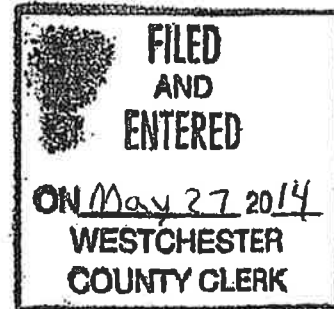


DISPO Seq #1 and #2 (Case)

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 WESTCHESTER

-----X
In the Matter of the Application of

SUZANNE MCCRORY,

DECISION/ORDER

Petitioner,

-against -

Index No:
3830/13

THE ZONING BOARD OF APPEALS of the
Village of Mamaroneck, New York

Motion Date:
3/16/14

Respondent.

-----X
ZUCKERMAN, J.

The following papers numbered 1 to 3 were considered in connection with this motion by Respondent Zoning Board of Appeals of the Village of Mamaroneck to dismiss the pending Article 78 Petition:

<u>PAPERS</u>	<u>NUMBERED</u>
RESPONDENT MOTION TO DISMISS/AFFIDAVIT/EXHIBITS	1
PETITIONER AFFIDAVIT/AFFIRMATION/EXHIBITS	2
RESPONDENT REPLY	3

PARTIES & SUBJECT PROPERTY

Petitioner Suzanne McCrory (hereinafter "McCrory") resides at 720 The Crescent, in the Village of Mamaroneck. Respondent the Zoning Board of Appeals (hereinafter "ZBA") is the appointed

body authorized under New York State Village Law, and the Village of Mamaroneck Code, to hear appeals from those aggrieved by alleged errors of Village zoning officials. Respondents Richard and June Ottinger (hereinafter "the Ottingers") are the owners of the real property known as 818 The Crescent, the subject property herein (hereinafter "the subject" or "the property"). The property is zoned R-15 single-family residential and identified on the tax map of the Village of Mamaroneck as Section 9, Block 85, Lots 34B, 35 and 36A.

FACTS

In 2006, the Ottingers applied for a building permit to construct a single-family residence on the subject property, then a vacant parcel. Before the permit was issued, McCrory corresponded with Richard Carroll, the Village Building Inspector, about Carroll's review of the Ottingers' permit application. McCrory, along with several other neighbors, sought to challenge the application, contending that the proposed Ottinger residence exceeded the maximum Floor Area Ratio (FAR)¹; that the lot size was below the zoning minimum; that the proposed construction encroached on required yard setbacks²; and that the proposed pool construction was not proper.

¹ Calculated, pursuant to the Village Code, by dividing the gross floor area, exclusive of cellars or basements used only for storage and utilities, within a building or buildings on a lot, by the total area of the lot.

² The area, to the front, the rear, and/or to either side, between a building and the property line.

McCrory, based on her correspondence with Carroll, and apparently believing that the building permit was about to be issued, appealed Carroll's anticipated determination to the ZBA. This appeal was denied as premature. Subsequently, Carroll did determine that the lot was buildable as is, provided that State, Village and FEMA regulations were met during construction. In late 2006, the Ottingers obtained a building permit, which allowed construction of the planned one-family, two-story dwelling, with swimming pool, on the subject property. Subsequent to the permit's issuance, however, an associated action challenging the Inspector's determination [hereinafter "the Henderson appeal"] was commenced. In that action, the ZBA upheld issuance of the permit with respect to two issues--relating to FAR and gross floor ratio requirements under the Code--but the Board also sustained two objections to the permit, with regard to proper setbacks, and the proposed swimming pool.

Following the above determination of the Henderson appeal, Inspector Carroll issued an Order to Remedy Violation, providing that no work was to continue in either the setback areas or the pool site on the subject property. The Ottingers were also instructed to remove all structures from the setback area (or to file for a variance of the setback requirements), and to complete the necessary application for the swimming pool. (Both the

setback area and the pool work were subsequently removed from the building permit).

Construction of the structure then proceeded. In late 2007, after the Ottingers had largely completed construction, they applied for a Certificate of Occupancy, which application was denied since Village officials had discovered that the building foundation not only did not follow the approved plans, but that it also failed to comply with existing flood zone rules. Specifically, building construction (like the subject) which occurs in a "V" flood zone, and which is thus subject to breaking waves during storms, must elevate structures on piers or pilings to leave the foundation open and free of obstruction, allowing flood waters to pass beneath the building without damaging the structure. Construction on the instant property failed to conform to those requirements, since the foundation consisted of walls rather than piers or pilings.

In May, 2008, Federal Emergency Management Agency (FEMA) officials confirmed the non-compliance of the structure with flood zone rules. FEMA proposed three options for compliance: a FEMA Map revision to redefine the house as being in an "A" zone rather than a "V" zone; a local floodplain variance (with associated effect on the community rating with FEMA and floodplain compliance requirements from NYSDEC); or structural modification to bring it into compliance with the flood zone

rules. Subsequently, the Ottingers sought a Flood Map Revision from FEMA.

In April, 2011, the Ottingers also sought a tidal wetlands permit for seawall stabilization work at the subject property. The stated reason was to strengthen an existing seawall against overturning during a major storm/wave event. In September, 2011, the Planning Board adopted a resolution approving the tidal wetlands permit (hereinafter the "Wetlands Permit Resolution"), and in October of that year the Building Inspector issued a building permit revision authorizing the seawall work³. This work was completed several months later and a Certificate of Compliance was then issued by the Village. FEMA also, in late 2012, finalized the flood map revision. The revision placed the subject property in the "A" zone, which brought the solid foundation walls into compliance with FEMA regulations. The Village then issued a Certificate of Occupancy for the house and the swimming pool, finding that the premises was no longer in the "V" flood zone; that as built it complied with the approved plans; and that it fully satisfied all laws and regulations applicable to it. In February, 2013, the Ottingers also amended their building permit to delete reference to the unbuilt swimming

³This issue was separately appealed to the ZBA (hereinafter the "Seawall Appeal"), which upheld the grant of the seawall permit, and subsequently the subject of an Article 78 Proceeding (hereinafter the "Seawall Article 78"). This court (Cacace, J.) also upheld the seawall permit grant; while a Notice of Appeal was filed in that matter, it was never perfected, and is not before this court.

pool, to show the changes made to the foundation during construction, and to show the changed flood mapping.

PROCEDURAL HISTORY AMONG THE PARTIES

While the building inspector had the Ottinger's initial permit application under consideration, McCrory (together with other neighbors) appealed to the ZBA, seeking to prevent building on the subject property from going forth (hereinafter the "Permit Appeal"). Among other things, they contended in the Permit Appeal that the Ottinger Residence exceeded the FAR. After conducting a hearing, in December, 2006, the ZBA denied the appeal on procedural grounds of ripeness, finding that it lacked jurisdiction to make a determination on substantive issues pertaining to the permit because the appeal was filed before the issuance of the permit⁴. After denial of the Permit Appeal by the ZBA, McCrory commenced an Article 78 Proceeding challenging the ZBA's decision to dismiss the appeal on ripeness grounds (hereinafter "Article 78 Action # 1"). In a Decision and Order dated August 1, 2008, this Court (Adler, J.), dismissed Article 78 Action # 1, upholding the ZBA's determination that, due to McCrory's premature commencement of the appeal, the ZBA lacked jurisdiction to rule on the Permit Appeal.

⁴ Despite being given the opportunity by the ZBA to amend their appeal to reflect the premature filing, McCrory and her fellow petitioners declined to do so.

Following issuance of the building permit, in September 2006 (i.e. while the Permit Appeal was still pending), McCrory and other allegedly affected parties, including George and Irene Henderson (hereinafter "the Hendersons"), filed a timely (i.e. post issuance) appeal to the ZBA (hereinafter the "Henderson Appeal"), raising the same issues raised by the Permit Appeal. McCrory served as both petitioner *pro se* and as counsel for the several other petitioners in the Henderson Appeal. Among other things, the Henderson Appeal sought revocation of the permit, contending that the proposed Ottinger residence, which was already under construction, exceeded the permitted FAR and gross floor area portions of the Village Zoning Regulations.

The ZBA determined, in June 2007, that the lot consisted of 15,000 square feet; that the proposed construction FAR for the subject was thus .40, which exactly met the maximum FAR permissible under the Code; and that the property was in compliance with the gross floor ratio requirements of the Code. The ZBA also ruled that the proposed structures encroached on required setbacks, and that no proper and complete application had been submitted for the proposed pool. As noted in the transcript of the public hearing, McCrory not only represented the Hendersons at the hearing, she also advocated positions identical with those previously taken by her (and by then

rejected) in the Permit Appeal. The entire record of the Permit Appeal was, in fact, incorporated into the record of the Henderson appeal by the ZBA.

Upon dismissal of the Henderson Appeal, McCrory and the Hendersons commenced an Article 78 Proceeding (hereinafter "Article 78 Action # 2") to challenge the 2007 ZBA determination. McCrory again, as with the Henderson Appeal before the ZBA, served as both Petitioner *pro se* and as counsel for the other petitioners in the action. Among the relief sought by petitioners in this proceeding was reversing the determination that the premises met the minimum required lot area of 15,000 square feet for the R-15 residential district, and that the structure complied with the FAR maximum. In a Decision and Order dated August 15, 2008, this Court (Adler, J.), granted Respondents' Motion to Dismiss Article 78 Action # 2 as related to McCrory, finding that she had failed to exhaust her administrative remedies by failing to appeal the inspector's issuance of an Order of Remedy, or to amend her Permit Appeal to seek that relief. Only the Henderson Appeal then remained before the Court in Article 78 Action # 2 .

Thereafter, in a Decision and Order dated March 17, 2009, this Court (Adler, J.), dismissed Article 78 Action # 2 in its entirety as to the remaining petitioners. First, the court

found substantial evidence that the property conformed to the Village Code's FAR and square footage requirements. The court also rejected the petitioners' claim that it was obligated to apply the FAR provisions as amended in 2008. Instead, the court applied the FAR provisions that existed on the date of the permit application because construction had already commenced (indeed, the construction had been completed) before the amendment came into effect. This March 2009 Decision and Order was subsequently appealed to the Appellate Division, Second Department, and consolidated for review with an appeal of the Court's August, 2008 Decision as related to McCrory and the Permit Appeal. McCrory again appeared not only as a Petitioner *pro se*, but also as counsel for all other petitioners on this appeal.

In April, 2010, the Second Department affirmed dismissal of the Henderson Appeal, holding that the petitioners (including McCrory, as she was denominated as a petitioner on the appellate papers) had failed to exhaust their administrative remedies (by failing to challenge issuance of the building permit before the ZBA) prior to commencing Article 78 Action # 2. That court also upheld dismissal of the Fourth and Fifth Causes of Action as they failed to state a cause of action, as well as the ZBA's determination that the construction and the subject property as constructed complied with the applicable square footage and gross

floor area ratio regulations at the time the permit application was submitted. McCrory, as Petitioner pro se, filed a Motion for Leave to appeal the Second Department's decision to the Court of Appeals. This Motion was denied.

In late 2012, after the Ottingers had successfully sought a change in the FEMA Flood Zone designation of the subject property, the Village issued a Certificate of Occupancy for the dwelling. McCrory then appealed that grant to the ZBA (hereinafter "the McCrory C of O Appeal"). She argued that the change in foundation construction (from piers to walls) had created a crawlspace which then increased the gross floor area, causing the FAR to be exceeded; that this construction configuration also violated flood zone regulations; and that the Certificate of Occupancy was void since it was based on an invalid building permit (due to the improper pool application).

In October, 2013 the ZBA denied the McCrory C of O appeal. The ZBA found, with regard to the FAR, that in the two prior ZBA appeals--the Permit Appeal in 2006, and the Henderson Appeal in 2007--the Board had determined that the FAR for the residence complied with the Zoning Code provisions. It also noted that the 2007 holding had been appealed and upheld by the courts; that McCrory had been both personally involved in those actions, and had actively litigated them before the ZBA and the courts for

herself and the other petitioners; and that, therefore, the doctrines of res judicata and collateral estoppel barred the appeal of that issue again. The ZBA also found that it would be fundamentally unfair to the Ottingers to permit reexamination of the FAR and gross floor area issues so long (six years) after they were initially determined by that board, and since possibly over six years had elapsed since the construction of the premises had been completed. Finally, the ZBA ruled that it was without jurisdiction to hear a challenge to the flood provisions of the Code since the Code itself designated the Planning Board, and not the ZBA, as the body to whom appeals relating to acts of the Building Inspector under the flood provisions of the Code must be brought. McCrory then commenced the instant Article 78 Action.

RELIEF SOUGHT

In the current action, McCrory again raises objections related to the FAR and gross floor area. These issues were previously determined by the ZBA. Thereafter, this court and the Appellate Division affirmed the ZBA's decisions. More specifically, the ZBA and the courts rejected McCrory's theory that a crawl space created beneath the residence has increased the gross floor area so that, when the additional area is included in the calculation, the structure now violates the FAR

and gross floor area provisions of the zoning code. McCrory acknowledges that this is a re-litigation of these issues, but claims that it is excused by changed circumstances: the issuance of a Certificate of Occupancy to the Ottingers for the subject property; the change in the code with respect to maximum FAR; and the departure by the Ottingers from the building plan as relates to the foundation; i.e., replacement of piers with poured concrete walls creating additional enclosed space below the first-floor level and created a crawl space. McCrory also asserts a new claim: that the ZBA improperly found that it was without subject matter jurisdiction to adjudicate petitioners' claim that the respondents violated Chapter 186 of the Village Code relating to flood damage prevention.

The ZBA opposes the application, asserting *res judicata* and collateral estoppel; the inequity (to the Ottingers) of a reconsideration of floor area ratios approved in 2007; and that the ZBA was not the proper forum to review a flood damage determination.

DISCUSSION

1. Application of *Res Judicata* to the Current Action

McCrory's petition raises, for perhaps the fifth time before either the ZBA or the courts, issues related to the FAR and gross

floor area. She does not deny that the ZBA and this court have previously upheld the determination that the FAR of the premises does not exceed that permitted by the Code. Rather, she urges this court to find that she was not a party to those prior matters before; that she did not have a full and fair opportunity to litigate those matters before the ZBA and this court; and, in any event, a change of circumstances permits her to litigate these issues anew.

Specifically, McCrory argues that the Permit Appeal was dismissed as to her by the ZBA on procedural grounds. She further asserts that this court later dismissed Article 78 Action # 1 as to her, again on procedural grounds, for her failure to exhaust administrative remedies in the Permit Action, and then also dismissed Article 78 Action # 2 as to her for the same reason. Thus, she argues, she was not a party to Article 78 Action # 2 when this court subsequently determined that matter on the merits. As a result, McCrory asserts, she may contest that determination in this action. Further, she posits that she did not have a full and fair opportunity to litigate these issues before the ZBA or this court on the merits, due to dismissal of the Permit Action and her twin dismissals from Article 78 Actions # 1 and 2.

In addition, with the 2012 issuance of a Certificate of Occupancy to the Ottingers by the Village, McCrory asserts that the prior determination of the FAR and gross floor area, insofar as it supported the grant of the Certificate of Occupancy, can be re-litigated. This is because the Ottingers' construction deviated from the building plan, by erecting walls (not in compliance with the flood zoning regulations) instead of piers, to create a crawl space below the first-floor level. McCrory asserts that such space is not a basement or cellar within the meaning of the Code; that the space therein must therefore be included in the FAR and gross floor area; and that, irrespective of prior Board or judicial determinations on the FAR and gross floor area issues, inclusion of this space makes the subject now non-compliant with the Code and subject to challenge by her. Finally, she urges this court to find that the issuance of the Certificate of Occupancy in 2012 was not proper since the Village Code had been amended to provide for a lower FAR, and that the amended provision is applicable to the Ottingers because the amendment became effective prior to the issuance of the Certificate.

Res judicata is the preclusive effect accorded to the final determinations of claims or causes of actions on the merits, with respect to the same parties in the two actions or parties in

privity with them. In *Pawling Lake Property Owners Assn., Inc. v Greiner*, 72 AD3d 665 (2nd Dept. 2010), the Court stated:

Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action" (*Parker v Blauvelt Volunteer Fire Company*, 93 NY2d 343, 347 [1999]; *Employers' Fire Ins. Company v Brookner*, 47 AD3d 754, [2nd Dept. 2008]).

It has been said that "one linchpin of res judicata is an identity of parties actually litigating successive actions against each other" (*City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 127 [2007]); *Matter of Reilly v. Reid*, 45 NY2d 24, 27 [1978]; *Gramatan Home Investors v. Lopez*, 46 NY2d 481, 485 [1979]; *Schuykill Fuel Corporation v. Nieberg Realty Corporation*, 250 NY 304, 306-07 [1929]). "Once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *Matter of Reilly*, 45 NY2d, 30; *O'Brien v. City of Syracuse*, 54 NY2d 353, 357 (1981).

Under the principles of res judicata, final determinations of administrative boards and tribunals are "conclusive" and prevent the applicants from seeking the same relief from an

administrative agency or court as had been sought in a prior application. In fact, "[w]hensoever any board, tribunal, or person is by law vested with authority to judicially determine a question, such a determination, when it has become final, is as conclusive as though the adjudication had been made by a court of general jurisdiction and will therefore have *res judicata* effect." *Matter of Kennedy v. Zoning Board of Appeals of Village of Hastings-on-Hudson*, 145 AD2d 490, 491 (2nd Dept. 1998), citing *Jones v. Young*, 257 AD 563, 566 [3rd Dept. 1939]. Even if further investigation of the law or facts indicate that the controversy has been erroneously decided in the previous action due to oversight by the parties or error by the courts, policy considerations will nevertheless bar the second action. *Matter of Reilly*, 45 NY2d at 28. The doctrine applies with equal force to quasi-judicial determinations of a zoning board of appeals when such determinations become conclusive and binding. *Ryan v. New York Telephone*, 62 NY2d 494, 500 (1984); *Jensen v. Zoning Board of Village of Old Westbury*, 130 AD2d 549 (2nd Dept. 1986); *Town of Wallkill v. Lachmann*, 27 AD3d 724 (2nd Dept. 2006).

When the "...parties, property, issues, facts and relief sought..." are essentially identical, *res judicata* will preclude the relief sought in a subsequent application, including "...claims which were previously litigated on the merits or might

have been litigated at the time." *Freddolino v. Village of Warwick Zoning Board of Appeals*, 192 AD2d 839, 840 (3rd Dept. 1993). A matter which has been heard and decided cannot be reconsidered again for the sole purpose of permitting the losing party to cure a defect in its proof or to assert other grounds not previously asserted supporting his claim. *Jensen, supra*; *Freddolino, supra*; see also *Palm Management Corp. v. Goldstein*, 8 NY3d 337 (2007--the mere issuance of a new, substantially identical, certificate of occupancy does not create a new ground to challenge the previously adjudicated issue when no challenge was permissible before the issuance of the new certificate.)

Regarding the issue of privity,

...it is a fundamental principle that a judgment rendered jurisdictionally and unimpeached for fraud shall be conclusive, as to the questions litigated and decided, upon the parties thereto and their privies, whom the judgment, when used as evidence, relieves from the burden of otherwise proving, and bars from disproving, the facts therein determined.

Ryan, 62 NY2d at 500. As to who is in privity, privity has been described as "...an amorphous concept not easy of application..." which "...includes those who are successors to a property interest, those who control an action although not formal parties

to it, those whose interests are represented by a party to the action, and [those who are] coparties to a prior action." *Matter of Juan C. V. Cortines*, 89 NY2d 659, 667 (1997).

Recently, in *Bayer v. City of New York*, 115 AD2d 897 (2nd Dept. 2014), the Second Department stated.

Generally, to establish privity the interests of the nonparty must have been represented by a party in the prior proceeding (see *Green v Santa Fe Indus.*, 70 NY2d 244, 253, 514 NE2d 105, 519 NYS2d 793)...persons in privity include those whose interests are represented by a party to the previous action and those "[whose] own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation" *D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664, 564 NE2d 634, 563 NYS2d 24).

115 AD2d at 898.

A. The Parties Herein are the Same or in Privity

1. Identity of Parties

As set forth in greater detail above, the parties to the Permit Appeal before the ZBA included McCrory as petitioner and the Village and the Ottingers as respondents. In the subsequent Article 78 Action # 1 contesting that

ruling, the parties were also the same. Regarding the Henderson Appeal, which was filed after issuance of the building permit but while the Permit Appeal was still pending before the ZBA, although that matter was initially filed by the Hendersons alone, the ZBA permitted McCrory to advocate for her own position and appear on behalf of the Hendersons (by way of Power of Attorney). It also incorporated the record of the Permit Appeal into the Henderson Appeal to avoid McCrory having to resubmit or repeat the submissions in that dismissed matter. The ZBA stated that it did so in order to reach a decision on the merits in McCrory's Permit Appeal. After the ZBA denied the Henderson Appeal, the Hendersons and McCrory commenced Article 78 Action # 2 to contest that finding by the ZBA. The matter was initially dismissed by this court as to McCrory due to her failure to exhaust administrative remedies, and was later dismissed as to the Hendersons on the merits.

McCrory and the Hendersons, in a consolidated appeal, then sought relief from the Second Department from their own dismissed portions of Article 78 Action #2. In that appeal, McCrory appeared as both Petitioner pro se for herself and, again, on behalf of the Hendersons. The Second Department upheld the dismissals as applied to both McCrory and the Hendersons. McCrory and the Hendersons then unsuccessfully sought Leave to

Appeal to the Court of Appeals with McCrory again appearing as both Petitioner *pro se* for herself, and as counsel for the Hendersons. Based on the various proceedings held before the ZBA, this court, the Appellate Division, and in a Leave application to the Court of Appeals, this court can only conclude that the parties to those actions were McCrory and the Hendersons as petitioners, and the Village and the Ottingers as respondents. Therefore, there is an identity of parties between each and every one of those actions, and the one at bar.

2. In Privity with the Parties

McCrory objects, though, that her dismissal from the Permit Appeal by the ZBA, and from Article 78 Actions # 1 and 2 by this court, on purely procedural grounds, removed her from the future litigation as to the FAR and gross floor area issues and from the ZBA's and court's determinations of the merits of those actions. In determining the FAR and gross floor area issues in the C of O Appeal, the ZBA was bound by its own prior decision in the Henderson Appeal. McCrory not only appeared for the Hendersons before the ZBA in the Henderson Appeal, but, because her own prior action had been dismissed on procedural grounds, was permitted to advocate her own position before the ZBA as if it was still pending. In addition, the ZBA incorporated the record

of McCrory's dismissed matter into the record in that appeal to reach the merits of both.

Indeed, the ZBA made clear in dismissing the Permit Appeal, that it was aware that the Henderson Appeal had already been filed, and that the issues in the Permit Appeal would be decided on the merits in the Henderson Appeal irrespective of the dismissal. Two of those issues in the Permit Appeal, as denominated in Paragraphs 50 through and including 63 of the Petition filed in Article 78 Action # 1, were the FAR and gross floor area issues. The ZBA thus held in the C of O Appeal (the matter now under review by this court) that McCrory not only appeared for the Hendersons and others in, but also as a party to, the prior actions before it. The ZBA further found that she had a full and fair opportunity as both party and counsel to litigate with respect to those specific issues. In light of her previous extensive participation in these matters, those ZBA determinations were neither arbitrary and capricious, nor an abuse of discretion.

It is equally clear that, even if the dismissal of the Permit Appeal as to her did make her no longer a party to that action, McCrory was fully in privity with the Hendersons before the ZBA. While the Permit Appeal was litigated with the

Weiss' (not with the Hendersons) as petitioners, McCrory consistently described herself in each and every action as Petitioner *pro se*. Further, the ZBA permitted her to argue for the Hendersons during the Henderson Appeal. They considered the record from her dismissed Permit Appeal in the Henderson Appeal. Moreover, the ZBA stated that it would allow McCrory's claims, notwithstanding the dismissal, to be decided in the Henderson Appeal on the merits. Conversely, the Hendersons prosecuted the same claims before the ZBA in their own appeal as McCrory had previously. Since the ZBA clearly consolidated the two appeals for decision on the merits, McCrory was indeed in privity with the Hendersons before the ZBA.

With regard to Article 78 Action # 1 (commenced to challenge the dismissal by the ZBA of the Permit Appeal) that matter was filed by McCrory and the Weiss' together as Petitioners *pro se*. After dismissal of the Henderson Appeal, they and McCrory, again together as Petitioners *pro se*, commenced Article 78 Action # 2. Even after dismissal of the McCrory claims from Article 78 Action # 2, however, McCrory remained as counsel, and continued to litigate the same issues which she had addressed earlier. Moreover, in Article 78 Action # 2, McCrory appeared on behalf of herself and the Hendersons. The Hendersons continued to litigate the identical claims asserted by McCrory

previously before this court. When that action, too, was dismissed, McCrory still appeared on her own and on their behalf in their consolidated appeal to the Second Department. Together with the Hendersons as petitioners, she sought to litigate on appeal the same issues which she had sought to prosecute before the ZBA and this court.

When the Appeal was dismissed by the Second Department, McCrory continued to serve as counsel and as petitioner *pro se* with the Hendersons in their consolidated Leave application to the Court of Appeals. Again, McCrory and the Hendersons together sought Leave to prosecute an appeal based on the same issues as previously before the ZBA, this court, and the Second Department. In each of these matters, McCrory shared claims and actions, and ~~apparently commonality of goals and strategy, with her fellow~~ petitioners. Even after several of the matters were dismissed as to her, McCrory continued to litigate and actively participate in the proceedings. Thus, McCrory, even if she was not a party to these actions due to her dismissal therefrom, was completely and totally in privity with those who were.

B. Identical Causes of Actions-FAR and Gross Floor Area

The FAR and gross floor area issues were essential to the Permit Appeal before the ZBA. That matter included McCrory as petitioner and the Village and the Ottingers as respondents. The

ZBA, of course, did not reach the merits of this claim in the Permit Appeal, as it found that McCrory had failed to exhaust her administrative remedies. Nevertheless, in dismissing, the ZBA recognized that, since the Henderson Appeal had already been filed, the issues raised in the Permit Appeal (which included the FAR and gross floor area issues), would be decided on their merits despite the dismissal in the Henderson Appeal. The ZBA insured that the FAR and gross floor area issues would be decided on the merits in the Henderson Appeal by, *inter alia*, permitting McCrory to not only appear as counsel for the Hendersons, but also allowing her to advocate her own positions. During the proceedings, the ZBA specifically permitted McCrory to address the FAR and gross floor area issues and directed that the record of the Permit Appeal be incorporated entirely into the record.

Article 78 Action # 1 was filed by McCrory and the Weiss' to contest dismissal of the Permit Appeal on procedural grounds, namely their failure to exhaust administrative remedies. Article 78 Action # 2, contesting the findings of the ZBA, was filed as a consolidated action which included requests for review of the ZBA's dismissal of McCrory's Permit Appeal on procedural grounds, and dismissal of the Henderson Appeal on the merits, including the FAR and gross floor area issues. Notwithstanding that Article 78 Action # 2 was initially dismissed as to McCrory due to her

failure to exhaust administrative remedies, this court decided the FAR and gross floor area issues on the merits. More specifically, the court found substantial evidence that the property conformed to the Village Zoning Code's FAR and gross floor area requirements.

McCrory and the Hendersons filed a consolidated appeal to the Second Department of this court's twin dismissals (one procedural and one on the merits) of Article 78 Action #2. McCrory appeared as both petitioner *pro se* for herself, and as counsel for the Hendersons, and again argued before that Court that the decision of the ZBA on the FAR and gross floor area issues was flawed. She also conceded, in her appellate papers, that she, the Hendersons, and the Weiss', had been equally affected by the claimed errors by Respondent and that they had all worked together in challenging the several prior determinations. The Second Department upheld the dismissals, specifically finding, *inter alia*, that the ZBA's decision as to FAR and gross floor area was entitled to great deference, and was not arbitrary, capricious, illegal, or an abuse of discretion. McCrory and the Hendersons together sought Leave to Appeal to the Court of Appeals, with McCrory again appearing as petitioner *pro se*. They argued for a grant of Leave on several issues including the ZBA's FAR and gross floor area decision. This Leave

application was denied. Thus, throughout several proceedings, including the appeal before the ZBA, the first two Article 78 Actions, the appeal to the Appellate Division, and the Leave application to the Court of Appeals, McCrory personally and actively litigated the FAR and gross floor area issues. Clearly, Petitioner's claims were founded on those issues and litigated in those actions. Consistently, the rulings were adverse to McCrory and to the benefit of the Ottingers. McCrory, before the ZBA again at the C of O Appeal, has raised claims sounding in whether the ZBA had previously calculated the FAR and gross floor area properly. Such a claim, having been previously decided by the Board, may not again be litigated. *Freddolino, supra*, (barring "...claims which were previously litigated on the merits or might have been litigated at the time"); *Jensen, supra*; see also *Palm Management, supra*; *Matter of Reilley, supra*; *O'Brien, supra*.

C. No Change in Circumstances

McCrory argues, however, that despite conclusive determination of this issue by the ZBA and this court in Article 78 Actions 1 and 2, affirmance of those decisions in the appeal to the Appellate Division and denial of the Leave application to the Court of Appeals, a change of circumstances makes the current action (asserting failure to meet the FAR and gross floor area requirements of the Code) an appropriate challenge. More

specifically, McCrory argues that issuance of a Certificate of Occupancy, as well as that the FAR and gross floor area issues were decided based on planned, not actual, construction (i.e. the use of foundation walls rather than piers) presents sufficient change in circumstances to permit the instant action. The "newness" of this information, however, is completely belied by the fact that the use of foundation walls rather than piers was certainly known to McCrory at least as far back as January, 2010 when she included it in her Brief on Appeal to the Second Department. Indeed, on February 2, 2008, the Building Inspector determined that the premises was not in compliance with the Code's, primarily because of the departure in the construction of the premises from the original foundation plans. This surely was known to McCrory in early 2008, before this court's several decisions dismissing Article 78 Action # 2. Despite clear knowledge of these circumstances at least by 2010, and perhaps as early as 2008, McCrory never sought to amend her action to reflect this clear and crucial departure of the construction from the plan. She, thus, cannot complain now that the departure from the building plan constitutes a change of circumstance, as she has been aware of that change for perhaps as much as six years.

D. Failure to Enforce *Res Judicata* Would Be Fundamentally Unfair

Petitioner does not deny that the construction on the Ottinger property, which precipitated the instant and prior actions, was substantially completed a number of years ago. In fact, while the Certificate of Occupancy was not granted until late 2012, the construction work on the house may have been completed as early as the fall of 2007. Now, Petitioner seeks to turn back the clock with respect to the residence, some six to six and one-half years after construction was substantially completed, after never having sought a temporary restraining order or preliminary injunction to halt the construction.

Considerations of fairness are particularly important in the context of *res judicata*, where a different judgment "would destroy or impair rights or interests established by the first [decision]." *Kennedy, supra*, citing *Schuylkill Fuel Corporation v. Nieberg Realty Corporation*, 250 NY 304; 307 (1929); see also *Freddolino, supra*; *BDO Seidman v. Strategic Resources*, 70 AD3d 556 (1st Dept. 2010); *Million Gold Realty Company v. S.E. & K. Corporation*, 4 AD3d 196 (1st Dept. 2004); *c.f. Rainbow v. Swisher*, 72 NY2d 106 (1988), which declined to rewrite a judgment of divorce "...which has been relied on by the parties for 10 years [and which] would defeat the plaintiff's reasonable

expectations that the judgment was valid as entered...." Here, rather than seek injunctive relief to preserve the *status quo* during litigation, Petitioner merely commenced successive actions while construction of the residence was completed⁵. It would work a manifest unfairness upon the Ottingers, at this point, for this court to consider the proffered FAR/gross floor area arguments, with the possible remedy that this court would order demolition of all or a portion of a residence completed over six years ago.

2. Motion to Dismiss With Respect to Village Code Chapter 186

The ZBA also moves to dismiss the Petition as it relates to the ZBA's rejection of the claims under Village Code Chapter 186.

As noted in the ZBA's decision, one ground for McCrory's challenge to the issuance of the Certificate of Occupancy was that the construction failed to satisfy Village Code Chapter 186 and flood zone rules. Petitioner's Affirmation in Opposition to the instant Motion to Dismiss by respondent, however, contests that Village Code Chapter 186 was even an issue before the ZBA,

⁵ In the August 15, 2007 Decision and Order (Adler, J.) dismissing Article 78 Action # 2 as to McCrory, the court noted that Petitioner had initially sought injunctive relief from the court, but at some point had abandoned her request for that remedy. While petitioner could have actively sought such interim relief (by way of temporary restraining order and/or injunction), she chose only to seek an automatic stay before the ZBA, which relief was denied on procedural grounds and also not pursued further by her.

and argues that therefore dismissal of the Appeal as improper under that Chapter was error.

Initially, Paragraph 62 of the Petition, which describes the C of O Appeal as challenging Chapter 342 "and related provisions", states that petitioner declined to challenge the failure of the Village to make a flood determination, despite recognizing that construction in the flood zone was proceeding without the determination. Further, the ZBA Application filed by McCrory, at page 2, lists Chapter 186 as one ground of the application. And, in Section IV of McCrory's detailed grounds for the Appeal, she asserts that both Chapter 186 and flood zone rules are at issue. Thus, it is apparent that McCrory raised Chapter 186 of the Village Code before the ZBA, and challenges that body's determination on that issue.

Beyond this, and incorrectly asserting that the motion to dismiss on Chapter 186 grounds is improperly directed by movant to the entire petition, McCrory simply fails to contest the motion as it relates to Chapter 186 on substantive grounds. Her papers essentially ignore that issue. Even if opposed, however, the movant is nevertheless correct as to its argument that the ZBA properly found that it lacked subject matter jurisdiction to adjudicate an appeal with respect to the Chapter 186 claim. As the ZBA points out now, and as it found on the C of O Appeal, §

342-90 of the Village Zoning Code provides that the Board only has the authority to

...hear and determine appeals from and review from any order, requirement, decision, interpretation, or determination made by any administrative official or board charged with the implementation or enforcement of this [i.e. the zoning] chapter...

Mamaroneck Village Zoning Code § 342-90. Chapter 186 of the Code, on the other hand, is not a zoning regulation or part of the Zoning Code, but instead is a separate chapter which addresses flood damage prevention. Chapter 186 itself grants authority to hear and decide appeals, providing

The Planning Board shall hear and determine appeals when it is alleged that there is an error in any requirement, decision, or determination made by the local administrator in the enforcement or administration of this article.

Village Code § 186-6 (A) (2). Clearly, given the lack of authority for the ZBA to adjudicate claims outside of the zoning code, and the specific assignment of authority to hear and determine claims under Chapter 186 (relating to flood damage prevention) to the Village Planning Board, it was not an abuse of discretion, or arbitrary and capricious,

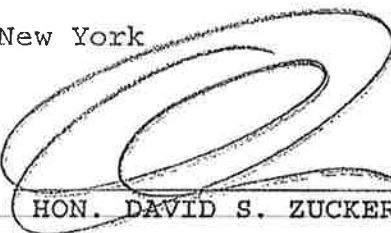
for the ZBA to hold that it could not hear McCrory's claims relating to flood damage prevention measure under Village Code Chapter 186.

Based on the foregoing, it is hereby

ORDERED, that the motion by Respondent Zoning Board of Appeals of the Village of Mamaroneck to dismiss the petitioner's Article 78 Petition is granted in all respects, and the same is hereby dismissed.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
May 23, 2014



HON. DAVID S. ZUCKERMAN, A.J.S.C.

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