

Court of Appeals to Answer Question on Plat Restrictions

BY CHARLOTTE A. BIBLOW

Long Island towns and villages, as well as local governments located throughout New York, should closely watch the progress of *O'Mara v. Town of Wappinger*,¹ a case in which the U.S. Court of Appeals for the Second Circuit recently certified a question to the New York State Court of Appeals: 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?

The trial court's decision in *O'Mara*² principally relied on a case arising out of Long Island, *Ioannou v. Southold Town Planning Board*,³ when it found the open space restriction at issue to be unenforceable.⁴ Whether the Court of Appeals relies on the analysis in that opinion remains to be seen. It is clear, however, that the upcoming decision of New York's highest court has the potential to affect the validity of the contents of subdivision plats on file in county clerk offices on Long Island and in every other county in the state.

The pertinent facts in *O'Mara* started in 1962, when two developers purchased property in the upstate Town of Wappinger intending to develop a condominium project to be known as Wildwood Manor. The town's planning board tentatively approved a preliminary layout for the project in December 1962, conditioning

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its approval, in part, on the creation of a "permanent open space on the plat."⁵

In January 1963, the town planning board approved a plat of the Wildwood Manor development that divided the property into seven parcels, including two parcels, Parcels B and E, that were designated the "buffer" area where the open space would be. The words "Open Space" were written on Parcels B and E on the plat. The minutes for the Jan. 23, 1963, planning board meeting at which the plat was approved indicated that the plat was accepted subject to eight conditions, the last of which was that "no building permits will be issued for Parcels B and E," which condition was indicated on the plat.

The planning board's minutes and the plat were filed with the town. The plat also was filed with the Dutchess County Clerk's Office but not recorded and therefore did not show up in the title search. The Wildwood Manor condominium was constructed, and Parcels B and E were left undeveloped.

In October 2000, a company owned by Donald and Patrick O'Mara acquired Parcels B and E for \$29,500 in an in rem tax sale with the intention of constructing 10 single

family houses on the parcels. The O'Maras began constructing a house on Parcel B, however, and the town building inspector issued a stop work order based on the 1963 open-space restriction.

The O'Maras brought suit, challenging the stop work order and claiming that the open-space restriction was unenforceable and that the town had violated their due process rights.

The federal District Court ruled that the open-space restriction was unenforceable because it had not been recorded with the Dutchess County Clerk's Office and the O'Maras were purchasers for value who had neither actual nor constructive notice of the restriction.

Relying on *Ioannou*, the lower court assumed that the enforceability of the open-space restriction against the O'Maras was governed by New York Real Property Law §291, the statute that addresses the recording of a "conveyance of real property."

In *Ioannou*, the Southold Town Planning Board denied a property owner's application for subdivision on the basis that the lots were subject to a restrictive covenant, imposed on the prior owner, that no further subdivision of the property be allowed. The property owner alleged that he was a bona fide purchaser of the property, having no actual or constructive notice of the covenant, because the condition was not set forth or noted on the subdivision map that was filed with the county clerk.

The Southold planning board countered that it had complied with the filing requirements that existed at the time the restriction was imposed. The court ruled in favor of the property owner, holding that the restrictive covenant prohibiting subdivision was not binding on the purchaser of the property when it was only filed in the planning board's office.

As an alternative basis for finding that the open-space restriction had to be recorded

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in the county clerk's office, the District Court in *O'Mara* posited that the town had acted pursuant to New York General Municipal Law §247 in imposing the open-space restriction.

General Municipal Law §247 authorizes towns to acquire by "purchase, gift, grant, bequest, devise, lease or otherwise" interests in real property for the purpose of preserving "open spaces," and makes clear that any interest acquired must be recorded to be enforceable against subsequent purchasers.

The town appealed the trial court's ruling.

Circuit Decision

In its opinion, the Second Circuit decided that the District Court's reliance on *Ioannou* and Real Property Law §291, governing conveyances, was inappropriate. It noted that the lower court had incorrectly assumed that a zoning regulation fell within the definition of "conveyance" under Real Property Law §291. That section defines "conveyance" as a "written instrument" that "create[s], transfer[s], mortgage[s], or assign[s]" an interest in real property.⁶

The Second Circuit noted that the District Court's opinion did not discuss why a duly promulgated zoning regulation should fall within that definition. *Ioannou*, as the Second Circuit noted, addressed the enforceability of restrictive covenants, not a restriction imposed by the planning board through its zoning powers.

The circuit also rejected the trial court's alternative basis for finding that the open space restriction had to be recorded: General Municipal Law §247. As the circuit noted, the District Court did not find, as part of its findings of fact, that the town had acted pursuant to General Municipal Law §247 in imposing the open-space restriction, and there was no evidence in the record to support such a finding.⁷

Absent a factual finding that the town had acted pursuant to that statute, the circuit ruled that it would not presume that it had done so, particularly in the face of "clear evidence" that the plat had been approved by the town planning board pursuant to New York Town Law §276.

Town Law §276

Under Town Law §276, the final approved subdivision plat must be filed by the owner of the subdivision "in the office of the county clerk or register." This requirement is echoed in §334 of New York Real Property Law, which states that it "shall be the duty of every person or corporation who...subdivides real property...for the purpose of offering such lots, plots, blocks or sites for sale to the public, to cause a map thereof...to be filed in the office of the county clerk."

The Second Circuit stated that although it was clear that the process of approving and filing the plat in 1963 had complied with both of the relevant statutory sections, neither section addresses whether a subdivision plat is enforceable against subsequent purchasers.

The circuit stated that this silence was particularly notable when contrasted with New York law in other land use contexts that requires restrictions to be recorded in order to be enforceable against subsequent purchasers.⁸

Because the circuit found no cases or New York statutes that clearly answered this question, it concluded that this was an area in which there was no authoritative New York law. Thus, it decided to certify the question to the Court of Appeals, which certification was accepted in May 2007.

Conclusion

Given the widespread use of the subdivision process as a regulatory tool, the upcoming decision in this case by the Court of Appeals will have significant practical consequences for how New York's cities, towns, and villages manage growth.

Indeed, the Association of Towns of the State of New York argued, in an amicus brief it filed with the Second Circuit in *O'Mara*, that the District Court's decision in this case "calls into question the validity of the contents of subdivision plats on file in county clerk offices throughout the state."

Should the Court of Appeals find that the restrictions in the plat are not enforceable on subsequent purchasers because they have not been filed in accordance with other

provisions of state law, local governments will have to decide—at conceivably great cost—which provisions in plats are enforceable and may face suits under 42 U.S.C. §1983 for actions they take to enforce restrictions. The implications of the ruling expected from the Court of Appeals clearly are quite significant.



1. 485 F.3d 693 (2d Cir. 2007).

2. 400 F.Supp.2d 634 (S.D.N.Y. 2005).

3. 304 A.D.2d 578, 758 N.Y.S.2d 358 (2d Dep't 2003).

4. *O'Mara* also included a challenge of the town's decision pursuant to 42 U.S.C. §1983, which was the basis for federal jurisdiction.

5. A plat is a "map describing a piece of land and its features, such as boundaries, lots, roads, and easements." Black's Law Dictionary 1188-89 (Bryan Garner ed., 8th ed. 2004).

6. Real Prop. Law §290(3).

7. It also should be noted that the filing requirement in §247 was added to the statute in 1977—more than a decade after the Wappinger planning board had imposed the open space restriction on Parcels B and E.

8. See, e.g., Gen. Mun. Law §247(4); Real Prop. Law §291; Envtl. Conserv. Law §49-0305(4).