

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 08/23/2016
ADJ. DATE: 10/26/2016
Mot. Seq. 001-MD

In the Matter of the Application of Armand Gustave, LLC, c/o
Peter Baron,,

Petitioner

DECISION & ORDER

For an Order Pursuant to Article 78 of the Civil Practice Law and
Rules,

-against-

JOHN PAVACIC, EDWARD ROMAINE; STEVEN BELLONE;
SEAN M. WALTER; and ANNA THRONE-HOLST, in their
capacity as Members of the Central Pine Barrens Joint Planning &
Policy Commission, Basil Seggos, Acitng Commissioner, New
York State Department of Environmental Conservation,

Respondents

TO:

RICHARD I. SCHEYER, ESQ.
110 LAKE AVENUE SO., STE 46
NESCONSET, NY 11767
631-265-8500

HON. ERIC T. SCHNEIDERMAN,
ATTORNEY GENERAL
BY: ABIGAIL ROSNER, ESQ.
120 BROADWAY, RM 26-134
NEW YORK, NY 10271
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Upon the reading and filing of the following papers in this matter: (1) Notice of Petition dated July 8, 2016, Verified Petition by James P. Eagan, as manager of the Petitioner, sworn on July 8, 2016, Attorney's Affidavit in Support by Richard I. Scheyer, Esq. sworn on July 8, 2016 with Exhibits A-C attached thereto; (2) Verified Answer to Verified Petition sworn on September 20, 2016; (3) Affidavit of John W. Pavacic in Support of Respondents' Verified Answer and in Opposition to Verified Petition sworn on September 20, 2016 with Exhibits A-N attached thereto; and (4) Reply Affidavit by Richard I. Scheyer, Esq. affirmed on October 18, 2016, it is:

ORDERED that the Petition (Seq. #001) by Armand Gustave, LLC to reverse the determination of the Central Pine Barrens Joint Planning and Policy Commission and grant its application to build a residence on the 6,000 square foot parcel of property; and finding the determination of the Central Pine Barrens Joint Planning and Policy Commission constituted a taking under the United States Constitution and the Equal Protection Clause as applied to the states by the Fourteenth Amendment to the United States Constitution is denied.

DECISION

Petitioner is the owner of certain real property, Suffolk County Tax Map 200-460-1-10, that is located in the Core Preservation Area of the Central Pine Barrens within the Town of Brookhaven after having purchased the subject property in 2014 for \$12,000. The Long Island Pine Barrens Protection Act of 1993 (Act), L 1993, ch. 262, adopted to protect the Central Pine Barrens. The Act created the Central Pine Barrens Joint Planning and Policy Commission as a regional planning agency, and directed the creation of a comprehensive land use plan to guide development in the Pine Barrens area. The Act divided all land within the Pine Barrens into two legally significant areas: (1) the core preservation area, in which development is generally prohibited, and (2) the compatible growth area, in which development is generally more permissible, but must take place in a responsible and ecologically sound manner. *See ECL 57-0107(11), (12), 57-0109; 57-0121(4).*

Petitioner made application to the Central Pine Barrens Joint Planning and Policy Commission for an extraordinary hardship waiver to permit it to construct a single family home on a six thousand square foot parcel, and develop a road to this parcel that uses 5,333 square feet to . A public hearing was held on March 16, 2016. Pursuant to ECL 57-0123(3)(a), the Central Pine Barrens Joint Planning and Policy Commission may waive strict compliance with the Central Pine Barrens Comprehensive Land Use 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 § 57-0121(10)(a) and (c).

The Respondent, in considering this application, identified a study area, that being all property located within a one-half mile radius of the subject property. The dominant land use in the study area was described as natural, public, protected open space primarily owned by Suffolk County and New York state. In order to succeed upon his extraordinary hardship application before the Central Pine Barrens Joint Planning and Policy Commission Petitioner was required to show that there are unique qualities to its parcel of property that imposes upon it a unique burden not imposed upon other similarly situated property based upon unique characteristics of the property. Central Pine Barrens Joint Planning and Policy Commission determined Petitioner failed in presenting any evidence to support such a conclusion. While Petitioner identified other parcels

in the study area upon which a hardship exception had been granted, the Respondent has distinguished these exceptions and the reasoning advanced was not arbitrary and capricious such that the Court would be permitted to substitute its own judgment for that of the Respondent. With respect to the Petitioner's claims that the determination has resulted in an unconstitutional taking without just compensation Petitioner did not make a record to support that contention, particularly as pertains to the transfer of development rights, if any, constituted just compensation for those development rights compromised by the Respondent's determination, and what process was undertaken to assign development rights to this parcel of property consisting of only 6,000 square feet. *Penn Cent. Transp. Co. v. New York*, 42 N.Y.2d 324, affirmed 438 U.S. 104. Accordingly, the Petition is denied.

The foregoing shall constitute the decision and order of the court.

Dated: November 7, 2016



JOHN H. ROUSE, Acting J.S.C.

FINAL DISPOSITION