

# Fax Message

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**To:** 19149971039

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**From:** Heather Lorenzen

**Date:** 9/27/2012 9:34 AM

**Pages:** 1 of 6 (including this page)

**Subject:** George Henderson, et al. v. The Village of Mamaroneck, et al.

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CHAMBERS OF THE HON. SUSAN CACACE  
COUNTY COURT OF THE STATE OF NEW YORK  
111 DR. MARTIN LUTHER KING, JR. BOULEVARD  
WHITE PLAINS, NEW YORK 10601  
(914) 824-5401 (Chambers)

## FACSIMILE TRANSMITTAL

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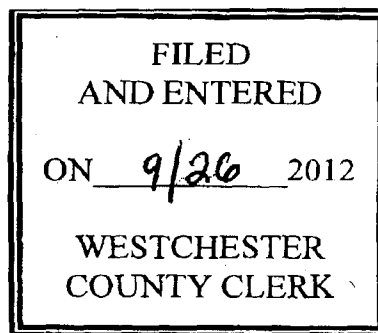
MATTER: Attached please find a decision recently signed by Judge Cacace regarding the case George Henderson, et al. v. The Village of Mamaroneck, et al. Have a great day!

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SUPREME COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER



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In the Matter of the Application of  
GEORGE HENDERSON, IRENE HENDERSON,  
SUZANNE MCCRORY, LEONARD WEISS and  
ELEANOR WEISS,

Petitioners,

For the Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules.

-against-

**Decision & Order**  
Index No.: 3038-12

THE VILLAGE OF MAMARONECK,  
ITS BOARD OF APPEALS and DIRECTOR  
OF BUILDINGS, CODE ENFORCEMENT  
AND LAND USE ADMINISTRATION  
and RICHARD OTTINGER and JUNE OTTINGER,

Respondents,

-----X  
CACACE, J.

This is a proceeding pursuant to Article 78 of the Civil Practice Law and Rules wherein petitioners seek a judgment annulling a determination dated April 5, 2012 of the respondent Board of Appeals which denied the petitioners' challenge to the issuance of a building permit to the respondents Ottinger.

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 meetings and

a public hearing on the application was held in June and July, 2011. The Planning Board members also conducted a site visit of the subject property on June 26, 2011. The Planning Board approved the Ottingers' application.

On October 4, 2011, the Building Inspector issued a building permit revision for the seawall work, incorporating the approval of the Planning Board. The work commenced and was certified as completed on November 15, 2011.

On September 22, 2011, the petitioners filed a petition seeking to overturn this approval. In a decision and order dated February 17, 2012, this Court denied that petition. (*In the Matter of the Application of Henderson, et al. v. the Planning Board of the Village of Mamaroneck and Ottinger*, Supreme Court, Westchester County, Cacace, J., Index No.: 14411-11) The basis for the dismissal was that the challenged work had been completed rendering the petition moot. *see, Dreikausen v. Zoning Board of Appeals of City of Long Beach*, 98 NY 2d 165.

On October 14, 2011, the petitioners appealed the issuance of the building permit revision to the Board of Appeals. The rules of the Board of Appeals required that application materials be submitted at least twenty-two days prior to a public hearing. Because of this rule, the earliest that a public hearing could have been conducted would have been at the December, 2011 meeting of the Board. However, the petitioners refused to pay a required escrow deposit required with their application and the matter was not scheduled for a hearing at the December meeting.

The petitioners then made the escrow payment and the matter was calendared for a hearing at the January, 2012 Board meeting. At that meeting, petitioner McCrory requested that the opening of the hearing be adjourned to the February meeting because

the full board was not present at the January meeting.

The public hearing was held at the meeting of the Board on February 2, 2012. The public hearing was closed that night without objection.

After the close of the hearing, petitioner, McCrory made an additional submission to the Board. The Board addressed this at its March meeting and decided that it would not consider this submission as untimely.

The Board's next meeting was scheduled for April 5, 2012 which was sixty-three days after the close of the public hearing. Village Law § 7-712-a requires that a decision be rendered within sixty-two days of the close of the hearing unless the board and the applicants consent to an extension. The Board requested the petitioners' consent to a one day extension of time to render a decision. The petitioners did not consent and the application was denied by operation of law on April 4, 2012. Notwithstanding this denial, the Board did issue a resolution at the April 5, 2012 meeting which set forth findings for the denial of the petitioners' application.

The petitioners now bring a separate proceeding pursuant to Article 78 of the Civil Practice Law and Rules challenging an approval for the same completed work. While the prior proceeding challenged the approval of the Planning Board, they now challenge the denial of their application to the Board of Appeals to overturn the approvals for the work.

The respondents have each brought a motion to dismiss on the grounds, *inter alia*, that the application is barred by the doctrine of mootness. They argue that the facts behind this petition are substantially the same as set forth in the first proceeding.

In neither this case nor the first proceeding, did the petitioners make an application for injunctive relief. The respondents acted pursuant to valid existing approvals. see

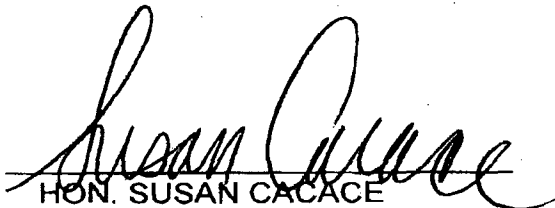
*Durham v. Village of Potsdam*, 16 AD 3d 937. The work is now completed and a Certificate of Compliance was issued on November 15, 2011.

The Court finds that the doctrine of mootness controls in this case and precludes the granting of the relief sought by the petitioners. The rationale for this finding was adequately set forth in the decision of the court in its prior decision and order and need not be repeated here. Accordingly, the motions to dismiss are granted and the petition is dismissed.

The Court considered the following papers in connection with this application: (1) Notice of Petition dated May 3, 2012 with petition verified May 3, 2012 and May 4, 2012 and attached exhibits; (2) Notice of motion to dismiss on behalf of respondent Village of Mamaroneck dated June 19, 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 June 26, 2012 with affirmation in support and attached exhibits; (5) Petitioner McCrory's affidavit in opposition to motion to dismiss sworn to June 27, 2012; (6) Affidavit of petitioner McCrory in opposition to motion to dismiss sworn to June 29, 2012; (7) Affirmation in support of motion to dismiss on behalf of Respondents Ottingers dated June 29, 2012 with attached exhibits; (8) Affirmation in support of motion to dismiss on behalf of Municipal respondents dated July 9, 2012 with attached exhibit; and (9) Certified record.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York  
September 24, 2012

  
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