

**County of Suffolk v Central Pine Barrens Joint
Planning Policy Commn.**

2011 NY Slip Op 30313(U)

January 28, 2011

Sup Ct, Suffolk County

Docket Number: 21807/10

Judge: Thomas F. Whelan

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publication.

At issue in this Article 78 proceeding is the respondent's assertion of jurisdiction over the petitioner's reopening and reestablishment of a trap and skeet shooting range at Southaven County Park, which sits within the boundaries of the Core Preservation area of the Long Island Pine Barrens region (*see* ECL § 57-0107[11]). This environmentally sensitive region was established in 1993 with the enactment of the Long Island Pine Barrens Maritime Reserve Act (ECL Article 57), as was the respondent, the Central Pine Barrens Joint Planning and Policy Commission. It is charged, among other things, with jurisdiction to oversee planning, management and other aspects of land use within the Long Island Pine Barrens Region (*see* ECL § 57-0119[1]).

For well over 30 years, the subject range operated at its present location without interruption. However, in 2001, the range ceased shooting operations due to economic and business forces that operated adversely upon the range itself and its licensee operator. As early as 2002, the petitioner undertook steps necessary to re-repair, modernize and otherwise bring the range into conformity with state statutes and local laws applicable thereto. In July of 2006, the range reopened under a license granted by the petitioner to a new operator and the recreational activities hosted by the range were purportedly reestablished in accordance with all applicable statutes and local laws, including those aimed at environmental protection.

In August of 2006, several residents of the Town of Brookhaven and a prominent environmental group commenced an Article 78 proceeding against the County of Suffolk (petitioner herein), the Central Pine Barrens Joint Planning and Policy Commission (respondent herein), and the range licensee to halt the shooting and other recreational activities at the newly reopened range. The petitioners claimed that the actions of those involved in reopening the range violated Article 57 of the Environmental Conservation Law. The petitioners also claimed that the Commission's failure to take action assuring compliance with ECL Article 57 constituted a failure in its statutory responsibility to act to preserve the Pine Barrens from the adverse environmental impacts which the range purportedly presented. The petitioners thus asked the court, among other things, to mandate that the Commission exercise its jurisdiction over the range, as the Commission's apparent determination to take no action with respect thereto was inconsistent with the goals and objectives of the Pine Barrens Act and the duties of the Commission thereunder.

In May of 2007, the trial court granted the respondents' motions to dismiss that prior proceeding finding that the Pine Barrens Act did not provide a private right of action in favor of the petitioners, that discretionary determinations by public officials and agencies charged therewith cannot be judicially compelled, and that the petitioners' claims were otherwise non-justiciable. The petitioners appealed but the order and judgment of the trial court was affirmed, albeit, on untimeliness grounds not addressed by the trial court (*see In the Matter of the Long Island Pine Barrens Society, Inc. v County of Suffolk*, 55 AD3d 610 866 NYS2d 225 [2d Dept 2008]).

In March of 2009, some two and one-half years after the reopening of the range, the respondent directed a staff review of the recreational activities at the range that resumed in 2006. Based upon the Commissioner's review of its staff's investigative report, the respondent adopted a resolution on June 16,

2010 relative to the subject range. Therein, the Commission found that the reopening of the range constituted development within the purview of the Long Island Pine Barrens Protection Act because it “represented a reestablishment of a use which had been abandoned for one year”. The respondent went on to find that the recreational activities taking place on the range were within the jurisdiction of the respondent Commission and that the petitioner was required to obtain a Core Preservation Hardship permit to keep the range open. The respondent thus directed the petitioner to submit a Core Preservation Hardship permit application to the respondent for its review.

Rather than comply with the respondent’s directives, the petitioner commenced this Article 78 proceeding for a judgment annulling and reversing the June 16, 2010 resolution. The claims set forth in the petition are premised upon allegations that the subject resolution is arbitrary and capricious, irrational and made in violation of lawful procedure. All of such claims thus sound in mandamus to review (*see* CPLR 7803[3]).

In lieu of answering, the respondent moves (#002) to dismiss the petition on the grounds that the action challenged herein is a non-final act within the purview of § 7801 and thus not subject to judicial review. In support of these contentions, the respondent relies, almost entirely, upon a recent appellate case entitled, *Matter of Town of Riverhead v Central Pine Barrens Joint Planning and Policy Commission* (71 AD3d 679, 896 NYS2d 382 [2d Dept 2010]). Therein, the Second Department found that the Commission’s adoption of resolutions asserting its jurisdiction over proposed development of properties in Riverhead by “requesting the petitioners to submit suitable materials to the commission to determine whether the Project has a significant impact on ECL Article 57, the plan or the goals thereof” (*Id.*, at 682, 384), were non-final determinations not subject to review until the administrative proceedings required by said resolutions were concluded. Here, the respondent claims its June 16, 2010 resolution, in which it asserted its jurisdiction over the activities at the range, is, under the holding in *Matter of Town of Riverhead v Central Pine Barrens Joint Planning and Policy Commission*, likewise immune from judicial review.

In its opposition to the respondent’s motion, the petitioner contends that the respondent’s June 16, 2010 resolution went far beyond the mere assertion of jurisdiction over the activities at the range. Said resolution is alleged to have made factual findings that the subject range was closed to the public from 2001 through 2006, and that its reopening constituted “development” as defined in the Pine Barrens Protection Act because “it represented a re-establishment of a use which has been abandoned for one year”. The petitioner thus argues that the subject resolution inflicted an immediate, direct and concrete injury or harm that may not be ameliorated by further administrative review. The petitioner further claims that the respondent’s delay in interjecting itself into the field also caused actual harm to it and to the licensed operator of the range. The petitioner contends that the holding in *Matter of Town of Riverhead v Central Pine Barrens Joint Planning and Policy Commission*, is inapposite and that judicial review of the June 16, 2010 resolution by the court in this proceeding is warranted.

The respondent characterizes the petitioner’s opposition as a vague claim that administrative remedies would be futile, which claim, if successfully advanced, would relieve the petitioner of its burden

of exhausting administrative remedies. The respondent also characterizes its June 16, 2010 resolution as one which is not a final determination of the Commission, but one that simply reflects the position of its investigative staff (*see* Reply Memorandum of Law p. 3). The respondent argues that the subject resolution is not final as the respondent is free to reject the position of its staff after considering the County's arguments and proofs in the context of the formal administrative proceeding contemplated by the resolution (*see* Reply Memorandum of Law p. 3).

For the reasons set forth below, the court rejects the position of the respondent on this motion. It thus denies the motion to dismiss and adjourns the petition pending submission of the respondent's answer and return and reply papers, if any be submitted by the petitioner.

Judicial review of determinations of an agency, body or officer under Article 78 that are not final, or for which, adequate review by an appeal or other further administrative processes is available is statutorily precluded (*see* CPLR 7801). In determining whether a matter is ripe for judicial review, the court must first consider whether the issues advanced are appropriate for judicial resolution and secondly, assess the hardship to the parties if judicial relief is denied (*see Matter of Town of Riverhead v Central Pine Barrens Joint Planning and Policy Commn.*, 71 AD3d 679, 896 NYS2d 382 [2d Dept 2010]). Where fact-finding is implicated in resolving the controversy, administrative action which may fairly be characterized as "final" may nonetheless be found to be inappropriate for judicial review, and hence "unripe" (*Id.*, 71 AD3d 679, 681, *supra*).

An action is considered to be final when it represents a definitive position on an issue which "impose[s] an obligation, den[ies] a right or fix[es] some legal relationship" resulting in an actual, concrete injury (*Matter of Gordon v Rush*, 100 NY2d 236, 242, 762 NYS2d 18 [2003]), unless it is shown that such injury may be rectified or significantly ameliorated by further administrative review or by other steps available to the complaining party (*see Matter of Best Payphones v Department of Info. Tech. & Telecom. of City of NY*, 5 NY3d 30, 799 NYS2d 182 [2005]; *Stop-The-Barge ex rel Gilrain v Cahill*, 1 NY3d 218, 771 NYS2d 40 [2003]; *Matter of Essex County v Zagata*, 91 NY2d 447, 672 NYS2d 281 [1998]; *Matter of Demers v New York State Dept. of Envtl. Conservation*, 3 AD3d 744, 770 NYS2d 807 [3d Dept. 2004]). Thus, if further administrative proceedings might render the disputed issue moot or academic, then the challenged action cannot be considered definitive or the injury actual or concrete (*see Stop-The-Barge ex rel Gilrain v Cahill*, 1 NY3d 218, *supra*). Where, however, the harm suffered is not amenable to further administrative review and corrective action, the finality requirement for judicial review is satisfied (*see Matter of Gordon v Rush*, 100 NY2d 236, *supra*).

In the absence of a direct or immediate impact from administrative action, mere participation in an ongoing administrative process is not, in and of itself, an actual concrete injury (*see Matter of Town of Riverhead v Central Pine Barrens Joint Planning and Policy Commn.*, 71 AD3d 679, 681, *supra*). If an agency having apparent jurisdiction over the petitioner's activities takes no steps to regulate them, other than to insist that the petitioner submit to the agency's permit application procedures, judicial review of the

agency's determination to assert its jurisdiction is generally precluded for want of an actual injury (*see Matter of Essex County v Zagata*, 91 NY2d 447, *supra*; *Matter of Hunt Bros. v Glennon*, 81 NY2d 906, 597 N.Y.S.2d 643[1993]; *Matter of Wal-Mart Stores, Inc. v Campbell*, 305 AD2d 83, *supra*; *cf.*, *Matter of Gordon v Rush*, 100 NYS2d 236, *supra*).

Contrary to the contentions of the respondent, the June 16, 2010 resolution at issue here includes findings by the respondent Commission that the recreational activities engaged in at the range were abandoned in 2001 and that their reestablishment constituted "development", with respect to which, the respondent may require a Core Preservation Hardship permit. The inclusion of such findings in the subject resolution clearly distinguishes this resolution from those at issue in *Matter of Town of Riverhead v Central Pine Barrens Joint Planning and Policy Commn* (*supra*).

The included findings also serve to render the resolution final within the purview of CPLR 7801, as the petitioner demonstrated that it imposes upon it an obligation, denies it a right and fixes a legal relationship of the petitioner resulting in actual and direct impacts that implicate concrete harm or injury for which judicial review is available (*see Matter of Gordon v Rush*, 100 NYS2d 236, *supra*). Indisputably, the subject resolution, with its factual findings of an abandonment of the prior use of the range and its reestablishment as constituting development, fails to indicate that it was issued by the respondent with notice to and with an invitation to participate in a process of any kind by the County. In this regard, the court notes that neither the existence of such findings nor their unilateral issuance are denied by the respondent. Rather, the respondent attempts to lessen the adverse impacts and effects of such findings upon the petitioner by characterizing them as mere findings of its "staff" rather than final determinations of the Commission. The respondent goes on to assure that the County shall have ample opportunity to present its position with respect to the facts and to challenge the staff's findings during the course of the permit application proceedings.

However, these *post hoc* retreats from the express language of the subject resolution and the characterizations and assurances by the respondent's counsel do not alter the existence of the Commission's factual findings nor their infliction of sufficiently actionable and immediate impacts upon the petitioner. For there is no greater harm recognized by the law than having one's rights or interests fixed without being afforded notice and the opportunity to be heard. Notwithstanding counsel's assertions, it is not apparent that the Commission will, or is required to, review these findings, *de novo*. Nor are these findings insignificant, as they appear critical to the Commission's assertion of jurisdiction. Without them, the Commission would likely be without jurisdiction over the pre-existing range notwithstanding its situs within the Core Preservation area due to its status as a pre-existing non-conforming use. Under these circumstances, the court finds that the subject resolution is sufficiently final to warrant judicial review in this proceeding in as much as it appears to have inflicted direct, immediate concrete harm and/or injury upon the County which may not be rectified or ameliorated in administrative proceedings before the respondent Commission.

In addition, the petitioner's claims of direct and actionable harm resulting from the respondent's four year delay in asserting its jurisdiction over the range were not addressed by the respondent. Similar claims

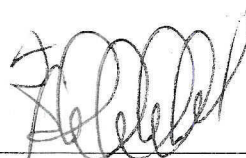
regarding a belated interjection into the regulatory field by the respondent Commission and resulting harm to the petitioners do not appear to have been asserted in the *Riverhead* case.

The facts present here are also distinguishable from those reported in *Matter of Town of Riverhead v Central Pine Barrens Joint Planning and Policy Commn (supra)*, by the abundance of evidence that the Commission had actual knowledge of the reopening of the range long before the occurrence of the events at issue in this proceeding. The Commission's status as a party/respondent in the prior legal proceeding commenced in 2006, and its participation as an interested agency in the environmental assessment processes undertaken by the County in 2002-2003, are clearly apparent from the record of that proceeding. The Commission's steadfast and publicly documented resolve not to exercise its jurisdiction over the renewed range activities during the proceedings conducted prior to and those commenced after the 2006 reopening of the range, is equally apparent from the record maintained in that prior action. The restored and remediated situs of the range was thus accomplished with the Commission's knowledge and participation in certain of the administrative processes that were undertaken by the petitioner from 2001 through July of 2006. The Commission's recent reversal of its prior determination to take no action on the reopening of the range by the adoption of its June 16, 2010 resolution gives credence to the petitioner's claims that the said resolution is sufficiently final for purposes of CPLR 7801 and ripe for judicial review under CPLR 7803(3).

Moreover, the petitioner's claims of resulting harm by reason of the delayed actions undertaken by the Commission in June of 2010, may be lost to a time-bar defense if the interposition of such claims were left to the conclusion of the administrative proceedings contemplated by the subject resolution. The petitioner's claims of unreasonable delay on the part of the respondent also implicate legal issues, rather than fact-finding functions, which are not likely to be the subject of corrective or curative, future administrative action by the Commission. Under these circumstances, and those outlined above, the hardships the petitioner will endure if judicial review is denied are assessed by this court to be great enough to warrant a finding of finality (*see Matter of Town of Riverhead v Central Pine Barrens Joint Planning and Policy Commn.*, 71 AD3d 679, 682, *supra*). The court thus finds that the June 16, 2010 resolution constitutes final administrative action for which judicial review in this proceeding is warranted.

In view of the foregoing, the respondent's motion (#002) to dismiss the petition served and filed in this Article 78 proceeding is denied. The petition (#001) is adjourned to Friday, March 18, 2011. The respondent is directed to serve its answer and return on or before March 4, 2011, in response to which, the petitioner shall serve and file its reply papers, if any, on or before March 15, 2011.

DATED: 1/28/11



THOMAS F. WHELAN, J.S.C.