

HONORABLE JACK J. CANNAVO

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

X

In the Matter of the Petition of
ROBERT I. TOUSSIE,
-against-



Index No. 98-17135

At a IAS Part 3 of
the Supreme Court, of the State
of New York, held in and for the
County of Suffolk, in the County
Court House, Riverhead, New York
on the 13th day of May, 1999

**CENTRAL PINE BARRENS JOINT PLANNING
AND POLICY COMMISSION,**

Respondent.

X

ENTERED: **MAY 26 1999**
AT: **12:29 PM**

ORDER AND JUDGMENT

Upon review and reading of the Petition dated July 21, 1998, the Respondent-Commission's Verified Answer, Return, and Objections in Point of Law dated November 10, 1998, the two affirmations of Timothy Hopkins, the affirmation of John Milazzo, the affidavit of Mark Rizzo, the Respondent-Commission's Opening Brief dated November 12, 1998 (including the November 17, 1998 errata sheet), the Petitioner's Response Brief served on December 16, 1998, the Commission's Reply Brief dated December 30, 1998, the parties' oral arguments presented to the Court on February 24, 1999 (a transcript of which has been prepared and filed with the Court), the various exhibits, appendices, and addenda attached to the parties' litigation papers or submitted to the Court during the February 24, 1999 hearing, and the matter having been submitted to the Court after oral argument by counsel for the Petitioner and the Respondent-Commission, and after due deliberation the Court having issued a Memorandum Decision dated

April 27, 1999 which Memorandum Decision is annexed hereto and incorporated herein, it is:

ORDERED that JUDGMENT is hereby entered in favor of the Respondent-Commission and against the Petitioner on all claims contained in the Petition,

AND IT IS FURTHER ORDERED that the Petition be dismissed in its entirety.

~~AND IT IS SO ORDERED.~~

ENTER:

JACK J. CANNAVO

Dated: _____

Central Islip, New York

Justice Jack J. Cannavo
Justice of the Supreme Court

GRANTED

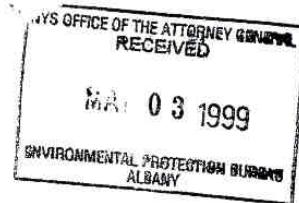
MAY 13 1999

Edward P. Romaine
Clerk of Suffolk County

Edward P. Romaine

FILED
MAY 26 1999
EDWARD P. ROMAINE
CLERK OF SUFFOLK COUNTY

MEMORANDUM



SUPREME COURT, SUFFOLK COUNTY

TRIAL TERM

PART III

BY: JACK J. CANNAVO, J. S. C.

In the matter of the petition of
ROBERT I. TOUSSIE,

Petitioner,

for an order pursuant to Article 78 of the
Civil Practice Law and Rules reviewing, and
upon review, annulling, vacating and reversing
a certain determination of respondent,

Index No. 1998-17135

Motion No. 001 MD SUB J

Motion Date: 8/24/98

Motion No. #1 2/24/99

- against -

**CENTRAL PINE BARRENS JOINT
PLANNING AND POLICY COMMISSION,**

Respondent.

PHILIP H. SANDERMAN, ESQ.
Attorney for Petitioner
1770 Motor Parkway
Hauppauge, NY 11788

ELIOT L. SPITZER
ATTORNEY GENERAL
STATE OF NEW YORK
Attn: John S. Sipos and Andrew J. Gershon
The Capitol
Albany, NY 12224

The proceeding commenced by petitioner, ROBERT TOUSSIE, for summary judgment directing full Pine Barrens Credit for each single and separate parcel owned by the petitioner and a judgment holding that the Pine Barrens Credit allocation formulas in Section 6 of the Central Pine Barrens Comprehensive Land Use Plan are void as arbitrary, capricious, unreasonable and unconstitutional and that these allocation formulas violate the

Environmental Conservation Law is denied. SUBMIT JUDGMENT.

The petitioner purchased eight parcels of property in the Pine Barrens over the last eight years for a total of \$14,000. These are small parcels, the largest of which is approximately one-half acre in size. Three of the parcels range between 6,000 and 13,000 square feet and four of them are less than 4,000 square feet. All of these parcels are located in a residential area where the zoning permits one unit of housing for every 200,000 square feet. The parcels are also remote in location. One is more than 1,000 feet from a road, and the rest of the parcels are further than 1,000 feet from any road. The petitioner was awarded 1.1 credits¹ on May 14, 1998 for these parcels by the Pine Barrens Commission. These credits awarded by the Commission to the petitioner are worth \$23,100. Therefore, the petitioner will have realized a \$9,100 profit on his investment of \$14,000 if he accepts the credits awarded to him by the Pine Barrens commission.

Under these facts, the decision of the CENTRAL PINE BARRENS JOINT PLANNING AND POLICY COMMISSION to award a total of 1.1 Pine Barrens Credits for all eight parcels was not arbitrary, unreasonable or confiscatory.

The provisions of the Pine Barrens Credit Land Use Plan that relate to transferable

¹ A Pine Barrens Credit Certificate "indicates the number of Pine Barrens Credits to which the owner of a particular parcel of land is entitled and which attests to the fact that the development rights of a particular parcel of land in a sending district of the Central Pine Barrens have been severed from the land . . ."

development rights do not require that the Commission provide the petitioner with one unit of credit for each and every parcel held in single and separate ownership.

The Pine Barrens Credit for a parcel of property is determined by multiplying the area of the parcel by the development yield factor. Development yield is determined by various factors including the residential zoning category in which the property is located. This is a reasonable means to determine the credit due to the owner of parcels in the Pine Barrens. Any method based primarily upon the concept that any parcel qualifying for "single and separate ownership" status, no matter its size or location, should be entitled to a full Pine Barrens Credit would only exponentially increase speculation for relatively worthless property.

In any event, landowners who are dissatisfied with the Pine Barrens Credit program need not participate in this program. They may seek to develop their own property by permit, or, in limited situations, not available here, as of right.

While the Pine Barrens legislation clearly limits the development of parcels located within the designated Pine Barrens of Suffolk County, such restrictions are valid if enacted for public health and safety reasons (*See generally, Matter of Town of Islip v. Cuomo*, 64 N.Y.2d 50, 484 N.Y.S.2d 528; *W.J.F. Realty v. State of New York*, 176 Misc.2d 763, 672 N.Y.S.2d 1007). Statutes that are enacted to protect public health and safety are interpreted liberally (*Putnam Lake Community Council Bathing Beaches v. Deputy Commission of Health*, 90 A.D.2d 850, 456 N.Y.S.2d 100) and in the manner necessary to attain the result

intended (Statute § 341). The interpretation of Section 6.3.1 of the Central Pine Barrens Comprehensive Land Use Plan put forth by the petitioner would require that any size parcel if it is in single and separate ownership no matter where it is located be awarded a full Pine Barrens Credit.

However, Section 6.7.6.7 specifically provides that all parcels must receive a minimum of .10 Pine Barrens Credit. Section 6.7.6.6 states that one full credit may be allocated to a parcel of at least 4,000 square feet if it has frontage on an “existing improved road.” Thus, these sections specifically contemplate that not all property in the Pine Barrens will be entitled to a full credit. Further, the Generic Environmental Impact Statement prepared in 1995 prior to the adoption of the Central Pine Barrens Comprehensive Land Use Plan indicated that a full credit would not be extended to all properties held in single and separate ownership. Thus petitioner’s argument that the provisions of the Central Pine Barrens Comprehensive Land Use Plan require that he receive a full credit for each parcel of property is without merit.

The single and separate ownership privilege contained in most zoning codes is not a common law privilege (*See, Khan v. Village of Irvington*, 87 N.Y.2d 344, 639 N.Y.S.2d 302) and exemptions to substandard lots need not be provided in a zoning or land use plan (*See, Anello v. Zoning Board of Appeals of Village of Dobbs Ferry*, 226 A.D.2d 458, 641 N.Y.S.2d 52, *aff'd* 89 N.Y.2d 535, 656 N.Y.S.2d 184 *cert den'd* 118 S. Ct.2, 138 L.Ed 2d 1036, 65 USLW 3815; *See also, Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87

N.Y.2d 668, 642 N.Y.S.2d 164). The argument of the petitioner that the Long Island Pine Barrens Protection Act and the Central Pine Barrens Comprehensive Land Use Plan must be strictly construed because it is in derogation of common law is therefore without merit (*See generally*, Statutes § 301).

The concept of "single and separate" ownership is not traceable to common law (*See, Khan v. Village of Irvington*, 87 N.Y.2d 344, 639 N.Y.S.2d 302). Therefore, a statute that restricts development on parcels that were once permissible to build upon, but under present law may no longer be built upon, is not in derogation of common law and need not be strictly construed. The property owner is still constitutionally protected from a confiscatory taking by government (*See, Khan v. Village of Irvington*, 87 N.Y.2d 344, 639 N.Y.S.2d 302). Here, the petitioner has failed to show an unconstitutional taking without compensation (*See, Allt v. Zoning Board of Appeals of Town of Hyde Park*, ____ A.D.2d ____, 679 N.Y.S.2d 422), and in fact, the evidence before the court indicates that he has been generously compensated for the development rights of the land.

The process of transferring development rights established by the Pine Barrens Comprehensive Land Use Plan has been held to be constitutional (*W.J.F. Realty Corp. v. State*, 176 Misc.2d 763, 672 N.Y.S.2d 1007). The court notes that the concept of transferable development rights, while often challenged, is an accepted and constitutional land use planning device (*See, Russo v. Beckelman*, 204 A.D.2d 160, 611 N.Y.S.2d 869 *leave to*

TOUSSIE v. CENTRAL PINE BARRENS JOINT PLANNING & POLICY COMMISSION
Index No. 1998-17135
Page 6

*appeal den'd 85 N.Y.2d 802, 624 N.Y.S.2d 372, Schubert Organization v. Landmarks
Preservation Commission of the City of New York, 166 A.D.2d 115, 570 N.Y.S.2d 504,
appeal den'd 79 N.Y.2d 751, 579 N.Y.S.2d 651 and cert den'd 504 US 946, 112 S. Ct. 2289,
119 L.Ed.2d 213; See also, Williams v. Town of Hilton Head Island S.C., 311 S.C. 417, 429
S.E.2d 802).*

Dated: April 27, 1999



JACK J. CANNAVO, J. S. C.