

WILLIAM J. GERBER,
Petitioner,
v.
NEW JERSEY PINELANDS COMMISSION,
Respondent.

Initial Decision: May 5, 1988
Final Agency Decision: June 3, 1988
Approved For Publication By
The Pinelands Commission: June 10, 1988

SYNOPSIS

Petitioner applied to the Pinelands Commission for a Waiver of Strict Compliance with sections of the Pinelands Comprehensive Management Plan. The waiver was denied and petitioner requested a hearing. The appeal was transmitted to the Office of Administrative Law.

Petitioner sought a waiver in order to subdivide a parcel of land. During the hearing testimony indicated that petitioner did not actually own the land in question. It had been promised to him by an employer, but the gift was never memorialized. Therefore, the administrative law judge concluded that petitioner could not satisfy the eligibility requirement of *N.J.A.C.* 7:50-5.32(a)3i, which states that the applicant for development approval must establish ownership of the land as of February 1979.

Accordingly, the administrative law judge found that petitioner was not the real party in interest in this matter and granted the Commission's motion to dismiss the matter.

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

Ernest DeStefano, Esq., for petitioner (DeMarco & DeStefano, attorneys)

George P. Cook, Deputy Attorney General, for respondent (W. Cary Edwards, Attorney General of New Jersey attorney)

CAMPBELL, ALJ:

Appeal from the recommended decision of the Executive Director of the Pinelands Commission that a Waiver of Strict Compliance with

certain sections of the Pinelands Comprehensive Management Plan (CMP), *N.J.A.C.* 7:50-1.1 *et seq.*, be denied.

PROCEDURAL HISTORY

On July 24, 1986, William J. Gerber applied to the New Jersey Pinelands Commission for a Waiver of Strict Compliance with certain sections of the CMP so that he might subdivide a 52.8 acre parcel in Tabernacle Township, Burlington County. On December 29, 1986, the Pinelands Commission denied the requested waiver. The petitioner timely requested reconsideration and, on May 8, 1987, the Commission transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

After notice, a prehearing conference was held on August 5, 1987. Among other things, it was settled that the issue to be determined in this matter is whether, under the circumstances of this case, the requested waivers should be issued because either the applicant can meet or notwithstanding: the seasonal high water table requirement, *N.J.A.C.* 7:50-6.84; the intensity and use in Special Agricultural Areas, *N.J.A.C.* 7:50-5.2, and the criteria for hardship, *N.J.A.C.* 7:50-4.66.

The matter was heard on March 11, 1988, at the Burlington County Administration Building, Mount Holly.

PAROL AND DOCUMENTARY EVIDENCE

The parties stipulated that the petitioner cannot meet the seasonal high water standard without a waiver and cannot meet the intensity and use criteria without a waiver.

Two witnesses were heard and 12 documents were admitted in evidence.

The petitioner adduced testimony that he and his family have worked for many years for a Mr. Brick, Brick is the owner of the property in question. Brick gave property to the petitioner's father with an understanding that "a couple of lots" would go to each son. The petitioner's brother received a deed in 1980 or 1981 for approximately 3.2 acres.

Brick's gift never was memorialized. The petitioner is married and knows of the understanding among his father, brother, himself and Brick. The petitioner's father worked for Brick for many years, taking no remuneration.

The petitioner was not familiar with lot and block numbers in the area of the subject property and could not precisely locate the lot or lots he says are his on an area map. No municipal development permits of any type were issued for the subject parcel prior to February 7, 1979. Within the last year, the petitioner has had some surveying done and has had a plot plan and septic plan drawn.

The petitioner's application identifies the parcel as lot 11, block 2002. The witness notified all persons he was required by the Commission to notify in connection with his proposed development and he correctly identified the parcel in those notices.

The petitioner rested and the Commission moved to dismiss.

THE MOTION TO DISMISS

After hearing brief oral argument, I directed the parties to submit memorandums of law on the question, which they did, the last reaching me on March 30, 1988.

The parties agree there are three issues that must be addressed. First is the question of whether proper notice was given to all persons and agencies necessary, and, if not, whether the notice was or may be cured. Second is the issue of whether or not the petitioner has demonstrated hardship. Last is the issue of whether the petitioner had an equitable interest in the land.

Addressing the last matter first, the petitioner contends that his situation falls outside the scope of the Statute of Frauds. Under the doctrine of part performance, if an individual takes possession of a property and makes improvements upon it or, as in this situation, performs some task for the owner in exchange for the property, then the Statute of Frauds has been satisfied.

The petitioner has shown that both parties meant a transfer of the property to occur. The petitioner, his father and his grandfather have provided services to the owner over many years, based on a promise that the land was to be theirs. Even though a legal transfer of the property did not occur, the facts show that an equitable interest was obtained by the petitioner on the basis of his past and present actions. Real property sales contracts are subject to the general rule that contracts must be supported by valuable consideration. In case law, however, the legal sufficiency of consideration depends on the element of bargain and exchange, not on the comparative value of the consideration. In this case, there was valid consideration. Petitioner and

his family provided services to the land owner over many years in exchange for an interest in the land.

There was substantial part performance sufficient to satisfy the requirements of the Statute of Frauds and the intent of the parties was that the petitioner would acquire an equitable interest in the land. This equitable conversion of the property is nothing more than a consequence of the common doctrine that where things are agreed to be done, they are to be treated for many purposes as if they were done.

In this case, the facts show that the petitioner and Brick intended the property in question to be transferred. The only missing element of the transfer is a formal written contract. However, the absence of the agreement has been satisfied by the doctrine of part performance.

The Commission argues that the evidence at hearing indicates the petitioner does not own the property. Legal title presently is vested in J. Rogers Brick. The petitioner admits he does not have any written document or memorandum that would establish his claim.

To be eligible for development approval in the Special Agricultural Production Area, an applicant must first establish that the "parcel of land on which the dwelling is to be located was owned by the applicant or a member of his immediate family on February 7, 1979." *N.J.A.C.* 7:50-5.32(a)3i. The testimony shows that the petitioner cannot establish this requisite.

Legal ownership in land can be established only by written agreement. The New Jersey Statute of Frauds, *N.J.S.A.* 25:1-5, states:

No action shall be brought upon any of the following agreements or promises, unless the agreement or promise, upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized:

...

- d. A contract or sale of real estate, or any interest in or concerning the same; or
- e. An agreement that is not to be performed within one year from the making thereof.

The petitioner's argument falls short on both counts. The petitioner could not produce any written memorandum or document from Mr. Brick that would indicate a change in legal ownership or even an intent to alienate, prior to February 7, 1979. Any oral promises made prior to 1979 would have been valid only for a one-year period.

Next, even if the petitioner were able to overcome the ownership

problem, he would still not be entitled to a Waiver of Strict Compliance from the seasonal high water table requirements in *N.J.A.C.* 7:50-6.84(a)4iv, or the buffer to wetlands requirements in *N.J.A.C.* 7:50-6.14.

The Petitioner has not demonstrated that the "particular physical surroundings, shape or topographical conditions" are the cause of hardship or that he would have no "beneficial use" if the land were retained in its present state. The petitioner has not shown any hardship relating to or arising out of "the characteristics of the subject property." If there is a hardship, it relates to the personal situation of the petitioner. Personal circumstances are not cognized under the hardship regulation.

It was apparent from the testimony that the petition's application for development and subsequent notice were defective in that the wrong lot and block numbers were listed. This is not simply a technical error because the lot identified is in an entirely different tract and lies on the other side of Moores Meadow Road. It is 64 acres, not 52.8 acres in size. Nor does it have the same contiguous property owners. If necessary, this error would have to be cured and appropriate notices given prior to resumption of the hearing.

Having heard and considered the parties' arguments, I **FIND** and **CONCLUDE** that the petitioner is not the real party in interest in this matter. The normal real estate transaction includes a contract of sale. A contract for the sale of land must be evidenced by writing signed by the seller or someone authorized to act for him. It is hornbook law that the essential terms of the contract must be contained in the writing. These include (1) a description of the property, (2) identification of the parties, (3) the price, and (4) the manner of payment.

Parol evidence is generally admissible to resolve ambiguities, but essential terms cannot be supplied by parol. *N.J.S.A.* 25:1-5, cited above, clearly covers the present case.

The petitioner cannot produce any writing that indicates a change in legal ownership or even an intent to alienate the land prior to February 7, 1979. An unenforceable, indefinite promise to convey an undescribed parcel, with no mention of consideration at some specific time in the future, does not satisfy that criterion.

I do not believe it necessary to address the seasonal high water table, buffer to wetlands or hardship arguments. The petitioner does not own or have an equitable interest in the land for which the waiver

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is sought. In *Kufta v. Hughson*, 46 *N.J. Super.* 222 (Ch. Div. 1957), Judge Conford observed.

The principle under examination is more frequently stated in the form that the acts relied upon must be other than ancillary or merely preparatory to the contract. Pomeroy states that "the following acts do not constitute a part performance within the doctrine: acts done prior to the contract; acts merely preparatory or ancillary to the agreement, such as delivering abstract of title, measuring the land, drawing up deeds, etc.; . . ." 4 *Pomeroy, Equity Jurisprudence* (5th ed. 1941), §1409, p. 1057.

46 *N.J. Super.* at 229.

I **FIND** that the work done by the Gerber family does not constitute the acts contemplated in the treatise. Even accepting it as true for the purposes of the motion, the testimony that the petitioner had plot and septic plans drawn and had some surveying done, without more, is insufficient to take this matter out of the Statute of Frauds. The policy underlying the statute and its continuance is legislative. The judicial function is to ascertain and apply the statute in the light of the authorities. *Kooba v. Jacobitti*, 59 *N.J. Super.* 496 (App. Div. 1960).

Finally, although the writing required by the Statute of Frauds need not be a formal contract, and need not contain a statement of consideration supporting the contract, it must contain the essential terms of the contract. *Gilbert v. Gilbert*, 66 *N.J. Super.* 246 (App. Div. 1961). Even if I were to accept the signed statement of Mr. Brick as an attempt to execute a contract, under *Gilbert*, it would be lacking the essential terms of a contract for the sale of land.

In consideration of the foregoing, I **CONCLUDE** that the motion to dismiss must be **GRANTED**. It is **ORDERED** that the present petition be and is hereby **DISMISSED**.

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 Initial Decision and the record of the contested case;

WHEREAS, the applicant did not file any exceptions to the Initial Decision;

WHEREAS, the Pinelands Commission hereby adopts the Initial Decision of the administrative law judge;

WHEREAS, the applicant is proposing to develop one lot in a 2 lot subdivision of the above 64 acre parcel;

WHEREAS, the applicant is proposing to develop a single family dwelling on the resulting 3.5 acre lot;

WHEREAS, no development is proposed for the resulting 60.5 acre parcel;

WHEREAS, the parcel is located in a Special Agricultural Production Area in the Preservation Area;

WHEREAS, the parcel was not owned by the applicant prior to February 8, 1979 as required by *N.J.A.C.* 7:50-5.32(a)3i nor at any time since that date;

WHEREAS, since the seasonal high water table on the entire parcel is less than 5 feet below the natural ground surface the applicant needs a Waiver of Strict Compliance from the seasonal high water table requirement contained in *N.J.A.C.* 7:50-6.84(a)4iv;

WHEREAS, since the proposed development would have a significant adverse impact on fresh water wetlands located within 300 feet, the applicant needs a Waiver of Strict Compliance from the wetlands buffer requirements contained in *N.J.A.C.* 7:50-6.14;

WHEREAS, the Pinelands Commission must consider all property in common ownership in determining whether a parcel has a beneficial use;

WHEREAS, the applicant has not submitted any information to document that the overall parcel does not have a beneficial use;

WHEREAS, the Pinelands Development Credits are allocated to the overall parcel;

WHEREAS, any inability of the parcel to have a beneficial use does not arise out of unique circumstances peculiar to the subject parcel;

WHEREAS, the restriction on residential development in a Special Agricultural Production Area and the seasonal high water table and buffer to wetlands requirements of the Plan affect all other undeveloped property in the area.

WHEREAS, there is no hardship which arises out of the characteristics of the subject parcel;

WHEREAS, any hardship which the applicant has is a result of his own personal circumstances and his actions and inactions;

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

WHEREAS, *N.J.A.C.* 7:50-4.66(a)i is the exclusive means of establishing extraordinary hardship; and

WHEREAS, the applicant did not provide public notice of the application for the parcel he is seeking to develop as required by *N.J.A.C.* 7:50-4.62(b).

NOW, THEREFORE BE IT RESOLVED that the Initial Decision by the administrative law judge is hereby affirmed and the requested Waiver of Strict Compliance by William J. Gerber (Application No. 80-0038.2P, OAL DKT NO. EPC 3145-87, Block 2001, Lot 64, Tabernacle Township) is hereby denied.

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the history of this case in the New Jersey courts.**