SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

DOUGLAS BARNABY and KARIN BARNABY,

Petitioners/Plaintiffs,

- against -

INCORPORATED VILLAGE OF SEA CLIFF, ZONING BOARD OF APPEALS OF THE INCORPORATED VILLAGE OF SEA CLIFF, WENDY ROSOW a/k/a WENDY ROSOW-SIMPSON and JERRY SIMPSON,

Respondents/Defendants.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 9081/11
Motion Seq. Nos.: 01, 02
Motion Dates: 08/08/11
11/28/11

The following papers have been read on these applications:

	Papers Numbered
Notice of Petition (Seq. No. 01), Verified Petition and Exhibits and Memorandum of Law and Supplemental Affirmation	1
Notice of Motion (Seq. No. 02), Affirmation, Affidavit and Exhibits	2
Affirmation in Opposition and Exhibits and Memorandum of Law	3
Affidavit in Opposition and Exhibits and Memorandum of Law	4
Reply Affirmation and Exhibits	5

Upon the foregoing papers, it is ordered that the applications are decided as follows:

Petitioners/plaintiffs move (Seq. No. 01), pursuant to Article 78 of the CPLR, for an order annulling the Decision of respondent/defendant Zoning Board of Appeals of the Incorporated Village of Sea Cliff ("Zoning Board"), dated May 23, 2011, which denied petitioners/plaintiffs'

application to subdivide their property into three residential lots.

Petitioners/plaintiffs also move (Seq. No. 02), pursuant to CPLR §§ 3212 and 3001, for an order of partial summary judgment on the First and Second Causes of Action in the Combined Verified Petition/Complaint declaring the rights of the parties as a matter of law regarding a roadway known as Preston Avenue, situated within the municipal boundary lines of respondent/defendant Incorporated Village of Sea Cliff ("Village"); and move, pursuant to CPLR § 3212(e)(1), for an order severing the Third and Fourth Causes of Action in the Verified Petition/Complaint from the final judgment rendered on this motion; and move, pursuant to CPLR § 3212(b) and (h), for an order dismissing respondents/defendants Wendy Rosow a/k/a Wendy Rosow-Simpson and Jerry Simpson's (collectively the "Simpsons") First Counterclaim on the basis that they have not alleged a proper claim under Section 76-a(1) of the Civil Rights Law; and move, pursuant to CPLR § 3212(a), for an order collectively dismissing respondents/defendants' affirmative defenses and objections in point of law. Respondents/defendants oppose both motions.

This is a hybrid proceeding brought pursuant to Article 78 of the CPLR for a judgment annulling the May 23, 2011 decision of respondent/defendant Zoning Board, which denied petitioners/plaintiffs' application to subdivide an existing parcel into three building lots, which would result in the continuation of a two-family residence and the construction of two new single family residences. The Verified Petition/Complaint is also made pursuant to CPLR § 3001 for declaratory relief regarding the property rights of the petitioners/plaintiffs to use Preston Avenue.

Petitioners/plaintiffs own the subject property located at 404 Littleworth Lane, Sea Cliff, which is designated as Section 21, Block L1, Lot 306 on the Nassau County Land and Tax Map (the "Premises"). Presently, the Premises contain a dwelling that is used as a two-family dwelling. The Premises has a front property line width of 150.45 feet on Littleworth Lane and

117.32 feet on Willow Shore Avenue. The Premises also adjoins property now or formerly known as Preston Avenue and Bryant Avenue, each of which petitioners/plaintiffs make claims of rights to either as owners, or with rights to establish ownership or private easement interests. As to the property that is depicted on petitioners/plaintiffs' proposed subdivision map as Bryant Avenue, petitioners/plaintiffs claim to own portions of that property. The westerly portion of Preston Avenue, immediately abutting the Premises, consists of wooded and landscaped area.

Respondent/defendant Village is a municipal corporation. Respondent/defendant Zoning Board is the duly created Zoning Board of respondent/defendant Village, pursuant to the provisions of the New York State Village Law, having the authority to hear and decide applications for variances and appeals from determinations of the Superintendent of Buildings of the Village.

Respondents/defendants Simpsons are the owners of real property known as 386 Littleworth Lane, Sea Cliff, New York, which is located directly to the east of the Premises.

The Verified Petition/Complaint alleges that petitioners/plaintiffs' property is "bounded on the north and includes an unopened portion of Bryant Avenue, an unopened private street, which measures 50 feet wide by 275.03 feet long [and] the east side of the Premises is bounded by an unopened portion of Preston Avene, an unopened private street which measures 50 feet wide by 369.89 feet long." *See* Petitioners/Plaintiffs' Verified Petition/Complaint ¶¶ 11 and 12. Petitioners/plaintiffs allege they own Preston Avenue and Bryant Avenue, up to the center line, subject only to the possible easement rights of any additional landowners that abut said Avenues. Petitioners/plaintiffs further allege that, by virtue of the grant in the chain of title, they have an absolute right to open the unimproved portions of Preston Avenue and Bryant Avenue and utilize them for access to the Premises. The Verified Petition/Complaint sets forth the following allegations: Preston Avenue, which abuts petitioners/plaintiffs' property, has never been opened

or used by the general public. There has never been a formal dedication to, nor acceptance of, Preston Avenue by respondent/defendant Village. Some time prior to 1937, respondent/defendant Village added Preston Avenue to the Official Map of respondent/defendant Village. In 1954, respondent/defendant Village adopted and filed a resolution discontinuing the portion of Preston Avenue which abuts petitioners/plaintiffs' property as a public street and removed it from the Official Map of respondent/defendant Village. The Verified Petition/Complaint continues to allege that said discontinuance extinguished the rights, if any, of the general public to use the discontinued portion of Preston Avenue, but had no effect on the ownership and rights of the property owners abutting Preston Avenue to use and/or open Preston Avenue. At no point in time has the right to open Preston Avenue been extinguished by abandonment, conveyance, condemnation nor adverse possession by the owners of property that abut Preston Avenue. Petitioners/plaintiffs maintain their ownership of Preston Avenue and their rights to use Preston Avenue for access to the Premises. Petitioners/plaintiffs are entitled to abandon the westerly half of Preston Avenue and have it incorporated it into their existing tax lot, with the joint and concerted effort of the respondents/defendants Simpsons to abandon the easterly half of Preston Avenue and incorporate same into their tax lot, thereby extinguishing the right to open and improve Preston Avenue. Because no abandonment of Preston Avenue has occurred, petitioners/plaintiffs are entitled to open Preston Avenue and improve it to allow access to its property, without any joint action, or consent, of respondents/defendants Simpsons. *See* Petitioners/Plaintiffs' Verified Petition/Complaint ¶¶ 23-33.

The Verified Petition/Complaint sets forth the following allegations regarding Bryant Avenue which also abuts petitioners/plaintiffs' property: Bryant Avenue was created by the filing of the Preston Map. The portion of Bryant Avenue which abuts petitioners/plaintiffs' property has never been opened or used by the general public. There has never been a formal dedication to, nor a formal acceptance of, Bryant Avenue by respondent/defendant Village. Sometime prior to 1937, respondent/defendant Village added Bryant Avenue to the Official Map

of respondent/defendant Village. In 1953, respondent/defendant Village adopted and filed a resolution discontinuing the portion of Bryant Avenue which abuts petitioners/plaintiffs' property as a public street, and removed it from the Official Map of respondent/defendant Village. The discontinuance extinguished the rights, if any, of the general public to use the discontinued portion of Bryant Avenue, but had no effect on the ownership and rights of the property owners abutting Bryant Avenue to use and/or open Bryant Avenue.

At no point in time has the right to open Bryant Avenue been extinguished by abandonment, conveyance, condemnation nor adverse possession by the owners of property that abut Bryant Avenue. Therefore petitioners/plaintiffs allege they maintain their ownership of Bryant Avenue and their right to use Bryant Avenue for access to the Premises. In addition to acquiring fee title to the southerly half of Bryant Avenue, by virtue of the deeds in the chain of title to tax lot 306, petitioners/plaintiffs also obtained all right, title and interest in the northerly half of Bryant Avenue from the Riaboffs who obtained this title through a deed from The Meadow Woods Corp., dated March 2, 1954, and from The Church of Our Lady of Kazan by deed dated September 17, 1954. The Meadow Woods Corp. was the owner of the land abutting Bryant Avenue to the north which was developed into the Woodridge Lane/Orchard Lane subdivision under the map filed as Newell and Daniel at Sea Cliff (the "Newell Map") on February 11, 1953. By issuing the deed to the Riaboffs, The Meadow Woods Corp. transferred its ownership and granted its rights to the northerly portion of Bryant Avenue to the Riaboffs. Those rights were conveyed to petitioners/plaintiffs through subsequent deeds, and, accordingly, petitioners/plaintiffs now have title to the entire width of Bryant Avenue where it abuts their property. Consequently, petitioners/plaintiffs allege they are entitled to abandon Bryant Avenue and have it incorporated into their existing tax lot. *See* Petitioners/Plaintiffs' Verified Petition/Complaint ¶¶ 34-48.

By building permit application dated June 29, 2010, petitioners/plaintiffs filed with the Building Department of respondent/defendant Village an application ("Application") that

proposed to subdivide their property into three lots: a 31,239 square foot lot ("Lot A") with frontage along Littleworth Lane and a portion of Preston Avenue, on which the existing two-family home would be maintained, and which met or exceeded all area and setback requirements of the Zoning Code of the Incorporated Village of Sea Cliff ("Code"); a 10,134 square foot lot ("Lot B") with frontage along Willow Shore Avenue on which a new one-family dwelling would be constructed, and which also met all of the area and setback requirements of the Code; and a 27,317 square foot lot ("Lot C") which incorporated the unopened portion of Bryant Avenue, which is owned by petitioners/plaintiffs, into the lot. Lot C had frontage along Preston Avenue, and provided a driveway to Willow Shore Avenue. Lot C was also to be improved with a single family residence.

Section 138-506 of the Code required a minimum front property line of one hundred (100) feet for lots in the Residence B Zoning District. In order to achieve compliance with the frontage requirements of the Code for Lot C, petitioners/plaintiffs proposed to open Preston Avenue to improve it to respondent/defendant Village road specifications. In order to comply with the rear-yard and side-yard setback requirements of the Code for Lot C (Sections 138-511, 512), petitioners/plaintiffs proposed to formally abandon the portion of Bryant Avenue which abuts their property and, upon doing so, the Nassau County Tax Map would be amended and that portion of Bryant would be added to their property by the County Assessor.

Upon improvement of Preston Avenue and the abandonment of Bryant Avenue, petitioners/plaintiffs contend each of the three new proposed lots would conform to all of the requirements of the Code, including lot area and front property line. Petitioners/plaintiffs assert they were prepared to and are entitled to improve Preston Avenue to respondent/defendant Village road specifications, if required by the Planning Board, in order to achieve access to Lot C. Petitioners/plaintiffs proposed an alternative access to Lot C by means of a driveway which was proposed to run from Willow Shore Avenue to the main portion of Lot C. If this alternative access was approved by respondent/defendant Board, petitioners/plaintiffs would be willing to

leave Preston Avenue unimproved, if requested by the Planning Board, and would utilize the driveway from Willow Shore Avenue as the primary access to Lot C. Section 138-504 of the Code, which affects the Residence B zoning district, requires a minimum lot area of 10,000 square feet. Each of the proposed lots exceeds this lot area requirement. Petitioners/plaintiffs agreed to accept as a condition of approval, that a Certificate of Abandonment would be filed for Bryant Avenue, thereby officially removing it from the subdivision map and the Nassau County Tax Map and having it added to Lot C for tax assessment purposes. Petitioners/plaintiffs contend that, even if respondent/defendant Board did not require the abandonment of Bryant Avenue and its incorporation into Lot C as a condition of approval, Lot C would contain net square footage of 17,492, far exceeding the 10,000 square foot requirement of the Code, and would remain compliant with the lot area requirements of the Code. The Building Department denied petitioners/plaintiffs' building permit application, by letter dated July 26, 2010 ("Notice of Disapproval"). On September 27, 2010, petitioners/plaintiffs submitted an application to respondent/defendant Board appealing the Building Department's determination contained in the Notice of Disapproval that the proposed street, front property line and required setbacks were not in conformance with the Code, or requesting, in the alternative, variances that would permit the subdivision to proceed to be reviewed by the Planning Board.

A public hearing was held on December 14, 2010 and was subsequently continued to January 25, 2011 and February 9, 2011. At the hearing, counsel for petitioners/plaintiffs described ownership and the rights of the petitioners/plaintiffs to open and use, or, alternatively, abandon both Preston Avenue and Bryant Avenue without the need for any variances. Petitioners/plaintiffs offered evidence at the hearing to support their claim that, in the event respondent/defendant Board found the Building Department's determination to be correct, petitioners/plaintiffs were entitled to variances of the strict and literal application of the Code in order to subdivide the Premises. Petitioners/plaintiffs submitted multiple exhibits, including a scale model of the neighborhood, that demonstrated numerous "flag lots" already existing in

respondent/defendant Village, existing lots which exist with no front property line at all, as well as three apartment houses with their related parking lots, a catering facility and a church, all within the immediate vicinity of their property. All parties agree that the proposed parcel C would be a "flag lot." (A parcel of land shaped like a flag; the staff is a narrow strip of land providing vehicular and pedestrian access to a street, with the bulk of the property lying to the rear of other lots; access to the public road is by a narrow, private right-of-way or driveway. *The New Illustrated Book of Development Definitions*, Moskowitz & Lindbloom, Center of Urban Research 1993). Also, petitioners/plaintiffs included evidence to support their position that no detriment to the character of the neighborhood would occur if respondent/defendant Board approved the Application, including the expert testimony of Michael Lynch, a state certified real estate appraiser, who testified on behalf of petitioners/plaintiffs. Mr. Lynch had testified before respondent/defendant Board in the past and had been previously accepted as an expert by respondent/defendant Board. Mr. Lynch testified that many lots in the immediate vicinity of the Premises contain front property lines which do not meet the requirements of the Code and which contain significantly less lot area than the proposed lots. Mr. Lynch further testified that the Application is the least intrusive means to develop the Premises, will not be out of character with other properties in the neighborhood, as well as the overall respondent/defendant Village, and that the proposed lots will be far larger than most lots within the Residential Zoning District, since most of the lots in the immediate vicinity of the Premises do not conform to the minimum lot size or minimum front property line requirements of the Code.

He further offered his expert opinion that the Application will increase the average market value of the residences in the surrounding neighborhood. Some of the neighbors, including respondents/defendants Simpsons spoke in opposition to the Application. The neighbors questioned petitioners/plaintiffs' claim of ownership and the right to open and use or abandon Bryant and Preston Avenues. Petitioners/plaintiffs also allege there is no expert testimony in the record that the Application would have a detrimental effect on the character of

the neighborhood. Respondent/defendant Board questioned petitioners/plaintiffs regarding their ownership and rights to open and use or abandon Bryant and Preston Avenues, in light of the fact that respondent/defendant Village discontinued said Avenues in 1953 and 1954.

Respondent/defendant Board denied the Application and upheld the determination of the Building Department that the proposal did not meet the front property line requirements of the Code and denied the alternative request for variances.

In its determination that the Premises did not comply with the Front Property Line requirements of the Code, respondent/defendant Board found that Preston Avenue was not a street and therefore Lot C does not have a front property line of one hundred (100) feet, as its only front property line consisted of 17.32 feet on Willow Shore Avenue. Respondent/defendant Board further stated that, even if Preston Avenue is a "street" as defined in the Code, a variance would be required as Lot C would maintain street access on both Preston Avenue and Willow Shore Avenue, and that both street frontages must comply with the 100 foot Front Property Line requirement of the Code.

At the Hearing, petitioners/plaintiffs submitted a copy of the official zoning map of respondent/defendant Village and a certified copy of the Preston Map, which is the subdivision map that created Preston Avenue, certified to have been filed in the Office of the County Clerk in 1892. Respondent/defendant Board made a finding that Preston Avenue is not a "street" based on the following rationale: since Preston Avenue is represented by dashed lines on the "Zoning Map of the Incorporated Village of Sea Cliff" and the dashed line representing Preston Avenue contains the notation "not open," it cannot be considered a "Street" for front property line purposes. In addition, respondent/defendant Board found that Preston Avenue is not a "street" under the definitions provided in the Code because it is not a thoroughfare, is not presently improved and therefore does not "exist" or "legally exist." Respondent/defendant Board also questioned whether the Preston Map is a properly filed subdivision map. Respondent/defendant Board additionally stated that petitioners/plaintiffs failed to prove that they possess ownership

rights in Preston Avenue because, absent action taken by either abutting owner to acquire title in Preston Avenue after respondent/defendant Village's discontinuance of same, ownership remains in respondent/defendant Village. Respondent/defendant Board stated that the proposed variances would produce an undesirable change in the character of the neighborhood or detriment to nearby properties. The creation of a flag lot would be an anomaly and would create a substantial detriment to nearby properties and the neighborhood. The requested variances are substantial; there were feasible alternatives that petitioners/plaintiffs should consider. An adverse impact on the physical or environmental conditions in the neighborhood would occur because the proposed variances are at odds with the requirements of the Code. The hardship was self created. The petitioners/plaintiffs contend that Preston Avenue is a "street" according to the definition of the Code and can be used as a front property line. Respondent/defendant Board disagreed, finding that Preston Avenue is not a "street" and cannot be used as the front property line of the premises.

In making this determination, respondent/defendant Board first looked to the Code's definition of "Front Property Line," which is "[t]he dividing line between a lot and the street to which it is adjacent, as shown on the Official Zoning District Map." (§ 138-201). Respondent/defendant Board claims that since Preston Avenue is represented by dashed lines on the "Zoning Map of the Incorporated Village of Sea Cliff" and the dashed line representing Preston Avenue contains the notation "not open," Preston Avenue is "not shown on the Official Zoning District Map." Petitioners/plaintiffs allege that nowhere in the definition of Front Property Line is the term "shown" qualified; nor does the Code require a street to be named on the Official Zoning District Map in order to quality as a street; nor does the Code specifically dictate the nature of the line required to identify a street on the Official Zoning District Map or require a street to be open to qualify as a street in order to be counted as a front property line.

The term "street" is defined in the Code as "[a] thoroughfare dedicated and accepted by a municipality for public use, or legally existing on any map of a subdivision filed in a matter

provided by law." (§ 138-201). Respondent/defendant Board held that, since Preston Avenue is not presently improved, it cannot be a thoroughfare. Petitioners/plaintiffs assert that they have the right to and intend to open and improve Preston Avenue so that it can be considered a thoroughfare. Petitioners/plaintiffs also contend that subdivisions are routinely approved showing proposed streets, which are not yet opened and improved, but which nevertheless qualify as a "street" under the definition in the Code. Respondent/defendant Board also found that since Preston Avenue will be a dead-end street it will not quality as a thoroughfare. Whether it would qualify as a cul-de-sac pursuant to the Code as alleged by petitioners/plaintiffs was also questioned by respondent/defendant Board. The decision noted the exception to permit cul-de-sacs as long as the street leading to the cul-de-sac is not longer than five hundred (500) feet and has a radius of at least sixty (60) feet (Village Code § 145-9(B)(2)(b)). Respondent/defendant Board also found that the term *legally existing* "requires more than just a showing of a street on a map. It has to exist. . . . Absent its actual existence, it does not legally exist." Petitioners/plaintiffs argue that this would preclude any subdivision map that proposes new streets to be legitimate until the streets are created. The Decision faulted the validity of the Preston Map, questioning whether it is in fact a subdivision map and if it was filed in a manner provided by law. Petitioners/plaintiffs argue the map was recorded in the Office of the County Clerk, as demonstrated by the certification of the County Clerk, which was submitted to respondent/defendant Board and carries a presumption that, absent evidence to the contrary, the filing of the Preston Map was validly performed, on the date indicated, in a manner provided by law.

As part of the declaratory relief, petitioners/plaintiffs argue that they have ownership of and the right to open and use Preston Avenue for access to their property. In short, they assert that ownership of Preston Avenue is not, nor was it ever, owned by respondent/defendant Village. Petitioners/plaintiffs assert that Preston Avenue was created by the Preston Map. There is no notation on the Preston Map which would indicate that it was dedicated to

respondent/defendant Village. There is no formal act or offer of dedication of Preston Avenue in respondent/defendant Village's records. There is no formal acceptance of dedication in respondent/defendant Village's records. It is undisputed that Preston Avenue has never been improved by respondent/defendant Village or used by the general public. Therefore, it is clear as a matter of law that Preston Avenue was never formally dedicated to respondent/defendant Village. The only record respondent/defendant Board relies on in asserting respondent/defendant Village's "ownership" of Preston Avenue is a letter from the subdivider of the property (W.I. Preston) sent to the Board of Trustees, five years after he sold the property and four years after the filing of the Preston Map, indicating that he had "fully dedicated all said avenues or streets to the public as public highways and field maps of same in the County Clerk's office." The date of the letter was September 25, 1896. Petitioners/plaintiffs argue that, notwithstanding the assertion by Mr. Preston in his letter, there was no notation on the Preston Map that indicated that the streets were dedicated to respondent/defendant Village. The letter goes on to state that "[i]f there be any question as to my views being correct, I hereby desire to set said avenues or streets apart as public highways and as such under your control." Petitioners/plaintiffs allege this is of no legal consequence because he no longer owned or controlled the property when he wrote the letter and no further action was taken by either Mr. Preston or respondent/defendant Village to secure dedication.

Petitioners/Plaintiffs assert that, even if the streets were dedicated to respondent/defendant Village for public use, the ownership of the streets remained in the abutting property owners and were not transferred to respondent/defendant Village. The Verified Petition/Complaint further alleges that the series of deeds conveying title to the Premises to petitioners/plaintiffs and their predecessors in title refer to either: (1) the Preston Map and convey the premises by reference to lot numbers thereon or (2) convey the lots by metes and bounds description, indicating that the parcels are bounded by the four streets including Preston Avenue and provide for the conveyance of any interest that the transferors may have in Preston

Avenue, as well as the rights to use it for access to their property. Therefore, petitioners/plaintiffs conclude they have fee title to Preston Avenue, as well as the rights to use it for access to their property.

Next, petitioners/plaintiffs assert that the right to open and use Preston Avenue for access can be extinguished only by the united action of all lot owners for whose benefit the easement was created for, *i.e.*, petitioners/plaintiffs and respondents/defendants Simpsons, by abandonment, conveyance, condemnation or adverse possession. The Verified Petition/Complaint alleges that petitioners/plaintiffs and respondents/defendants Simpsons are the only interested property owners as they are the only property owners whose properties border the unopened area of Preston Avenue in question. Petitioners/plaintiffs and respondents/defendants Simpsons have never, in a united action, abandoned, conveyed, condemned or adversely possessed Preston Avenue. It is also alleged petitioners/plaintiffs' and respondents/defendants Simpsons' predecessors in title have never, in a united action, abandoned, conveyed, condemned or adversely possessed Preston Avenue. Consequently, petitioners/plaintiffs and respondents/defendants Simpsons have equal rights to open and use Preston Avenue or abandon it. Respondents/defendants Simpsons are already exercising their right, as they have improved the easterly half of Preston Avenue and are using it for access to their premises. Preston Avenue was discontinued as a respondent/defendant Village street on January 4, 1954. The effect of the discontinuance, petitioners/plaintiffs allege, was to extinguish the rights of the general public to use Preston Avenue. Petitioners/plaintiffs continue to allege respondent/defendant Village could not, and did not, extinguish the right of petitioners/plaintiffs and respondents/defendants Simpsons to use the roadway by its discontinuance.

The hybrid Verified Petition/Complaint sets forth Five Causes of Action. The First Cause of Action seeks a declaratory judgment against respondent/defendant Village. It is respondent/defendant Village's position that petitioners/plaintiffs do not have the authority to open and improve Preston Avenue because the discontinuance of Preston Avenue by

respondent/defendant Village eliminated any parties' rights to open Preston Avenue. It is petitioners/ plaintiffs' position that they have acquired affirmative rights to use, open and improve Preston Avenue because the conveyance of the Premises created an affirmative easement in favor of petitioners/plaintiffs who have the right to have Preston Avenue opened and improved to allow access to the premises, particularly Lot C, because at no point has the portion of the Preston Map affecting the relevant portion of Preston Avenue ever been abandoned, conveyed or condemned by petitioners/plaintiffs or respondents/defendants Simpsons. This position is supported by the fact that respondents/defendants Simpsons are already exercising their right, as they have improved the easterly half of Preston Avenue and are using it for access to their premises. The First Cause of Action against respondent/defendant Village seeks a declaratory judgment determining the rights and interests of the parties with respect to whether Preston Avenue can be opened and improved to respondent/defendant Village road specifications and declare that petitioners/plaintiffs be permitted to open and improve Preston Avenue to comply with the front property line requirements imposed by respondent/defendant Board.

The Second Cause of Action against respondents/defendants Simpsons for a declaratory judgment is similar to the First Cause of Action against respondent/defendant Village as regards to petitioners/plaintiffs' right to open and improve Preston Avenue. Moreover, the Second Cause of Action alleges that adverse possession is not available to extinguish a party's absolute right to use a street created by the filing of a subdivision map. In the alternative, petitioners/plaintiffs allege that respondents/defendants Simpsons cannot establish adverse possession over the unopened portion of Preston Avenue because respondents/defendants Simpsons' use has not been adverse to petitioners/plaintiffs.

The Third and Fourth Causes of Action are for a permanent injunction against respondents/defendants Simpsons, enjoining them from trespassing upon and using petitioners/plaintiffs' property to dump their yard waste, refuse and garbage.

The Fifth Cause of Action pursuant to Article 78 of the CPLR against respondent/defendant Board seeks to annul the decision of the Zoning Board on the ground that it is not based on substantial evidence, is arbitrary and capricious and incorrect as a matter of law.

In order for a dedication to occur, there must be proof of three elements: (1) the owner's intent to donate the land and to relinquish his exclusive rights; (2) an acceptance by the municipality and (3) the public's use of the land as a public highway. *See Carman v. Hewitt*, 105 N.Y.S.2d 239 (N.Y. Sup. Ct Suffolk County 1951).

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *See Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985).; *Fox v. Wyeth Laboratories, Inc.*, 129 A.D.2d 611, 514 N.Y.S.2d 107 (2d Dept. 1987); *Royal v. Brooklyn Union Gas Co.*, 122 A.D.2d 132, 504 N.Y.S.2d 519 (2d Dept. 1986). Petitioners/plaintiffs have made an adequate *prima facie* show of entitlement to summary judgment in the First and Second Causes of Action granting them the right to open Preston Avenue, subject respondent/defendant Village road specifications.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *See Friends of Animals, Inc. v. Associated Fur Mfgrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Conclusory statements are insufficient. *See Sofsky v. Rosenberg*, 163 A.D.2d 240, 559 N.Y.S.2d 873 (1st Dept. 1990) *aff'd* 76 N.Y.2d 927, 563 N.Y.S.2d 52 (1990); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). *See also Indig v. Finkelstein*, 23 N.Y.2d 728, 296 N.Y.S.2d 370 (1968); *Werner v. Nelkin*, 206 A.D.2d 422, 614 N.Y.S.2d 66 (2d Dept. 1994); *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v. Petrides*, 80 A.D.2d 781, 437 N.Y.S.2d 1

(1st Dept. 1981) *app dism.* 53 N.Y.2d 1028, 442 N.Y.S.2d 496 (1981); *Jim-Mar Corp. v. Aquatic Construction, Ltd.*, 195 A.D.2d 868, 600 N.Y.S.2d 790 (3d Dept. 1993) *lv app den.* 82 N.Y.2d 660, 605 N.Y.S.2d 6 (1993).

In opposition to both the First and Second Causes of Action wherein petitioners/plaintiffs seek a determination of the rights and other legal relations of the parties in respect to open and improve Preston Avenue to respondent/defendant Village road specifications and a determination that petitioners/plaintiffs be permitted to open and improve Preston Avenue to comply with the front property line requirements imposed by respondent/defendant Board, respondent/defendant Village asserts there are also issues relating to ownership rights regarding the land area described as Bryant Avenue and a 1250 square foot portion of parcel C. Respondent/defendant Village contends that, until these title issues are resolved, no relief can be granted by the Zoning Board. Nevertheless, respondent/defendant Board proceeded with a hearing and rendered a decision. Moreover, respondent/defendant Village asserts that petitioners/plaintiffs would also need a determination as to whether they would be able to construct a roadway in accordance with the respondent/defendant Village road and Village Code requirements. Respondent/defendant Village opines that approval regarding the configuration of the road would necessitate review by the Village Planning Board and cannot be assumed even if the initial relief (rights of the parties in Preston Avenue) is finally determined by the Court. Respondent/defendant Village argues that without an application having been processed before the Village Planning Board and without the Planning Board as a party, petitioners/plaintiffs would not be entitled to the full relief they seek in regard to the First Cause of Action. *See Matter of Bosico v. Mertze.*, 71 A.D.2d 637, 418 N.Y.S.2d 784 (2d Dept. 1979).

The attorneys for respondents/defendants Simpsons, who challenge the Second Cause of Action, assert that petitioners/plaintiffs have not produced any deed or other instrument that expressly grants petitioners/plaintiffs either (1) title to the westerly half, or any portion of Preston Avenue or (2) an easement in any portion of Preston Avenue.

The only proof offered that Preston Avenue was dedicated to respondent/defendant Village is the letter from William Preston dated September 25, 1896, which was never fully authenticated and which attempts to convey the roadbed of streets that he no longer owned. Even if the letter is recognized as an "ancient document" it does not establish as a matter of law the elements required to be a dedication of a street.

A municipality's acceptance can be implied with official acts that treat the parcel as a street, such as an ordinance to have the street graded or paved. *See In re Hunter*, 1 Bedell 542, 163 N.Y. 542 (1900). The municipality may also exercise supervision and control of the street, approving the installation of public utilities and the adoption of a city map laying out streets. *See Peetrie v. City of Rochester*, 206 Misc. 96, 132 N.Y.S.2d 501 (N.Y. Sup Ct. Monroe County 1954). There have been so such official acts regarding Preston Avenue.

Mr. Preston's offer was made only after the map was filed and only after he conveyed the Premises. Respondent/defendant Village's act of placing the street name on the official map alone without ever paving or maintaining the street or taking ownership and control, does not constitute an acceptance. Moreover, all parties concede that Preston Avenue was never a public road, but rather has always been maintained by private parties. In fact, respondent/defendant Wendy Rosow a/k/a Wendy Rosow-Simpson specifically states in her affidavit that Preston Avenue "has never been physically opened or used as a public road."

Respondents/defendants Simpsons have not established an adverse possession claim or a prescriptive easement over the westerly hall of Preston Avenue. The affirmative defenses addressed to the First and Second Causes of Action are hereby **DISMISSED**.

To prevail on a claim to title by adverse possession, the claimant must establish that the character of the possession is "hostile, under a claim of right, actual, open or notorious and continuous for the statutory period of ten years." *Ray v. Beacon Hudson Mtn. Corp.*, 88 N.Y.2d 154, 643 N.Y.S.2d 939 (1996). Respondents/defendants Simpsons cannot have a hostile claim to property (a) which they already own and (b) that they have a right to use by an express easement.

Respondents/defendants Simpsons own the easterly half of Preston Avenue, just as petitioners/plaintiffs own the westerly half. Where an easement in a street is created by reference to a filed map, it "can be extinguished only by the unified action of all lot owners for whose benefit the easement was created." *O'Hara v. Wallace*, 83 Misc.2d 383, 371 N.Y.S.2d 570 (N.Y. Sup Ct, Suffolk County 1975) *as modified on other grounds* 52 A.D.2d 622, 382 N.Y.S.2d 350 (2d Dept. 1976). As with petitioners/plaintiffs' property, title to easterly half of Preston Avenue, along with an easement across the entire width of the street, was conferred with the filing of the Preston Map and the conveyances making reference to the property being bounded by the streets depicted on the Preston Map. Respondent/defendant Wendy Rosow a/k/a Wendy Rosow-Simpson's Affidavit does not substantiate any claims for adverse possession. Respondent/defendant Wendy Rosow a/k/a Wendy Rosow-Simpson states that she "continuously maintained the driveway, driveway apron, and hedgerow ever since our purchase." Although she concedes that only a portion of the hedgerow is located on the westerly half of Preston Avenue, petitioners/plaintiffs assert that most of the hedgerow is located on the apparent center-line of Preston Avenue with hedges also protruding onto her easterly half of Preston Avenue. Respondent/defendant Wendy Rosow a/k/a Wendy Rosow-Simpson does not establish any element of adverse possession because she does not claim that she crosses over the center line of Preston Avenue or that she maintains the hedges on petitioners/plaintiffs' westerly half of the street. The fact that she maintains her side of the street does not prove an adverse claim to the westerly portion of the roadway that is improved with the hedgerow. Respondent/defendant Wendy Rosow a/k/a Wendy Rosow-Simpson also asserts that she installed Belgium block curbing along both sides of her driveway and installed poles and fixtures and various plantings along the sides of the driveway. Petitioners/plaintiffs assert that the driveway, including the Belgium block and other improvements, is located entirely on the easterly half of Preston Avenue which is owned by respondents/defendants Simpsons. Nor has there been any acquiescence to a boundary line between the parties, because petitioners/plaintiffs and respondents/defendants

Simpsons and their respective predecessors-in-title all knew the hedgerow was partially on petitioners/plaintiffs' property – respondents/defendants Simpsons concede that as well. The application of this doctrine requires "a clear demarcation of a boundary line and proof that there is mutual acquiescence to the boundary by the parties such that it is 'definitely and equally known, understood and settled.' " *McMahon v. Thornton*, 69 A.D.3d 1157, 897 N.Y.S.2d 247 (3d Dept. 2010). Respondents/defendants Simpsons did not provide any evidence of a clear demarcation of a boundary line given that the hedges meander over the respective parties' property lines. Respondents/defendants Simpsons also did not provide evidence that it was mutually understood that the hedges would reflect a boundary line or that such understanding persisted for more than a ten-year statutory period of adverse possession.

It is the determination of this Court that petitioners/plaintiffs have the right to open and improve Preston Avenue subject to making an application to and receiving the approval of the Village Planning Board.

The Court will next consider petitioners/plaintiffs' application to annul the determination of respondent/defendant Zoning Board.

Respondent/defendant Zoning Board determined that, even if Preston Avenue is considered a street, Lot C does not meet the front property line requirement of the Code because one hundred (100) feet of front property line would still be required on Willow Shore Avenue. Lot C would be considered a "double front lot" according to the definitions in Section 138-201 of the Code. A "double front lot" is distinguished in the Code from a "corner lot" and a "front lot."

In the definition of "front property line," Section 138-201 of the Code distinguishes between these two lot configurations in providing that:

> the front property lines of a corner lot shall consist of the dividing lines between the lot and each of the streets to which it is adjacent. A corner lot shall have as many front property lines as it has street lines.

The definition further provides:

> a double front lot shall have two front property lines, each being the dividing line between the lot and the streets to which it is adjacent.

Regarding minimum front property line requirements, Section 138-506 of the Code provides that:

> No building shall be erected on any lot having a front property line of less than 100 feet.

Section 138-510 goes on to say that in the Residence B zoning district:

> Building erected on corner lots shall comply with the minimum front property line and front property line setback requirements for each street upon which the lot abuts.

Petitioners/plaintiffs argue that Lot C is not required to have a one hundred (100) foot front property line at Willow Shore Avenue, even if Preston Avenue is a street. Petitioners/plaintiffs contend that the Code specifically delineates that a corner lot shall comply with the minimum front property line and front property line setback requirement for each street that it abuts.

Petitioners/plaintiffs further assert there is no similar provision that imposes the requirement that each front lot of the double front lot property be one hundred (100) feet. Petitioners/plaintiffs argue that using the rules of statutory construction, the double front lots are not subject to the same restrictions as corner lots in its requirements that lots comply with the minimum one hundred (100) feet property line for each street upon which it abuts. Petitioners/plaintiffs argue that zoning laws must be strictly construed, and if respondent/defendant Village intended for double front lots to have the same dimensional requirements as corner lots it would have expressly provided for it as it did in defining a front lot and a corner lot. *See Matter of Allen v. Adami*, 39 N.Y.2d 275, 383 N.Y.S.2d 565 (1976); *Matter of Baker v. Town of Islip Zoning Bd. of Appeals,* 20 A.D.3d 522, 799 N.Y.S.2d 541 (2d Dept.

2005). Respondent/defendant Zoning Board agreed that Willow Shore Avenue frontage constitutes a front property line. If there is a front property line on Willow Shore Avenue and a front property line on Preston Avenue, then the 17.32 foot property length is inadequate. It must be one hundred (100) feet. Petitioners/plaintiffs' arguments regarding the required lengths of each of the front lots on a double front lot is misplaced. In challenging this conclusion, petitioners/plaintiffs refer to the definitions of "corner lots" and "double front lots" and contend that such lots must be treated differently for front property line and front property line setback requirements. Petitioners/plaintiffs argue that the Village Code provision that clarifies that corner lots are subject to a minimum front property line and front property line setback requirements indicates an intent to apply such restrictions to corner lots and, without such a reference for double front lots, there should be no corresponding limitation on double front lots. Petitioners/plaintiffs do not recognize that a double front lot contains the word "front" and that the term corner lot does not contain the term "front." As a result of this distinction, there is no rational basis to require a municipality to further clarify that double "front" lots are subject to the same restrictions as "corner lots" or even single front lots. In a double front lot situation, both frontages are quite simply front lot lines subject to the front property line and front property setback requirements. This is further demonstrated by a review of some of the relevant Village Code provisions relating to property lines. In zoning nomenclature, a dividing line between a parcel of land and a street has to be a front, rear or side property line. Respondent/defendant Village defines each of these lines. A "front property line" is the "dividing line between a lot and the street to which it is adjacent. . . ." This applies to single front lots (fronting on only one street), double front lots and corner lots. A corner lot has as many front property lines as it has street lines. *See* definition of "Front Property Line," Village Code § 138-201, subsection B. A double front lot has two front property lines, each being the lines between the lot and the street to which it is adjacent. *See* definition of "Front Property Line," Village Code § 138-201, subsection C . *See also* definition of double front lot in Village Code § 138-201.1(E). Lot lines that are not

front property lines must be either rear or side property lines. Village Code § 138-201 defines a "side property line" as a boundary line connecting the front and rear property lines. Side property lines are dependent on which lines are deemed to be the front or rear property lines. A "rear property line" is a "boundary line of a lot opposite to the front property line. . . ." See Village Code § 138-201 ("rear property line" definition, subsections B and C).

If Preston Avenue was deemed to be a street, then, according to petitioners/plaintiffs, the Premises would constitute a "double front lot." As a double front lot, there is "no rear property line" and the boundary line adjoining Willow Shore Avenue is a "front property line." Thus, whether or not Preston Avenue is a street, the dividing line between the Premises and Willow Shore Avenue is a front property line. As such, the 17.32 foot width is insufficient where one hundred (100) feet is required. Respondent/defendant Board also took notice of the concerns of a neighbor that there exists a serious safety issue on Willow Shore Avenue during church services as the street is narrow, vehicles park on both sides of the street and parking would be eliminated to accommodate two additional driveways. Further, as there is no rear property line and there are two front property lines bounding the Premises (a double front lot), Village Code § 138-509 provides another restriction that limits the development of the Premises in the configuration proposed. Pursuant to § 138-509, "[n]o building shall be erected on any lot having a width at the setback line which is less than [100 feet]." As the setback line requirement is twenty-five (25) feet from the front property line (Village Code § 138-508) and the Premises are only approximately 17.32 feet in width for a depth of approximately one hundred (100) feet running east from Willow Shore Avenue, the Premises clearly is substantially deficient in width. Moreover, the statutory reference to Village Code § 138-510 relating to corner lots as referred to in petitioners/plaintiffs' argument makes no mention of the width of a lot. Thus, in trying to differentiate corner lots from double front lots based on such reference, the argument would not extend to the width of a lot. Accordingly, even utilizing petitioners/plaintiffs' argument would not lead to a change in the requirement that the lot be at least one hundred (100) feet wide at the

setback line.

Moreover, respondent/defendant Zoning Board stated the applicants also submitted plans indicating there were feasible alternatives in compliance with the Village Code that petitioners/plaintiffs could have considered.

In reviewing a determination of a zoning board, courts should presume that the decision was correct. See 2 Anderson, *New York Zoning Law and Practice* § 26.17 [3d ed.]. However, a determination of a zoning board will be set aside if it is arbitrary and capricious. *See Preston v. Board of Zoning Appeals of Town of North Hempstead*, 229 A.D.2d 585, 646 N.Y.S2d 41 (2d Dept. 1996). A zoning board's determination "must be sustained if it has a rational basis and is supported by substantial evidence." *Matter of Toys "R" Us v. Silva,* 89 N.Y.2d 411, 645 N.Y.S.2d 100 (1996). The Court in *Cowan v Kern*, 41 N.Y.2d 591, 394 N.Y.S.2d 579 (1977) stated:

> "The crux of the matter is that the responsibility for making zoning decision has been committed primarily to quasi-legislative, quasi-administrative boards composed of representatives from the local community. Local officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community. Absent arbitrariness, it is for locally selected and locally responsible officials to determine where the public interest in zoning lies."

Even where a contrary determination would be reasonable and sustainable, a reviewing Court may not substitute its judgment for that of the agency if the determination is supported by substantial evidence. *See Matter of Consolidated Edison Co. of N.Y. v. New York State Div. of Human Rights, on Complaint of Pamela M. Easton*, 77 N.Y.2d 411, 568 N.Y.S.2d 569 (1991). Substantial evidence has been defined as "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." *300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y.2d 176, 408 N.Y.S.2d 54 (1978).

The decision of respondent/defendant Zoning Board was based on full consideration of all the evidence and was neither arbitrary, capricious or irrational. Accordingly, petitioners/plaintiffs' motion (Seq. No. 01), pursuant to Article 78 of the CPLR, for an order annulling the Decision of respondent/defendant Zoning Board of Appeals of the Incorporated Village of Sea Cliff ("Zoning Board"), dated May 23, 2011, which denied petitioners' application to subdivide their property into three residential lots is hereby **DENIED**.

The portion of the motion (Seq. No. 02) by petitioners/plaintiffs in regard to the **First and Second Causes of Action** for an order to open and improve Preston Avenue is hereby **GRANTED subject to** respondent/defendant Village road specifications and the approval of the Village Planning Board.

Notwithstanding the fact that petitioners/plaintiffs may have prevailed on the First and Second Causes of Action, that determination does not vitiate the final decision of respondent/defendant Zoning Board. *See Ellsworth Realty Co. v. Kramer*, 268 A.D. 824, 49 N.Y.S.2d 512 (2d Dept. 1944).

The portion of petitioners/plaintiffs' motion (Seq. No. 02), pursuant to CPLR § 3212(e)(1), for an order severing the Third and Fourth Causes of Action in the Verified Petition/Complaint from the final judgment rendered on this motion is hereby **GRANTED**.

The portions of petitioners/plaintiffs' motion (Seq. No. 02), pursuant to CPLR § 3212(b) and (h), for an order dismissing respondents/defendants Simpsons' First Counterclaim on the basis that they have not alleged a proper claim under Section 76-a(1) of the Civil Rights Law; and, pursuant to CPLR § 3212(a), for an order collectively dismissing respondents/defendants' affirmative defenses and objections in point of law is hereby **DENIED**.

In the event the parties contemplate discontinuing the balance of the action (the Third and Fourth Causes of Action and the Counterclaim), executed stipulations of discontinuance should be forwarded to Chambers. Otherwise, the parties shall appear as set forth below for a Preliminary Conference in regard to the remaining Causes of Action and the Counterclaim.

It is thereby ordered that the parties shall appear for a Preliminary Conference on May 10, 2012, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
March 27, 2012

ENTERED
MAR 29 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE