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SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF SUFFOLK

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In the Matter of the Application of

GLADYS GHERARDI,

Petitioner-Plaintiff

INDEX NO.
06-17693

For a Judgment pursuant to Article 78
& Section 3001 of the CPLR,

-against-

PETER A. SCULLY, Chairman, PHILIP J.
CARDINALE, BRIAN X. FOLE, PATRICK A.
HEANEY, and STEVE A. LEVY, constituting
The Members of the CENTRAL PINE BARRENS
JOINT PLANNING & POLICY COMMISSION,

Respondents/Defendants

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August 1, 2007
Riverhead, New York

**B E F O R E: HON. RALPH F. COSTELLO,
SUPREME COURT JUSTICE**

A P P E A R A N C E S:

CERTILMAN BALIN ADLER & HYMAN LLP
1393 Veterans Memorial Highway
Suite 301S
Hauppauge, New York 11788
BY: **GLENN B. GRUDER, ESQ.**
For the Petitioner

SO-ORDERED DECISION OF COURT

William K. Coyle
Sr. Court Reporter

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STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
ANDREW M. CUOMO
120 Broadway
New York, New York 10271-0332
BY: **JANICE B. TAYLOR, ESQ.**
& JANICE A. DEAN, ESQ.
Asst. Attorney General
For the Respondents

1 **Oral Argument**2
3 (In Chambers) .4 THE COURT: Please note your
5 appearances for the record.6 MR. GRUDER: Certilman Balin Adler &
7 Hyman, 1393 Veterans Memorial Highway,
8 Hauppauge, New York 11788, by Glenn B.
9 Gruder, for petitioner-plaintiff, Gladys
10 Gherardi.11 MS. TAYLOR: Andrew M. Cuomo, Attorney
12 General for the State of New York, by Janice
13 B. Taylor and Janice Dean, 120 Broadway, New
14 York, New York 100271, on behalf of
15 Respondents.

16 THE COURT: Mr. Gruder.

17 MR. GRUDER: Yes, Your Honor.

18 THE COURT: Just give me the gist of
19 it.20 MR. GRUDER: Okay, my client owns
21 property in Manorville, which is clearly
22 within the core area of the Central Pine
23 Barrens, it's undeveloped, it's treed, it's
24 vacant, and he would like to establish a
25 winery. And when you look at the statute

Oral Argument

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2 and then you look at the regulations for
3 what is not development, okay, not
4 development, because the Pine Barrens
5 Statute of Regulations only applied to
6 development and it lists what development is
7 and it lists what development is not, and
8 one of the things that's not development is
9 agriculture, including a vineyard, the
10 growing of vegetables, and it specifically
11 says a vineyard. In order to establish this
12 vineyard we need to clear the native
13 vegetation, which are trees.

14 But nevertheless, we think that it is
15 very, very clear we can't establish a farm
16 or vineyard unless you have to clear first.
17 Clearing is one of the things that's
18 generally prohibited in the core area of the
19 Pine Barrens, and when you look at the
20 different exceptions and language used,
21 there are certain things that are not
22 development but are qualified with words
23 such as "so long as it's consistent with the
24 act, so long as it's consistent with the
25 intent of the act." There's no such

Oral Argument

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2 qualifying language when you get to
3 agriculture, Your Honor, it just says
4 agriculture, and it defines what agriculture
5 is, and it includes vineyards. And we think
6 that was intentional by the legislature to
7 make very clear that one of the things they
8 wanted to promote, despite the fact that
9 they wanted to protect the Pine Barrens, one
10 of the things they wanted to promote was
11 agriculture and vineyards on the, within the
12 Pine Barrens.

13 And we strongly maintain when you look
14 at the language of the Act, and the
15 regulations, it is very, very crystal clear
16 that my client's proposal is not
17 development.

18 Procedurally by, for some background,
19 Judge, the first thing we did was we applied
20 to the Pine Barrens Commission for what is
21 known as a determination of non
22 jurisdiction. Based on that --

23 THE COURT: A letter of non
24 jurisdiction?

25 MR. GRUDER: A letter, yes. Based on

Oral Argument

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2 that argument, they denied us in their
3 determination, which you have in the
4 records, saying that, no, because we have to
5 clear, we are development, and you've got
6 to, you know, comply with the regulations
7 and you're not allowed to do it because you
8 have to clear, and that's the nutshell
9 version, Your Honor.

10 THE COURT: Okay, on behalf of the
11 State.

12 MS. TAYLOR: As a jurisdictional
13 matter, the determination from which the
14 petitioners are essentially appealing by
15 this Article 78 proceeding, is a non-final
16 determination and only final determinations
17 are reviewable by an Article 78 proceeding.

18 Under the authority of the Matter of
19 Essex vs. Zagata, the law is clear that an
20 order -- that a determination is final only
21 if it inflicts an injury on the allegedly
22 aggrieved party. There is no injury here
23 because under the Zagata decision, which is
24 a Court of Appeals decision, the Court held
25 that although the APA in that case,

Oral Argument

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2 assertion of jurisdiction may constitute a
3 definitive agency determination, it did not
4 inflict the type of concrete injury for a
5 finding of finality.

6 The Court goes on to say indeed a
7 agency's erroneous assertion of jurisdiction
8 may ultimately never cause any real injury.

9 In this case, were the Pine Barrens
10 Commission ultimately to grant Mr. Gruder's
11 client's hardship exemption, this, the
12 issues presented in this proceeding would
13 become academic, it would become moot,
14 therefore the resolution for which they seek
15 review is non-final within the meaning of
16 Article 78.

17 With respect to the merits of the case,
18 the interpretation that Mr. Gruder is
19 proposing, that excavation, clearing and a
20 material alteration of grade on 37 areas in
21 the core area, the most pristine area of the
22 Pine Barrens is not development, would
23 pervert the plain language of the Act and
24 would defeat the entire legislative scheme
25 and legislative intent of the Pine Barrens

Oral Argument

Act.

Petitioner's own project proposal states that it is a plan to, quote, develop the property, that it is a plan. The ultimate use, intended use, not current use, but projected use would require a prescribed material change in the use of the land, it would require proscribed excavation, and therefore would defeat the legislative intent to protect this very unique ecological resource.

This is not a current use, which is the type of agriculture use sought to be protected by the exemptions that you have for agriculture uses but it is intended for future use.

Justice Burke correctly construed the Act to effectuate its legislative intent in the Pine Barrens Society Case that we cite in our brief. There Justice Burke found that a proposed recreational use was not exempt because it would increase the intensity of the use of the land.

THE COURT: You are talking about the

Oral Argument

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2 baseball field?

3 MS. TAYLOR: Yes, because it would
4 changes the intensity of the use, and that
5 is something that is prescribed as
6 constituting development under the act and
7 precisely the same result should obtain in
8 this case. The Pine Barrens Act prohibits
9 all development in the core preservation
10 area in the absence of a hardship exemption,
11 which Mr. Gruder's client may well get, but
12 at this point she has declined to apply for
13 one. And were that to occur, or the
14 exemption to be granted, the injury would be
15 ameliorated in its entirety and this
16 proceeding would be rendered academic.

17 THE COURT: Thank you. The Court did
18 review the paperwork submitted, the motion
19 001 in this Article 78 proceeding and the
20 attached responses, replies and support
21 papers.

22 I have one question. I seem to recall,
23 from reading all the papers, that this area
24 was at one point used for agricultural
25 purposes, but that use lapsed for some time;

Decision of Court

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2 am I correct?

3 MR. GRUDER: There was, I believe,
4 Your Honor, and I'm not sure it's in that
5 record, it may or may not be, honestly, I
6 can't --

7 THE COURT: That's the only place I
8 looked.

9 MR. GRUDER: A long time ago it may
10 have been used for some agricultural
11 purpose.

12 THE COURT: Because there's a study
13 in here by a horticulturist who walked the
14 land on behalf of the petitioner, and
15 recorded the fact that the existing
16 vegetation developed after the area was
17 abandoned for agricultural purposes, and I
18 note for the record that it was not used for
19 agricultural purposes for more than a year,
20 several years in fact, which is apparently
21 critical in a decision that the Agency has
22 made. Because if it was used within a year,
23 there wouldn't be an opportunity to block
24 the use of the land, and that is the problem
25 that I see.

Decision of Court

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2 There is a need to clear the vegetation
3 that's developed over a period of time from
4 the property and regrade it for use as a
5 vineyard. Now I know that when this, when
6 this application first went in, there was a
7 more extensive proposal to develop the
8 property with buildings than on this final
9 application, and that the building on the
10 property was minimized and the last
11 application that I understand was in before
12 the Commission pretty much confined the use
13 for the growth of the growing of the grapes
14 rather than the processing and some other
15 uses in connection with the grapes and a
16 vineyard. The last thought was that the
17 grapes would be grown and then marketed to
18 other wineries on the East End of Long
19 Island.

20 And it was interesting. I mean there
21 was a full discussion of the use of the area
22 for grapes, the atmospheric conditions, the
23 dirt, the precipitation in the area. It was
24 obvious that this might be a very good place
25 for this function, and it is agriculture.

Decision of Court

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2 But the problem is that it being in the core
3 area, I believe that the Agency has a right
4 to take a look and determine, because of the
5 clearance being rather substantial, that
6 they have, that they should have an
7 opportunity to fully examine the
8 development, not that they would necessarily
9 deny the exemption, and I understand that
10 there was some resistance, for whatever
11 reason, to make the application for a
12 hardship permit.

13 The petitioner-plaintiff may very well
14 get such a permit, because the vegetation
15 isn't necessarily native, it sprung up after
16 there was abandonment of the agricultural
17 use some years ago, and that was -- and I
18 note for the record that the natural
19 vegetation in the core area is different,
20 much of it different than what's in this
21 particular area, according to the survey
22 that was done. Other experts may disagree
23 with me, but I don't pass on it at this
24 point. But it may very well be that this
25 type of use will be allowed. But again, as

Decision of Court

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2 the State argued, because of the change in
3 the character of the land and basically the
4 extent that the vegetation has to be
5 cleared, I think that they were correct in
6 not issuing the letter of nonjurisdiction
7 that was asked for by the petitioner here.

8 In the event that a hardship
9 application is submitted and it's denied,
10 the issue of whether or not the Commission
11 had jurisdiction would be part of the
12 review. If they grant the application,
13 again, it's moot whether or not they had
14 jurisdiction because the petitioner would
15 get what they're asking for, possibly in a
16 modified form, but would be able to, with
17 the hardship grant, hardship permit granted,
18 be allowed to use the land as they propose.

19 So for that reason the Court chooses
20 not to disturb the decision of the
21 Commission and denies the application. The
22 Court views this, and I'll note for the
23 record that the Court did study the Essex
24 County against Zagata case, 91 N.Y. 2nd 447,
25 from the Court of Appeals. And this is not

Decision of Court

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2 a final determination of the application.
3 The proper application should be for the
4 hardship permit, and therefore denies the
5 petitioner's request.

6 And that's the decision of the Court.
7 I'll So-Order the minutes.

8 MR. GRUDER: Judge, for the record,
9 there's another motion coming to disqualify
10 because of Mr. Rigano's prior
11 representation--

12 THE COURT: With respect to the
13 State's application, the Respondent's
14 application for disqualification of the
15 attorney under 002, the Court does not reach
16 a decision on that. The main application in
17 our opinion moots that out and I commend the
18 arguments to the Plaintiff's counsel to
19 review and examine for themselves whether or
20 not they should proceed as, or continue as
21 the Plaintiff's counsel. We didn't feel
22 that it was necessary for us to make that
23 decision at this point, considering after
24 denying the original petition, we don't even
25 know if the Plaintiff is going to make an

Decision of Court

application for a hardship permit. And
that's the decision on that case.

MR. GRUDER: Thank you, Your Honor.

MS. TAYLOR: Thank you, Your Honor.

THE COURT: You are welcome.

* * *

I, William K. Coyle, certify
That the above minutes are true
and correct.

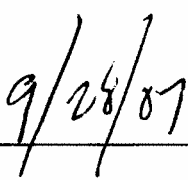


RALPH F. COSTELLO

SO ORDERED:

HON. RALPH F. COSTELLO,
SUPREME COURT JUSTICE

Date:



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