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MEMORANDUM DECISION

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 33

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COUNTY OF SUFFOLK,

BY: WHELAN, J.S.C.
DATED: April 28, 2011
INDEX No. 21807/2010

Petitioner, :

For a Judgment under Article 78 of the Civil
Practice Law and Rules

MOT. SEQ. # 001 - MGSUBJ; CDISP
RETURN DATE: 8/23/10
ADJOURNED: 4/15/11

-against- :

CENTRAL PINE BARRENS JOINT PLANNING
AND POLICY COMMISSION,

Respondent :

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Atty. for Petitioner
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NYS Attorney General
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120 Broadway
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The petitioner commenced this Article 78 proceeding for a judgment reversing and annulling a resolution adopted by the respondent, Central Pine Barrens Joint Planning and Central Policy Commission (hereinafter the Commission), on June 16, 2010 relative to the July 22, 2006 re-opening of a shooting range within a Suffolk County Park. The petitioner claims that the subject resolution is arbitrary and capricious, irrational and affected by errors of law and in violation of lawful procedure. For the reasons set forth below, the petition is granted.

At issue in this Article 78 proceeding is the respondent's assertion of jurisdiction over the petitioner's reopening and re-establishment of a trap and skeet shooting range at Southaven County Park, which sits within the boundaries of the Core Preservation area of the Long Island Pine Barrens region (*see* ECL § 57-0107[11]). This environmentally sensitive region was established in 1993 with the enactment of the Long Island Pine Barrens Maritime Reserve Act (ECL Article 57), as was the respondent, the Central Pine Barrens Joint Planning and Policy Commission. It is charged, among other things, with jurisdiction to oversee planning, management and other aspects of land use within the Long Island Pine Barrens Region (*see* ECL § 57-0119[1]).

For well over 30 years, the subject range operated at its present location without interruption. However, in 2001, the range ceased shooting operations due to economic and business forces that operated adversely upon the range itself and its licensee operator. As early as 2002, the petitioner undertook steps necessary to re-repair, modernize and otherwise bring the range into conformity with state statutes and local laws applicable thereto. In July of 2006, the range re-opened under a license granted by the petitioner to a new operator and the recreational activities hosted by the range were purportedly re-established in accordance with all applicable statutes and local laws, including those aimed at environmental protection.

In August of 2006, several residents of the Town of Brookhaven and a prominent environmental group commenced an Article 78 proceeding against the County of Suffolk (petitioner herein), the Central Pine Barrens Joint Planning and Policy Commission (respondent herein), and the range licensee to halt the shooting and other recreational activities at the newly reopened range. The petitioners claimed that the actions of those involved in re-opening the range violated Article 57 of the Environmental Conservation Law. The petitioners also claimed that the Commission's failure to take action assuring compliance with ECL Article 57 constituted a failure in its statutory responsibility to act to preserve the Pine Barrens from the adverse environmental impacts which the range purportedly presented. The petitioners thus asked the court, among other things, to mandate that the Commission exercise its jurisdiction over the range, as the Commission's apparent determination to take no action with respect thereto, was inconsistent with the goals and objectives of the Pine Barrens Act and the duties of the Commission thereunder. The Commission opposed the petitioner's demands by moving to dismiss. Among the grounds asserted by the Commission was that it could not be compelled to exercise control over the range notwithstanding its location in the Core Preservation area.

In May of 2007, the trial court granted the respondents' motions to dismiss that prior proceeding finding that the Pine Barrens Act did not provide a private right of action in favor of the petitioners, that discretionary determinations by public officials and agencies charged therewith cannot be judicially compelled, and that the petitioners' claims were otherwise non-justiciable. The petitioners appealed but the order and judgment of the trial court was affirmed, albeit, on untimeliness grounds, which had not been addressed by the trial court (*see In the Matter of the Long Is. Pine Barrens Socy, Inc. v County of Suffolk*, 55 AD3d 610, 866 NYS2d 225 [2d Dept 2008]).

In March of 2009, some two and one-half years after the re-opening of the range, the respondent directed a staff review of the recreational activities at the range that resumed in 2006. Based upon the Commission's review of its staff's investigative report, the respondent adopted a resolution on June 16, 2010 relative to the subject range. Therein, the Commission found that the re-opening of the range constituted development within the purview of the Long Island Pine Barrens Protection Act because it "represented a re-establishment of a use which had been abandoned for one year". The respondent went on to find that the recreational activities taking place on the range were within the jurisdiction of the respondent Commission and that the petitioner was required to obtain a Core Preservation Hardship permit to keep the range open. The respondent thus directed the petitioner to submit a Core Preservation Hardship permit application to the respondent for its review.

County of Suffolk v Central Pine Barrens Joint Commission

Index No. 10-21807

Page 3

Rather than comply with the respondent's directives, the petitioner commenced this Article 78 proceeding for a judgment annulling and reversing the June 16, 2010 resolution. In lieu of answering, the respondent moved to dismiss the petition. That motion was denied by order of this court dated January 28, 2011 and the petition was adjourned so as to afford the respondent time to assemble its Administrative return and submit it with its answer to the petition. The petition last appeared on the motion calendar of this court April 15, 2011 and was marked submitted on that day.

It is the contention of the petitioner that the June 16, 2010 resolution of the respondent is subject to reversal as it is affected by errors of law for the following reasons: 1) the re-opening of the range did not constitute "development" within the "re-establishment of abandoned use" provisions of ECL § 57-0107(13)(e) due to continuing activities engaged in by the County following cessation of shooting activities in October 2001, including the undertaking of environmental, acoustical and other assessments, the making of necessary repairs and improvements aimed at the overall modernization of the range's facilities; 2) that because such activities constituted: a) public improvements undertaken for the health, safety and welfare of the public; and/or b) work for the maintenance, renewal, replacement, reconstruction, improvement or alteration of any existing structure; and/or c) an existing or expanded recreational use consistent with the purposes of ECL Article 57, they are expressly exempt, pursuant to ECL §§ 57- 0107(13)(I)(iii); (viii) from the definition of development. The petitioner further claims that the June 16, 2010 resolution was arbitrary and capricious because it is without support in the record and is inconsistent with the Commission's determination (made four years earlier and confirmed in the prior litigation) not to assert jurisdiction over the re-opening of the range. Finally, the petitioner claims that the Commission's unilateral and belated assertion of jurisdiction over the range, well after a new lessee had been put into possession by the County, is likewise arbitrary, capricious and irrational. The petitioner also claims that the Commission violated ECL § 57-0131 which prohibits the regulation of hunting and other recreational activities in the Pine Barrens maritime reserve, except as otherwise provided by law.

The answer of the respondent includes two affirmative defenses/objections in points of law, both of which were advanced in support of the respondent's prior motion for dismissal and which were rejected by the January 28, 2011 order of this court denying said motion. Needless to say, these objections are dismissed. In its memorandum of law, the respondent advances the following arguments in opposition to the petition: 1) that the non-conforming use status that the range enjoyed ceased in 2001, and none of the minimal activities undertaken by the County to improve the range during the years it remained closed constitute a continuance of its non-conforming use which had been abandoned for a period in excess of one year, thereby making its re-opening in 2006, "development" within the contemplation of ECL 57-0107(13)(e); 2) that the exemption from the term development set forth in ECL 57-0107(13)(vii) is not applicable to the re-opened range because it is not an "existing" use under that statutory provision; and 3) that the Commission's determination to require the petitioner to apply for a hardship permit to legalize the re-opened range is not a regulation of recreational activities, but instead, the regulation of land use.

A determination by an agency, such as the one at issue here, is subject to annulment only if it was affected by an error of law or was arbitrary and capricious, an abuse of discretion or irrational (see CPLR 7803[3]; *Baker v Elmsford*, 70 AD3d 181, 891 NYS2d 1343 [2d Dept 2009]; *Matter of Zupa v Board of Trustees of Town of Southold*, 54 AD3d 957, 864 NYS2d 142 [2d Dept 2008]; *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 809 NYS2d 98 [2d Dept 2005]). It is long been held that the “arbitrary and capricious test chiefly ‘relates to whether a particular action should have been taken or is justified *** and whether the administrative action is without foundation in fact.’ *** Arbitrary action is without sound basis in reason an is generally taken without regard to the facts” (*Lyons v Whitehead*, 2 AD3d 638, 769 NYS2d 283 [2d Dept 2003], quoting, *Matter of Pell v Board of Educ.*, 34 NY2d 222, 231, 356 NYS2d 833 [1974]). While deference must be afforded to land use determinations of local officials (see *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, *supra*), a determination will be annulled as arbitrary if it is made without sound basis in reason and without regard to the facts (see *Matter of Merrick Auto Serv. v Grannis*, 82 AD3d 895, 919 NYS2d 173 [2d Dept 2001]). The rationality of an agency’s determination is dependent upon whether it has some objective, factual basis as opposed to resting on subjective considerations (see *JSB Enter., LLC v Wright*, 81 AD3d 955, 917 NYS2d 302 [2d Dept 2011])

Here, the June 16, 2010 resolution of the respondent Commission was arbitrary and capricious, irrational and constituted an abuse of discretion. The findings contained in such resolution, including that the range constituted development within the purview of the Long Island Pine Barrens Protection Act because it “represented a re-establishment of a use which had been abandoned for one year”; that the recreational activities taking place on the range were within the jurisdiction of the respondent Commission; and that the petitioner was required to obtain a Core Preservation Hardship permit to keep the range open, is without a sufficient factual basis in the record. Instead, it appears that the Commission’s revisit to the issue of the re-opening of the range, some four years after such re-opening, was based principally on the subjective concerns of one of the members of the respondent Commission.

Nevertheless, the court finds that neither the facts nor the conclusions of the Commission’s staff set forth in Part 1 of their May 7, 2009 written report, upon which the June 16, 2011 resolution of the respondent Commission is solely predicated, support the findings set forth in such resolution. It appears from even a most cursory review of that portion of the May 7, 2009 staff report that is included in the Administrative return of the respondent, that said report is nothing more than a restatement of articles, historical accounts and photographs of the range originally set forth in other documents that were re-compiled by the Commission’s staff. Indeed, the staff admits in its conclusions that the report “is not a complete record of activity that has occurred at the range” and that inferences of changes to the range might be drawn or perceived from a review of the file maintained by the Commission on the range. The Commission’s finding that the re-opening of the range constituted a “re-establishment” of an “abandoned use” and not, as alleged by the petitioner, a) public improvements undertaken for the health, safety and welfare of the public; and/or b) work for the maintenance, renewal, replacement, reconstruction, improvement or alteration of any existing structure; and/or c) an existing or expanded recreational use consistent with the purposes of ECL

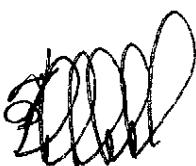
Article 57, which are expressly excluded from the term development under ECL §§57-0107(13)(I)(iii); (viii), and from the jurisdictional reach of the Commission.

Moreover, the court finds that the Commission's belated attempt to interject itself as a body politic having control over the re-opening of the range is irrational and unjustified under the circumstances. Said circumstances include the passage of some four years since the range re-opened in July of 2006; the Commission's determination not to get involved therewith prior to or immediately following the re-opening, even in the face of the lawsuit to compel the Commission to exert its jurisdiction over the range that was commenced in August of 2006, and the existence of a lease between the County and the operator of the range who is not a party to this action.

The court also finds merit in the petitioner's claim that the re-opening of the range falls within recreational use exemption from development that is codified in ECL § 57-0107 (13)(viii). The petitioner established, *prima facie*, that the improvements it made to the range during its closure to the public constituted an expansion of recreational use consistent with the purposes of the Pine Barrens Act and thus within the contemplation of ECL § 57-0107(13)(viii). In its opposing papers, the respondent failed to establish the disjunctive terms employed by the legislature in ECL § 57-0107 (13)(viii), namely, "existing or expanded recreational uses" do not encompass the subject range which was improved and thus expanded by the County. Nor did the respondent Commission demonstrate that the expanded use exception set forth in ECL § 57-0107(13)(viii) was otherwise inapplicable to the range. The Commission's finding that the re-opening of constituted development because it was a "re-establishment of a use abandoned for one year" under ECL § 57-0107(13) rather than exempt from the term development under ECL § 57-0107(13)(e) was thus arbitrary, capricious and irrational.

In view of the foregoing, the petition is granted and the June 16, 2010 resolution of the respondent Commission is annulled.

Settle Judgment upon a copy of this order.



THOMAS F. WHELAN, J.S.C.