction and other activities in the Pinelands. The restrictions are designed to protect the natural resources of the region.

N.J.A.C. 7:50-4.51 provides that waivers of strict compliance with those restrictions may be granted in certain cases. *N.J.A.C.* 7:50-4.55, however, provides that such waivers may only be granted if the applicant demonstrates he has met certain criteria:

- (a) An application for a waiver shall be approved only if the Executive Director finds an extraordinary hardship or compelling public need under the following standards:
 1. The particular physical surroundings, shape or topographical conditions of the specific property involved would result in an extraordinary hardship, as distinguished from a mere inconvenience, if the provisions of this Plan are literally enforced. The necessity of acquiring additional land to meet the minimum lot size requirements of this Plan shall not be considered an extraordinary hardship, unless the applicant can demonstrate that there is no adjacent land which is reasonably available. An applicant shall be deemed to have established the existence of extraordinary hardship only

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if he demonstrates, based on specific facts, one of the following:

- i. The subject property is not capable of yielding a reasonable return if used for its present use or developed as authorized by the provisions of this Plan, and that this inability to yield a reasonable return results from unique circumstances peculiar to the subject property which:
 - (1) Do not apply to or affect other property in the immediate vicinity;
 - (2) Relate to or arise out of the characteristics of the subject property rather than the personal situation of the applicant; and
 - (3) Are not the result of any action or inaction by the applicant or the owner of his predecessors in title; or
- ii. The applicant can demonstrate that in good faith reliance on a valid municipal development approval, he has made expenditures of such a nature and amount that he is unable to secure a minimum reasonable rate of return on those expenditures under a strict application of the minimum standards of this Plan. In determining whether an applicant can secure a minimum reasonable rate of return, the Commission shall employ the following criteria:
 - (1) The rate of return shall be related to the applicant's debt to equity ratio in the project;
 - (2) Expenditures for legal or other professional services that are unrelated to the design or construction of improvements shall not be considered as development expenditures;
 - (3) Taxes paid shall not be considered as development expenditures except for any increase in taxes which result from the governmental approval or improvements actually constructed on the property.
- iii. For applications filed within two years of the effective date of this Plan, a valid final subdivision approval under the Municipal Land Use Law for the property proposed for development in the Protection Area was in effect on February 7, 1979, provided that all lots proposed for development have an area of at least one acre, unless sewer is available, and the proposed development is in conformance with the minimum standards and guidelines of *N.J.A.C.* 7:50-6.

The assistant executive director of the Commission, acting on behalf of the Commission, found that the petitioner did not qualify for a waiver under any of these provisions. The petitioner bears the burden of showing that the conclusions in that regard are erroneous. The Commission maintains it is clear from the petitioner's answers to interrogatories that she could not do so, as a matter of law, even if a hearing were held on the merits.

N.J.A.C. 7:50-4.55(a)1 provides that the applicant must show that "[t]he particular physical surroundings, shape or topographical conditions of the specific property involved would result in extraordinary hardship, as distinguished from a mere inconvenience, if the provisions of this Plan are literally enforced. The necessity of acquiring additional land shall not be considered an extraordinary hardship, unless the applicant can demonstrate that there is no adjacent land which is reasonably available." The petitioner's answer to interrogatory No. 6 of the first set of interrogatories indicates that she intends

to allege that this property meets this criterion because it is located in a subdivision and bordered on two sides by single-family dwellings. However, it has been previously held that similar circumstances do not qualify an applicant for a waiver under this Section. *See, e.g., Renz v. Pinelands Commission*, OAL DKT. EPC 8057-82 (May 17, 1983), *aff'd*, Pinelands Comm'n (June 3, 1983); *Tordella v. Pinelands Commission*, OAL DKT. EPC 6085-82 (July 2, 1984), *aff'd*, Pinelands Comm'n (Aug. 3, 1984).

The Commission further argues that the petitioner has failed to show that other properties in the vicinity are not similarly situated. She also has not shown that any unique physical feature of the property would result in extraordinary hardship if developed only as permitted by the provisions of the CMP.

The size of the parcel gives rise to no hardship. It is substandard. However, it is uncontroverted that the property is bordered on one side by Lot 30, Block 23, a parcel of some 18 acres which is owned by 18 Acre Farms, Inc., a corporation of which the petitioner is the sole stockholder. In effect, she owns the adjacent property. It is therefore impossible for her to show that no adjacent land is reasonably available for purchase in order to meet the minimum lot size requirements.

The Commission further argues that even if the petitioner were able to demonstrate that her circumstances satisfy *N.J.A.C.* 7:50-4.55(a), she still would have to show that subsections 1, 2 or 3 of that section also have been satisfied. In view of her answers to interrogatories and the stipulated facts it would be impossible for her to do so. Subsections 1 and 2 require the applicant to show that the subject property would not yield a reasonable rate of return if used for the purposes allowed by the CMP, as well as other facts. Based on answers to interrogatories, the petitioner would be unable to satisfy either subsection.

Her answers show that the subject property is part of the subdivision created by a developer, Lyon Homes, in 1977. In 1978, Lyon Homes sold the parcel to Oakwood Development, Inc., an entity of which the petitioner's husband is the sole stockholder. Oakwood Development, Inc. conveyed the property, still in its undeveloped state, to the petitioner later that year.

These circumstances place the case on all fours with the precedent of *Greenbaum v. Pinelands Commission*, OAL DKT. EPC 8879-81 (Nov. 4, 1982), *rev'd*, Pinelands Comm'n (Dec. 3, 1982). In *Greenbaum*, an applicant wished to develop one vacant lot that was part of a subdivision which was determined to have failed to qualify for

a waiver because of the applicant's failure to submit information regarding revenues and costs for the subdivision as a whole. *Greenbaum* establishes that where a subject parcel is part of a subdivision, it is the developer's costs and revenues which must be examined in order to determine whether the applicant can obtain a reasonable rate of return. The final decision in that matter gave great attention and weight to the facts that the applicant did not submit any information concerning the costs incurred for the whole subdivision, the applicant did not submit any information concerning revenues from the sale of any other lots in the subdivision, that it is impossible to determine whether an applicant has an extraordinary hardship based on investment made in reliance on a valid municipal development approval unless an evaluation is made of all the expenditures and revenues related to the development, and that certain costs were in fact recovered or recoverable from the sale of other lots.

The Commission further held that whenever an applicant has sold some of the property in contiguous parcels and is seeking a waiver of strict compliance for the remaining property, the costs and revenues related to the entire subdivision must be considered. In addition, a reasonable rate of return can only be determined if these costs and revenues are supplied to the Commission.

As the Commission pointed out in *Greenbaum*, a developer who creates a subdivision and builds homes on the majority of the lots could easily recover all of his costs from the sale of the developed properties. If the developer later wished to develop some of the unsold lots, he could not qualify for a waiver to do so on the grounds of inability to obtain a reasonable rate of return. He would already have obtained a legally adequate return on his entire investment from the earlier sales. In short, when an applicant for a waiver seeks to develop a lot in a subdivision created by the original developer, he stands in the shoes of the developer for reasonable rate of return purposes. To permit the applicant-purchaser to develop when the developer could not, would be contrary to the goals of the CMP and the Pinelands legislation, which are designed to allow exceptions only where absolutely necessary.

In her interrogatory answers, the petitioner submitted no information regarding the developer's revenues and only fragmentary information regarding its costs. She did submit information regarding her own costs. However, *Greenbaum* establishes that it is the developer's costs and revenues which are relevant in this fact situation.

In the alternative, the petitioner could not qualify for a waiver

pursuant to *N.J.A.C.* 7:50-4.55(a)1(ii) on the basis of the septic and well permits obtained in 1977 because they expired on their own terms in 1978. They cannot be considered municipal development approvals within the meaning of *N.J.A.C.* 7:50-4.55(a)2.

Finally, the Commission urges that the petitioner could not qualify for a waiver pursuant to *N.J.A.C.* 7:50-4.55(a)1(iii). That subsection requires that all lots be at least one acre in area and the parties have stipulated that the lot in question is less than one acre in size. Even if the subject property were in excess of one acre, the petitioner still could not qualify for a waiver under the subsection since the subsection also requires that the proposed development be in conformance with the minimum standards set forth at *N.J.A.C.* 7:50-6 *et seq.* It is not disputed that the proposed development would not meet with minimum standards of *N.J.A.C.* 7:50-6.14, wetlands buffer, or *N.J.A.C.* 7:50-6.84, seasonal high water table.

For these reasons, the Commission seeks summary judgment in its favor.

III.

The petitioner argues that the existing record sets forth a genuine issue of fact as to the entitlement of the petitioner to a waiver under *N.J.A.C.* 7:50-4.51 *et seq.* The Commission's brief sets forth the applicable sections of the CMP. The Commission asserts that the petitioner's answers to initial interrogatories 2, 4 and 6 set forth the factual basis establishing entitlement for a waiver under *N.J.A.C.* 7:50-4.55.

The petitioner argues that those answers, together with the filed plan of subdivision she supplied to the Commission, clearly demonstrate the characteristics of the subject parcel which do not affect any other property in the immediate vicinity and which arise out of the characteristics of the subject property rather than the personal situation of the petitioner and are not the result of action or inaction on the part of the petitioner or her predecessor in title.

Further, concerning the allowed use of the property which lies in an agricultural production area, the petitioner has identified several witnesses having knowledge of the inability of the property to yield a reasonable rate of return given the parcel's size and physical characteristics.

The petitioner submits that *Renz*, above, and *Tordella*, above, are not determinative of this matter. In fact, in *Tordella*, a waiver was in fact granted to one subsize lot which was the subject of that

proceeding, albeit the subsize lot was made up of two separate, contiguous parcels.

The petitioner also seeks to distinguish *Greenbaum*, above, from the present case. In *Greenbaum*, the applicant was the developer of the subdivision, and as such, not only made the expenditures relevant to development but also was the recipient of all revenues derived from the development. *Greenbaum* should not be followed here because the applicant is not the developer of the subdivision in question. In this case, the petitioner is the purchaser of a single family building lot and does not have access to the developer's schedule of expenditures and revenues.

In addition, the petitioner has not and will not receive any benefit arising from the development of this subdivision other than the right to purchase and use the subject lot. Given the answers to interrogatories already supplied, the petitioner's total expenditures, including the lot acquisition, are \$64,608. The petitioner has asserted that the use of this parcel in a manner consistent with the agricultural production area standards will result in an inability to yield a reasonable return to her which is a genuine issue of fact.

As asserted above, the rationale of *Greenbaum* should not be applied to purchasers of single family building lots relying upon final filed plans of a subdivision.

Finally, the petitioner submits that the Commission has not met the standard for summary judgment set forth in *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67 (1954).

IV.

In consideration of the stipulated facts in this matter and having considered the arguments of the parties, I **FIND** and **CONCLUDE** that *Greenbaum*, above, controls. It would not be possible for the petitioner to demonstrate that she could not obtain a reasonable rate of return if the property were developed in accordance with the CMP.

In *Greenbaum* an applicant sought a waiver to develop a substandard lot which was part of a subdivision. However, as is the case with the instant petitioner, the applicant failed to submit information regarding costs of development and revenues received for the entire subdivision. *Greenbaum*, as did Pfeiffer, submitted information regarding costs and possible revenues for the subject parcel alone. The Pinelands Commission held that the costs and revenues for the development as a whole are those which are relevant in order to determine reasonable rate of return in such circumstances. The Com-

mission's rule is based upon the principle that if the developer already has obtained a reasonable rate of return on his entire investment, he is not entitled to develop any remaining substandard lots on the grounds of failure to obtain a reasonable rate of return on them specifically. Furthermore, if the developer sells those vacant lots to others who wish to develop them, the new owners stand in the shoes of the developer and cannot do what the developer could not, that is, develop additional substandard lots where a reasonable rate of return has already been obtained on the larger property.

The petitioner's argument that the subject property is in some way unique must be rejected. That a particular property is part of a subdivision does not qualify its owner for a waiver of strict compliance on the grounds of hardship based, in turn, on uniqueness. *Renz*, above; *Tordella*, above.

If the pleadings and answers to interrogatories and affidavits filed in support of and opposition to the respondent's motion for summary judgment show the existence of a genuine fact question which, if proved, would establish the petitioner's right to recovery, and the fact question could be established by evidence in the form of depositions, interrogatories, affidavits and admissions that would be evidential at hearing, the hearer may not grant a summary judgment, but if no such question of fact could be established by the record summary judgment is appropriate. *Shiddell v. Electro Rust-Proofing Corp.*, 34 N.J. Super 278 (App. Div. 1954).

Applying the rationale of the Commission set forth in *Greenbaum*, above, I **FIND** and **CONCLUDE** that Helene Pfeiffer cannot show entitlement to a waiver of strict compliance on the grounds of failure to obtain a reasonable rate of return on the subject property within the meaning of the CMP. Accordingly, summary decision is entered in favor of the Pinelands Commission and the petition of appeal is **DISMISSED**. It is so **ORDERED**.

This recommended decision may be affirmed, modified or rejected by the **PINELANDS COMMISSION**, which by law is empowered to make final decisions in this matter.

FINAL DECISION BY THE PINELANDS COMMISSION:

WHEREAS, the Pinelands Commission has reviewed the record in this case and the initial decision by the administrative law judge; and WHEREAS, the Pinelands Commission hereby adopts the initial decision of the administrative law judge; and WHEREAS, the applicant is seeking to develop a single family dwelling on the above-reference 0.97 acre lot; and

WHEREAS, the lot is located in an Agricultural Production Area; and

WHEREAS, the applicant needs a Waiver of Strict Compliance from the restrictions on residential development in an Agricultural Production Area contained in Section 5-304 of the Plan; and

WHEREAS, an on-site sewage disposal system is proposed for the lot; and

WHEREAS, the seasonal high water table on the entire parcel is less than 5 feet below the natural ground surface; and

WHEREAS, the applicant needs a Waiver of Strict Compliance from the seasonal high water table requirements contained in Section 6-804 C3 of the Plan; and

WHEREAS, there are fresh water wetlands located on and adjacent to this parcel; and

WHEREAS, the proposed development will have a significant adverse impact on fresh water wetlands located within 300 feet of that development; and

WHEREAS, the applicant needs a Waiver of Strict Compliance from the buffer to wetlands requirements contained in Section 6-114 of the Plan; and

WHEREAS, there is vacant land adjacent to this parcel; and

WHEREAS, Section 4-505 A provides in part, that:

the necessity of acquiring additional land to meet the lot size requirements of this Plan shall not be considered an extraordinary hardship, unless the applicant can demonstrate that there is no adjacent land which is reasonably available.

WHEREAS, this land is available for the applicant to acquire; and

WHEREAS, the applicant is entitled to Pinelands Development Credits for its parcel; and

WHEREAS, the applicant has not demonstrated that the parcel is not capable of yielding a reasonable return; and

WHEREAS, there is no hardship which arises out of the unique circumstances of the subject parcel or which arises out of the characteristics of the subject parcel; and

WHEREAS, any hardship which does exist is a result of the personal situation of the applicant and her actions or inactions; and

WHEREAS, the seasonal high water table and buffer to wetlands requirements and the restrictions on residential development in an Agricultural Production Area affect all other Vacant property in the area;

WHEREAS, the applicant does not meet the requirements of Section 4-505 A1; and

WHEREAS, the approvals the applicant received prior to February 8, 1979 expired prior to that date;

WHEREAS, the applicant is seeking to reply on the subdivision approval received by the original developer of this subdivision; and WHEREAS, the applicant did not submit any information concerning the costs incurred for the entire subdivision; and

WHEREAS, the applicant did not submit any information concerning revenues from the sale of any other lots in the subdivision; and

WHEREAS, the Pinelands Protection Act and the Comprehensive Management Plan only authorize the granting of a Waiver of Strict Compliance if an applicant has an extraordinary hardship; and

WHEREAS, it is impossible to determine whether an applicant has an extraordinary hardship based on investment made in reliance on a valid municipal development approval unless an evaluation is made of all the expenditures and revenues related to a particular development; and

WHEREAS, if the revenues received prior to 1979 are not considered, no determination can be made if a developer in fact has an extraordinary hardship related to a particular subdivision; and

WHEREAS, since the applicant is relying only on the subdivision approval received by the original developer of this subdivision, this lot must be considered as part of the subdivision which created it; and

WHEREAS, a minimum reasonable rate of return can only be determined if the costs and revenues for the entire subdivision are considered; and

WHEREAS, Section 4-505 A2 (a) requires that the minimum reasonable rate of return must be related to the applicant's debt to equity ratio in the development; and

WHEREAS, this provision requires that the rate of return be based only on the developer's cash investment in the project and not on any money borrowed to finance the development; and

WHEREAS, the debt to equity ratio provision applies to all applicants seeking approval pursuant to Section 4-505 A2; and

WHEREAS, the minimum reasonable return is to be based on the cash investment which constitutes the rate base; and

WHEREAS, this applicant submitted no information concerning the original developer's debt to equity ratio; and

WHEREAS, the applicant does not meet the requirement set forth in Section 4-505 A2; and

WHEREAS, this lot cannot be developed consistent with the manage-

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ment standards contained in Article 6 of the Plan; and
WHEREAS, the applicant does not meet the requirements set forth
in Section 4-505 A3; and

WHEREAS, Section 4-505 A1, Section 4-505 A2 and Section 4-505
A3 are the exclusive means of demonstrating extraordinary hardship.

NOW, THEREFORE BE IT RESOLVED that the initial decision
of the administrative law judge affirming the denial by the Executive
Director of the request for a Waiver of Strict Compliance by Helene
Pfeiffer is hereby affirmed.

**You must check the New Jersey Citation Tracker in
the companion looseleaf volume to determine the
history of this case in the New Jersey Courts.**