

Matter of Rich v Bralower

2010 NY Slip Op 32091(U)

July 27, 2010

Supreme Court, Nassau County

Docket Number: 004245/10

Judge: Daniel R. Palmieri

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SHORT FORM ORDER AND JUDGMENT

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

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In the Matter of the Application of

TRIAL TERM PART: 45

MICHAEL F. RICH, JR. And ROSEMARY RICH,

INDEX NO.: 004245/10

Petitioners,

**for a Judgment pursuant to Article 78 of the
Civil Practice Law and Rules,**

-against-

**MOTION DATE:4-1-10
SUBMIT DATE:7-13-10
SEQ. NUMBER - 001**

**JOHN BRALOWER, ANDREW RAFUSE, JAMES
ECKEL, EUGENE GEDDES, ADAM KIMMICK,
RICHARD WEIR, III and alternates HENRY C.
CLARK and MICHAEL O'BRIEN, constituting the
PLANNING BOARD OF THE INCORPORATED
VILLAGE OF OYSTER BAY COVE,**

Respondent,

-----x

The following papers have been read on this proceeding:

Notice of Petition, dated 3-3-10.....	1
Verified Answer, dated 3-24-10.....	2
Respondent's Return, Certified 3-16-10.....	3
Petitioners' Memorandum of Law, dated 5-28-10.....	4
Affirmation, dated 6-25-10.....	5
Respondents' Memorandum of Law, dated 6-25-10.....	7
Petitioners' Reply Memorandum of Law, dated 7-7-10.....	8
Affidavit, dated 7-9-10.....	9

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This is a hybrid declaratory judgment and CPLR Article 78 proceeding to vacate the determination of the respondent Planning Board of the Incorporated Village of Oyster Bay Cove (“Village Board”) denying the petitioners’ application for subdivision of approximately 1.25 acres into four legal building lots.

The property is located not within the Village of Oyster Bay Cove (“Village”), but rather within a nearby unincorporated area of the Town of Oyster Bay (“Town”). Petitioners’ property is designated on the Nassau County Land and Tax Map as Section 27, Block 28, Lot 156. It lies on the northwest corner formed by Burtis Avenue (to the south) and McCoun’s Lane (to the east). There are two existing dwellings on the property, and the proposed subdivision would create a lot for each, and two additional building lots. East of the property, and within 300 feet, lies the boundary line of the Village.

There is no dispute that the four proposed lots comply with the zoning requirements of the Town’s “R1-6” zoning district, evidenced by a Letter of Zoning Compliance on January 18, 2008 supplied by the Town. In addition, the petitioners sought and obtained from the Nassau County Planning Commission (“NCPC”) a waiver of map filing pursuant to Real Property Law § 334-a(1) and Nassau County Charter § 1610(1)(a).

Nevertheless, the petitioners applied to the Village Board seeking its consent to the subdivision of their property. After a hearing continued over a period of some eighteen months, the Village denied the application. This proceeding ensued.

The petitioners contend that, although they sought the Village Board’s consent, they did so not because that body’s approval was necessary under law but rather to avoid

litigation. In the present proceeding they raise want of the Village Board's jurisdiction as their first claim. Alternatively, they contend that, should jurisdiction be found, the petition should still be granted and the determination annulled on the ground that it was arbitrary and capricious.

Initially, the Court notes that the petitioners' application to the Village Board for its consent and participation in a series of hearings on the plan does not constitute a waiver or a judicial estoppel of their right to raise lack of jurisdiction in the current proceeding.

Assuming for purposes of argument that the Village Board had no jurisdiction over the subdivision plan under the Nassau County Charter, it cannot be created by mutual assent. Regulation by municipalities of land use is in derogation of the common law, and thus any statutes or ordinances which so regulate privately owned real property must be strictly construed. *DeTroia v Schweitzer*, 87 NY2d 338 (1996); *Allen v Adami*, 39 NY2d 275, 277 (1976). Therefore, if no statute or ordinance provides a clear basis for rule-making or review power in the Village Board over petitioners' property there is none, and it cannot be created by the acts or statements of the parties, any more than parties can confer subject matter jurisdiction on a court if none exists. *See, e.g., Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 351 (1988). This type of jurisdiction by consent appears to be respondent's argument here, as it points to numerous statements of petitioners' counsel at various appearances before the Village Board (and other villages) that such jurisdiction exists. Moreover, lack of subject matter jurisdiction based on insufficient geographical reach is recognized, and can be raised at any time. *Burke v Aspland*, 56 AD3d 1001 (3d Dept. 2008). The cases of "judicial estoppel" relied upon by the respondent do not have to do with jurisdiction over the

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subject matter of the litigation. See, *Hartsdale Fire Dist. v Eastland Constr., Inc.*, 65 AD3d 1345 (2d Dept. 2009); *Maas v Cornell University*, 253 AD2d 1 (3d Dept. 1999), *affd* 94 NY2d 87 (1999).

Turning to the merits, the Court agrees with the petitioners that under the Nassau County Charter the Village lacked the jurisdiction to review the subdivision once the NCPC had granted the waiver and the Town of Oyster Bay found the plan to be in compliance with its zoning requirements.

As noted, statutes and ordinances which regulate privately owned real property must be strictly construed; ambiguities are to be read in favor of the property owner. *DeTroia v Schweitzer*, 87 NY2d 338, *supra*; *Allen v Adami*, 39 NY2d 275, 277, *supra*. The Court finds that although the relevant statutory scheme, found in Nassau County Charter, Article 16, clearly gives a village whose boundary is within 300 feet of the subject property the authority to review a subdivision plan where a map must be filed, its authority ends where a waiver for a four-lot plan, without alteration to existing streets, has been granted by the NCPC and where the larger town has approved the plan under its zoning authority.

There is no dispute that section 1610 mandates the filing of subdivision maps with the Nassau County Clerk, and that such a filing cannot take place until the map has been approved by the planning commissions which have jurisdiction over the subject area. That would include a municipality whose border is within 300 feet of the property. Nassau County Charter (“Charter”) § 1610(1), (2).¹

¹ This section was revised (Nassau County Ordinance No. 46-2009), effective April 14, 2009, but the petitioners filed their subdivision application some two years before. The parties do not dispute that the earlier, 1989 version thus applies to the present matter.

This power in favor of local municipalities is found in § 1610(2), which states as follows:

2. No plat of a subdivision of land partly or wholly within the county shall be filed until it shall have been approved by each Planning Commission and/or planning authority having jurisdiction over that area and the approval thereof entered on the plat by the Chairman, Director or such agent as may be authorized by the Planning Commission and/or planning authority thereof. For purposes of this section the County Planning commission shall be a planning authority with jurisdiction over all portions of the county outside of cities and villages or within a city or village and within three hundred feet of the boundary thereof and the planning board or Commission, the Board of Zoning Appeals of such city or village shall be the planning authority of such city or village, with jurisdiction over all portions of such city or village and over all territory outside of such city or village and within three hundred feet of the boundaries of such city or village.

However, there are exceptions to the filing requirement, and this limits the power of an adjacent village. Subsection 1610(1)(a) provides as follows:

(a) where real property is subdivided into *not more than four* lots, plots, blocks, sites or units that conform to the applicable planning and zoning regulations or ordinances of the city, town or village, as the case may be, and such subdivision does not involve the laying our of a street or the extension of a previously laid out street, the owner or agent may make a written application to the Planning Commission or planning authorities having jurisdiction for a waiver of the filing requirements hereunder upon forms supplied by the appropriate Planning Commission or planning authority. Such a waiver may be granted by such Planning Commission or planning authorities *after determining that such subdivision plat is in compliance with this Section and with the zoning and planning regulations of the city, town or village, as the case may be, in which the property is located...* Where real property is capable of being subdivided into *more than four (4)* lots, plots, blocks or units that conform to the applicable planning and zoning regulations or ordinances of the city, town or village, as the case may be, and such subdivision does not involve the laying out or the extension of a previously layed out street, *the Planning Commission or planning authorities having jurisdiction may, in the sole discretion of such Planning Commission or planning authorities deny such waiver application and require the filing in the Office of the Clerk of Nassau County a map...* subject to appropriate conditions as in the judgment of such Planning Commission or planning authorities as may be required in the interest of the public health, safety and general welfare;...

Emphasis supplied; see also Real Property Law § 334-a(1)(a).

This Court concludes that, reading these provisions together, the Charter gives the NCPC and a village mutual jurisdiction for the stated land regulation purpose within 300 feet of a village border, insuring that neither can take any action that would usurp the other's power to control what happens in the nearby area. The NCPC can reach into a village to the extent of 300 feet, and the village can reach out to the extent of 300 feet. However, the rules of waiver under the Charter alter the equation. In cases such as the one at bar, where the subdivision is to be no more than four lots and no changes to streets are implicated, a waiver granted by the NCPC means that the only municipality that can raise its zoning or planning concerns is the one in which the property is actually located.

Where more than four lots are proposed but where there are no implications for local streets a waiver may still be sought, but in that case the statutory language limiting the zoning review to those entities in which the property is located is absent. This makes logical sense, as the greater number of proposed lots, carrying with it greater concern, creates the need for approval not only from the entities where the property is located, but from the one that is less than 300 feet away. In the present case, however, the proposed subdivision was only four lots. Accordingly, the language limiting zoning and planning review to the municipalities in which the property is located applies.

If the respondent is correct, and it had jurisdiction to deny a waiver and disapprove the subdivision notwithstanding the waiver granted by Nassau County and zoning approval by the Town, the distinction made in the statute as described above becomes meaningless, and the words highlighted above in § 1610(1)(a) lose their force. That runs contrary to a

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fundamental rule of statutory construction that all words are presumed to have been included for some purpose, and must be accorded meaning. McKinney's Statutes § 98.

The only other possible interpretation of the statute which would allow the Village Board to exercise jurisdiction here would be that the Village Board has the authority to decide that the zoning regulations of the Town, as they apply to the area "in which the property is located" have not been met – even after the Town had approved the subdivision. That clearly could lead to absurd results; the Village would be in a position to find that the Town was incorrect about its approval under its own Code and override it. That itself runs contrary to the Charter, which gives the Town zoning primacy in unincorporated areas. Nassau County Charter § 1607. The Court therefore concludes that the Village Board's determination is without legal force, as it did not have the jurisdiction to rule on the petitioners' subdivision after the actions of the NCPC and the Town, and must be annulled.

In any event, the Court notes that its review of the record reveals that the Village Board's denial should be vacated pursuant to CPLR 7803 and CPLR 7804 as being arbitrary and an abuse of discretion, even if jurisdiction exists. The objections were based on aesthetics and on adverse environmental effects. The latter – storm water runoff onto McCoun's Lane, "severe slopes" in two of the proposed new building lots, and traffic flow interrupted by vehicles coming on to that street – have an insufficient basis in the record to support its determination. *See, Matter of In-Towne Shopping Ctrs., Co. v Planning Board of the Town of Brookhaven*, 73 AD3d 925 (2d Dept. 2010); *Matter of Richter v Delmond*, 33 AD3d 1008 (2d Dept. 2006).

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Indeed, the decision of the NCPC noted that drainage plans were to be submitted not to the Village but to the Town, which approved the subdivision, and the Village Board's own reference to the slopes noted that they may be un-buildable under the Town Code "if not for an exemption" from slope regulations granted by the Town. References to the NCPC determination and the Town by the Village Board in its determination indicate no more than statements of disapproval regarding decisions of the larger municipal entities. However, the subdivision's ultimate zoning approval of the Town was beyond the Village Board's reach. As noted above, the Town's zoning power in such matters does not yield to the Village in the unincorporated area in which the property is located. Nassau County Charter § 1607.

Further, there was no expert rebuttal to the petitioners' traffic expert, who had advised that the impact would be *de minimis*. It is also worth noting that the Village's own civil engineer did not dispute the findings of this expert, nor that of the petitioners' other expert, a civil engineer, that the slopes would not bar development even if the Town's slope regulations had been applied.

As to the aesthetics objections, which rest largely on the need for retaining walls and loss of trees, claimed to be out of character with the "rural nature of the McCoun's Lane area," these are essentially matters addressed to the zoning power of the appropriate municipal entity, in this case the Town. For that reason, this type of objection cannot form the basis for denying an application for a subdivision that is otherwise consistent with applicable law.

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Accordingly, the Court holds and declares that in view of the waiver of the subdivision map filing requirements under Article 16 of the Nassau County Charter granted by the Nassau County Planning Commission, and zoning approval of such subdivision by the Town of Oyster Bay, the respondent Village of Oyster Bay Cove was without jurisdiction to disapprove the filing of a subdivision map of the subject property, or to deny a waiver of such filing, and its determination is therefore vacated and annulled.

In addition, assuming that jurisdiction exists, the Court would grant the petition, annul the Planning Board's determination and approve the filing of the subdivision plan of the petitioners as submitted to the Village Board for the reasons stated herein.

This shall constitute the Decision, Order and Judgment of this Court.

ENTER

DATED: July 27, 2010


HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED

JUL 29 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**