

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

Oral Argument

(In Chambers) .

THE COURT: Please note your appearances for the record.

MR. GRUDER: Certilman Balin Adler &
Hyman, 1393 Veterans Memorial Highway,
Hauppauge, New York 11788, by Glenn B.
Gruder, for petitioner-plaintiff, Gladys
Gherardi.

MS. TAYLOR: Andrew M. Cuomo, Attorney General for the State of New York, by Janice B. Taylor and Janice Dean, 120 Broadway, New York, New York 100271, on behalf of Respondents.

THE COURT: Mr. Gruder.

MR. GRUDER: Yes, Your Honor.

THE COURT: Just give me the gist of it.

MR. GRUDER: Okay, my client owns property in Manorville, which is clearly within the core area of the Central Pine Barrens, it's undeveloped, it's treed, it's vacant, and he would like to establish a winery. And when you look at the statute

Oral Argument

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

But nevertheless, we think that it is very, very clear we can't establish a farm or vineyard unless you have to clear first. Clearing is one of the things that's generally prohibited in the core area of the Pine Barrens, and when you look at the different exceptions and language used, there are certain things that are not development but are qualified with words such as "so long as it's consistent with the act, so long as it's consistent with the 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

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

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

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

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

baseball field?

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

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

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

Decision of Court

am I correct?

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

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

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

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

Decision of Court

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

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

Decision of Court

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

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

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

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

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

Decision of Court

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

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

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

THE COURT: With respect to the State's application, the Respondent's application for disqualification of the attorney under 002, the Court does not reach a decision on that. The main application in our opinion moots that out and I commend the arguments to the Plaintiff's counsel to review and examine for themselves whether or not they should proceed as, or continue as the Plaintiff's counsel. We didn't feel that it was necessary for us to make that decision at this point, considering after denying the original petition, we don't even 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.

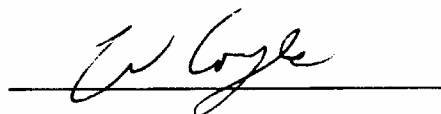
MR. GRUDER: Thank you, Your Honor.

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:

