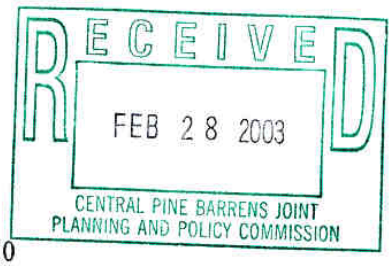
MEMORANDUM



SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 10

In the Matter of the Application of SPRING MEADOW ENTERPRISES, LLC,

Petitioner,

for a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

- against -

ROBERT J. GAFFNEY, Chairman, RAY E. COWEN, PATRICK A. HEANEY, ROBERT F. KOZAKIEWICZ and JOHN JAY LaVALLE, constituting the members of the CENTRAL PINE BARRENS JOINT PLANNING AND POLICY COMMISSION,

Respondents.

By: JONES, J., J.S.C.

Dated: February 11 ,2003

Index No. 02-20765

Mot. Seq. #001 - CDISPSUBJ
#002 - MD

Return Date: 9/10/02 (#001)
10/28/02 (#002)
Adjourned: 11/20/02

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In this Article 78 proceeding the petitioner, Spring Meadow Enterprises, LLC, seeks an order annulling the determination of the respondent, Central Pine Barrens Joint Planning and Policy Commission (the "Commission"), which denied the petitioner's subdivision project, on the grounds that the Commission's determination was made without jurisdiction and that it was arbitrary and capricious and not based upon substantial evidence. The petition is dismissed.

Proposed intervenor Long Island Pine Barrens Society's motion for leave to intervene is denied.

The petitioner is the owner of 59 acres of real property (the "Property") located on one section of a proposed three-section cluster subdivision. The total acreage of the proposed subdivision, what is commonly known as the Map of Spring Meadow at Wading River, is approximately 189 acres. Since 1988 the Property has been zoned "A Residence 1," a zoning classification which permits single-family homes on 40,000 square foot lots. Before 1991 the prior owner of the 189 acres filed an application for

preliminary and cluster subdivision approval with the Town of Brookhaven Planning Board (the "Board"). The application divided the acreage into four total parts: the property (Section 1), Section 2, Section 3 and 63 acres ofproperty designated as "open space." The application was submitted as a "cluster" development pursuant to Town Law §278, which allows for modification of the development scheme to preserve open space, while allowing the developer to maintain the total number of buildable lots under a conventional subdivision.

The petition alleges that the prior owner received cluster subdivision approval on August 12, 1991 and preliminary subdivision approval on April 13, 1992. As approved, the application allowed for the construction of 75 homes on 59 acres of the Property. However, no construction was ever undertaken, and the preliminary approval expired as a matter of law six months later.

Because the preliminary subdivision approval had expired, one Edward Carrera, the purported owner of the Property, requested an extension of the preliminary approval on September 15, 1997. This application was denied by the Board. Consequently, on March 24, 1997, Mr. Carrera filed a new application seeking preliminary and final approval for the 75 lots on the Property. This application necessitated the filing of a draft supplemental environmental impact statement ("DSEIS") pursuant to Article 5 ofthe Environmental Conservation Law (the "ECL"), commonly known as the State Environmental Quality Review Act ("SEQRA"). On September 18, 2000 the Board held a joint preliminary/final public hearing on the subdivision map in conjunction with the public hearing pursuant to SEQRA on the DSEIS.

On February 13, 2001 Suffolk County acquired Sections 2 and 3 ofthe total subdivision, along with the designated "open space" of63 acres, for $4.5 million. Suffolk County did not, however, purchase those 59 acres comprising the Property.

On January 7, 2002 the Board accepted as complete and filed a final supplemental environmental impact statement ("FSEIS"). Thus, on that date, the environmental review process pursuant to SEQRA was deemed complete.

Prior to the application for preliminary/final approval, however, on July 14, 1993, the Governor of New York signed into law the Long Island Pine Barrens Protection Act (the "Act") as an amendment to the ECL, Article 57. The purpose of the law is "to allow the state and local governments to protect, preserve and properly manage the unique natural resources of the Pine Barrens-Peconic Bay system" (ECL 57-105). In furtherance of these goals, the legislature established "a commission made up of the governor's appointee, the county executive of Suffolk County and the supervisors of the Town of Brookhaven, Riverhead and Southampton to prepare, oversee and participate in the implementation of a comprehensive land use plan for the Central Pine Barrens area" (ECL 57-103). That commission, in its present state, is the respondent in this proceeding.

The Commission was required to prepare a draft a comprehensive land use plan and generic environmental impact statement after consultation with the Central Pine Barrens Advisory Committee (ECL 57-121). The advisory committee was created to "actively assist and advise the commission in the preparation, adoption and implementation of the Central Pine Barrens Comprehensive Land Use Plan (the "Plan") (ECL 57-0119[6][a],[9]). The Commission, pursuant to the rules ofprocedure stated in the

Plan. is charged with the environmental review of proposed development within the Central Pine Barrens. The Plan defines two geographic areas within the overall Central Pine Barrens: the core preservation area ("CPA") and the compatible growth area ("CGA"). The Property is located within the CGA.

The Commission alleges that it first learned of the petitioner's application upon receipt of the FSEIS from the Board on February 13, 2002. In response thereto the Commission notified the Board that the application for development within the Property did not comply with the Plan's applicable standards and guidelines. Thereafter, on March 25, 2002 the Commission asserted jurisdiction over the proposed project and requested the petitioner submit an application for the proposed subdivision in time for a public hearing to be held on May 8, 2002. The Commission based its assertion ofjurisdiction primarily on section 5.3.3.6 of the plan, which limits the amount of vegetation that can be cleared on any given project site.

Although alerted of the Commission's assertion ofjurisdiction and the concomitant request for a completed application for relief from the Commission and the Plan. the petitioner failed to supply the Commission with the requisite application and instead, by letter, rejected the Commission's averment of jurisdiction. On May 8, 2002 the Commission held a public hearing on the petitioner's proposed project. Without a formal application or live testimony from the petitioner, the Commission apparently considered the petitioner's application before the Board and denied the project proposal. The petitioner commenced this proceeding in response to the Commission's determination.

The petitioner argues. *inter alia,* that the Commission's determination of the proposal was ultra vires and an abuse of discretion because the proposed project constitutes non-development as defined by the ECL §57-107(13). That section of the statute defines development as "the performance of any building activity or mining operation," but shall not include "residential development on any subdivision, residential clustered development, land division or site plan which has received preliminary or final approval on or before June first, nineteen hundred ninety-three, providing the lots to be built upon conform to the lot area requirements of the current zoning, are subject to the three year exemption contained in section two hundred sixty-tive-a of the town law, or are subject to an exemption from an up zoning adopted by a town board." The petitioner contends that the subdivision was granted preliminary approval and cluster approval prior to June 1, 1993 and, thus, is exempt from the Act. Accordingly. the petitioner maintains. the Commissioner has no jurisdiction over the application.

The Commission argues that the preliminary approval that was allegedly granted to the petitioner expired. by operation of law. six months after it was granted because the petitioner failed to apply for final approval, pursuant to Town Law §276(5)(h). Therefore. the Commission maintains. the application by the petitioner in 1997 was new application and. therefore, not entitled to the "grandfather" provisions of ECL §57-107(13)(ix). As a result. the Commission contends it lawfully asserted jurisdiction over the application.

There can be no argument that the preliminary approval for the subdivision. as originally proposed. expired as a matter of law six months after the approval date *(see. **Matter of Aloya v Planning Board of the Town of Stony Point***, 241 AD2d *73*, 671 NYS2d 124 [1998]. *affd* 93 NY2d 334. 690 NYS2d 475 [1999]). The Town Code for the Town of Brookhaven unequivocally states "The

Planning Board approval of a preliminary layout submission shall expire six (6) months after the date of such formal action" (Brookhaven Town Code, Subdivision Regulations, $5). As was noted earlier, the developer failed to undertake any clearing or construction at the project site within that six-month period.

Petitioner argues, however, that the cluster subdivision approval granted by the Board, allegedly on August 12, 1991, did not expire as a matter of law and, thus, makes the proposed project "non-development" for the purposes of the ECL and the Act. Based on the following, this Court does not agree.

Admittedly, there are no provisions within the Town Law §278, nor in the Brookhaven Town Code §85-388, that section regulating cluster subdivision approval by the Board, which mirror those six-month revocation provisions in Town Law §276 and Brookhaven Town Code, Subdivision Regulations, $5. However, it has been noted that the substantive provisions of the conventional subdivision enabling statutes are fully applicable to cluster developments *(see,* Rice, Practice Commentaries, McKinney's Cons Laws of New York, Town Law §278 [2002]). Indeed, the identical hearing requirements for a conventional subdivision also apply to a cluster subdivision *(see,* Town Law §278[4]). Moreover, the Court of Appeals has stated, "the Legislature intended other provisions found in Article 16 *[entitled "Zoning and Planning"]* to apply also to subdivisions approved for cluster development. Thus, the procedures for submission, approval and filing of plats for cluster developments are those required for subdivisions generally," *[added](see, **Kamhi v Planning Board of the Town of Yorktown***, 59 NY2d 385,465 NYS2d 865 [1983]), and in interpreting a statute, the intent of the legislature is the controlling factor *(see, **State of New York v Ford Motor Co.,*** 74 NY2d 495, 549 NYS2d 368 [19891). By logical extension, therefore, the revocation of approval for cluster development would expire six months after approval without the filing of a final plat, as would a conventional subdivision approval. The petitioner has cited no case, nor legislative history, to rebut this determination. Therefore, the petitioner's contention that the preliminary cluster approval did not expire after six months is without merit. Consequently, inasmuch as the preliminary approvals for the conventional and cluster subdivision expired, the petitioner's application for preliminary/final approval of the proposed project, in 1997, is a new application for review purposes and subject to the jurisdiction asserted by the Commission.

Therefore, the Court must now turn its attention to the issue of whether the Commission's determination was arbitrary and capricious and an abuse of discretion *(see,* ECL §57-0135).

First, the petitioner argues that the Commission failed to assert jurisdiction in a timely manner pursuant to ECL §57-0123(2)(a) which provides, "[T]o the fullest extent possible, the Commission shall consolidate and coordinate its review with the applicable local government." The petitioner maintains that despite becoming aware of the project proposal in July 2000, the Commission waited until March 2002 to assert jurisdiction. Thus, the petitioner contends, the Commission abused its discretion and the determination should be annulled.

In July 2000 the subdivision application before the Board was still comprised of the Property and the aforementioned Sections 2 and 3, along with the 63 acres of designated "open space." In that form the application sought approval for a true cluster subdivision. However, as is noted in the petition, the County of Suffolk purchased Sections 2 and 3, along with the "open space" on or about February 13,

2001. Therefore, when the Commission received the FSEIS on February 12,2002, for the revised subdivision plan on the 59 acres of the petitioner's property, no longer with the benefit of the 63 acres of "open space" purchased by Suffolk County, it treated the application as substantially different from that originally proposed. As such, without the "open space" the new subdivision proposal did not comply with the applicable clearing requirements of the Plan. Accordingly, less than six weeks later, the Commission correctly and timely notified the petitioner that it was assertingjurisdiction over the application.

Next, the petitioner maintains that the Commission failed to identify those specific standards and guideline in the Plan upon which the Commission based its assertion ofjurisdiction, in violation of §4.5.3.3 of the Plan. However, in the minutes of the meeting of the Commission held on March 20, 2002, the applicable paragraph clearly states,

> "A discussion ensued regarding both the time periods that apply to the Commission's review of projects over which it asserts jurisdiction, as well as the specific standards and guidelines in the Central Pine Barrens Comprehensive Land Use Plan upon which this assertion will be based. After a brief discussion, it was agreed that Sections 5.3.3.1, 5.3.3.4, 5.3.3.6, and 5.3.3.9 will be applied to the project..."

Therefore, inasmuch as the Commission clearly identified the specific standards upon which it asserted jurisdiction, the petitioner's argument is without merit.

Next, the petitioner contends that the Commission's determination should be annulled because it was arbitrary and capricious and not based upon substantial evidence in the record. The petitioner bases its argument on the fact that the Commissioned denied the project proposal without an applicant, an application and related documents and, thus, could not have made an informed decision.

Despite notifying the petitioner of its intention to assertjurisdiction and hold a public hearing on the proposed project, the petitioner refused to submit an application to the Commission. Therefore, the Commission proceeded with the public hearing as advertised on May 8,2002. On May 13,2002 the Commission ,by letter, requested information from the Board relating to the proposed project. Furthermore, the Commission was in possession of the voluminous FSEIS on the proposed project. Therefore, the Commission, in light of its determination, had sufficient information upon which it relied to make its determination. Simply put, because of Suffolk County's purchase of the "open space" in February 200 1, the project as proposed to the Commission was not a true cluster development because the petitioner could not include the 63 acres of "open space" in its proposal for density calculations. Therefore, as the petitioner owned only 59 acres and proposed 75 lots on the project site, the proposal violated not only the "A Residence 1"zoning designation, but also the vegetation clearing limits of the Plan §5.3.3.6. Therefore, the Commission's determination was not arbitrary and capricious and was based on substantial evidence in the record. To hold otherwise would be to award the petitioner for dilatory conduct in failing to provide the Commission with a completed application and promote disrespect to the Commission and its authority.

Finally, the Long Island Pine Barrens Society's motion to intervene, inasmuch as it has failed to include in the motion a proposed pleading, must be denied (see, CPLR 1014; ***Zelnder v*** State ***of New*** York, 266 AD2d 224,697 NYS2d 347 [19991).

Submitjudgment.

J.S.C.