

EDWARD AND GRACE WADOWIARZ,
Petitioners,
v.
PINELANDS COMMISSION,
Respondent.

Initial Decision: December 11, 1989

Final Agency Decision: January 5, 1990

Approved for Publication by the Pinelands Commission:
January 11, 1990

SYNOPSIS

Staff of the Pinelands Commission recommended denial of petitioners' application for a waiver of strict compliance from minimum lot size and overall density requirements in order to develop a single family dwelling on their lot in the Pinelands. The matter was transmitted to the Office of Administrative Law for a hearing.

The administrative law judge assigned to the case found that an adjacent lot was available to be purchased but that petitioners refused to buy the land because of lack of funds. Since financial inability to buy an adjacent lot is not an extraordinary hardship as defined by the waiver rule, *N.J.A.C.* 7:50-4.66(a), petitioner is not entitled to a waiver.

Upon review, this initial decision was adopted by the Pinelands Commission. The Commission noted that there is no hardship that arises out of the characteristics of petitioners' lot. The only hardship that exists is the result of petitioners' refusal to attempt to buy the available adjacent lot. Petitioners' application for a waiver was denied.

Edward and Grace Wdowiarz, petitioners, *pro se*

Robert G. Hoyt, Deputy Attorney General, for respondent (Peter N. Perretti, Jr., Attorney General of New Jersey, attorney)

LAVERY, ALJ:

This is an appeal by Edward and Grace Wdowiarz (petitioners) from the amended "Report on an Application for a Waiver of Strict Compliance." This report prepared by the staff of the Pineland Commission (Commission) denied petitioners request for a waiver from:

(a) minimum lot size and (b) overall density requirements contained in *N.J.A.C.* 7:50-5.26.

PROCEDURAL HISTORY

Originally, this appeal was timely filed by Mrs. Geraldine M. Brennan, after receipt of a "Report on an Application for a Waiver of Strict Compliance" dated January 4, 1989, by the staff of the Pinelands Commission. Thereafter the matter became a contested case as a result of *N.J.A.C.* 7:50-4.91, when this matter was filed by the Executive Director in the Office of Administrative Law (OAL) on February 18, 1989.

Prehearing conference followed on April 18, 1989, and hearing was scheduled thereafter for September 1, 1989, but converted to telephone prehearing conference. The telephone conference convened on September 5, 1989, and plenary hearing was scheduled for September 27, 1989. The hearing convened in the Moorestown Municipal Court. However, in response to citation of a case for the first time made known to petitioners at hearing, time was afforded for review and response by petitioners. That response was to be submitted no later than 30 days from hearing (October 27, 1987). Instead, on October 27, a submission was received from the Commission. Petitioners, who had not yet responded, then were contacted by OAL by phone on November 3, 1989 to determine whether they intended to respond to the cases cited at hearing, and/or to the latest letter brief from the Commission. Petitioners advised that they intended to respond to neither. Consequently, on that date, the record closed.

ISSUES

The sole issues for determination are whether the waiver sought by petitioners should be denied because additional land is available to be purchased, and whether the land is contiguous and reasonably available within the meaning of *N.J.A.C.* 7:50-4.66(a)1.

Burden of Proof

The burden of proof falls on petitioners, who must carry it by a preponderance of the credible evidence.

Undisputed Facts

The material facts in this case are not in serious contention.

On September 21, 1987, petitioner Edward J. Wdowiarz filed with the New Jersey Pinelands Commission an application form. Through that application, he hoped to obtain a "waiver of strict compliance", *N.J.A.C.* 7:50-4.61, *et seq.*, from the restrictions imposed on his residential property, which he owned in the Borough of Folsom in Atlantic County. More specifically, that property was in Collings Lakes, within the municipality on Collings Drive Road, block #69, lot #263. The parcel itself had a total area of 75 feet by 150 feet, approximately one quarter of an acre.

After that application, petitioner dealt with the staff of the Commission. As a result, petitioner then wrote to Mrs. G. Brennan, who owned lot #616, located behind petitioner on Fernwood Terrace. Only one of the four sides of lot #616 was adjacent to petitioner's lot #263, and that only in part. Nevertheless, since the availability of this lot had an impact on the entitlement to waiver, the property was of significant interest to petitioner. In his letter to Mrs. Brennan, he noted that: "As I stated before, I am not interested in buying your property." The letter went on to declare that, without a waiver for their separate properties, fair market value could not be obtained. Additionally, petitioner asserted that William F. Harrison, Esq., Assistant Director of the Pinelands Commission, had urged their joint cooperation to resolve the problem.

Notwithstanding the plain intent of petitioners not to purchase Ms. Brennan's land, Assistant Director Harrison issued a "Report on an Application for a Waiver of Strict Compliance" on January 4, 1989. In that report, he pointed out that although petitioner had sought to develop his 11,250 square foot parcel to include a single-family dwelling there were deficiencies which would prevent such development:

1. Lack of an on-site sewage disposal system which would assure average concentration of the nitrate/nitrogen in the ground water at the property line of no more than two parts per million. This deficiency would require a waiver of strict compliance from the water quality requirements in *N.J.A.C.* 7:50-6.84(a)4iii.
2. The high water table was less than five feet below the natural ground surface on the property so that a septic system could not be located thereon without a waiver of strict compliance from the seasonal high water table requirement of at least five feet below ground surface mandated by *N.J.A.C.* 7:50-6.84(a)4iv.

3. Since fresh water wetlands were located within 300 feet of petitioners' parcel, and petitioners had given no information to demonstrate a significant adverse impact on the fresh water wetlands would not follow, a waiver was also needed from strict compliance with the "buffer to wetlands requirement" at *N.J.A.C. 7:50-6.14*.

The report noted that three parcels bordered the subject lot; however, two were occupied by existing single-family dwellings. The owner of the third parcel was not willing to sell the land to the applicant, nor was the owner willing to buy applicants' land for fair market value. Consequently, there was no land available for purchase. This circumstance amounted to "extraordinary hardship", anticipated by the provisions of *N.J.A.C. 7:50-4.66(a)1*. For this reason, the staff recommendation to the Commission was that it deem the property to be "not capable of having a beneficial use."

Additionally, the other deficiencies (outlined *supra*), in the staff's judgment at the time, were recommended to be waived if petitioners agreed to comply with the requirements set forth in staff recommendations. These included installation of a dry well, use of designated materials for a driveway, provision for sufficient fill in the area of the septic system, and utilization of a ruck septic system. The report also imposed conditions for the alternative to the ruck system. In sum, however, a waiver of strict compliance was recommended which, if adopted by the Commission, would allow development of the property.

On receipt of this recommendation, an aggrieved person, one Mrs. Geraldine M. Brennan, who owned lot #616 described above, appealed to the Commission before the recommendation could be adopted. At the prehearing conference on April 18, 1989, Mrs. Brennan declared that the waiver should not be granted, since she and her husband had land available for purchase by petitioners. Because of this information, no hearing was scheduled. Instead, time was allowed for the staff of the Commission to reinvestigate. Afterward, an amended report was issued on July 7, 1989. It took into account the newly provided information that vacant land adjoined the instant parcel, which was available for sale. The report also reassessed the position of petitioners that they were unwilling to purchase, under any circumstances, Mrs. Brennan's lot, which was for sale. With this new perspective, the staff report now concluded that the Brennans were correct, and that a waiver should not be granted. It was also concluded by the Commission staff that the applicants/petitioners

Wdowiarz had not demonstrated that the subject property did not have a beneficial use. The "extraordinary hardship" which prompted the prior recommendation of waiver by staff had turned entirely on the unavailability of adjacent properties. With that property now clearly available, the "hardship" prerequisite to waiver could not be so found, and, therefore, the deficiencies outlined above could not be waived.

With this more recent information now of record, further prehearing convened on September 5, 1989, during which the Wdowiarzs were advised that: (a) they were now petitioners, (b) the Brennans were no longer parties, but might be called as witnesses, and (c) petitioners were appealing from a denial of an application for waiver. Petitioners were also told that plenary hearing was still available for them to challenge the latest staff recommendation. Petitioners agreed to do so. Prehearing Order of September 8, 1989 confirmed that intent, and, as noted above, the proceeding from which this initial decision issues, went forward.

ARGUMENTS OF THE PARTIES

Petitioners' Argument

Petitioner, through his personal testimony, recounted the frustration he had endured through the perceived unfairness of reconsideration after reconsideration by the Commission. While he agreed that there is a lot available for purchase which would go toward meeting lot size requirement, he argued that its purchase would be a severe hardship. Petitioner did not believe he should be compelled to buy Mrs. Brennan's adjacent land, which is a larger lot. Petitioner added that Mrs. Brennan had offered to sell but he was unable to get a real estate appraisal of the worth of the property. Although the tax assessment is available to him, the fair market value is not known.

Finally, having been retired for 10 years, and living on a low income, it would be impossible for him to buy even one foot of that land, for lack of money. In fact, petitioner stated, it is his intention to sell his land for funds which he could use. Petitioner introduced maps of the property which he had prepared and obtained in support of his argument.

Respondent's Argument

The Commission staff supported its recommendation through the

testimony of Assistant Director William F. Harrison, Environmental Specialist II Cathleen Timpy and the witness for the State, Mrs. Geraldine M. Brennan.

Ms. Timpy testified that she had reviewed the applications at issue against Comprehensive Management Plan standards. She confirmed that the shortcomings described in the two reports of Mr. Harrison were as she personally had found them. Mr. Harrison stipulated on behalf of the State that, with the purchase of a second lot, the deficiencies noted in those reports would be entitled to a waiver under the conditions specified therein. He noted that the one available lot, lot #616 owned by Mrs. Brennan, was offered for sale to petitioners but refused. It was on learning this that the staff recommendation changed.

Geraldine M. Brennan testified that while petitioner had first informed her by letter that he wished to buy the property, once she followed up by telephone, he refused to buy. In like manner, Mrs. Brennan herself was also determined not to buy petitioner's lot. It was for this reason that she brought her objection to the Pinelands Commission. While she had no difficulty with the prospect of petitioner building on his own land, she felt that he was obliged to make an offer on her property before doing so. Mrs. Brennan emphasized that she was still willing to sell, for a reasonable price.

Mr. Harrison noted that his last recommendation, approved by the chief administrator and executive officer, turned entirely on petitioners' refusal to make a reasonable offer for the property owned by Mrs. Brennan. A reasonable offer was equated with fair market value. Mr. Harrison conceded that it was difficult for buyers and sellers to obtain from real estate companies what qualified as fair market value. Nevertheless, it was this price which equated, in the Commission's view, with a reasonable offer. However, the staff had no need to pursue that inquiry, since petitioner would not buy at any price.

Finally, the state offered, by way of legal argument, the decisions in *Forman v. Pinelands Commission*,* OAL Dkt. No. EPC 7391-88, decided April 25, 1989 and *LaVecchia v. Pinelands Commission*, 10 *N.J.A.R.* 63.

FINDINGS OF FACT

Therefore, after considering the testimony previously set forth, and

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independently assessing the credibility of witnesses and parties, as well as reviewing the record as a whole, I make the following FINDINGS OF FACT:

As to UNDISPUTED facts, I FIND those designated on pages two through five of this opinion.

As to matters which are DISPUTED OR CONTESTED, I FIND:

There are no material facts in dispute.

ANALYSIS

The factual issue has been resolved by the testimony of petitioner himself, supported by the supplementary recollection of Mrs. Brennan. Petitioner has indeed refused to buy, under any circumstances, the property which has been offered for sale by Mrs. Brennan. Therefore, the remaining issue is one of law: Is petitioners' inability to purchase the Brennan parcel for lack of funds "extraordinary hardship" which would justify a waiver of strict compliance which he seeks?

The answer must be no.

The standards for granting an application for waiver are set forth at *N.J.A.C.* 7:50-4.66(a). There are two reasons for granting of a waiver: (1) "extraordinary hardship" and (2) "compelling public need." Although the rule goes on at great length to explain the standards for establishment of one or both of these reasons, the only segment at issue here is the ability to purchase land. In that respect the rule is unambiguous:

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 . . . 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 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

It is plain that there is contiguous land, lot #616 owned by Mrs. Brennan, which is available. She asserts that the land is available for sale and she will accept a "reasonable offer." Mr. Harrison has testified that the practical Commission interpretation of "reasonable

offer” is “fair market value.” Although no inquiry has been made as to whether Mrs. Brennan’s position equates with fair market value, none is necessary. Petitioner is adamant in his refusal to buy any portion of the land, because he has insufficient money to do so. This, however, by the rule’s own terms, is not an “extraordinary hardship” which would trigger a waiver. The cases of *LaVecchia v. Pinelands Commission*, and *Forman v. Pinelands Commission, supra*, are consistent with this interpretation of *N.J.A.C. 7:50-4.66(a)1*. Since the decision here turns on the refusal to purchase, it is unnecessary to address those deficiencies listed by the Commission staff as requiring a waiver.

CONCLUSION

I **CONCLUDE**, therefore, based on my review of the entire record, including the credibility of witnesses, that contiguous land is available for purchase, and petitioner refuses to purchase that land at any price. Because of this refusal, the *N.J.A.C. 7:50-4.66(a)1* bars granting of the waiver of strict compliance sought by petitioners.

ORDER

I **ORDER**, therefore, that the application for relief brought by petitioners Edward and Grace Wdowiarz be, and hereby 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 applicants are seeking to develop a single family dwelling on Block 69, lot 263 which contains 11,250 square feet;

WHEREAS, the lot is located in a Rural Development Area in Folsom Borough;

WHEREAS, the minimum lot size in a Rural Development Area is 3.2 acres (*N.J.A.C. 7:50-5.26(c)*);

WHEREAS, in order to develop a single family dwelling on the subject lot, the applicant needs a Waiver of Strict Compliance from

the minimum lot size and overall density requirements in a Rural Development Area set forth in *N.J.A.C.* 7:50-5.26;

WHEREAS, an on-site sewage disposal system is proposed;

WHEREAS, no known on-site sewage disposal system will result in an average concentration of nitrate nitrogen in the ground water at the applicant's property line of 2ppm;

WHEREAS, the applicant needs a Waiver of Strict Compliance from the requirement contained in *N.J.A.C.* 7:50-6.84(a)4iii that the average concentration of nitrate nitrogen in the ground water at the applicant's property line not exceed 2ppm;

WHEREAS, there are fresh water wetlands located within 300 feet of the proposed development;

WHEREAS, the applicant has not demonstrated that the proposed development will not cause a significant adverse impact on freshwater wetlands as required by *N.J.A.C.* 7:50-6.14;

WHEREAS, based on the quality and location of the wetland and the nature of the proposed development, there will be a significant adverse impact on freshwater wetlands;

WHEREAS, the applicant also needs a Waiver of Strict Compliance from the buffer to wetlands requirements contained in *N.J.A.C.* 7:50-6.14;

WHEREAS, there is a vacant parcel contiguous with the subject parcel;

WHEREAS, the contiguous parcel is also undersized;

WHEREAS, the owner of that parcel is willing to sell to the applicant;

WHEREAS, the applicant has refused to offer to buy the contiguous parcel;

WHEREAS, the applicant has not demonstrated that the contiguous parcel is reasonably available;

WHEREAS, the necessity of acquiring additional land to meet the minimum lot size and environmental requirements of the Comprehensive Management Plan does not constitute an extraordinary hardship;

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, any hardship which exists is a result of the applicant's refusal to attempt to buy the adjacent, vacant parcel;

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

WHEREAS, the applicants do not meet the requirements of *N.J.A.C.* 7:50-4.66(a)1; and

WHEREAS, *N.J.A.C.* 7:50-4.66(a)1 is the exclusive means of establishing extraordinary hardship.

NOW, THEREFORE BE IT RESOVLED that the Initial Decision of the Administrative Law Judge is hereby affirmed and the request for a Waiver of Strict Compliance by Edward and Grace Wdowiarz (Application No. 87-1070, OAL DKT NO. EPC 1151-87 Block 69 (now Block 2607), Lot 263, Folsom 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.