SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

In the Matter of EDWIN SMITH and DIANE SMITH,
Petitioners,

Index #000828/08
Sequence No. 001
Part 40

For a Judgment pursuant to Article 78 of the Civil Practice law and Rules to annul and set aside the determination of the Planning Board of the Incorporated Village of Matinecock dated December 17, 2007and filed with the Village Clerk on December 21, 2007,

5/15/2008

- against -

WILLIAM B. TABLER, as Chairman, JOHN B FAUGHNAN, JAMES LARGE and LAWRENCE R. GLEN as members of THE PLANNING BOARD OF THE INCORPORATED VILLAGE OF MATINECOCK, and JUDITH TRITE CAMPBELL, as Trustee under the Will of Beatrice A. Watts,
Respondents.

Amended Verified Petition....1
Reply Affirmation in Opposition....2
Verified Answer....3
Answer....4
Affidavits [K. Cimonetti; W. Tabler; E. Smith; G. Gray....5-8
Correspondence dated 5/22/08 [Humes & Wagner LLP]....9

Memoranda of Law
Weber Law Group LLP for Petitioners....10
Chase, Rathkopf & Chase, LLP for Respondent....11
Humes & Wagner, LLP for Respondent....12
County Clerk's File....13
Certified Transcript and Record Volume 1-3....14
Certified Transcript and Record Volume 2-3....15
Certified Transcript and Record Volume 3-3....16
Supplemental Certified Transcript and Record....17

Upon the foregoing papers, petitioners' application for a judgment pursuant to CPLR Article 78 annulling, reversing and vacating the final approval of the respondents The Planning Board of the Incorporated Village of Matinecock (the Board) dated December 17, 2007 and filed with the Town

Clerk on December 21, 2007 is denied in its entirety (CPLR §7803(3) and (4)).

At the outset, this Court determines that, with one exception, petitioners brought this proceeding in a timely manner (Village Law §7-712-c (1)). The Request for Judicial Intervention including the notice of petition and petition is dated and recorded January 14, 2008. The petition was amended on January 24, 2008 to include the additional necessary parties of petitioners' wife, Diane Smith, and Judith Strite Campbell as trustee under the William of Beatrice A. Watts, who was the applicant at the Planning Board's proceedings below. The Board was mailed the amended notice of petition January 18, 2008 and the respondent Trustee was personally served on January 31, 2008.

The Court hereby permits the amendment *nunc pro tunc* to January 14, 2008 (CPLR §1001, §1003; see *Solomon v. Solomon, 136 AD2d 697; In re Red Hook/Gowanus Chamber of Commerce, 5 NY3d 452*).

However, respondents' argument that petitioners' time within which to bring this proceeding commenced on July 5, 2007, the date the Board's approval of the preliminary plat was filed is persuasive with regard to an aspect of this appeal that will be addressed further below: the condition that driveway access to the three lots will be restricted to one common right-of- way, instead of there separate driveways as, arguably, required by the Village zoning law.

This case involves a 6.7 acre parcel of land located in the Incorporated Village of Matinecock (the Village) at 43 Laurel Lane. Respondent Campbell (the applicant) sought and ultimately received approval from the Board to partition the property into three residential lots. The subject property is located in the Village's R-2A Zoning District requiring a minimum of 2 acres.

The property is presently improved with a one-story dwelling with a driveway accessing Laurel Lane, a private road. The preliminary plat indicated the property was to be divided into three residential lots, each with a separate driveway connection.

The application was before the Board for two and one-half years during which five hearings with public participation and two on site inspections by the Board, took place.

The record reveals that local residents assiduously expressed their numerous concerns regarding the

property's development. In response, the Board addressed these issues during its investigation which included, among others, the nature of the property which contained steep slopes, the environmental impact of removing native vegetation including but not limited to any drainage problems, and emergency vehicle access.

As the initial plan was revised and in order to eliminate a too extensive site clearing and possible erosion, the amended plan changed the three-driveway access to Laurel Lane to one common right-of-way at the same location as the current driveway.

In addition, a conservation area was included in the steep slope portion of the property. Provision was made for a drainage area to diminish excess flooding during significant rain storms.

Any preliminary approval was subject to an environment review under the State Environmental Quality Review Act (ECL Article 8 [SEQRA]). The issue of driveway access was a key element to the Board's preliminary SEQRA decision of April 16, 2007.

In the case of *Long Island Pine Barrens Society, Inc. v. Planning Board of the Town of Brookhaven, 78 NY2d 608*, involving Town Law §282 and §276, comparable to Village Law §7-740 and §7-728, the Court of Appeals held that when the challenge to a subdivision is based upon noncompliance with SEQRA, the Legislature intended to provide for judicial review at this preliminary stage, rather than waiting for a final determination.

The Board's filing of the preliminary plat approval on July 5, 2007 triggered the 30-day Statute of Limitations for challenging the approval on SEQRA grounds. At this juncture, the approval is meant to fix the various components of the plat with its important design elements.

Here, as in the Pine Barrens case, the approval was final with respect to any SEQRA issues, including petitioners' challenge to the decision involving access to Laurel Lane. Consequently, that decision may not be reviewed by this Court under the Statute of Limitations.

In any event, on this record the Court concludes that the Board's approval on this issue as well as other SEQRA concerns was neither arbitrary nor capricious or an abuse of discretion and was based upon substantial evidence (CPLR §7803(3) and (4); see, e.g., *New City Office Park*

v. *Planning Board, 144 AD2d 348*). Indeed, it is difficult to imagine a more thoroughly crafted plan taking into account the opposition of the nearby residents. As each reasonable concern was voiced, the Board considered the alternatives (*compare Michaelson v. Warshavsky, 236 AD2d 406*).

Furthermore, the Board's decision, including the right-of-way design, was in compliance with Village Code §162-16(1), (E) and (F) on Design Standards and under its authority to make reasonable modifications (see Village law §7-725(a)(5) and 2008 Commentary p. 38 [2000]).

The Board, however, left the non-SEQRA issue, the enforceability of a 1948 deed restrictive covenant to the applicant's chain of title, to a Court's determination, thereby setting the stage for petitioners' questioning of whether the Board's action in this regard was an error of law to be raised from the final determination (CPLR §7803 (3)).

According to a copy of a deed dated October 8, 1948 from Lester A. Bassett to Philip T. Crystal and "*subject to zoning, planning and building rules and regulations of the Incorporated Village of Mantinecock. . .[T]he party of the second part covenants and agrees that the use of the premises herein shall be limited to one main dwelling house and accessory buildings and this covenant shall run with the land.*" Petitioners' asserted before the Board that this deed prohibits partitioning of the property for building additional residences while the applicant contended that it was an unenforceable private covenant.

The applicant was able to demonstrate her colorable right of title by a Lawyer's Title Insurance policy on the property, insuring against the unenforceability of the 1948 restrictive covenant. In addition, the Board heard testimony and a legal analysis from the president and counsel of TBS Abstract Corporation and his conclusion that the covenants and restrictions contained in the 1948 deed were unenforceable.

By contrast, petitioners presented a letter from Chicago Title Company which stated that any policy would have to contain the 1948 deed and covenant as an exception.
However, the Lawyer's policy acknowledged the exception by virtue of its independent risk assessment and decision to insure the property nonetheless.

In light of the applicant's presentation, the Board's decision that it could proceed on a colorable

right of title rather than making a legal determination enforcing the private covenant had a rational basis (*Friends of the Sawagunks, Inc. v. Knowlton, 64 NY2d 387; cf. Chambers v. Old Stone Hill Road Associates, 1 NY3d 424; see also, Village Code 195-9 (c)*).

As demonstrated before the Board, petitioners, as adjacent property owners, were not privy to the original covenant. Lester Basset owned a 79-acre tract of land which he subdivided into several parcels, including the subject property. When the other parcels were subdivided into two-plus acre lots, the deeds did not contain the same covenant.

Petitioners' theory that they are third-party beneficiaries to the Basset-Crystal conveyance is not supported in the record (*see Nature Conservancy v. Congel, 253 AD2d 248*). The covenant does not have a specific clause conveying a third-parties' right to enforce it. Furthermore, petitioners failed to submit sufficient evidence to the Board that the original grantor, Mr. Basset's intent was to benefit them as the adjoining property owners (Id).

Moreover, the covenant was "subject to zoning, planning and building rules and regulations of the Incorporated Village of Mantinecock," thus recognizing, as strictly construed against petitioners, that local government could alter the covenant within its authority (*see Witter v. Taggart, 78 NY2d 234, 237*).

Finally, petitioners' allegation that the Board "rushed to judgment" by conducting its final meeting on December 17, 2007, one day before the Village Board of Trustees had scheduled a vote on the extension of a moratorium for all properties having steep slopes, is speculative.

The Board, cognizant of the Trustees' meeting, was concerned that after two and one-half years it might be unable to render a final decision for months, taking into consideration holiday schedules and the like and the possibility that the Trustees' vote might be postponed. Furthermore, the original moratorium of April 25, 2007 in effect at that time, Local Law §1-2007, exempted respondent Campbell's application from its provisions because it had been filed prior to December 31, 2006, the cut-off date. Therefore, the Board was legally permitted to take its final vote when it did.

The Court will not second guess any other agenda. Nor will the Court recognize any evidence that petitioners now submit that was not originally before the Board. The tax records for the subject and

surrounding properties that petitioners proffer as circumstantial evidence that the property received a 30% reduction because of the restrictive covenant is not only inconclusive, but has no bearing on the original grantor's intent.

As to any remarks made against counsel for the Board, petitioners had the option of seeking a contempt order for failure to produce the original subdivision records if they could sustain their belief that the Village was intentionally suppressing such evidence. As attested to by an employee at counsel to the Board's firm, she was unable to locate the requested documents upon researching the files.

Moreover, prior to the subpoena petitioners had sufficient opportunity to attempt to locate these documents. The Court signed the subpoena not because it believed the Village had them in its possession, but rather to allow petitioners every possible recourse to find evidence to support their position in this proceeding vis-a-vis the restrictive covenant in order to convince the Court to remand the case for further action.

The petition is dismissed.

Dated: June 2, 2008

ENTERED J.S.C.

JUN 10 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE