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

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4 In the Matter of the Application of

5 GLADYS GHERARDI,

6 Petitioner-Plaintiff

INDEX NO.  
06-17693

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

8 -against-

9  
10 PETER A. SCULLY, Chairman, PHILIP J.  
11 CARDINALE, BRIAN X. FOLE, PATRICK A.  
12 HEANEY, and STEVE A. LEVY, constituting  
13 The Members of the CENTRAL PINE BARRENS  
14 JOINT PLANNING & POLICY COMMISSION,

15 Respondents/Defendants

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

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

19 CERTILMAN BALIN ADLER & HYMAN LLP  
20 1393 Veterans Memorial Highway  
21 Suite 301S  
22 Hauppauge, New York 11788  
23 BY: **GLENN B. GRUDER, ESQ.**  
24 For the Petitioner

25 **SO-ORDERED DECISION OF COURT**

26 William K. Coyle  
27 Sr. Court Reporter

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4 STATE OF NEW YORK  
5 OFFICE OF THE ATTORNEY GENERAL  
6 ANDREW M. CUOMO  
7 120 Broadway  
8 New York, New York 10271-0332  
BY: **JANICE B. TAYLOR, ESQ.**  
**& JANICE A. DEAN, ESQ.**  
**Asst. Attorney General**  
For the Respondents

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## Oral Argument

(In Chambers).

THE COURT: Please note your 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

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.

## Oral Argument

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.

23 THE COURT: A letter of non  
24 jurisdiction?

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

## Oral Argument

that argument, they denied us in their determination, which you have in the records, saying that, no, because we have to clear, we are development, and you've got to, you know, comply with the regulations and you're not allowed to do it because you have to clear, and that's the nutshell 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.

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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.

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

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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

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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.

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

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 --

## Decision of Court

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

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.

## 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

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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.

\* \* \*

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

W. Doyle

**RALPH F. COSTELLO**

**SO ORDERED:**

HON. RALPH F. COSTELLO,  
SUPREME COURT JUSTICE

Date:

9/28/07