

## MEMORANDUM

COPY

SUPREME COURT - SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

I.A.S. PART 36

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In the Matter of the Application of the  
LONG ISLAND PINE BARRENS SOCIETY INC.,  
RICHARD AMPER as Executive Director and in his  
individual capacity,

By: Baisley, J.S.C.

Dated: September 26, 2011

INDEX NO.: 29130/2010  
MOT. NO.: 002 MD CASEDISP

Petitioners,

**PETITIONERS' ATTORNEY:**  
REGINA SELTZER, ESQ.  
30 South Brewster Lane  
Bellport, New York 11713

-against-

CENTRAL PINE BARRENS JOINT PLANNING  
& POLICY COMMISSION and AMERICAN  
PHYSICAL SOCIETY, INC.,**RESPONDENTS' ATTORNEYS:**

ERIC T. SCHNEIDERMAN  
Attorney General of the State of New York  
By: Isaac Cheng, Esq.  
120 Broadway, 26<sup>th</sup> Floor  
New York, New York 10271

Respondents,

JOHN C. MILAZZO, ESQ.  
3525 Sunrise Highway, 2<sup>nd</sup> Floor  
Islip Terrace, New York 11752

For Relief Pursuant to Article 78 of the  
New York Civil Practice Law and Rules.

WEBER LAW GROUP, LLP  
By: Garrett L. Gray, Esq.  
290 Broadhollow Road, Suite 200E  
Melville, New York 11747

Petitioners Long Island Pine Barrens Society, Inc. (the "Society") and Richard L. Amper as Executive Director and in his individual capacity commenced this Article 78 proceeding for a judgment or order annulling the July 21, 2010 resolution of the respondent Central Pine Barrens Joint Planning and Policy Commission (the "Commission") that approved a hardship exemption conditionally authorizing respondent American Physical Society ("APS") to construct a second story on its office building located within the core preservation area of the Long Island Central Pine Barrens. Petitioners allege that the resolution violates Article 57 of the Environmental Conservation Law ("ECL") and its associated Comprehensive Land Use Plan, violates the New York State Environmental Quality Review Act, and is arbitrary and capricious and an abuse of discretion and therefore null and void.

APS, a publisher of scientific journals, owns a five-acre parcel in Ridge, New York, Town of Brookhaven, improved with a one-story office building originally constructed in 1979 to house APS' editorial offices (and subsequently expanded in 1985). The property was purchased with the intent of

maintaining a close proximity to the nearby Brookhaven National Laboratory ("BNL"), with whose research scientists APS and its scientist-editors enjoy a close and long-standing professional association. Upon the enactment in 1993 of the Long Island Pine Barrens Protection Act (the "Act" [ECL Article 57]), the APS property fell within the area of the Pine Barrens designated as the core preservation area, within which new development is prohibited unless a hardship exemption is obtained pursuant to ECL §57-0121(10).

ECL §57-0121(10) requires an applicant for a hardship exemption to establish "extraordinary hardship" or "compelling public need" by satisfying the following conditions and 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.

(b) A person, the state or a public corporation shall be deemed to have established compelling public need if the applicant demonstrates, based on specific facts, one of the following: The proposed development will serve an essential health or safety need of the municipalities in the Central Pine Barrens such that the public health and safety require the requested waiver, that the public benefits from the proposed use are of a character that overrides the importance of the protection of the core preservation area as established in this title, that the proposed use is required to serve existing needs of the residents, and that no feasible alternatives exist outside the core preservation area to meet the established public need and that no better alternatives exist within the county; or

(ii) The proposed development constitutes an adaptive reuse of an historic resource designated by the commission and said reuse is the minimum relief necessary to ensure the integrity and continued protection of the designated historic resource and further that the designated historic resource's integrity and continued protection cannot be maintained without the granting of a permit.

(c) An application for a permit in the core preservation area shall be approved only if it is determined that the following additional standards also are met:

(i) The granting of the permit will not be materially detrimental or injurious to other property or improvements in the area in which the subject property is located, increase the danger of fire, endanger public safety or result in substantial impairment of the resources of the core preservation area;

(ii) The waiver will not be inconsistent with the purposes, objectives or the general spirit and intent of this title; or

(iii) The waiver is the minimum relief necessary to relieve the extraordinary hardship, which may include the granting of a residential development right to other lands in the compatible growth area that may be transferred or clustered to those lands to satisfy the compelling public need."

In 1994, to accommodate the significant expansion of its publishing operations and editorial staff, APS sought and the Commission granted a hardship exemption pursuant to ECL §57-0121(10) which permitted APS to construct a 12,000-foot addition to its existing editorial office building. In express recognition of the possibility of future expansion of APS' publishing operations, the resolution adopted

by the Commission imposed as a condition of approval that, *inter alia*, "The building addition shall be designed and constructed in such a manner that any future expansion need of [APS] may be accommodated by vertical expansion above the new addition" (Administrative Record ["AR"] 0001). The Court notes that petitioners participated in the public hearing in connection with the 1994 hardship exemption, and individual petitioner Richard Amper is credited in the record thereof with having suggested that the Commission require that any future expansion of the APS building be vertical "because we would love to see the American Physical Society stay here and grow, and, if they do, I don't want them to need to come back with the need to expand beyond the perimeter of the footprint they are proposing" (AR 0039).

In 2010, the APS again sought a hardship exemption to further expand its building to accommodate its expanded workload and staff by constructing a second story above the previous addition in accordance with the condition set forth in the 1994 resolution approving the prior hardship exemption. The proposed project, which (with the exception of exterior support columns) will not increase the footprint of the existing building, will require the removal of 0.06 acres of natural vegetation (1.2% of the site area), the restoration of approximately 1.14 acres from developed to vegetated land, the addition of 27 parking spaces, and the reconfiguration of internal driveways and the site ingress/egress on County Road 46. In addition, an increase in sanitary flow of 985.5 gallons per day ("gpd") is anticipated.

After a public hearing on April 21, 2010, the Commission adopted a resolution on July 21, 2010 conditionally granting the hardship exemption. The instant Article 78 proceeding ensued.

Petitioners challenge the Commission's action on the ground that the application does not meet the standards for a hardship exemption under ECL §57-0121(10)(a) because APS is presently conducting business activities on the property and thus cannot demonstrate that it does not have "beneficial use" of the land. Petitioners also argue that the application does not meet the "additional standards" under §57-0121(10)(c) because the "minimum relief necessary" to overcome APS' alleged hardship was already granted in connection with the 1994 waiver.<sup>1</sup> Any additional relief, petitioners argue, would necessarily provide APS with *more than* the "minimum relief necessary," thus exceeding the Commission's authority under the statute.

The Court has carefully reviewed the parties' respective pleadings and memoranda of law, the authorities cited therein, and the extensive administrative record of both the 1994 waiver application and that of 2010. Upon such review, and for the reasons set forth hereinafter, the Court denies the petition and dismisses the proceeding.

The submissions reflect that the subject property lies on the westernmost edge of the core preservation area – "across the street" (William Floyd Parkway, a/k/a CR 46) from Brookhaven National Laboratory, which is located in the compatible development area of the Pine Barrens. The submissions further reflect that the property which APS purchased in 1979 had previously been substantially disturbed, and was subsequently substantially disturbed again when APS improved it by constructing a one-story office building and then expanding it in 1985 – all prior to the enactment of the Act.

<sup>1</sup> Respondents concede that the "compelling public need" exception of §57-0131(1)(b) is not applicable here and that the exemption was sought and granted solely on the basis of the hardship exemption of §57-0121(10)(a).

Accordingly, as the Commission implicitly recognized in its approval of the 1994 expansion, and again in the 2010 approval, the APS property, although falling within the boundaries of the core preservation area, was not representative of the “essentially intact area of undeveloped pine barrens ecology” that the authors of the Act were trying to preserve (ECL §57-0105; §57-0121(3)(a)). The submissions also reflect that the APS parcel is the only developed parcel within a one-quarter-mile radius, so the physical conditions of APS’ property are unique and not applicable to other property in the immediate vicinity.

Moreover, in the unique circumstances of this case, the physical location of the land itself is a key factor in whether APS has a beneficial use of the property. The submissions establish that the location of the property was chosen specifically for its proximity to Brookhaven National Laboratory in order to maintain and foster the longstanding collegial relationship between APS and BNL scientists, which is integral to the continued success of APS’ peer-reviewed scientific journal publishing operations (AR 00248). The submissions reflect that the building as presently configured is unable to accommodate APS’ gradually expanding staff, and that denial of the hardship exemption would deprive APS of any beneficial use and force it to relocate its editorial offices elsewhere (AR 0026, 0442).

The submissions also reflect that the nature of the extraordinary hardship that deprived APS of a beneficial use of its property in 1994, as recognized by the Commission in its grant of a hardship exemption at that time (and as acknowledged by petitioners, who did not oppose the exemption), is the same as the hardship currently confronting APS. This precise scenario was specifically contemplated in the 1994 resolution, which presciently anticipated and provided for the future expansion of the APS building in a manner that would protect and preserve the Pine Barrens ecology to the greatest extent possible by maintaining the current footprint of the building and minimizing further disturbance of the property. It is undisputed that the 1994 addition was specifically constructed to accommodate the second story APS is now seeking to add, in accordance with the 1994 resolution. Accordingly, the hardship APS is presently facing is not the result of any action or inaction by APS or its predecessors.

The Court finds that, in reviewing the foregoing facts and circumstances, the Commission reasonably and appropriately determined that APS’ application satisfied the requirements for a hardship exemption pursuant to §57-0121(10)(a).<sup>2</sup> The Commission’s July 21, 2010 resolution recognized the “unique” nature of the project in light of the circumstances peculiar to the property, which, it noted, “contains a pre-existing commercial building continuously occupied by the same owner since prior to the enactment of ECL Article 57.”

The Commission also reasonably and appropriately found that APS had met the “additional standards” set forth in ECL §57-0121(10)(c) “due to the concentration of the majority of disturbance in areas of the site which were already developed, the containment of all physical activity within the subject site, and the minimal amount of on site disturbance in areas not formerly disturbed.” Accordingly, “the Project will not be materially detrimental or injurious to other property or improvements in the area or result in endangering public safety or substantial impairment of the resources of the Core.” The Commission noted that ECL Article 57 “contemplated continuation of pre-existing uses within the Core

<sup>2</sup> The Court notes that the specifications of subdivisions (i) through (iii) of both §57-0121(10)(a) and §57-0121(10)(c) are expressed in the disjunctive and not the conjunctive.

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“Preservation Area” in support of its conclusion that the waiver is not inconsistent with the purposes, objectives, or general spirit and intent of the Act. Finally, the Commission reasonably concluded that the waiver is the minimum relief necessary to relieve APS’ extraordinary hardship. Any prospective “substantial impairment of the resources of the core preservation area” is mitigated by the numerous conditions imposed by the resolution, including the requirement that APS purchase and retire 3.29 sanitary wastewater credits to offset and mitigate the increased sanitary flow that will result from the expansion.

The Court finds no support in the record for petitioners’ conclusory allegation that the proposed construction will increase the risk of fire. In fact the record reflects that the proposed expansion will conform to the prevailing New York State Uniform Fire and Building Code (AR 00303). Nor is there any merit to petitioners’ assertion that “[t]he granting of a hardship exemption to permit clearing and construction in the Core Preservation Area of the Pine Barrens is inconsistent with the letter and the spirit of the Pine Barrens Protection Act” (Petition ¶34). In fact, the granting of such an exemption is expressly provided for in the Act (ECL §57-0121(10)) and, when the conditions and standards set forth therein are satisfied – as here – is fully consistent with the letter and spirit of the Act. Finally, the Court does not agree with, and petitioners have cited no authority to support, their argument that multiple hardship exemptions may not be granted. Indeed, the record reflects that the Commission has granted multiple hardship waivers in the past without objection by petitioners. The “minimum relief” granted to APS in 1994 does not preclude the Commission’s granting APS additional and further “minimum relief” in 2010 which addresses its changing circumstances and needs with respect to its property within the core preservation area.

In light of all of the foregoing, the Court finds that the July 21, 2010 resolution of the Commission granting the hardship exemption was not illegal, arbitrary or an abuse of discretion, and that the Commission did not exceed its authority in granting APS a second hardship exemption (*Matter of Zupa v Board of Trustees of Town of Southold*, 54 AD3d 957 [2d Dept 2008]). Accordingly, the petition is denied and the proceeding is dismissed.

Settle judgment. A copy of this decision shall accompany any proposed judgment submitted to the Court.

Dated: September 26, 2011

**PAUL J. BAISLEY, JR.**

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J.S.C.

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