

Town of German Flatts
For Immediate Release
April 4, 2019
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Press Release

Court Rejects Latest Effort by Owners of Creekside Mobile Home Park to Delay Restoration Work

On March 29, 2019, Supreme Court Justice Charles C. Merrell issued a decision denying the latest request by William and Virginia Jaquish, the owners of the former Creekside Mobile Home Park, to delay doing remedial work on the property until their latest lawsuit against the Town of German Flatts is resolved. The court did grant the Jaquishes an extension to June 1, 2019 to complete the work due to inclement winter weather, but will impose a fine of \$250 per day after that date until the work is completed.

Despite being under multiple court orders since the fall of 2016 to complete the work, the Jaquishes have consistently refused. The Jaquishes have previously been found in contempt of court and were ordered to pay the town \$7,312 for its attorney's fees. In last week's Order, Judge Merrell ordered the Jaquishes to pay the town an additional \$7,744 in attorney and engineering fees incurred in the summer of 2018 trying to bring the Jaquishes into compliance. The Court also ordered the Jaquishes to deposit by May 1, 2019, \$22,500 in an escrow account held by the town attorney to pay for future fines and possibly completion of the project if the Jaquishes fail to complete the work.

On December 12, 2018, the Jaquishes commenced their second lawsuit against the town, despite the most recent court order directing the Jaquishes to restore the site as previously ordered. It was this lawsuit that was the subject of the request for a stay. The primary claim in the lawsuit is that the town board refused to consider an October 25, 2018 application from the Jaquishes for a "variance" from the town's Flood Damage Prevention Law. The town refused because the Jaquishes had previously applied for a permit for their illegal fill and structures and that permit was denied. As Judge Merrell noted in his decision denying the stay, that previous

Town Board decision was final and binding and had been fully litigated in the town's favor. Any request for a "variance" from the flood law's standards either was made during the initial application or should have been and the court would not allow an attempt to further litigate the case.

The Town Board has filed a motion to dismiss the entirety of the new lawsuit. The court will hear argument on that motion on April 11, 2019. The Town Board is confident that the court will grant the town's motion and dismiss the case.

Town Board member Dennis Mowers issued this statement regarding the court's decision:

"We are very pleased that once again the courts are upholding the rule of law and requiring that this property be restored. The Town has been patient with Mr. and Mrs. Jaquish and has offered to work with them towards the proper restoration of the property. They have consistently refused. The town board must insist that the property and the floodway be restored not only to protect the health and safety of town residents, but to ensure that the Town can continue to participate in the Federal Flood Insurance Program. We are under orders from FEMA to rectify the situation at Creekside. If we do not continue to enforce the flood law, FEMA has made it very clear that German Flatts' continued participation on the federal insurance program is in jeopardy. We will not allow the selfish desires of a few people to endanger the livelihood of the community."

The Town Board regrets that it has to continue to expend taxpayer resources to pursue the case. Fortunately two different judges have offset the cost to taxpayers by ordering the Jaquishes to pay over \$15,000 to the Town for its fees. While that does not cover all of the town's expenses, it is a significant amount. It is also fortunate that the Jaquishes' new lawsuit has triggered the town's insurance policy and the town's insurer has agreed to cover all of the town's legal expenses for the new lawsuit.

At a Term of the Supreme Court of the State of New York, held in and for the County of Herkimer at Herkimer, New York on the 10th day of January, 2019.

PRESENT: HON. CHARLES C. MERRELL
Justice of the Supreme Court

STATE OF NEW YORK
SUPREME COURT COUNTY OF HERKIMER

William Jaquish and Virginia Jaquish

Petitioners,

v.

Town Board of the Town of German Flatts, and
Town of German Flatts, New York,

Respondents.

**DECISION AND
ORDER**

Index No. 2016-101466
RJI No. 21-16-043

STATE OF NEW YORK
SUPREME COURT COUNTY OF HERKIMER

William Jaquish and Virginia Jaquish

Petitioners-Plaintiffs,

v.

Town Board of the Town of German Flatts, and
Town of German Flatts, New York,

Respondents-Defendants.

Index No. 2018-105065
RJI No. 21-18-194

APPEARANCES: KNAUF SHAW LLP
ALAN J. KNAUF, Esq.
Attorneys for Petitioners-Plaintiffs

YOUNG / SOMMER LLC
JEFFREY S. BAKER, Esq.
Attorneys for Respondents-Defendants

Merrell, C. C., J.S.C.

William and Virginia Jaquish, Petitioners in the above-entitled proceedings,
Jaquish v. Town Board, Index No. 2016-101466 ("Action II"), and Jaquish v. Town

Board, Index No. 2108-105065 ("Action III") own the Creekside Mobile Home Park, located on Route 168 in the Town of German Flatts, Herkimer County ("Property"), which is the subject of these proceedings.¹

Presently before the Court is Petitioners' motion for a Stay or Extension pursuant to CPLR §§2201 and 7805, of the Court's Order, dated October 25, 2018 ("October 2018 Order"), whereby Petitioners are required to perform work ("Work") on their Property as a result of violations of Local Law No. 2 of 1987, "Flood Damage Prevention" ("Flood Law"), enacted by the Town Board of German Flatts ("Town"). The Court's October 2018 Order enforces a previous injunction and subsequent Order of Contempt by Judge Siegel entered on September 18, 2017. Petitioners now seek to have the contempt proceedings in Action II stayed, and/or any deadline or requirements in Action II stayed or extended, as set forth in the Court's October 2018 Order, until Action III is concluded and the Town entertains both Petitioners' Application to Renew their Mobile Home Park Permit and Application for a variance from the Flood Law.

Action III involves Petitioners' renewal application filed with the Town on October 25, 2018 ("Renewal Application"), seeking to renew their Mobile Home Park Permit pursuant to the Town's Local Law No. 1 of 1987 ("Mobile Home Park Law"). Action III also contests denial of a variance application filed by Petitioners on November 5, 2018 ("Variance Application"), seeking a variance from the Flood Law

¹ A related action ("Action 1"), entitled Town Board of the Town of German Flatts and Town of German Flatts v. William Jaquish and Virginia Jaquish, Index No. 101064, was consolidated with Action II on consent of the parties as noted in Judge Siegel's Order entered November 4, 2016.

which would essentially nullify the work ordered by the Court to remedy prior violations of the Flood Law. The Town Board issued a letter dated November 18, 2018 refusing to entertain the request for renewal of Petitioners' Mobile Home Park Permit, stating the Town would not consider the application until the work Ordered by the Court was completed. The Town Board also issued a letter dated November 12, 2018 which denied Petitioner's request for a variance from the Flood Law.

On December 12, 2018, Petitioners filed Action III, an Article 78 proceeding against the Town and Town Board, seeking an Order and Judgment pursuant to CPLR Article 78 and sections 3001 and 3212, 42 U.S.C. §1983, and/or other legal authorities: (1) granting Petitioners' Renewal Application of their Mobile Home Park Permit; (2) granting Petitioners' Variance Application under the Flood Law; (3) ordering that the Town entertain both the Renewal and Variance Application; (4) declaring that Creekside Park is grandfathered from the Mobile Home Park Law; (5) declaring that the Town Board cannot legally act as the board of appeals under the Flood Law; and (6) awarding Petitioners their costs, expert fees and attorney fees, pursuant to 42 U.S.C. §1988 and EDPL §§701 and 702. Action III is scheduled to be heard on April 11, 2019.

CPLR 2201 provides that "except where otherwise prescribed by law, the Court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just". Petitioners contend a stay is warranted to prevent an unnecessary multiplicity of suits, the risk of inconsistent adjudications and potential waste of judicial resources. Petitioners further contend a stay of further enforcement proceedings with respect to any administrative determination under review is

authorized by CPLR 7805. CPLR 7805 further provides that in granting such a stay the court may condition same on the terms including notice, security and payment of costs.

In determining whether to grant a stay pursuant to CPLR 7805 the courts may apply the criteria used to assess an application for a preliminary injunction: (1) petitioners' likelihood of success on the merits; (2) whether petitioners will suffer an irreparable injury in the absence of provisional relief; and (3) whether the balancing of the equities favor the petitioners. See e.g. Jarrett v. Westchester County, 166 Misc2d 777 (1995); Melvin v. Union College, 195 AD2d 447 (2nd Dept. 1993); McKinney's Consolidated Laws of NY Practice Commentary to CPLR §7805.

Petitioners' motion for a stay of this Court's October 2018 Order, which was necessary to enforce Judge Siegel's Judgment, Order and Injunction entered November 4, 2016 and his subsequent Order and Judgment of Sanctions for Contempt of Court entered September 18, 2017, is denied.

Petitioners have not shown a likelihood of success on the merits with respect to the variance requested. Action III is based in part on the Town's refusal to consider Petitioners' Application for Variance from the Flood Law whereby Petitioners seek to avoid performing the Court Ordered remedial work, which has been litigated over several years as painfully detailed in the moving papers and prior Court Orders, culminating in a finding of the contempt against Petitioners and their continuing inability to complete the remedial work. With respect to the variance application, the issues now raised by Petitioners were or could have been previously sought administratively and/or raised in Actions I and II. These Actions were finally

determined after affirmance by the Appellate Division (Jaquish v. Town Board of Town of German Flatts, 160 AD3d 1372 [2018]). It appears from the motion papers that at no point prior to the final determination in those Actions did Petitioners seek a variance from the Flood Law. Many of the arguments and issues now raised in support of the variance request were repeated to this Court when it issued its October 2018 Order. The Town's previous decision has been fully litigated and would appear to be final and binding.

Further, at this late stage of the litigation, irreparable harm is not shown. Petitioners have commenced the work ordered by the Court but have left it unfinished over the winter. The Court has considered the affidavits of Petitioners' engineer and finds them unpersuasive with respect to a showing of irreparable harm. Petitioners' delays in seeking this stay and persistent litigation of this matter, while their right, cut against any legitimate claim of irreparable harm. Given the history of this litigation, as set forth in the previous Orders of Judge Siegel and this Court and the failures of Petitioners to complete the work ordered, the equities do not tip in Petitioners' favor.

Nonetheless, the Court will note that some work was performed in October and November of 2018 and that late 2018 was unusually wet with an early snowfall. The Court inspected the property with counsel present prior to the commencement of the work and agrees that recent inclement weather reasonably delayed completion of the work. The Court will therefore conditionally grant Petitioners' motion for an extension to perform the work which is the subject of the contempt proceeding in Action II. It is therefore Ordered that:

1. The Court's previous Order of October 2018 is modified to the extent that the

fine of \$250.00 per day will now commence on June 1, 2019 and continue until a certificate of substantial completion is issued by Petitioners' engineer.

2. In lieu of the \$50,000 bond previously Ordered, which Petitioners' claim to be unable to secure, Petitioners are Ordered to deposit on or before May 1, 2019 the sum of \$22,500.00 with Town Attorney to be held in escrow as security for the payment of fines and completion of any unfinished work, subject to further Order of the Court.
3. The Petitioners shall also pay to the Town of German Flatts on or before June 1, 2019 the total sum of \$7,744.00 consisting of attorney fees of \$5,000.00 and engineering fees of \$2,744.00 as set forth in the Court's October Order, as reimbursement to the Town for the cost of litigating and overseeing the work from June 1, 2018 to September 26, 2018 which was necessary as a result of Petitioners' violations of the Flood Law. The Court had reserved on awarding fees when it issued the October Order and finds that the engineering fees and a portion of the attorney fees are a direct result of Petitioners' failure to comply with Judge Siegel's Order in completing the work. The Town may immediately enter this Order with the Herkimer County Clerk against Petitioners as Judgment for said sum, without costs. Interest, as allowed by law, will accrue on said sum beginning on June 1, 2019.
4. In the event the work is not substantially completed by August 1, 2019 Respondents may apply to the Court for further relief hereunder.

It is further Ordered that Petitioners' motion for a stay is in all other respects denied.

The foregoing constitutes the Decision and Order of the Court. So Ordered.

ENTER

Dated: March 29, 2019



Hon. Charles C. Merrell
Justice of the Supreme Court

This Decision and Order is based on the Court's consideration of the following pleadings:

1. Notice of Motion dated December 21, 2018;
2. Affirmation of Alan J. Knauf affirmed December 21, 2018;
3. Petitioners' Memorandum of Law dated December 21, 2018;
4. Opposition Affirmation of Jeffrey S. Baker dated January 3, 2019;
5. Opposition Affidavit of Anthony Klimek sworn to January 3, 2019;
6. Reply Affidavit of Robert R. Ellison P.E. sworn to January 9, 2019;
7. Reply Affidavit of William Jaquish sworn to January 9, 2019;
8. Notice of Petition and Petition in Action III dated December 21, 2018 (Index Number 2018-105065); and
9. Affidavit of Jeffrey S. Baker in support of fee award, sworn to September 28, 2018.