

**Merklin v Incorporated Vil. of Freeport**

2008 NY Slip Op 31548(U)

May 15, 2008

Supreme Court, Nassau County

Docket Number: 7234-07/

Judge: F. Dana Winslow

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**DAVID A. MERKLIN and MCI BUSINESS & PROPERTY MANAGEMENT CORP.,**

**TRIAL/IAS, PART 7  
NASSAU COUNTY**

**Plaintiffs,**

**-against-**

**MOTION DATE: 11/19/2007  
MOTION SEQ. NO.: 001**

**INCORPORATED VILLAGE OF FREEPORT;  
JOSEPH MADIGAN, both individually and in his capacity as Superintendent of Buildings for the Village of Freeport; PLANNING BOARD OF THE INCORPORATED VILLAGE OF FREEPORT;  
ROBERT CARDINALE, both individually and as a member of the Village of Freeport Planning Board;  
CAROL RYAN, both individually and as a member of the Village of Freeport Planning Board; WILLIAM A. SEWARD, both individually and as a member of the Village of Freeport Planning Board; ROBERT DELMOND, both individually and as a member of the Village of Freeport Planning Board; NINA DILLON, both individually and as a member of the Village of Freeport Planning Board; NOREEN DOMINO, both individually and as a member of the Village of Freeport Planning Board; KENNETH R. DASH, both individually and as a member of the Village of Freeport Planning Board,**

**INDEX NO.: 017234/07**

*entered complete*

**Defendants.**

**The following papers having been read on the motion (numbered 1-3):**

- Notice of Petition.....1**
- Affirmation in Opposition.....2**
- Verified Answer.....3**

In this Article 78 proceeding petitioners seek judgment reversing the denial of a building permit by the Building Department of the Village of Freeport, following petitioners' refusal to comply with a conditional site plan approval.

Petitioner David A. Merklin is the owner of the property at issue, and petitioner MCI Business & Property Management Corp. is the manager of the property. The property is improved by a two-family dwelling and a detached garage at 400 Atlantic Avenue in Freeport, which is zoned Business A. The property had fallen into a state of disrepair, and petitioners sought a building permit to perform the following work: "remove existing partial wrap-around porch and replace with smaller portico, replace kitchen windows, cabinetry, flooring, new siding and roof over porch to match existing." Petitioners' plans also included removing a side stairway and a side door, and repaving an existing driveway. When petitioners applied for a building permit for this work they were advised that their application required approval from the Site Plan Review Board ("the Board").

A public hearing was held before the Board on July 12, 2007. Following the hearing, approval was granted by the Board on July 31, 2007, subject to 12 conditions, including the following:

(3) Applicant/Owner must submit a Landscape Plan to the Village Clerk's Office (with a copy to the Building Department) within fourteen (20) (sic) days if this approval and shall provide and maintain landscaping at the premises in accordance with said landscape plan. Such landscape plan to include perennial gardens in front of house, as well as, arborvitae hedge of west side and east sides of

(4) A parking area shall not be constructed in front of the house or the front yard and the remainder of the front yard to be landscaped. The driveway to be a single land; no more that ten feet wide, paved in blacktop and edged

with Belgian blocks.

(5)Porch to be constructed as per submitted rendering, with turn porch posts with a minimum of six inches in diameter with brackets and integrated trim. All rails, cornices, posts and trims posts shall be painted in white to match siding and window trim. Front deck and porch deck to be constructed in Trek decking material. A lattice skirt to be constructed under the entire porch and painted to match porch posts and rails.

(6) All elevations of the house are to be sided in white vinyl placed in a horizontal fashion. All windows to be trimmed in a minimum of four-inch traditional style trim. Two front doors to be replaced with Victorian style front doors. The front porch light in a Victorian style to be placed on the porch or near the front doors.

(7)The entire garage is to be painted to match the color of the siding on the house.

The conditions were set forth in an affidavit of compliance that the applicant was directed to execute and return to the office of the Village Clerk within 14 Days. The applicants made changes to the Affidavit of Compliance before they submitted it. Thereafter petitioners were notified by letter dated August 31, 2007, that as a result, the application for a building permit was denied. This Article 78 proceeding, seeking a reversal of that denial, was commenced on September 25, 2007.

The Building Superintendent originally determined that petitioners' application was subject to review by the Board pursuant to Freeport Code §209-4.A, which provides, *inter alia*:

No building, structure or outdoor use of land shall be used, constructed, enlarged, altered or moved in any zoning district until a site plan meeting the requirements of this chapter has been approved by the Planning Board.

The Building Superintendent concluded that the proposed construction called for alteration of the subject two-family dwelling, and thus fell within the broad parameters of the Board's jurisdiction. Although neither side has defined the concept of "alteration," this Court agrees with the Building Inspector that the proposed construction would qualify as an alteration to the subject two-family dwelling.

Petitioners' major argument is that the proposed construction is specifically excluded from the coverage of the Freeport Code provision mandating site plan review. These specific exclusions from this requirement are set forth in §209-4.B, including the following:

- 1) Renovations which are 100% internal to an existing building or structure;
- (2) Exterior renovations to an existing building or structure which do not increase, alter or otherwise modify the outer envelope of said building or structure. However, facade improvements to business and commercial structures are specifically included within the provisions of this chapter.
  
- (3) Repair and replacement of existing driveways, curb cuts, aprons and sidewalks.

Petitioners argue that all of their proposed renovations fall within these exclusions, and therefore the Board had no jurisdiction over their application for a building permit.

Moving on to the exclusions, there is no dispute that the interior renovations certainly fall within the specific exclusion , and the Court notes that there are no conditions in the site plan approval regarding the interior renovations.

With respect to the driveway, respondents argue that the existing driveway is being extended, rather than simply replaced. However, there is no evidence to support such a conclusion. Therefore the proposed alterations to the existing driveway fall within the specific exclusion.

What remains is the issue of whether the removal of the wraparound porch and construction of a smaller porch, portico, new steps, new windows, new doors, and new siding may be considered “exterior renovations to an existing building” which do not “alter” the “outer envelope” of the existing building.

The term “envelope” is not defined in the Freeport Code. Petitioners assert generally that the “envelope” consists of the structural elements of the building which act to exclude the outside environment from the building’s interior. The Court notes that according to Wikipedia, the physical components of the “envelope” of a building include the foundation, roof, walls, doors and windows.

By any definition of the term “envelope,” petitioners’ proposed exterior renovations to the walls, doors, and windows of the existing building certainly appear to this Court to “alter” the existing walls, doors and windows, and thereby, alter the “outer envelope” of the existing building. Under these circumstances, the Court is compelled to conclude that petitioners’ application for a building permit does NOT fall within the exclusion for “exterior renovations . . . which do not .

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 . . . alter . . . the outer envelope of said building.”

Petitioners are correct that the subject two-family dwelling is not a business or commercial structure [see Real Property Law §443,444-b and 461; Real Property Tax Law §738], and the location of this two-family dwelling within a Business A District does not change this determination. Nevertheless, the second sentence of the second exclusion is of no assistance to petitioners, because it includes, rather than excludes, the properties to which it pertains.

Based on the foregoing, petitioners’ challenge to the jurisdiction of the Board must be rejected in part, as to the renovations to the roof, walls, doors, and windows, and granted in part as to the interior renovations and the driveway repairs.

To the extent that the Board’s jurisdiction has been upheld as to alterations to the “outer envelope” of the existing building, respondents’ major argument is that this proceeding is time-barred. Respondents point out that petitioners have failed to comply with the brief 30-day limitations period [Village Law §7-725-a (11) and Freeport Code §209-13; *Ramapo Homeowners Assn v Planning & Zoning Board of Town of Ramapo*, 2 AD3d 530 (2<sup>nd</sup> Dept. 2003)]. The limitations period commences upon the filing of the decision by the Board in the office of the village clerk, and the Court looks to respondents to present *prima facie* proof of the date of filing [*Ziembra v City of Troy*, 295 AD2d 693 (3<sup>rd</sup> Dept. 2002); see generally *In re Schwartz*, 44 AD3d 779 (2<sup>nd</sup> Dept. 2007)], such as by affidavits of individuals having personal knowledge of the date of such filing [*Gagliardi v Board of Appeals of Village of Pawling*, 188 AD2d 923 (3<sup>rd</sup> Dept. 1992) lv app den 81 NY2d 707 (1993); *Pickett v Town of Tusten Zoning Board of Appeals*, 169 AD2d 906 (3<sup>rd</sup> Dept. 1991)], or documentary evidence with a date-stamp. Absent *prima*

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*facie* proof of such filing, the burden does not shift to the party opposing the limitations defense [*Swift v New York Medical College*, 25 AD3d 686(2<sup>nd</sup> Dept. 2006)], and the defense of expiration of the limitations period must be denied [*Ziembra; Ferrigan v Thompson*, 135 AD2d 953(3<sup>rd</sup> Dept. 1987), app dsmd 72 NY2d 854 (1988)].

Here, the sole evidence regarding the timing of the filing of the decision by the Board that is at issue, is a statement by the Village Attorney (Edwards Affirmation in Opposition, par.14), who does not state that he has personal knowledge of the alleged filing. There is no affidavit by the Village Clerk, nor the Deputy Village Clerk, nor any of the members of the Board with personal knowledge; nor is there any documentary evidence with a date-stamp. Under these circumstances, respondents have failed to establish a *prima facie* case of their limitations defense, which is hereby **dismissed**.

Respondents' argument that petitioners have failed to exhaust their administrative remedies is erroneous, as it is based on the faulty premise that petitioners are challenging the March 15, 2007, determination of Building Superintendent Madigan to refer their application for building permits to the Board.

The Court now turns to the substance of the petition. Although petitioners seek reversal of the denial of their request for a building permit, the essence of petitioners' challenge is to the conditions of the site plan approval. The standard for judicial review of a Planning Board's determination is whether it is arbitrary and capricious, illegal, or an abuse of discretion [*Pagnozzi v Planning Board of the Village of Piermont*, 292 AD2d 613 (2<sup>nd</sup> Dept. 2002); *McKennett v Hines*, 289 AD2d 246 (2<sup>nd</sup> Dept. 2001)]. The imposition by a Planning Board of conditions

that have no objective factual basis in the record, and are not reasonably designed to mitigate some demonstrable effect, is arbitrary and capricious [*Richter v Delmond*, 33 Ad3d 1008 (2<sup>nd</sup> Dept. 2006)]. The Board's determination must not rest entirely on subjective considerations [see *Matter of Berk v McMahon*, 29 AD3d 902 (2<sup>nd</sup> Dept. 2006)]. The Court is authorized to strike from a site plan numerous improper conditions to site plan approval that are imposed by a Planning Board [ *Chase Partners LLC v Inc. Village of Rockville Centre*, 43 AD3d 1053 (2<sup>nd</sup> Dept. 2007)].

At the hearing petitioners expressly conceded all matters concerning the landscaping set forth in Condition #3 (transcript, p.25), and admitted that painting the garage to match the house was anticipated, as required by Condition #7 (transcript, p. 27). Therefore the record contains a factual basis for these conditions, which are sustained.

Condition#4 regarding the driveway is hereby stricken, as the driveway falls within the express exclusion discussed above. In any event, the Court notes that no basis for a requirement of Belgian blocks, on either side of the proposed new asphalt, is contained in the record.

Condition #5, governing minute details of the porch, porch posts, rails, cornices, posts, decking material, and a lattice skirt, sets forth certain requirements for which there is no objective factual basis in the record. Condition #6, which provides requirements for the windows with "traditional style trim", "Victorian style" doors and a "Victorian style" porch light, is unenforceable as it involves totally subjective judgment. There is no showing that these conditions are reasonably designed to mitigate some demonstrable effect, and therefore Conditions #5 and 6 are hereby stricken as arbitrary and capricious.

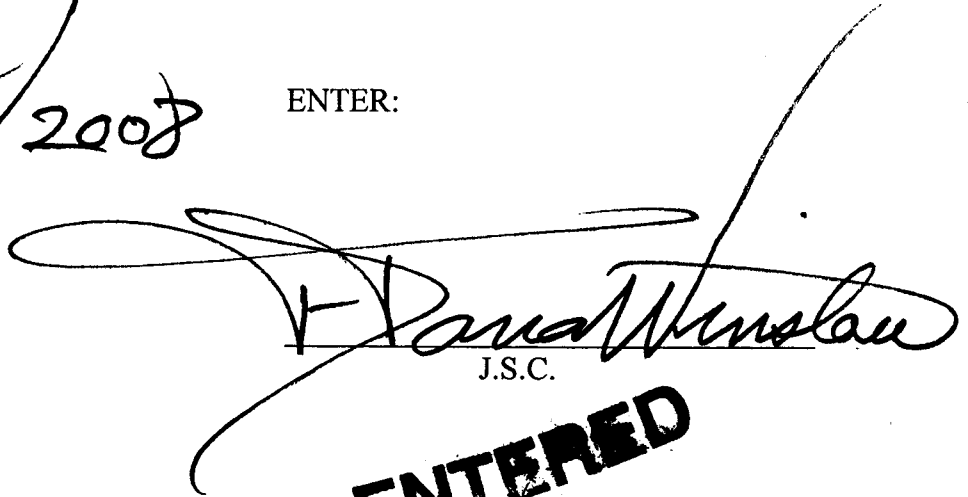
Based on the foregoing, the petition is granted to the following limited extent: Conditions #4 of the site plan approval dated July 31, 2007, is a nullity, and Conditions #5 and 6, are hereby stricken as arbitrary and capricious. The remainder of the petition, is denied. The Village Clerk is directed to mail to petitioners a new letter of approval with a new affidavit of compliance in accordance herewith, within 15 days of service or receipt of a copy of this determination. This proceeding is hereby **dismissed**.

This constitutes the Order of the Court.

Dated:

5/15/2008

ENTER:



J.S.C.

**ENTERED**

MAY 21 2008

NASSAU COUNTY  
COUNTY CLERK'S OFFICE