

**Pine Barrens Credit Appeal
of George and Inge Schmelzer**

Contents:

- Excerpt from 6/30/99 Commission minutes, with initial approval
- Written appeal decision adopted 9/1/99



Commission Meeting Summary (FINAL)
for Wednesday, June 30, 1999 (Approved 7/21/99)
Riverhead Town Hall
East Main Street and Howell Avenue; Riverhead, NY
2:00 pm

Commission members present: Mr. Proios (for Suffolk County), Mr. Girandola and Ms. Wiplush (for Brookhaven; Mr. Girandola voting unless otherwise noted), Mr. Villella (for Riverhead), Mr. Cannuscio and Mr. Shea (for Southampton; Mr. Cannuscio voting when present) and Mr. Cowen (for New York State).
...

Pine Barrens Credit Program

! Schmelzer / Manorville (Brookhaven) / credit appeal: decision (*hearing held 4/28; decision postponed on 5/19 until today*)

Summary: Mr. Rigano summarized the facts of the appeal, explaining that 5.28 Pine Barrens Credits were offered through a Letter of Interpretation, that the parcel is approximately 2,780 feet from a road, and is without legal access. A brief discussion ensued, in which it was decided that the draft decision will not be accepted by the Commission. Rather, a motion was made by Mr. Cowen and seconded by Mr. Girandola to not increase the Pine Barrens Credit allocation to the Schmelzer / Manorville property. In a brief discussion on the motion, Mr. Proios noted that the applicant has not provided any credible evidence why the credit allocation should be increased or the development yield factors changed. The motion was then approved by a 4-1 vote, with the dissenting vote cast by Mr. Villella.

Mr. Schmelzer then asked whether the Commission has the map of old roads that he had provided to the Commission. The staff explained that they did not have it with them, but that they would return it. Mr. Schmelzer then stated that he does have legal access, that the property has been rezoned over the years from 2 acre to 5 acre lots, and that he has paid over \$5,400 in taxes on the parcel. He asked whether the Commissioners would pay taxes on it if it were worthless. Mr. Proios explained that the Commission has made a decision, and Mr. Schmelzer stated that the Commission made a decision without talking to him. He stated that today was supposed to be a continuation of the hearing. The Commission and staff stated that the hearing had already closed, and that today's discussion was for the purpose of making a decision on the appeal.

P.O. Box 587
3525 Sunrise Highway
2nd Floor
Great River, New York
11739-0587

Phone (516) 224-2604
Fax (516) 224-7653
Internet:
<http://pb.state.ny.us>



**CENTRAL
PINE
BARRENS**

JOINT
PLANNING
&
POLICY
COMMISSION

Robert J. Gaffney
Chair

Felix J. Grucci, Jr.
Vice Chair

Vincent Cannuscio
Member

Ray E. Cowen
Member

Vincent G. Villella
Member

FILE COPY

**Session of September 1, 1999
Riverhead Town Hall
Riverhead, New York**

Present: Mr. Cowen (for State of New York), Mr. Girandola (for Town of Brookhaven), Mr. Proios (for County of Suffolk), Mr. Shea (for Town of Southampton), and Mr. Villella (for Town of Riverhead)

Resolution on accepting the written decision on the Letter of Interpretation Appeal of George L. Schmelzer and Inge J. Schmelzer ("the Appellants") for Suffolk County Tax Map Parcel # 200-463-1-15.001, decided on June 30, 1999

WHEREAS, the Commission decided the Letter of Interpretation Appeal of George L. Schmelzer and Inge J. Schmelzer for Suffolk County Tax Map Parcel # 200-463-1-15.001 on June 30, 1999 and instructed council to draft a formal written decision; and

WHEREAS, the Commission adopted the written decision on September 1, 1999 for the Letter of Interpretation Appeal for the above referenced tax parcel decided on June 30, 1999; NOW THEREFORE BE IT

RESOLVED, that the attached document constitutes the written decision for the Letter of Interpretation appeal for the above referenced parcel.

Record of Motion:

Made by:

Mr. Cowen

Seconded by:

Mr. Shea

Yea Votes:

Mr. Cowen

Mr. Girandola

Mr. Proios

Mr. Shea

Nay Votes:

Mr. Villella

P.O. Box 587
3525 Sunrise Highway
2nd Floor
Great River, NY
11739-0587

Phone (516)224-2604
Fax (516)224-7653

FILE COPY

The Central Pine Barrens
Joint Planning and Policy Commission

-----X-----

In the Matter of the Application of:

GEORGE L. SCHMELZER and INGE J. SCHMELZER

Pursuant to Section 6.7.3.3 of the
Pine Barrens Comprehensive Land Use Plan

-----X-----

This decision concerns a specific allocation of transferable development rights pursuant to the Land Use Plan (as amended) and Environmental Conservation Law ("ECL") Article 57.

On February 23, 1999, the Central Pine Barrens Clearinghouse issued a Letter of Interpretation to George L. and Inge J. Schmelzer (the "Appellant" of the "Appellant") allocating 5.28 Pine Barrens Credits to certain property owned by the Schmelzers and located in the Town of Brookhaven. Thereafter, the Schmelzers sought to increase the number of Pine Barrens Credits allocated to the property and filed an appeal with the Central Pine Barrens Joint Planning and Policy Commission (the "Commission").

On May 7, 1999 the Commission held a public hearing to consider the Schmelzers' appeal in connection with the Pine Barrens Credit Clearinghouse's allocation of Pine Barrens Credits to the Schmelzer's property located in the Town of Brookhaven. At the hearing, Mr. Schmelzer appeared before the Commission. During the hearing, both Mr. Schmelzer and the Commission's Staff introduced exhibits. In addition, a court reporter attended the hearing and prepared a written transcript of the proceeding.

This decision constitutes the Commission's findings of fact and conclusions of law.

The Property At Issue

A. Location of the parcel.

The Schmelzers currently own an irregularly-shaped property in the Town of Brookhaven comprising of approximately thirty-three (33) acres, *see* Exhibit Staff 2. Exhibit Staff 3 outlines in yellow the Schmelzer's property. The property in question is landlocked. The County of Suffolk owns property on the west and the south of the property, *see* Exhibit Staff 4.

There is no improved road access to the property. The Long Island Expressway, a limited

access highway, lies to the north of the parcel. To the south, Hot Water Street, an open but unimproved road (*i.e.* unpaved, with no drainage facilities, no lighting, and no traffic safety devices, etc) runs west to east. Hot Water Street, however, does not border or provide access to the Schmelzer property. Rather Suffolk County holdings lie between the Schmelzer parcel and Hot Water Street. Indeed, the distance between the southern-most portion of the Schmelzer property and Hot Water Street is approximately 2,780 feet, *see* Exhibit Staff 4. This distance was calculated using a computer based Geographic Information System program called Arcview Version 3.1, *see* Transcript at 7. The distance traveling west along Hot Water Street to the nearest improved road, County Road 111, is approximately 1,215 feet, *see* Exhibit Staff 4. That distance was also calculated using Arc View, *see* Exhibit Staff 4.

The parcel, as of June 28, 1995, was within the Town of Brookhaven's A Residence 5 Zoning District.

The Pine Barrens Credit Program

A. The Transferable Rights Program

In June 1995 the Commission adopted the Pine Barrens Comprehensive Land Use Plan (the "Land Use Plan"). The Land Use Plan includes a transferable development rights program for lands like that of Mr. Schmelzer which are located in the Pine Barrens sending area. *See* Land Use Plan, Section 6. The Land Use Plan contains an allocation formula for properties that are located in various zoning districts within the Pine Barrens.¹ To implement the Pine Barrens Credit transferable development rights program, the Commission developed a formula to quantify the number of Pine Barrens Credits to be allocated to a particular property. The allocation framework ultimately adopted by the Commission is found in the Land Use Plan at Sections 6.3, 6.7.6.6 and 6.7.6.7. The first step in determining the number of Pine Barrens Credits to be allocated is to determine the Development Yield Factor of a specific property. The Development Yield Factors, contained in Section 6.3.1.1 of the Plan, estimate the number of residential units that could be constructed on a particular parcel of subdivision land under conventional zoning regulations, taking into account land used for necessary infrastructure such as roads, sidewalks, and utilities. These development yield factors were derived from the Long Island Comprehensive Waste Treatment Management Plan² and by analyzing the development

¹In addition to the allocation formula for residentially-zoned properties, on August 7, 1996, the Commission adopted an allocation formula for non-residentially zoned properties located within the Pine Barrens. *See* August 7, 1996 Findings Statement prepared pursuant to the State Environmental Quality Review Act ("SEQRA"), ECL Article 8.

²The Long Island Comprehensive Waste Treatment Management Plan was published in July 1978 and was prepared by the Nassau-Suffolk Regional Planning Board pursuant to Section 208, Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500).

yield of projects completed in the Central Pine Barrens prior to passage of the Pine Barrens Protection Act. Once the Development Yield Factor is determined, the Clearinghouse multiplies the area of the parcel by the Development Yield Factor prescribed in Section 6.3.1.1 of the Plan in order to establish the number of Pine Barrens Credits for a particular parcel.

In addition, Section 6.7.6.6 of the Land Use Plan allows the Clearinghouse to elect to allocate one full Pine Barrens Credit for parcels of at least 4,000 square feet with frontage on an existing improved road. Moreover, Section 6.7.6.7 assures that the owners of all undeveloped and underdeveloped Sending District parcels, as determined by the parcel's June 28, 1995 zoning classification and application of the Development Yield Factor, will be eligible to obtain some Pine Barrens Credits, by providing that no matter how small the parcel, or whether it has frontage on an existing road, an allocation of no less than 0.10 Credits will be made. Finally, to accommodate the possibility that factors not considered in the development of the allocation formula might be relevant to individual parcels, property owners are given the opportunity to increase their initial allocation of Pine Barrens Credits by the Clearinghouse by appealing it to the Commission.

B. Application of Allocation Formula to Appellant's Property

Parcels within the A Residence 5 zoning district within the town of Brookhaven are allocated Pine Barrens Credits pursuant to §6.3.1.1.9 of the Plan. That residential zoning category permits one (1) dwelling unit per 200,000 square feet of property. Therefore, under the Plan, the Development Yield Factor for property within such a zoning category is 0.16 Pine Barrens Credit per acre. *See also* Plan, Figure 6-1.

Appellant's Argument

A. Access by "old woods road"

In response to the questions, "[w]hat is your legal access to this property, Mr. Schmelzer?" Mr. Schmelzer responded, "I claim legal access through old woods road. They have been there for generations," *see* Transcript at 14. When pressed if any legal document existed to support his purported access, Mr Schmelzer responded, "I don't know of any . . . People assume that right of way is by usage, and you can see where the roads were," *see* Transcript at 14-15.

B. Application Of The Development Yield Standard

Mr. Schmelzer requested that the allocation of Pine Barrens Credits be based upon dividing the parcel's acreage by its zoning, *see* Transcript at 23. Appellant argued that if the parcel was purchased for estate purposes, roads would not be required on the parcel, and thus, ". . . for every five acres one development right."

The Appeal

A Letter of Interpretation was issued on February 23, 1999 to the George L. Schmelzer and Inge J. Schmelzer allocating 5.28 Pine Barrens Credits to the parcel. An appeal was filed with the Commission on March 12, 1999 seeking "no less than 6.6 credits," *see* Exhibit Staff 5. A public hearing was held on April 28, 1999 and the record was held open until May 19, 1999 with the agreement of the appellant. Ultimately Commission staff entered 10 exhibits into the Record, and the appellant introduced one exhibit. The Commission in scheduling the public hearing on the appeal requested that the appellant supply a copy of a yield map if possible. No yield map was produced.

Commission Findings

A. Issuance of Letter of Interpretation

The Commission finds that the Pine Barrens Credit Clearinghouse Letter of Interpretation issued for the Schmelzer property was correct and consistent with Section 6 of the Land Use Plan. Furthermore, the Commission finds that the correct development yield factor was applied by the Clearinghouse.

B. Access to the Parcel

The Commission finds that the appellant has not demonstrated that legal access exists to the parcel. No evidence of any written instruments providing access was provided by the appellant. Given the particular configuration of the parcel expense would be incurred by the appellant given that access to the parcel would involve obtaining the consent of additional landowners to allow the appellants to burden their land to benefit the Schmelzers' land. Furthermore, the length of the road accessing the Schmelzer parcel may be greater than the distances shown in Exhibit Staff 4 if access is through any other parcel than those shown. As noted, in Exhibit Staff 4 the parcels directly to the south of the Schmelzer piece is owned by the County. Burdening this parcel with an access road to benefit the Schmelzer parcel would, at a minimum, involve obtaining permission from the County Legislature.

C. Method of Allocating Pine Barrens Credits Reasonable

The Commission upholds the development yield factors set forth in the plan and the method of allocating Pine Barrens Credits to sending area parcels. Indeed, as Justice Cannava wrote in *Toussie v. Central Pine Barrens Joint Planning and Policy Commission*, "This is a reasonable means to determine the credit due to the owner of parcels in the Pine Barrens." *See* Slip op., Index No. 1998-17135, Page 3. Appellant has not provided any credible evidence on why the allocation formula is erroneous nor why the development yield factors should not be applied to the property in question.

Conclusion

For the reasons set forth above, the Commission declines to increase the number of Pine Barrens Credits previously allocated to Mr. Schmelzer's property.

votes in favor:

Mr. Cowen
Mr. Girandola
Mr. Proios
Mr. Shea

votes in opposition:

Mr. Villella