

**Putnam Community Found. v Planning Bd. of the  
Town of Carmel**

2014 NY Slip Op 33080(U)

August 6, 2014

Supreme Court, Putnam County

Docket Number: 1609/12

Judge: Lewis J. Lubell

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Dispo

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK  
COUNTY OF PUTNAM**

-----X  
THE PUTNAM COMMUNITY FOUNDATION,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules

- against -

THE PLANNING BOARD OF THE TOWN OF CARMEL, THE TOWN OF CARMEL, and THE PUTNAM HOSPITAL CENTER,

Respondents.

-----X  
**LUBELL, J.**

**DECISION & ORDER**

Index No. 1609/12

Sequence No. 1

Motion Date 5/5/14

The following papers were considered in connection with this petition by The Putnam Community Foundation for an Order and Judgment pursuant to Article 78 of the CPLR of the State of New York, granting petitioner the following relief: (a) annulling and setting aside the planning board's de facto denial of petitioner's request to extend the 2009 site plan approval and granting petitioner's extension request, thereby extending the 2009 site plan approval to June 8, 2013; (b) annulling and setting aside the planning board's June 13, 2012 conditional subdivision approval resolution which purported to retroactively re-draft the May 9, 2012 conditional subdivision approval resolution; (c) reinstating, to the extent necessary, the 2009 site plan approval and May 9, 2012 resolution of conditional subdivision approval; and (d) granting petitioner such other, different and further relief as the Court may seem just and proper, including legal fees, costs and expenses:

<b>PAPERS</b>	<b>NUMBERED</b>
NOTICE OF PETITION	1
VERIFIED PETITION/EXHIBITS A-I	2
VERIFIED ANSWER	3
RETURN OF PLANNING BOARD/EXHIBITS A-O	4
AFFIDAVIT IN SUPPORT OF PETITION	5

AFFIDAVIT IN SUPPORT OF PETITION	6
AFFIRMATION IN SUPPORT OF PETITION/EXHIBITS A-D	7
AFFIRMATION IN OPPOSITION/EXHIBIT A	8
AFFIDAVIT	9
AFFIRMATION IN SUPPORT/EXHIBIT A	10
MEMORANDUM OF LAW IN OPPOSITION	11
3 CD'S OF CARMEL PLANNING BOARD MEETINGS	12

Petitioner, The Putnam Community Foundation ("PCF"), commenced this Article 78 proceeding against the Planning Board of the Town of Carmel (the "Planning Board") and neighboring property owner, Putnam Hospital Center (the "Hospital"), to declare null and void the Planning Board's de facto denial of PCF's application to extend (the "Extension Application") the Planning Board's 2009 Site Plan Approval (the "2009 Site Plan Approval") of PCF's proposed development of 120 units of affordable senior citizen housing (the "Project") on a 35.3 acre parcel (the "Property") located on Stoneleigh Avenue in the Town of Carmel, County of Putnam. PCF also challenges the Planning Board's un-noticed *sua sponte* correction of same date to an "administrative error" in its May 9, 2012 Conditional Subdivision Approval (a lot line adjustment) which approval was needed to effectuate PCF's then anticipated conveyance of a 18.21 acre parcel of the Property to the Hospital.

In 2001, PCF purchased approximately 43 acres of unimproved land on the east side of Stoneleigh Avenue. In 2005, approximately eight acres were sold to the Hospital for which PCF and the Hospital obtained subdivision approval for a needed lot line adjustment.

On February 13, 2006, with approximately 35.3 acres remaining, PCF filed a site plan application for approval of the Project. The approval process involved numerous public hearings and required the preparation of an environmental impact statement ("EIS") pursuant to the State Environmental Quality Review Act ("SEQRA"). At the conclusion of the EIS process, in December 2008, the Planning Board adopted its detailed findings statement pursuant to SEQRA, thus allowing the Project to go forward from an environmental standpoint.

Later, on June 10, 2009, the Planning Board adopted the 2009 Site Plan Approval which was set to expire one year from the date of approval unless construction was commenced pursuant to an authorized building permit. On May 26, 2010, the 2009 Site Plan Approval was extended for a 12-month period, expiring on June 9, 2011. Again, on April 13, 2011, the 2009 Site Plan Approval was extended for a 12-month period, thus expiring on June 9, 2012. (This proceeding challenges the Planning Board's treatment of PCF's June 1, 2012 application to extend the June 9, 2012 expiration for

one year [the "2012 Extension Application of the 2009 Site Plan Approval".])

Thereafter, PCF and the Hospital agreed to PCF's sale to the Hospital of approximately 18.21 acres, thus leaving approximately 17 acres for PCF to proceed with the Project. In 2012 and while enjoying the benefit of the earlier granted extension of the 2009 Site Plan Approval, PCF and the Hospital applied to the Planning Board for a lot line adjustment necessary to effectuate the contemplated transfer.<sup>1</sup>

On May 9, 2012, the Planning Board passed Resolution #12-11 wherein it granted PCF conditional subdivision approval (the "May 2012 Conditional Subdivision Approval"). Upon the fulfillment of the conditions set forth therein, execution of the Final Subdivision Plat by the Chair of the Planning Board and the filing of the executed Final Subdivision Plat with the Putnam County Clerk, PCF would be able to effectuate the contemplated sale of the 18.21 acre parcel to the Hospital.

Both the underlying negative declaration (SEQRA) and the May 2012 Conditional Subdivision Approval provide that,

[t]he conveyance of land [from PCF to the Hospital] would render the previously approved 120 unit affordable senior housing project on the [PCF] site[] null and void".

In addition to its challenge to the Planning Board's June 13, 2012 treatment of its 2012 Extension Application of the 2009 Site Plan Approval, PCF challenges the Planning Board's actions of same date with respect to the May 2012 Conditional Subdivision Approval.

More particularly, PCF appeared before the Planning Board on June 13, 2012 to address the then scheduled 2012 Extension Application of the 2009 Site Plan Approval. In contrast to an anticipated uneventful and pro forma application for an extension of its 2009 Site Plan Approval, PCF was treated to a de facto denial of the application following an un-noticed, sua sponte motion by the Planning Board to amend the May 2012 Conditional Subdivision Approval, over PCF's objection, to correct an "administrative error" which effectively nullified the 2009 Site Plan Approval and rendered moot the 2012 Extension Application of the 2009 Site Plan Approval. The Planning Board implemented its sua sponte amendment in a new resolution signed by the Chairman of

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<sup>1</sup> The proposed lot line adjustment is treated as a request for subdivision approval in accordance with Carmel Town Code section 131-4.

the Planning Board (the "June 2012 Amended Conditional Subdivision Approval").

To put this action in perspective, a comparison of the May 2012 Conditional Subdivision Approval and the June 2012 Amended Conditional Subdivision Approval is in order.

The following is found at the second recital paragraph, or "Whereas" clause", of the May 2012 Conditional Subdivision Approval:

Whereas, the action involves the transfer of 18.21 acres of land from [PCF] to [the Hospital]. **The conveyance of land** would render the previously approved 120 unit senior housing project on the [PCF] site, null and void. [Emphasis added].

In contrast, the June 2012 Conditional Subdivision Approval reads as follows:

Whereas, the action involves the transfer of 18.21 acres of land from [PCF] to the [Hospital]. No additional lots are being rendered. **This approval** renders the previously approved 120 unit senior housing project on the [PCF] site, null and void. [Emphasis added].

PCF contends that the May 2012 Conditional Subdivision Approval recognized and provided that, if the contemplated sale by PCF to the Hospital of the 18.21 acre parcel did not occur, PCF would still have all rights to develop the Project on the original 35.3 acres as permitted by the 2009 Site Plan Approval.

Notwithstanding the clear "conveyance of land" language found in both the underlying negative declaration (SEQRA) and the May 2012 Conditional Subdivision Approval, the Planning Board disagrees. More particularly, the Planning Board argues that the May 2012 Conditional Subdivision Approval contained an incorrect statement due to an "administrative error" "despite the clear intentions of the Planning Board to terminate the existing approvals upon granting the [conditional] subdivision approval and not upon the transfer of the property" (Planning Board memorandum of law, 10). In addition, the Planning Board avers that the amendment of the May 2012 Conditional Subdivision Approval was based upon express representations of PCF.

At the outset, the Court is not persuaded that June 2012

Amended Conditional Subdivision Approval constitutes the correction of an "administrative error" to the May 2012 Conditional Subdivision Approval (cf. Sheer Pleasure Lingerie Inc. v. Town of Colonie Planning Bd., 251 AD2d 859, 861 [3d Dept 1998] ["facts clearly demonstrate[d]" respondent's attempt to rectify administrative/clerical error regarding approved hours of operation of a business]). At the very least, there are conflicting statements and/or representations made by PCF as well as Planning Board members and/or other town officials as to what was intended with respect to the viability of the 2009 Site Plan Approval upon the granting of the May 2012 Conditional Subdivision Approval. Moreover, it is not even clear if many of the quoted uses of such terms as "transfer", "conveyance", "approval" or the like were used in the legal and/or otherwise binding sense sought to be imposed by the Planning Board through the June 2012 Amended Conditional Subdivision Approval.

In light of this and especially upon consideration of the Planning Board's use of the term "conveyance of land" in not one, but two, significant Planning Board resolutions, one of which has not been "administratively" corrected, the Court does not find that there is sufficient support in this record to uphold the Planning Board's unilateral, un-noticed determination to insert the term "this approval" in place of "the conveyance of land".

The Court finds that there is insufficient support in the record to justify the Planning Board's sua sponte, un-noticed amendment to the May 2012 Conditional Subdivision Approval. The Court rejects the Planning Board's contention that the "corrected" language in the May 2012 Conditional Subdivision Approval was the result of an "administrative error" and "was included in [r]esolution #12-11 despite the clear intentions of the Planning Board to terminate the existing approvals upon granting the subdivision approval and not upon the transfer of the property."

However, the Court does agree that the record reflects that both the Planning Board and PCF made inconsistent representations regarding what their respective intentions were as to whether the conveyance of the land or the approval of the May 2012 Conditional Subdivision Application would render the 2009 Site Plan Approval null and void. Even when assuming that PCF intentionally used the term "[t]his approval", such can only be reasonably and fairly interpreted to have meant subdivision approval following the fulfillment of all conditions of the May 2012 Conditional Subdivision Approval.

Given the history of the Project and PCF's investment in it and in the Property, the Court would be hard pressed to accept, and the record does not support, the position that PCF intended to surrender its 2009 Site Plan Approval, which costs PCF upwards of

\$2,000,000, for Conditional Subdivision Approval that is needed for an anticipated sale of a portion of the Property. As expressed by PCF's principal Project engineer, Jeffrey Contelmo, P.E., this would be "contrary to basic business principles of real estate."

The contemplated sale to the Hospital was just that, a possibility that might never come to fruition. [PCF] never would have agreed that all the hard work, time and costs incurred to obtain the [2009 Site Plan Approval] would be nullified based solely on a possible transfer to the Hospital or a conditional subdivision approval. The [2009 Site Plan Approval] would only be extinguished when the transfer occurred, upon filing the plat.

(Contelmo Affidavit, 3-4).

At most, PCF's comments and/or representations could support a finding by the Planning Board that the 2009 Site Plan Approval would become null and void upon the fulfillment of all conditions of the May 2012 Conditional Subdivision Approval. "'Conditional approval of a final plat' means approval by a planning board of a final plat subject to conditions set forth by the planning board in a resolution conditionally approving such plat" (Town Law §276[4][e]). However, "[s]uch conditional approval does not qualify as a final plat for recording nor authorize issuance of any building permits prior to the signing of the plat by a duly authorized officer of the planning board and recording of the plat in the office of the county clerk . . ." (id.).

To obtain approval of a final plat, the applicant must submit same to the Chair of the Planning Board for signature "after a 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" (Carmel Town Code §131-3).

Here, there has yet to be Final Subdivision Approval within that meaning. There is no showing that all conditions set forth in the May 2012 Conditional Subdivision Approval have been satisfied and that a final subdivision map has been filed. Thus, to the extent that "approval" can be understood to mean "final subdivision approval," the 2009 Site Plan Approval has not been rendered null and void.

With respect to the Planning Board's de facto denial of PCF's 2012 Extension Application of the 2009 Site Plan Approval, the Town Code of Carmel provides, "[i]f there is no substantial change in the condition of the site and/or its environs and upon request of

the applicant, a site plan approval may be extended by the Planning Board for one additional period of 12 months" (§156-61[I]).

Here, the Planning Board effectively denied PCF's 2012 Extension Application of the 2009 Site Plan Approval upon its issuance of the June 2012 Amended Conditional Subdivision Approval because, by its terms, the June 2012 Amended Conditional Subdivision Approval rendered the 2009 Site Plan Approval null and void. In any event, the Court notes that the end date of the extension of the 2009 Site Plan Approval for which PCF applied has itself since passed, pending this special proceeding.

As such, upon annulling the June 2012 Amended Conditional Subdivision Approval (see infra), the Court will remit PCF's 2012 Extension Application of the 2009 Site Plan Approval to the Planning Board for consideration as more specifically set forth hereinbelow, as such application may be amended by PCF as it may deem appropriate give the passage of time.

Based upon the foregoing, the Court finds that the Planning Board's de facto denial of PCF's 2012 Extension Application of the 2009 Site Plan Approval and the issuance of the June 2012 Amended Conditional Subdivision Approval are arbitrary, capricious, contrary to law and are otherwise without support in the record.

Accordingly, it is hereby

ORDERED, that, the June 2012 Amended Conditional Subdivision Approval is annulled and vacated for the reasons hereinabove stated; and, it is further

ORDERED, that, the May 2012 Conditional Subdivision Approval is hereby reinstated; and, it is further

ORDERED, that, the 2009 Site Plan Approval is hereby deemed extended for a period of 45 days from the date hereof during which period PCF may apply to the Planning Board for an extension of the 2009 Site Plan Approval pursuant to the section 156-61(I) of the Carmel Town Code §156-61[I]), if so advised; and, it is further

ORDERED, that, to any further extent the petition be and is hereby denied.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York  
August 6 , 2014

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HON. LEWIS J. LUBELL, J.S.C.

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