

**Matter of Long Is. Pine Barrens Socy., Inc. v Central
Pine Barrens Joint Planning & Policy Commn.**

2014 NY Slip Op 30560(U)

February 27, 2014

Supreme Court, Suffolk County

Docket Number: 34735/2012

Judge: Ralph T. Gazzillo

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SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

Mot. Seq.: 001 Mot. D.
002 Mot. D.

Hon. RALPH T. GAZZILLO
A.J.S.C.

	X
In the Matter of the Application of the Long Island	:
Pine Barrens Society, Inc., Richard Amper, as	:
Executive Director and in his Individual capacity,	:
Robert McGrath and Thomas Casey as members	:
of the Board of Directors and in their individual	:
capacities,	:
	:
Petitioner(s),	:
	:
- against -	:
	:
The Central Pine Barrens Joint Planning & Policy	:
Commission and Westhampton Property	:
Associates, Inc.,	:
	:
	:
Defendant(s),	:
	X

Upon the following papers numbered 1 to 38 read on this proceeding brought pursuant to CPLR Article 78; Notice of Amended Petition and Amended Petition and supporting papers numbered 1- 22; Verified Answers and supporting papers numbered 23-26; Affirmation in Opposition and supporting papers numbered 27-32; Memorandum of Law in Support of the Petition with exhibits numbered 33; Memorandum of Law in Opposition to the Petition numbered 34; Memorandum of Law in Opposition to the Petition numbered 35; Petitioner's reply affirmation and supporting papers numbered 33-37; Return of Record numbered 38; it is,

ORDERED that after consideration of the papers filed in support and in opposition thereto, this application (seq 001) by the petitioner, pursuant to Article 78, seeking to annul the resolution of the respondent Central Pine Barrens Joint Planning and Policy Commission (hereafter Commission) dated October 17, 2012 which granted an "extraordinary hardship" exemption to respondent Westhampton Property Associates, Inc., (hereinafter "Westhampton"), is denied and the Amended Petition dismissed, and it is further

ORDERED that counsel for respondent shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to CPLR §§2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

The instant proceeding seeks relief pursuant to CPLR Article 78 annulling the determination of the respondent Commission dated October 17, 2012 which granted respondent Westhampton an “extraordinary hardship” exemption from the applicable provisions of the Long Island Pine Barrens Maritime Reserve Act of 1993 (hereinafter the “Pine Barrens Act”).

Westhampton is the owner of a parcel of real property located in the hamlet of Remsenberg/Speonk in the township of Southampton. The property consists of approximately 115 acres that is presently used as a sand/gravel mine. It is undisputed that approximately 91 acres of the Westhampton site has been used continuously as a sand/gravel mine since prior to 1981. In fact, it is undisputed that mining has taken place on the site since 1957.

The property lies within the area regulated by the Pine Barrens Act which area is set forth in ECL §57-0107(10). Specifically, approximately 68.07 acres of the site is located within the Core Preservation Area (CPA) (ECL §57-0107(11)) of the Central Pine Barrens and 46.93 acres is located within the Compatible Growth Area (CGA) (ECL §57.0107(12)). Pursuant to ECL §57-0105, these areas are included in the Pine Barrens comprehensive land use plan (hereinafter “CLUP”) which is implemented and administered by the Commission (ECL§57-0119(I) and §57-0119 (6)(a)).

Pursuant to the Pine Barrens Act, pre-existing uses may continue within the CPA and new “development” is prohibited except in cases where the property owner can demonstrate “extraordinary hardship, or a compelling public need” (ECL §57-0121(10) and 57-0123(3)(a)). Westhampton currently maintains a valid mining permit from the New York State Department of Environmental Conservation. However, since the mine is currently nearing the depth limits contained in that permit, Westhampton required a modification of the current DEC permit. Since the property is partially located within the CPA, it requires an “extraordinary hardship” exemption from the Commission since the expansion of the pre-existing mining use is considered “development” for the purposes of the CLUP.

Accordingly, on or about November of 2011 Westhampton submitted its application to extend the level of mining from the permitted 45 feet above sea level to 26 feet above sea level, six feet above ground water. In addition, Westhampton proposed a plan for the restoration of the mine after closure, including the creation of conservation easement which would preserve the land as permanent open space.

Thereafter, the Commission commenced review of the application. Pursuant to the requirements of the State Environmental Quality Review Act (SEQRA), the Commission

requested “lead agency” status so that it could coordinate the environmental review of the project with any other municipal agencies involved in permitting the project as is required pursuant to 6 NYCRR Part 617.6 (b)(3). In connection with the application, the Commission prepared a draft report dated January 13, 2012 which analyzed all of the potential environmental impacts of the project and, consistent with the CLUP, applied the “extraordinary hardship” criteria to Westhampton’s application. In addition, the Commission held a public hearing on the “extraordinary hardship” exemption application. A second public hearing was held on February 15, 2012 for the purpose of allowing the public to comment on additional submissions made by Westhampton. Thereafter, a third public hearing was held by the Commission on July 18, 2012 whereat Westhampton again addressed the “extraordinary hardship” criteria through the testimony of its expert witness Charles Voorhis, a Certified Environmental Professional and principal in the firm Nelson, Pope and Voorhis, LLP. Mr. Voorhis also submits an affidavit in connection with this proceeding wherein he outlines the contents of Westhampton’s application and the review and analysis conducted by his firm as well as the Commission. In his affidavit in opposition to the petition, Mr. Voorhis states that the application included the FEAF, a CPA “Hardship Application narrative”, maps of the subject properties, existing permits and DEC Mining approvals, a revegetation plan and a Mined Reclamation plan. He further states that the Commission prepared a staff report in anticipation of the public hearings as well as a 2 page letter dated February 8, 2012 summarizing the outstanding questions and comments made by the Commission and members of the public at the public hearing. Mr. Voorhis adds that his firm submitted a response to the Commission’s staff comment letter which addressed the 8 different points and 10 sub-points made in the Commission’s February 8, 2012 letter, a Long Term Groundwater Elevation Summary and a Spill Control Prevention and Response Plan. Following the second public, on June 15, 2012 Westhampton submitted additional supplemental information which included a cover letter further describing the extraordinary and immediate hardship to Westhampton together with a Fiscal and Economic Impact Analysis and Assessment of Needs and Benefit. The third and final public hearing was held following the Commission’s receipt of these submissions.

After consideration of all Westhampton’s submissions together with all of the comments made at the public hearing, on October 17, 2012 the Commission issued a “negative declaration” pursuant to SEQRA adopted a resolution granting Westhampton a CPA “extraordinary hardship” exemption stating that same was “not inconsistent with the purposes, objectives or general spirit or intent of ECL Article 57. In addition, the Commission determined that the proposed activity was also in compliance with the standards and guidelines under the Pine Barrens Land Use Plan (CLUP) for the portion of the mine that is located within the CGA. Petitioners commenced the instant proceeding challenging the approval on December 3, 2012.

In opposition to the motion, respondent Westhampton argues that the petitioners lack

standing to commence the action and that, even if they did have standing, the Commission's decision to grant it an "extraordinary hardship" exemption complied with the requirements of SEQRA and was not arbitrary. Similarly, respondent Commission argues that petitioners' SEQRA claim, as well as its claim that its decision was arbitrary, are without merit.

Since it is a threshold issue, the Court will address the standing argument first. "Whether in the form of an Article 78 proceeding for review of an administrative determination or an action for an injunction, challenges to zoning determinations may only be made by "aggrieved" persons. By the same token, an aggrieved person may have standing to seek judicial review even where a statute vests exclusive power to enjoin zoning violations in local authorities (see, e.g., Village Law § 7-714), because such a person pursues "more than a civic interest in law enforcement; he is vindicating a discrete, separate identifiable interest of his own" (citations omitted) (see, *Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of Town of North Hempstead*, 69 NY2d 406, 416)).

In *Sun Brite*, with respect to the issue of standing, the Court of Appeals held that "[a]ggrievement warranting judicial review requires a threshold showing that a person has been adversely affected by the activities of the defendants ... or - put another way - that it has sustained special damage, different in kind and degree from the community generally" (see, *Sunbrite* at 413). Moreover, [e]conomic harm caused by business competition is not an interest protected by the zoning laws (see *Sun-Brite, Id.*; *Matter of Friedman v Town Clerk of Town of Hemstead*, 62 AD3d at 700; *Scannell v. Town Board of the Town of Smithtown*; 250 AD2d 832; *Riverhead PGC, LLC v. Town of Riverhead*; 73 AD3d 931).

With regard to the standing of the Long Island Pine Barrens Society as a petitioner, the law is clear that at least one of the members of the organization has to have standing as an individual to confer standing upon the organization. Stated in the reverse, when all of the members lack standing, the organization also lacks standing (see, *Matter of Long Island Pine Barrens Society, Inc. v. Supervisor of Town of Southampton*, 301 AD2d 528; *Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town*; 213 A.D.2d 484).

In support of its position, respondent Westhampton asserts that none of the individual petitioners have alleged that they live in close proximity to Westhampton's property. Specifically, respondent Westhampton asserts that petitioner Casey makes only very generalized claims regarding the harm he would suffer, i.e. that "he uses the Pine Barrens ... as an educator and avid naturalist and hiker". Further, respondent Westhampton argues that petitioner Richard Amper alleges only that he takes visitors "including the media to areas of the Pine Barrens to help educate and motivate the public with respect to drinking water protection and habitat preservation." Westhampton notes that "none of the petitioners even asserts that the granting of

a Hardship Exemption to Westhampton will result in damage to the water supply beneath the pine barrens or cause the destruction of trees in the area” In response, petitioners argue that they have been granted standing in 5 matters commenced against the Commission.

It is clear from a review of petitioners’ submissions that none of the petitioners is entitled to standing in this proceeding. None of the parties lives within the “zone of interest” needed to challenge the determination and none of the allegations made by the petitioners asserts that they will suffer any harm that is unique from that which would be experienced by the public at large. Based upon the petitioner’s failure to make these allegations, the petition must be dismissed (see, ***Matter of Long Island Pine Barrens Society, Inc. v. Supervisor of Town of Southampton***, 301 AD2d 528; ***Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town***; 213 A.D.2d 484).

Moreover, even if the petitioners did have standing, a reading of the record of the proceedings before the Court shows that the Commission gave the application a hard look and that its determination to grant the “extraordinary hardship” exemption was not arbitrary, capricious or an abuse of discretion.

Initially, petitioners’ claim that respondent Commission failed to comply with the requirements of SEQRA is without merit. A reading of the petition shows that petitioners make only a very general allegations in this regard without citing specifically to the defect(s) they claim exist in the SEQRA or application review process. In addition, a review of the record submitted in support of Westhampton’s application shows that the Commission gave the application thorough consideration. Specifically, after Westhampton submitted a Full Environmental Assessment Form (FEAF) the Commission identified the application as a “Type I” action pursuant to SEQRA and directed that review of the project be coordinated with any other agency having jurisdiction over the action. Thereafter, in January 2012, the Commission commenced coordinated review pursuant to 6 NYCRR Part 617.6(b)(3) with the New York State Department of Environmental Conservation (NYSDEC) and Town of Southampton Planning Board. Following the establishment of coordinated review, the Commission held three separate public hearings at which the applicant Westhampton made presentations and public comment was received. Following the public hearings, the Commission’s staff prepared an FEAF Part 2 to allow the Commission to evaluate the potential environmental impacts of the proposed project. The Commission then reviewed of the FEAF Parts I and II in accordance with the required Criteria for Determining Significance which is set forth in 6 NYCRR Part 617.7 (c). This resulted in the Commission issuing a Negative Declaration pursuant to SEQRA and an approval of the “extraordinary hardship” exemption. The resolution approving the application made eleven separate findings in its “reasoned elaboration” regarding the potential environmental impacts of the proposed project. Specifically, the Commission analyzed potential odors and air emissions, the possibility for ground water contamination due to the decrease in the vertical

distance to groundwater created by increasing the depth of the mine, potential adverse impacts to the hydrogeologic zone, potential impacts to wetlands and the Wild, Scenic and Recreational Rivers areas, storm-water recharge, traffic impacts and the project's pre-existing mining permit.

Pursuant to SEQRA, a lead agency must "thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and ... set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation" (6 NYCRR §617.7[b][3], [4]; see *N.Y.C. Coalition to end Lead Poisoning, Inc. v Vallone*, 100 NY2d 337).

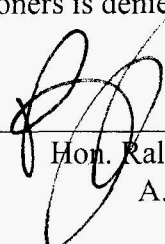
Judicial review of the lead agency's conclusions is limited to "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (*Id.*, at 348, quoting *Matter of Jackson, NYS Urban Dev. Corp.*, 67 NY2d 400; see also, *Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668).

Here, the Commission's review was extensive. It bears mentioned that the petitioner has not submitted any empirical or scientific information which contradicts the findings made by Westhampton's environmental professionals or the by the Commission. Accordingly, and based upon the extensive review of the project conducted, it is clear that the Commission has complied with the mandates of SEQRA and took the requisite "hard look" at the relevant areas of environmental concern and provided a reasoned elaboration which supports its determination.

Based upon the foregoing, the relief sought by the petitioners is denied and the proceeding is dismissed as set forth herein.

Dated: 2/27/14

Riverhead, N.Y.


 Hon. Ralph T. Gazzillo
 A.J.S.C.

Non-Final Disposition

Regina Seltzer
 20 S. Brewster
 Bellport, N.Y. 11713

The Central Pine Barrens Joint Planning and Policy Commission
 624 Old Riverhead Road
 Westhampton Beach, N.Y. 11978

Westhampton Property Associates, Inc.
 928 Long Island Avenue
 Deer Park, N.Y. 11729

Eric T. Schneiderman
 Attorney General
 120 Broadway, Room 26-134
 New York, N.Y. 10271

Albanese & Albanese, LLP
 1050 Franklin Avenue
 Garden City, N.Y. 11530