

INDEX NO.: 09916/2016

PRESENT:

Motion Submit Date: 02/02/17
Mot SCH: 03/22/17
Mot Seq 001 MD; CASE DISP

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JOHN PAVACIC, EDWARD ROMAINE, STEVEN BELLONE, SEAN M. WALTER, & ANNA E. THRONE-HOLST, in their capacity as Members of the Central Pine Barrens Joint Planning & Policy Commission & the CENTRAL PINE BARRENS JOINT PLANNING & POLICY COMMISSION, BASIL SEGGOS, Acting Commissioner, New York State Department of Environmental Conservation & the STATE OF NEW YORK,

In consideration of petitioner's proceeding pursuant to CPLR Article 78 to vacate or annul a determination of respondent Central Pine Barrens Joint Policy & Planning Commission, the Court considered:

1. Notice of Petition dated October 13, 2016; Verified Petition dated October 11, 2016 and supporting papers;
2. Affirmation in Opposition dated December 14, 2016; Verified Answer dated December 14, 2016; Memorandum of Law in Opposition dated December 15, 2016 and Certified Administrative Record dated December 14, 2016;
3. Reply Affirmation in Further Support dated February 1, 2017; and upon due

deliberation and full consideration of the same; it is

ORDERED that the Verified Petition brought pursuant to CPLR Article 78 by petitioner seeking to vacate, rescind or annul a determination by respondent denying its application for extraordinary hardship waiver pursuant to Environmental Conservation Law § 57-0121(10) is **denied** as follows; and it is further

ORDERED that counsel for respondents serve a copy of this decision and order with notice of entry on counsel for petitioner by certified first class mail, return receipt requested forthwith.

Petitioner Antro Realty Corp. is a real estate entity that is the fee owner of wooded and undeveloped real property comprised of 26,000 square feet between two merged lots located within the Pine Barrens Core Conservation Area at or near the intersection of Wading River Manor Road a/k/a Schulz Road and Fourth Street in the Town of Brookhaven, County of Suffolk, New York. Petitioner proposed to improve its property and construct a single-family dwelling with frontage onto Third Street, requiring opening of that paper street with a 80-foot setback. In furtherance of this proposal, on April 25, 2016, petitioner made an application before respondent the Central Pine Barrens Joint Policy & Planning Commission ("the Commission") seeking grant of an extraordinary hardship waiver under the Pine Barrens Act for development within the Core Pine Barrens Preservation Area.

In connection with its application, the Commission held a public hearing on July 20, 2016, where petitioner was represented by counsel. At that hearing, respondent provided petitioner with a staff report prepared by its professional staff analyzing and interpreting the waiver request. In that report, respondent determined the "Study Area" pertinent to petitioner's application to comprise all property and parcels within ½ mile of petitioner's property, or stated somewhat differently, 69 parcels constituting approximately 600 acres.

At the hearing, the Commission took note of a letter from the New York State Natural Heritage Program which could not conclusively confirm or deny the presence or absence of endangered species, flora or fauna, but did classify petitioner's project site as located within wetlands. Further it was noted that the property site was surrounded on 3 sides by publicly owned land bearing conservation easements. Public testimony in opposition to petitioner's application came presented by Richard Amper, Executive Director of the Long Island Pine Barrens Society. At the hearing, petitioner submitted several exhibits constituting prior determinations by the Commission which petitioner thought similar, supporting granting of its application on prior precedent. The hearing was adjourned and held open on petitioner's counsel's request to afford him an opportunity to respond to the Commission's staff report.

After a short adjournment, the Commission reconvened another public hearing on petitioner's application on August 17, 2016. It noted that in the interim, petitioner had not submitted any new material in support of the application. At the hearing, petitioner's counsel presented additional materials of previously granted applications to the Commission and answered additional questions.

Respondent by unanimous vote adopted a resolution on September 21, 2016 denying petitioner's application. This proceeding followed whereby petitioner argues that respondents' denial of its application was arbitrary and capricious to the extent it relied upon a determination that the "study area" of similar or like land uses constituted a ½ mile radius from petitioner's project site. Further, petitioner argues denial of the application constituted deprivation of its

14th Amendment right to equal protection of the laws and an unconstitutional taking without just compensation violative of the 5th amendment of the Constitution. Respondent opposes the proceeding in its entirety arguing that the denial of the application was rational and supported by substantial evidence to the extent that petitioner failed to provide supporting unique or specific facts emphasizing its merits-based need for an extraordinary hardship waiver. Put differently, respondent argues that petitioner's mere reliance on prior grants of waiver to other parcel owners without any explanation of petitioner's individual circumstances is statutorily deficient, warranting denial of the application. For reasons stated below, respondent is correct, and this proceeding must be **dismissed**.

In opposition to the Petition, respondents submitted a Verified Answer with Objections in Point of Law, as well as the affidavit of the respondent John Pavacic, Director of the Commission. Pavacic testified that in connection with petitioner's application, the Commission considered how much vegetation and undeveloped woodland would have to be cleared to afford petitioner's parcel access to an improved road. Since the parcel was located between two paper streets, 3rd and 4th streets respectively, and set back 80 ft from Wading River-Manor Road, the Commission utilized simple arithmetic multiplying the setback distance of 80 ft by the parcel's width (50 ft) to determine that 4,000 sq. ft would require clearance as part of petitioner's proposal. This was in addition to 7,000 sq. ft of clearing requires for construction to the dwelling petitioner sought. The Commission further considered that the parcel was located within the Pine Barres Core Conservation Area, surrounded by publicly owned undeveloped land. The staff report prepared by the Commission in advance of petitioner's public hearing also emphasized that the Core Preservation Area by itself comprises 55,000 acres or 85 sq. miles. Thus, to afford a proper review, the Commission utilized the smaller "Study Area" which it found consisted of 80% of public land with only 20 developed or improved parcels.

Dealing squarely with petitioner's contentions of administrative prior precedence dictating approval of its waiver, the Commission distinguished the cases petitioner relied upon based upon a few factors. First, the Commission excluded any prior grant not located within the Study Area, reasoning that the hardship waiver analysis requires consideration of substantially similar land uses and specific individualized factors. Thus, the Commission determined that petitioner's proposal differed, since the property was not connected to or lacked access to any improved roadway and was undeveloped and surrounded by undeveloped publicly owned property. More important, the Commission noted that only 2 cases cited by petitioner at the hearing were situated within the "Study Area," and those cases also were distinguishable for express statutory exemption or access to developed roadways and/or being adjacent to improved property.

The courts have previously recognized that the Pine Barrens Act vis-à-vis extraordinary hardship requests imbues the Commission with authority under ECL 57-0123(3)(a), to "waive strict compliance with [the Comprehensive Plan] or with any element or standard contained therein, for an application for development of any person, upon finding that such waiver is necessary to alleviate hardship for proposed development in the core preservation area according to the conditions and finding of extraordinary hardship or compelling public need pursuant to [ECL 57-0121(10)]" and where the "application is consistent with the purposes and provisions of this article and would not result in substantial impairment of the resources of the Central Pine Barrens area." An application for a waiver on the ground of extraordinary hardship may be approved only if the application satisfies the requirements of ECL 57-0121(10)(a) and (c) (*Long*

Stated plainly, to warrant approval of an extraordinary hardship request:

Any person, ... upon a showing of hardship caused by the provisions of ... this section on development in the core preservation area, may apply to the commission for a permit exempting such applicant from ... any proposed development in the core preservation area. Such application for an exemption pursuant to the demonstration of hardship within the core preservation area shall be approved only if the person satisfies the following conditions and extraordinary hardship or compelling public need is determined to have been established under the following standards or for development by the state or a public corporation or proposed for land owned by the state or a public corporation compelling public need is determined to have been established under the following standards:

(a) The particular physical surroundings, shape or topographical conditions of the specific property involved would result in an extraordinary hardship, as distinguished from a mere inconvenience, if the provisions of this act are literally enforced. A person shall be deemed to have established the existence of extraordinary hardship only if he or she demonstrates, based on specific facts, that the subject property does not have any beneficial use if used for its present use or developed as authorized by the provisions of this title, and that this inability to have a beneficial use results from unique circumstances peculiar to the subject property which:

(i) Do not apply to or affect other property in the immediate vicinity;

(ii) Relate to or arise out of the characteristics of the subject property rather than the personal situation of the applicant; or

(iii) Are not the result of any action or inaction by the applicant or the owner or his or her predecessors in title including any transfer of contiguous lands which were in common ownership on or after June 1, 1993.

Envtl. Conserv. L. § 57-0121(10)(a) &(c)(i)-(iii) [McKinney's 2018]

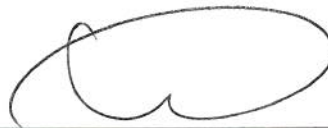
Here, reviewing the administrative record, this Court cannot determine as petitioner seeks that the Commission's denial of the application before it was arbitrary, capricious or unsupported by substantial evidence. To the contrary, the Commission rationally determined that in accord with statutory interpretation, to be successful, petitioner had to provide a specific, unique and particularized demonstration of individualized hardship that it possessed, separate and apart of prior applications by other property owners previously before the Commission. Determining that petitioner provided no such factual showing, this Court will not substitute its judgment for the respondent. Therefore, because the Commission's determination was rational and not arbitrary and capricious as petitioner argues, the Petition is **denied**, and accordingly this proceeding is **dismissed**.

Further, to the extent that petitioner's remaining contentions present as-applied constitutional

claims, because the Petition relies upon insufficient factual contentions to support Article 78 relief, this Court finds that the equal protection and takings claims to similarly be inadequately plead and further suffers from insufficient detail to be plausibly plead within the confines of this now dismissed special proceeding. Accordingly, that branch of the Petition is also **denied**.

The foregoing constitutes the decision and order of this Court.

Dated: October 30, 2018
Riverhead, New York



WILLIAM G. FORD, J.S.C.

 X FINAL DISPOSITION

 NON-FINAL DISPOSITION