



CHAMBERS OF  
HON. SUSAN CACACE

COUNTY COURT OF THE STATE OF NEW YORK  
RICHARD J. DARONCO  
WESTCHESTER COUNTY COURTHOUSE  
111 DR. MARTIN LUTHER KING, JR. BOULEVARD  
WHITE PLAINS, NEW YORK 10601  
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## FACSIMILE TRANSMITTAL

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**MATTER:** George Henderson, Irene Henderson, Suzanne McCrory, Leonard Weiss, Eleanor Weiss, and Stuart Tiekert v. The Planning Board of the Village of Mamaroneck, The Commissioner of General Services of the State of New York, The Commissioner of the Department of Environmental Conservation of New York State and Richard Ottinger and June Ottinger, Index No.: 14411/2011

**FROM:** Heather Lorenzen,  
Secretary to the Hon. Susan Cacace

**PHONE:** (914) 824-5401

**DATE:** February 21, 2012

**NO. OF PAGES (INCLUDING COVER SHEET):** 7

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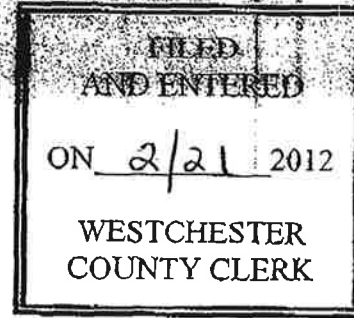
**COMMENTS:** Attached please find a decision recently signed by Judge Cacace. Have a great day!

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SUPREME COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
In the Matter of the Application of  
GEORGE HENDERSON, IRENE HENDERSON,  
SUZANNE MCCRORY, LEONARD WEISS,  
ELEANOR WEISS and STUART TIEKERT,  
Petitioners,

For the Judgment Pursuant to Articles 30 & 78  
of the Civil Practice Law and Rules.

-against-

**Decision & Order**  
Index No.: 14411-11

THE PLANNING BOARD OF THE VILLAGE OF  
MAMARONECK, THE COMMISSIONER OF GENERAL  
SERVICES OF THE STATE OF NEW YORK, THE  
COMMISSIONER OF THE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION OF NEW YORK  
STATE and RICHARD OTTINGER and JUNE OTTINGER,

Respondents,  
-----X

CACACE, J.

This is a proceeding pursuant to Articles 30 and 78 of the Civil Practice Law and Rules wherein petitioner seeks a judgment declaring that the State of New York has right, title and interest to certain lands below the high water line below Mamaroneck Harbor adjacent to property owned by the respondents Ottinger, annulling a determination by the respondent, the Commissioner of the Department of Environmental Conservation that it has no jurisdiction over seawall reinforcements proposed for the subject property, annulling a wetlands permit that was granted by the respondent Planning Board of the Village of Mamaroneck ("Planning Board") and staying the issuance of building permits for such reinforcements.

The respondents, Richard and June Ottinger ("Ottingers") are the owners of property located at 818 The Crescent in the Village of Mamaroneck. The property abuts the

Mamaroneck Harbor.

On April 26, 2011, the Ottingers submitted an application to the respondent Planning Board seeking a tidal wetlands permit to construct a tie-back and dead-man system to strengthen an existing seawall at the property.

The application was considered by the Planning Board at its regular meeting on May 23, 2011. A public hearing on the application was held on June 22, 2011 and continued on July 13, 2011. The Planning Board members also conducted a site visit of the subject property on June 26, 2011.

By a letter dated May 20, 2011, the Department of Environmental Conservation ("DEC") issued a "Notice of No Jurisdiction" indicating that no tidal wetlands permit, freshwater wetlands permit, Article 15 Excavation and Fill permit or Article 11 Incidental Take Permit was required from the DEC for the proposed work.

By a letter dated June 14, 2011, the New York State Office of General Services ("OGS") indicated that the proposed work would not require a lease, easement or permit from the OGS pursuant to Article 6 of the Public Lands Law.

The petitioners filed this petition to commence this hybrid action on September 22, 2011. No application for a Preliminary Injunction or Temporary Restraining Order was submitted to the court.

On October 4, 2011, a building permit was issued for the proposed project and work commenced shortly thereafter. The work was completed on November 15, 2011. After an inspection by the Village Building Department, the Village issued a Certificate of Compliance.

The respondents Planning Board and Ottingers have filed motions to dismiss the

proceeding. The respondents DEC and OGS have filed a verified answer and objections in point of law.

The Planning Board moves to dismiss on the grounds that as the work authorized by the challenged permit has been completed, that portion of the proceeding is rendered moot and beyond the consideration of this court. They also argue that the portion of this proceeding which challenges the determinations of the DEC and the OGS seek no relief and state no cause of action against the Planning Board.

The Ottingers also base their motion on the ground that the proceeding is moot. They also argue that the portion of the proceeding which challenges the determination of the DEC is time barred by the provisions of Environmental Conservation Law § 25-0404.

The OGS objects in point of law that as the petitioners do not seek a judgement of this court overturning or annulling an act of the OGS, it is not a proper party to this proceeding.

The DEC objects in point of law arguing that its determination was based upon a proper and appropriate interpretation of its own regulations.

The situation presented to the court is similar to the one considered by the Court of Appeals in *Dreikausen v. Zoning Board of Appeals of City of Long Beach*, 98 NY 2d 165. There, the action of the respondent Zoning Board of Appeals granting use and area variances was challenged. The petition was dismissed in the Supreme Court and the petitioners appealed. The petitioners failed to seek injunctive relief until the proceeding had advanced to the intermediate appellate stage. In the mean time, work on the subject project progressed pursuant to the challenged approvals.

The Appellate Division affirmed the dismissal of the petition and an appeal was

brought in the Court of Appeals. At the time leave to appeal was granted, twelve of the twenty proposed units had been fully constructed with the remaining eight in various stages of completion.

The Court of Appeals dismissed the appeal as moot. In analyzing the situation, the Court stated, "courts have found several factors significant in evaluating claims of mootness. Chief among them has been a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continue during the pendency of the litigation." *Dreikausen*, supra at 172, 173.

In this case, the petitioners did not proceed by order to show cause nor did they make an application for injunctive relief. The respondents acted pursuant to valid existing approvals. see *Durham v. Village of Potsdam*, 16 AD 3d 937. The work is now completed and a Certificate of Compliance was issued on November 15, 2011.

The Court finds that the doctrine of mootness controls in this case and precludes the granting of the relief sought by the petitioners. Accordingly, the motions to dismiss are granted and the petition is dismissed.

~~Additionally, the court finds that the petitioners are not entitled to the declaratory judgement which they seek. see *DiCanio v. Nissequogue*, 189 AD 2d 223.~~

The Court considered the following papers in connection with this application: (1) Notice of Petition dated September 15, 2011 with petition verified September 14, 2011 and attached exhibits; (2) Notice of motion to dismiss on behalf of respondent Village of Mamaroneck dated January 6, 2012 with affirmation in support and attached exhibits; (3) Respondent Village of Mamaroneck's Memorandum of Law in support of motion to dismiss; (4) Notice of motion to dismiss on behalf of respondents Ottingers dated January 11, 2012

with affirmation in support and attached exhibits; (5) Respondents Ottingers answer verified January 4, 2012; (6) Affidavit of respondent June Ottinger in support of motion to dismiss sworn to January 4, 2012; (7) Affidavit of Leonard Jackson in support of motion to dismiss sworn to January 4, 2012; (8) Answer and Objections in Point of Law of respondents OGS and DEC verified January 12, 2012 with attached exhibit; (9) Affidavit of Adam Peterson sworn to January 6, 2012 in support of verified answer and objections in point of law; (10) Affidavit of Eleanor Weiss in opposition to motion to dismiss sworn to January 14, 2012; (11) Affidavit of Suzanne McCrory in opposition to Village of Mamaroneck motion to dismiss sworn to January 14, 2012 with attached exhibits; (12) Affidavit of Stuart Tiekert in opposition to motion to dismiss sworn to January 14, 2012; (13) Petitioners' memorandum of law in opposition to motion to dismiss dated January 14, 2012; (14) Reply affirmation in support of motion to dismiss dated January 19, 2012; (15) Reply affirmation of Anna L. Georgiou dated January 20, 2012 ; (16) Affidavit of Suzanne McCrory in opposition to motion to dismiss sworn to January 23, 2012; (17) Affirmation of Joseph C. Messina dated January 31, 2012 and (18) Certified record.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York  
February 17 2012

  
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