STEVEN ALLGEYER,
Petitioner,
v.
PINELANDS COMMISSION,
Respondent.

Initial Decision: March 3, 1989
Final Agency Decision: April 7, 1989
Approved for Publication by the
Pinelands Commission:
April 17, 1989

SYNOPSIS

Petitioner applied to the Pinelands Commission for a waiver of strict compliance from the requirements of the Pinelands Comprehensive Management Plan in order to build a single family dwelling on a lot that did not meet the minimum lot size provisions of N.J.A.C. 7:50-5.26. The assistant director of the Pinelands Commission recommended that the application be denied. The matter was transmitted to the Office of Administrative Law for a hearing.

The administrative law judge assigned to the case granted respondent’s motion for summary decision. Because petitioner did not demonstrate the existence of an extraordinary hardship arising from the unique circumstances and character of his property, he was not entitled to a waiver. Petitioner’s lot did not meet the minimum lot size requirements of the Pinelands law. His desire to build a home on his property is subject to reasonable regulation by the State to protect and preserve the Pinelands.

Upon review, this initial decision was modified by the Pinelands Commission. The denial of the application for a waiver was affirmed, but the Commission rejected the administrative law judge’s implication that petitioner would not have been required to obtain an adjacent lot in order to qualify for a waiver if the adjacent lot had been available. N.J.A.C. 7:50-4.66 requires that all reasonably available adjacent land be acquired in order to minimize the extent to which the proposed development necessitates a waiver, even if acquisition of such land would not make the lot large enough to satisfy lot size standards.
Steven Allgeyer, petitioner, pro se

Lynne E. Byrnes, Deputy Attorney General, for respondent (Peter N. Perretti, Jr., Attorney General of New Jersey, attorney)

MURPHY, ALJ:

STATEMENT OF THE CASE

Petitioner, Steven Allgeyer, seeks a waiver of strict compliance under N.J.A.C. 7:50-4.66 from the requirements of the Pinelands Comprehensive Management Plan establishing minimum lot size and overall density requirements. See, N.J.A.C. 7:50-5.26. Mr. Allgeyer seeks to build a single family dwelling in Mullica Township on a lot of less than one acre that does not meet the minimum lot size requirements. He has attempted unsuccessfully to buy adjoining property in order to meet the minimum. There are no questions of fact and the sole issue is whether petitioner is entitled to a waiver of strict compliance with the minimum lot size requirements under N.J.A.C. 7:50-5.26. Summary decision is granted for the Commission under N.J.A.C. 1:1-12.5, for the reasons set forth below.

PROCEDURAL HISTORY

Steven Allgeyer filed an application to construct a single family home in Mullica Township on February 26, 1987, and on October 16 of that year the Assistant Director of the Pinelands Commission recommended that the application be denied. The case was transmitted to the Office of Administrative Law on December 14, 1987, for hearing as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was scheduled for February 2, 1988, but was adjourned due to a change of judges. The parties attempted to reach a settlement in this matter involving purchase of additional property by the petitioner to meet minimum lot requirements. The DAG also consulted with the Pinelands Commission's Assistant Director in a effort to resolve this matter without the need for further proceedings. The case was assigned to me at the end of June 1988, following the departure from the office of the administrative law judge previously assigned, and a prehearing conference was scheduled for September 1, 1988. At that telephone prehearing conference, it was determined that the deputy attorney general would file a motion for summary decision and a motion was received, after some delay, on December

FINDINGS OF FACT

The material facts are not in dispute. Steven Allgeyer applied to the Pinelands Commission in February 1987 for permission to build a one-family, three-bedroom house on a lot in the Township of Mullica in a Rural Development Area of the pinelands. The lot size listed was 150' x 290', or 0.998 acres. The Report on an Application for a Waiver of Strict Compliance filed on October 16, 1987, by Assistant Pinelands Director William F. Harrison, Esq., made the following findings of fact:

... In order to conform with the overall density requirements in the Rural Development Area, Mullica Township has established the minimum lot size in this portion of the Rural Development Area as five acres. As the proposed lot size is not consistent with the minimum lot size and overall density requirements in a Rural Development Area, the applicant is requesting a Waiver of Strict Compliance from the minimum lot size and overall density requirements contained in N.J.A.C. 7:50-5.26.

The parcel has been inspected by a member of the Commission's staff. In addition, the appropriate resource capability maps and data available to the staff have been reviewed.

There is vacant land adjoining this parcel. The applicant has submitted no information to demonstrate that the parcel is incapable of having a beneficial use if utilized as authorized by the provisions of the Plan. The applicant has submitted no information to demonstrate that any inability of the parcel to have a beneficial use results from unique circumstances peculiar to the subject property which do not affect other property in the immediate vicinity. The applicant has also not submitted information to demonstrate that any inability to have a beneficial use arises out of the characteristics of the subject parcel rather than the personal circumstances of the applicant or the actions and inactions of the owner or any predecessor in title.

There is additional land available to be purchased [Report at 1-2; emphasis added]

Because of the availability of additional land, the Assistant Director of the Pinelands Commission recommended that:

The applicant has not demonstrated that the subject property does not have a beneficial use. The applicant has not submitted any material concerning the ability of this property to be utilized, either by itself or in conjunction with adjoining property, for any of the
permitted uses in a Rural Development Area. As stated above, the necessity of acquiring additional land does not constitute a hardship. [Ibid.]

The petitioner represents that he has contacted all adjoining property owners and "there is no property available" (petitioner's letter of January 4, 1989). In answer to an interrogatory question as to whether there is additional land available to be purchased, Allgeyer stated that:

I have contacted all landowners near mine and they do not wish to sell. Except the owner adjacent to mine and she wants twice the market value. Also if I purchase said property it will not bring the acreage up to pinelands law in this area. [answer to respondent's interrogatory no. 34 at page 19]

At the telephone prehearing conference in February 1988 before Judge Voliva, it was determined that the owner of lot 22, which is adjacent and the same size as lot 21 owned by the petitioner, was willing to sell the property for $10,000, and that its value had been assessed at $5,000. Purchase of lot 22 by the petitioner would add an acre to his pinelands holding but still would not satisfy the minimum lot size requirement in the Rural Development Area of five acres, or the density requirements set forth in the Pinelands Management Plan of one dwelling unit for every 3.2 acres of privately-owned, undeveloped land not defined as wetland. See, N.J.A.C. 7:50-5.26(a).

As to possible substantial impairment of the resources of the pinelands, petitioner claims, and the respondent does not dispute, that:

There are many other homes nearby and mine would no [sic] be out of context with them and as said before mine would have waterless toilets and would not pollute [sic] the environment. [petitioner's answer to interrogatory no. 33 at page 19]

Petitioner describes lot 22 as "sparsely wooded" and covered with "rough vegetation," and notes that it "attracts a few squirrels and rabbits" (petitioner's answer to interrogatory no. 29 at page 17).

There is no dispute as to the above facts and I so FIND.

**ISSUE**

The question presented is whether the respondent is entitled to summary decision under N.J.A.C. 1:1-12.5, denying petitioner a waiver of strict compliance with the minimum lot size and overall

DISCUSSION AND CONCLUSIONS OF LAW

The regulation adopted by the Pinelands Commission as part of the Pinelands Management Plan provides that:

Residential dwelling units at municipally designated densities shall be permitted provided that the total number of dwelling units authorized by a municipality does not exceed one dwelling unit for every 3.2 acres of privately owned undeveloped land which is not defined in this Plan as wetland. [N.J.A.C. 7:50-5.26(a)]

Since the property currently owned by the petitioner is less than one acre, it does not meet the requirements of the above regulation and he has sought a waiver of strict compliance with that provision under N.J.A.C. 7:50-4.66, which provides, in pertinent part:

(a) An application for a waiver shall be approved only if the applicant satisfies (b) below and 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 or management standards of this Plan shall not be considered an extraordinary hardship, unless the applicant can demonstrate that there is no contiguous land which is reasonably available. Any contiguous lands in common ownership at any time on or after January 14, 1981, shall be considered to be reasonably available. An applicant shall be deemed to have established the existence of extraordinary hardship only if he demonstrates, based on specific facts, that the subject property, along with any contiguous lands in common ownership of which are reasonably available, does not have any beneficial use if used for its present use or developed as authorized by the provisions of this Plan, and that this inability to have a beneficial use results from unique circumstances peculiar to the subject property which:
   i. Do not apply to or affect other property in the immediate vicinity;
   ii. Relate to or arise out of the characteristics of the subject property rather than the personal situation of the applicant; and
   iii. Are not the result of any action or inaction by the appli-
... cant or the owner or his predecessors in title including any transfer of contiguous lands which were in common ownership on or after January 14, 1981.

(b) An application for a waiver shall be approved only if it is determined that the following additional standards also are met:

1. 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;

2. 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

3. The waiver 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 lands in accordance with N.J.A.C. 7:50-5.30, or to satisfy the compelling public need. [emphasis added]

Counsel for the Pinelands Commission argues that petitioner is not entitled as a matter of law to a waiver of the minimum lot and density requirements because he has failed to demonstrate that he would suffer extraordinary hardship as defined by the regulation, if the terms of the Pinelands Management Plan were strictly enforced in particular, the DAG contends that there is additional contiguous land reasonably available to the applicant to meet the minimum requirements and that the necessity of acquiring this land is not deemed an extraordinary hardship under the regulation. Second, the State claims that Allgeyer has failed to prove that his lot has any unique characteristics not shared by other property in the immediate vicinity which renders it unable to have beneficial use under the terms of the Pinelands Management Plan. Third, even if Allgeyer can overcome the minimum lot requirement, he still would be unable to meet the overall density requirements and seasonal high water table requirements set forth in the regulation. Finally, the DAG maintains that any inability of the property to yield a reasonable return results from his action or inaction in failing, prior to purchase, to determine whether he would be permitted to build a residence on his lot.

Steven Allgeyer, who was unrepresented, argues, in answers to interrogatories, that he is constitutionally entitled to a waiver of strict compliance by the Fifth and Fourteenth Amendments to the United States Constitution. He also argues that no contiguous land is reason-
ably available to be purchased, because several of the owners will not sell and the only owner willing to sell has set a price almost twice the property's fair market value.

Both the report of the Assistant Director of the Pinelands Commission and the DAG's brief are based on the factual premise that there is additional land available to be purchased and that the petitioner therefore cannot demonstrate that there is "no contiguous land which is reasonably available" within the meaning of N.J.A.C. 7:50-4.66(a)1. On the basis of the petitioner's answers to interrogatories, I CONCLUDE that no such contiguous land is reasonably available to him. He represents that he has contacted several adjoining property owners and that they have declined to sell their property. The owner of the adjoining lot 22 is willing to sell the property but is asking $10,000, when the assessed value of the property is only half that much. Land offered at such a greatly inflated price by a seller who may be aware of the petitioner's predicament cannot be said to be "reasonably available." But even if petitioner purchased lot 22, which covers 0.998 acres (as does lot 21), petitioner would still not have satisfied the five-acre minimum lot size of Mullica Township or the 3.2-acre density established by N.J.A.C. 7:50-5.26. On that basis, I CONCLUDE sufficient additional contiguous land is not reasonably available and that the necessity of acquiring such land to meet the minimum lot size requirements may be considered in determining whether petitioner has shown extraordinary hardship within the meaning of N.J.A.C. 7:50-4.66(a)1. Cf., Pfeiffer v. Pinelands Commission, 8 N.J.A.R. 317 (1985), affirmed per curiam, N.J. App. Div., June 3, 1986, A-573-85 (unreported).

That conclusion does not end the inquiry as to whether the applicant has demonstrated the existence of an extraordinary hardship based on specific facts showing that the property does not have any beneficial use because of unique circumstances peculiar to it, which do not apply to or affect other property in the vicinity, do not arise out of the personal situation of the applicant, and are not the result of any action or inaction by the applicant or owner or his predecessor in title. The petitioner has not shown any "unique circumstances peculiar to the subject property" within the meaning of N.J.A.C. 7:50-4.66(a). The size of the property is the same as that of at least one adjoining lot and no other different characteristics are cited by the petitioner. On this basis, I CONCLUDE that the petitioner, Steven Allgeyeyer, has failed to demonstrate the existence of an extraordinary hardship within the meaning of N.J.A.C. 7:50-4.66(a)1. Although I
am sympathetic to his desire to build a home on his pinelands property, his right to do so is subject to the reasonable regulation by New Jersey to protect and preserve the Pinelands by establishing such restrictions as minimum lot size, subject to waiver only upon a showing of an extraordinary hardship arising from the unique circumstances and character of the property. In this instance, the petitioner has failed to make that showing and his personal interest in the property must be subject to the greater public interest lying behind the sometimes onerous and inconvenient restrictions of the Pinelands Protection Act. See, N.J.S.A. 13:18A-1 et seq.

ORDER

On the basis of the above findings of fact and conclusions of law, it is ORDERED that the motion for summary decision is granted and the application for a waiver of strict compliance with the minimum lot size requirements of the Pinelands Management Plan 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 in this matter;

WHEREAS, the Pinelands Commission has reviewed the exceptions filed by the Deputy Attorney General who represented the Pinelands Commission staff;

WHEREAS, the applicant is seeking to develop a single family dwelling on the above 0.998 acre parcel;

WHEREAS, in order to conform with the overall density requirements in a Rural Development Area, Mullica Township has established the minimum lot size in this portion of the Rural Development Area as five acres;

WHEREAS, the applicant has requested a waiver of Strict Compliance from the minimum lot size and overall density requirements in a Rural Development Area contained in N.J.A.C. 7:50-5.26;

WHEREAS, the Deputy Attorney General who represented the Commission staff made a motion for summary judgement;

WHEREAS, in ruling on such a motion the Administrative Law
Judge and the Pinelands Commission must give the applicant the benefit of all reasonable inferences which arise from the facts;

WHEREAS, there is vacant land bordering the subject parcel;

WHEREAS, the Initial Decision states that there is no necessity to purchase a contiguous lot if that lot combined with the subject property would not meet the minimum lot size and overall density requirements of the Comprehensive Management Plan;

WHEREAS, that conclusion ignores the possibility that additional vacant land may be available adjoining the vacant contiguous lot that would enable the applicant to meet the minimum lot size and overall density requirements of the Plan;

WHEREAS, even if no such land were available, the Initial Decision is contrary to the requirements of N.J.A.C. 7:50-4.66(a);

WHEREAS, the Initial Decision implies that if the adjoining vacant lot were of a different size than the subject lot that the applicant would qualify for a Waiver of Strict Compliance if the combined lots were smaller than five acres;

WHEREAS, based on that logic the owner of the other undersized lot would also qualify for a Waiver of Strict Compliance.

WHEREAS, this would result in two single family dwellings being developed on two lots where total acreage is less than five acres;

WHEREAS, such a result would be inconsistent with the purposes, objectives and general spirit and intent of the Pinelands Protection Act, the Federal Act and the Plan in violation of N.J.A.C. 7:50-4.66(b)2;

WHEREAS, such a result would be more than the minimum relief necessary to alleviate any extraordinary hardship in violation of N.J.A.C. 7:50-4.66(b)3;

WHEREAS, N.J.A.C. 7:50-4.66 requires that all reasonably available adjacent land be acquired in order to minimize the extent to which the proposed development requires a Waiver of Strict Compliance even if the acquisition of such land will not make the lot fully conforming;

WHEREAS, the applicant has not demonstrated that any inability of the parcel to have a beneficial use results from unique circumstances peculiar to the subject property which does not apply to or affect other property in the areas as required by N.J.A.C. 7:50-4.66(a)1i and as a result the applicant does not qualify for a Waiver of Strict Compliance;
WHEREAS, facts may exist which would enable the applicant to demonstrate that the parcel qualifies for a Waiver of Strict Compliance; and

WHEREAS, the Commission staff has not had an opportunity to verify that vacant, contiguous land is not reasonably available.

NOW, THEREFORE BE IT RESOLVED that the Initial Decision is hereby modified to delete the conclusion on page 7 that it is not necessary to acquire a vacant, contiguous lot if the acquisition of that lot would still not enable the applicant to meet all the standards of the Comprehensive Management Plan (OAL DKT NO. EPC 8261-87).

BE IT FURTHER RESOLVED that the application for a Waiver of Strict Compliance by Steven Allgeyer (Application No. 87-0225, Block 10302, Lot 21, Mullica Township) is hereby denied without prejudice.

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.