Enforceability of Subdivision Restrictions Against Subsequent Purchasers: New York Courts Issue Key Rulings

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One of the principal land use tools relied on by local governments across the country is the subdivision or site plan approval process. This process is particularly subject to the nuances of local rules and local control, but the general outlines are well understood. In New York State, for example, towns and villages typically have the authority to approve proposals for the use of real property located within their geographical boundaries. When they do so, they generally include restrictions on development, such as any open space requirements that the officials may impose, directly on approved "plat" maps. These maps then are filed with the county clerk or other appropriate local government agency. It also is typically the case that the development restrictions imposed in this manner are not necessarily reflected in other documents—including any deed for the affected property—and thus may not be easily discovered in a search of the title.

A recent dispute involving property located in New York's Dutchess County placed at risk the widespread use by New York State's local governments of the subdivision process as a regulatory tool to manage growth. Threatening to upset years of settled practices—and, conceivably, decades of local governments' land use decisions—regarding plat approvals, the particular question was whether an open space restriction imposed by a subdivision plat under a section of New York law was enforceable against a subsequent purchaser, and under what circumstances. A series of court decisions over a number of years, including an opinion issued in November 2007 by the New York State Court of Appeals on a certified question from the Second Circuit Court of Appeals and the subsequent decision by a federal district court issued in January 2009, likely settled the dispute once and for all. These series of cases resolved the issue in favor of local government control and permit the established practice of enforcing restrictions that are directly noted on plats, but not otherwise recorded, to continue. The rulings make it important for developers, lenders and purchasers of property to pay particular attention to the plat approval process because ignoring restrictions found only on historic plat maps can have dire consequences

BACKGROUND

The case arose in 1962, when two developers, David Alexander and Fred Lafko, purchased property in the New York Town of Wappinger, in Dutchess County, with plans to develop a condominium project to be known as Wildwood Manor. The local 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 planning board approved the final plat (the 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 Space" were written on Parcels B and E of the plat. The planning 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 planning board minutes were filed with the town. The 1963 Plat also was filed with the county clerk's office. Wildwood Manor ultimately was constructed and occupied.

Parcels B and E remained undeveloped for nearly 40 years. Then, on October 18, 2000, Absolute Property Management (Absolute), a corporation owned by brothers Donald and Patrick O'Mara, acquired Parcels B and E. Absolute purchased the parcels for $29,500 at an in rem tax sale with the intent to construct 10 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 the property, retained a licensed land surveyor, who prepared a survey of Parcels B and E. The surveyor based the survey, in part, on an examination of the 1963 Plat. The surveyor 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's building department. The first house to be built was to serve as a residence for Donald O'Mara and his family. The town issued a building permit and approved both an interim survey and a site plan. Although subject to several stop work orders, the house was almost complete at the time this matter reached the litigation stage. Mr. O'Mara estimated he spent $300,000 to $350,000 to construct the home.

In July 2003, Ronald Lafko, the son of Fred Lafko (who was one of the original developers of the land), approached a town councilman to express his concern that the development of Parcels B and E 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 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 had 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 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 New York Real Property Law § 291 to be enforceable against them. In further support of that argument, the plaintiffs urged that the town had acquired an interest in the property pursuant to General Municipal Law § 247 and that 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 district court held that the open space restriction was unenforceable against the O'Maras, whom it found were bona fide purchasers for value without notice. The court, citing New York Real Property Law § 291, determined that the restriction was not properly recorded within Dutchess County. Further, the court, relying on *Matter of Ioannou v. Southold Town Planning Bd.*,[3] held that the failure to record any restriction on the use of property precluded enforcement of the restriction.[4]

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 circuit 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 subsequent

purchasers." In light of the foregoing, and given the absence of controlling precedent from New York's highest court, the New York Court of Appeals, the Second Circuit certified the following question to the New York 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 New York Court of Appeals issued its decision in this case, *O'Mara v. Town of Wappinger*, in November 2007.[5]

NEW YORK COURT OF APPEALS RULING

The New York Court of Appeals answered the certified question in the affirmative, holding that an open space restriction placed on a final plat pursuant to Town Law § 276, when filed in the county clerk's office pursuant to Real Property Law § 334, is enforceable against a subsequent purchaser.

The Court of Appeals explained that 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 county clerk's office or the 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. Thus, the Court of Appeals explained, the statutory scheme 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 county clerk's office within 90 days of its approval.

Accordingly, the Court of Appeals continued, 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.

The plaintiffs in *O'Mara* argued that the planning board could not enforce the open space restriction on their property unless the restriction was recorded under Real Property Law § 291, which requires that conveyances of real property be recorded. In furtherance of this argument, the plaintiffs posited that the town, in reserving to itself the right to prevent anyone from building anything on these parcels, had "acquired" an open space interest pursuant to General Municipal Law § 247(2) and that this acquisition amounted to a "conveyance" of real property. The plaintiffs submitted 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. The New York Court of Appeals disagreed and found "no evidence" that the town acquired Parcels B and E by "purchase, gift, grant, bequest, devise, lease or otherwise" as provided in General Municipal Law § 247 (2). Further, the Court of Appeals declared that there was no evidence that there was a "conveyance" within the meaning of Real Property Law § 290 (3). Accordingly, it held, Real Property Law § 291 was inapposite to the *O'Mara* case. Moreover, it found that there was no statutory requirement to record a plat in the chain of title.

The Court of Appeals observed that the system of filing subdivision plats existed throughout New York State. In the *O'Mara* case, it added, a search of the 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, the Court of Appeals declared, Absolute should have searched the county clerk's property records until it found the subdivision plat that had created its parcel. Had Absolute examined the plat, "it would have discovered the open space restriction," the Court of Appeals added.

The Court of Appeals concluded its decision by noting that under New York State law, towns are separately bestowed with the authority to regulate land use within their borders.[6] This grant of authority was broad and encompassed a town's ability to impose reasonable conditions in the course of approving a subdivision.[7] The Court of Appeals concluded that the ability to impose such conditions on the use of land through the zoning process was "meaningless without the ability to enforce those conditions, even against a subsequent purchaser."

FEDERAL RULINGS

Following the decision by the New York Court of Appeals, the case returned to the Second Circuit. In a brief

opinion,[8] the Second Circuit noted that the New York Court of Appeals had decided that "[a]n 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." Accordingly, the circuit court reversed the district court's judgment concerning the enforceability of the open space restriction and remanded the case to the district court.

Last May, the district court directed the court clerk to enter judgment dismissing the complaint. That judgment was entered on November 12, 2008. Thereafter, the town moved for summary judgment on its claims to have the house removed from the land that was subject to the restriction.

In January 2009, the district court issued its decision on that motion.[9] It stated that there could be "no question," following the decision of the New York Court of Appeals as applied by the Second Circuit, that the town was entitled to the entry of judgment on its counterclaims to the extent of directing that the house be removed from Parcel E. It noted that the Second Circuit had declared that the open space restriction was enforceable against all subsequent purchasers of Parcel E, including the O'Maras. Therefore, the district court stated, it could do nothing except enforce it.

The district court found that the arguments raised by the plaintiffs to forestall "the inevitable" did not have "the slightest merit." For example, the plaintiffs' argument that the town could not "change its mind and decide to enforce the open space restriction after it allowed the house to be built" was "simply silly." The district court pointed out that the New York Court of Appeals had the full record in this case before it and the district court's findings of fact after trial and had declared that the open space restriction was "enforceable against plaintiffs." The district court acknowledged that it was "not at liberty to ignore the Second Circuit's mandate" and that it had to "enforce the open space restrictions against plaintiffs." It therefore granted the town's motion for summary judgment in its favor.

Interestingly, the district court also stated that it was "not worth the trouble" to address the plaintiffs' claim that they should be awarded compensation for the loss of their house, adding that it had dismissed the plaintiffs' "takings" claim years ago; because the plaintiffs had not appealed that decision when the final judgment had first been entered in this action, they had no right to appeal it now.

In any event, the district court ruled, there had been no "taking" of the house by the town. Rather, the town was enforcing an existing restriction on the use of Parcel E. It added that New York Town Law § 268(2) expressly permitted the town to "correct or abate" the plaintiffs' violation of the open space restriction.

Additionally, the district court rejected the plaintiffs' contention that any issue of "unclean hands" prevented it from entering an injunction directing that the plaintiffs remove the house from Parcel E—or permitting the town to do so if the plaintiffs did not.[10] As the district court noted, the plaintiffs had a house on the lot in violation of the open space restriction, and there were no equities to balance in this case because traditional equitable defenses were not available against a municipality seeking an injunction to enforcing a zoning violation. The district court ruled that the relief the town sought—an injunction restoring the open space—was "wholly appropriate." The district court gave plaintiffs 30 days to remove the structures on Parcel E.

The district court concluded by noting that it quite understood the plaintiffs' frustration with the situation in which they found themselves, stating that they "did nothing wrong" (noting that plaintiffs' title insurer certainly had done something wrong) and adding that 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, the district court said, the lawsuit had "gone on long enough" and the plaintiffs had to accept that they had lost. The district court ended by stating that it would view further proceedings before it in an attempt "to delay the inevitable" as "frivolous" and would subject the plaintiffs—and any attorney who represented them—to the "very real possibility of sanctions."

In a footnote, the court further remarked that plaintiffs could have settled the action years ago, which would have allowed them to keep their house if they agreed to no further development on both parcels. However, they chose to doggedly pursue the lawsuit, with the attendant risk that they could lose.

CONCLUSION

The practical significance of the decision by the New York State Court of Appeals, and the subsequent rulings by the Second Circuit and by the district court, cannot be overstated. If the courts had ruled that plat restrictions were enforceable on subsequent purchasers only if they had been filed in accordance with other provisions of state law, (*i.e.*, in the county clerk's chain-of-title registries), local governments would have had to determine, undoubtedly at

great expense, which plat provisions were enforceable and which were not, and might have faced numerous Section 1983 claims for damages. The courts' decisions, upholding restrictions noted on final plat maps against subsequent purchasers, keeps in place a system that has served New York well for many decades and which is an essential tool for the effective management of growth within a community. Following these rulings, developers, purchasers and lenders should make certain to look at the historical plat maps to ensure that intended uses of property are not prohibited.

NOTES

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 1188-89 [8th ed 2004]). Under New York Town Law § 276(4)(b), a "preliminary plat" is defined as:

   > 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 New York Town Law § 276(4)(d), a "final plat" is defined as:
   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.
3. 304 A.D.2d 578 (2nd Dep't 2003).
4. In its decision, *O'Mara v. Town of Wappinger*, 485 F.3d 693 (2nd Cir. 2007), the Second Circuit held that *Ioannou* was inapposite because it addressed the enforceability of restrictive covenants that were filed in the town planning board office but were not recorded in the county clerk's grantor-grantee index, and not zoning restrictions imposed by the planning board through its zoning powers.
5. 9 N.Y.3d 303 (2007).
6. *See* Town Law § 261.
7. *See* Town Law § 276; *see also Matter of Koncelik v. Planning Bd. of Town of E. Hampton*, 188 A.D.2d 469 (2d Dept 1992).
8. *O'Mara v. Town of Wappinger*, 518 F.3d 151 (2nd Cir. 2008).
9. *O'Mara v. Town of Wappinger*, __F.Supp.2d__, 2009 U.S. Dist. LEXIS 3775 (S.D.N.Y. Jan. 6, 2009).
10. By the time the matter was ultimately decided in January 2008, plaintiffs no longer owned Parcel B. Rather, the plaintiffs stopped paying taxes on that parcel, which was subsequently obtained by the county in a foreclosure and then conveyed to the town. 2009 U.S. Dist. LEXIS 3775, at *4.