

Mantello v Town of Southampton Planning Bd.

2011 NY Slip Op 32246(U)

July 18, 2011

Supreme Court, Suffolk County

Docket Number: 41314-09

Judge: Daniel Martin

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**SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 9 SUFFOLK COUNTY**

PRESENT:**HON. DANIEL MARTIN**

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**JOSEPH MANTELLO, JON ROBIN
BAITZ, SAUL RIFKIN, IVA RIFKIN,
KEN OLIN, PATRICIA WETTIG and
FOUR QUARTET
TRUST,**

Petitioners,

**For a Judgment under Article 78 of the
Civil Practice Law and Rules**

-against-

**TOWN OF SOUTHAMPTON
PLANNING BOARD, *Et al.*,**

Respondents.

_____ x

INDEX NO.: 41314-09

Motion Date: 11/12/09

Submitted: 3/8/11

Motion Sequence No.: 01 - **CaseDisp****PLAINTIFF'S ATTY:****Michael G. Walsh, Esq.****1923 New York Avenue****Water Mill, NY 11976****RESPONDENTS' ATTYS:****Esseks, Hefter & Angel, LLP.****108 East Main Street****PO Box 279****Riverhead, NY 11901****O'Brien & O'Brien, LLP.****186 Smithtown Blvd.****Nesconset, NY 11767**

The following named papers have been read on this motion:

Order to Show Cause/Notice of Motion/ Notice of Petition	X
Cross-Motion	
Answering Affidavits	X
Replying Affidavits	X

In this Article 78 proceeding the petitioners seek a judgment annulling and reversing a determination by the respondent Town of Southampton Planning Board, dated September 10, 2009, which granted an application by the respondent Vanderbilt Nursery General Contracting Corp. for a modification of construction permit, subject to certain conditions.

The petitioners, Joseph Mantello, Jon Robin Baitz, Saul Rifkin, Iva Rifkin, Ken Olin, Patricia Wettig and Four Quartet Trust, are the abutting landowners to the south of a parcel of real property

owned by respondent Vanderbilt Nursery General Contracting Corp. (Vanderbilt), which is located at the intersection of Windmill Lane and Hayground Road and is known as 181 Hayground Road, Bridgehampton, New York. The subject parcel is a 4.8 acre agricultural reserve area situated in the CR-40 Country Residence Zoning District, Agricultural Overlay District. It was created as part of the subdivision approval of its former owner, Rose Anne Foster (Foster), and by a grant of agricultural easement dated July 20, 2001 from Foster to the Town of Southampton (Town).

The restrictions in the grant of agricultural easement included use of the agricultural reserve for farming operations and activities, the use of farm vehicles and equipment in connection with such activities, to promote and enhance agricultural production for commercial purposes of horticultural specialties including nursery stock, ornamental shrubs, and ornamental trees and flowers. In addition, the grant of agricultural easement required that there be no regrading and that no topsoil, loam, sand, stone, gravel, rock or mineral be excavated or removed, and that the premises be free of all signs, billboards or other forms of visual advertisement except for one farm identification sign not to exceed 20 square feet. The grant of agricultural easement also allowed the construction of agricultural accessory buildings or structures deemed reasonably necessary for use of the property for bona fide agricultural production subject to the approval of the Planning Board. The grant of agricultural easement also provided that the grantee would have the continuing right to inspect the property to monitor compliance with the easement conditions.

Prior to selling the agricultural reserve, Foster executed a Declaration of Covenants and Restrictions dated April 20, 2004 and filed on May 24, 2004, adding the restrictions that any agricultural building or structure on the agricultural reserve had to be constructed at least 1,000 feet east of the front property line on Windmill Lane measured from the southerly property line and that any entrance or exit to the agricultural reserve had to be from the north side of the lot along Hayground Road. Foster deeded the agricultural reserve to Vanderbilt on June 15, 2004.

Vanderbilt subsequently applied to the Planning Board of the Town of Southampton (Planning Board) for site plan approval and a construction permit to build a 5,000 square foot agricultural building and associated parking on the property. On July 28, 2005, the Planning Board approved, with certain conditions, Vanderbilt's application. Said conditions included that no landscaping and horticultural services be operated from the site, no topsoil be removed but that topsoil could be retained and distributed around the exterior of the proposed building or on the site as necessary, and that the site plan be amended to indicate drainage calculations for the building and other impervious surfaces and associated structures subject to the review and approval of the Town Engineer. The construction permit was issued on July 21, 2005.

By order dated October 4, 2006 (Emerson, J.), the Court denied the petition in a proceeding entitled Joseph Mantello, Jon Robin Baitz, Saul Rifkin, and Iva Rifkin, petitioners, against Dennis Finnerty, Chairman, E. Blair McCaslin, Lawrence Toler, John J. Blaney, Jaqui Lofaro, Alma Hyman, and George Skidmore, Constituting the Planning Board of the Town of Southampton and Vanderbilt Nurseries General Contracting Corp., respondents, under Index No. 05-20339 (the 2005 action) for a judgment pursuant to CPLR Article 78 annulling the July 28, 2005 determination of the

Planning Board. The Court found that the determination was not arbitrary, capricious or an abuse of discretion and that Vanderbilt had produced substantial evidence that a 5,000 square foot agricultural building was necessary for housing all aspects of Vanderbilt's proposed plant nursery business. Vanderbilt completed construction of the agricultural building in December 2006.

The Town of Southampton conducted a site inspection on December 21, 2006 which disclosed numerous deviations from the site plan that was approved by the Planning Board and that needed correction prior to the issuance of a certificate of occupancy for the agricultural building. Then, on December 29, 2006, the Town of Southampton issued a stop work order on the ground that the building was not proceeding in conformity with site plans and specifications filed with the Town.

On June 22, 2007 Joseph Mantello (Mantello), Jon Robin Baitz (Baitz), Saul and Iva Rifkin (the Rifkins), Ken Olin (Olin), and Patricia Wettig (Wettig) served the Town with notice pursuant to Town Law § 268 (2) demanding that the Town institute appropriate action or proceeding to prevent the unlawful construction, use, maintenance and occupancy of the agricultural building. The Chief Building Inspector for the Town issued a notice of violation to Vanderbilt on August 23, 2007 for occupying the building without a certificate of occupancy and for violating the site plan approvals and conditions. Mantello, Baitz, the Rifkins, Olin and Wettig subsequently commenced an action entitled Joseph Mantello, Jon Robin Baitz, Saul Rifkin, Iva Rifkin, Ken Olin and Patricia Wettig, plaintiffs, against Vanderbilt Nursery General Contracting Corp. and "John Doe" 1-12 and "Jane Doe 1-2", defendants, under Index No. 07-24338 (the 2007 action). The plaintiffs alleged that the agricultural building was built with, among other things, windows, doors, lighting, signage, drainage and grading that did not conform to the site plan approved by the Planning Board in 2005. In addition, the plaintiffs alleged that the building was not being used for "bona fide agricultural production" in violation of the agricultural easement and that the non-agricultural use and non-conforming building construction created a nuisance.

Vanderbilt applied on October 23, 2007 to the Planning Board to modify the construction permit issued on July 21, 2005 to permit amendments to the original site plan to reflect as-built conditions on the property. The site plan amendments with respect to the agricultural building consisted of five overhead doors on the north side elevation, windows on the south side elevation, doors and windows on the west side elevation, and a 3.2 feet higher concrete slab foundation than the 36 foot elevation approved in 2005 for a total building height of 19 feet and 6 inches. The other site plan amendments included the installation of a sign at the site entrance, an entrance gate, and a deer fence surrounding the property. The Planning Board classified the project as a Type II action under the State Environmental Quality Review Act (SEQRA), and that no further review was required under SEQRA.

By order dated October 4, 2008 this Court (Emerson, J.) granted a motion by the plaintiffs in the 2007 action for a preliminary injunction to the extent of enjoining Vanderbilt from occupying the agricultural building without a certificate of occupancy and using the premises for any purpose other than as a plant nursery.

Public hearings on Vanderbilt's application for modification of the construction permit were held on February 12, 2009, May 28, 2009, and June 11, 2009. The attorney for the petitioners and some of the petitioners and their neighbors attended the hearings and voiced complaints concerning the use of the property and the building, the looming height of the building, and lights flooding from

its windows into their residences. Kristen Farrell, Vanderbilt's vice president, stated at the May 28, 2009 public hearing that Vanderbilt was incorporated in 1995 and preceded Farrell Building Company and that the nursery was an independent entity which at times might serve the needs of the building company by providing nursery stock for landscaping. She also stated that there is a restriction on the building's lights so that they cannot be on after 5 p.m. without an electrician. At the June 11, 2009 public hearing Vanderbilt's excavating contractor, Butch Payne, stated that no fill was brought in to the site and Michael Hemmer, a land surveyor, spoke on behalf of the petitioners stating that the building could be built as originally approved, without the "as built" elevation of the concrete slab.

John J. Condon, P.E. of Condon Engineering, P.C. submitted letters dated February 11, 2009 to the Planning Board indicating that his company was retained by Vanderbilt to prepare site plans including grading and drainage plans and explaining that during construction the finished floor of the building was set at a higher elevation during a cut-and-fill operation to avoid the need to excavate the area under and in the vicinity of the building. He added that the property slopes severely and that unfortunately, the revised plans were not filed with the Town as required. According to Mr. Condon, decreasing the finished floor elevation from 39.2 to 36 feet would require the removal of approximately 2,200 cubic yards of soil from the property, which is prohibited by covenant, and the total estimated cost of lowering the finished floor elevation was \$342,000.00. A memo dated July 16, 2008 from John La Rosa, P.E., Assistant Town Engineer, to the Planning Board indicated that he had reviewed the amended site plan for Vanderbilt dated June 14, 2008 prepared by Condon Engineering, P.C. and found that it satisfactorily addressed the grading, drainage, and storm water management issues and that he recommended engineering approval. Joseph Farrell, owner of Farrell Building Company, submitted a letter dated February 13, 2009 to the Planning Board in response to the public hearing comments on the lighting of the building and represented to the Planning Board that he would "cause the electricians to place a control upon the electric system (to the extent that the Town Code allows) to insure that lights will not be on after 6:00 p.m. each day."

By adopted resolution decision dated September 10, 2009 and filed on September 16, 2009, the Planning Board granted the modified construction permit subject to the original July 21, 2005 conditions and new supplemental conditions. The Planning Board made the following findings in reaching its decision, i.e., that the site was planted with nursery stock in the western portion of the lot and the eastern portion of the lot was fallow, that Vanderbilt had offered to agree to an inspection process by which the Planning Board could be assured that the use associated with the 5000 square foot building was and would continue to be bona fide agricultural production, and that the Planning Board would require an Inspection Agreement to be submitted as a condition of approval and to further ensure compliance with the agricultural reserve, and the area of outdoor storage would be limited to the parking area to the north of the building and not within 50 feet of the south property line. Other findings by the Planning Board included that the changes to the building elevations, including changes to the overhead doors and the doors on the north and west elevations, based on comments from the Architectural Review Board, were acceptable, and that the change to the building elevation on the south side to include windows were acceptable subject to limiting light trespass from the windows by incorporating a window treatment for 90 percent or more light blockage from inside out.

Notably, the Planning Board reviewed the additional height of 3.2 feet for the foundation of

the agricultural building and found that the additional height was acceptable as the total height of the building is 19 feet 6 inches, which is less than the maximum height requirement of 32 feet of the underlying CR-40 Zoning District. Also, the Planning Board found that to mitigate the windows and the additional height of the building that seven Leyland Cypress trees a minimum of 10 feet tall and spaced 20 feet apart would be planted immediately south of the existing building. The sole negative finding of the Planning Board concerned the location of the sign, that it did not conform to the 20 foot setback from the front of the property line or the corner clearance, and the Planning Board directed that the sign be removed. The Planning Board indicated that public comments from the hearings and the written comment period and comments from interested agencies and departments to which the Planning Board had referred the application were noted in the Planning Board's Staff Report of September 10, 2009.

The petitioners commenced the instant Article 78 proceeding challenging the resolution dated September 10, 2009 adopted by the respondent Planning Board granting the application for a modification of construction permit. The verified petition was filed on October 14, 2009.

On January 20, 2010 Vanderbilt and the Town entered into an agreement giving the Chief Building Inspector or his designee the right to inspect the building and premises for a five year period from the date of issuance of a permanent certificate of occupancy. The permanent certificate of occupancy was issued on April 12, 2010.

By order dated September 7, 2010 (Emerson, J.), this Court granted the motion by Vanderbilt for summary judgment dismissing the 2007 action. The Court found that the defendants established, prima facie, that the agricultural building and the premises were now conforming and were being used for "bona fide agricultural production." In addition, the Court found the plaintiffs' allegations that the premises were still not being used as a plant nursery to be unsubstantiated. Notably, the Court also determined that Vanderbilt presented evidence before the Planning Board that it intends to use the premises to grow nursery stock. The Court indicated that the Town now has the right to inspect the building and premises to ensure that they are being used for "bona fide agricultural production." The Court added that the fact that Vanderbilt's owner, Joseph Farrell, is also a developer does not permit speculation that the premises will be used for purposes prohibited by the Town Code and the agricultural easement. Based on this determination, the preliminary injunction was vacated.

The petitioners in the instant proceeding allege that the agricultural reserve and building continue to be used as a building contractor's shop and office by Vanderbilt and its owner, Joseph Farrell, Jr. of Farrell Building Company, and a commercial catering equipment warehouse in contravention of the Town Code and that the Planning Board failed to consider Vanderbilt's illegal use and blatant violations of the Town Zoning Code and the agricultural reserve easement. The petitioners note that the Farrell Building Company's business offices are located one mile from the agricultural reserve and that the Vanderbilt Nursery sign displays Farrell Building Company's telephone number. In addition, the petitioners assert that Vanderbilt deposited large amounts of fill on the site, substantially re-graded and manipulated the elevations at the site, constructed the building at a height greater than approved by the Planning Board, constructed the building with windows and doors in locations that were not approved by the Planning Board, installed a commercial sign in violation of the Planning Board's approval, and installed an illegal fence and security gate that was not approved. They also allege that Vanderbilt manipulated the location of

the building by causing a private Covenant and Restriction to be recorded on May 24, 2004 prior to Vanderbilt's purchase of the agricultural reserve and, in effect, amended the agricultural reserve easement by defining a building envelope and divesting the Planning Board of any discretion in the building site. The petitioners further assert that they have a clear view of the offending building and continue to be damaged by Vanderbilt's activities of regrading causing flooding problems, by the mass of the building which now looms over the petitioners' properties, and by the noise and dust of the construction vehicles constantly parking at the site. The petitioners argue that the granting of the site plan/construction permit modification approval by the Planning Board was not supported by the facts, was illegal, unjust, arbitrary and capricious and contrary to the Town Building and Zoning Law. The petitioners request that the determination of the Planning Board be annulled and remanded, that the Planning Board be directed to deny the respondents' modification application and rescind all prior approvals and permits issued to Vanderbilt, and that Vanderbilt be directed to remove the building and to restore the agricultural reserve to its original condition.

The petitioners assert that inasmuch as Town Code § 330-184 (G) provides that amendments to site development plans shall be processed in the same manner as the original plan, no vested rights were acquired by Vanderbilt by virtue of any prior approval. The petitioners assert that the public hearing record contains substantial evidence of violations of the agricultural easement and the agricultural overlay district regulations by Vanderbilt and that Vanderbilt admitted that Farrell Building Company would use the site as a landscape yard for storing trees used for landscaping their building projects, specifically prohibited by zoning regulations, the agricultural easement and the Planning Board's 2005 approval resolution. They argue that the issue of Vanderbilt's violations is res judicata as determined by the order dated October 4, 2008 (Emerson, J.) in the 2007 action, and that those violations alone warranted denial of the application pursuant to Town Code § 330-181.1. The petitioners also argue that the record before the Planning Board, especially as developed at the public hearings of February 12, 2009 and May 28, 2009, clearly show that Vanderbilt is not and does not intend to use the premises for agricultural production or to derive revenue from gross sales of crops or plant nursery stock from the site and that the "plant nursery" consists of 1,600 two foot tall arborvitae bushes. They further assert that although Vanderbilt attempted to rehabilitate the record by arguing at the public hearing that the site will be used as a landscape yard for Farrell Building Company using company trucks, storing trees from building sites, and propagating bushes for the Company's landscape projects, Vanderbilt has fallen far short of demonstrating that the site is or will be used for agricultural production within the meaning of New York State Agriculture and Markets Law § 301, the Town's farmland preservation program, and the Town's Agricultural Overlay District regulations.

By their verified answer, the Town respondents assert affirmative defenses that the petition fails to state a cause of action and that the Planning Board's determination had a rational basis in fact and law, was supported by substantial evidence, was not arbitrary or capricious or affected by an error of law, and was reasonable and consistent with the objectives, spirit and intent of the Town Code, the Town's Master Plan and all other applicable laws. The Town respondents also assert objections in point of law including, that the petitioners' claims constitute a time-barred collateral attack on the Planning Board's July 21, 2005 resolution, that the respondents are bound by the order dated October 4, 2006 (Emerson, J.) inasmuch as they did not appeal the judgment entered on December 8, 2006, and that the petitioners are estopped from objecting to the construction of an agricultural building as they had actual and constructive notice at the time of purchase of their premises of the right reserved in the grant of the agricultural easement for the construction, and that

the petitioners are not aggrieved and lack standing. The Town respondents also submit their certified administrative return.

The respondent Vanderbilt submits an affidavit of opposition together with the affidavit dated March 5, 2010 of Kristen Farrell, Vice President of Vanderbilt, and the affidavit dated March 5, 2010 of non-party Dennis Suskind. Vanderbilt contends that all of the petitioners' claims concerning the original site plan approval, such as the size, use and the location of the agricultural building are barred by res judicata and collateral estoppel, their claims concerning the September 10, 2009 Planning Board determination to allow the agricultural building to remain "as built" had a rational basis and was not arbitrary and capricious, and their claim that the modifications requested by Vanderbilt subjects the entire site plan to de novo review, is unsupported by the Town Zoning Code or any case law. Ms. Farrell asserts in her affidavit that the petitioners are not challenging the site plan and construction permit modifications approved by the Planning Board in its September 10, 2009 resolution but are instead attempting to resurrect the challenges dismissed long ago concerning Vanderbilt's right to construct a 5,000 square foot accessory agricultural building and are seeking to dismantle the completed building based on arguments that were made or should have been made in 2005.

"The standing of a party to seek judicial review of a particular claim or controversy is a threshold matter which, once questioned, should ordinarily be resolved by the court before the merits are reached" (*Hoston v New York State Dept. of Health*, 203 AD2d 826, 611 NYS2d 61 [3d Dept 1994], *lv denied* 84 NY2d 803, *citing Society of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 570 NYS2d 778 [1991]; *New York State Nurses Assn. v Axelrod*, 152 AD2d 888, 544 NYS2d 236 [3d Dept 1989]). Standing to bring a CPLR article 78 proceeding requires the existence of an injury in fact—an actual legal stake in the matter being adjudicated—which must be distinct from that of the general public [citations omitted] (*Brown v County of Erie*, 60 AD3d 1442, 876 NYS2d 801 [4th Dept 2009]).

The Court finds that the petitioners established standing by showing that their properties were in close proximity to the subject property, their properties were required to receive notice of the administrative hearing, and through allegations in their petition that Vanderbilt's activities affected the value and use of their properties by causing flooding, noise and dust, and by the existence of the building towering over their properties (*see Agoglia v Benepe*, 84 AD3d 1072, 924 NYS2d 428 [2d Dept 2011]; *East Hampton Indoor Tennis Club, LLC v Zoning Bd. of Appeals of Town of E. Hampton*, 83 AD3d 935, 921 NYS2d 308 [2d Dept 2011]; *J & M Harriman Holding Corp. v Zoning Bd. of Appeals of Vil. of Harriman*, 62 AD3d 705, 879 NYS2d 494 [2d Dept], *lv denied* 13 NY3d 712, 891 NYS2d 304 [2009]).

Turning to the merits of the petition, "[a] local planning board has broad discretion in reaching its determination on applications ... and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion" (*see Matter of Kearney v Kita*, 62 AD3d 1000, 1001, 879 NYS2d 584 [2d Dept 2009]; *see also In-Towne Shopping Centers, Co. v Planning Bd. of Town of Brookhaven*, 73 AD3d 925, 901 NYS2d 331 [2d Dept 2010]; *Matter of Davies Farm, LLC v Planning Bd. of Town of Clarkstown*, 54 AD3d 757, 864 NYS2d 84 [2d Dept 2008]). "The planning board's determination should be sustained upon judicial review if it was not illegal, has a rational basis, and is not arbitrary and capricious" (*Matter of Kearney v Kita*, 62 AD3d at 1001, 879 NYS2d 584 [internal quotation marks omitted]; *see*

Fairway Manor, Inc. v Bertinelli, 81 AD3d 821, 822-823, 916 NYS2d 630 [2d Dept 2011]; *Matter of Gallo v Rosell*, 52 AD3d 514, 515, 859 NYS2d 675 [2d Dept 2008]). “When reviewing the determinations of a local planning board, courts consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the Board’s determination” (*Matter of Kearney v Kita*, 62 AD3d at 1001, 879 NYS2d 584 [internal quotation marks omitted]).

The doctrine of res judicata applies to quasi-judicial determinations of administrative agencies, including municipal zoning tribunals, and precludes relitigation of claims which previously were litigated on the merits or might have been so litigated at the time (see *Calapai v Zoning Bd. of Appeals of Vil. of Babylon*, 57 AD3d 987, 871 NYS2d 288 [2d Dept 2008]). Pursuant to the doctrine of res judicata, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy” (*O’Brien v City of Syracuse*, 54 NY2d 353, 357, 445 NYS2d 687 [1981]; see *Incorporated Vil. of Laurel Hollow v Nichols*, 260 AD2d 439, 440, 688 NYS2d 581 [2d Dept 1999], *lv denied* 94 NY2d 752, 700 NYS2d 426 [1999]).

The doctrine of collateral estoppel, or issue preclusion, bars the relitigation of issues that have been actually litigated and necessarily decided in a prior proceeding (see *Robert v O’Meara*, 28 AD3d 567, 568, 813 NYS2d 736 [2d Dept 2006], *lv denied* 7 NY3d 716, 826 NYS2d 605 [2006]). Collateral estoppel applies whether or not the tribunals or causes of action are the same, and what is controlling is the identity of the issue which necessarily has been decided in the prior action or proceeding (see *Ryan v New York Tel. Co.*, 62 NY2d 494, 478 NYS2d 823 [1984]; *Lexjac, LLC v Beckerman*, 72 AD3d 748, 749-750, 898 NYS2d 245 [2d Dept 2010]). To invoke the doctrine, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination (see (*see Robert v O’Meara*, 28 AD3d at 568).

Contrary to the petitioners’ assertions, subsection G of Town Zoning Code § 330-184 (Site Plan Application Procedure), which provides that “[a]mendments to a site development plan shall be acted upon in the same manner as the approval of the original plan,” did not require the Planning Board to review the original site plan de novo. The petitioners’ challenges concerning the existence of the agricultural building are barred inasmuch as the Court determined in the prior CPLR Article 78 proceeding that Vanderbilt had produced substantial evidence that a 5,000 square foot agricultural building was necessary (see *Segreto v Grannis*, 70 AD3d 704, 892 NYS2d 872 [2d Dept 2010], *lv dismissed* 15 NY3d 869, 910 NYS2d 34 [2010]). In addition, the petitioners’ challenges to the building’s location close to the southern boundary of the site are barred inasmuch as they relate to the original site plan approval of 2005 and should have been raised in the 2005 action. The parties to this proceeding are also bound by the determination of this Court dated September 7, 2010 (Emerson, J.) in the 2007 action concerning the use of the agricultural building and the agricultural reserve, that they are now being used for “bona fide agricultural production” (see *East End Prop. Co. #1, LLC v Town Bd. of Town of Brookhaven*, 56 AD3d 773, 868 NYS2d 264 [2d Dept 2008]).

However, the petitioners’ remaining challenges, that Vanderbilt deposited large amounts of fill on the site, substantially re-graded and manipulated the elevations at the site, constructed the building at a height greater than that approved by the Planning Board, constructed the building with

windows and doors in locations that were not approved by the Planning Board, installed a commercial sign in violation of the Planning Board's approval, and installed an illegal fence and security gate that was not approved, relate to Vanderbilt's modification application and were not specifically addressed in the Court's order dated September 7, 2010 (Emerson, J.) in the 2007 action. Therefore, said claims are not barred by res judicata or collateral estoppel (*see generally, Hurley v Zoning Bd. of Appeals of Vil. of Amityville*, 69 AD3d 940, 893 NYS2d 277 [2d Dept 2010]).

There was conflicting evidence before the Planning Board concerning the presence of fill on the site and the ability to build the agricultural building with a lower elevation. The evidence presented an issue regarding the veracity of opposing witnesses. It is for an administrative board to pass on credibility and where the conflicting evidence leaves room for choice, a court may not weigh the evidence or reject the choice made by the board (*see Kessler v Town of Shelter Is. Planning Bd.*, 40 AD2d 1005, 1005, 338 NYS2d 778 [2d Dept 1972]). The sole question for this Court is whether the determination is supported by substantial evidence (*see id.*). The record demonstrates that the Planning Board considered all of petitioners' allegations, consulted with the appropriate agencies and departments, reviewed comments and submissions from the public hearings, and included conditions with its approval so as to minimize the impact of the building on the petitioners and ensure compliance with the conditions and the relevant zoning laws, easement and covenant. The Board was entitled to credit the findings of the experts that there was no fill added to the property and that decreasing the building's elevation would entail violation of the covenant and be costly (*see Gladstone v Zoning Bd. of Appeals of Inc. Village of Southampton*, 13 AD3d 445, 785 NYS2d 697 [2d Dept 2004]). In light of the foregoing, the Court finds that the September 10, 2009 determination of the Planning Board was not arbitrary or capricious, was not illegal, and had a rational basis (*see Fairway Manor, Inc. v Bertinelli*, 81 AD3d 821, 916 NYS2d 630 [2d Dept 2011]; *Herzog v Planning Bd. of E. Hampton*, 281 AD2d 419, 721 NYS2d 272 [2d Dept 2001]).

Accordingly, the petition is denied and the proceeding is dismissed.

So Ordered.

Dated: July 18, 2011
Riverhead, NY



HON. DANIEL MARTIN, A.J.S.C.