USCOA,2 No. 141

Donald J. O'Mara III, Patrick L. O'Mara Sr., and Absolute Property Management, Inc.,

Respondents,

v.

Town of Wappinger,

Appellant.

Kenneth M. Stenger, for appellant.
James W. Glatthaar, for respondents.
Association of Towns of State of New York, amicus curiae.

JONES, J.:

In 1962 two developers, David Alexander and Fred Lafko purchased property in the town of Wappinger, Dutchess County, with plans to develop a condominium project to be known as Wildwood Manor. The Planning Board tentatively approved a

preliminary layout of the project and conditioned approval in part, on the creation of a permanent open space on a preliminary plat.[1] At a January 23, 1963 meeting, the Board approved the final plat (1963 Plat),which divided the property into seven parcels, including parcels B and E, which were designated the buffer area where open space would be located.[2] The words "Open

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[1] Generally, a plat is a map describing a piece of land and its features, such as boundaries, lots, roads, and easements (see Black's Law Dictionary, at 1188-89 [8th ed. 2004]).

Under Town Law § 276(4)(b), a "preliminary plat" is

> "a drawing prepared in a manner prescribed by local regulation showing the layout of a proposed subdivision including, but not restricted to, road and lot layout and approximate dimensions, key plan, topography and drainage, all proposed facilities unsized, including preliminary plans and profiles, at suitable scale and in such detail as local regulation may require."

[2] Under Town Law § 276(4)(d), the "final plat" is

> "a drawing prepared in a manner prescribed by local regulation, that shows a proposed subdivision, containing in such additional detail as shall be provided by local regulation all information required to be shown on a preliminary plat and the modifications, if any, required by the planning board at the time of approval of the preliminary plat if such preliminary plat has been so approved."

Further, Town Law § 276(4)(f) provides as follows:

> "'Final plat approval' means the signing of a plat in final form by a duly authorized officer of a planning board pursuant to a planning board resolution granting final approval to the plat or after conditions specified in a resolution granting conditional approval of the plat are completed. Such final approval qualifies the plat for recording in the office of the county clerk or register in the county in which such plat is located."

Space" were written on parcels B and E of the plat. The Board minutes for the January 23 meeting indicated that the plat was accepted subject to eight conditions, among them that no building permits would be issued for parcels B and E, as indicated on the 1963 Plat. The 1963 Plat and Board minutes were filed with the Town. The 1963 Plat was also filed with the Dutchess County Clerk's Office. Wildwood Manor was ultimately constructed and continues to be occupied.

Parcels B and E remained undeveloped for nearly 40 years until the circumstances that prompted this litigation arose.[3] Plaintiff Absolute Property Management, a corporation owned by brothers Donald and Patrick O'Mara, acquired parcels B and E. On October 18, 2000, Absolute purchased the parcels for $29,500 at an *in rem* tax sale with the intent to construct ten single family houses on the property. It took title subject to any existing right of way, easement, any and all existing restrictions, conditions and covenants of record. Prior to closing, Patrick O'Mara ordered a title report and obtained title insurance. Attached to the policy was Schedule B. Neither Schedule B nor the title policy made reference to an "Open Space" restriction.

In 2002, the O'Maras, taking steps towards building on

[3] Notwithstanding the Board's restrictions, at some point, the Wappinger Tax Assessor increased the assessment on the property from $7500 to $47,000 noting on his records, "No reason for the very low value. Good buildable land." Thereafter, Fred Lafko's estate ceased making tax payments on the two parcels.

the property, retained a licensed land surveyor (Gerald Lynn) who prepared a survey of parcels B and E. Lynn based the survey, in part, on an examination of the 1963 Plat. Lynn observed the "Open Space" notation on parcels B and E, but ignored it and never included the notation on the survey submitted to the Town Building Department.[4] The first house was to be built on Parcel B and was to serve as a residence for Donald O'Mara and his family. The Town issued a building permit, a temporary certificate of occupancy and approved both an interim survey for the lot on which the house was to be built and a site plan.

In July 2003, Ronald Lafko, the son of Fred Lafko (one of the original developers of the land) approached a Town Councilman to express his concern that the development violated the 1963 Plat. In November 2003, the newly-appointed Town Building Inspector issued a stop work order based on the open space restriction noted on Field Map 3107. Donald O'Mara protested the issuance of the order and attempted to resolve the matter with the Town. The O'Maras were not aware of the "open space" restrictions on parcels B and E until after the Town issued the order -- three years after they purchased the property. The Town permitted Donald O'Mara to complete exterior work but did not vacate the stop work order. On December 2, 2003 an attorney for the Town made a written settlement proposal to

[4] Had Lynn included the notation on the survey, the building inspector would have been alerted to the restriction.

the O'Maras' counsel in which the Town offered to grant a certificate of occupancy for the house provided the rest of Parcels B and E were dedicated to the Town. In response, the O'Maras filed an action in the United States District Court for the Southern District of New York.

The O'Maras' original complaint alleged claims under 42 USC § 1983 and under the Takings Clause of the Federal Constitution, the latter being dismissed on the eve of trial. The complaint was amended to add a claim for a judgment declaring that the O'Maras owned parcels B and E free and clear of the open space restriction. Essentially, the O'Maras argued that the open space restriction had to be recorded under Real Property Law § 291 to be enforceable against them. In further support of that argument, plaintiffs urged that the Town acquired an interest in the property pursuant to General Municipal Law § 247 and upon acquisition of the property by the Town, the recording requirement was triggered. The amended complaint also contained claims for fraud and negligent misrepresentation.

The District Court dismissed the fraud and negligence claims. As to the section 1983 claim, the court held that because the O'Maras had a legitimate claim of entitlement to a certificate of occupancy and the Town's basis for withholding the certificate was illegal, the Town had violated the O'Maras' constitutional right to substantive due process, thus entitling them to damages for the loss of use and occupancy of the house.

Finally, the court held that the open space restriction was unenforceable against the O'Maras, who were bona fide purchasers for value without notice. The court, citing Real Property Law § 291, determined that the restriction was not properly recorded within Dutchess County. Further, the court, relying on Ioannou v Southhold Town Planning Bd. (304 AD2d 578 [2d Dept 2003]), held that the failure to record any restriction on the use of property precludes enforcement of the restriction.[5]

Upon the Town's appeal, the United States Court of Appeals for the Second Circuit reversed in part by dismissing the section 1983 claim. Additionally, the Court held that "[w]hile . . . the process of approving and filing the 1963 Plat complied with both [Town Law § 276 and Real Property Law § 334,] neither section addresses whether a subdivision plat is enforceable against a subsequent purchaser." In light of the foregoing, and given the absence of controlling precedent from this Court, the Second Circuit certified the following question to this Court: "Is an open space restriction imposed by a subdivision plat under New York Town Law § 276 enforceable against a subsequent purchaser, and under what circumstances?" Under the circumstances of this case, we answer the certified question in

[5] The Second Circuit in its decision, O'Mara v Town of Wappinger (485 F3d 693 [2d Cir 2007]), held that Ioannou was inapposite because it addressed the enforceability of "restrictive covenants" and not zoning restrictions imposed by the Planning Board through its zoning powers" (id. at 698 n 6). Furthermore, the agreement was neither noted on the filed subdivision plat nor recorded in the Office of the County Clerk pursuant to Real Property Law § 291.

the affirmative. An open space restriction placed on a final plat pursuant to Town Law § 276, when filed in the Office of the County Clerk pursuant to Real Property Law § 334, is enforceable against a subsequent purchaser.

DISCUSSION

Real Property Law § 334, the law applicable to the filing of the 1963 Plat (and applicable today), provides that no real property subdivided into separate lots can be offered for sale to the public without the filing of a map in the Office of the County Clerk or Register of Deeds where the property is located. Additionally, no plat of a subdivision may be recorded (i.e., filed) with the County Clerk or Register until it is approved by a planning board and such approval is endorsed in writing on the plat in the manner designated by the planning board (see Town Law § 278 [now renumbered Town Law § 279(1)]. Thus, the statutory scheme in effect in 1963 provided that (1) no subdivision could be approved except by the planning board, (2) no plat could be filed with the County Clerk unless it had the endorsement of the planning board and (3) the subdivision plat had to be filed in the Office of the County Clerk within 90 days of its approval. Accordingly, no lot subdivided from a larger piece could be sold without planning board approval. By virtue of its filing requirement, this statutory scheme afforded notice to the public.

Plaintiffs argue that the Board cannot enforce the open

space restriction on their property unless the restriction is recorded under Real Property Law § 291, which requires that conveyances of real property be recorded.[6] In furtherance of this argument, plaintiffs posit that the Town, in reserving to itself the right to prevent anyone from building anything on these parcels, "acquired" an open space interest pursuant to General Municipal Law § 247(2) and that this acquisition amounts to a "conveyance" of real property. Plaintiffs submit that because the prior owners (David Alexander and Fred Lafko) had been stripped of all rights to use parcels B and E, except the right to be taxed, the effect was that the property was acquired by the Town through its pervasive and restrictive control of the property. This Court disagrees and finds no evidence that the Town acquired parcels B and E by "purchase, gift, grant, bequest, devise, lease or otherwise" (General Municipal Law § 247[2]). Further, there is no evidence that there was a "conveyance" within the meaning of Real Property Law § 290(3). Accordingly, Real Property Law § 291 is inapposite to the case at bar. Moreover, there is no statutory requirement to record a plat in the chain of title.

The system of filing subdivision plats exists throughout New York State. In the instant case, a search of the

[6] Under Real Property Law § 290(3), the "term 'conveyance' includes every written instrument, by which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected" (emphasis added).

records filed in the Office of the Dutchess County Clerk would have disclosed the 1963 Plat. When Absolute acquired title at the tax sale, a description of the property was limited to its Tax Grid number. The tax map only showed two boundaries for the lot conveyed. In order to determine the boundaries of its holdings, Absolute should have searched the County Clerk's property records until it found the subdivision plat that created its parcel. Had Absolute examined the plat, it would have discovered the open space restriction.

In conclusion, we note that towns are separately bestowed with the authority to regulate land use within their borders (see Town Law § 261). This grant of authority is broad and encompasses a town's ability to impose reasonable conditions in the course of approving a subdivision (see Town Law § 276; see also Koncelik v Planning Bd. of the Town of E. Hampton, 188 AD2d 469, 471 [2d Dept 1992]). The ability to impose such conditions on the use of land through the zoning process is meaningless without the ability to enforce those conditions, even against a subsequent purchaser.

Accordingly, under the circumstances of this case, the certified question should be answered in the affirmative.

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Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this Court pursuant to section 500.27 of the Rules of Practice of the New York State Court of Appeals, and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question answered

under the circumstances of this case in the affirmative. Opinion by Judge Jones. Chief Judge Kaye and Judges Ciparick, Graffeo, Read, Smith and Pigott concur.

Decided November 15, 2007