CHARLES AND JEANNE GHAUL,
Petitioners,

v.

PINELANDS COMMISSION,
Respondent.

Initial Decision: April 27, 1987
Final Agency Decision: June 5, 1987

Approved for Publication by the Pinelands Commission:
June 15, 1987

SYNOPSIS

Petitioners, the owners of two contiguous subdivision lots in a Regional Growth Area of the Pinelands sought a waiver of strict compliance from the Pinelands Comprehensive Management Plan to construct a single family home on the second of the two lots.

The administrative law judge assigned to the case noted that under N.J.A.C. 7:50-5.28(b) residential dwellings such as the one sought to be constructed here could only be developed on lots of 3.2 acres where a conventional on-site septic waste disposal system is to be utilized or on a site of at least one acre where an alternative waste water system is used. Where, as here, the property to be developed is smaller than the designated lots a waiver of strict compliance is required. Pursuant to N.J.A.C. 7:50-4.61 for such a waiver to be obtained, it must be found that strict compliance with the plan would result in extraordinary hardship to the owners or that a compelling public need necessitates the waiver. Here, the judge found that there was no hardship which arose out of the unique circumstances of the land or which arose out of the characteristics of the lot.

The judge received petitioners argument that their inability to develop the smaller parcel would prevent them from obtaining a reasonable return.

While acknowledging that the smaller lot, on its own, might not be capable of providing a reasonable return the judge noted that in light of prior Commission rulings the undeveloped lot could not be considered to stand alone. Based upon these rulings, the rate of return would have to be figured on the combined lots, since all contiguous land owned by an applicant must be considered in determining whether a parcel is capable of yielding a reasonable return.
Accordingly, the administrative law judge rejected the petitioners application and granted the Commission’s motion for summary decision.

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

Charles and Jeanne Ghaul, pro se petitioners
Ronald P. Heksch, Deputy Attorney General, for respondent (W. Cary Edwards, Attorney General of New Jersey, attorney)

MASIN, ALJ:
This matter was opened to the Office of Administrative Law following transmittal from the Pinelands Commission. The petitioners, Charles and Jeanne Ghaul, owners of property located at block 525, lot 28 in Pemberton Township, seek a Waiver of Strict Compliance from the provisions of the Pinelands Comprehensive Management Plan, N.J.A.C. 7:50-1 et seq. They desire to construct a single family dwelling on block 525, lot 28, which is contiguous to lot 27.02. They propose to service the proposed single family dwelling on lot 27.02 with an on-site sewage disposal system. Both properties are located in the Regional Growth Area of the Pinelands and are thus subject to the controls of the Pinelands Protection Act, N.J.S.A. 13:18A-1 et seq.

After reviewing the Ghauls' application for a Waiver, the assistant executive director of the Commission, William F. Harrison, issued a letter on October 17, 1986 reporting on the application. The letter recommended that the Commission deny the requested Waiver. The Ghauls requested a hearing on the proposed denial and the matter was transferred to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing was held before me on February 24, 1987 and a prehearing order was issued on March 4, 1987. Subsequent to the prehearing, on March 20, 1987, the deputy attorney general representing the Commission filed a Notice of Motion for Summary Judgment with an accompanying Letter Brief in support thereof. The Ghauls responded to the motion by letter of April 14, 1987.

THE COMMISSION'S POSITION
In its brief, the Commission, through its deputy attorney general,
argues that the petitioners have failed to present any evidence which indicates that there is a dispute of material fact concerning the facts and circumstances surrounding the properties in question and the desire of the Ghauls to construct the dwelling on lot 28. Further, the attorney general suggests that a reasonable review of the factual material presented by both parties in the light of the applicable statutory and regulatory provisions which govern those circumstances in which a Waiver of Strict Compliance may be awarded indicates that under no circumstances can the Ghauls carry their burden of establishing by the requisite preponderance of the evidence that they are entitled to the Waiver which they seek. The reason for this, in the attorney general's view, is that given the applicable regulatory scheme, as interpreted by the Commission in previous matters, a review of this application can only be undertaken if both lots 27.02 and 28 of block 525 are considered. In support of this contention, that is that the application must be viewed with both lots in mind, the attorney general cites Letter of Interpretation No. 236 which deals with the Mercado case, which Letter was issued by the Pinelands Commission's assistant director on March 17, 1983. The interpretation set forth in Mercado with reference to the treatment of contiguous properties has been adopted by the Commission in Chappine v Pinelands Comm., OAL DKT. NO. EPC 4593-83, initial decision, October 19, 1983, adopted Pinelands Commission, December 2, 1983, and Renz v Pinelands Commission, EPC 8057-82, initial decision May 17, 1983, adopted, Pinelands Commission, June 3, 1983. The Ghauls' April 14, 1987 letter addressing the issues raised in the motion for summary decision does not dispute the legal correctness of the Letter of Interpretation or the reliance thereon by the attorney general in the present case. As such, the analysis set forth below concerning the request for a Waiver and the appropriateness of a grant of summary decision with respect thereto will be made in accordance with the Mercado doctrine.

STIPULATIONS

In the prehearing order, the parties agreed and stipulated the Ghauls' ownership of the property located at block 525, lot 27.02 and 28 in Pemberton Township in a Regional Growth Area. They further agreed that they had purchased lot 27.02 in 1960 and that they purchased the subject lot 28 in June 1973 and cleared it in 1974. Lot 27.02 contains a single family home in which the petitioners reside.
DISCUSSION

The Pinelands Protection Act, N.J.S.A. 13:18A-1 et seq., provides for the protection of areas of New Jersey found by the Legislature to contain:

pine-oak forests, cedar swamps, and extensive surface and ground water resources of high quality which provide a unique habitat for a wide diversity of rare, threatened and endangered animal species and contains many other significant and unique natural, ecological, agricultural, scenic, cultural and recreational resources. . . . N.J.S.A. 13:18A-2.

Pursuant to the act, the Pinelands Commission adopted the Comprehensive Management Plan contained at N.J.A.C. 7:50-5.28(b). Under the Plan, the area in which the Ghaus' property lies is designated as a Regional Growth Area. In such an area, residential dwellings such as the Ghaus seek to construct can only be developed on lots of 3.2 acres where a conventional on-site septic waste disposal system is to be utilized, N.J.A.C. 7:50-5.28(b), or on a lot size of at least one acre where alternative or innovative on-site waste water systems are used. Where the property in question on which development is sought is smaller than the designated sizes, development of residential housing is not permitted except where a Waiver of Strict Compliance from the minimum lot size and density requirements of the Plan is granted. For such a Waiver to be obtained, it must be found that strict compliance with the Plan would result in extraordinary hardship to the property owners or where a compelling public need necessitates the Waiver, N.J.A.C. 7:50-4.61. Extraordinary hardship can only be found where certain specified conditions are met. Notable among these is the condition that "the particular physical surroundings, shape or topographical conditions of the specific property involved" must give rise to the extraordinary hardship, rather than the personal circumstances of the property owners. N.J.A.C. 7:50-4.66(a)(i) further specifies that extraordinary hardship is only established where the applicant demonstrates that:

[t]he 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 this inability to yield a reasonable return results from unique circumstances peculiar to the subject property, which (a) do not apply to or affect other property in the immediate vicinity, (b) relate to or arise out of the characteristics of the subject property rather than a personal situation of the applicant, and (c) are not the result of any action or inaction by the applicant or the owner or his predecessors in title:
The Plan does provide for additional circumstances in which extraordinary hardship may be established, such as where monies have been expended in good faith reliance by a valid municipal development approval or if the applicant holds a valid final subdivision approval in effect prior to February 1, 1979, the date of Governor Byrne's moratorium on construction in the Pinelands, N.J.A.C. 7:50-4.66(a)ii and iii.

In the present case, the Ghauls do not contend that they qualify for an extraordinary hardship on either the "valid municipal development approval" basis or the "final subdivision approval" basis. Instead, they claim that their inability to develop the parcel will prevent them from obtaining a reasonable rate of return. It is their burden to present evidence of such an extraordinary hardship.

According to the Ghauls' letter of April 14, 1987, they originally purchased lot 27.02 in 1961. That lot contains a Cape Cod house with a basement, four bedrooms and two full baths. When they purchased lot 28 in 1973, they did so with the expectation of eventually building a one level, two bedroom slab house on that property. At present, both Mr. and Mrs. Ghaul have health problems and they are now in advanced age. They have intended since the 1973 purchase of the second property to sell or rent the existing family home and move into the smaller home on the second lot.

In support of their contention that they cannot receive a reasonable rate of return for the undeveloped lot, the Ghaul's point out that it is located on a "military road with a military reservation across the street with rifle ranges. No one would be interested in that lot except ourselves." Further, they submit a letter from Charles Van Horn, a broker with Charles Van Horn Agency, Inc., a real estate agency, which states, in full:

To Whom It May Concern:

The above captioned land has no value to anyone except the owners of the adjoining property.

The difficulty with the Ghauls' position, in light of the Mercado doctrine, is that they have not presented any evidence whatsoever indicating that, if the two lots are considered together, they are unable to receive a reasonable return on their property if they sell both lots. In the absence of evidence to the contrary, it is reasonable to assume that the present existing four bedroom, two bath, basemented home is saleable and that sale thereof with the two lots would provide the Ghauls with some significant return. If this is so, and there is no evidence to indicate to the contrary, then the Ghauls have the ability
to obtain a reasonable return and have no basis for obtaining a Waiver. Mr. Van Horn's letter, brief as it is, apparently refers only to the undeveloped lot. By itself, that lot may not be capable of being used in any way which would provide a reasonable return. However, in light of the interpretation given to the rules by the Commission, the undeveloped lot cannot be considered to stand alone.

The Ghauls correctly point out that the plans which they made for their retirement years will be greatly affected by anything which would require them, in order to obtain a reasonable return on their property, to sell both lots and abandon their intention to build a smaller home on the undeveloped property. One can readily understand their concern at the possibility of being uprooted from the area in which they have lived for many years and being forced to seek other suitable housing somewhere other than where they have for so long intended. It is unfortunate that the effect of the Act upon these individuals may be to cause them to have to change long held dreams. Such problems for similarly situated individuals have existed ever since the imposition of the moratorium. However, the public policies advanced by the Act, as incorporated in the Legislative statement of purpose, clearly indicate that the Legislature felt that the necessity of limiting development in the Pinelands was of such paramount concern as to necessitate controls which might, in circumstances such as this, have unfortunate side effects. See, Brenner v Pinelands Commission, 1 N.J.A.R. 273, 281 (1979).

Based on the evidence presented, and giving the Ghauls the benefit of all reasonable inferences arising from the evidence, as is required in considering a motion of this nature at this time, Judson v People's Bank and Trust Co of Westfield, 17 N.J. 67 (1954), I cannot conceive of any reasonable way in which it can be concluded that they may prevail if the matter proceeds further to a hearing. As noted, there are no disputes of material fact supported by evidence. In the legal framework created by the Mercado doctrine, the Ghauls' ability to succeed in this case is extremely limited at best. Although that is not to say that no one similarly situated could under any circumstances prevail, the facts presented by the Ghauls in support of their application do not create a reasonable possibility of their success. As such, the Commission's motion must be granted.

For the reasons expressed, I CONCLUDE that the Pinelands Commission has established that it is entitled to summary decision as there are no issues of material fact which must be decided at a
hearing and the stipulated facts, when viewed in light of the statute, regulations and interpretations promulgated by the Commission, require a legal conclusion favorable to the Commission.

It is ORDERED that the petitioners' application for a Waiver of Strict Compliance be DENIED.

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;

WHEREAS, the Pinelands Commission hereby adopts the initial decision of the administrative law judge;

WHEREAS, the applicants own 2 contiguous subdivided lots (Block 525, lots 27.02 and 28);

WHEREAS, there is a single family dwelling on lot 27.02 which contains less than 1 acre;

WHEREAS, the applicants are now seeking to develop a single family dwelling on lot 28 which contains 15,000 square feet;

WHEREAS, both lots are located in a Regional Growth Area in Pemberton Township;

WHEREAS, the applicants have an existing on-site sewage disposal system serving the existing house on lot 27.02;

WHEREAS, the applicants are seeking to utilize an on-site sewage disposal system on lot 28;

WHEREAS, the applicants need a Waiver of Strict Compliance from the minimum lot size requirements contained in Section 5-308B when an on-site sewage disposal system is utilized;

WHEREAS, as set forth in Letter of Interpretation 236 and several subsequent decisions by the Pinelands Commission, all contiguous lands owned by an applicant must be considered in determining whether a parcel is capable of yielding a reasonable return;

WHEREAS, considering the existing single family dwelling, the combined 2 lots are capable of yielding a reasonable return;

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

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

WHEREAS, the minimum lot size requirements in a Regional Growth Area when an on-site sewage disposal system is utilized affect all other vacant property in the area;
WHEREAS, the applicants do not meet the requirements of Section 4-505A1:

WHEREAS, the applicants did not receive any approvals for the development of the vacant lot and no costs were incurred in reliance on such an approval;

WHEREAS, the applicants completed this application after January 14, 1984;

WHEREAS, the purchase of a previously subdivided lot does not in itself constitute an extraordinary hardship pursuant to the requirements of Section 4-505A2;

WHEREAS, the applicants do not meet the requirements of Section 4-505A2;

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

WHEREAS, an applicant must demonstrate that the requirements of Section 4-505A1 or A2 are met even if there is no adjacent land available for purchase;

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

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

NOW, THEREFORE BE IT RESOLVED that the initial decision of the administrative law judge is hereby affirmed and the request for a Waiver of Strict Compliance by Charles and Jeanne Ghaul (Application No. 86-1013, OAL DKT NO. EPC 8013-86, Block 525, Lot 28 Pemberton Township) 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.