

Commission Meeting of May 16, 2018
Wertheim National Wildlife Refuge
340 Smith Road, Shirley, NY

**Central Pine Barrens Joint Planning and Policy Commission
Final Adopted Resolution on Accepting the Written
Decision on Remittal for the
Henry Dittmer Core Preservation Area
Extraordinary Hardship Application
Yaphank, Town of Brookhaven, SCTM #200-529-5-35**

Carrie Meek Gallagher
Chairwoman

Steven Bellone
Member

Laura Jens-Smith
Member

Edward P. Romaine
Member

Jay H. Schneiderman
Member

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. Jens-Smith, Riverhead Town Supervisor
Mr. Collins, for the Southampton Town Supervisor

Whereas, by resolution on February 16, 2016, the Central Pine Barrens Joint Planning and Policy Commission denied the application of Henry R. Dittmer ("Dittmer"), as Administrator of the Estate of Richard Dittmer, to build a house on a 10,000 square foot landlocked parcel of land in Yaphank in Brookhaven Town in the Core Preservation Area of the Central Pine Barrens and to construct a road to access this parcel and,

Whereas, on March 11, 2016, Dittmer commenced a proceeding challenging the Commission's determination in the New York Supreme Court, and

Whereas, by decision dated January 24, 2018, the Honorable Joseph Farneti, Justice of the Supreme Court, annulled the Commission's decision and remitted the matter back to the Commission for further proceedings consistent with the Court's determination, and

Whereas, the Commission issues the attached decision, and

Whereas, as the Commission previously determined, the Dittmer Project is a Type II Action pursuant to Article 8 of the Environmental Conservation Law (State Environmental Quality Review Act, SEQRA), now, therefore, be it

Resolved, that the attached document constitutes the written decision for the Henry Dittmer Core Preservation Area Extraordinary Hardship Application Yaphank, Town of Brookhaven, SCTM #200-529-5-35.

Motion by: Ms. Gallagher

Second by: Mr. Collins

Ayes: Ms. Gallagher, Mr. Dale, Mr. Romaine, Ms. Jens-Smith and Mr. Collins

Nays: None

Abstentions: None

Absent: None

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Decision on Remittal
Henry Dittmer Core Preservation Area Extraordinary Hardship Application
Yaphank, Town of Brookhaven, SCTM #200-529-5-35

Henry R. Dittmer (“Dittmer”) inherited from his father, Richard Dittmer, a 10,000 square foot landlocked parcel of land in Yaphank in Brookhaven Town in the Core Preservation Area of the Central Pine Barrens. Dittmer, as Administrator of the Estate of Richard Dittmer, applied to the Central Pine Barrens Joint Planning and Policy Commission to build a house on his parcel and a road to access the house. By Resolution dated February 16, 2016, the Commission denied the application. On March 11, 2016, Dittmer commenced in the New York Supreme Court, Suffolk County, a proceeding pursuant to Article 78 of the Civil Practice Law and Rules, challenging the Commission’s determination. By decision dated January 24, 2018, the Honorable Joseph Farneti, annulled the Commission decision and remitted the matter back to the Commission for further proceedings consistent with the Court’s determination. The Court noted that “[a]n agency’s determination which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious, even if there may otherwise be evidence in the record sufficient to support the determination.” Dittmer at 4.

The Commission has considered Dittmer’s application, the record developed on the application and finds that the specific facts underlying the Dittmer application differ from the 10 hardship exemptions Dittmer cites as precedent and thus those decisions were not made on essentially the same facts as the Dittmer application.

I. The Act, the Commission and Development

In 1993, the New York State Legislature passed the Act and it was codified in Article 57 of the Environmental Conservation Law. The Act created the Central Pine Barrens Joint Planning and Policy Commission (the “Commission”) to, among other things, oversee land use activities within the specially designated Central Pine Barrens Area. The Act created two regions with the Central Pine Barrens Area, the Core Preservation Area and the Compatible Growth Area. In furtherance of its mission and in compliance with the directives set forth in the Act, the Commission drafted the Central Pine Barrens Comprehensive Land Use Plan (the “Plan”), which was adopted on June 28, 1995. The Plan was developed to implement the provisions of the Act and in certain instances, contained recommendations for further legislative action.

The Commission regulates “development” in the Core Preservation Area and the Compatible Growth Area. The Act defines “development” as among other things “any building activity.” ECL §57-0107. New development in the Core Preservation Area may only proceed upon Commission approval. The Act authorizes the Commission to grant waivers to allow new development in the Core Preservation Area if an applicant for such development demonstrates that they will suffer an extraordinary hardship without such waiver. To demonstrate an extraordinary hardship the applicant must demonstrate that their parcel has no beneficial use if used for its present use or as authorized under the Act or that compelling public need exists for the public and the inability to have a beneficial use results from unique circumstances peculiar to the subject

parcel which does not apply to other property in the immediate vicinity, relate to or arise out of the characteristics of the subject property rather than the personal situation of the applicant or are not the result of any action or inaction by the applicant. *See generally* ECL § 57-0123. Dittmer's proposed project constitutes development and he applied for an extraordinary hardship waiver.

II. The 2015 Dittmer Application, the Commission Staff Report and the Commission's February 16, 2016 Decision

By letter dated August 24, 2015, Dittmer submitted an Extraordinary Hardship Waiver application to the Commission to develop a single-family residence with an individual sanitary system and related infrastructure including customary accessory uses on his parcel which is located on the mapped but not developed road known as Chesterfield Road and 153 feet from County Road 21¹, the nearest improved road. Dittmer's application was supplemented by materials dated October 7, 2015, November 13, 2015, and January 28, 2016. A public hearing was held on the application on December 16, 2015 and a transcript was made of the hearing.

In anticipation of the hearing, Commission staff prepared a report that included information about the Dittmer parcel, Dittmer's application and contained eight exhibits. The report also provided information about the "Surrounding Land Use and Zoning" an area located within one-half to a mile of the Dittmer parcel. Information of this area, denominated the "Study Area" was used by the Commission to determine the whether the circumstances affecting the Dittmer parcel are peculiar to the Dittmer parcel and do not apply or affect other properties in the immediate vicinity which is part of the standard the Commission must apply to determine whether Dittmer demonstrated an extraordinary hardship distinguished from a mere inconvenience as required under the Act. ECL §57-0121.

The Report notes that the "predominant land use category within a study area of one-half mile to one mile of the [Dittmer Parcel] is preserved public land owned and managed by Suffolk County, encompassing more than 450 acres." Staff Report at 3. The Report states that within the Study Area, no roads intersect County Road 21 for a distance of approximately 3,700 feet on the east or approximately 1,700 feet on the west. The Report notes that there are seven dwellings and one commercial structure on the east side of County Road 21 in the 3,700 feet stretch on the east. There are two houses on the west side of County Road 21 in the 1,700 stretch on the west. Staff Report, Exhibit A. Chesterfield Road, on which the Dittmer parcel is platted, if developed, would intersect County Road 21 at a point within the 3,700 foot stretch on the east side of County Road 21 currently free of road intersections.

¹ County Road 21 is also known as Yaphank-Middle Island Road.

During the Dittmer application hearing, Richard Scheyer, Dittmer's attorney urged the Commission to find that the facts in the Dittmer application were substantially similar to the facts in applications that were previously granted extraordinary hardship waiver exemptions and thus application should also be granted. Scheyer and Michael Nobiletti, who also testified on Dittmer's behalf, that the area surrounding the Dittmer parcel was a "substantially developed area," notwithstanding the conclusions of the Commission staff contained within its Staff Report.

III. The Article 78 Proceeding

The Court annulled the Commission's determination and remitted the matter back to the Commission noting that the Commission "failed to address, much less distinguish, any of the hardship exemptions previously granted."

The Commission finds that factual bases and conclusions of its February 16, 2016 decision are valid and were not annulled by the Court. Therefore, the Commission incorporates by reference the February 16 decision into this decision and makes it a part hereof. The Commission finds that its decision properly established that Dittmer did not provide specific facts demonstrating that the Dittmer parcel would have no beneficial use if used for its present use or as authorized under the Act. The Commission supplements its Decision with the analysis contained herein to demonstrate that the specific facts underlying the Dittmer Parcel differ from the facts underlying the ten cases that Dittmer points to.

IV. Findings and Determinations

The Commission finds that the area in the immediate vicinity of the Dittmer parcel is not substantially developed based upon the Commission's staff report and the Study Area defined in it. The Staff Report notes that there are only seven residences and one commercial structure on the east side of County Road 21 and two structures on the west side in the Core Preservation Area of the Study Area and that all of the developed structures front County Road 21. The Commission further finds that it has not granted an extraordinary hardship exemption to allow a person to develop 153 feet of a paper road to provide access to an otherwise landlocked parcel and to allow the person to construct a house on the otherwise landlocked parcel.

The Commission finds that all of the facts set forth in the cases Dittmer cited are distinguishable from the facts set forth in the Dittmer application. The Commission makes this determination by its review of its decisions in these matters, the Commission files, and the transcripts of the hearings on them. The hearing transcripts are posted on the Commission's website at www.pb.state.ny.us.

None of the parcels cited by Dittmer, with the exception of the Woodstock parcel, are located in the study area. The Commission finds that these other parcels were not within the immediate vicinity of the Dittmer parcel.

While Woodstock is located in the Study Area, Woodstock is immediately distinguishable

because Woodstock concerned a Letter of Interpretation Credit Appeal, not a grant of an extraordinary hardship waiver. The Commission created a transferable rights program in the Plan known as the Pine Barrens Credit program. Woodstock participated in the Program, he did not seek a hardship as Dittmer does. Thus, any decision in the Woodstock matter cannot constitute precedent requiring the Commission find that Dittmer suffers an extraordinary hardship. The legal standards for a Pine Barrens Credit appeal and an extraordinary hardship exemption request differ. Thus Woodstock was not decided on “essentially the same facts” as Dittmer.

Screven, Osleeb and Czarnecki are also immediately distinguishable because these parcels are located on the Core Preservation Area residential nondevelopment roadfront parcel list. See Plan 9.1.1 and Figure 9-1. Parcels on this list are located on improved roads and the Legislature accepted the Commission’s 1995 recommendation to amend the Act to define the construction of a single family residence on the parcel as an action not constituting regulated development. Thus, landowners of parcels on this list are permitted to construct a single-family dwelling as of right without a permit from the Commission. See ECL § 57-0107(13)(x). The hardships were approved before the list was enacted into law by the Legislature but after the parcels were proposed for inclusion on the list in the Plan. The Dittmer parcel is not located on the residential nondevelopment roadfront parcel list nor is it proposed for any such list or in the Plan. Thus, the Commission’s decisions in these three instances do not constitute precedent that requires the Commission to approve Dittmer’s application.

Kristiansen, Blake, Marshall, Cachimpanis, Czarnecki, DeMauro, Goldstein, and Cox are also factually distinguishable because these parcels are located on developed roads. Similarly, Morgan received approval to develop a parcel that took access across a driveway on another parcel he owned which had frontage on an existing road. Dittmer’s parcel is not on an existing road and he did not seek to access his parcel across other property he owns that fronts on an existing road and has a developed driveway. Thus these cases were not decided on “essentially the same facts” as Dittmer.

Kristiansen and DeMauro presented facts substantially different from those involved in the Dittmer matter. In Kristiansen there was an existing 22 foot by 24 foot two-car garage and a 20 by 14 foot concrete slab on the parcel for which Kristiansen applied to the Commission for an extraordinary hardship exemption. Kristiansen had already received prior permission from the Town of Brookhaven to build on the land and had a pre-Act permit to do so in a Town of Brookhaven Building Department Building Permit dated December 15, 1970 and had Wild, Scenic and Recreational Rivers Act Permit and Freshwater Wetlands Permit.

The DeMauro property was developed with a dwelling prior to the Act. A fire occurred on the property in the 1970s and the house burned down. DeMauro sought to rebuild a house that had burned down in the 1970s. In 1994, the Town Board of the Town of Brookhaven issued a Negative Declaration with draft conditions for a Wetlands Permit for DeMauro. Here, there is no development on Dittmer’s parcel, nor has Dittmer stated he has received permission to build on the land or a permit of any kind. Dittmer is not replacing a structure destroyed by fire. The Commission finds that these matters do not compel it find Dittmer suffered an extraordinary

hardship. Thus these cases were not decided on “essentially the same facts” as Dittmer.

Additionally, in Blake, Marshall, Cachimpanis, and DeMauro there was existing development in the immediate vicinity of the parcels on existing improved roads. Blake’s southern boundary adjoined the north side of 10 developed lots in a subdivision with frontage and access on a developed road, Patrick Lane, on the south side of each lot. Blake had approximately 134 feet of frontage directly on William Floyd Parkway. Similarly, in Marshall, the parcel was adjacent to two existing single-family residences. Cachimpanis and DeMauro were infill lots, which were vacant lots situated between developed lots. Here, the record shows that the Dittmer parcel is not immediately adjacent to any development. It is not on an existing improved road. Thus, the Commission’s decisions in these applications do not constitute precedent requiring that Dittmer’s application be approved.

The Commission determines that Dittmer’s reliance of Cox is misplaced. Cox’s parcel fronted on an existing improved road. Second, Cox had received pre-Act permission from the Town of Brookhaven’s Zoning Board of Appeals prior to the Act’s adoption to split it into two lots. One of the lots contained a partially constructed house. The ZBA approval lapsed and the parcel remerged before Cox could take measures to prevent their re-merger due to financial and personal issues. None of those factors exist in the Dittmer application. It is not on an existing road, a lot split approved by the ZBA or partially developed. Thus Cox was not decided on “essentially the same facts” as Dittmer.

Finally, Goldstein is also factually distinct because the vegetation on the Goldstein parcel was disturbed and had been previously cleared and has more than 300 feet of frontage on an existing improved County road, CR 111. The vegetation on the Dittmer parcel is undisturbed, has not been cleared, and the parcel is not on an existing improved road. Thus Goldstein was not decided on “essentially the same facts” as Dittmer. The Commission’s decision in Goldstein also does not constitute precedent requiring that Dittmer’s application be approved.

The Commission finds that all of the matters referenced by Dittmer presented facts significantly different from those in the Dittmer matter. The Commission determines that Dittmer has not identified any instance where the Commission granted an extraordinary hardship exemption to allow the construction of a single family home on a parcel that does not front on an existing improved road, or does not have access to an existing improved road via an improved driveway on adjacent property owned by Dittmer.

The Commission finds that Dittmer failed to establish or provide information sufficient to demonstrate an extraordinary hardship exists under the standards in ECL §57-0121 for the reasons set forth in its February 17, 2016 decision.

For the foregoing reasons, the Commission denies the Dittmer application.