DECISION BY THE TOWN BOARD OF THE TOWN OF GREENBURGH IN THE
MATTER OF 100 OLD ARMY ROAD

APPEAL OF THE PRELIMINARY APPROVAL OF A TREE PERMIT TP-05-42

HEARING DATE: May 29, 2008

MEMBERS PRESENT: Paul J. Feiner, Supervisor
FOR CONFERENCE
Diana Juettner, Councilwoman
(10/30/07)
Francis Sheehan, Councilman
Steve Bass, Councilman
Eddie Mae Barnes, Councilwoman

MEMBERS PRESENT: Paul J. Feiner, Supervisor
FOR CONFERENCE
Diana Juettner, Councilwoman
(11/15/07)
Francis Sheehan, Councilman

MEMBERS PRESENT: Paul J. Feiner, Supervisor
FOR HEARING (5/29/08)
Diana Juettner, Councilwoman
Francis Sheehan, Councilman
Kevin Morgan, Councilman
Sonja Brown, Councilwoman

MEMBERS PRESENT: Paul J. Feiner, Supervisor
FOR DECISION
Diana Juettner, Councilwoman
Francis Sheehan, Councilman
Kevin Morgan, Councilman
Sonja Brown, Councilwoman

APPEARANCES: Collier, Halpern, Newberg, Nolletti & Bock, LLP
Attorneys for Appellants
By: Paul David Sirignano, Esq.

Shamberg Marwell Davis & Hollis, P.C.
Attorneys for Owners of 100 Old Army Road
By: John S. Marwell, Esq. and Megan K. Smith, Esq.

Thomas Madden, Deputy Commissioner
Community Development and Conservation

Aaron Schmidt, Forestry Officer
Community Development and Conservation

PROPERTY LOCATION: 100 Old Army Road
SUMMARY:

Appellants Julie and James Hallowell (100 Ardsley Road), Zoe and Ira Lazar (101 Old Army Road), Michele and Mike Sigal (147 Old Army Road) and Holly and David Younger (111 Old Army Road) appeal from the Preliminary Approval of Tree Removal Permit TP-05-42 issued by the Town Forestry Officer for the removal of trees pursuant to an application to construct a single family dwelling at 100 Old Army Road. The appeal is hereby denied for the reasons set forth in the Findings section below.

HISTORY:

On March 25, 1999, ("Applicants"), the owners of a 2.7 acre property at 100 Old Army Road, situated in an R-20 One Family Residence Zoning District, submitted an application to the Town’s Department of Community Development and Conservation to subdivide the property into three separate building lots. On February 7, 2001, the Town Planning Board, acting as lead agency pursuant to the State Environmental Quality Review Act (SEQRA), issued a Positive Declaration of Environmental Significance citing environmental concerns requiring additional study of the impacts of the proposed three-lot subdivision. On December 11, 2002, subsequent to the SEQRA determination, the owners of the property forwarded a letter to the Town Planning Board withdrawing their application for the proposed three-lot subdivision.1

On May 14, 2003, Applicants instead submitted an application for a Tree Removal Permit to the Town Forestry Officer, pursuant to §260-4(D) of the Town Code, proposing the removal of thirty-nine (39) trees to allow for the construction of a single-family dwelling. No subdivision application was required pursuant to Chapter 285 of the Town Code since the building permit sought was for the construction of a single-family home on an existing previously subdivided lot. Applicants subsequently submitted revisions to the Tree Removal Permit application on August 30, 2004 and February 23, 2005. On November 9, 2005, Applicants submitted a letter to the Department of Community Development and Conservation withdrawing said Tree Removal Permit application.


On September 28, 2007, the Town Forestry Officer issued a Notice of his intent to approve Applicants’ Tree Removal Permit application (“the Preliminary Approval”) to neighbors adjoining 100 Old Army Road pursuant to §260-4(D)(6) of the Town Code. In response, four of the neighboring property owners (“Appellants”) filed Notices of Appeal on March 24, 2005, October 9, 2007 and October 12, 2007, respectively, seeking to deny the Town Forestry Officer’s Preliminary Approval of Applicants’ original and subsequent Tree Removal Permit applications.

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1 The file of the Town Forestry Officer has been deemed part of the administrative record of the May 29, 2008 proceeding.
Appellants in their Notices of Appeal, and at an evidentiary hearing that was conducted by the Town Board on May 29, 2008, presented two principal arguments as the basis for their appeal, namely: (1) that the Town Forestry Officer, in issuing the Preliminary Approval, did not sufficiently consider the factors outlined in Chapter 260 of the Town Code governing the granting of Tree Removal Permits and (2) that Applicants failed to comply with SEQRA and Chapter 200 of the Town Code prior to the Town Forestry Officer issuing the Preliminary Approval on Applicants’ application for a Tree Removal Permit.

FINDINGS:

First, the jurisdiction of the Town Board in Tree Removal Permit appeals is governed by §260-4D(7)(b), which states: “Any person aggrieved, affected or interested in the determination or decision of the Forestry Officer shall have the right, within 10 days from receipt of the decision of the Forestry Officer, to appeal to the Town Board, which shall review the decision.”

Second, the Town Board concludes that applicable standard of review governing determinations of the Forestry Officer with respect to Tree Removal Permits is the well-established standard of review used by courts requiring that municipal determinations not be arbitrary, capricious or unreasonable. This scope of review acknowledges that local officials are generally familiar with local conditions and are often sensitive to planning decisions which affect the development of their community. While Appellants contend that some lesser standard should be applicable given that the Town Board is not a reviewing court but consists of elected officials answerable to the public and not bound by the determinations of Town staff,² the Town Board is persuaded that the arbitrary and capricious standard is applicable in this circumstance particularly since such standard would govern on appeal should the Board’s decision subsequently be reviewed by an appellate court. See Halperin v. City of New Rochelle, 24 A.D.3d 768 (2d Dep't. 2005) (agency determination should not be disturbed unless the record shows that the agency's action was arbitrary, unreasonable, irrational or indicative of bad faith).

Third, as Appellants correctly point out, the determination of the Town Forestry Officer in granting a Tree Removal Permit application must be a reasonable and rational determination supported by the tree regulation provisions of Chapter 260 of the Town Code. Specifically, §260-4(B) of the Chapter requires that determinations of the Forestry Officer be based not only on factors such as the species of tree, but on general considerations of land use and considerations of the general welfare and overall environment of the area. In fact, the legislative intent of Chapter 260 of the Town Code provides, in pertinent part, that:

the preservation and maintenance of trees is necessary to protect the health, safety, environment, ecosystems and general welfare of the inhabitants of the Town of Greenburgh ... The destruction and damage of trees and the indiscriminate and excessive cutting cause barren and unsightly conditions, create subsurface drainage problems, increase municipal costs

² 5/29/08 Hearing Transcript, pages 13-14.
to control drainage, impair stability of real property values and adversely affect the character of the community. This chapter seeks to address those conditions.

Town Code § 260-1.

Thus, the clear legislative intent of Chapter 260 is not to prevent the development of property but to ensure that proposed uses of land preserve trees and shrubs and prevent the unnecessary destruction of both. To this end, the Town Forestry Officer’s decision conditions Applicants’ Preliminary Approval on the requirement that Applicants replace the (58) trees proposed to be removed from the property with multiple replantings, since the application proposes the removal of existing large trees that cannot be replaced with trees of the same size.

Nevertheless, Appellants contend that the $30,000 Tree Replacement Plan suggested by the Town’s Consulting Arborist and approved by the Town Forestry Officer is insufficient. Specifically, Appellants contend that the Plan’s sixty (60) trees and fifteen (15) shrubs that are proposed to replace the fifty-eight (58) trees to be removed by Applicants are too small and too bunched together to compensate for the loss of tree canopy that would exist on the northeast corner of the property. Appellants further contend that the proposed plan to install a retaining wall around the perimeter of the property is insufficient to prevent damage to existing trees on neighboring properties. The Town Board disagrees.

Here, the Town Board finds that an extensive review of the Tree Removal Permit application was conducted not only by the Forestry Officer, but also by Scott Cullen, the Town's Consulting Arborist, and Thomas Madden, the Town Deputy Commissioner of Community Development and Conservation. This review included numerous site visits to confirm the type, condition, location and value of the proposed trees to be removed and included a requirement that a Consulting Arborist also be retained by Applicants. As a result of extensive field work conducted by all the parties, significant reports, calculations, individual tree worksheets, and tree protection plans were generated by the Applicants’ consultants and reviewed by the Town's consultants. After existing conditions on the Property were determined and the Town's Consulting Arborist deemed the location of the fifty-eight (58) trees proposed to be removed was accurate and consistent with Applicants’ survey, the proposed removal plan was carefully studied, revised and studied again through field work and subsequent analysis before being deemed acceptable.

Applicants were also required to retain a Landscape Architect to develop an appropriate tree replacement plan to which the Forestry Officer and Town's Consulting Arborist then gave extensive comments which led to the plan’s update and modification, a plan ultimately deemed acceptable by the Forestry Officer and Deputy Commissioner. Moreover, the plan for the proposed retaining wall along the perimeter of the property was redesigned to address the concerns of neighbors regarding potential damage to abutting trees along the northeast boundary of the property, which led to the Town Arborist’s conclusion that, in terms of tree health, the design was acceptable.

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3 5/29/08 Hearing Transcript, pages 16-24
4 The Deputy Commissioner at the time is now the Commissioner of Community Development and Conservation.
In sum, the Town Board is satisfied that the Town Forestry Officer’s Preliminary Approval of Applicants’ Tree Removal Permit application was based on an exhaustive review by the Town’s Forestry Officer, Deputy Planning Commissioner, Consulting Arborist, and Applicants’ own Consulting Arborist and Landscape Architect. The Preliminary Approval was issued in accordance with the factors found in §260-4(B) and criteria found in §260-4(D), and is consistent with the legislative intent found in §260-1 for the granting of Tree Removal Permits.

Furthermore, the Town Board rejects Appellants’ claims that letters from the Town’s Consulting Arborist disclosing that he previously worked with and utilized the services of Applicants’ law firm created a conflict of interest and rendered him bias. Aside from the fact that this argument is raised by Appellants for the first time on appeal although a letter disclosing this relationship has existed in the Planning Department file without challenge since June 23, 2006, the Town Board is satisfied that none of the matters previously involving the Town’s Consulting Arborist and Applicants’ law firm would have compromised his independence or objectivity in this case.

Next, Appellants contend that the Forestry Officer lacks jurisdiction to issue a Tree Removal Permit because of the Planning Board’s February 21, 2001 SEQRA Positive Declaration of Environmental Significance issued when Applicants had their three-lot application for subdivision approval pending before the Planning Board. Essentially, Appellants argue that, despite Applicants’ withdrawal of their subdivision application on December 9, 2002, Applicants are still bound by the Planning Board’s SEQRA finding and Chapter 200 of the Town Code, the Town’s local environmental regulations. This claim is without merit.

Currently, Applicants have no application pending before the Planning Board and propose only to construct one single-family residence that requires a Tree Removal Permit pursuant to §260-4 of the Town Code and a Building Permit pursuant to §100-5 of the Town Code. The SEQRA determination of the Applicants’ withdrawn subdivision application has no bearing on the Applicants’ current Tree Removal Permit application or its Building Permit application to construct a one single-family residence. Indeed, to conclude otherwise would require the Town Board to speculate about the intent of the Applicants with respect to the future use of their property. Although Appellants contend that granting the Tree Removal Permit would constitute “segmentation,” the division of an environmental review into stages so that such a review is addressed as though it involved unrelated actions, there is no corroborated evidence in the record confirming that Applicants plan to further subdivide their property. See Matter of Buerger v. Town of Grafton, 235 A.D.2d 984 (3rd Dept. 1997)(no segmentation found where developer sought to develop an area of a large parcel and there was no indication that the proposed subdivision was the first phase of a larger project); Matter of Long Is. Pine Barrens Socy. v. Planning Bd. of Town of Brookhaven, 204 A.D. 2d. 548 (2nd Dept. 1994)(project not improperly segmented when there was uncertainty as to when, if ever, one of the three lots would be developed); Matter of Residents for a More Beautiful Port Washington v. Town of North Hempstead, 155 A.D.2d 521 (2nd Dept. 1989)(project was not improperly segmented when other proposals for additional use of the land were tentative).

5 5/29/08 Hearing Transcript, pages 31-51
Significantly, pursuant to Town Code Section §250-4, once a building permit application has been
granted for the construction of a single-family residence, no subdivision application may be
accepted, or even received, by the Planning Board for at least five years thereafter. Thus, should
Applicants file an application to subdivide their property in the future, Appellants’ assertions of a
segmented SEQRA process, and their concerns that the trees removed as part of the current
application were done so to foster that future subdivision, as well as the prior Planning Board
Positive Declaration of Environmental Significance could be raised and addressed at that time.
The record before us simply does not permit us to consider these factors at this time without
engaging in speculation that is not supported by the current record.

Likewise, the contention that the Preliminary Approval was issued in violation of Section 200-6
of the Town Code and SEQRA, even in the absence of a subdivision application, is equally
without merit. The Town Forestry Officer’s granting of a Tree Removal Permit in
connection with the construction of a single-family residence is a “Type II” action pursuant
to SEQRA and Chapter 200 and is accordingly exempt from SEQRA review. See (6
NYCRR § 617.5(c)(9). Contrary to Appellants' arguments, while the Applicants require the
removal of trees to construct the proposed residence, this additional discretionary approval does
not constitute a distinct basis for SEQRA review. See Griffin v. Town of Somers, 2006 WL

Appellants’ remaining arguments relating to purported violations of SEQRA are similarly
without merit.

CONCLUSION:

In sum, the Town Board affirms the Preliminary Approval of the Application and the Tree
Removal Permit granted by the Town Forestry Officer on the basis that the Forestry Officer's
determination was clearly authorized based upon a comprehensive record, and is reasonable
and rational. The granting of the Permit is exempt from SEQRA and Chapter 200 of the Town
Code and is issued in connection with the construction of one single-family residence on the
Applicants’ property.

The Application is the only application pending before the Town, and the Preliminary Approval
complies with all applicable laws and regulations and is in accord with the legislative intent of
Chapter 260 of the Town Code.

For the reasons stated above, Appellants’ appeal of the determinations of the Town Forestry
Officer for Tree Removal Permit TP-05-42 is hereby denied and the matter is dismissed.

Dated: November 12, 2008

By Order of the Town Board of the Town of Greenburgh