

Central Pine Barrens Joint Planning and Policy Commission

November 18, 2020

Joseph F. Gazza Core Preservation Area Hardship Waiver Application
Manorville, Town of Brookhaven, SCTM #s 200-355-4-5 and 200-412-3-6

I. The Project

On July 14, 2020, Joseph F. Gazza (the Applicant) submitted an application to the Central Pine Barrens Joint Planning and Policy Commission (the Commission) for a Core Preservation Area Extraordinary Hardship Waiver to develop a 12-lot cluster subdivision on 58.9 acres of undeveloped land (the Application). On August 14 and September 15, 2020, the Applicant modified his proposal to develop one single-family residence, individual sanitary system, horse riding ring, barn, and windmill on five (5) acres of 58.9 acres (the Project). The Project is sketched on a survey prepared by Howard W. Young, dated May 13, 2019.

The Applicant owns two parcels of land in Manorville, in the Core Preservation Area, in the Town of Brookhaven. Lot A is identified on the Suffolk County Tax Map as # 200-355-4-5 and 33.4676 acres. Lot B is identified on the Suffolk County Tax Map as # 200-412-3-6 and is 36.4257 acres with 10.9169 acres affected by an overlap condition and the remaining 25.5088 acres having clear title.

Lot A sits between Mill Road and the Long Island Expressway (LIE). The north side of Lot A has 570 linear feet of road frontage on the south side of Mill Road, opposite Primrose Path. The south side of Lot A has 2,042 linear feet of frontage on the north side of the LIE, a limited access highway.

Lot B is on the south side of the LIE. The north side of Lot B has 2,036 linear feet of frontage on the LIE, has no improved road front on its south side, where the overlap condition is located, and is otherwise landlocked.

The Project Site includes Lot A and the non-overlapped portion of Lot B. The physical development for the Project would occur on Lot A. The Applicant is seeking Pine Barrens Credits (PBCs) for Lot B from the portion without an ownership dispute. The overlap portion is not eligible to receive Pine Barrens Credits until the overlap condition is resolved.

Gazza bought both parcels from Gloria Hendrix on July 1, 2019. He paid \$403,702.07 for them. The Applicant applied for a Letter of Interpretation (LOI) to determine the number of Pine Barrens Credits (PBCs) the two parcels were eligible to receive. The July 30, 2019 LOI estimated a total of 11.19 PBCs including 5.36 PBCs for Lot A and 5.83 PBCs for Lot B including the overlap portion, with a caveat that the PBCs on Lot B would not be issued on the overlap portion unless it was resolved. On September 23, 2019, the LOI for Lot B was revised, recalculated and reissued to sever the overlap portion. Lot B is eligible for 4.09 PBCs excluding the overlap condition, reducing the total LOI for the Project Site to 9.45 PBCs.

On September 16, 2020, during the public hearing on the application, the Commission identified the current value of a PBC to be estimated at \$80,000, which translates to a value for

the Gazza Holdings of approximately \$756,000 to \$895,200, approximately twice the price Gazza paid for the parcels.

At the September 16, 2020 public hearing, the Applicant modified the Application by withdrawing the 12-lot subdivision proposal leaving only the single-family residence proposal for the Commission to decide.

II. The Long Island Pine Barrens Protection Act of 1993, the Commission, Development and the Central Pine Barrens Comprehensive Land Use Plan

The Commission was created by the Long Island Pine Barrens Protection Act (the “Act”) adopted in 1993 and codified in Article 57 of the Environmental Conservation Law (ECL). The Act empowered the Commission, to, among other things, oversee development activities within the specially designated Central Pine Barrens Area. Section §57-0107(13) of the ECL defines development to be the “performance of any building activity, . . . , the making of any material change in the use or intensity of use of any . . . land and the creation . . . of rights of access.”

ECL Section §57-0123(3)(a) provides that, “[s]ubsequent to the adoption of the land use plan, the provisions of any other law, ordinance, rule or regulation to the contrary notwithstanding, no application for development within the Central Pine Barrens area shall be approved by . . . the [C]ommission . . . unless such approval or grant conforms to the provisions of such land use plan; provided, however, that the [C]ommission by majority vote is hereby authorized to waive strict compliance with such plan or with any element or standard contained therein, for an application for development of any person, upon finding that such waiver is necessary to alleviate hardship for proposed development in the core preservation area according to the conditions and finding of extraordinary hardship . . . pursuant to subdivision ten of section 57-0121 of this title, and every application is consistent with the purposes and provisions of this article and would not result in substantial impairment of the resources of the Central Pine Barrens.”

ECL Section 57-0121 (10) provides that, “[a]ny person, . . . , may apply to the commission for a permit exempting such [development from the prohibition on new development in the Core Preservation Area]. Such application for an exemption pursuant to the demonstration of hardship within the core preservation area shall be approved only if the person satisfies the following conditions and extraordinary hardship or compelling public need is determined to have been established under the following standards:

- (a) The particular physical surroundings, shape or topographical conditions of the specific property involved would result in an extraordinary hardship, as distinguished from a mere inconvenience, if the provisions of this act are literally enforced. A person shall be deemed to have established the existence of extraordinary hardship only if he or she demonstrates, based on specific facts, that the subject property does not have any beneficial use if used for its present use or developed as authorized by the provisions of this title, and that this inability to have a beneficial use results from unique circumstances peculiar to the subject property which:

- (i) Do not apply to or affect other property in the immediate vicinity;
- (ii) Relate to or arise out of the characteristics of the subject property rather than the personal situation of the applicant; or
- (iii) Are not the result of any action or inaction by the applicant or the owner or his or her predecessors in title including any transfer of contiguous lands which were in common ownership on or after June 1, 1993.

* * *

- (c) An application for a permit in the core preservation area shall be approved only if it is determined that the following additional standards also are met:
 - (i) The granting of the permit will not be materially detrimental or injurious to other property or improvements in the area in which the subject property is located, increase the danger of fire, endanger public safety or result in substantial impairment of the resources of the core preservation area;
 - (ii) The waiver will not be inconsistent with the purposes, objectives or the general spirit and intent of this title; or
 - (iii) The waiver is the minimum relief necessary to relieve the extraordinary hardship, which may include the granting of a residential development right to other lands in the compatible growth area that may be transferred or clustered to those lands to satisfy the compelling public need.

On June 28, 1995 the Commission, in furtherance of its mission and in compliance with the directives set forth in the Act, adopted its Central Pine Barrens Comprehensive Land Use Plan (the “Plan”). Section 4.5.1 of the Plan, states, “[t]he Act requires the prohibition or redirection of development in the Core Preservation Area and sets forth the jurisdiction of the Commission over, and certain requirements for processing, hardship exemptions. The Act authorizes the Commission, by majority vote, to waive strict compliance with this Plan upon finding that such waiver is necessary to alleviate hardship according to the conditions and finding of extraordinary hardship” pursuant to subdivision of Section 57-0121(10) of the Act.

The Project constitutes development as defined by the Act and in order to proceed, the Applicant must demonstrate a hardship exists pursuant to Section § 57-0121(10) of the Act.

III. The Application, the Staff Report, the Public Process and the Supplemental Materials

The Applicant submitted Part I of the Full Environmental Assessment Form and a sketch of the Project, which at the time of submission included both the 12-lot subdivision and single-family development proposals.

The proposal to construct a single-family residence is a Type II Action pursuant to Article 8 of the Environmental Conservation Law (State Environmental Quality Review Act,

SEQRA). No further environmental review is required.

A public hearing on the Application was held on September 16, 2020 in a virtual format through Zoom. At the Hearing a Commission Staff Report with 10 Exhibits (A through J) and an additional three exhibits K through M, including materials submitted by the Applicant and a report from the Town of Brookhaven dated September 14, 2020, were introduced into the record. The Commission received sworn testimony from the Applicant. One member of the public submitted oral comments, and one written comment was received via email. A stenographic transcript was made of the hearing and received on September 29, 2020. It was at this hearing the Applicant withdrew the 12-lot subdivision proposal while maintaining the single-family residence on five acres proposal.

The hearing was closed to written comments on October 21, 2020. The decision deadline was extended to November 18, 2020, at the request of the Applicant.

IV. The Project Site and its Immediate Vicinity, the Study Area

The Applicant acquired the unimproved, undisturbed, naturally vegetated parcels from Gloria Hendrix on July 1, 2019 for \$403,702.07. She acquired the land on March 24, 1953. The Project Site is in the Town of Brookhaven's A Residence 5 Zoning District. The minimum lot area requirement is 200,000 square feet.

To determine the characteristics of the immediate vicinity of the Project Site, the Commission defined a Study Area, which is the area that extends one-half mile from the Project Site in all directions. The Study Area was part of the Commission's Staff Report presented as Exhibit F at the public hearing. The Study Area encompasses approximately 450 to 500 acres in the Core Preservation Area. The dominant land use in the Study Area is public land owned by Suffolk County and New York State. The area is known as Manorville Hills.

Adjacent to the Project Site is a developed subdivision, Map of Deer Ponds, approved in 1986, which pre-dates the Act. Six lots in Deer Ponds were developed pursuant to the Core Roadfront Residential Parcel Exemption List, defined in Section 57-0107(x) of the Act and Chapter 9 of the Plan. The roadfront list is a compilation of parcels identified and approved by the State Legislature in 1995 and subsequently amended in 2001 to permit development on "in-fill lots" in the Core that were surrounded by or immediately adjacent to development or part of a subdivision. The Project Site is not on the roadfront exemption list, is not part of a subdivision and is not "in-fill" to other development.

One lot on Primrose Path was developed as per a Core Hardship Waiver granted in 1996. This parcel was developed in 1996 but had development approvals that pre-dated the Act. The Applicant has not provided any approvals for the Project Site.

Regulated and mapped freshwater wetlands adjoin and extend into the west side of the Project Site. Other environmentally sensitive resources in the Study Area include a Scenic Resource corridor, identified in Volume 2, Chapter 8 of the Plan.

According to a New York Natural Heritage Program (NHP) Report on State Listed Animals, dated September 9, 2020, the Tiger Salamander (*Ambystoma tigrinum*), a State-listed Endangered amphibian, has been documented in the vicinity of the site, specifically in the vicinity of Lot A.

The NHP identified the vicinity of the site as a non-winter location for a State and Federally listed Threatened species, Northern Long-eared Bat (NLEB) (*Myotis septentrionalis*). It reports the species is documented within 3/4 mile of the southern portion of the project site, and at multiple locations within 1.5 miles of both the northern and southern portions of the project site. Individual animals may travel 1.5 miles from documented locations. The Report qualifies that it “cannot provide a definitive statement as to the presence or absence of all rare or state-listed species or significant natural communities. Depending on the nature of the project and the conditions at the project site, further information from on-site surveys or other sources may be required to fully assess impacts on biological resources.”

V. The Application, Applicant Statements in Support of the Application

The Applicant asserts in his hearing testimony that he is a “real estate guy” and when he discovered that the owner of 67 years, Ms. Hendrix, had stopped paying her real estate taxes, he called the owner’s attorneys (Transcript page 14). The Applicant stated he “knew it had potential for acquisition by a municipality, maybe the County, maybe the State.” (Transcript page 15) Gazza stated that he thought an agency would step up and buy it (Transcript page 16).

The Application contains copies of letters the Applicant sent to local, County, State and Federal agencies soliciting interest in acquisition. Based on statements in his Application and testimony at the public hearing, the Applicant purchased the Project Site on the presumption that a government agency would purchase it from him. However, the Applicant had no substantial evidence or confirmation, such as a contract or resolution committing a governmental agency to acquisition of the Project Site through purchase. Although the Applicant has prior experience with government acquisition of other properties he owned and with acquiring and selling credits, as evidenced in the Commission’s Pine Barrens Credit registry, he speculated and invested in this property by taking a significant intangible risk and with no proof such acquisition would occur.

The Application states the Project Site is unique because it is private vacant Core land and almost all other property in the immediate vicinity is either developed with homes or is publicly owned and preserved.

The Application states the hardship is necessary in order to not deprive the Applicant of his investment-backed expectations consistent with zoning at the time of the Act and in accordance with current fair market values.

The Applicant maintains that he already has 13.69 credits that he has been holding for over 10 years, that there is a small market to sell credits and obtaining more credit is not in his “best interest.” He stated he has “no other lands that need Pine Barrens Credit for development within Suffolk County.” In his testimony, the Applicant stated that he is a “dealer in Pine Barrens

Credits (PBCs) and Town of Southampton development rights.” The Applicant stated that two years ago he thought the credit market was improving but that it is “floundering right now.” He said he is an “investor” and “took a chance on credits.” He stated he wishes to recoup his investment saying he “must have some use.”

VI. Potential Adverse Environmental Impacts

The Commission finds the Project would result in significant adverse environmental impacts on the resources of the Central Pine Barrens including adverse impacts on water resources, ecological resources including disturbance of the habitat and populations of endangered species, fragmentation of existing natural habitat and public open space. The Project may establish an adverse precedent in that it may induce similar types of development proposals in the Core and encourage development in the vicinity of the Project Site and in other hamlets in the Core Preservation Area where low-density development and expansive public land holdings exist.

The Project encourages growth inducing impacts by promoting development in the Core of the Central Pine Barrens where it is restricted by the Act to preserve its integrity ecologically and to protect groundwater resources. It encourages development and induces secondary actions including the construction of a road and intrusion into and fragmentation of a forested area where infrastructure extensions, including public water mains, do not exist. It diminishes the functional integrity of the pine barrens ecosystem, quality of water resources and facilitates deleterious changes in land use and population patterns. The Project adversely impacts the immediate upland habitat and documented breeding area of a New York State-listed Endangered amphibian.

VII. Commission Review of the Application and Findings

The Commission finds the immediate vicinity of the Project Site is not substantially developed based upon the description of the Study Area defined in the Commission’s Staff Report. Approximately 75% of the Study Area contains expansive public land holdings and in conservation easements granted to the Commission under the Credit Program. The remaining 25% contains development that pre-dates the Act, including the adjacent 17-lot subdivision Map of Deer Ponds, approved in 1986, and in the case of a parcel owned by Roberta Sterk, who received a hardship permit in 1996 because the parcel benefited from a subdivision approval that predated the Act

Pursuant to the Act, in reviewing a Core Preservation Area Hardship exemption application, the Commission shall consider the criteria set forth in ECL §57-0121(10)(a) (i), (ii), and (iii) and Sections 57-0121(10)(c)(i), (ii), and (iii) and determine whether or not the requested relief is consistent with the purposes and provisions of the Act and if granted, would not result in a substantial impairment of the resources of the Central Pine Barrens. The Commission has considered the Application, the Staff Report and Exhibits, and the hearing transcript to determine whether the Applicant satisfied the elements.

In order to establish a hardship under ECL §57-0121(10)(a)(i), the Applicant is required to demonstrate that the property does not have any beneficial use if used for its present use or

developed as authorized by the provisions of this Act, and that this inability to have a beneficial use results from unique circumstances peculiar to the property which do not apply to or affect other property in the immediate vicinity.

The Commission finds the Applicant has not satisfied the element in ECL §57-0121(10)(a)(i), because the Project is not unique. The provisions of the Plan apply to and affect other privately-owned and undeveloped land in the immediate vicinity, in the Study Area and in similar areas of the Core Preservation Area. The Commission finds the characteristics of the Gazza Holdings are not unique to this hardship request. The provisions of the Plan apply to and affect the Study Area and the entirety of the Core. The circumstances pertain to the Applicant's personal situation and his investment decision to purchase the property in 2019 with his expectation that he could sell it to a municipal agency without confirmation, financial surety or other certainty guaranteed by an agency.

The elements under (ii) and (iii) are combined for review. In order to establish a hardship, under ECL §57-0121(10)(a)(ii), the Applicant is required to demonstrate that the property does not have any beneficial use if used for its present use or developed as authorized by the provisions of the Act, and that this inability to have a beneficial use results from unique circumstances peculiar to the subject property which relate to or arise out of the characteristics of the subject property rather than the personal situation of the Applicant. In order to establish a hardship under ECL §57-0121(10)(a)(iii), the Applicant is required to demonstrate that the subject property does not have any beneficial use if used for its present use or developed as authorized by the provisions of this article, and that this inability to have a beneficial use results from unique circumstances peculiar to the subject property which are not the result of any action or inaction by the Applicant or the owner or his predecessors in title including any transfer of contiguous lands which were in common ownership on or after June 1, 1993.

The Applicant has not demonstrated that his lack of beneficial use, if it exists, is not due to his personal situation and/or the action or inaction by the Applicant. The Applicant is a "real estate guy" who made a speculative purchase and claims a hardship.

Relative to the Applicant's personal situation, in July and September 2019, the Applicant requested Letters of Interpretation for Pine Barrens Credits for the Gazza Holdings. The LOIs issued identified 9.45 PBCs or up to 11.19 PBCs if the overlap condition on Lot B is resolved. During the hearing, the Commission provided for the record the current estimated sale price of credit of \$80,000 based on the Commission's PBC registry of recent transactions. At this rate, the Project Site value in PBCs is worth approximately \$756,000 to \$895,200.

Addressing the beneficial use criteria, the Applicant stated the "hardship is not a result of inaction by the Applicant because Mr. Gazza acquired interest to this property in 2019. The Rights and Privileges run with the land, not the Applicant." The Commission finds that the Applicant paid \$403,702 for the Project Site after the effective date of the Act and, contrary to the Applicant's statement, and while not determinative in and of itself, the hardship could be in part due to the Applicant's action or inaction as the Applicant's purchase of the Project Site constitutes an action.

In order to establish a hardship, the Applicant must also demonstrate that, pursuant to ECL §57-0121(10)(c)(i), the Project will meet the standard that the granting of a permit will not be materially detrimental or injurious to other property or improvements in the area in which the subject property is located, increase the danger of fire, endanger public safety or result in substantial impairment of the resources of the Core Preservation Area.

The Project results in the endangerment of public safety or substantial impairment of the resources of the Core Preservation Area since it may result in growth-inducing impacts and is precedent setting in nature. It would induce and promote additional development in an area where infrastructure improvements are limited, residential development density is low and public agencies have invested significantly in land acquisitions to preserve water and ecological resources. Due to the extensive public land holdings and natural area, additional development has the potential to increase the risk of fire danger to the public and property.

In order to establish a hardship, the Applicant must also demonstrate that pursuant ECL §57-0121(10)(c)(ii) the Project will be consistent with the purposes, objectives or general spirit and intent of this title. The Plan requires that development be redirected from the Core Preservation Area and protection of Core lands, existing natural vegetation, ecologic and hydrologic functions of the Pine Barrens. The Commission finds that the Project does not achieve the goals and objectives of the Act or the Plan for the Core Preservation Area because it would cause development in the Core. In addition, the Project could adversely affect the NLEB, a State and Federally listed Threatened mammal species and its habitat.

In order to establish a hardship, the Applicant must also demonstrate that, pursuant to ECL §57-0121(10)(c)(ii), the Project is the minimum relief necessary to relieve the extraordinary hardship. According to statements from the Applicant, his 12-lot subdivision proposal, classified as a Type I Action pursuant to SEQRA, prompted him to “get out of Type I” and propose a Type II Action. He modified his proposal to develop a single-family residence on five acres, which is classified as a Type II Action, pursuant to SEQRA, requiring no further environmental review. His testimony referred to his need for a “little bit of use” finds the credits may provide minimum relief.

VIII. Precedent

The Commission finds the denial of the Hardship Exemption Waiver would be consistent with its prior Hardship Exemption Waiver decisions. The Applicant has not identified precedential matters that support his Application. The Project exceeds the minimum relief necessary to relieve hardship. The Applicant has not identified a decision for an extraordinary hardship exemption for a similar type of development proposal in the Study Area involving the construction of a single-family residence. The Roberta Sterk Core hardship on Primrose Path, granted in 1996, benefited from a subdivision approval in 1989, which pre-dated the Act. On a matter outside the Study Area, in 2016, the Commission denied the Core hardship waiver of Armand Gustave c/o Peter Baron on SCTM# 200-460-1-10 in Manorville involving development of a single-family residence on a parcel purchased after the Act. In 1997, the Seth Morgan Core hardship waiver granted approval to build a residence on a tax lot greater than one acre;

however, it was described as disturbed and used for storage and equipment. The Project Site is undisturbed. (Commission Staff Report page 1).

IX. Conclusion

The Commission finds that the Applicant failed to establish or provide information sufficient to demonstrate an extraordinary hardship exists for the reasons set forth above. Therefore, the Commission respectfully declines to grant the request hardship exemption.

Present:

Ms. Gallagher, for the Governor of the State of New York
Mr. Dale, for the Suffolk County Executive
Mr. Romaine, Brookhaven Town Supervisor
Ms. Aguiar, Riverhead Town Supervisor
Mr. Schneiderman, Southampton Town Supervisor

Record of Motion:

Motion by: Mr. Romaine

Seconded by: Mr. Dale

In Favor: 5

Opposed: 0

Abstain: 0