

PAUL T. HAWKER,
Petitioner,
v.
PINELANDS COMMISSION,
Respondent.

Initial Decision: September 9, 1986

Final Agency Decision: October 10, 1986

Approved for Publication by the Pinelands Commission:
October 14, 1986

SYNOPSIS

Petitioner sought a waiver of strict compliance from the Pinelands Comprehensive Management Plan pursuant to *N.J.A.C. 7:50-4.66(a)1* in order to construct a single-family dwelling on a 10,000 square foot parcel of land.

The administrative law judge assigned to the case found that the lot in question did not meet the minimum lot size of 17 acres required for development in a forest area. In addition, the judge found that the petitioner had failed to qualify for a waiver based upon extraordinary hardship pursuant to *N.J.A.C. 7:50-4.66(a)1*, since petitioner had failed to show that the property in issue was not capable of yielding a reasonable return if used in one of the approved ways. The application was also found to fail based upon petitioner's sale of a contiguous, developed lot, which, when considered in conjunction with the present lot, would have permitted the yield of a reasonable return.

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

Paul T. Hawker, pro se

Priscilla E. Hayes, Deputy Attorney General, for respondent (W. Cary Edwards, Attorney General of New Jersey, attorney)

TYLUTKI, ALJ:

This matter concerns the recommended denial of the waiver of strict compliance as set forth in the February 10, 1986 letter sent by William F. Harrison, Assistant Director of the Pinelands Commission,

to Paul T. Hawker, the owner of an approximate 10,000 square foot parcel of land, identified as Block 745, Lot 18, in Pemberton Township, New Jersey.

In this letter, Mr. Harrison stated that Mr. Hawker's application for the development of a single-family dwelling on the property in issue does not meet the minimum lot size requirement of 17 acres for development in a Forest Area as established by the Master Plan and Land Use Ordinances promulgated by Pemberton Township. Also, Mr. Harrison stated that based on a soil boring taken by an employee of the Pinelands Commission, the seasonal high water table on the property in issue does not meet the requirement set forth in Section 6-804C3 of the Comprehensive Master Plan (CMP),¹ adopted by the Pinelands Commission. Therefore in order to develop the property in issue, Mr. Hawker must meet the requirements for a waiver of strict compliance pursuant to Section 4-506A1 of the CMP.² The appropriate portion of this regulation provides:

An application for a waiver shall be approved only if an extraordinary hardship or compelling public need is determined to have established 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 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 particular 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

¹This regulation is codified as *N.J.A.C.* 7:50-6.84(a)2ii.

²This regulation is codified as *N.J.A.C.* 7:50-4.66(a)1.

- (3) Are not the result of any action or inaction by the applicant or the owner or his predecessors in title; or
- ii For any application for a Waiver of Strict Compliance which was completed by January 14, 1984, 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. . . .
[*N.J.A.C.* 7:50-4.66]

In his letter, Mr. Harrison concluded that Mr. Hawker was not entitled to a waiver based on the above regulation. Mr. Harrison stated that after January 14, 1981, Mr. Hawker sold a developed lot, Block 745, Lot 17, adjacent to the property in issue, and that "[a]ll contiguous lands in common ownerships on or after January 14, 1981, must be considered in determining whether the overall parcel is capable of yielding a reasonable return [see Letter of Interpretation #236]. Considering the existing house, the overall parcel was capable of yielding a reasonable return. An applicant cannot separate ownership of a portion of an overall parcel capable of yielding a reasonable return and then claim that the remaining portion of the property is not capable of yielding a reasonable return. Any hardship that occurs in such a situation is a result of the applicant's own actions." Also, Mr. Harrison stated that Mr. Hawker did not submit any information to show that he had a municipal development approval for the proposed development.

After receipt of Mr. Harrison's letter, Mr. Hawker requested a hearing by letter, dated February 21, 1986, and the matter was transmitted by the Pinelands Commission to the Office of Administrative

Law on March 20, 1986, for a determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

On May 1, 1986, the date set for the prehearing conference, Richard Embly was present on behalf of his friend, Mr. Hawker, and was allowed to participate in the conference even though he is not an attorney and did not have, at the time, any interest in the property in issue. However, Mr. Embly was advised that only the owner of the property or his legal representative would be allowed to participate at the hearing, as required by *N.J.A.C.* 1:1-3.7.

At the prehearing conference, the parties agreed that the issues in this matter are:

A. Whether Mr. Hawker has demonstrated extraordinary hardship within the meaning of Section 4-506A of the CMP,³ so as to meet the requirements for a waiver of strict compliance from:

- (1) The restrictions on residential development in the Forest Area as to the size of the parcel of property in issue.
- (2) The restrictions on residential development as to the seasonal high water table.

At the time of the prehearing conference, Deputy Attorney General Patricia E. Hayes, on behalf of the respondent, stated that she would submit a motion for summary judgment on the basis that Mr. Hawker had not shown that he was entitled to a waiver pursuant to the standards set forth in Section 4-506A of the CMP. I received the motion from Ms. Hayes and as provided by the prehearing order, Mr. Hawker's response to the motion was due on or before August 2, 1986.

By letter dated June 22, 1986, I was informed by Mr. Hawker that Mr. Embly has an interest in the property in issue and would be representing himself and Mr. Hawker in this matter. In addition, Mr. Hawker stated that he wanted a hearing on the question of whether the action of the respondent constitutes a constructive confiscation of the property in issue.

In response to this letter, I wrote to both Mr. Hawker and Mr. Embly on July 7, 1986, and indicated that the issues in this matter were those identified at the prehearing conference and reiterated in the prehearing order, and that the "confiscation of the property" issue could not be heard before the Office of Administrative Law due to the limited jurisdiction of the office. Further, I informed Mr. Hawker and Mr. Embly that they would have to submit a response to Ms.

³This regulation is codified as *N.J.A.C.* 7:50-4.66(A)1.

Hayes' motion by August 2, 1986, and that I would render a decision on the motion after that date. Neither Mr. Hawker nor Mr. Embly submitted a response to Ms. Hayes' motion.

Based on the information set forth in the February 10, 1986 letter from Mr. Harrison, in the application filed by Mr. Hawker with the Pinelands Commission and in Mr. Hawker's letters of February 21, 1986 and June 22, 1986, I **FIND** that the facts as stated above are pertinent to my consideration of the motion for summary judgment and are not in dispute. Neither Mr. Hawker nor Mr. Embly has offered any evidence to dispute the statements made by Mr. Harrison in his letter of February 10, 1986.

In her brief, Ms. Hayes reiterated the reasons for the denial of the waiver contained in Mr. Harrison's letter and stressed that Mr. Hawker and Mr. Embly had not shown that the property in issue is not capable of yielding a reasonable return if used in one of the ways permitted in the Forest Area, and that it was Mr. Hawker's decision to separate the property in issue from the lot with the residency. Ms. Hayes argued that the fact that Mr. Hawker no longer owns the lot with the residency is immaterial pursuant to the Pinelands Commission's policy as set forth in the Letter of Interpretation No. 236, which is consistent with Section 4-506A1 of the CMP⁴ which disallows a waiver based on any hardship created by the applicant's own action.

Based on the above, I **CONCLUDE** that Mr. Hawker and Mr. Embly have not shown that they are entitled to a waiver of strict compliance pursuant to the standards set forth in Section 4-506A1 of the CMP and, therefore, I **ORDER** that the petition in this matter be **DISMISSED** and that the determination to deny the waiver of strict compliance be **AFFIRMED**.

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

FINAL DECISION BY THE PINELANDS COMMISSION:

WHEREAS, the Pinelands Commission has reviewed the record in this matter and the initial decision by the administrative law judge; and

WHEREAS, the Pinelands Commission hereby adopts the findings made by the administrative law judge; and

⁴This regulation is codified as *N.J.A.C.* 7:50-4.66(a)1.

WHEREAS, the applicant is seeking to develop a single family dwelling on the above-referenced 10,000 square foot lot in Pemberton Township; and

WHEREAS, the parcel is located in a Forest Area; and

WHEREAS, in order to comply with the overall density requirements in a Forest Area, Pemberton Township established the minimum lot size in this portion of the Forest Area as 17 acres; and

WHEREAS, the applicant needs a Waiver of Strict Compliance from the minimum lot size and overall density requirements contained in Section 5-303 of the Plan; and

WHEREAS, a soil boring on the parcel indicated the seasonal high water table was less than 5 feet below the natural ground surface; and

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

WHEREAS, the applicant owned a 10,000 square foot lot which is adjacent to the subject parcel; and

WHEREAS, this lot was sold by the applicant after the adoption of the Comprehensive Management Plan; and

WHEREAS, there is an existing single family dwelling located on that lot which was developed prior to 1979; and

WHEREAS, the applicant also has owned the subject parcel since January 14, 1981; and

WHEREAS, as set forth in Letter of Interpretation No. 236, all contiguous lands owned by an applicant after January 14, 1981 must be considered in determining whether a parcel is capable of yielding a reasonable return; and

WHEREAS, considering the existing single family dwelling, the combined 2 lots were 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 his actions or inactions, specifically from his selling the developed lot after the adoption of the Plan; and

WHEREAS, the minimum lot size and overall density requirements in a Forest Area affect all other vacant property in the area; and

Hawker v. Pinelands Comm'n

Cite as 9 *N.J.A.R.* 152

WHEREAS, the applicant does not meet the requirements of Section 4-506 A1; and

WHEREAS, the applicant did not receive any approvals for the proposed single family dwelling prior to February 8, 1979; and

WHEREAS, this amended application was completed after January 14, 1984; and

WHEREAS, the applicant does not meet the requirements of Section 4-506 A2; and

WHEREAS, Sections 4-506 A1 and A2 are the exclusive means of establishing extraordinary hardship; and

WHEREAS, all the lots adjacent to the vacant lot are developed; and

WHEREAS, as set forth in Letter of Interpretation No. 236, an applicant must demonstrate that the requirements of Sections 4-506 A1 or A2 are met even if there is no adjacent land available for purchase; and

WHEREAS, as set forth above, the applicant does not meet the requirements of either of those subsections; and

NOW THEREFORE BE IT RESOLVED that the initial decision of the administrative law judge dismissing a contested case concerning the decision of the Executive Director recommending denial of the Request for a Waiver of Strict Compliance by Paul T. Hawker (Application No. 85-1219, Block 745, lot 18, Pemberton Township) is hereby affirmed and the application for a Waiver is hereby denied.

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.