Huntington Hebrew Congregation of Huntington v Tanenbaum
2007 NY Slip Op 32479(U)
August 7, 2007
Supreme Court, Suffolk County
Docket Number: 0014305/2007
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 14305-07

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5/31/07
ADJ. DATES 7/19/07
Mot. Seq. # 001 - MG; CDISP
Mot. Seq. # 002 - WDN

HUNTINGTON HEBREW CONGREGATION OF HUNTINGTON,

Petitioner,

-against-

MELVYN TANENBAUM, DAN SCHOEFFLER and SPLIT ROCK DEVELOPERS, INC.,

Respondents.

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Upon the following papers numbered 1 to 41 read on this motion for leave to sell real property and motion for leave to intervene (which has been previously withdrawn); Notice of Motion/Order to Show Cause and supporting papers 1 - 7; 22-25; 8-14 (#002 - WDN); Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 15-16; 17-18; Replying Affidavits and supporting papers 29-30; 31-32; ; Other 19-21 (answer of Split Rock Dev.); 26-28 (memorandum of Split Rock); 33-34 (sur-reply); 35-36 (applic. to strike sur-reply); 37-38 (consent to change atty.); 39 (correspondence from Atty. Pashkin, 7/31/07); 40-41 (correspondence from Resp. Tanenbaum, 8/3/07); ; and after hearing counsel in support of and in opposition to the motion at the oral argument held on July 19, 2007, it is

ORDERED that this special proceeding seeking an Order authorizing petitioner, Huntington Hebrew Congregation of Huntington, to sell to respondent, Split Rock Developers, Inc., pursuant to the terms of the February, 1998 contract and the September 22, 2005 extension agreement, for the price of $2,250,000.00,

the 7.53 acres plus the lot, a size of 155 feet x 30 feet of vacant land owned by petitioner, located in the Village of Plandome, County of Nassau, is granted; and it is further

ORDERED that the remaining branch of the motion by respondent, Melvyn Tanenbaum, pursuant to CPLR 409(b) and N-PCL § 511(d), seeking to summarily dismiss the petition, is denied; and it is further

ORDERED that pursuant to N-PCL § 511(d), respondent, Split Rock Developers, Inc., is directed to bear all costs and expenses previously incurred by petitioner, Huntington Hebrew Congregation of Huntington, in obtaining preliminary subdivision approval.

This special proceeding was commenced by petitioner, Huntington Hebrew Congregation of Huntington (hereinafter "HHC"), pursuant to the Religious Corporations Law § 12 and the Not-for-Profit Corporation Law § 511, seeking judicial approval of HHC's sale of 7.53 acres of vacant land to respondent, Split Rock Developers, Inc. (hereinafter "Split Rock") for $2.25 million. HHC incorporated under the Religious Corporations Law by certificate of incorporation dated March 6, 1907and maintains a synagogue for religious and educational interests, a religious school, and a nursery school. The vacant land is located in the Village of Plandome, County of Nassau and was part of a charitable donation to HHC of approximately 16 acres more than 10 years ago. In 2001, HHC sold slightly more than eight acres to one, Dr Anthony Pilavis, for $700,000.00. The Attorney General did not object to that sale and the Hon. Harry E. Seidell, by Order dated August 13, 2001, approved it.

The property that remains from that charitable donation, which is the subject of this special proceeding, is not used by HHC for any of its religious, charitable or benevolent purposes. The Planning Board of the Village of Plandome, on July 27, 2006, granted preliminary conditional subdivision approval for the property. It is still subject to final subdivision approval from that Planning Board and from the Village of Plandome Manor, the Village of Flower Hill, and the Nassau County Planning Commission. An additional condition of the preliminary subdivision approval requires consent from the Nassau County Legislature of the sale of a nearby parcel of land for construction of an emergency access road. Therefore, the subdivision process remains uncompleted and as of this date, the property is not subdivided and remains vacant land.

As set forth in the petition (*see* petition, ¶ 34) and during the extensive oral argument held before the Court on July 19, 2007, prior attempts to develop this property failed due to topography problems, the existence of wetlands, water quality and drainage issues, and the lack of appropriate sanitary systems. As explained, the property was donated to HHC as a charitable deduction. Split Rock, which had developed an abutting parcel that possessed some of the same problems and issues as found on the HHC property, was familiar with the parcel and expressed an interest in purchasing only that portion of the entire parcel that was located within the Village of Plandome. An agreement was reached in February, 1998, wherein HHC agreed to sell the property to Split Rock for $250,000.00 per approved lot as shown on a final subdivision map. The sale was conditioned on the issuance by the Village of Plandome of final approval of a subdivision of at least seven lots for single-family residences.

HHC decided to control the subdivision process in order to maximize the sale price to be received from Split Rock. As explain in the November 14, 2006 letter from Arthur Goldstein, the well-respected land use attorney who is a member of HHC and who handled this matter on behalf of HHC without compensation, "[t]he seller had an interest in obtaining the maximum lot yield on this challenging property and sought to avoid any misunderstanding concerning the maximization of the yield and the approval by controlling the subdivision process." Therefore, under the terms of the contract, it became the obligation of HHC to obtain final subdivision approval and it assumed all costs related to processing the subdivision application. As set forth in the initial contract, the price was based upon the total number of lots approved. It was a reasonable decision in 1998 for HHC to want to control the process to maximize lot numbers, particularly where counsel fees were not an issue. The contract provided that at closing, after final subdivision approval, Split Rock would be obligated to pay one-third the purchase price by cash or check, with the remainder payable, pursuant to a note and purchase money mortgage, 21 months thereafter.

The Board of Trustees of HHC approved the terms of the contract by a unanimous vote on February

12, 1998 and its President executed the contract later that month, with final approval expected to be obtained by July 1, 1999. However, the subdivision process did not go smoothly and in fact, delays extended the process year after year. The subdivision approval deadline was extended by various letter agreements between HHC's counsel and Split Rock's principal. These letters are dated February 3, 2000, January 10, 2001, August 8, 2001, July 18, 2002, February 25, 2003, and September 15, 2005. Additionally, agreements dated August 18, 2004 and February 7, 2005 modified the initial contract by memorializing the fact that Split Rock had been making loan payments on behalf of HHC and that the practice would continue with Split Rock providing $11,000.00 a month towards HHC's mortgage payment, with reimbursement by HHC at the closing of the transaction. Additionally, with the August 18, 2004 agreement, Split Rock assumed some of the major costs associated with the subdivision approval, without reimbursement from HHC.

On September 22, 2005, the parties entered into a substantial modification agreement which extended the closing deadline from September 22, 2005 to November 15, 2006. The new amendments to the contract included the fact that the closing would now occur upon preliminary subdivision approval instead of final approval, the purchase price would be $2,250,000.00 regardless of the number of lots approved by the Village of Plandome, and that at closing, the entire purchase price would be paid in full, instead of payment over time. Additionally, Split Rock assumed payment of all real estate taxes, the $7,000.00 it cost to extend the terms of the mortgage, $8,700.00 in costs to the Village of Plandome Manor for prior subdivision costs, and assumed all new subdivision approval costs, all without credit at closing. Split Rock also committed to paying HHC's monthly mortgage payment (ranging from $9,000.00 to $15,000.00) with a credit at closing of only $2,201.00, which represents one-half the monthly principal.

By interjecting into the contract a fixed purchase price as if nine lots were to be approved, HHC argues that at the time of the amendment, when only seven lots were anticipated, $500,000.00 was secured toward the purchase price. HHC also argues that based upon an ambiguity contained in the underlying contract, in particular, reading paragraph 58(c) in conjunction with the Addendum to Agreement, the new terms set forth in the September 22, 2005 agreement were the best that could be obtained in light of the strong possibility that Split Rock could insist upon purchasing the property at the seven-lot price of only $1,750,000.00. The contract ambiguity limited HHC's options over the years as it failed to obtain final subdivision approval. The Board of Trustees of HHC approved the terms of the contract modification by a unanimous vote on September 15, 2005.

As set forth above, on July 27, 2006 the Village of Plandome granted HHC preliminary subdivision conditional approval for a nine-lot subdivision. One of the many conditions requires the creation of an emergency access road between the HHC parcel and an abutting subdivision which is owned and developed by Split Rock, a condition that HHC contends could be difficult, if not impossible, for any other potential purchaser to fulfill.

On October 19, 2006, HHC submitted a petition to the Attorney General's office seeking consent for the sale. By correspondence dated October 27, 2006 and November 8, 2006, the Attorney General's office sought additional information, including a vote by the Board and the membership, together with a current appraisal. In response thereto, on February 2, 2007, HHC submitted a new appraisal, dated January 9, 2007, which offered various valuation dates, including a recent date as if final subdivision approval had been obtained. On March 12, 2007, the Attorney General's office replied by letter requesting new votes from the Board and the membership. A further recommendation suggested that the cost of obtaining the subdivision should be bourne by the buyer and not the seller.

On the same day, March 12, 2007, Split Rock agreed to forgive half of a credit of $80,243.22 which was due at closing as expenses related to subdivision approval. Also on March 12, 2007, the Board of Trustees of HHC, with knowledge of the current appraised value of the property, voted by a unanimous vote, to approve the pending sale to Split Rock, under the terms of the contract modification, and voted to call a special meeting of the entire congregation for March 28, 2007.

At the meeting on March 28, 2007, after a discussion that reviewed the history of the transaction and opposition from respondent, Melvyn Tanenbaum, that focused on the claimed current appraised value of the property, the congregation approved the sale by a vote of 62 for and 3 against with 3 abstentions. On April

10, 2007, respondent, Melvyn Tanenbaum, submitted opposition to the sale with the Attorney General's office. Thereafter, on April 15, 2007, the Assistant Attorney General handling this matter informed HHC that in light of the opposition to the sale, the Attorney General would take no position and would submit an affirmation to the Court setting forth the pros and cons of the sale. The Attorney General's office also insisted that a new congregation vote take place that permitted proxy voting by the members.

The new membership vote was held on April 26, 2007. Prior thereto, respondent Melvyn Tanenbaum, mailed an opposition letter to the membership and established a web site that included all the relevant documents, including the recently obtained appraisal. The vote at the new meeting, after a discussion in favor and opposed to the pending sale, was 205 in favor to 35 against with 8 abstentions. On April 30, 2007, respondent, Melvyn Tanenbaum, submitted to the Attorney General's office a supplemental affidavit in opposition to the sale. Thereafter, on May 7, 2007, the Hon. Emily Pines signed an order to show cause commencing this special proceeding seeking judicial approval of the pending sale to Split Rock. Respondents, Melvyn Tanenbaum and Dan Schoeffler, were the only members of HHC who requested notice of any court proceeding regarding the sale.

A religious corporation cannot sell, mortgage, or lease for a term exceeding five years any of its real property without obtaining court approval pursuant to the procedures set forth in § 511 of the Not-For-Profit Corporation Law (*see* Religious Corporations Law § 12[1]). Pursuant to said § 511, the Court may authorize a religious corporation to sell, mortgage, or lease any of its real property based upon a two-prong test that mandates the Court to determine (1) whether "the consideration and the terms of the transaction are fair and reasonable to the corporation" and (2) whether "the purposes of the corporation and the interests of the members will be promoted" (*see* NPCL §511[d]; *see also* ***Matter of Friends World College v Nicklin***, 249 AD2d 393, 671 NYS2d 489 [2d Dept 1998]). In essence, the Court must issue a determination on the fairness of the contract and as to whether there are any valid reasons for refusing petitioner's request for enforcement of the agreement.

It has been repeatedly noted that "[t]he purpose of this requirement is to protect the members of the religious corporation, the real parties in interest, from loss through unwise bargains and from perversion of the use of the property" (***Church of God of Prospect Plaza v Fourth Church of Christ, Scientist, of Brooklyn***, 76 AD3d 712, 716, 431 NYS2d 834 [2d Dept 1980], *affd* 54 NY2d 742, 442 NYS2d 986 [1981]).

It is also well established that in examining the first prong of the statutory test, the Court determines the fairness and reasonableness of the terms of the transaction at the time of the making of the contract (*see* ***Church of God of Prospect Plaza v Fourth Church of Christ, Scientist, of Brooklyn***, 76 AD3d 712, 717, *supra*; ***Rende & Esposito Consultants, Inc. v St. Augustine's Roman Catholic Church***, 131 AD2d 740, 743, 516 NYS2d 959 [2d Dept 1987]; ***In the Matter of the Application of the Church of St. Francis De Sales of New York City***, 110 Misc2d 511, 513, 442 NYS2d 741 [Sup Ct. New York County 1981]; ***Wolkoff v Church of St. Rita***, 132 Misc2d 464, 471, 505 NYS2d 327 [Sup Ct. Richmond County, 1986], *affd* 133 AD2d 267, 518 NYS2d 1020 [2d Dept 1987]).

As stated in ***Wolkoff v Church of St. Rita***, 132 Misc2d 464, 471, *supra*, "[t]he critical variable of the contract for the court was timing. The time the contract was entered into was the moment for calculating fair market value. If approval was sought a year later and there was a rise in market value, the contract could not be defeated because the sale price was below market value."

Here, no party is disputing the fact that in 1998, that is, at the time of the contract, the purchase price of $250,000.00 per lot, which translates into $2.25 million based upon a nine-lot subdivision, was fair and reasonable. The January 9, 2007 appraisal, which was directed by the Attorney General to be obtained by HHC, sets forth a fair market value in 1998 of $240,000.00 per lot or $2,160.000.00 for a nine-plot subdivision with site plan approvals. It must be remembered that at this time only preliminary and not final subdivision approval, is in place. The Court also notes that in 2001, HHC sold, after Attorney General and Court approval, the other half of the donated parcel as a vacant, unsubdivided parcel for $700,000.00.

The Court finds that based upon all the evidence submitted on behalf of all the parties on their respective motions, the terms and consideration of the contract were not unwise at the time the bargain was

struck. After careful consideration of all the factors that went into the making of the agreement and the explanations offered by the former and current counsel to HHC, the terms of the contract with Split Rock were fair and reasonable when HHC entered into the contract in February, 1998 (*see* NPCL § 511[9][d]). The Court concludes that the contract was fair and reasonable when made (*compare* ***Wolkoff v Church of St. Rita***, 132 Misc2d 464, 465, *supra*, where the appraised market value was 80% higher than the contract price).

Similar to the case of ***Scher v Yeshivath Makowa Corp.***, 20 AD3d 470, 471, 799 NYS2d 106 (2d Dept 2005), it would be an error for this Court to rewrite "the parties' contract for the sale of real property insofar as it changed the agreed-upon price."

The case cited by the objector-respondent, Melvyn Tanenbaum, that is, ***Rose Ocko Foundation, Inc. v Lebovits***, 259 AD2d 685, 686 NYS2d 861 (2d Dept 1999), does not stand for a contrary rule of law. In that case, the issue was not one of a different value on the date of contract and the date of closing, but the fact that the value of the property was found to be nearly double the contract purchase price. The Court disapproved the transaction because the not-for-profit corporation's president executed the contract without knowing about a contract rider that altered the agreement.

The second prong of the test requires the Court to examine whether the purposes of the corporation and the interests of the members will be promoted. An application can be denied if it would not benefit the religious society. Courts should be "guided primarily by whether those ends would be realized in light of conditions prevailing at the time the issue is presented to the court" (***Church of God of Prospect Plaza v Fourth Church of Christ, Scientist, of Brooklyn***, 76 AD3d 712, 717, *supra*). Here, the verified petition and the oral argument before the Court demonstrated that HHC's Board and its membership strongly favor HHC's sale of the property under the current agreement. Various votes undertaken by the Board and the entire congregation reflect repeated and nearly unanimous consent to the sale of the property (*cf* ***Church of God of Prospect Plaza***, *supra*). It was conceded at oral argument that if the matter was sent back to the congregation for further review and vote, the outcome would be the same.

The Court agrees with HHC when it argues that by virtue of the various votes by the congregation approving the sale, the congregation ratified the contract. That ratification obviates any claimed defects advanced by the objector-respondents. As set forth in ***Holm v C.M.P. Sheet Metal***, 89 AD2d 229, 232, 455 NYS2d 429 (4th Dept 1982):

> Ratification is the express or implied adoption of the acts of another by one from whom the other assumes to be acting, but without authority (see 21 NY Jur, Estoppel, Ratification, and Waiver, § 85). An unauthorized execution of an instrument affecting the title to land or an interest therein may be ratified by the owner of the land or interest so as to be binding upon him (21 NY Jur, Estoppel, Ratification, and Waiver, § 87).

Ratification requires a clearly expressed assent to the transaction and may not be inferred from doubtful or equivocal acts. Here, the congregation clearly and unequivocally ratified the proposed sale.

Moreover, the record before the Court demonstrates that the sale would not be detrimental to the purpose of the corporation and the interests of its members. The property to be sold is vacant land that does not affect the synagogue, the religious school, or the nursery school. The sale would not, in any way, impact the religious and educational interests of the religious corporation (*compare* ***Matter of Agudist Council of Greater New York v Imperial Sales Co.***, 158 AD2d 683, 551 NYS2d 955 [2d Dept 1990]) or work a fundamental change in its corporate purpose (*see* ***64th Assoc., L.L.C. v Manhattan Eye, Ear & Throat Hosp.***, 2 NY3d 585, 588, 780 NYS2d 746 [2004]).

An important consideration is the fact that HHC has a nearly $1.2 million mortgage covering the vacant parcel at issue and the synagogue building and property. The mortgage matures on September 1, 2007. As explained above, since September 2005, Split Rock had been paying the monthly mortgage

payment, relieving HHC of that obligation. In its papers and at oral argument, HHC has stressed the need to finalize this sale, in order to pay off the mortgage, without the need to seek refinancing and an extension of the mortgage. Moreover, it is obvious that if the sale is not completed, Split Rock will stop making the monthly mortgage payments and will seek to recover the past payments for which it will seek repayment. HHC claims that aside from seeking additional funds to refinance the mortgage, it will have to find a way to make the mortgage and tax payments from its membership. HHC advances the contention that it may have to raise annual assessments by 50%, with the strong possibility of losing membership

There is no doubt that if this sale is not approved by the Court, HHC would lose the benefit of receiving the proceeds of the sale immediately, with no prospective purchaser even suggested by the respondents. With approval of the sale, HHC can pay-off the mortgage, its obligation to a one-eighth owner of the property, and its outstanding debt owed to the congregation members who advanced money on behalf of its current Rabbi, thereby leaving HHC debt-free. HHC also argues that with the sale, various substantial credits will be obtained and outstanding liabilities will be satisfied out of the proceeds. There is no doubt that the existing mortgage can only be satisfied by virtue of the sale of the vacant parcel at issue. There are no other available assets. Finally, HHC argues that over the years two different developers tried to subdivide the parcel but failed, due to environmental difficulties and reluctant municipal zoning authorities.

Objector-respondents focus on the underlying contract's provision whereby HHC was responsible for payment of all subdivision expenses, claiming it is not normal for the seller to bear this obligation. For all the reasons set forth above, the Court rejects the concern of the Attorney General about HHC's obligation to obtain subdivision approval at its own cost. Concerned about maximizing lot yield, HHC decided to push the subdivision process itself and pay the costs associated with that process. At the time of entering into the contract, it was reasonable for HHC to conclude that the greatest benefit would arise from basing the purchase price on the number of approved lots. The fact that on-site conditions lead to extensive delays and that it took until July 27, 2006 to only obtain preliminary conditional subdivision approval, does not justify an attack upon the reasonableness of the decisions made by HHC in February 1998.

An additional objection centers on the lack of a price adjustment provision in the contract to anticipate the rising real estate market. Such constitutes little more than second-guessing. The contract contained the normal termination clause if subdivision approval was not obtained. Respondents can point to no case law to support the claim that it was unreasonable to provide for an adjustment clause in place of the normal termination clause. The fact that HHC was reluctant to terminate the contract based upon a fear that Split Rock would be able to purchase the parcel for only $1,750,000.00 does not change the result. The Court agrees with HHC's argument that the contract modification of September 2005 was designed to protect the congregation from loss through unwise bargains. HHC obtained important concessions even in the face of the ambiguous contract provisions regarding the purchase price.

The final complaint offered by the objectors is centered on the claim that the property was valued at $6.7 million as of July 2006, as set forth in the appraisal mandated by the Attorney General's office. This argument fails because that value is based upon the assumption that there exists an approved final subdivision with approved site plans for a nine-lot subdivision. As set forth above, such zoning approvals are not in place and it is conceded that such will not be forthcoming for at least two or three years. There are no buildable plots available at this time. Therefore, the claimed value of $6.7 million is not based upon facts supported by the record. In any event, the case law, as set forth above, demonstrates that market valuation is to be based upon value as of the time of the contract and the July 2006 date set forth in the appraisal has no relationship to the contract date.

The Court finds that the second prong of the test has been satisfied. The sale will benefit the corporation and will promote the best interests of its members. The members have repeatedly voted overwhelmingly to approve the sale of this land, which has never been used in conjunction with its religious or educational purposes and after which the congregation will be debt-free (*see* ***Matter of Friends World College v Nicklin***, 249 AD2d 393, *supra*). The immediate benefits to be received by HHC from this sale overwhelmingly outweigh any speculative and unsupported claim of future benefits advanced by the objector-respondents, if this sale was rejected by the Court.

In ***Muck v Hitchcock,*** 149 AD 323, 328-9, 134 NYS 271, (4th Dept 1912), *revd. on other grounds*, 212 NY 283 (1914), it was noted that a court of equity "has ample power to inquire into the fairness of the contract and as to its advantage or disadvantage to the religious corporation, and to approve the proposed conveyance and direct it to be made where, upon all the facts, no valid reason appears for refusing such relief" (*see also* ***Church of God of Prospect Plaza v Fourth Church of Christ, Scientist, of Brooklyn***, 54 NY2d 742, 744, 442 NYS2d 986 [1981]). The statutes at issue here are intended to protect religious and charitable organizations from loss through unwise bargains. On this record, the objector-respondents have failed to demonstrate to this Court sufficient reason to disapprove the sale.

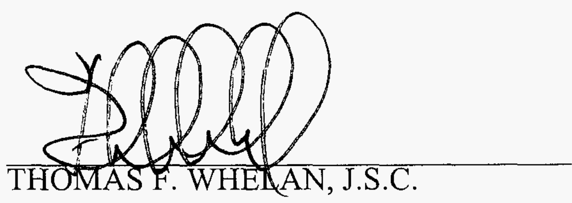
One issue must be addressed by the Court. The statute in question states that once the court is satisfied that the transaction fulfills the two prong test, "it may authorize the sale ... for such consideration and upon such terms as the court may prescribe" (NPCL § 511[d]). The record before the Court reflects that HHC has expended $248,583.86 in expenses relating to obtaining subdivision approval, with Split Rock assuming $40,000.00 of that cost pursuant to an August 18, 2004 concession agreement. Thereafter, by virtue of the September 22, 2005 modification agreement, Split Rock assumed all future costs associated with the subdivision approval, without reimbursement from HHC. With Split Rock now responsible for obtaining final subdivision approval, it has assumed responsibility for hundreds of thousands of dollars in subdivision expenses, all contrary to the original contract provision.

The Court of Appeals has recently held that all provisions of "a sales transaction of this kind should be reviewed under the N-PLC 511 standard of fairness, reasonableness and furtherance of corporate purpose" (***64th Assoc., L.L.C. v Manhattan Eye, Ear & Throat Hosp.***, 2 NY3d 585, 591, *supra*). Here, Split Rock partially waived this provision of the contract in August 2004 and completely waived the provision in September 2005. While this provision was not unwise as of the time of the execution of the contract, as set forth in detail above, fairness and reasonableness mandate that this term of the contract be further modified to direct Split Rock to bear all costs and expenses previously incurred by HHC in obtaining preliminary subdivision approval. As the expenses and costs of the subdivision process mounted, the cash-strapped congregation could not meet that unexpected demand. In order to move the stalled process, Split Rock, with greater liquid assets, had to assume that responsibility. With this *de minimis* modification, the contract is in keeping with the protections of the statutes governing the sale of religious property.

Finally, the record before the Court does not disclose a need for a hearing. This is not a case of conflicting appraisals and the possibility of higher offers (*see* ***In the Matter of the Application of the Church of St. Francis De Sales of New York City***, 110 Misc2d 511, 512, *supra*). Here, all parties were afforded an extended time at oral argument on the motions to demonstrate to the Court their respective positions. Moreover, NPCL § 511(b) permits interested parties to appear and "show cause why the application should not be granted." The two objector-respondents were offered ample time to state their positions before the Court.

Accordingly, the petition is granted, the motion to dismiss is denied, and the terms of the sale are modified to reflect that Split Rock is directed to bear all costs and expenses previously incurred by HHC in obtaining preliminary subdivision approval. This constitutes the decision and Order of the Court.

DATED: 8/7/07



THOMAS F. WHELAN, J.S.C.