

SHORT FORM ORDER

INDEX No. 21497-2007

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY**

P R E S E N T :

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 8-10-07
ADJ. DATE 10-11-07
Mot. Seq. # 001 - MD; CASEDISP

-----X-----
 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 and PINE
 BARRENS CREDIT CLEARINGHOUSE,
 :
 Respondents. :
 -----X-----

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ORDERED, that this Petition pursuant to CPLR Article 78 seeking an Order reversing, vacating, annulling and voiding the determination of the respondents, Central Pine Barrens Joint Planning and Policy Commission and Pine Barrens Credit Clearinghouse is denied in its entirety.

Petitioners, Edwin Fishel Tuccio and Patricia Tuccio ("petitioners") commenced this proceeding pursuant to CPLR Article 78 by filing a Notice of Petition and Petition on July 19, 2007. Petitioners seek an Order reversing, vacating, annulling and voiding the determination of respondents which denied their application for an allocation of Pine Barrens Credits for property located in Westhampton, Town of Southampton, Suffolk County New York. The property consists of 52.299 acres and is designated on the Suffolk County Tax Map as district 0900, section 248, block 1, lot 110.004 (hereinafter, the "subject premises"). The subject premises is located in the Core Preservation Area of the Central Pine Barrens.

In or about December, 2006, petitioners applied to the respondent, Pine Barrens Credit Clearinghouse (the "Clearinghouse") for a Letter of Interpretation for the Property for the allocation of Pine Barrens Credits for the subject premises. By letter dated January 3, 2007, the Clearinghouse denied petitioners' request and advised that no Pine Barrens Credits could be allocated for the subject premises. The Clearinghouse did advise, however, that it would reconsider this determination if

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petitioners removed the out buildings and revegetated the subject premises. Petitioners declined this offer and appealed the Clearinghouse denial to respondent Central Pine Barrens Joint Planning and Policy Commission (the "Commission") and a hearing was held on April 18, 2007 before the Commission. By resolution dated June 20, 2007, the Commission unanimously voted to deny the appeal. In the resolution denying the appeal, the Commission made the following findings:

1. Six of the buildings on the Property were developed pursuant to Commission Core Preservation Area Hardship Exemption;
2. The value has been maintained in the Property and the larger Tuccio holdings given the combination of acquisitions, hardships, allocation of Pine Barrens Credits, and the use, in part, of the Pine Barrens Credit Program to resolve title problems associated with a 75 acre portion of the Tuccio holdings;
3. In light of the number of buildings constructed on the Property pursuant to hardship exemptions and continuing use of the facility, value has been maintained in the Property;
4. The determination to deny allocation of Pine Barrens Credits is based on the extent of the improvement of the Property; and
5. The implementation of the Long Island Pine Barrens Protection Act of 1993 has not prevented reasonable use of the Property.

With regard to the development of the property, the following facts, as set forth in the Memorandum of Law in opposition to the Petition, appear uncontested. In the 1980's, petitioners inherited approximately 403.5 acres of property, including the subject premises, in the Core Preservation Area. The Nature Conservancy purchased 275 acres of this parcel from petitioner in 1986 for \$2.75 million dollars and petitioners retained approximately 125 acres. Thereafter, approximately 75 acres of the remaining 125 acres was the subject of a bar claim action, resolved by the placement of a conservation easement on 50 of the disputed 75 acres. In January of 2005, the Commission issued 50 Pine Barrens Credits to various title-holders, including 27 Pine Barrens Credits to petitioners. Petitioners subsequently sold their 27 Pine Barrens Credits for approximately \$1.6 million dollars. The remaining 52.3 acres is the subject of this Article 78 proceeding.

Petitioners argue that the determination of the Commission denying the appeal of the Clearinghouse denial of allocation of Pine Barren Credits to the remaining 52.3 acre parcel was arbitrary and capricious and unsupported by substantial evidence. Petitioners further argue that respondents' determination denied petitioners rights under the Constitution, Amendments V and XIV, in that it deprived them of property without due process and just compensation. Petitioners also argue that the determination of respondents' was untimely in that it was rendered more than sixty (60) days after the public hearing on April 18, 2007. Petitioners take issue with respondents' findings which relied on the Central Pine Barrens Comprehensive Land Use Plan (the "Plan") §6.1, in that the value of the property has been maintained. Petitioners argue that their intent is to maintain the undisturbed portion of the property, to wit, 50.42 acres of the 52.299 acre parcel, and the hardship exemptions previously granted

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are not dispositive of the relief sought herein. Petitioners assert they are in full compliance with the Pine Barrens Act and that they simply seek to receive Pine Barrens Credits for the portion of the subject premises they will maintain without future development.

Respondents submit a Verified Answer with Certified Return of Record and a Memorandum of Law in opposition to the Petition. Respondents set forth a detailed history of the adoption of the Long Island Pine Barrens Protection Act and the Comprehensive Land Use Plan. Respondents also detail the history of the subject premises and the hardship exemptions previously granted. Specifically, as set forth above, in 1994, the Commission granted petitioners an "extraordinary hardship exemption" to enable petitioners to add two buildings to the existing storage facility on the subject premises. Again, in 1997, the Commission granted a second "extraordinary hardship exemption", allowing petitioners to construct four additional buildings, driveways and parking areas on the subject premises. As a result of this second hardship exemption, a total of 15 buildings are now present and used on the subject premises.

Respondents argue that the subject premises is not entitled to Pine Barrens Credit allocation because the value of the property has been maintained. Respondents assert that the provisions of the Plan which limit the allocation of Pine Barrens Credits on partially improved property and restrict allocation for any property on which the development rights have previously been fully used, justify the denial in the case *sub judice*. Respondents refer to the prior hardship applications granted to petitioners, demonstrating that petitioners elected to expand the income generating potential of the property by increasing the number of buildings on the site. Such election, respondents argue, like petitioners' rejection of the offer to remove the outbuildings and revegetate, demonstrates petitioners' "gainful utilization of the property". Moreover, respondents argue that the overall value of the subject premises has been maintained by virtue of the combination of acquisitions, hardship exemptions and prior Pine Barrens Credits allocated.

With regard to petitioners' claim that the denial of the allocation of Pine Barrens Credits amounts to an unconstitutional taking, respondents argue that this Court lacks subject matter jurisdiction because a "takings" claim cannot be raised in an Article 78 proceeding. Additionally, respondents assert that petitioners have failed to properly plead such claim in that they have not identified any adverse impact resulting from the Commission's resolution.

Finally, respondents argue that petitioners are not entitled to mandamus relief to compel the issuance of Pine Barrens Credits. Respondents argue that petitioners cannot establish entitlement to mandamus because the decision to allocate Pine Barrens Credits, and how many such Credits, rests in the discretion of the Commission and is not a ministerial act.

In reply, petitioners argue that the prior grant of a hardship exemption does not mandate denial of the current application and that the Commission cannot base its determination on the fact that petitioners received Pine Barrens Credits on their other property. Rather, petitioners assert that the prior issuance of a hardship exemption and a proportional allocation of Pine Barrens Credits is a remedy available. Petitioners argue that the failure to allocate Pine Barrens Credits amounts to an impermissible taking and that they are entitled to receive 50.419 Credits based on the amount of undeveloped property. Therefore, petitioners assert that the Petition should be granted in all respects and respondents be

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compelled to allocate the requested Pine Barrens Credits.

The law is well settled that judicial review of administrative agency determinations is limited to whether the action taken by the agency was "illegal, arbitrary and capricious, or an abuse of discretion." *Gjerlow v. Graap*, 43 A.D.3d 1165, 842 N.Y.S.2d 580 (2d Dept. 2007); *citing, Sasso v. Osgood*, 86 N.Y.2d 374, 633 N.Y.S.2d 259, 657 N.E.2d 254. Arbitrary action "is without sound basis in reason and is generally taken without regard to the facts." *Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321. In applying the arbitrary and capricious standard, the Court looks to whether the determination at issue had a rational basis. *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 809 N.Y.S.2d 98 (2d Dept. 2005). *See also, Rendely v. Town of Huntington*, 44 A.D.3d 864, 843 N.Y.S.2d 668 (2d Dept. 2007). In a proceeding seeking judicial review of an administrative action, "the Court may not substitute its judgment for that of the agency responsible for making the determination." *Ball v. New York State Department of Environmental Conservation*, 35 A.D.3d 732, 826 N.Y.S.2d 698 (2d Dept. 2006).

Chapter 6 of the Central Pine Barrens Comprehensive Land Use Plan sets forth the rules and regulations of the Pine Barrens Credit Program. Section 6.1 states that the primary purpose of the Pine Barrens Credit Program is "to maintain value in lands designated for preservation or protection under the Plan for providing for the allocation and use of Pine Barrens Credits (PBCs). The Pines Barrens Credit Program will also promote development which is compact, efficient and orderly, and which is designed to protect the quality and quantity of surface water and groundwater and the long term integrity of the pine barrens ecosystem." Section 6.3.3.4 sets forth limits on the allocation of Pine Barrens Credits for partially developed properties. That section provides that "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."

Respondents rely on *Toussie v. Central Pine Barrens Commission*, 182 Misc.2d 582, 700 N.Y.S.2d 358 (Sup. Ct. Suffolk Co. 1999), in support of their position. In that case, petitioner challenged the Pine Barrens Credit allocation formulas contained in Section 6 of the Central Pine Barrens Comprehensive Land Use Plan as arbitrary, unreasonable and unconstitutional and violative of the Environmental Conservation Law. There, petitioner owned eight single and separate parcels ranging from less than 4,000 square feet to 13,000 square feet in size, in a residential zoning district requiring 20,000 square feet. Petitioner was awarded a total of 1.1 Pine Barrens Credit for all of the parcels and argued that he should have received one full credit for each parcel because they were single and separate. The Court disagreed, finding that if petitioner accepted the Pines Barrens Credits allocated he would have realized a \$9,000 profit on his investment, that the parcels were located more than 1,000 feet from any roads, and that the single and separate ownership did not mandate allocation of one credit per parcel. The Court held that petitioner was compensated for his development rights and thus could not demonstrate an unconstitutional taking. Moreover, the Court reiterated that the process of transferring development rights pursuant to the Plan had withstood constitutional challenge. *Citing, W.J.F. Realty Corp. v. State of New York*, 172 Misc.2d 763. Finally, the Court noted that "In any event, landowners who are dissatisfied with the Pine Barrens Credit Program need not participate in the program. They may seek to develop their own property by permit, or, in limited situations, not available here, as of right."

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In the case *sub judice*, petitioners have not demonstrated that the determination by the respondent Commission was arbitrary and capricious or an abuse of discretion. The Court agrees with respondents that the determination comports with the intent of the Central Pine Barrens Comprehensive Land Use Plan in that the subject premises has clearly maintained its value. Respondents have developed the property as a commercial storage facility and previously obtained two hardship exemptions to expand the facility so that it now currently contains fifteen (15) buildings and driveways and roadways appurtenant thereto. The subject premises, having originally been part of a larger parcel, has yielded value to petitioners in terms of prior allocation of Pine Barrens Credits and the resultant sale thereof. Petitioners have elected to develop the subject premises resulting in the maintenance of its value. Additionally, although the Clearinghouse agreed to reconsider petitioners' application if they agreed to remove certain out buildings located on the property, respondents declined. These factors demonstrate a rational basis for respondents' determination denying the allocation of Pine Barrens Credits.

Petitioners' claim that the denial of the allocation of Pine Barrens Credits amounts to an unconstitutional taking of their property without just compensation is also without merit. Petitioners have not demonstrated any adverse economic impact resulting from the Commission's determination or that the denial has interfered with reasonable investment-backed expectations. *See, Gazza v. State Dept of Environmental Conservation*, 89 N.Y.2d 603, 657 N.Y.S.2d 555, 679 N.E.2d 1035 (1999), citing, *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1997).

The Court has considered petitioners' remaining contentions and find them without merit.

Based upon the foregoing, the Petition is denied in its entirety.

The foregoing constitutes the Decision and Order of the Court.

Dated:

1/16/08

Emily Pines
J.S.C.