HERMAN KRUCKNER, III,
Petitioner,
v.
NEW JERSEY PINELANDS COMMISSION,
Respondent.

Initial Decision: December 17, 1987
Final Agency Decision: February 5, 1988
Approved for Publication by the Pinelands Commission:
February 8, 1988

SYNOPSIS

Petitioner requested a waiver under N.J.A.C. 7:50-4.61 et seq. of strict compliance with the provisions of the Comprehensive Management Plan for the Pinelands which establish minimum standards for septic waste water treatment systems. N.J.A.C. 7:50-6.84(a) (2). The matter was transmitted to the Office of Administrative Law for a hearing.

Petitioner sought the waiver on the basis of extraordinary hardship, pursuant to N.J.A.C. 7:50-4.66, in order to sell his Pinelands property to purchasers being funded by a Federal housing program that does not approve septic systems that would meet minimum standards. Petitioner argued that the cost of an acceptable septic system would be prohibitive for purchasers.

The administrative law judge denied the waiver because petitioner did not establish that the property was not capable of yielding a reasonable return. The fact that purchasers in this case could not obtain financing for an acceptable septic system did not mean that the property could not yield a reasonable return in another situation. Therefore, petitioner failed to prove extraordinary hardship.

Upon review, the Pinelands Commission adopted this initial decision.

Herman Kruckner, III, petitioner, pro se
Lorraine Otis, Deputy Attorney General, for respondent (Cary Edwards, Attorney General of New Jersey, attorney)
MURPHY, ALJ:

Petitioner, Herman Kruckner, III, requests a waiver under N.J.A.C. 7:50-4.61 et seq. of strict compliance with the provisions of the Comprehensive Management Plan for the Pinelands which establish minimum standards for septic waste water treatment systems. See, N.J.A.C. 7:50-6.84(a)(2). He wishes to sell his Chesilhurst, New Jersey property to purchasers being funded by a Federal housing program that does not approve alternative septic systems which would meet the minimum standards. The issue is whether Kruckner can show extraordinary hardship within the meaning of N.J.A.C. 7:50-4.66. This opinion grants the New Jersey Pinelands Commission's motion for summary decision and denies the waiver because of the absence of any extraordinary hardship within the meaning of the rule.  

FACTS

There is no dispute as to the facts, and the matter is thus ripe for summary decision. The land in question is a 1.2-acre lot on Harvey Avenue in Chesilhurst Borough, of Camden County, also known as block 100, lots 5, 7, 9, 11, 13, 15 and 17, and is located within a regional growth area under the Comprehensive Management Plan. See, N.J.S.A. 7:50-5.13(g). The petitioner applied for a development of a proposed single family dwelling on the property and received approval from the Camden County Department of Health in 1986 for a standard septic system on the parcel, which approval was called up for review by the Pinelands Commission.

The petitioner proposes to use the "pressure dosing" alternative design septic system, for the property, which he concedes or at least does not contest results in a discharge concentration of nitrate/nitrogen of 2.58 parts per million (ppm) at the property line, which would exceed the 2-ppm minimum established by the regulation. The dosing system designed by petitioner is one of several alternative and so-called "innovative" septic systems which minimize or disperse discharge and, therefore, are preferred for use in the  

1This matter was transmitted to the Office of Administrative Law for hearing as a contested case on May 6, 1987, and a prehearing was held on July 23. The Pinelands Commission filed for summary decision on August 26. The petitioner, after being given a lengthy period to obtain counsel or other expert assistance, chose not to respond to the motion and the record was closed on November 2.
Pinelands, with its porous and sandy soil overlying an immense supply of pure water known as the Cohansey Aquifer. A pressure dosing system can be used with an ordinary flush toilet on lots as small as 1.7 acres with sandy and permeable soil and works by receiving septic effluent from a septic tank and then pumping it under pressure into a disposal field when the volume reaches a certain level. The sudden disposal of effluent can reduce by 40 percent the amount of nitrate/nitrogen dispersed into ground water. As indicated, use of this system on petitioner’s property would, according to the analysis of the Pinelands staff, exceed the 2-ppm standard and, therefore, is not acceptable. Use of a standard septic system on petitioner’s parcel would result in 4.6 ppm at the property line, also unacceptable under the minimum standard. Other innovative septic systems do meet the minimum standards of the regulation and would meet with Pinelands Commission approval. These include the Ruck alternative design septic system, which works by separating the “black” toilet water from the “gray” waste water from showers, sinks, etc., and the waterless toilet, which works pretty much as one might imagine. The problem with those systems from the petitioner’s perspective is one of relative expense, as compared to the pressure dosing system. Petitioner states that Chesilhurst Borough is an extremely rural and rather poor community and that many new home buyers, who seek houses in the $50,000 range, are financed through the Farm Home Administration (FHA), which does not accept waterless toilets. The cost of a Ruck system is estimated by the parties to be in the vicinity of $16,000, which petitioner feels is prohibitive. He also notes that he has already invested $9,000 in the property, and currently has it under contract of sale for that price. He has unsuccessfully attempted to buy additional property and failed to obtain a deed restriction to increase his acreage. He concludes that his lot, like the others surrounding him in the low income area of Chesilhurst, will not financially support a Ruck system. Petitioner also concedes that he did not obtain any municipal development approvals prior to February 8, 1979, and that this application was completed after January 14, 1984.

On March 23, 1987, the executive director of the Pinelands Commission recommended that the application for a waiver be disapproved on the grounds that petitioner had failed to demonstrate the property was not capable of yielding a reasonable rate of return within the meaning of N.J.A.C. 7:50-4.66(a)(i), because a single-family home could be developed on the parcel consistent with the ppm standard if the waterless toilet or Ruck system were utilized.
There is no dispute as to the above facts and I so **FIND**.

**ISSUE**

The sole issue is whether the circumstances set forth by petitioner satisfy the standard of extraordinary hardship set forth in *N.J.A.C. 7:50-4.66*.

**ARGUMENTS AND CONCLUSIONS**

The deputy attorney general (DAG) argues that the undisputed facts of record show that the petitioner is not entitled to a waiver of strict compliance because his property is capable of yielding a rate of return within the meaning of *N.J.A.C. 7:50-4.66(a)(i)*. The DAG also argues that the 2-ppm minimum discharge standard applies equally to neighboring parcels of property and that the cost of the Ruck system, as well as the fact that FHA financing is not available for homes containing waterless toilets, are essentially personal matters which do not warrant a waiver under the regulation. The petitioner makes no response to this argument, though he has set forth his general circumstances in answers to interrogatories. In addition to noting the cost of Ruck and FHA unacceptability of the waterless system, petitioner notes that there are only four other homes in the immediate area of his proposed single-family dwelling and that the grant waiver will therefore not adversely affect the underground water supply or ecological balance of the area. He also notes that the soil and water are excellent, and that sewer construction will occur within several years, before which there will be little construction. He seeks the waiver so that "an affordable home" can be built upon the lot.

The issue is whether petitioner has shown extraordinary hardship within the meaning of *N.J.A.C. 7:50-4.66*, which provides:

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

3. The granting of the waiver will not be materially detrimental or injurious to other property or improvements in the area in which the subject property is located, increase the danger of fire, endanger public safety or result in substantial impairment of the resources of the Pinelands Area; and

4. The waiver will not be inconsistent with the purposes, objectives or the general spirit and intent of the Pinelands Protection Act, the Federal Act or this Plan; and

5. The waiver granted is the minimum relief necessary to: Relieve the extraordinary hardship, which may include the granting of a residential development right to other lands in the Protection Area that may be transferred or clustered to those other lands in accordance with N.J.A.C. 7:50-5.30 or other developable land in the Rural Development Area, or to satisfy the compelling public need. [Emphasis added.]

I agree with the DAG that any inability of petitioner's specific property to yield a reasonable return does not result from unique circumstances peculiar to it, but, rather, apply to other property in the immediate vicinity affected by the minimum standards, and arise out of the personal situation of the applicant rather than from any characteristic of the subject property. The fact that the waterless toilet system approved by the Pinelands is not acceptable under the FHA program which might be used by prospective purchasers does not constitute an extraordinary hardship within the meaning of the regulation. Petitioner has been offered at least two alternative methods by which his property may be developed for a single-family dwelling, both of which meet the minimum discharge standards established by rule. The fact that he may have problems attracting purchasers because of the cost of Federal acceptability of these alternative septic systems is a factor which arises out of his personal situation and that
of his possible buyers and does not, per se, render the property incapable of yielding a reasonable rate of return.

Accordingly, I CONCLUDE that the petitioner has failed to establish the existence of an extraordinary hardship within the meaning of the Comprehensive Management Plan of the Pinelands.

ORDER

On the basis of the above findings of fact and conclusions of law, it is ORDERED that the petitioner's application for a waiver of strict compliance is DENIED.

This recommended decision may be adopted, 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 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 applicant is seeking to develop a single family dwelling on a 1.2 acre parcel;

WHEREAS, the lot is located in a Regional Growth Area in Chesilhurst Borough;

WHEREAS, the applicant is proposing to utilize a pressure dosing alternate design septic system;

WHEREAS, said system will result in an average concentration of nitrate-nitrogen in the ground water at the applicant's property line in excess of 2ppm in violation of N.J.A.C. 7:50-6.84(a)4iii;

WHEREAS, the applicant is requesting a Waiver of Strict Compliance from the requirements of N.J.A.C. 7:50-6.84(a)4iii;

WHEREAS, the applicant has not demonstrated that the parcel does not have beneficial use, either by itself or in conjunction with other adjoining parcels;

WHEREAS, a single family dwelling can be developed on the lot consistent with the water quality requirements of the Plan;

WHEREAS, based on this ability to develop a single family dwelling, the parcel is capable of having a beneficial use;

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

WHEREAS, the water quality requirements of the Plan affect all other vacant property in the area;

WHEREAS, the applicant does not meet the requirements of N.J.A.C. 7:50-4.66(a)1;

WHEREAS, N.J.A.C. 7:50-4.66(a)1 is 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 Herman Kruckner, III (Application No. 83-10,472.2, OAL DKT. NO. EPC 3033-87, Block 100, Lots 5, 7, 9, 11, 15 and 17 Chesilhurst Borough) 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.