



Commission Meeting of July 6, 2010

Brookhaven Town Hall

1 Independence Hill, Farmingville, NY

Present: Mr. Scully (for New York State), Mr. Isles (for Suffolk County), Ms. Prusinowski (for Brookhaven), Mr. McCormick (for Riverhead) and Mr. Shea (for Southampton)

Resolution on Credit Appeal for Edwin Fishel Tuccio and Patricia Tuccio

SCTM # 900-248-1-110.4

East of CR 31 and North of Gabreski Airport
Westhampton, NY

Peter A. Scully
Chair

Mark Lesko
Member

Steve A. Levy
Member

Anna E. Throne-Holst
Member

Sean M. Walter
Member

Whereas, on July 13, 1993, the Long Island Pine Barrens Protection Act (the "Act") was adopted which, *inter alia*, created the Central Pine Barrens Joint Planning and Policy Commission (the "Commission"), and mandated the preparation of a comprehensive regional land use plan for the Central Pine Barrens, and

Whereas, in enacting the Act, the "legislature intend[ed] that a comprehensive regional land use plan be implemented whereby private landowners whose property is located within the Central Pine Barrens area are afforded an opportunity to receive benefits from the plan such as transferable development rights, conservation easements, rights and values transfers, purchase of development rights and/or fee acquisition with monetary compensation," and

Whereas, the Act also contains provisions by which a person demonstrating that compliance with the Act and/or the Plan causes extraordinary hardship may petition the Commission for a waiver of the application of such provisions to the applicant's particular development project, and

Whereas, on June 28, 1995, the Commission adopted its Comprehensive Land Use Plan (the "CLUP") containing a transferable development rights program, known as the Pine Barrens Credit Program set forth in Chapter 6 of the CLUP, (*See, Exhibit E*), and

Whereas, according to the CLUP, the "primary purpose of the Pine Barrens Credit Program [is] to maintain value in lands designated for preservation or protection under the [CLUP] by providing for the allocation and use of Pine Barrens Credits", (*See, Exhibit E*), and

Whereas, by resolution dated August 7, 1996, the Commission adopted a formula for allocating Pine Barrens Credits to non-residentially zoned property and pursuant to such formula property in the Light Industrial 200 District shall be eligible to receive 1.0 Pine Barrens Credit per acre, (*See, Exhibit F*), and

Whereas, the CLUP states that “[f]or the purpose of computing the allocation of Pine Barrens Credits, a parcel of land is defined as a separately assessed tax lot,” but does not specify the date the lot must exist, and

Whereas, the CLUP contains a minimum allocation provision which provides, “no fewer than 0.10 (one tenth) Pine Barrens Credit shall be allocated by the Clearinghouse or the Commission for any parcel of land, regardless of its size or road accessibility,” and

Whereas, the CLUP did not specify the date on which a parcel must have existed as a separately assessed tax lot for Pine Barrens Credit allocation purposes (*See, Exhibit N*), creating the unintended consequence whereby a landowner could repeatedly subdivide a parcel to increase its Pine Barrens Credit minimum allocation to vastly more credits than would have been allocated to the parcel as it existed on the date that the CLUP was adopted, and

Whereas, the Commission staff concluded that “[t]his could be a substantial issue and [could permit] potential abuse of the Clearinghouse program should parcels be newly subdivided (post 1995) in the Core Preservation Area,” and thereafter recommended that when allocating Pine Barrens Credits to a parcel that did not exist as a separately assessed tax lot on June 28, 1995, that the Commission instead base its allocation on the June 28, 1995 tax map parcel of which such parcel was a part, (*See, Exhibit N*), and

Whereas, on December 20, 2006, the Commission accepted the staff recommendation by adopting a resolution establishing the CLUP adoption date of June 28, 1995 as the date on which a parcel must have existed as a separately assessed tax parcel in order to be eligible for a Pine Barrens Credit allocation, (*See, Exhibit N*), and

Whereas, the status of a parcel on June 28, 1995 thus represents the starting point of any allocation analysis and in order to determine the exact number of Pine Barrens Credits to allocate to any given parcel, the Commission must then apply the CLUP’s specific Pine Barrens Credit allocation rules, and

Whereas, the allocation rules provide, *inter alia*, that no allocation shall be made for property owned by a governmental subdivision, for property for which the development rights have previously been fully used or allocated for use under the CLUP, for property owned or held for the purpose of land protection, preservation or conservation, that partially improved parcels shall receive a decreased allocation based upon the extent of improvement and that Pine Barrens Credits will be allocated upon, “the allocation formula and any unique features of a particular parcel of land,” (*See, Exhibit E*), and

Whereas the Commission’s failure to apply those factors could result in, in among other things, the allocation of Pine Barrens Credits for property owned or held by a public agency, municipal corporation or governmental subdivision, or to property for which the development rights have been previously fully used, or allocated for use, under the Plan, (*See, Exhibit E*), and

Whereas, on September 19, 1940, Edwin D. Fishel acquired 403 acres in the Town of Southampton from the County of Suffolk for One Hundred and Seventy-Nine Dollars and Ninety-Eight Cents (\$179.98), (hereinafter the “Tuccio Holding”), (*See, Exhibit B*), and

Whereas, on October 18, 1990, the Suffolk County National Bank as Executor and Trustee under the Last Will and Testament of Ethel B. Fishel conveyed the Tuccio Holding to Patricia Tuccio and Edwin F. Tuccio, (the “Tuccios”), (*See, Exhibit C*), and

Whereas, the Tuccio Holding is located within Light Industrial 200 District in the Core Preservation Area of the Central Pine Barrens in the Town of Southampton, and on July 13, 1993 was partially improved with various buildings, some of which were used as a commercial mini-storage facility, and

Whereas, on August 12, 1994, the Commission approved by resolution, a Core Preservation Hardship application submitted by the Tuccios for permission to construct two, one-story steel framed storage buildings on the Tuccio Holding, (*See, Exhibit D*), and

Whereas, on October 22, 1996, the Tuccios sold 275 acres of the Tuccio Holding to The Nature Conservancy for \$2,750,000 and after the sale the Tuccios retained title to approximately 128.5 acres of the Tuccio Holding, (*See Exhibit G*), and

Whereas, The Nature Conservancy transferred the portion of the Tuccio Holding it acquired to New York State, and thus although this portion of the Tuccio Holding existed on the June 28, 1995 tax map parcel owned by the Tuccios, according to CLUP Sections 6.3.3.1 and 6.3.3.3 it is not eligible to receive Pine Barrens Credits because Pine Barrens Credits shall not be allocated to property owned by a government subdivision or for purpose of land protection, preservation or conservation, and

Whereas, on October 8, 1997, the Commission approved by resolution, a second Core Preservation Hardship application submitted by the Tuccios for permission to construct four additional storage buildings totaling 24,000 square feet to expand the commercial mini-storage facility on a portion of the Tuccio Holding, (*See Exhibit H*), and

Whereas, in the 1998 Suffolk County Real Property Tax Service tax map book, a 52.3 acre portion of the Tuccio Holding was assigned the unique Suffolk County Tax Map number 900-248-1-110.4 (hereinafter the “Tuccio Property”), (*See, Exhibit O*), and

Whereas, as of April 21, 2010, the commercial self-storage facility was located on the Tuccio Property, and

Whereas, pursuant to a May 25, 2004, Stipulation of Settlement, the Tuccios resolved a title dispute affecting approximately 75 acres of the Tuccio Holding by granting a conservation easement to the Commission on fifty acres of the Tuccio Holding in exchange for 50 Pine Barrens Credits, (*See, Exhibits K and L*), and according to CLUP Section 6.3.3.2, this portion of the Tuccio Holding is not eligible to receive Pine Barrens Credits because Pine Barrens Credits shall not be allocated to property for which the development rights have been

previously used under the CLUP, and

Whereas, the Tuccios retained title to 27 Pine Barrens Credits and conveyed 23 Pine Barrens Credits to other parties involved in the title dispute in order to settle the title dispute, and

Whereas, as of April 21, 2010 the Tuccios have sold 21 of their Pine Barrens Credits for a total of \$1,520,000.00, (*See, Exhibit M*), and

Whereas, in 2006, the Tuccios applied for a Letter of Interpretation for the Tuccio Property and on January 3, 2007 the Pine Barrens Credit Clearinghouse issued a Letter stating that no Pine Barrens Credits would be allocated to the 52.3 acre parcel, (*See, Exhibit R*), and

Whereas, the Tuccios appealed this determination to the Commission and the Commission by resolution dated June 20, 2007 denied the appeal, (*See, Exhibits S and T*), and

Whereas, the Tuccios commenced an Article 78 action concerning the Commission's decision and by decision dated January 16, 2008 and corrected on January 25, 2008, Justice Emily Pines of Supreme Court, Suffolk County upheld the Commission's decision, (*See, Exhibit U*), and

Whereas, the Tuccios successfully appealed the Supreme Court decision and by decision dated November 4, 2009, the Second Judicial Department of the Appellate Division, reversed the January 2008 Supreme Court decision and remitted the matter to the Commission to determine the proper number of Pine Barrens Credit that are to be allocated to the Tuccio Property, and

Whereas, in order to determine the proper number of Pine Barrens Credits to be allocated to the Tuccio Property, the Commission needed to fully develop the record to, among other things, consider the effect of its December 2006 resolution on the Tuccio's application and to determine the number of Pine Barrens Credits to allocate to the Tuccio Property given the Second Department's instruction that the Tuccio Property was entitled at "least to some allocation of Pine Barrens Credits," for various reasons and that the Tuccios "could have developed and used approximately 7.16 additional acres" of the Tuccio Property, (*See, Exhibit A*), and

Whereas, to develop a record, the Commission held a public hearing on the remitted matter on April 21, 2010 during which the Commission staff introduced 23 exhibits and the Tuccios by their attorney, Michael G. Kruzynski of Lewis Johs Avallone Aviles, LLP, introduced a two page report from the Tuccios and the record from the proceeding to the Second Judicial Department, and

Whereas, during the hearing, the Tuccios by their attorney, Mr. Kruzynski, demonstrated that buildings presently cover 1.88 acres of the 52.3 acre parcel, and

Whereas, the Tuccios by their attorneys, submitted correspondence dated May 3, 2010 objecting to the exhibits introduced by the Commission during the hearing, and

Whereas, in a letter dated August 9, 2006 to Murray Schneps, Esq., Joseph A. Ingegno, Land Surveyor, reviewed the Tuccio Property and determined that 7.69 acres are covered with “[r]oofed over buildings,” “[p]aved areas” and “[d]irt roads” and 44.61 acres were “undeveloped.” Mr. Schneps represented the Tuccios before the Commission in connection with their application for Pine Barrens Credits and provided the letter to the Commission in August 2006, (*See, Exhibit Q*), and

Whereas, under the Town of Southampton Code, the maximum coverage permitted on parcels within the LI-200 Light Industry District is 20% and according to the Code, lot coverage is defined to be “[t]he portion of the lot area covered by the area of a building or buildings,” and thus excludes dirt, roads and paved areas, (*See, Exhibit W*), and

Whereas, the Tuccio Property is also located in the Town of Southampton’s Aquifer Protection Overlay District and the District’s regulations proscribe the disturbance of more than fifty percent (50%) of the natural vegetation on such parcels or 26.15 acres of the Tuccio Property, and

Whereas, development of the Tuccio Property, in addition to complying with the Town Code, must also comply with the Act and the CLUP, and

Whereas, notwithstanding any ordinance, rule or regulation, and assuming that the Tuccios need only demonstrate compliance with the Town Code, approximately 8.58 additional acres of the Tuccio Property could be developed and natural vegetation could be disturbed from up to 18.46 additional acres of the Tuccio Property (26.15 acres -7.69 acres), and

Whereas, the subject action is an unlisted action pursuant to the NYS Environmental Quality Review Act, and

Whereas, the Commission prepared a short Environmental Assessment Form for unlisted actions and performed an uncoordinated SEQRA review, pursuant to New York Code Rules and Regulations Part 617, now therefore be it

Resolved, that the further development of the Tuccio Property as defined by the Act is subject to the jurisdiction of the Commission, and be it further

Resolved, that the Commission finds that by its December 20, 2006 resolution it established the date at which a parcel is analyzed for purposes of the allocation of Pine Barrens Credits as June 28, 1995, and be it further

Resolved, the Commission finds application of its December 20, 2006 resolution to the Tuccio Property requires that the CLUP’s provisions and its August 7, 1996 resolution be applied to the Tuccio Holding, and be it further

Resolved, pursuant to the CLUP Sections 6.3.3.1 and 6.3.3.3 no allocation can be made to the 275 acres of the Tuccio Holding sold to The Nature Conservancy, and be it further

Resolved, pursuant to CLUP Section 6.3.3.2 no additional Pine Barrens Credit allocation can be made to the 50 acres of the Tuccio Holding encumbered by the Commission's conservation easement, and be it further

Resolved, in allocating Pine Barrens Credits to the Tuccio Property, the Commission must maintain value in the Tuccio Holding and the benefits obtained by the Tuccios for the Tuccio Holding must be considered in reviewing the uniqueness of the Tuccio Property and in making a Pine Barrens Credit allocation to the Tuccio Property, and be it further,

Resolved, pursuant to the Commission's December 20, 2006 resolution, all of the benefits obtained from the Tuccio Holding can be considered in determining whether value has been maintained in the Tuccio Property, and be it further

Resolved, the Commission finds that the Tuccio Property is partially improved with the existing commercial mini-storage facility, and the full development of the Tuccio Property under the Town Code would authorize the coverage of 8.58 additional acres of the Tuccio Property and the disturbance of natural vegetation from 18.46 acres of the Tuccio Property, and be it further

Resolved, the Commission finds that if the prohibition on development in the Core Preservation Area of the Central Pine Barrens without the Commission's approval did not apply to the Tuccio Property, under the Town Code, the Tuccios could disturb the natural vegetation from 26.15 acres of the Tuccio Property and within such area cover, as that term is defined by the Town Code, is an additional 8.58 acres, and be it further

Resolved, that the natural vegetation from 7.69 acres of the Tuccio Property has already been disturbed and for purposes of allocating Pine Barrens Credits to the Tuccio Property is equal to the extent of improvement, and be it further

Resolved, the Commission finds that the maximum extent of improvement possible on the Tuccio Property is limited by the Town's Aquifer Overlay District regulations which prohibit disturbing the natural vegetation from more than 26.15 acres of the site, and be it further

Resolved, due to the partially improved nature of the Tuccio Property, the Commission allocates 18.46 Pine Barrens Credits to the Tuccio Property (total area of the Tuccio Property from which natural vegetation could not be disturbed (26.15) less existing coverage (7.69)), and be it further

Resolved, that the allocation of 18.46 Pine Barrens Credits and the combination of the acquisition, Pine Barrens Credits previously issued, the granting of two hardship approvals,

the existence of commercial enterprise on the Tuccio Property maintains value in the Tuccio Holdings, and be it further

Resolved, that the allocation of 18.46 Pine Barrens Credits to the Tuccio Property is an unlisted action pursuant to the New York State Environmental Quality Review Act and be it further

Resolved, on the basis of the Short Environmental Assessment Form and Negative Declaration prepared for this action, the Commission finds that this Action will not result in a significant adverse impact to the environment.

Motion by: Mr. Scully

Seconded by: Mr. Shea

Vote:

Yes: 5

No: 0