At an I.A.S. Term, Part 9, of the Supreme Court of the State of New York, held in and for the County of Suffolk, at the County Courthouse in Riverhead, New York, on the 11th day of June 2001,

PRESENT: Hon. Edward D. Burke, Justice.

In the Matter of the Application of the LONG ISLAND PINE BARRENS SOCIETY INC., RICHARD AMPER as Executive Director and in his individual capacity, KATHERINE FORSTER SCREVEN, FRANK P. FOSTER, JOHN TROCCHIO, RICHARD and PAMELA TODARO, residents, taxpayers and members of the LONG ISLAND PINE BARRENS SOCIETY, INC.,

Petitioners,

-against-

THE CENTRAL PINE BARRENS JOINT PLANNING & POLICY COMMISSION, SLOANE MARCUS & MARIA HICKEY,

Respondents.

ORDER SETTLING JUDGMENT AND DIRECTING ENTRY

Index No. 00-19896

Petitioners herein, having moved this Court for a judgment pursuant to CPLR Article 78, declaring that respondent Central Pine Barrens Joint Planning & Policy Commission's, Resolution and findings of July 12, 2000, that the proposed construction of an indoor riding arena was not developmental, was violative of of New York State Environmental conservation Law Section 57-0107(13)(ii), and annulling that resolution; and

This proceeding having come on to be heard at IAS Part 9 of the Supreme Court Suffolk County, before Justice Edward D. Burke, and after due deliberation having been had thereon and a memorandum decision of this Court having been made therein,dated March 20, 2001, granting the petition and directing settlement of judgment as hereinafter provided; it is

ORDERED, ADJUDGED AND DECREED, that the petition hereby is granted and the Central Pine Barrens Joint Planning Policy Commission Resolution and findings of July 12, 2000, is declared null and void.

ENTER.

GRANTED
JUN 11 2001
EDWARD F. ROMAINE
Clerk of Suffolk County

HON. Edward D. Burke
Justice of the Superme Court

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EDWARD P. ROMAINE
CLERK OF
SUFFOLK COUNTY

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 9

Judge Edward

By: Burke, J.S.C.

Dated: March 20, 2001

In the Matter of the Application of the LONG ISLAND PINE BARRENS SOCIETY INC., RICHARD AMPER, as Executive Director and in his individual capacity, KENNETH and IRENE KNESKI,, STANLEY and GENEVIEVE HORTON residents, taxpayers and members of the LONG ISLAND PINE BARRENS SOCIETY,

Petitioners,

-against-

THE CENTRAL PINE BARRENS JOINT PLANNING & POLICY COMMISSION, SLOANE MARCUS and MARIA HICKEY

Respondents.

Index No. 00-19896

Mot Seq. # 001 - MG
CDISPSJ

Return Date: 9-15-00
Adjourned: 2-14-01

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This proceeding, brought pursuant to CPLR Article 78, seeks a judgment declaring null and void respondent's determination which deemed a proposal for construction of an indoor riding arena to be "non-development" within the meaning of New York State Environmental Conservation Law § 57-0107(13)(ii). Petitioner claims that respondent's determination was arbitrary and capricious, and an abuse of discretion; and that it violated the New York State Environmental Quality Review Act.

Article 57 of the Environmental Conservation Law was enacted to protect and manage the Pine Barrens-Peconic Bay maritime region (Long Island Pine Barrens Maritime Reserve Act, hereafter the "Act"). 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 and to encourage coordination of existing programs and studies affecting land and water resources

in the region and to protect the value of the existing public and private investment that has already been made to acquire land in the region" (ECL § 57-0105). It was contemplated that the Act might "restrict the beneficial use of some lands currently in private ownership" but that, such "restrictions [were] deemed to be necessary and desirable to protect and preserve the hydrologic and ecologic integrity of the Central Pine Barrens as well as the public's health and welfare for future generations" (ECL§ 57-0105).

The Act established the Long Island Pine Barrens Maritime Reserve, which delineated the intact area comprising a "core preservation area" (§57- 0107. 11) as well as a "compatible growth area," which comprises that area within the central pine barrens, but outside the core preservation area (§57- 0107. 12). The private property in dispute is located within the delineated "core preservation area." The Act also established the Central Pine Barrens Joint Planning and Policy Commission, a respondent herein (§57- 0119). The Commission is empowered to prepare a comprehensive land use plan designed to, *inter alia*, protect the Pine Barrens ecosystem; to protect the quality of surface and ground water; to promote active and passive recreational and environmental educational uses consistent with the plan; as well as to accommodate development in a manner consistent with the long term integrity of the Pine Barrens ecosystem (§57-0121.2). The Commission is empowered to review and approve all proposed development in critical resource areas and to designate staff for the purpose of advising the commission with respect to such development applications (§57-0123.2 (a)).

The proposed indoor riding arena came to the Commission's attention via a letter, dated June 26, 2000, from a real estate broker who asked for confirmation that his client's property could be developed with an 80 x 200 foot indoor arena as long as the structure: "1. Had an approved building permit; 2. is done on clean area, which will not require removal of vegetation, and 3. Is built withing existing zoning requirements as to placement of property." The prospective buyer was Sloan Marcus, hence the label the "Marcus Proposal." The property in dispute, located in Manorville, Riverhead Township, is zoned Agriculture A and partially Industrial A; comprises 36 acres; contains several structures, including, a horse barn with 42 stalls, a cottage, and a half-mile riding track. No horses are currently boarded at the property, nor has it been utilized as same since 1995.

By letter dated August 1, 2000, the Commission advised the proposed buyer and current owner that the proposed project was determined to be non-development pursuant to ECL § 57-0107(13)(ii). Apparently, the Commission based its determination on a similar decision rendered May 10, 2000, for similar construction of an indoor riding arena. The court notes that determination (*see, Long Island Pine Barrens Society, et al v The Central Pine Barrens Joint Planning and Policy Commission, Carolyn Jolly d/b/a Hidden Pond Stables, Index No. 14222-2000*) is annulled by decision of this court simultaneously with this decision. Unlike the record for the previous determination, no transcripts of the public meeting, written application, or staff report were submitted with the instant proceeding. It does not appear that they exist.

Respondent offers that the potential buyer has withdrawn her offer to buy and that, therefore, the Marcus proposal is moot. However, since the Commission made its determination without any written application before it, or any staff report regarding any potential concerns, the court is unable to deem the " application" withdrawn.

The discussion reflected in the Commission's minutes mirrors that for the prior "Hidden Pond" determination, to wit: the application did not require approval of the Central Pine Barrens Joint Planning & Policy Commission in that the nature of the application, i.e. an indoor riding arena, was recreational in nature and, therefore, not "development" for the purpose of the Act pursuant to E CL § 57-0107(13) (vii). § 57-0107(13), after defining and enumerating "development" at subsections (a) through (f), provides:

> The following operations or uses do not constitute development for the purposes of this article:
>
> . . . (vii) existing or expanded recreational use consistent with the purposes of this article including scouting activities, the maintenance or expansion of facilities associated with or necessary for such scouting activities, but not limited to, the addition, modification, expansion or replacement of structures necessary for such activities and such clearing as may be reasonably required for the maintenance or expansion of scouting activities; . . .

The Central Pine Barrens Comprehensive Land Use Plan (hereafter the "Plan" as defined at 4.3.2) sets forth the Standards and Guidelines for Land Use as subsection 5, and addresses the Core Preservation Area at subsection 5.2 by declaring that preservation of the area shall be obtained by "a strategy of government land acquisition, the transfer of development rights, conservation easements, gifts, land swaps, and donations; and prohibits development, absent a hardship exemption." Allowable uses are limited to those operations or uses which do not constitute development. "Any existing, expanded, or new activity involving agriculture or horticulture in the Core Preservation is an allowable use if it does not involve material alteration of native vegetation. The erection of agricultural buildings, including but not limited to barns, greenhouses and farm stands, required for the production of plants or animals as reflected under ECL § 57-0107(14), shall constitute an allowable use." However, the property in question cannot meet the definition of "agriculture" or "horticulture," as provided in § 57-0107(14), in that it is not engaged in the production of plants or animals, or the breeding of horses. In fact, the Commission's minutes reflect that, although the property has the capacity for 42 horses, no horses have been boarded there since 1995.

The Plan sets forth a "Recreation overview" at 7.5.1 and declares that "[o]pportunities for recreation are a principal objective" of the Plan. " The Act also recognizes that the quality of present and future recreational activities depends on the protection and preservation of the pine barrens' natural resources." A comprehensive recreational program must take into account the recreational needs of present and future users and accommodation of diverse needs which requires active and cooperative efforts of "public and private recreational providers." The categories of recreational use are:

> 1. **Passive recreational activities** are those which have minor physical impacts on natural resources, require minor facility development and maintenance, and are compatible with others using the same area or facilities simultaneously. Examples include, but are not limited to, walking, hiking, birdwatching, canoeing, hunting, fishing, and photography.
>
> 2. **Active recreational activities** are those which have moderate physical impacts on natural resources; require moderate facility development and maintenance; and may be incompatible with other users using the same area or facilities. Examples include, but are not limited to, mountain biking, horseback riding.
>
> 3. **Incompatible recreational activities** are those which have major impact on natural resources. Example include, but are not limited to, all terrain vehicle use, motorcycle riding and snowmobiling.

The Plan's "Recreational recommendations," described at section 7.5.2, include, at 7.5.2.2 "**Active recreational activities and facilities to accommodate them should be planned and implemented by public and private agencies** and should avoid adverse impact on ecologically sensitive areas." Here, the property is located in the Core Preservation Area. Therefore it has already been declared to be an ecologically and hydrologically sensitive area.

To reach a determination as to whether a 200' by 80' indoor riding arena is "development," the court is bound by the clear meaning of the statute. The property is located in a Core Preservation Area which prohibits development and limits uses to those operations or allowable uses which "do not constitute development" (*see*, Plan 5.2). Development is defined at § 57-0107(13) as:

> . . . the performance of any building activity or mining operation, the making of any material change in the use or intensity of use of any structure or land and the creation or termination of rights of access or riparian rights. With limitation the following activities or uses shall be taken for the purposes of this article to involve development as defined in this subdivision:

(a) a change in type or use of a structure or land . . .
(b) a material increase in the intensity of use of land
or environmental impacts as a result thereof; . . .
(e) re-establishment of a use which has been abandoned for one year;
. . .

Here, clearly, the construction of the 200' by 80' structure is a "building activity." Here, also, there will be a "change in the use of the land" and an increase in the intensity of the use of the land" and a "re-establishment of a use which has been abandoned for more than one year." Therefore, there is no doubt that it is "development" for the purposes of § 57-0107(13). For the Commission's decision to remain, the court must find that it does not constitute development because it fits the exception provided at § 57-0107(13)(vii).

When a statute is reasonably free from ambiguity, a court must construe it so as to give effect to its plain meaning (*see, **Doctors Council v New York City Employees' Retirement Sys.***, 71 NY2d 669, 529 NYS2d 732 [1988]; McKinney's Cons Laws of NY, Book 1, Statutes §§ 76, 94). The " plain and obvious meaning of a statute is always preferred to any curious, narrow or hidden sense that nothing but a strained interpretation of legislative intent would discern." Courts "may only look behind the words of a statute when the law itself is doubtful or ambiguous" (*see, **Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.***, 45 NY2d 471, 410 NYS2d 268 [1978]). Although a court will defer to an agency's expertise in situations where such expertise is relevant, an agency's or board's construction of a statute merits less weight and will not be accorded special deference when the question is purely one of statutory analysis dependent of accurate determination of legislative intent (*see, **Yong-Myun Rho v Ambach***, 74 NY2d 318, 546 NYS2d 1005 [1989]). Here, respondent's seek to ignore the clear definition as to what constitutes "development" in favor of a provision which favors recreational use, but respondents fail to read the statute as a whole ((*see, **Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.***, *supra*). In interpreting the statute, the intent of the legislature is the controlling factor (*see, **New York v Ford Motor Co.***, 74 NY2d 495, 549 NYS2d 368 [1989]). The clear and unambiguous intent of ECL § 57 mandates the "preservation of the core area" of the Long Island Pine Barrens, an area encompassing over one hundred thousand acres, which "is of critical importance to the state because it overlies the largest source of pure groundwater in New York" (*see*, Memorandum in Support of Legislation, S.8961-A, L. 1990, ch. 814).

The statute provides that the core area should be preserved in its natural state (§57-0123(3)(a)) and has, as its stated purpose, to protect "the ecologic and hydrologic integrity" of the area (§57- 0105). Horse farms create special concerns for the environment based on their use, as evinced by subsection 8.2.1 of the Plan. Subsection 8.2.1 addresses the mitigation of the impacts of storm water discharge emanating by horse farms. Moreover, the property has not operated as a horse boarding facility since 1995, certainly more than one year pursuant to §57-107 (13)(e). Petitioner offers the affidavit of Assemblyman Engelbright in which he offers that the legislative

intent contemplated within § 57-0107(13)(vii) was to restrict it to Scouting activities and pre-existing Scouting facilities. While his affidavit may be enlightening, it is not dispositive on the issue (*see, **Consolidated Edison Co. v D.E.C.***, 71 NY2d 186, 524 NYS2d 409 [1988]).

The relevant section of (§57- 0107 (13) (vii) is the exclusion of recreational use consistent with the purposes of this article (emphasis added). Re-introduction of use of the property as a commercial horse boarding facility, while inclusive of an "active recreational activity" does, in fact, impact on natural resources (Plan 7.5.1.2). It is not merely the proposed re-introduced horseback riding which is at issue, it is the proposed construction of an indoor facility. There is no reading of the statute which would not find the 16,000 square foot facility a structure. Nor is there any interpretation of the evidence presented which would not support a finding that its effect, and indeed its very intent, would not increase its use. Therefore, the petitioner's projection of increased traffic and vehicle use with the re-opening of the facility and the proposed improvement, with its concomitant environmental problems, is unavoidable. Also unavoidable is the conclusion that the construction is not consistent with the Act (*see, **Long Island Pine Barrens Society v Central Pine Barrens Joint Planning & Policy Commission***, 261 AD2d 476, 687 NYS2d 905 [2d Dept 1999]), *appl denied* 93 NY2d 816, 697 NYS2d 564 [1999]).

Accordingly, the Commission's determination, of July 12, 2000, that the proposed construction was not developmental is inconsistent with the purpose of the Act and violative of ECL § 57- 0121(3)(a) and, thus, arbitrary and capricious and must be annulled. Since the Court is granting this petition on the ground that the approval is violative of the Act, it need not reach the other issue raised by petitioners.

Settle judgment.

Dated: 3/20/01.

J.S.C.