SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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IN THE MATTER OF THE APPLICATION OF
ROBERT BUTLER and PAULA BUTLER

Petitioners,

For a Judgment Pursuant to
CPLR Article 78

- against -

THE CITY OF RYE PLANNING COMMISSION,
DANIEL MATHISSON and HELENE MATHISSON

Respondents.

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AMENDED
DECISION & JUDGMENT
Index No. 16603-11

A. LORENZO, J: .

The Petitioners brought this proceeding pursuant to CPLR Article 78, seeking an order of this Court to annul, reverse and set aside the determination of the Respondents, modifying the Subdivision Map for the Forest Harbor Subdivision as set out in a Resolution (hereinafter the "Resolution"), which was approved by the Respondents, the City of Rye Planning Commission (hereinafter the "Planning Commission") on October 19, 2011. The Petitioners claimed that the Planning Commission's determination in modifying the setback requirements should be annulled and reversed based on the grounds that the resolution; (1) is erroneous as a matter of law as the Respondents did not have the authority to modify the front yard setback (it

was a deed restriction that ran with the land and was enforceable against all subsequent purchasers): (2) that it violates Article 1, Section 10, Clause 1 of the United States Constitution; and (3) that it was arbitrary and capricious, irrational and in violation of the law. The Respondents opposed the instant petition in all respects.

The Court issued its decision and dismissed the petition on or about March 20, 1012, finding in favor of the Respondent's, concluding that the City of Rye Planning Commission did not abuse their authority by approving the Matheson's (Respondent's) request for a front setback modification, as the restriction did not run with the deed, and their determination was not arbitrary and capricious.

Petitioners subsequently filed the instant Notice of Motion to Reargue and Renew dated April 24, 2012, and Respondent's filed their Affirmation in Opposition to Petitioner's Motion to Reargue and Renew dated May 15, 2012. The Court's decision is as follows:

Facts:

In 1966, the Subdivision Map was drawn and approved by the Planning Commission by Resolution No. 18-66, concerning the subdivisions of property between Forest Avenue and the Long Island Sound. It was consistent with the "Land Subdivision Regulations" at that time. In 1967, the Subdivision Map was re-approved by Resolution No. 16-67 and filed with the County Clerk on July 21, 1967 as Map No. 15512. In 1981, the Petitioners (The Butlers) acquired title to lot 11, which is located at 10 Philips Lane, Rye, New York, and have lived there for approximately 30 years. The Butler and Respondent Mathisson properties are adjacent to each other and are located

in an area of Rye known as the "Forest Harbor Subdivision." (The Court also notes that the Mathisson's own property is located at 3 Philips Lane, Rye, New York, but that property is not an issue in the instant case). According to the Petitioners, property owners in the Forest Harbor Subdivision are automatically members of the Forest Harbor Corp., and as such, the Petitioners assert that they have the contractual right to enforce the deed restrictions applicable to the homeowners in the Forest Harbor Subdivision as set forth in the Declaration. The Petitioners allege that they received three instruments at the time of their closing and that these documents constituted a "deed restriction" which may not be modified and/or revoked by the Planning Board. The Mathissons acknowledge that they received a deed (to lot 11), the 1967 Subdivision Map, and a Declaration referencing the Subdivision Map and imposing restrictions (but not including front yard setbacks). The Mathissons purchased and acquired title to lot No.10 in 2010. Under the 1991 Wetlands regulations, the rear half of lot No.10 is within the regulated 100 foot wetland buffer zone. On January 12, 2011, the Mathissons submitted a construction plan to demolish the existing house on their lot and proposed to build a new structure (house, pool and terrace), according to the Petitioners. The Court also notes that the proposal for the new house according to the Mathissons is less square footage than the original structure on the property. The Mathissons also submitted an application to the City of Rye for a variance (from the Zoning Board of Appeals hereinafter "ZBA") for a 30-foot front yard setback from the Floor Area Ratio ("FAR") requirement on or about May 19, 2011. According to the Petitioners, the Mathissons did not inform either the ZBA or the Planning Commission that they were aware of the front yard deed restrictions, which were shown on the

subdivision map for this specific subdivision. The ZBA concurred with the Mathissons regarding the front yard setback requested by the Respondents and denied the Mathisson's application. The January plan contemplated a 398 square foot increase in "impervious" wetlands use. The proposed structure therefore required a wetlands permit. On January 29, 2011, the Planning Commission conducted an onsite inspection and requested a revised plan to provide for more suitable environmental protection of the wetlands. On February 7, 2011, the Mathissons submitted a revised construction plan, reducing the net increase in impervious wetland use from 398 square feet to 167 square feet. The Planning Commission restated its environmental concerns and asked the Mathissons to submit additional revisions. On March 8, 2011, the Planning Board found the proposed construction, with the additional revisions, unacceptable in that the proposed structure was approximately 40 feet from the wetland's edge. On April 11, 2011, the Mathissons submitted a redesign so that the proposed structure would be no closer than 74.5 feet from the wetland's edge. On May 19, 2011, the Planning Board learned that the "front yard setbacks" indicated on the 1967 Subdivision Map had not been modified. On June 7, 2011, the Mathissons submitted a "compromised plan" to accommodate the setbacks, shifting the proposed structure closer to the Long Island Sound, although the proposed structure was still within the front yard setback (45 feet from the front property line). On June 27, 2011, the Planning Commission advised the Mathissons that they needed an approval for a Subdivision Modification pursuant to §170-11 of the Code to go forward with their proposed structure. On August 1, 2011, the Mathissons submitted an application for a modification to modify the front yard setback for lot No. 10. A second site inspection was conducted and a public hearing

was held on September 13, 2011. The Petitioners and other neighbors attended the public hearing and objected to the modification of the front yard setbacks. On October 11, 2011, the Planning Commission approved the Mathisson's modification of the Subdivision Map by resolution No. 24-2011, approving the "modification" of the front yard setback. Under the approved modification, the proposed structure is set back 44.75 feet from the property line. (Previously, the set back was 60 - 63 feet from the property line - a difference of approximately 15 feet). This Resolution was issued in response to an application filed by the Respondents (The Mathissons) dated January 20, 2011 (with many above referenced amendments) related to property located at 12 Philips Lane, Rye, New York, for a Wetland and Watercourses permit pursuant to Chapter 195 of the Rye City Code (hereinafter the "City Code"). On November 16, 2011, the Petitioners (the Butlers) filed the instant Article 78 proceeding, arguing that the modification approved by the Planning Commission modifying the required front yard set back from the property line was unlawful per the 1967 original Subdivision Map. The Petitioners also claim that §44.9 of the Land Subdivision Regulations was adopted by the Rye City counsel in 1957 and was the predecessor to the current code §170-16(1), which is still in effect. Section 44.9 of the Land Subdivision Regulations gave the Planning Counsel the right to establish setbacks within subdivisions that are greater than required under the City of Rye zoning ordinances. The current version of City Code §170-16[I], states that the modified setback deed restrictions, created for the protection of all property owners in the subdivision, cannot be modified.

Decision

Firstly, the Court will grant the motion to renew and reargue as the Court overlooked certain facts when making its original finding, and there is "new evidence" submitted by Petitioners. While Respondents are correct in that the general rule is that "[a] petitioner may not raise a new claim in a proceeding pursuant to CPLR Article 78 that was not raised in the administrative hearing under review," in this case, the claim is not a new claim but a new document which supports their previous claim that the covenant runs with the deed of the land. (*Matter of Myles v. Doar*, 24 AD3d 677 [2nd Dept. 2005]; *Matter of Sharf v. New York State Dept. of Motor Vehicles*, 74 AD3d 978 [2nd Dept. 2010]). As there is not a new claim being made, this Court finds that the recently discovered document is properly before this Court. (See CPLR 2221(d)).

The Court in its review, finds that it did concentrate on the Butler's deed, which referenced the subdivision map with a hand written note. The Court notes that it did not know when this hand written notation was made and why it was not typed. However, the Court at the time of its original decision was not aware that the Mathisson's deed included an express typed reference to the subdivision map in the legal description of the Mathisson's property. (See Exhibit No. 5, Petitioner's Motion to reargue and renew). On the subdivision map of Forest Harbor, the Court now sees in small print, that it states "direct zoning requirements . . . specifically indicated required setbacks are shown by dotted lines." The Court in its initial review overlooked this clear and expressed language located on the subdivision map and was incorrect when it stated that there was no clear and unambiguous language indicating a deed restriction existed. This subdivision map was referenced in the Mathisson's deed, and therefore placed

Respondent's on notice of the setback restrictions.

Additionally, Petitioners have supplied this Court with new documentation which was previously unavailable to the Butlers, showing the setback deed restrictions were in the Mathisson's chain of title and that they had notice of the deed restriction. More specifically, the Title Insurance Policy for the property in question references map # 15512, which (Exhibit 2, Petitioner's Motion to Reargue and Renew) excepts the setbacks and notes on the subdivision map, showing proof that the setbacks were clearly restrictions in the Mathisson's chain of title and they were on notice of this restrictive covenant. The Court finds that this evidence confirms that the setbacks were in fact in the chain of title when the Mathisson's acquired their property, which included the subdivision map and declaration.

All of the above, including the fact that the Mathisson's deed, referenced the filed subdivision map under schedule "A," shows that they had notice of the restrictive deed that ran with the land. In addition, the declaration for the Forest Harbor Subdivision which was recorded and filed in Westchester County on March 21, 1968, also referenced the subdivision map regarding lot No. 10.

Therefore, this Court finds in its re-examination of the instant matter, that there is express language along with other evidence showing that this restrictive covenant ran with the land, and the notice of the deed requirement was clear and unambiguous.

Both the Petitioners and the Respondents cite the case of *O'Mara* in their memoranda of law (See *O'Mara v. Town of Wappinger*, 9 NY3d 303 (2007)). In *O'Mara*, the Petitioners purchased land in 1962 with the intent of building a condominium on it. The plat map in this case was filed with the town and with the Dutchess County Clerk's

Office in 1963 and stated the words "Open Space" for lots B and E, which the Petitioners purchased. In 2002, when the Petitioners sought to build, they were stopped as it was alleged to be a violation of the 1963 filed plat map. The Court of Appeals held in that instance that the "Open Space" notations on the filed plat map were sufficient to create an enforceable right against a subsequent purchaser, and had the purchaser conducted a search of records and seen the plat map, he would have discovered the "Open Space" restriction. The Petitioners argue that since the Court in *O'Mara* found that New York State had a system for filing of plats, and a search of the record would have disclosed any restrictions related to the parcel, that the Mathissons should have been aware of the setback restrictions on their land after viewing the plat map. This Court finds that *O'Mara* is on point in this case now. In fact, the notations said "Open Space" on both of the subdivided parcels ("B" and "E") which are similar to the plat map in this case which contained typed letters stating that the "required setbacks are shown by dotted lines."

The Petitioners' second cause of action claiming that the Resolution impaired their Constitutional rights is also reversed, as the Court upon reevaluating has found that the dotted lines on the subdivision map were incorporated into the deed, and therefore the setback lines run with the land and are deed restrictions and as such cannot be interfered with by a legislative body. To prove that a violation of the contract clause has occurred, the wronged party must show that a law was passed that substantially impaired their rights. Here, it appears that the resolution law was passed, and it clearly and substantially impaired Petitioner's rights. The Planning Commission had no authority as a deed restriction, to limit or negate said restriction by approving the setback lines outside the perimeter of the dotted lines on the subdivision map.

The Court will not address the argument that the modification was a self-created hardship, as it was not previously argued. Additionally, it appears that Petitioners have supplied the Court with the full record.

Therefore, this Court has come to the conclusion that the Planning Commission did abuse their authority by approving the Respondent's request for a front setback modification. The Petition is therefore granted and the Planning Commission's October 11, 2011 resolution modifying the setbacks on Lot No. 10 is void. This decision reverses this Court's prior decision of March 20, 2012, based upon Petitioner's motion to renew and reargue. As the Court does not find that this proceeding was frivolous in nature, costs will not be awarded to either party.

The foregoing constitutes the Decision and Judgment of the Court.

Dated: White Plains, New York
June 4, 2012

Albert Lorenzo
Acting Supreme Court Justice

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No. of pages (including cover sheet) 11

Attached is a Decision and Order from the Hon. Albert Lorenzo for the following case:

Butler v. City of Rye Planning Commission

Per UCS budget reductions, we will no longer be sending copies through the mail.