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

The Ringhoff Family
Limited Liability Company #1,

Petitioner,

-against-

Central Pine Barrens Joint Planning
and Policy Commission,

Defendants.

Motion Sequence No.: 001; MOT. D
CDISPSUBJ

Motion Date: 8/21/08
Submitted: 12/17/08

Index No.: 26991/2008

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In this article 78 proceeding, the petitioner challenges a resolution of the respondent dated June 18, 2008 which denied the petitioner's request for an increased allocation of Pine Barrens Credits for over 150 acres of its land in the Core Preservation Area of the Central Pine Barrens Reserve. Upon due consideration, the petition is granted to the extent indicated below and is otherwise denied.

The petitioner is the owner of the following five tax lots comprising more than 150 acres of land in Eastport, New York.

Suffolk County Tax Map 200-512-1-15	("Lot 15")	5.116 acres
Suffolk County Tax Map 200-512-1-21	("Lot 21")	4.245 acres
Suffolk County Tax Map 200-562-4-21	("Lot 4-21")	1.337 acres
Suffolk County Tax Map 200-512-1-17	("Lot 17")	0.83 acres
Suffolk County Tax Map 200-512-1-18	("Lot 18")	139.737 acres

All the lots are located along Toppings Path between Hot Water Street (to the north) and County Road 111 (to the south). Lots 15, 21, and 4-21 are triangular lots having road frontage on the west side of Toppings Path. Lot 15 also has road frontage on the south side of Hot Water Street. Lot 18, which completely surrounds Lot 17, has road frontage on the north side of County Road 111 and on the east side of Toppings Path, and is directly across Toppings Path from Lots 15, 21, and 4-21. Lots 17 and 18 are cleared and have historically been used for crop farming, which use continues to the present day.

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 commission 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, 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 based on the size of the property and the "development yield factor" assigned to the residential zone in which property is located as of June 1995, providing that one PBC "shall be allocated" for each single-family dwelling permitted on a residential parcel located within the Core Preservation Area based on the factors set forth below [1]

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[1] It is undisputed that as of June 1995, each of the petitioner's lots was located in the Town of Brookhaven's A Residence 5 zoning district, which allows one dwelling unit per 200,000 square feet, or approximately five acres and which corresponds to a development yield factor of 0.16 PBCs per acre.

Figure 6-1: Pine Barrens Credit Program development yield factors

Provision	If zoning allows:	Then the development yield factor (*) is:
6.3.1.1.1	1 (one) dwelling unit per 10,000 sq. ft	2.70 PBCs per acre (**)
6.3.1.1.2	1 (one) dwelling unit per 15,000 sq. ft	2.00 PBCs per acre (**)
6.3.1.1.3	1 (one) dwelling unit per 20,000 sq. ft	1.60 PBCs per acre (**)
6.3.1.1.4	1 (one) dwelling unit per 40,000 sq. ft	0.80 PBC per acre (**)
6.3.1.1.5	1 (one) dwelling unit per 60,000 sq. ft	0.60 PBC per acre (**)
6.3.1.1.6	1 (one) dwelling unit per 80,000 sq. ft	0.40 PBC per acre (**)
6.3.1.1.7	1 (one) dwelling unit per 120,000 sq. ft	0.27 PBC per acre (**)
6.3.1.1.8	1 (one) dwelling unit per 160,000 sq. ft	0.20 PBC per acre (**)
6.3.1.1.9	1 (one) dwelling unit per 200,000 sq. ft	0.16 PBC per acre (**)
6.3.1.1.10	1 (one) dwelling unit per 400,000 sq. ft	0.08 PBC per acre (**)

(*) These development yield factors are augmented by section 6.3.1.1.12: fractional allocations are rounded upward to the nearest one hundredth (1/100 = 0.01) of a Pine Barrens Credit (PBC).

(**) One acre equals 43,560 sq. ft.

Thus, for a 3.25 acre residential parcel zoned one unit per 40,000 square feet, *e.g.*, the allocation would be 3.25 acres multiplied by 0.80 PBCs per acre, or 2.60 PBCs.) 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. According to records annexed to the respondent's return, most PBCs sold for $100,000.00 per PBC in 2007.

On or about July 9, 2007, the petitioner applied to the Clearinghouse for Letters of Interpretation with respect to its five parcels, seeking an allocation of one PBC per acre, or approximately 151 PBCs. The petitioner argued in support of its application that its request for an award of credits exceeding the development yield was justified given that each of the lots has frontage on either County Road 111, Toppings Path, or Hot Water Street, all of which are maintained

as public roads, and in light of prior determinations by the Clearinghouse concerning similarly situated parcels. The Clearinghouse subsequently issued Letters of Interpretation allocating a total of only 24.22 PBCs to the petitioner, based on the allocation formula set forth in section 6.3.1 of the Plan.

By letter dated August 23, 2007, the petitioner appealed the Letters of Interpretation to the respondent, again requesting an allocation of one PBC per acre. A public hearing was held on October 17, 2007 at which the petitioner and its attorney testified and submitted evidence. The petitioner thereafter supplemented the hearing record and addressed issues raised during the hearing in submissions dated December 14, 2007, February 26, 2008, March 18, 2008, and May 19, 2008. By letter dated December 14, 2007, the petitioner offered an alternative appeal request, *i.e.*, 0.5 PBCs per acre for Lots 17 and 18, and one PBC each for Lots 21, 4-21, and 15.[2]

By resolution dated June 18, 2008, the respondent denied the petitioner's appeal in its entirety, based on the following findings:

- that Toppings Path adjacent to Lots 21 and 4-21 is not an existing improved road.

- that Hot Water Street adjacent to Lot 15 is not an existing improved road.

- that since its April 4, 2001 decision granting an appeal by Joseph Gazza, the respondent has in no fewer than three decisions rejected appeals for parcels which are not on existing improved roads (McConnell, February 6, 2002; Joseph Zachary Gazza, December 11, 2002; Joseph Gazza, April 19, 2006) and has thus disavowed its April 4, 2001 decision.

- that the denial of the petitioner's appeal as to the "triangular lots" (Lots 15, 21, and 4-21) is consistent with its October 2, 1996 decision denying an appeal by George Nicholson and with its March 8, 2000 decision denying an appeal by John Andersen, in which the respondent found that no unique or additional features of the parcels were identified.

- that because none of the triangular lots front on an existing improved road but rather are approximately 250 feet from an existing improved road, those lots differ from the parcels at issue in the appeals by Alberto/Sipala, Expressway 60 Patent, and Martha Backus, et al. in which the applicants received allocations of no fewer than one PBC per acre and, instead, are similar to the parcels involved at issue in the appeal by John Andersen.

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[2] Section 6.7.6.6 of the Plan provides that the Clearinghouse may elect to allocate one full PBC for a parcel of land consisting of at least 4,000 square feet with frontage on an existing improved road.

• that Lot 18[3] is not similar to the parcels at issue in the appeals by Alberto/Sipala, Expressway 60 Patent, and Martha Backus, et al. because it was created by the merger of numerous old filed map lots and is subject to the Town of Brookhaven's A Residence 5 zoning requirements.

• that the continued agricultural use of Lots 17 and 18 provides the petitioner a reasonable use of the parcel, particularly as the petitioner could apply for and receive 22.50 PBCs for the lots and continue to farm them under the Pine Barrens Credit Program.

This proceeding ensued.

The petitioner contends that the respondent acted arbitrarily and capriciously in refusing to grant the same one PBC per acre as it did in previous appeals based on substantially similar facts, in claiming to have disavowed its April 4, 2001 decision granting an appeal by Joseph Gazza, in basing its road analysis on the current state of the roads and in finding that neither Toppings Path nor Hot Water Road is an "existing improved road."

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 (see, 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 (see, 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 Environmental 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]).

Initially, the Court deems it appropriate to sustain the respondent's determination with respect to Lots 17 and 18. Among the bases cited by the respondent for denying the petitioner's appeal was its finding regarding the petitioner's continued use of Lots 17 and 18 for farming.[4]

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[3] The resolution mistakenly refers in this regard to "Lot 17"; this is presumably a typographical error.

[4] Section 5.2 of the Plan provides that any existing activity involving agriculture is an allowable use in the Core Preservation Area.

Section 6.1 of the Plan 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 * * *." Given the continued agricultural use, it cannot be said that an allocation of PBCs consistent with the development yield factors set forth in section 6.3.1 of the Plan, as here, would not suffice to maintain the value of the subject parcel. The petitioner, moreover, has failed to demonstrate the existence of any precedent granting an increased allocation (*i.e.*, an award exceeding the development yield) for a cultivated parcel; section 6.3.3.4 of the Plan, in fact, contemplates that parcels which are partially improved shall receive a *decreased* allocation based on the extent of the improvement. Thus, irrespective of whether the respondent may previously have granted increased allotments of PBCs to other parcels subject to similar zoning requirements and which fronted on similarly improved roads, the Court finds that the denial of the petitioner's appeal as to Lots 17 and 18 is not without a rational basis.

The respondent's determination with respect to Lots 21 and 4-21 is likewise sustained. While it appears that the respondent has historically approved increased allocations for parcels fronting on improved roads, there is ample support in the record for the finding that Toppings Path is not an improved road in the area adjacent to these lots and, hence, that neither lot fronts on an improved road. To the extent that the petitioner relies on limited precedent (Joseph Gazza, April 4, 2001) in which the respondent awarded one PBC for a 1.15 acre parcel located on an unimproved dirt road (presumably pursuant to section 6.7.6.6 of the Plan), the Court notes the express reference in the June 18, 2008 decision not only to the respondent's disavowal of that precedent, but also to the existence of several appeals decided subsequent thereto reflecting the respondent's retreat from its earlier decision. "[A]n agency has the power and obligation to rectify what it deems to be an erroneous interpretation of the law or an injudicious policy. A shift in agency position to ensure affecting [sic] the statute's purpose serves to indicate heightened agency conscientiousness, not arbitrariness" (see, Matter of Delese v. Tax Appeals Trib. of State of N.Y., 3 AD3d 612 [3rd Dept., 2004], quoting Matter of AT&T Info. Sys. v. Donohue, 113 AD2d 395 [3rd Dept., 1985] [Yesawich, Jr., J., dissenting], *revd on dissenting op of Yesawich, Jr., J.*, 68 NY2d 821 [1986]). The Court also perceives no error in the respondent's implicit finding that the phrase "existing improved road" refers to whether the road is currently improved and not, as the petitioner claims, whether the road was improved at the time the Plan was adopted in 1995; the respondent's reading of the phrase is consistent both with its plain meaning and with the proper consideration of this factor in assessing a parcel's current potential for development in accordance with the purposes of the Pine Barrens Credit Program.

The Court is constrained, however, to annul the respondent's determination with respect to Lot 15. Although Lot 15 fronts on both Hot Water Street and Toppings Path, the respondent made no finding as to whether Toppings Path is an improved road in the area adjacent to Lot 15. Accordingly, the petition is granted to the extent of vacating the respondent's determination with respect to Lot 15, and the matter is remitted to the respondent to determine, following a further

hearing if necessary, whether Toppings Path is an improved road in the area adjacent to Lot 15 and if so, whether the petitioner is entitled to receive additional PBCs.[5]

Settle judgment.

So ordered.

Dated: April 8, 2009

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

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[5] While the respondent also claims that a denial of the appeal for Lot 15 is consistent with its October 2, 1996 decision denying an appeal by George Nicholson and with its March 29, 2000 decision denying an appeal by John Andersen, the Court notes that each of those appeals was denied based–at least in part–on a finding that no unique features of the parcels were identified, a finding which the respondent did not make with respect to Lot 15.