MEMORANDUM

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

In the Matter of the Application of Edwin Fishel Tuccio and Patricia Tuccio, Petitioners, For a judgment pursuant to Article 78 of the Civil Practice Law and Rules - against - Central Pine Barrens Joint Planning and Policy Commission, Respondent.	Motion Sequence No.: 003; MD CDISPO; SETTJ Motion Date: 9/20/10 Submitted: 10/5/11 Index No.: 28576/2010 Attorney for Petitioner: Lewis Johs Avallone Aviles, LLP 21 East Second Street Riverhead, NY 11901 Attorney for Respondent: Eric T. Schneiderman Attorney General for the State of New York Office of the Attorney General By: Janice B. Taylor, Esq. 120 Broadway, 26th Floor New York, NY 10271 Clerk of the Court

In this article 78 proceeding, the petitioners challenge a resolution of the respondent, dated July 6, 2010, which allocated 18.46 Pine Barrens Credits to a parcel of real property owned by the petitioners comprised of 52.3 acres in the Core Preservation Area of the Central Pine Barrens Reserve, and seek to compel the respondent to issue a resolution allocating 50.42 Pine Barrens Credits to the property.

The petitioners' property, designated as Suffolk County Tax Map 900-248-1-110.4, is a separately assessed tax lot located in Westhampton, New York. In 1994, and again in 1997, the

respondent granted hardship exemptions to allow the petitioners to construct storage buildings and to add parking areas and roadways to expand the existing storage facility on the property. It is undisputed that those buildings currently cover 1.88 acres of the property and that, in total, the buildings, paved areas, and dirt roads cover 7.69 acres, leaving 44.61 acres undeveloped. The property is situated in the Town of Southampton's Light Industrial 200 (LI-200) zoning district, where a maximum of 20% of the lot area of a parcel may be covered by the area of buildings (see, Town of Southampton Code §§330-5, 330-38). The property is also situated in the Town of Southampton's Aquifer Overlay District, where the amount of disturbance of natural vegetation may not exceed 50% of the area of a nonresidential lot (see, Town of Southampton Code §330-67).

The respondent is a commission consisting of the Suffolk County Executive, the supervisors of the towns of Brookhaven, Riverhead and Southampton, and a fifth member appointed by the Governor, created under article 57 of the Environmental Conservation Law (ECL §§57-0103, 57-0119).

Article 57 of the Environmental Conservation Law, which was designed to protect the Long Island Pine Barrens and the underlying aquifer, was amended in 1993 by the enactment of the Long Island Pine Barrens Protection Act ("Act"). The Act, apart from establishing the respondent commission, designated a Core Preservation Area and a Compatible Growth Area within the Central Pine Barrens (ECL §57-0109 [2]), and directed the respondent to prepare and oversee the implementation of a Comprehensive Land Use Plan ("Plan") to preserve the Core Preservation Area through acquisition and transfer of development rights and to accommodate orderly development in the Compatible Growth Area consistent with protecting the existing resources (ECL §57-0121). On June 28, 1995, the Plan was adopted. Chapter 6 of the Plan creates the Pine Barrens Credit Program ("Program"), the purpose of which is to maintain value in lands designated for preservation or protection under the Plan by providing for the allocation, use, and transfer of development rights known as Pine Barrens Credits ("PBCs") and to promote development which is compact, efficient and orderly. Section 6.3 of the Plan sets forth a method for allocating PBCs for property in the Core Preservation Area based on the zoning class and size of the property, with nonresidential property within the LI-200 zoning district allocated 1.0 PBCs per acre, rounded upward to the nearest one-hundredth. Section 6.3.3 provides for the following limitations to the allocation of PBCs:

> 6.3.3.1. No allocation shall be made for any property owned or held by a public agency, municipal corporation or governmental subdivision, including property held by reason of tax default.
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> 6.3.3.2. No allocation shall be made for any property for which the development rights have previously been fully used, or allocated for use, under this Plan or any other program.
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> 6.3.3.3. No allocation shall be made for any property owned or held for the purpose of land protection, preservation or conservation.

> 6.3.3.4. Partially improved parcels shall receive a decreased allocation based upon the extent of improvement. Furthermore, there shall be a proportional decrease in allocation based upon the receipt of all discretionary permits for improvement of a parcel * * *.

Section 6.6 directs the establishment of a Pine Barrens Credit Clearinghouse ("Clearinghouse") to promote the use and sale of PBCs, and to purchase, sell and track PBCs. Section 6.7 sets forth the procedures for the issuance of Pine Barrens Credit Certificates by the Clearinghouse, including the submission of an application to the Clearinghouse to obtain a Letter of Interpretation stating how many PBCs can be allocated to a parcel of land, and the process by which an applicant can appeal an allocation with which it is dissatisfied to the respondent.

In December 2006, the petitioners applied to the Clearinghouse for a Letter of Interpretation requesting a statement of the number of PBCs that could be allocated to their property. By letter dated January 3, 2007, the Clearinghouse advised that no PBCs could be allocated to the property, noting, in part, that the property had maintained value due to the ongoing storage operation. The petitioners subsequently appealed to the respondent and a public hearing was held on April 18, 2007. By resolution dated June 20, 2007, the respondent upheld the Clearinghouse's determination and denied the appeal noting that the Act had not prevented the reasonable use of the property and that the decision to allocate no PBCs was rationally based on the extent of improvements at the property. On July 19, 2007, the petitioners commenced an article 78 proceeding to annul the prior determinations and to compel the respondent to allocate 50.42 PBCs to the property. By "order" dated January 16, 2008, as corrected January 25, 2008, this Court (Pines, J.) denied the petition and dismissed the proceeding and the petitioners appealed.

By order and decision (one paper) dated November 4, 2009, the Appellate Division modified the judgment by granting that branch of the petition which was to annul the prior determinations and remitting the matter to the respondent to determine the proper number of PBCs to be allocated to the property (67 AD3d 689 [2nd Dept., 2009]). The Appellate Division found, in part, that the respondent had erroneously based its determination on findings that value had been maintained in the property and that implementation of the Act had not prevented the reasonable use of the property since the petitioners could have developed and used several additional acres of the property but for the adoption of the Act; to the contrary, the Appellate Division concluded that the value of the property had decreased with the passage of the Act and would not be maintained without the issuance of PBCs for the undeveloped portion. The Appellate Division also found that the mere existence and use of the storage facilities would not prevent the petitioners from obtaining an allocation of PBCs for the undeveloped portion of the property, as section 6.3.3.4 of the Plan contemplates only a decreased allocation based on the extent of improvements and does not completely displace the right to an allocation of PBCs. However, the Appellate Division found that this Court had properly declined to compel the respondent to allocate 50.42 PBCs to the property, as the petitioners had failed to establish a clear right to the requested allocation. "Notably, inter alia, such an allocation fails to account for

the fact that only 20% of the Property could have been developed under the Town Code absent the adoption of the Act" (id. at 695).

On April 21, 2010, a public hearing was convened to determine the proper number of PBCs to be allocated to the property. At the hearing, the petitioners again requested an allocation of 50.42 PBCs, computed by taking the total acreage of the property (52.3 acres) net of the acreage already improved with buildings (1.88 acres), and allocating 1.0 PBC per acre. The petitioners also argued against any interpretation of the Program which would result in limiting an allocation of PBCs to the percentage of land that could be developed under the zoning code and objected to the consideration of any of the numerous exhibits introduced by the respondent's attorney which were not a part of the record on the prior appeal.

By resolution dated July 6, 2010, the respondent–noting that the regulations governing the Town of Southampton's Aquifer Overlay District proscribe the disturbance of more than 50% of the area of a nonresidential lot–allocated 18.46 PBCs to the property, computed by taking the total acreage of the property subject to development (26.15 acres) net of the acreage already covered by buildings, paved areas and dirt roads (7.69 acres) and allocating 1.0 PBC per acre. This proceeding ensued.

The petitioners now seek to annul the July 6, 2010 resolution and to compel the respondent to allocate 50.42 PBCs to the property. Alternatively, the petitioners seek to compel the respondent to allocate 42.9 PBCs to the property, computed by taking the total acreage of the property (52.3 acres), allocating 1.0 PBC per acre and then reducing the allocation proportionally by 17.9%, a percentage representing the ratio of the acreage already improved with buildings (1.88 acres) to the acreage which could be covered by buildings (10.46 acres, *i.e.*, 20% of the total acreage of the property). The petitioners contend that the respondent's determination is affected by an error of law, arbitrary and capricious, an abuse of discretion, irrational and a violation of Appellate Division's order (i) because the Program does not permit the respondent to limit an allocation of PBCs for a nonresidential property within the LI-200 zoning district based on the number of acres that could be disturbed pursuant to the regulations governing the Town of Southampton's Aquifer Overlay District, (ii) insofar as it is based on factual and legal arguments not raised on the prior appeal, (iii) to the extent that the respondent considered benefits obtained by the petitioners in connection with other parcels of land, (iv) because it does not allocate PBCs for the undeveloped portion of the property, so that value has not been maintained, and (v) because it ignores the language of the Program providing that "[p]artially improved parcels shall receive a decreased allocation based upon the extent of improvement" and that "there shall be a proportional decrease in allocation based upon the receipt of all discretionary permits for improvement of a parcel."

Where, as here, an administrative board is not required by statute or law to conduct a quasi-judicial hearing, judicial review of the board's determination is limited to whether the action taken was illegal, arbitrary and capricious, or an abuse of discretion (CPLR §7803 [3]; Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222 [1974]; Matter of Halperin v. City of New

Rochelle, 24 AD3d 768 [2nd Dept., 2005], *appeals dismissed* 6 NY3d 890, *lv denied* 7 NY3d 708 [2006]). In applying the "arbitrary and capricious" standard, a court looks only to whether the determination lacks a rational basis, *i.e.*, whether it was without sound basis in reason and without regard to the facts (id.). The burden is on the petitioner to show that there is no rational basis for the board's determination (see, Matter of Grossman v. Rankin, 43 NY2d 493 [1977]). A court may not substitute its judgment for that of the board (see, Matter of Ball v. New York State Dept. of Envtl. Conservation, 35 AD3d 732 [2nd Dept., 2006]). When a board sets forth multiple reasons for its determination, any one of which is supported by a rational basis, the determination will be sustained (see, Matter of Logiudice v. Southold Town Bd. of Trustees, 50 AD3d 800 [2nd Dept., 2008]).

Upon review, it cannot be said that the respondent's determination lacked a rational basis. Pursuant to chapter 6 of the Plan, PBCs are transferable development rights issued in exchange for the placement of a conservation easement on property, and are intended to protect a property owner from a confiscatory taking by maintaining value in the property (see, Matter of Toussie v. Central Pine Barrens Joint Planning & Policy Commn., 182 Misc 2d 582 [Sup. Ct., Suffolk County, 1999]). More particularly, PBCs are intended to compensate the owner, in effect, for the loss of development rights which he or she would have enjoyed but for the passage of the Act (see id.)–a point recognized by the Appellate Division when it noted that the petitioners' request for an allocation of 50.42 PBCs failed to account for the fact that only a fraction of the property could be developed (67 AD3d at 695). Thus, it is not unreasonable to conclude, as the respondent did, that if a property owner who chooses to participate in the Program has lost the right to develop 18.46 acres by reason of the passage of the Act, and PBCs are issued one per acre, the owner should be allocated 18.46 PBCs. The petitioners' arguments to the contrary are without merit. Although section 6.3.3 of the Plan does not expressly authorize the respondent to limit or cap an allocation of PBCs based upon restrictions on development set forth in a zoning code, it does not purport to list all the limitations applicable to an allocation of PBCs and, therefore, cannot be said to prohibit the respondent from considering such restrictions either.[1] That the effect of the regulations governing the Town of Southampton's Aquifer Overlay District may not have been raised or considered by the respondent in connection with its initial determination in 2007 is irrelevant, as there is nothing in the order of remittitur to bar the respondent from considering such proof. Assuming further that the petitioners are correct in asserting that the respondent has, on at least two prior occasions, allocated one PBC per acre, without limitation, to property located within the LI-200 zoning district, they have failed to demonstrate that those properties were similarly situated, *i.e.*, partially developed; even if they were, the respondent cannot be bound to perpetuate what it may now perceive to be an error (see, Matter of Cowan v. Kern, 41 NY2d 591 [1977]).

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[1] The maxim "expressio unius est exclusio alterius," while a useful tool in construing a written instrument, should not be applied to defeat the writing's intended purpose (see, Goldstein v. City of Long Beach, 28 AD2d 558 [2nd Dept., 1967]).

Accordingly, the petition is denied and the proceeding is dismissed.

Settle judgment (see, 22 NYCRR §202.48).

So ordered.

Dated: 1/12/2012

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

__X__ FINAL DISPOSITION_____ NON-FINAL DISPOSITION