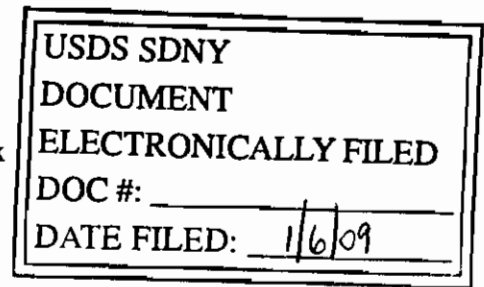


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



DONALD J. O'MARA, III, PATRICK L. O'MARA, SR.
and PROPERTY MANAGEMENT, INC.,

Plaintiffs,

-against-

03 Civ. 9814 (CM)

TOWN OF WAPPINGER,

Defendant.

DECISION, ORDER AND JUDGMENT IN FAVOR OF DEFENDANT
ON ITS COUNTERCLAIMS AGAINST PLAINTIFFS

McMahon, J.:

Defendant moves for entry of "judgment on the mandate" of the United States Court of Appeals for the Second Circuit.

The motion is granted and the court hereby enters judgment as requested (more or less).

This case, which has spawned numerous opinions¹, concerns the construction of a house by plaintiffs on a parcel of land (Parcel E) that – unbeknownst to them and to officials of the Town of Wappinger as well – was subject to an open space restriction, as shown on Map No. 3107 filed in the Office of the Dutchess County Clerk. When its officials belatedly learned of the restriction, the Town refused to grant plaintiffs a certificate of occupancy and directed them to remove the structure. Plaintiffs brought this action seeking to compel the issuance of a certificate of occupancy; defendant counterclaimed for an order directing that the structure be removed from the property. After a bench trial, this court ruled in favor of plaintiffs, but the Second Circuit overturned the verdict following a decision by the New York Court of Appeals on a certified question of law concerning the enforceability of the open space restriction at issue in this case. *O'Mara v. Town of Wappinger*, 518 F. 3d 151 (2d Cir. 2008). The case was remanded to this court for further proceedings consistent with the Second Circuit's decisions.

¹ There is no need to discuss any aspect of this case except the resolution of the state law claims by the New York Court of Appeals and the Second Circuit, and the fate of the Town's counterclaim.

On May 27, 2008, this court directed the Clerk of the Court to enter judgment dismissing the complaint. The judgment was finally entered on November 12, 2008. There followed the instant motion, which is really a motion for summary judgment on the Town's fourth and fifth counterclaims – the counterclaims that sought to have the house removed from the land that was subject to the restriction.

There can be no question, following the decision of the New York Court of Appeals as applied by the Second Circuit, that the Town is entitled to the entry of judgment on its counterclaims to the extent of directing that the house be removed from Parcel E.² The Second Circuit has declared that the open space restriction is enforceable against all subsequent purchasers of Parcel E, including the plaintiffs. *Id.* at 152. Therefore, this court can do nothing except enforce it.

None of the arguments raised by plaintiffs' once-and-future attorney to forestall the inevitable has the slightest merit. For example, plaintiffs' argument that, "The Town cannot now change its mind and decide to enforce the open space restriction after it allowed the house to be built" is simply silly. The New York Court of Appeals had before it the full factual record in the case and this court's extensive (and for the most part unchallenged) findings of fact after trial. It declared that the open space restriction was enforceable against plaintiffs "under the circumstances of this case." *O'Mara v. Town of Wappinger*, 9 N.Y. 3d 303 (2007). The Second Circuit adopted that conclusion as its own and issued a mandate directing this court to act accordingly. I am not at liberty to ignore the Second Circuit's mandate. I must enforce the open space restriction against plaintiffs. Therefore, I must grant the Town's motion for summary judgment in its favor on its Fourth and Fifth Counterclaims.

It is not worth the trouble to address extensively plaintiffs' claim that they should be awarded compensation for the loss of their house. This court dismissed plaintiffs' "takings" claim years ago; plaintiffs did not appeal that decision when the final judgment was first entered in this action and they have no right to appeal it now.

In any event, there has been no "taking" of the house by the Town.³ Rather, the Town is enforcing an existing restriction on the use of Parcel E. New York's Town Law § 268(2) expressly permits defendant to "correct or abate" plaintiff's violation of the open space restriction.

Nor does any issue of "unclean hands" prevent this court from entering an injunction directing that plaintiffs remove the house from Parcel E – or permitting the Town to do so if plaintiffs do not. Plaintiffs are maintaining the house on the lot in violation of the open space restriction. There are no equities to balance here, because

² The other lot that was the subject of this lawsuit, Parcel B, is no longer owned by plaintiffs; they declined to pay taxes on the lot and Dutchess County obtained title to the parcel in foreclosure. The County has since conveyed Parcel B to the Town.

³ Indeed, plaintiffs have only themselves to blame for the fact that they cannot keep the house on Parcel E; they could have settled this action many years ago – and kept the house where it is – by agreeing not to develop the rest of Parcels B and E. I do not fault plaintiffs for pursuing their lawsuit – indeed, they had an absolute right to persist -- but they ran the risk of losing, and losing has inevitable consequences.

traditional equitable defenses are not available against a municipality seeking an injunction to enforce a zoning violation. The relief here sought -- an injunction restoring the open space -- is wholly appropriate.

Defendants are also entitled to an order declaring that the building permit for the house has expired by operation of law. Pursuant to the Wappinger Town Code, Section 85-5 (C)(3), it either expired when the Town, carrying out the now-overturned order of this court, issued a certificate of occupancy for the house (which certificate was nullified by this court's order dated May 27, 2008), or expired because more than one year has passed since it was issued.

I quite understand plaintiffs' frustration with the situation in which they find themselves. They did nothing wrong (although their Title Insurer certainly did). And the Town did not acquit itself well by issuing a building permit to plaintiffs after placing a restriction on Parcel E -- and then forgetting it had done so. However, this lawsuit has gone on long enough. Plaintiffs need to accept that they have lost, and move on. Further proceedings before this court in an attempt to delay the inevitable will be viewed as frivolous and will subject plaintiffs -- and any attorney who represents them -- to the very real possibility of sanctions.

ORDER AND JUDGMENT

For the reasons set forth above, the court hereby ORDERS that plaintiffs restore Parcel E, bearing the address 1 Wildwood Drive, in the Town of Wappinger, New York (Tax Parcel Grid Identification # 135689-6158-02-870777-0000) to an "open space" condition by removing any and all structures, and any debris from said structures, from said parcel within thirty days of the date of this order. Removal of any and all structures is all that is necessary to restore the parcel to an "open space" condition.⁴ Plaintiffs are specifically advised that they do not need to tear down the house they built; they are free to move it elsewhere. But it cannot remain on Parcel E at the expiration of thirty days.

If, by February 6, 2008 (being the thirty-first day following the date of this order), all structures have not been removed from Parcel E by plaintiffs, defendant shall be allowed without further order of the court to enter upon Parcel E and remove all structures thereon and the debris therefrom, and to apply to the court for a judgment for the cost of said removal. Any such application for costs shall be limited to the cost of removing the structure(s) and debris in the cheapest possible way, and shall not include

⁴ As the Town itself notes, the definition of "open space" in Black's Law Dictionary means "undeveloped (or largely undeveloped) urban or suburban property." There is no requirement in law that the land itself be in any particular condition; it does not even need to be in a natural state. Rather, it need only be without any sort of development (i.e., structure) on it. Just to be clear, plaintiffs would be ill-advised to, say, pave over the lot -- the court would interpret that as imposing a "structure" on it. And of course, plaintiffs will be liable to any party who is injured if any nuisance (like a large hole than children can jump into) remains on the land after the house disappears -- which might augur in favor of grading the site after clearing it. But plaintiffs do not need to landscape the property, or anything of that nature, in order to comply with this injunction. They need only remove the structures that render Parcel E "developed."

any cost other than the cost of removing the structure(s) and debris – which, as I have noted, is all that is sufficient to restore the land to an “open space” condition.

It is further ORDERED that plaintiffs be and hereby are enjoined, now and in the future, from taking any steps to develop or improve Parcel E.

It is further ORDERED that defendant have of this court a declaration that the building permit pursuant to which the house presently on Parcel E was constructed has expired by operation of law.

It is further ORDERED that plaintiffs shall pay defendant the costs (not attorneys’ fees) on this motion. Defendant shall present the Clerk with a bill of costs for entry.

This constitutes the decision, order and judgment of the Court. The Clerk of the Court is directed to ENTER THIS JUDGMENT AND CLOSE THE FILE.

Dated: January 6, 2008



U.S.D.J.

BY FAX TO ALL COUNSEL (THIS IS NOT AN ECF CASE)