WB Kirby Hill LLC v Incorporated Vil. of Muttontown
2016 NY Slip Op 33084(U)
April 12, 2016
Supreme Court, Nassau County
Docket Number: 10774/2014
Judge: Karen V. Murphy

[redacted] Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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WB KIRBY HILL LLC,

Plaintiff,

-against-

INCORPORATED VILLAGE OF MUTTONTOWN, BOARD OF TRUSTEES OF THE INCORPORATED VILLAGE OF MUTTONTOWN, and PLANNING BOARD OF THE INCORPORATED VILLAGE OF MUTTONTOWN,

Defendants.

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Index No. 10774/2014

Motion Submitted: 03/23/16
Motion Sequence: 007

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XXX
Answering Papers.....XXX
Reply.....XX
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....X

Upon the instant application, petitioner, WB Kirby Hill LLC, seeks [Mot. Seq. 007], an Order and Judgment, *inter alia*, pursuant to Article 78 of the CPLR, (1) annulling the decision of the respondents, Incorporated Village of Muttontown, Board of Trustees of the Incorporated Village of Muttontown, and Planning Board of the Incorporated Village of Muttontown (collectively referred to herein as "the Village"), to retain $1,911,557.00 in security on the grounds that said decision was arbitrary and capricious, an abuse of discretion, and/or affected by an error of law; and (2) remitting the matter to the respondent, Planning Board of the Incorporated Village of Muttontown ("Planning Board").

The petition is granted in its entirety.

This proceeding seeks review of and relief from respondents' decision in 2014 to retain $1,911,557.00 in security for the completion of improvements and maintenance of the completed improvements at a residential subdivision formerly owned by the petitioner.

As best as can be determined from the papers submitted herein, the underlying facts are as follows:

In 2004, by a decision dated August 24, 2004, the Planning Board granted the petitioner's, WB Kirby Hill LLC ("Kirby") request to subdivide a 148.48 acre parcel of land in the Village of Muttontown into 80 lots. The decision granting subdivision approval required the applicant to post a performance bond "...in the amount of $12,600,508 and a $1,400,057 cash deposit..." to "...ensure payment by the subdivider of all costs of the construction of the public improvements and their proper maintenance and repairs until such time as the bond is released..." The decision also provided that the bond "...shall comply with, and be subject to, the provisions of [Village Code] Section 158-25 and 158-26, at the expense of the subdivider..."

In 2005, pursuant to the 2004 Planning Board decision, *supra*, and Village Code §158-25, the subdivision developer, i.e., the petitioner, posted the security (performance bond) for the improvements at the residential subdivision which was then (but is no longer) owned by the petitioner (Second Amended Verified Petition, ¶¶1-2).

Notably, Village Law §7-730 and Village Code §158-25 both mandate that the required improvements be completed within a period of no more than three years; however, the Village Law authorizes the Planning Board to extend that time with the consent of the applicant/petitioner.

In this case, the 2004 Planning Board decision required that the improvements be completed within two years. However, over the years, the time for completion of the required improvements has been extended by successive renewals of the bond in amounts approved by the Planning Board.

Ultimately, it is undisputed on this record that, while in the more than ten years since the Planning Board granted subdivision approval, nearly all of the improvements have been completed (Petition, ¶3), not all have yet been performed.

To that extent, it is also undisputed that the Village has released some but not all of the security posted by the petitioner, retaining the balance of the security pursuant to the authority granted by the Village Law §7-730(9)(d) (Petition, ¶4; Aff. In Opp., ¶23). This forms the basis of this proceeding by the petitioner.

That is, in 2014, while the respondent granted, in part, the petitioner's application for the reduction of security originally posted pursuant to the 2004 application for subdivision approval, *supra*, it retained $1,911,557.00 in security, *infra*.

Notably, in 2013, the petitioner commenced a prior Article 78 proceeding – to wit, ***WB Kirby Hill LLC v. Incorporated Village of Muttontown, et. al.***, Index No. 600661/13 [Murphy, J] – seeking to annul the 2010 decision of the respondent Board of Trustees to retain a performance bond of $3,126,524. Specifically, in the prior related Article 78 proceeding, this Court entertained the petitioner's application to, *inter alia*, annul the respondents' decision on the grounds that it was arbitrary and capricious, an abuse of discretion and/or affected by an error of law, and that the bond fees should be reduced to the sum of $10,500.

In addressing the prior application, this Court noted that the respondents' verified answer to the petition asserted three affirmative defenses – namely, judicial estoppel, lack of ripeness and failure to comply with Article 78 – none of which, this Court determined, presented a valid basis on which to dismiss the petitioner's Article 78 proceeding.

Next, in addressing the prior Article 78 proceeding, this Court reviewed the transcript of the proceedings held before the Planning Board on September 19, 2012 and concluded that upon its review, the transcript "bolster's [sic] petitioner's claims" (Second Amended Verified Petition, Ex. 1 [Short Form Order, Dec. 6, 2013, Murphy, J.], p. 2). Specifically, this Court held, in pertinent part, as follows:

> ...the transcript makes clear that petitioner's counsel clearly stated at multiple junctures that the performance bond in excess of three million dollars was "unreasonable" in view of the three aspects of the project that were not one hundred percent complete, namely, part of the horse trail, some of the driveway aprons, and some of the plantings/landscaping. Toward that end, petitioner's counsel cited to the letter of the Village's own engineer, which, according to counsel, put the figure for incomplete items in the neighborhood of $600,000, not in excess of three million dollars....

Moreover, respondents' submissions of the minutes of the Board of Trustees meeting that occurred on November 13, 2012 establishes that the motion to reduce the bond to the amount of $3,126,524 was unanimously carried. Petitioner was not present at this meeting; however, petitioner's October 4, 2012 letter was marked into the record. The Village's mayor requested that Village counsel "give an overview of what it is that WB Kirby Hill LLC is seeking this evening," whereupon Village counsel stated, "[t]he applicant is seeking a reduction of the performance bond that the applicant posted pursuant to the Planning Board decision that approved the applicant's subdivision

pplication." After launching into a synopsis of the history of a prior reduction in the amount of the bond, and explaining the bond reduction process in general, counsel stated that "the Planning Board has recommended that the bond be reduced from its current balance of $7,215,059 to $3,126,524. And the applicant is asking that this Board reduce the bond to that amount in accordance with the recommendation of the Planning Board.

When specifically asked by the Mayor if "that is what the letter of October 4, 2012 requests that this Board do this evening," Village counsel responded, "That is correct. That is based upon the Village Engineer's analysis of the work that has been performed and the work that is yet to be performed."

Based upon the foregoing, and as previously determined by this Court, petitioner has established its exhaustion of administrative remedies, that it is not judicially estopped from seeking a further reduction in the performance bond, or that is estopped pursuant to CPLR §7803.

Petitioner alleges that the amount of the bond recommended by the Planning Board, and then approved by Board of Trustees in the amount of $3,126,524, was an arbitrary and capricious determination based upon an error of law as to the distinction between a performance bond and a maintenance bond. Specifically, petitioner avers that the Planning Board adopted the Village engineer's bond recommendation amount, which is itself based on the engineer's faulty logic of retaining 10% of a performance bond when work is 100% complete.

It is undisputed in this case that the entire project is not 100 percent completed, as outlined above. Petitioner's counsel agreed at the Planning Board meeting that respondents have no obligation to *release* the entire performance bond, but counsel maintained that the Planning Board does have an obligation to base its reduction on a "line by line basis" in order to determine a rational amount for the reduction.

In fact, the Code of the Village of Muttontown §§ 158-21 and 158-25 do not prohibit reduction of the bond on a line by line basis, and Village Law §7-730(9)(d) provides in pertinent part that "the planning board may modify its requirements for any or all such improvements, and the amount of such security shall thereupon be reduced by an appropriate amount so that the new amount will cover the cost in full of the amended list of improvements required by the planning board."

As argued by petitioner at the Planning Board meeting, "it is not rational to withhold monies, any amount of monies, on items that are concededly by the engineer who represents the village 100 percent complete." By petitioner's calculations as stated at the Planning Board meeting, the sum of the incomplete items is "just a shade over

$600,000."

The Village engineer's September 11, 2012 letter to the Planning Board recommends reduction of the performance bond to $3,126,524; yet, the letter acknowledges that only three items are incomplete: construction of the horse trails, landscaping items, and driveway aprons. According to the engineer's own theory, he recommends retaining 10% of the bond, even though an item has been 100% completed; thus, he has apparently included in calculating the $3,126,524 sum, monies pertaining to completed items.

The Village engineer's rationale for so doing, which was adopted by the Planning Board, and subsequently by the Board of Trustees, was explained by the engineer as follows:

> the thing that's a little bit fuzzy here is that today, for instance, the curbs are 100 percent complete. When I do my final inspection, I'm going to do my final inspection when I feel comfortable that everything is done, the curbs may not be a hundred percent someone could have run over it or knocked it out or broke a curb or busted up something. So, I'm in a position where I have to advise this Board do not give back, do not cut that curb item by a hundred percent because when I go out there six months from now or two months from now, it might not be a hundred percent...That's why I recommend that the items not be zeroed out...

Petitioner's counsel objected to that rationale, stating that "the process he [is] describing, he's effectively converting the performance bond into a performance bond and maintenance bond...[the Board] shouldn't be telling my client that if a car or truck smacks into that curb while [the Board] is investigating the plantings and now that curb has to be repaired that it should come out of a performance bond. The fact is that everything has been complete other than the three items. And Mr. Stevens is on the record that everything is a hundred percent complete other than the horse trail, the plantings and the aprons."

The Chairman of the Planning Board responded that "the ordinance" does not require the Village to release the performance bond until all aspects of the works is done, and that they do not have to "break it apart piecemeal."

Contrary to the Chairman's interpretation of the Village Code, and contrary to the Village Law §7-730(9)(d), the Board has discretion to reduce the performance bond in order that "the new amount will cover the cost in full of the amended list of improvements required by the planning board" (Village Law §7-730[9][d]).

Based upon the foregoing, this Court finds that the Village engineer's "fuzzy" logic, which erroneously melds together the distinct concepts of performance versus maintenance bonds, has ultimately resulted in the Resolution to reduce the performance bond to an amount that includes completed items. The Court further finds that there is no rational basis to include the completed items in calculating the amount by which the performance bond should be reduced; therefore, respondents' reduction of the bond to $3,126,524 is "arbitrary and capricious" within the meaning of CPLR §7803, having been caused by the aforementioned error of law.

Equally unsupported by the submissions to the Court is petitioner's request that the performance bond be reduced to $10,500. Based upon the certified transcript, the issue of the completion of the plantings is in a state of flux because the completion thereof is generally not determined until all of the plantings have been approved by the Board and are alive at the time the performance bond is released. The amount of bond retainage for the plantings recommended by the Village engineer is $591,000, and the amount of bond retainage for the driveway aprons recommended by the Village engineer is $16,980. In addition, petitioner's counsel never mentioned the specific sum of $10,500 at the Planning Board meeting as a proposed bond amount; instead, petitioner's counsel proposed a sum of $16,000 for the remaining driveway aprons.

Accordingly, petitioner's first cause of action for mandamus to review the Resolution and determine that is arbitrary and capricious, and results from an error of law is granted to the extent that the Resolution adopted at the November 13, 2012 Board of Trustees meeting reducing the performance bond in this case to $3,126,524 is hereby annulled, and the matter is remitted to the respondent Planning Board for reconsideration of the amount by which to reduce the performance bond (see CPLR §3017[a]).

Petitioner's request that this Court declare that respondents are entitled to security the amount of $10,500 pursuant to the subject performance bond is denied. (Second Amended Verified Petition, Ex. 1 [Short Form Order, Dec. 6, 2013, Murphy, J.]).

Notably, this Order of the Court was never appealed.

In compliance with this Court's remittitur to the Planning Board "for reconsideration of the amount by which to reduce the performance bond," a hearing was conducted on May 12, 2014. Following the hearing, the Planning Board adopted a resolution accepting the recommendation of the Village Engineer to reduce the surety bond to the amount of $1,191,661 and to reduce the cash deposit held to the amount of $719,896. Ultimately, following another hearing, conducted pursuant to the Village Law on July 9, 2014, the respondent, Board of Trustees, adopted a resolution approving the

decision of the Planning Board.

This 2014 decision of the Planning Board forms the basis of this proceeding. The Village continues to hold the surety bond and cash deposit in those amounts.

In bringing this proceeding for mandamus to review and declaratory relief, the petitioner argues, among other things, that not only was the respondents' decision arbitrary, capricious, irrational and an abuse of discretion, but that it also violates the 2013 Order entered by this Court in a prior related action/proceeding, *supra*.

Petitioner claims that this figure – $1,911,557 – is comprised of a performance bond held in surety, primarily securing long-ago-completed landscaping work, and a $719,896 cash deposit for maintenance and repairs of twelve long-ago-completed items (Second Amended Verified Petition, ¶ 13). Petitioner submits that the respondents' decision to retain this sum violates the 2013 Order in that continues to impose maintenance-bond requirements upon the petitioner in the form of retaining security for completed items (*Id.*, ¶ 14). Petitioner argues that such retention allows the respondents to invade the retained security to repair potential post-completion damage to the subdivision improvements which is the function of a maintenance bond (*Id.*, ¶¶15-16).

According to the petitioner, prior to 2014, the respondents did not assert that there was a maintenance bond in addition to the performance bond; nor did they make a performance/maintenance distinction between the bond and cash components of the security (*Id.*, ¶¶17-18). Thus, inasmuch as the respondents seek a maintenance bond, petitioner claims that they can do so from the current owner of the residential subdivision, yet they have chosen not to do so (*Id.*, ¶¶19-20).

Petitioner contends that although the 2013 Order directed the respondents to eliminate the sums held for maintenance from the performance bond, in 2014, the respondents herein have created a new maintenance bond to recapture those same sums. In doing so, the petitioner contends that the respondents adopted the Village Engineer's recommendation to retain ten percent of the cost of twelve completed items and that they did so without making any factual findings as to the condition of the completed improvements (*Id.*, ¶¶21-23).

Petitioner also argues that whereas the 2013 Order expressly found the approach taken by the respondents in 2014 to be arbitrary, capricious, irrational and the product of "fuzzy logic," this time, the application of the ten percent rule is even more arbitrary and capricious than before because the Village Engineer did not explain the recommended retention of ten percent for the twelve items he selected (*Id.*, ¶¶24-25). Specifically, the petitioner contends that in 2013, the Village Engineer had done so in an across-the-board

manner; now, his reasoning as to each maintenance item is nowhere to be found in the record and thus his reasoning is inherently arbitrary and capricious (*Id.*, ¶¶26-28).

Notably, the petitioner concedes for the purpose of this litigation that the respondents can only assert with any factual basis that 1/70th – or $26,980 – of the total amount retained remains to be completed which amount reflects the work remaining for driveway aprons and clearing an equestrian trail; the remaining approximately $1.9 million is supported only by the conjecture of the Village engineer (*Id.*, ¶¶29-31). The petitioner points out that although the Village engineer admits that he has not inspected the plantings and seeding items since 2010 – i.e., before specific judicial parameters were given by the 2013 Order – he recommends more than $1 million retainage for those items (*Id.*, ¶¶32-33).

Thus, the petitioner argues, the respondents have not only violated the 2013 Order's substantive direction to stop retaining security for maintenance, they have also violated the 2013 Order's procedural direction to "reconsider" on "remittitur" the security to be retained (*Id.*, ¶34).

Petitioner also points out that the Village Engineer admitted in a June 30, 2011 letter to the Planning Board that the plantings are in "large percentage...installed and are in good condition" and that he reaffirmed that statement in his May 12, 2014 letter to the Planning Board. Petitioner notes that not only has the Village Engineer not presented any evidence to the contrary, but there is also no evidence to the contrary in the record. Accordingly, petitioner argues, his conjecture as to the state of the plantings has supplanted the actual inspections and fact finding process that this Court intended would take place when it remitted the matter to the Planning Board (*Id.*, ¶¶35-38). Petitioner contends that on the remittal required by the 2013 Order, the Planning Board should have directed an updated inspection so that it could develop a factual record to determine the cost to complete the only three remaining items identified as incomplete in the Village Engineer's 2011 letter: landscape plantings, driveway aprons, and an equestrian trail (*Id.*, ¶40).

Petitioner argues that this Court recognized in 2013 that, "[a]s argued by petitioner at the [September 19, 2012] Planning Board meeting, 'it is not rational to withhold monies, any amount of monies, on items that are concededly by the engineer who represents the village 100 percent complete'"(*Id.*, ¶41). Nonetheless, respondents continue to retain sums for maintenance of admittedly completed improvements (*Id.*, ¶42).

Petitioner also argues that in addition to keeping security for landscape plantings that are in "large percentage" complete, respondents are also applying a 33.7 percent

[redacted]onstruction cost increase from 2004 and various fees for the future services of the Village Engineer and other agents of respondents, and that, in doing so, they are again effectively treating the performance bond as a maintenance bond (*Id.*, ¶¶43-44). This retention of excessive security for an indefinite period of time petitioner argues is preventing it from returning such funds to its investors, which include public pension plans (*Id.*, ¶45).

Accordingly, pursuant to CPLR §7803(3), petitioner seeks a review of the Trustees' July 9, 2014 decision setting a total security of $1,911,557, and urges this Court to annul that decision and remit the matter once again to the Planning Board.

Petitioner also seeks a declaration, pursuant to CPLR §3001, that it need not pay any further fees or costs, administrative or otherwise (including but not limited to for engineering, legal or construction services or for miscellaneous expenses), to respondents, the Village Engineer, or any other agents of respondents, in connection with the reduction and release of the security.

Respondents oppose the petitioner's instant application and submit that the subject of this mandamus to review is a decision that was based on a new and different record than previously reviewed by this Court.

The respondents submit that the 2004 Planning Board decision required the applicant/petitioner to post security having two separate components: 1st a performance bond issued by a surety company that, by the terms of the surety agreement, secures satisfactory completion of the public improvements and the payment of related costs; and 2nd, a cash deposit, which, according to the respondents, unlike the surety bond, is not defined in any agreement with a third party but rather it is defined by the 2004 Planning Board Decision and Section 158 of the Village Code.

Thus, respondents argue the Village of Muttontown, in the 2004 Planning Board decision, required the applicant here to post security "to ensure payment by the subdivider of all costs of the construction of the public improvements and their proper maintenance and repairs until such time as the bond is released", and that in this case, the Village Code required that the maintenance bond be posted for one year from the date of completion of the required improvements (Village Code §158-25[B][3]).

Respondents point out that the 2004 surety bond – actually entitled "Subdivision Performance Bond" – posted by the petitioner here secured the obligation of the applicant/petitioner to:

(A) Well and truly construct, install, make, repair and maintain all of the

improvements shown on said plat or map regardless of the extent of building development that has taken place in the subdivision, and comply with all other conditions and requirements contained in the ... [2004 Planning Board] decision on or before...[a date subsequently extended by renewals of the bond], and,

(B) Pay, make good, and reimburse the... [Village] for all losses and damages which it may sustain by reason of failure on the part of the ... [applicant] to make said improvements in connection with the site work to the aforementioned streets, highways, curbing, and installation of drainage improvements, an other public improvements required in connection with the approval of the aforesaid plat.

(Aff. In Opp., Ex. G [2004 Subdivision Performance Bond]).

The performance bond further provides that, in the event the applicant fails to comply with the secured obligations, the Village may commence appropriate legal action against the applicant and the surety to obtain the appropriate amount of money to pay for:

(A) The satisfactory completion and compliance with the...[secured obligations].

(B) The reasonable engineering, witness and attorney fees and costs incurred by the Village to complete the installation of the required improvements.

The respondents submit that, here, the Planning Board adhered to the December 6, 2013 Decision of this Court in the prior Article 78 proceeding and avoided "melding the concepts of performance bond versus maintenance bonds." The bond, which was posted to ensure performance, was reduced to the amount by which the Planning Board, in the reasonable exercise of its discretion, determined was sufficient to ensure completion of the improvements and payment of related costs. According to the respondents, the 2004 Planning Board decision expressly provided that the cash deposit was posted for the additional purpose of ensuring the proper maintenance and repair of the improvements until such time as the bond is released, and expressly incorporated Section 158 of the Village Code, which contemplates that "an amount in cash, deemed adequate by the Board, shall be retained for a period of one year form the date of completion of the required improvements." Thus, the respondents argue that, consistent with the 2004 Planning Board decision and Section 158 of the Village Code, the Planning Board's recommended reduction of the cash deposit to the amount by which the Planning Board, in the reasonable exercise of its discretion, determined was sufficient to ensure the proper maintenance and repair of the improvements until such time as the bond is released, one

year following completion of all required improvements.

The instant proceeding pursuant to CPLR article 78 seeks review pursuant to CPLR 7803(3) of a determination made without a formal hearing. Judicial review of such a "determination is limited to whether [the] determination was arbitrary or capricious or without a rational basis in the administrative record, and once it has been determined that an agency's conclusion has a sound basis in reason the judicial function is at an end" (***Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v. State of N.Y. Div. Of Hous., & Community Renewal***, 46 AD3d 425, 428 [1st Dept. 2007] *affd.* 11 NY3d 859 [2008] [internal quotation marks and citations omitted]). " 'An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts' " (***Naranjo v. Commr. of Dept. of Motor Vehs.***, 116 AD3d 859, 861 [2nd Dept. 2014] *quoting* ***Matter of Peckham v. Calogero***, 12 NY3d 424, 431 [2009]; ***Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County***, 34 NY2d 222, 230 [1974]).

In the matter at hand, after an extensive review of, *inter alia*, the papers submitted to this Court and the relevant sections of the Code of the Village of Muttontown and the New York State Village Law, this Court simply cannot find any rational basis in the record for the respondents' 2014 determination to, in part, retain over $1.9 million in security. Indeed, the record is clear that the respondents did not determine the facts necessary to set a new performance bond amount and, in actuality, continue to include completed work in the performance bond.

For instance, the petitioner has asserted, based on the Village engineer's testimony at the May 12, 2014 Planning Board hearing, that his last inspection was in 2010, which means that he – and therefore the respondents – do not know the current state of the plantings (Petition, ¶¶108, 109, 117). Respondents' conclusory assertion, without more, that "the Planning Board engaged in fact finding" (Answer, ¶35) as to the "proper amount of security to retain for the performance bond" rings hollow as the Planning Board (and in reliance on the Planning Board, the Trustees) found no facts concerning the current state of the plantings and they made up 97 percent of the new bond.

Moreover, the respondents failure to refute the fact that "at least nine of the twelve improvements for which [they] currently hold maintenance retainage have been completed for *seven years or more*" (Petition, ¶154) and their failure to refute the claim that their own (Village) engineer, who deemed all twelve items complete in 2012, "identified no repairs necessary in the intervening two year period" between 2012 and his May 12, 2014 recommendation to the Planning Board, further establishes to this Court that there was no basis, much less a rational basis, for the respondents' determination to retain over $1.9 million dollars as security on the grounds that the repairs were necessary

or would be necessary for the "long-completed items".

Notably, counsel for the respondents attests that "[i]n adopting the recommendation of the Planning Board, the Board of Trustees...[i]ndividually analyzed each required improvement to determine the extent to which it might exhibit defects of material or workmanship or otherwise deteriorate prior to one year from the date of completion of the required improvements" (Aff. In Opp., ¶73). However, this contention is wholly unsubstantiated on this record. Indeed, there is no such record of any "individual[ized]" analysis. On the contrary, the minutes of the July 9, 2014 meeting confirms that counsel for the Village merely read to them the dollar amounts that resulted from the Village Engineer's application of his ten-percent "rule of thumb" (Petition, Ex. 6; Aff. In Opp., Ex. K, p. 21), which this Court specifically rejected in its 2013 Order.

In the absence of any evidence that the respondents engaged in any fact finding that this Court specifically ordered the respondents to undertake, despite the specific direction of this Court in 2013 to do so on remittitur, this Court finds that the respondents' decision must be annulled and the matter must be remitted once again to the Planning Board to, among other things, undertake an inspection of the landscape plantings, updating prior inspections already performed, *infra*.

Nor does this Court find any basis in law so as to permit the respondents to retain the security which is clearly a maintenance bond – not a performance bond, which (unlike a maintenance bond) the 2004 Planning Board approved. It is clear that while the respondents treat the 2004 Planning Board approval as one providing for both, a performance bond and a maintenance bond, nowhere did the Planning Board actually make any such distinction. On the contrary, in 2004, the Planning Board defined both the cash and bonded components of the performance bond together – as the "bond." The respondents' contention that "[t]he 2004 Planning Board decision...expressly provided that the cash deposit was posted for the additional purpose of ensuring the proper maintenance and repair of the improvements until such time as the bond is released..." (Aff. In Opp., ¶48), is wholly unsupported as there is no such "express" statement that appears in the 2004 decision of the respondents.

The respondents' attempt to redraft their 2004 approval of the subdivision to contain a maintenance component runs afoul of this Court's *express* prohibition against "erroneously meld[ing] together the distinct concepts of performance versus maintenance bond," which as this Court has previously held in the 2013 Order "ultimately" and with "no rational basis," "resulted in the Resolution to reduce the performance bond to an amount that includes completed items."

Nor is there any merit to the respondents' attempt to read a maintenance bond into

Section 158-25 of the Village Code – titled "Performance guaranties" – as even the subsection on which they seek to rely– to wit, 158-25(B) – expressly addresses "Performance bond[s]." Furthermore, the language that respondents quote from the 2005 "Subdivision Performance Bond" makes clear that the purpose of the security posted herein is to ensure "completion" of improvements within a specified period and not to cover potential maintenance in perpetuity.

Accordingly, the petitioner's application for mandamus to review, pursuant to CPLR 7803(3), the respondents' 2014 decision and determine that it is arbitrary and capricious is granted to the extent that said determination is annulled and the matter is remitted to the respondents to:

[a] undertake an inspection of the landscape plantings and seeding updating prior inspections already performed, with the further instruction that in estimating the costs of any remaining incomplete items, it would be irrational not to take into consideration:

[I] substitute plantings of equal or greater value to those originally specified in the approved planting and seeding plan,

[ii] field changes during construction (such as the building of new walls and incorporation of existing trees) that met the intent of the plan and enhanced the landscaping of the property, and

[iii] new plantings counted as completed in a prior inspection, but since damaged by severe weather or natural events;

[b] specify an amount required for completion of driveway aprons if it is other than $16,980 (the "Recommended Performance Bond Retainage" for driveway aprons listed by the Village Engineer in a letter to the Planning Board in May 2014); and,

[c] specify whether the equestrian trail has either:

[i] been constructed as required and/or is acceptable, in which case the security required therefor should be limited to the reasonable amount of map drawing work (not to exceed the "Recommended Performance Bond Retainage" for "Site Clearing/Grubbing" (referring to "Horse Trails") listed by the Village Engineer in a letter to the Planning Board in May 2014); or

[ii] requires additional work, such as a removal of a tree, and specify the cost to complete such work; which amounts, when combined, will comprise the new total reduced amount of security to be held by respondents (whether as a bond and/or cash).

Inasmuch as the petitioner also seeks a declaration, pursuant to CPLR 3001, that it need not pay any further fees and costs, administrative or otherwise, to the respondents for, among other things, engineering costs and clean up as part of a maintenance bond, said application is granted.

The 2005 Subdivision Performance Bond only contemplates the use of security (a performance bond) for "the reasonable engineering, witness and attorneys fees and costs incurred by the Village *to complete* the installation of the required improvements," and not for maintenance (Aff. In Opp., Ex. G, p. 2, §2(b) [Emphasis Added]). As such, this Court finds that the respondents are not entitled to any further fees.

The parties' remaining contentions have been considered and do not warrant discussion.

Any applications not specifically addressed are denied.

This shall constitute the decision and order of this Court.

Settle Judgment on Notice.

The foregoing constitutes the Order of this Court.

Dated: April 12, 2016
Mineola, N.Y.

Karen V. Murphy
J. S. C.