RESOLUTION OF THE NEW JERSEY PINELANDS COMMISSION

NO. PC4-16- 07

TITLE: **Denying** an Application for a **Waiver of Strict Compliance** (Application Number 2015-0044.001)

Commissioner McGlinchey **moves and Commissioner** Barr **seconds the motion that:**

WHEREAS, the Pinelands Commission has reviewed each of the Findings of Fact, Conclusion and the recommendation of the Executive Director that the following application for Waiver of Strict Compliance be denied:

2015-0044.001	
Applicant:	**Gary Russo**
Municipality:	Hamilton Township
Management Area:	Pinelands Forest Area
Date of Report:	January 25, 2016
Proposed Development:	Single family dwelling

WHEREAS, no request for a hearing before the Office of Administrative Law concerning the Executive Director's recommendation has been received for this application; and

WHEREAS, the Pinelands Commission hereby adopts the Findings of Fact and Conclusion of the Executive Director for the requested Waiver of Strict Compliance; and

WHEREAS, the Pinelands Commission hereby determines that the requested Waiver does not conform to the standards for approving an application for a Waiver of Strict Compliance based on extraordinary hardship as set forth in N.J.A.C 7:50-4.62, N.J.A.C. 7:50-4.63 and N.J.A.C. 7:50-4.65 if the conditions recommended by the Executive Director are imposed; and

WHEREAS, pursuant to N.J.S.A. 13A-5h, no action authorized by the Commission shall have force or effect until ten (10) days, Saturdays, Sundays and public holidays excepted, after a copy of the minutes of the meeting of the Commission has been delivered to the Governor for review, unless prior to expiration of the review period and Governor shall approve same, in which case the action shall become effective upon such approval.

NOW, THEREFORE BE IT RESOLVED that Application Number 2015-0044.001 for a Waiver of Strict Compliance is hereby **denied.**

Record of Commission Votes

	AYE	NAY	NP	A/R*		AYE	NAY	NP	A/R*		AYE	NAY	NP	A/R*
Ashmun	X				DiBello			X		McGlinchey	X			
Avery	X				Galletta	X				Prickett	X			
Barr	X				Jannarone			X		Quinn	X			
Brown	X				Lloyd	X				Rohan Green	X			
Chila	X				Lohbauer	X				Earlen	X			

* A = Abstained / R = Recused

Adopted at a meeting of the Pinelands Commission Date: 2/12/16

Nancy Wittenberg
Executive Director

Sean W. Earlen
Chairman

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Chris Christie
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Kim Guadagno
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General Information: Info@njpines.state.nj.us
Application Specific Information: AppInfo@njpines.state.nj.us

Mark S. Lohbauer
Chairman

Nancy Wittenberg
Executive Director

REPORT ON AN APPLICATION FOR A WAIVER OF STRICT COMPLIANCE

January 25, 2016

Gary Russo
1149 Viking Drive
Port Orange, FL 32129

Re: Application # 2015-0044.001
Block 593, Lot 1
Hamilton Township

Dear Mr. Russo:

The Commission staff has completed its review of this application for a Waiver of Strict Compliance ("Waiver") proposing development of one single family dwelling on the above referenced parcel. Based upon the facts and conclusions contained in this Report, on behalf of the Commission's Executive Director, I am recommending that the Pinelands Commission deny the application at its February 12, 2016 meeting.

You have expressed an interest in the New Jersey Department of Environmental Protection acquiring the parcel under the Commission's Limited Practical Use Program (LPU). One of the requirements to qualify for the LPU Program is Pinelands Commission denial of a Waiver application.

FINDINGS OF FACT

This application is for the development of one single family dwelling, served by an onsite septic system, on the above referenced 5.98 acre parcel in Hamilton Township. The parcel is located in Hamilton Township's FA-70 zoning district within a Pinelands Forest Area. To conform to the overall residential density requirements in the Pinelands Forest Area, Hamilton Township has established an overall residential density requirement of 1 dwelling unit per 70 acres in this portion of the Forest Area. As the proposed development is not consistent with the residential density requirement in a Pinelands Forest Area, the applicant is requesting a Waiver from the residential density requirement contained in the Pinelands Comprehensive Management Plan (CMP, N.J.A.C. 7:50-5.23(c)).

The parcel has been site 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.

The CMP (N.J.A.C. 7:50-6.84 (a)4iv.) requires that if development is proposed to be served by an onsite septic system, the proposed onsite wastewater disposal field must be located in an area where the depth to seasonal high water table is at least 5 feet below the natural ground surface. The Atlantic County Soils Survey indicates that the soils on this parcel have a seasonal high water table of less than 2 feet below the natural ground surface. The applicant has submitted no information to demonstrate that the septic system could be located in an area where the seasonal high water table is at least 5 feet below the natural ground surface. Since the available information indicates the seasonal high water table on the entire parcel is less than 5 feet below the natural ground surface, the applicant is requesting a Waiver from the seasonal high water table requirement for an onsite wastewater disposal field contained in the CMP (N.J.A.C. 7:50-6.84(a)4iv.)

The CMP (N.J.A.C. 7:50-6.6) prohibits most development in wetlands. The CMP (N.J.A.C. 7:50-6.14) also prohibits most development within 300 feet of wetlands unless it is demonstrated that the proposed development will not result in a significant adverse impact on wetlands. Available information indicates that the parcel is comprised entirely of a hardwood swamp and pitch pine lowland which are wetlands as defined in the CMP (N.J.A.C. 7:50-6.5(a)2 and 3). These wetlands do not meet the CMP definition of an impaired wetlands (N.J.A.C. 7:50-2.11). The applicant has not demonstrated that no development would be located on these wetlands. The applicant has submitted no information to demonstrate that proposed development within 300 feet of wetlands would not cause a significant adverse impact on the wetlands. Based on the quality and location of the wetlands, the proposed development will cause a significant adverse impact on the wetlands. As there will be a significant adverse impact on wetlands, the applicant is requesting a Waiver from the wetlands and wetlands buffer requirements contained in the CMP (N.J.A.C. 7:50-6.6 and N.J.A.C. 7:50-6.14.)

The CMP (N.J.A.C. 7:50-6.27) prohibits development unless it is designed to avoid irreversible adverse impacts on the survival of any local population of plants designated by the New Jersey Department of Environmental Protection as endangered plant species and those plants designated in the CMP as threatened or endangered. The CMP (N.J.A.C. 7:50-6.33) prohibits development unless it is designed to avoid irreversible adverse impacts on habitats that are critical to the survival of any local population of those threatened and endangered animal species designated by the New Jersey Department of Environmental Protection. The applicant has submitted no information to demonstrate that the proposed development could be designed to avoid irreversible adverse impacts on the survival of any local population of plants designated by the New Jersey Department of Environmental Protection as endangered plant species and those plants designated in the CMP as threatened or endangered. The applicant has submitted no information to demonstrate that the proposed development could be designed to avoid irreversible adverse impacts on habitats that are critical to the survival of any local population of those threatened and endangered animal species designated by the New Jersey Department of Environmental Protection. As the applicant has not demonstrated there will not be a significant adverse impact on threatened and endangered species, the applicant is requesting a Waiver from the CMP threatened and endangered species protection standards (N.J.A.C. 7:50-6.27 and N.J.A.C. 7:50-6.33).

PUBLIC NOTICE

The applicant has provided the requisite public notice. Public notice to all property owners within 200 feet of the parcel was completed on November 23, 2015. Newspaper public notice was completed on December 11, 2015. The application was designated as complete on the Commission's website on December 30, 2015. The Commission's public comment period closed on January 15, 2016. No public comment regarding this application was submitted to the Commission.

CONCLUSION

The CMP (N.J.A.C. 7:50-4.62) sets forth the standards which must be met before a Waiver can be approved. N.J.A.C. 7:50-4.62(a) requires that for a Waiver to be approved based on extraordinary hardship, an applicant must demonstrate that the conditions of either N.J.A.C. 7:50-4.63(a) or (b) have been met.

N.J.A.C. 7:50-4.63(a) sets forth **five conditions** which must be met for an applicant to qualify for a Waiver based on an extraordinary hardship pursuant to that subsection.

The first condition is that the only relief sought is from one or more of the standards contained in the CMP (N.J.A.C. 7:50-6) for certain specified types of development. The development of a single family dwelling in a Forest Area that needs a Waiver from the residential density requirement contained in the CMP (N.J.A.C. 7:50-5.23 (c)) is not one of the specified categories of development. The application does not meet the condition contained in N.J.A.C. 7:50-4.63(a)1.

The second condition is that the parcel includes all contiguous land in common ownership on or after January 14, 1981, including lands which are contiguous as a result of ownership of other contiguous lands. Since the parcel includes all such contiguous lands, the application meets the condition set forth in N.J.A.C. 7:50-4.63(a)2.

The third condition is that the proposed use will be the sole principal use on the entire contiguous parcel, except as expressly provided in N.J.A.C. 7:50-5.1(c). As the proposed single family dwelling would be the sole principal use on the parcel, the application meets the condition set forth in N.J.A.C. 7:50-4.63(a)3.

The fourth condition is that all necessary municipal lot area and density variances have been obtained if the parcel is located in a municipality whose master plan and land use ordinances have been certified by the Pinelands Commission. Hamilton Township's master plan and land use ordinances have been certified by the Pinelands Commission. The certified ordinances require a municipal lot area or density variance. No such variance has been obtained. The application does not meet the condition set forth in N.J.A.C. 7:50-4.63(a)4.

The fifth condition is that the development of the parcel will not violate any of the criteria contained in N.J.A.C. 7:50-4.65(b). N.J.A.C. 7:50-4.65(a) precludes the granting of a Waiver which permits a parcel to be developed unless such development will be consistent with the purposes and provisions of the Pinelands Protection Act, the Federal Act and the CMP and will not result in substantial impairment of the resources of the Pinelands Area. N.J.A.C. 7:50-4.65(b) provides that the following circumstances will result in substantial impairment of the resources of the Pinelands Area and do not comply with N.J.A.C. 7:50-4.65(a):

N.J.A.C. 7:50-4.65(b)5	The development of a single family dwelling and associated improvements in wetlands unless that wetland is an impaired wetland;
N.J.A.C. 7:50-4.65(b)6	The development of a single family dwelling and associated improvements within 50 feet of any wetland unless the wetland is either an impaired wetland or located in a Regional Growth Area, Pinelands Town or Pinelands Village;

N.J.A.C. 7:50-4.65(b)7	Any development which will violate the threatened and endangered species protection requirements contained in N.J.A.C. 7:50-6.27 and 6.33; and
N.J.A.C. 7:50-4.65(b)8	Any development which will require the location of an onsite wastewater disposal field in an area where the seasonal high water table is within 2 feet of the natural ground surface.

The proposed development is not permitted in wetlands. The wetlands on the parcel do not meet the CMP definition of "impaired wetlands." The applicant has not demonstrated that proposed development will not be located on wetlands as required by N.J.A.C. 7:50-4.65(b)5. As a result, the applicant has not demonstrated that the proposed development will not violate the criteria contained in N.J.A.C. 7:50-4.65(b)5.

The parcel is located in a Pinelands Forest Area. The applicant has not demonstrated that the proposed development could be located at least 50 feet from wetlands. As a result, the applicant has not demonstrated that the proposed development will not violate the criteria contained in N.J.A.C. 7:50-4.65(b)6.

The applicant has not demonstrated that the proposed development could be designed to avoid irreversible adverse impacts on the survival of any local population of plants designated by the New Jersey Department of Environmental Protection as endangered plant species and those plants designated in the CMP as threatened or endangered. The applicant has not demonstrated that the proposed development could be designed to avoid irreversible adverse impacts on habitats that are critical to the survival of any local population of those threatened and endangered animal species designated by the New Jersey Department of Environmental Protection. As a result, the applicant has not demonstrated that the proposed development will not violate the criteria contained in N.J.A.C. 7:50-4.65(b)7.

The applicant has not demonstrated that a proposed onsite wastewater disposal field will not be located in an area where the seasonal high water table is within 2 feet of the natural ground surface. As a result, the applicant has not demonstrated that the proposed development will not violate the criteria contained in N.J.A.C. 7:50-4.65(b)8.

The application does not meet the condition set forth in N.J.A.C. 7:50-4.63(a)5.

As the application does not meet all <u>five conditions</u> set forth in N.J.A.C. 7:50-4.63(a), the applicant does not qualify for a Waiver pursuant to that subsection.

N.J.A.C. 7:50-4.63(b) sets forth **<u>four conditions</u>** which must be met for an applicant to qualify for a Waiver based on an extraordinary hardship pursuant to that subsection.

The <u>first condition</u> is that the parcel includes all contiguous lands in common ownership on or after January 14, 1981, including lands which are contiguous as a result of ownership of other contiguous lands. As concluded above, the concerned parcel includes all contiguous lands that were in common ownership on or after January 14, 1981. The application meets the condition contained in N.J.A.C. 7:50-4.63(b)1.

The second condition is that the parcel includes all contiguous land with no substantial improvements which is available for purchase at fair market value, including lands which are contiguous as a result of the acquisition of other contiguous lands. There is vacant land bordering the concerned parcel. The applicant has not demonstrated that the vacant land is not available for purchase at fair market value. The application does not meet the condition set forth in N.J.A.C. 7:50-4.63(b)2.

The third condition is that the parcel, including all contiguous lands which are available pursuant to N.J.A.C. 7:50-4.63(b)1 and 2, may not have a beneficial use considering five factors.

The first factor to be considered is the value of any existing development or use of the overall parcel, including any allocation of Pinelands Development Credits (PDCs). The overall parcel is vacant and no use has been established on the parcel. PDCs are not allocated to lands in a Forest Area.

The second factor to be considered is the value of any use or development of the parcel that is authorized by the provisions of the CMP. The applicant has submitted no information to address the value of any use or development of the parcel that is authorized by the provisions of the CMP.

The third factor to be considered is the ability of the property owner to sell the parcel to the owner of a contiguous parcel, any governmental agency or to a nonprofit conservation group for its fair market value. The applicant has submitted no information to demonstrate that the parcel cannot be sold for its fair market value to any other governmental agency or to a nonprofit conservation group for its fair market value.

The fourth factor is the ability of the property owner to either buy noncontiguous land or to sell the concerned parcel to a noncontiguous property owner under a residential density transfer provision contained in a certified municipal land use ordinance or pursuant to the CMP (N.J.A.C. 7:50-5.30). Hamilton Township's certified land use ordinances contain a residential density transfer provision which applies to lands in Hamilton Township's FA-70 zoning district. The applicant has submitted no information to demonstrate that this parcel could not be sold to the owner of a non-contiguous parcel located in the FA-70 zoning district in the Forest Area. The applicant has submitted no information to demonstrate that there is no non-contiguous land available to be purchased in the FA-70 zoning district to meet the 70 acre residential density requirement.

The fifth factor to be considered is whether any inability to have a beneficial use relates to or arises out of the characteristics of the concerned parcel and results from unique circumstances peculiar to the parcel which are not the result of any personal situation of the applicant and are not the result of any action or inactions by the application or any predecessor in title. The residential density, minimum depth to seasonal high water table for an onsite septic system wastewater disposal field, threatened and endangered species protection requirements and wetland protection requirements apply to all other vacant parcels in the area. Any hardship which does exist is a result of the applicant's personal circumstances and their actions and inactions.

Based on these five factors, the application does not meet the condition set forth in N.J.A.C. 7:50-4.63(b)3.

The fourth condition is that the development of the parcel will not violate any of the criteria contained in N.J.A.C. 7:50-4.65(b). As concluded above, the applicant has not demonstrated that a single family dwelling can be developed on the concerned parcel without violating N.J.A.C. 7:50-4.65(b)5, 6, 7 and 8. As a result, the applicant does not meet the condition contained in N.J.A.C. 7:50-4.63(b)4.

As the applicant does not meet all the conditions for demonstrating extraordinary hardship contained in N.J.A.C. 7:50-4.63(b), the applicant does not qualify for a Waiver pursuant to that subsection.

As N.J.A.C. 7:50-4.63(a) and (b) are the exclusive means of establishing extraordinary hardship, the applicant does not qualify for a Waiver.

As a result, it is recommended that the Pinelands Commission **DENY** the requested Waiver of Strict Compliance.

APPEAL

The CMP (N.J.A.C. 7:50-4.91) provides an interested party the right to appeal this recommendation in accordance with N.J.A.C. 7:50-4.91. An interested party is someone who has a specific property interest sufficient to require a hearing on constitutional or statutory grounds. Only appeal requests submitted by someone meeting the definition of an interested party will be transmitted to the New Jersey Office of Administrative Law for a hearing. Any such appeal must be made in writing to the Commission within eighteen days of the date of this Report and must include the following information:

A. the name and address of the person requesting the appeal;

B. the application number;

C. a brief statement of the basis for the appeal; and

D. a certificate of service (a notarized statement) indicating that service of the notice has been made, by certified mail, on the clerk of the county, municipal planning board and environmental commission with jurisdiction over the property which is subject of this decision.

If no appeal is received, the Pinelands Commission may either approve the determination of the Executive Director or refer the application to the New Jersey Office of Administrative Law for a hearing.

Recommended for Approval by: _____

Charles M. Horner, P.P., Director of Regulatory Programs

c: Secretary, Hamilton Township Planning Board (via email)
Hamilton Township Construction Code Official (via email)
Atlantic County Department of Regional Planning and Development (via email)
Atlantic County Division of Public Health (via email)
Anthony E. Russo, Esq. (via email)
Betsy Piner