SUPREME COURT: STATE OF NEW YORK
COUNTY OF ORANGE

---X

In the Matter of the Application of

PETER CALTAGIRONE, PATRICIA INNIS,
JAMES & JENNIFER MOORE,

Petitioners,

MEMORANDUM OF LAW

-against-

Index No. 2006-2196

ZONING BOARD OF APPEALS, TOWN OF NEWBURGH, NY
GRACE CARDONE: CHAIRPERSON, Z.B.A. BOARD,

Respondents

Assigned Judge.

Hon. Lewis J. Lubell

---X

STATEMENT OF FACTS

Petitioners, Peter Caltagirone, Patricia Innis, and James and Jennifer Moore, are property owners in the Town of Newburgh. They own property located on Lakeside Road which is in the R-3 Zoning district. Neighbors Peter Caltagirone and Patricia Innis live adjacent to the subject parcel owned by Gilbert and Jeanne Halstead. Petitioners presume to be aggrieved by the Halstead application for area variances before the Town of Newburgh Zoning Board of Appeals. The Halsteads propose to demolish their existing house and their prospective purchaser, Mr. Mark Coppola, proposes to construct a new single family home which will exceed rear yard, side yard and lot width requirements in an R-3 zone. A Public Hearing before the ZBA was held on the variance on November 22, 2005. Following discussion of the application by the ZBA members during the November 22, 2005 meeting, the ZBA members voted unanimously to grant Gilbert and Jeanne Halstead an area variance to demolish their existing home and to allow their prospective purchaser, Mr. Mark Coppola the opportunity to build a new single family home which would exceed rear yard, side yard, and lot width requirements in an R-3 zone. Petitioners now bring this Article 78 proceeding seeking to challenge the determination made by the Town of Newburgh Zoning Board of Appeals.

ARGUMENT

POINT I

PETITIONERS HAVE FAILED TO JOIN ALL NECESSARY PARTIES AND THE PETITION MUST BE DISMISSED AS A MATTER OF LAW

Petitioners have failed to join all necessary parties to this proceeding prior to the expiration of the applicable statute of limitations, and as such the proceeding must be dismissed.

In the instant matter, petitioners allege that the respondent Town of Newburgh Zoning Board of Appeals improperly granted an area variance to the owners of the subject premises, Gilbert and Jeanne Halstead. However, it is undisputed that the owners of the property are necessary parties to this proceeding and the petitioners failed to join Gilbert and Jeanne Halstead as respondents. Furthermore, the prospective purchaser of the Halstead premises, Mr. Mark Coppola, is also a necessary party to this proceeding in that the article 78 proceeding would prevent him from purchasing the property and proceeding with plans to build a new home on the Halstead property. "A party whose interest may be adversely affected by a potential judgment must be made a party in a CPLR article 78 proceeding" (Cybul v. Village of Scarsdale, 17AD3d 462 (2nd Dept. 2005) citing CPLR 1001[a]; Matter of Martin v. Ronan, 47 NY2d 486; Matter of Lodge v. D'Aliso, 2 AD3d 525 (3rd Dept. 2003); Mannpella v. Troy City Zoning Board of Appeals, 27AD2d 761, and Suna v. Tura Associates, 204 Ad2d 122).

Further, the petitioners have "failed to .... explain why they did not include [Gilbert and Jeanne Halstead and Mark Coppola] as respondents ..." (Matter of C.A. Karmel v. White Plains Common Council, 284 AD2d 464 (2nd Dept., 2001) citing Mondello v. New York Blood Ctr, 80 NY2d 219 and Matter of Artrip v. Village of Piermont, 267 AD2d 467.) In addition, in considering the factors set forth in CPLR Section 1001(b), allowing the instant proceeding to continue in the absence of nonparties Gilbert and Jeanne Halstead and Mark Coppola would not be appropriate. "Accordingly, since [Gilbert and Jeanne Halstead and Mark Coppola] were necessary parties, and did not voluntarily appear or participate in the proceeding and since the applicable Statute of Limitation has expired," the petition must be dismissed. (Matter of C.A. Karmel v. White Plains Common Council, 284 AD2d 464 (2nd Dept., 2001) citing Matter of

Saunders v. Graboski, 282 AD2d 610; see also Matter of Artrip v. Village of Piermont, 267 AD2d 457 (2nd Dept., 1999); Matter of Ferruggia v. Zoning Board of Appeals of the Town of Warwick, 5 AD3d 682, (2nd Dept., 2004)).

POINT II

PETITION SHOULD BE DISMISSED FOR PETITIONERS' FAILURE TO TIMELY JOIN THE LANDOWNERS AS NECESSARY PARTIES WITHIN THE APPLICABLE STATUTE OF LIMITATIONS

Pursuant to Town Law section 267-c, an article 78 proceeding shall be instituted within thirty days after the filing of a decision of the board in the office of the town clerk. While the article 78 proceeding was brought within 30 days from when the Decision and Resolution of the Z.B.A. was filed in the office of the Town Clerk on February 27, 2006, petitioners failed to join the necessary parties within the applicable statute of limitations.

POINT III

PETITIONERS HAVE NOT ESTABLISHED THAT THE ACTIONS OF Z.B.A. WERE ARBITRARY, CAPRICIOUS, IRRATIONAL OR THAT THE ZBA ACTED CONTRARY TO LAW OR IN EXCESS OF THEIR AUTHORITY

It is well established that, "local zoning boards possess discretionary authority to consider applications for variances and the judicial function is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion." (Matter of Sorrenti v. Siegel, 138 AD2d 382 (2nd Dept., 1988) citing Matter of Fuhst v. Foley, 45 NY2d 441, 444; Matter of Cowan v. Kern, 41 NY2d 591, 599, rearg. den. 42 NY2d 910; Human Dev. Servs. v. Zoning Board of Appeals, 110 AD2d 135, aff'd, 67 NY2d 702.) In determining whether to grant an area variance such as the one sought, a zoning board must "engage in a balancing test, weighing the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted." (Matter of Richter v. Curran, 5 AD3d 687 (2nd Dept., 2004) quoting Matter of Ifrah v. Utshcig, 98 NY2d 304, 307; and citing Matter

of Sasso v. Osgood, 86 NY2d 374, 384).) Additionally, a zoning board must consider the following five factors in its decision of whether to grant an area variance: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created. Town Law Section 267(b). The aforementioned factors are only to be relevant considerations in the zoning board of appeals' decision and not bright line tests. See Town Law Section 267(b).

The Board held a public hearing in which Mr. Peter Caltagirone, a neighboring resident voiced various concerns. In its decision, the record of the proceeding clearly demonstrates the Board's proper consideration of the five factors set forth in Town Law Section 267(b). The members of the Board, all of whom visited the site of the proposed residence, determined that (1) the proposed placement of the new home further from the lake would increase the neighbors' line of sight to the lake and is consistent with the setbacks of the surrounding neighborhood; (2) to build any kind of house on the lot that would be livable year around, the variances requested would be essential; (3) the variances requested were substantial but not determinative in denying a variance; (4) the construction of a new home set further back from the lake enhances the neighbors' views of the lake and is consistent with the general property upgrading that has been taking place in the neighborhood; and (5) the difficulty was self-created but a significant emphasis was not given to this consideration.

A review of the evidence submitted to the Court should reveal that the Board's determination does not fall within the aforestated definition of "arbitrary and capricious." Rather, this Board made a determination upon a rational basis. Accordingly, the Board's determination must be affirmed and the petition dismissed.

POINT IV

PETITIONERS PATRICIA INNIS AND JAMES MOORE AND JENNIFER MOORE ARE NOT PROPER PETITIONERS AS THE PETITION WAS NOT VERIFIED BY

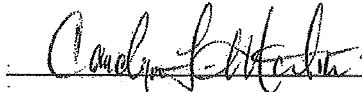
THEM AND PETITIONER PETER CALTAGIRONE IS NOT AN ATTORNEY AUTHORIZED TO VERIFY PETITION ON BEHALF OF OTHERS

CONCLUSION

For the foregoing reasons, the Court should deny the request for relief by petitioners and dismiss the petition in its entirety.

Dated: April 10, 2006
Newburgh, New York

Respectfully Submitted,



By: Carolyn L. Martini, Esq.
Attorney for Respondent
Town of Newburgh Zoning Board of Appeals
26 Route 17K
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(845) 569-0787

TO:

Peter Caltagirone
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Patricia Innis
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Newburgh, New York 12550

James & Jennifer Moore
321 Lakeside Road
Newburgh, New York 12550

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

PETER CALTAGIRONE, PATRICIA INNIS,
JAMES AND JENNIFER MOORE

Petitioners

against

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GRACE CARDONE, CHAIRPERSON Z.B.A. BOARD,

Assigned Judge:
Hon. Lewis J. Lubell

Respondents

MEMORANDUM OF LAW

TO:

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James & Jennifer Moore
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Newburgh, New York 12550

CAROLYN L. MARTINI, ESQ.
Attorney for Respondent
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Newburgh, New York 12550

SUPREME COURT: STATE OF NEW YORK
COUNTY OF ORANGE
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In the Matter of the Application of

PETER CALTAGIRONE, PATRICIA INNIS, JAMES & JENNIFER MOORE,

Petitioners,

VERIFIED ANSWER AND OBJECTIONS IN POINT OF LAW

-against-

Index No. 2006-2196

ZONING BOARD OF APPEALS, TOWN OF NEWBURGH, NY GRACE CARDONE: CHAIRPERSON, Z.B.A. BOARD,

Respondents
---X

The respondent, Zoning Board of Appeals of the Town of Newburgh (the "Town") for its answer to the petition herein respectively states as follows:

1. Admits the addresses of petitioner Peter Caltagirone as set forth in paragraph 1 and the addresses of respondent Zoning Board of Appeals and Chairperson Grace Cardone as set forth in paragraph 2 but denies that Patricia Innis and James and Jennifer Moore are appropriate petitioners to this action in that the petition was not verified by them and petitioner Peter Caltagirone is not an attorney authorized to verify petition on behalf of others.

2. Admit the allegations contained in paragraph 3 that an area variance was granted to Gilbert and Jeanne Halstead on November 22, 2005, that the amended minutes were approved on January 18, 2006 and that the Decision and Resolution (B.I. #1684-05) was filed on February 27, 2006. Respondent denies knowledge or information sufficient to form a belief as to petitioners claim that "Mr. Coppola presented flawed information" at the meeting while representing the applicant and denies the remainder of the allegations contained in paragraph 3 of the petition.

3. Respondent admits the Petitioners' citation of the requirements of the Town of Newburgh's Table of Use and Bulk Requirements in an R3 District in paragraphs 4A and 4B of the petition

but denies knowledge or information sufficient to form a belief as to the remainder of the allegations set forth in paragraphs 4A and 4B of the petition.

4. Respondent admits that Petitioner Mr. Caltagirone submitted a letter dated December 22, 2005 to Chairperson Grace Cardone before the next Z.B.A. meeting on December 22, 2005. Despite the fact that the public hearing was closed on November 22, 2006, respondent accepted Mr. Caltagirone's letter and survey in order to provide him an opportunity to submit documentation refuting applicant's survey. Respondent denies knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations set forth in paragraphs 5a, 5b, 6, 7 and 8 of the petition.

5. Respondent admits that Mr. Caltagirone submitted a letter dated December 22, 2005 to Chairperson Grace Cardone at the December 22, 2005 expressing his concern that the comments made by Mr. Coppola as listed in Petitioners' Exhibit N, page 21, lines 23-25 and page 22, lines 1-5, were inappropriate but denies every other allegation contained in paragraph 9 of the petition.

6. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraphs 10, 11, and 12 of the petition.

7. Respondent admits that the proposed new house will be 27 feet wide on 37 feet of property but denies knowledge or information sufficient to form a belief as to the truth or falsity of the measurements listed in paragraph 13 of the petition. Respondent denies petitioners' allegations in paragraph 13 that "the new house is uncharacteristically larger than any other house in the neighborhood and will overburden the land."

8. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 14 of the petition.

9. Admits the allegations set forth in paragraph 15a of the petition.

10. Respondent denies petitioners' allegations that "the design and size of the proposed house is totally uncharacteristic of the neighborhood" and denies knowledge or information sufficient

to form a belief as to the truth or falsity of the remaining allegations in paragraph 15b of the petition.

11. Admits the criteria cited by petitioners in paragraph 16 but denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 16b of the petition.

12. Denies petitioners' allegations that the area variance is "overly substantial and will overburden [petitioners'] properties" and denies petitioners' allegations in paragraph 18b of the petition.

13. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 19b of the petition.

14. Respondent denies the allegations set forth in paragraph 20b of the petition.

15. Admits that the criteria cited by petitioners in paragraph 21a is considered by the respondent when deciding the granting of variances.

16. Denies the allegations set forth in paragraph 21b of the petition.

17. Respondent admits the minutes of the proceeding were taken and that John McKelvey stated "It's nonconforming" but denies the conclusion attributed to such statement by Petitioners and further denies that petitioner Peter Caltagirone's objection at the meeting "should have been enough to stop [the] variance."

18. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraphs 23 and 24 of the petition.

19. Admits Mr. Coppola's statement during the November 22, 2005 hearing that he wanted to make the proposed new house "a year around house" but denies knowledge or information sufficient to form a belief as to the truth or falsity of every other allegation set forth in paragraph 25 of the petition.

20. Denies knowledge or information sufficient to form a belief as to the allegations set forth in paragraphs 26, and 30 of the petition.

21. Admits the Decision and Resolution filed on February 26, 2006 but denies that the "facts in Resolution are wrong and deceptive." Respondent denies knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 27 of the petition.

22. Denies the allegations set forth in paragraphs 29 and 31 of the petition.

AS AND FOR A FIRST OBJECTION IN POINT OF LAW

23. Petitioners have failed to join all necessary parties and the petition must be dismissed as a matter of law.

AS AND FOR A SECOND OBJECTION IN POINT OF LAW

24. Petition should be dismissed for petitioners' failure to timely join the landowners and contract vendee as necessary parties within the applicable statute of limitations.

AS AND FOR A THIRD OBJECTION IN POINT OF LAW

25. Petitioners have not established that the actions of the Z.B.A. were artibrary, capricious, or irrational, or that the ZBA acted contrary to law or in excess of their authority.

AS AND FOR A FOURTH OBJECTION IN POINT OF LAW

26. Petitioners Patricia Innis and James Moore and Jennifer Moore are not proper petitioners as the petition was not verified by them and Petitioner Peter Caltagirone is not an attorney authorized to verify petition on behalf of others.

AS AND FOR A FIFTH OBJECTION IN POINT OF LAW

27. Petitioners' Verified Petition should be dismissed for lack of jurisdiction.

WHEREFORE, respondent, Zoning Board of Appeals of the Town of Newburgh, prays that this Court grant a Judgment dismissing this proceeding and denying the relief requested in its entirety, and for such other and further relief as the Court deems just and proper including costs, disbursements and attorney's fees.

Dated: April 10, 2006
Newburgh, New York

Respectfully submitted,
CAROLYN L. MARTINI, ESQ.

Carolyn L. Martini, Esq.
Attorney for Respondent
Town of Newburgh Zoning Board of Appeals
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Newburgh, New York 12550
(845) 569-0787

TO:

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Patricia Innis
315 Lakeside Road
Newburgh, New York 12550

James & Jennifer Moore
321 Lakeside Road
Newburgh, New York 12550

VERIFICATION

STATE OF NEW YORK)
)S.S.:
COUNTY OF ORANGE)

GRACE CARDONE, being duly sworn, says:

I am the Chairperson for respondent Zoning Board of Appeals of the Town of Newburgh in the action herein; I have read the Verified Answer, know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged upon information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following: Books, records, and conversations with my attorney.

GRACE CARDONE

Sworn to before me on
this 10th day of April, 2006

Notary Public

CAROLYN L. MARTINI
NOTARY PUBLIC, State of New York
Qualified in Orange County
Reg. No. 02MA5043941
Commission Expires May 15, ~~19~~ 2007

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

PETER CALTAGIRONE, PATRICIA INNIS,
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CAROLYN L. MARTINI, ESQ.
Attorney for Respondent
26 Route 17K
Newburgh, New York 12550

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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In the Matter of the Application of PETER CALTAGIRONE, PATRICIA INNIS, JAMES & JENNIFER MOORE,

Petitioners,

-against-

ZONING BOARD OF APPEALS, TOWN OF NEWBURGH, NY, GRACE CARDONE: CHAIRPERSON, Z.B.A. BOARD,

Respondents.

---x

To commence the 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.

Index No.2196/06
Motion Date: April 28, 2006

The following papers numbered 1 to 6 were read on this petition for a CPLR Article 78 proceeding seeking to overturn a decision of the Zoning Board of Appeals of the Town of Newburgh, NY:

Notice of Petition-Petition-Exhibits 1-3

Answer-Objections in Point of Law 4

Memorandum of Law in Opposition 5

Reply 6

Upon the foregoing papers it is ORDERED that the petition is disposed of as follows:

Petitioners, abutting property owners of the subject property, commenced an Article 78 proceeding seeking to overturn a decision of the Zoning Board of Appeals of the Town of

Newburgh, NY dated January 18, 2006 and filed on February 27, 2006 which granted a variance to Gilbert and Jeanne Halstead, the owners of the property in dispute, and indirectly to Mark Coppola, the prospective purchaser of the Halstead property. Petitioners urge this Court to declare that the Zoning Board's decision was arbitrary, capricious and irrational and exceeded its authority.

Respondents submit that the action must be dismissed on a number of bases, not the least of which that the Halsteads and Mr. Coppola were never named as parties to this action, that the applicable statute of limitations has passed to name them as parties, and that such a failure necessitates dismissal of the petitioners' action. Petitioners respond by urging the Court to permit an amendment of the petition to include these unnamed individuals as defendants even after the expiration of the statute of limitations.

The threshold question which must be determined is whether the Halsteads and Mr. Coppola were necessary parties to this action and whether the petitioners' failure to name them requires that the action be dismissed pursuant to CPLR § 3211(a)(10). CPLR 1001(a) defines necessary parties as "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants."

The variance granted to the Halsteads by the Zoning Board of Appeals permits the demolition of the existing home on the subject premises and the building of a non-conforming home on that site. The property owners of the subject real property to whom the challenged variance was issued, i.e. the Halsteads, will most certainly be adversely affected if the relief requested in the petition is granted and therefore are necessary parties. *See, Manupella v Troy*

City Zoning Board of Appeals, 272 AD2d 761, 763 (3rd Dept. 2000); *O'Connell v Zoning Board of Appeals of Town of New Scotland*, 267 AD2d 742, 743 (3rd Dept. 1999).

Town Law §267-c establishes a statute of limitations for all Article 78 proceedings stemming from a decision of a zoning board of appeals, with the action having to be filed against all parties within 30 days after the decision of the board is filed in the office of the town clerk. It is undisputed in this case that the respondents' decision was filed on February 27, 2006, giving petitioners until March 29, 2006 to file their special proceeding against all necessary parties. It is further undisputed that the Halsteads were not named in the special proceeding and that the time within which to do so expired on March 29, 2006.

Petitioner Caltagirone appeared before respondents in a public hearing in opposition to the granting of the variance and were undeniably aware that the Halsteads were owners of the subject property and applied for the variance. As such, there was no question as to their identity. In fact, petitioner Caltagirone specifically stated in his reply that he contacted the Halsteads prior to instituting this action and he purposely did not name them at their request. The Halsteads did not voluntarily appear in this action, and joining them under these circumstances after the expiration of the statute of limitations is not generally favored. *See, Manupella*, 272 AD2d at 764; *O'Connell*, 267 AD2d at 743-744.

Having already determined that the Halsteads are necessary parties to this action, and that the applicable statute of limitations has expired without the Halsteads being named, the next issue is whether the respondents are united in interest with the Halsteads such that an action against the Halsteads would relate back to the filing date of the petition pursuant to CPLR §203[c].

> The Appellate Division, in *Brock v. Bua,* 83 A.D.2d 61, 443 N.Y.S.2d 407, *supra,* gave the rule a three-prong specificity, patterned largely after the Federal "relation back" test codified in rule 15[c] of the Federal Rules of Civil Procedure (*see generally,* 1 Weinstein-Korn-Miller, N.Y.Civ.Prac. ¶ 203.05, at 2-92, 2-93; *compare also, Duffy v. Horton Mem. Hosp.,* 66 N.Y.2d 473, 476-477, 497 N.Y.S.2d 890, 488 N.E.2d 820). The *Brock* test examines whether (1) both claims arose out of the same conduct, transaction or occurrence; (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement; and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff in originally failing to identify all the proper parties, the action would have been brought against the additional party united in interest as well (*Brock v. Bua, supra,* 83 A.D.2d at 69, 443 N.Y.S.2d 407). All three features must be met for the statutory relation back remedy to be operative.

Mondello v New York Blood Center-Greater New York Blood Program, 80 NY2d 219, 226 (1992).

Clearly, the claims against both the ZBA and the Halsteads arose out of the same transaction. While the respondents and the Halsteads both have the same purpose in maintaining the status of the granted variance, that reason alone does not create a unity of interest between the respondents and the Halsteads. *See, Red Hook/Gowanus Chamber of Commerce v New York City Board of Standards and Appeals,* 5 NY 3d 452, 457 (2005). In this case, while the respondents have an interest in seeing their decision upheld, that interest is purely an administrative one. The Halsteads have a financial interest in the decision completely irrelevant to the respondents' interest. In order for the Halsteads to sell the property to Mr. Coppola, a variance to build a non-compliant structure on the premises was a required. Given the fact that the property was already non-compliant but grandfathered, any new construction on the subject premises required a variance. These divergent interests between the Halsteads and the respondents cannot be

guaranteed to protect the Halsteads from future prejudice in this case. *See, Red Hook*, 5 NY3d at 457. Thus, at least one of the three prongs of the *Brock* test cannot be satisfied and therefore the relation back doctrine is unavailable to petitioners.

The next question for determination is whether the failure to join the Halsteads as necessary parties may be excused. CPLR 1001(b) states as follows:

> When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider:
>
> 1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
>
> 2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
>
> 3. whether and by whom prejudice might have been avoided or may in the future be avoided;
>
> 4. the feasibility of a protective provision by order of the court or in the judgment; and
>
> 5. whether an effective judgment may be rendered in the absence of the person who is not joined.

In the first place, the Court may not compel the joinder of the Halsteads to this action due to the lapsed statute of limitations since the Court does not have jurisdiction over them. As expressed in *Graziano v Walsh*, 189 Misc2d 680 (N.Y.Sup.,2001):

> In the final analysis, whether viewed through the prism of a lack of personal jurisdiction, failure to join a necessary party (see CPLR 1001) or failure to comply with the 14 day Statute of Limitations (see CPLR 201, "No court shall extend the time limited by law for the commencement of an action."), this Court's hands are tied. A court may not simply reach the "right" result, heedless of such

> crucial procedural safeguards as timeliness, service and notice. Our society can sooner tolerate one more (supposedly undeserving) person on the ballot than it can turn a blind eye toward due process.

Graziano, 189 Misc2d at 686. Therefore the Court must resort to an analysis of the five factors enumerated in CPLR 1001(b).

The first factor is whether the petitioners will have an effective remedy in the event of dismissal. Although the statute assigns no particular weight to the five factors, it is noteworthy that petitioner's ability to obtain relief is listed first. In the instant case, it is clear that absent an Article 78 proceeding, petitioners will not be able to reverse the decision of the ZBA.

Second on the list of factors is an evaluation of the prejudice that may accrue to the absentee if the nonjoinder is excused. In effect, this factor revisits the prejudice criteria in CPLR1001(a) by which the court determined the Halsteads' status as necessary parties. The Halsteads are the property owners and their ability to sell their property or build thereon in accordance with zoning bylaws or obtaining variances therefrom is critical to this action. If the petition is granted, the Halsteads would be unduly prejudiced in that the variance granted them would be potentially voided without their participation in violation of their due process rights.

Factor three again addresses prejudice, but with the focus on an existing party's responsibility for contributing to the prejudice or taking steps to help avoid it. This prejudice could certainly have been avoided if petitioners simply included the Halsteads prior to the expiration of the statute of limitations. Petitioners offer the only excuse as the Halsteads asked not to be included and for the sake of community peace, petitioners abided by their request (in spite of the fact that petitioners knew that the Halsteads' property rights would be adversely affected by the outcome of this action).

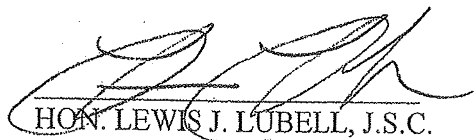
The fourth factor directs the court to consider whether protective measures might be taken to minimize prejudice either during the litigation or by some provision in the judgment. Since the validity of the variance is the very thing petitioners seek to have voided, the Halsteads' interest cannot be adequately protected by this Court in their absence.

The fifth factor is similar to the fourth in that it asks whether an "effective" judgment is possible despite the Halsteads' nonjoinder. It is inappropriate for this action to proceed if the likely judgment would be so hollow or inconclusive that it would be a waste of the court's and the parties' time to proceed with the litigation. See, e.g., *Anderson v Town of Lewiston*, 244 AD2d 965 (4th Dep't. 1997), appeal dismissed, 91 NY2d 920 (1998) (judgment against Town ordering restoration of plaintiff's water service would be futile because such service ultimately depended on consent of Indian nation, as to which jurisdiction could not be obtained). In this case, through their own error, petitioners created the prejudice that will accrue to them if this matter is dismissed, while the Halsteads did not cause themselves to suffer this prejudice. There can be no effective judgment in this matter without the Halsteads' participation, and the Court is without authority, given the enumerated factors, to direct their participation or permit the action to proceed without them. Therefore, this action is dismissed with prejudice.

The foregoing constitutes the decision and order of the court.

Dated: May 3, 2006
Goshen, New York

E N T E R



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

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