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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5656-06T2

IN RE RESOLUTION OF NEW JERSEY
PINELANDS COMMISSION NO. PC4-07-37.

Argued September 16, 2008 – Decided October 20, 2008

Before Judges Wefing, Parker and LeWinn.

On appeal from the Resolution of the New Jersey Pinelands Commission, No. PC4-07-37.

Stuart J. Lieberman argued the cause for appellant Ralph Pappas (Lieberman & Blecher, attorneys; Mr. Lieberman, of counsel; Winifred E. Campbell, on the brief).

Kathrine Motley Hunt, Deputy Attorney General, argued the cause for appellant New Jersey Pinelands Commission (Anne Milgram, Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Ms. Hunt, on the brief).

PER CURIAM

Petitioner Ralph Pappas appeals from a Resolution of the New Jersey Pinelands Commission (Commission) adopted on May 11, 2007 denying petitioner's application for a waiver of strict compliance with wetlands regulations. We reverse.

Petitioner owns twenty acres of property within the Commission's jurisdiction in Galloway Township (Township). In 1986, petitioner built a house with a septic system, a garage, tennis court, deck and gazebo. Since that time, petitioner has been seeking a certificate of occupancy (CO) for the premises but the Commission has objected on the ground that the structures encroach on wetlands and wetland buffer zones.

Petitioner purchased the property in 1985. In July of that year, the Atlantic County Division of Public Health issued a permit for a septic system on the property and the Commission reviewed the permit and issued a letter dated August 15, 1985 indicating that the septic permit did not raise any wetlands concerns.

In 1986, before he obtained a building permit and began construction of the house, petitioner met with Joseph Pratzer, an environmental specialist with the Commission. Pratzer advised petitioner that the wetlands buffer on the property could be reduced from 300 to 250 feet. This representation was confirmed in a letter dated January 21, 1986. The letter stated that a plan depicting the proposed development on the property met the wetlands buffer requirements. On the basis of that representation, the Township issued a building permit and petitioner began construction. In 1991, the Township issued a

building permit for the garage. No permits were issued for any of the other structures now on the property, however. The Township has refused to grant a CO and petitioner has been unable to occupy the premises since it was constructed in 1986.

In July 1991, the Commission inspected the site for the first time and notified petitioner that the driveway and septic system did not comply with the 300-foot wetlands buffer, and that the tennis court, detached garage, wooden deck and gazebo were "unauthorized development" and "were built on wetlands or wetland buffer areas."

On August 30 and September 3, 1991, the Commission received copies of the permits issued for construction of the house and septic system. On October 1, 1991, the Commission advised petitioner that the permits "raised substantial issues with respect to the standards of the [Pinelands Comprehensive Management Plan] CMP" and scheduled a public hearing on the matter for October 30, 1991.

On November 25, 1991 – more than five years after the permits were issued and the house constructed – the Commission issued a report recommending that approval for development of the proposed single-family dwelling be denied. On December 6, 1991, the Commission adopted a resolution memorializing its decision. Then, on January 21, 1992 the Atlantic County Division

of Public Health revoked the septic permit – more than five years after it had issued the permit in July 1985.

On August 25, 1992, the Commission sent a letter to petitioner inquiring "about his progress in restoring the site." The Commission received no response, but nevertheless waited almost a year to inspect the property in June 1993. Petitioner was present for that inspection and, in an effort to comply with the Commission's position, he retained an engineering firm to conduct boring and groundwater tests. The tests demonstrated that there was a sufficient buffer between the seasonal groundwater table and the septic field and that the house was more than 300 feet from any of the wetlands.[1] After submitting the engineering reports to the Commission, petitioner heard nothing further from the Commission for eight years.

In December 2001, the Commission filed a verified complaint in the Atlantic County Chancery Division, alleging that, "the house, septic system and driveway were built in wetlands or wetland buffer areas in violation of N.J.A.C. 7:50-6.6 and 6.14;" and that "[n]either the house, driveway nor septic system were constructed, in size or location, in accordance with the approved plans." The complaint further alleged that "[t]he

[1] Petitioner made this representation in his brief and the Commission did not refute it. Petitioner did not, however, include the reports in his appendix.

tennis courts, detached garage, wooden deck and gazebo also constitute unauthorized development as they were not depicted on the approved plans and they were built in wetlands or wetland buffer areas, in violation of N.J.A.C. 7:50-6.6 and 6.14." The Commission sought (1) to have the petitioner submit a survey depicting all development on the site and delineating wetlands; (2) a remediation plan approved by the Commission to remove and relocate all development outside of the wetlands and buffer area; (3) removal of all non-native vegetation; and (4) revegetation with approved native vegetation.

In May 2002, petitioner answered the complaint and pled defenses of statute of limitations, laches, unclean hands and estoppel. In September 2002, petitioner had the survey done, showing the structures on the property and wetlands delineations. In a written decision rendered on August 11, 2003, the court noted that:

> Although I have not been given reference to the specific Pinelands statute or regulation which forbids such construction without specific approval, the parties seem to agree that absent such approval or other justification, the [Commission] is authorized to require removal of the offending structure and obtain restoration of the affected areas.

The court further noted that petitioner had not obtained building permits for any of the structures, other than the

house, septic system and garage, "and consequently cannot assert that a permit carries with it an implied permission from all agencies for the proposed work." The court found that "there appears no question that the garage, tennis court, deck partly around a pre-existing pond and spur from the existing driveway to the garage were built in areas in which they were forbidden, that there was no justification for that improper placement, and that plaintiff has the authority to require removal and restoration of the land on which they were placed." Nevertheless, the court concluded:

> If, however, the existing construction has no real effect upon the wetlands that [the Commission] is charged with protecting (an issue which was not before me), the position taken by [the Commission] seems to be one that might fairly be characterized as both unreasonable and bordering on the vindictive. If that is the case and there is a provision by which relief from the strict provision of the Pinelands Act may be obtained, the matter may be brought back to me for reconsideration or for a stay of the provisions of this decision while that relief is sought elsewhere.

In an order entered on September 9, 2003 memorializing its decision, the court granted the Commission's application for "removal of the garage, driveway spur leading to the garage, the tennis court, the deck around the pond and the restoration of any areas of wetlands or wetland transition areas cleared by the [petitioner]." Although petitioner was ordered to complete the

work by November 10, 2003, the court stayed its order to permit petitioner "to file an application with the [Commission] seeking a waiver from the [Commission] which would allow all or any of these improvements to remain." The court further indicated that it would entertain reconsideration based upon the Commission's action on the waiver application.

On November 6, 2003, petitioner submitted his waiver application to the Commission, accompanied by the reports of Janeann Armbruster, an environmental specialist, and Target Environmental Company (Target). The Target report stated that groundwater samples had been taken from areas around the improvements on the property to measure nitrogen levels in the groundwater, and that "[n]one of the samples exceeded the limits established by the NJDEP for combined nitrate and nitrite concentrations." The Armbruster report noted that the CMP allows "certain low level activities," and that the garage and gazebo were not in the wetlands but in the buffer area. Armbruster further reported that she had "visited this property approximately six times within the past year and . . . found no physical evidence, i.e. ponding of water, erosion or materials that would impact the buffer." In her opinion, "based on physical and chemical evidence [in the Target report], . . . the

garage and gazebo are not causing any serious impact to the freshwater wetlands or wetlands buffer."

Although the waiver application and environmental reports were submitted in November 2003, the Commission did not respond until May 2006 when Charles Horner, Director, Regulatory Programs, sent a letter to petitioner denying the waiver application. Almost three years after the application was submitted, Horner advised petitioner that the application did not qualify for a waiver under the Commission's regulations because a single-family dwelling had been constructed without need of a waiver and petitioner could not, therefore, claim extreme hardship. Horner determined that the improvements on the property resulted "in a significant adverse impact," and that the "unauthorized development is inconsistent with the wetlands protection standards of the CMP and restoration of the area is required."

In October 2005, the Commission moved in the Chancery Division to lift the stay and enforce the terms of the September 9, 2003 order. In an order entered on October 13, 2006, the court denied the application, noting that petitioner had the right to a review of Horner's decision by the Commission. The Commission's motion for reconsideration of the October 13, 2006

order was denied on December 5, 2006. In a written statement of reasons, the court noted in particular that

> [Petitioner's] request for a waiver was apparently submitted fairly promptly, as reflected by the prior submission presented to this court in October of this year. For reasons that are difficult to understand, it was almost 3 years before [the Commission] reacted to that request for a waiver . . . . Several months later, [the Commission] filed the application considered in October, asking that the court now lift the stay imposed . . . in September 2003, thereby requiring [petitioner] to remove the improvements in question . . . . Notably, this court's order of October 16, 2006 directed [the Commission] to schedule the anticipated review by the Commission promptly.

In its reconsideration argument, the Commission maintained that petitioner was "collaterally estopped from requesting additional review, based on proceedings conducted by [the Commission] in 1991." The court rejected the Commission's arguments and found:

> That estoppel argument is particularly inappropriate, given the circumstances presented here. Clearly, [the Commission] was aware of the proceedings that had occurred in 1991 as of the time the matter was presented [to the court in September 2003]. [The Commission] was also aware of [the court's] determination as to how the matter was to proceed and of its right to challenge that decision through the filing of an appeal, presumably as a matter of right. Indeed, it appears [the Commission] made a conscious decision not to appeal from

> the determination that the waiver issue was to be presented to it. . . .
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> [The Commission] also argues that it does not have the authority to review the limited decision made by its staff in May 2006 and that no procedural mechanism exists for such a review . . . . [The] court has no doubt the [Commission] can arrange for such review. In any event, [the Commission's] right to request the lifting of the prior stay is dependent on it providing that review promptly, consistent with the prior court's order.

Despite the court's admonition that the Commission act promptly, it did not respond to the December 5, 2006 order for almost three months. On February 28, 2007, the Commission wrote to petitioner enclosing a draft resolution adopting Horner's May 2006 decision and stated that it intended to vote on the resolution on March 7, 2007.[2] Petitioner responded on March 6, 2007 objecting to the form of the resolution and the fact that he did not receive it until March 6, the day before it would be voted on. Petitioner requested a hearing as directed by the court in the October and December 2006 orders and sixty days to prepare for it.

[2] The Commission has not provided a copy of its February 28, 2007 letter. It is, however, referenced in petitioner's March 6, 2007 response.

In a letter dated May 9, 2007, petitioner responded to the Commission's March 15, 2007 letter,[3] indicating that since the Commission had obviously already made its decision, "it's kind of pointless for me to show up." Thus, on May 11, 2007, in petitioner's absence, the Commission adopted the resolution memorializing Horner's May 2006 denial of petitioner's waiver application.

Petitioner appeals and argues that (1) the Commission failed to follow its own regulations in denying the waiver; (2) the Commission's finding that the site improvements adversely affect wetlands is arbitrary and capricious; and (3) the Commission's insistence that the property has a pre-existing beneficial use causes an extraordinary hardship to petitioner.

Our scope of review of administrative decisions is narrowly circumscribed. In re Taylor, 158 N.J. 644, 656 (1999). Our role is to determine "'whether the findings made could reasonably have been reached on sufficient credible evidence present in the record' considering 'the proofs as a whole'" and "with due regard to the opportunity of the one who heard the witnesses to judge of their credibility." Ibid. (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)). We "may not 'engage in an

[3] Again, the Commission failed to provide us with a copy of its letter.

independent assessment of the evidence . . . . '" In re Taylor, supra, 158 N.J. at 656 (quoting State v. Locurto, 157 N.J. 463, 471 (1999)). We generally accord a strong presumption of reasonableness, Smith v. Ricci, 89 N.J. 514, 525 (1982), and give great deference to administrative decisions. State v. Johnson, 42 N.J. 146, 159 (1964). We do not, however, simply rubber stamp the agency's decision. Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980). An administrative decision will be reversed when it is found to be "arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole." Ibid.

Plaintiff first argues that the Commission abused its discretion because it violated its own regulations in failing to decide the waiver application within ninety days. N.J.A.C. 7:50-4.67 provides:

> Within ninety days following the receipt of a complete application for waiver, the Executive Director shall review the application and all information submitted by the applicant and any other person relating to the application and upon completion of such review make a determination whether the application should be approved, approved with conditions or disapproved. . . . The Executive Director shall give written notification of his findings and conclusion to the applicant, the Commission, interested persons, including all persons who have submitted information concerning the application as well as all persons who have requested a copy of said determination, and

> any person, organization or agency which has registered under N.J.A.C. 7:50-4.3(b)2i(2).

Clearly, the Commission did not comply with the regulation.

Other segments of the administrative code governing various applications contain provisions, commonly referred to as "automatic approvals," which require the agency to act timely or the application will be deemed granted. For example, N.J.A.C. 7:45-2.6(f) and 13:13A-14C require the Delaware and Raritan Canal Commission (DRCC) to approve or reject an application for project review within forty-five days or "the application shall be deemed to have been approved by the Commission."

Applications for Coastal Area Facility Review Act (CAFRA) permits require the Department of Environmental Protection (DEP) to act on wetland and waterfront development applications within ninety days after the application is declared complete or "the application shall be deemed to have been approved subject to the standard conditions set forth in N.J.A.C. 7:7-1.5." N.J.A.C. 7.7-4.7.

"The Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -15, requires an administrative agency to issue a final decision within forty-five days of receipt of the Administrative Law Judge's (ALJ's) initial decision, unless the Director of the Office of Administrative Law (OAL) extends this time for good cause. N.J.S.A. 52:14B-10(c). If an agency fails to issue a

final decision within the allowed time, the ALJ's initial decision is 'deemed adopted' as the agency's final decision." Capone v. N.J. Racing Comm'n, 358 N.J. Super. 339, 340 (2003).

Even the Municipal Land Use Law (MLUL) requires timely action on planning and zoning applications and prohibits a municipality from unilaterally extending the time "by deferring its consideration of the application while awaiting county approval." Manalapan Holding Co., Inc. v. Planning Bd. of Hamilton Twp., 92 N.J. 466, 469 (1983).

"'The evil which the automatic approval provisions were designed to remedy was municipal [or agency] inaction and inattention.' The purpose of these time limits is to expedite decision-making on . . . applications." Infinity Outdoor, Inc. v. Delaware and Raritan Canal Comm'n, 388 N.J. Super. 278, 287 (App. Div. 2006) (quoting Allied Realty v. Borough of Upper Saddle River, 221 N.J. Super. 407, 418-20 (1988)). Nevertheless, we noted in Infinity that "[i]t is clear that automatic approval statutes are to be 'applied with caution.'" Id. at 286 (quoting King v. N.J. Racing Comm'n, 103 N.J. 412, 422 (1986); Star Enter. v. Wilder, 268 N.J. Super. 371, 374 (App. Div. 1993)). An "application of the statutory time constraints must be anchored in the reason for their existence." Allied Realty, supra, 221 N.J. Super. at 418.

In Capone, we considered delays of seven months and one year "extremely lengthy," and noted "that the Commission has not even undertaken to show that it had a good excuse for failing to issue its decisions in a timely manner." 358 N.J. Super. at 349-50. In Infinity, however, we found "no purposeful delay or inattention on the part of the DRCC," rather, the delay was occasioned by petitioner's revisions and amendments of its plan before it was rendered complete. 388 N.J. Super. at 287.

Failure of a government entity to act timely on an application implicates due process principles. See, e.g., City of East Orange v. Kynor, 383 N.J. Super. 639, 647-48 (App. Div. 2006) ("'Fundamentally, due process requires an opportunity to be heard at a meaningful time and in a meaningful manner.'") (quoting Doe v. Poritz, 142 N.J. 1, 106 (1995).

> The primary focus of the administration of justice, be it in the traditional courts of justice or before administrative agencies, is the same: the delivery of quality justice, the elements of which are (1) due process or fairness which includes an opportunity for adequate pretrial preparation; (2) expeditious disposition, and (3) economically effective operation. The court must balance these elements and never favor the latter two above the first, fair play.
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> [Waters v. Island Transportation Corp., 229 N.J. Super. 541, 546-47 (App. Div. 1989) (citing Georgis v. Scarpa, 226 N.J. Super. 244 (App. Div. 1988).]

Here, the regulations governing the Commission do not contain an automatic approval provision. Nevertheless, we are convinced that inordinate, unexcused delay in considering and ruling on applications results in a gross injustice and deprivation of due process to the applicant. Even if we disregard the eight-year delay between the June 1993 inspection of the property and the December 2001 verified complaint, we cannot overlook the almost three-year delay between petitioner's filing the waiver application in accordance with the September 9, 2003 court order and the May 6, 2006 decision denying the application. At oral argument before us, the Deputy Attorney General characterized the delay as "unfortunate" but gave no excuse for it. In our view, the unexcused delay is a due process violation. Poritz, supra, 142 N.J. at 106.

Given the extraordinary length of time petitioner has been attempting to provide information and secure a hearing before the Commission, and given the Commission's failure to address petitioner's application timely, we find that the Commission has abused its discretion. Further, given the Commission's refusal to comply with the court's December 5, 2006 order to hold a hearing on petitioner's waiver application, we have no expectation that the Commission will comply with a remand by us for that purpose. Accordingly, we invoke our original

jurisdiction pursuant to Rule 2:10-5 to reverse the Commission's denial of the waiver. We hereby grant petitioner's application. Petitioner may now seek to have the municipality grant him a CO.[4] We, nevertheless, caution petitioner to avoid any further construction or disturbance of the property without the necessary approvals.

Petitioner further argues that the Commission abused its discretion in failing to advise the court and petitioner that "the waiver cannot apply to property that has already been developed." Since the Commission was clearly aware that the house was constructed more than twenty years ago, we are compelled to agree with petitioner. The Commission merely explained that

> [f]or this application, a single family dwelling has already been developed on the concerned lot without the need for a Waiver. The existing dwelling and septic system are located on an area of the lot that meets all applicable standards of the CMP. It is the additional development, which occurred in wetlands and wetlands transition areas as found by the Judge, that you are seeking to bring into conformance with the requirements of the CMP. As there is already an existing family dwelling on the lot, the lot has an existing beneficial use and an extraordinary hardship as required by the CMP to qualify

[4] Although the municipality is not a party to this action and, therefore, not subject to our jurisdiction, we suggest that the municipality act timely in granting the CO if the construction complies with municipal codes and ordinances.

> for a waiver does not exist. An application for a Commission Waiver could not permit the unauthorized development to remain on the lot since the proposed lot can be developed without a waiver.

Thus, for almost three years, the Commission knew, but failed to notify petitioner, that under its interpretation of the regulations, the waiver application could not be granted.

We are struck by the Commission's lack of timeliness in view of its claim that the wetlands are so significantly affected by the development on petitioner's property. We note further that this is a twenty-acre parcel of property on which the Commission objects to the construction of a small gazebo, a tennis court, what appears to be a two-car garage, a portion of the driveway and a small deck constructed around an existing pond. The Commission failed to note that the survey shows that these structures are spread out at significant distances from each other and occupy a small percentage of the twenty-acre property.

The Commission claims that "[p]recipitation, which previously infiltrated into the soil, increasingly flows overland, due to change in cover from woods to grass and woods to impervious surfaces, and also creates an increase in sedimentation entering the wetland." The Commission fails to note, however, the percentage of the property now covered with

impervious surfaces. The Commission further claims that it undertook soil borings on the property and found fill material "comprised of different characteristics and properties than native soil found in the undisturbed (wooded) areas of the parcel." Again, the Commission does not indicate the size of the fill area compared to the size of the property.

In short, if this were such a significant incursion on the wetlands having "an irreversible effect on the ecological integrity of the wetland and its biotic components," as the Commission claims, it could have and should have acted swiftly in seeking to compel petitioner to correct the incursions and in making a decision on his waiver application. The Commission somewhat cavalierly argues that petitioner could obtain all of the necessary approvals to occupy the house if he removed all of the accessory structures. This strikes us as disingenuous after the agency allowed the matter to languish all these years.

We have carefully considered the record in light of the arguments presented and the applicable law and we are satisfied that the Commission has not met its obligations under the regulations and that it abused its discretion in failing to make a timely decision on petitioner's waiver application. As we indicated previously, pursuant to our original jurisdiction, the Commission's decision dated May 2, 2006 and the resolution

adopted on May 11, 2007 are reversed, and the Commission is directed to grant all of the necessary approvals to petitioner so that he may obtain a CO for the property.

Reversed.