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

CHAMBERS OF
HON. LESTER B. ADLER

March 17, 2009

Silverberg Zalantis, LLP
Three Barker Avenue
White Plains, New York 10601
Att: Katherine Zalantis, Esq.

RE: Henderson v. Zoning Board of Appeals et al
Index No.: 07-12351

Dear Ms. Zalantis:

Enclosed is a copy of a **Decision, Order and Judgment** in the above-referenced case.

Very truly yours,

N. Lee Spaulding
Principal Law Clerk to the
Honorable Lester B. Adler

NLS/aa

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

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

Petitioners,

For a Judgment Pursuant to Article 78 of the CPLR

vs.

THE ZONING BOARD OF APPEALS, and
RICHARD CARROLL, as Zoning Enforcement Officer
of the Village of Mamaroneck, New York,

THE COMMISSIONER OF GENERAL SERVICES
OF THE STATE OF NEW YORK;

THE CLERK OF WESTCHESTER COUNTY OF THE
STATE OF NEW YORK;

CHARLES SCHER;

MICHAEL W. FINKBEINER, and

RICHARD AND JUNE OTTINGER,

Respondents.

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DECISION, ORDER AND JUDGMENT

Index No.: 07-12351

ADLER, J.

The following papers, numbered 1 to 14, were read upon petitioners George and Irene Henderson's (hereinafter referred to as the "petitioners") CPLR Article 78 proceeding to review a determination of respondent Zoning Board of Appeals of the Village of Mamaroneck (the "ZBA") dated June 7, 2007.[1]

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[1] In the Decision, Order and Judgment of this Court filed and entered on August 15, 2008, respondents' motion to dismiss the petition insofar as asserted by petitioners Suzanne McCrory, Leonard Weiss and Eleanor Weiss was granted.

	Papers Numbered
Notice of Petition, Verified Petition	1
Verified Answer and Cross-Claim of Respondent Commissioner of General Services of the State of New York	2
Affidavit of Richard Bennett, L.S.	3
Answer of Respondents Richard and June Ottinger	4
Respondent Ottingers Memorandum of Law	5
Notice of Motion of Respondent Ottingers to Dismiss Cross-Claim	6
Respondent Ottingers' Memorandum of Law in Support of Motion to Dismiss Cross-Claim	7
Affidavit of Petitioner George Henderson in Opposition to Motion to Dismiss Cross-Claim	8
Reply Affirmation of Patricia W. Gurahian, Esq.	9
Verified Reply of Petitioner Hendersons	10
Memorandum of Law in Support of Verified Reply	11
Sur-Reply Affirmation of Patricia W. Gurahian, Esq.	12
Respondent Commissioner of General Services of the State of New York's Memorandum of Law in Opposition to Motion to Dismiss Cross-Claim	13
Verified Answer of Respondent ZBA and Response to Cross-Claim	14

Upon the foregoing papers, this Article 78 proceeding is disposed of as follows:

FACTUAL AND PROCEDURAL BACKGROUND

Respondents Richard and June Ottinger (the "Ottingers") are the owners of certain real property known as 818 The Crescent in the Village of Mamaroneck, New York, located in the R-15 single-family residential zoning district and identified as Lot 159, Block 937 on the Village of Mamaroneck Tax Map (the "Property"). The Property was originally part of a larger parcel of land consisting of five lots owned by Raymond Hill. By deed dated March 27, 1944, Mr. Hill conveyed the lots to the DeGeorge Company. The DeGeorge Company subsequently conveyed the lots to Ella Bernard Scher by deed dated July 31, 1945.

In 1968, Ms. Scher filed an appeal of a determination of the building inspector, as well as an application for an area variance for the subdivision of the lots with a predecessor ZBA. In a resolution dated January 2, 1969, that ZBA granted the application based upon a finding that: 1) the area variance would not produce an undesirable change in the character of the neighborhood and would not be a detriment to the neighborhood or the general welfare of the Village of Mamaroneck and its residents; 2) the variance was necessary for the reasonable use of the Property; 3) the variance would not have an adverse effect or impact on the physical or environmental conditions in the neighborhood; and 4) the alleged hardship was not self-created. The ZBA further found that: "Except for the side and front setbacks, which would be 25' and 15' respectively, the subdivision would comply with the provisions of the present ordinance."

A subsequent request for the same subdivision was submitted to the ZBA in 1973 and, again, the application was granted. In its resolution dated September 6, 1973, the ZBA again found that, with the exception of the side and front setbacks, that the subdivision would comply with "the provisions of the present Ordinance." Approximately five years later, Ms. Scher conveyed the subdivided Property to Oscar and Rebecca Davis, who in turn conveyed the Property to Richard Ottinger by deed dated November 8, 1984.

On or about April 12, 2006, the Ottingers submitted an application for a building permit to construct a single-family residence on the Property.[2] Upon learning of the application, Suzanne McCrory contacted the building inspector, who at the time was Richard Carroll,[3] to inquire as to the status of his review of the application. In an e-mail to Ms. McCrory dated May 23, 2006, Mr. Carroll indicated that he had determined that the lot was buildable, and "that upon through [sic] review of the proposed drawings submitted, providing all State, Village and FEMA regulations are met, a building permit will be issued." Ms. McCrory, Leonard Weiss and Eleanor Weiss then immediately filed an appeal with the ZBA (the "McCrory/Weiss Appeal") in which they claimed, *inter alia*, that the May 23, 2006 e-mail from Mr. Carroll constituted an appealable determination.

A lengthy public hearing on the McCrory/Weiss Appeal commenced on July 6, 2006. On July 27, 2006, Mr. Carroll issued a building permit (no.: 22476) for the construction of a new single-family dwelling and a swimming pool. While the hearing regarding the McCrory/Weiss Appeal was still being conducted, petitioners filed an appeal of the issuance of the building permit on September 22, 2006 (the "Henderson Appeal"). Petitioners sought to revoke the permit on the ground that the proposed

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[2]Apparently, there is a long and contentious history behind the Ottingers' efforts to raze a prior existing structure and to build a new single-family dwelling on the Property, a recitation of which is neither relevant nor necessary in making a determination in this matter.

[3]In this Court's Decision, Order and Judgment filed and entered on August 15, 2008, Richard Carroll's motion to dismiss the petition insofar as asserted against him was granted.

dwelling did not conform to the zoning requirements of the Village of Mamaroneck Zoning Code (the "Code").[4]

Meanwhile, further argument regarding the substantive issues raised in the McCrory/Weiss Appeal was heard on October 5, 2006 and November 2, 2006. At the December 7, 2006 hearing, the resolution denying the McCrory/Weiss Appeal was adopted.[5] Ms. McCrory, Mr. Weiss and Mrs. Weiss then commenced an Article 78 proceeding (Index No.: 0603/07) in which they sought a judgment annulling the resolution. That proceeding was dismissed by this Court's Decision, Order and Judgment dated August 1, 2008.

The hearing with respect to the Henderson Appeal commenced on January 4, 2007. At the February 1, 2007 continuation of the hearing, David Christian, an architect retained by the Ottingers, was present to discuss numerous issues concerning the Property. The first issue raised was whether or not the Property complied with the 15,000 square foot requirement. The ZBA engaged in an extensive discussion regarding the numerous conveyances of the Property, which had originally been a part of a larger parcel which had been reduced to smaller parcels.

The ZBA then turned its attention to the issue of the calculation of the FAR and how to derive the second floor area in light of the roof slopes and unfinished spaces.

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[4]More specifically, petitioners argued that: 1) the lot size of the Property failed to meet the 15,000 square foot minimum required for the R-15 zoning district; 2) the proposed dwelling exceeded the permitted Floor Area Ratio ("FAR"); 3) the proposed placement of planters and a screening wall encroached on required yard setbacks; and 4) the permit for a swimming pool was issued without an application.

[5]The resolution also directed that the entire record from the McCrory/Weiss Appeal be incorporated into the Henderson Appeal.

Prior to adjourning the hearing on the appeal, the ZBA requested that Mr. Christian provide a report for the building inspector's review regarding his calculations of both the lot size and the FAR. The matter was then adjourned to the March 2007 meeting.

As requested, Mr. Christian prepared a report dated February 19, 2007, in which he set forth the basis for his calculations of lot size, lot coverage, side yard setbacks and FAR. With respect to the minimum lot size requirement, Mr. Christian relied on the "various surveys, descriptions and deeds prepared by licensed surveyors and attorneys over the years certifying the lot area at least 15,000 square feet." The report further stated the basis for his calculation of the FAR. In his opinion, the primary issue was the methodology for determining the "gross floor area." He measured the first floor from the exterior face of the exterior walls, excluding those areas specifically set forth in the definition, including the garage area. With respect to the second floor Mr. Christian concluded that "minor finished second floor areas with less than 7' headroom," as well as the unfinished attic storage areas and mechanical spaces, should be excluded. With these exclusions and using the total lot area of 15,000 square feet, the gross floor area total would yield a FAR of less than .40.

The hearing on petitioners' application continued at the ZBA's March 1, 2007 meeting. The 1973 resolution of a predecessor ZBA rendered in connection with Ms. Scher's application for subdivision and a variance was discussed. This was followed by additional discussion regarding the issue of the calculation of FAR.[6]

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[6]One ZBA member, who indicated he was a real estate appraiser, commented that there are many provisions of the Code which lack clarity and should not exist. With respect to the provision regarding FAR, he opined that he did not believe the Code is "crystal clear."

The ZBA also discussed the February 21, 2007 memo prepared by BFJ Planning ("BFJ"), a firm engaged to prepare a report for the ZBA on the issue of FAR. With respect to the exclusions made by Mr. Christian in his calculation of FAR, BFJ was of the opinion that the areas were not excludable because they were physically contiguous with the second floor, were enclosed, and had a roof and area within the exterior walls of the building. Therefore, these areas warranted inclusion as gross floor area.

The hearing was then adjourned to the April 5, 2007 meeting in order to give all of the parties an opportunity to submit additional information for the ZBA's consideration. One of the items which was submitted to the ZBA in the interim was a letter from the assessor of the Village of Mamaroneck dated March 23, 2006. This letter indicates that the Property was apportioned for taxes on the 1974 Village of Mamaroneck tax roll based on a survey dated November 14, 1968 (prepared by Sal Spinelli) in which the lot area was shown to be 15,000 square feet. The letter further indicates that no request to alter the lot size had been made to the Office of the Assessor as of the date of the letter.

At the April 5, 2007 meeting, after a revisiting the issues previously raised and discussed at considerable length during the prior meetings, the hearing was closed. Thereafter, the ZBA members engaged in extensive discussions regarding the issues raised by petitioners' application at the May 3, 2007 and June 7, 2007 meetings. After months of consideration and based upon the voluminous materials submitted in connection with the appeal, the ZBA adopted a resolution dated June 7, 2007 in which a majority of the ZBA found, *inter alia*, that the Property was in compliance with both the

square footage and gross floor ratio requirements of the Code.[7] On July 10, 2007, petitioners commenced the instant proceeding in which they seek, *inter alia*, an order/judgment reversing those portions of the 2007 Resolution.

In lieu of an answer, the Ottingers and then-respondents Charles Scher, Michael W. Finbeiner and Richard Carroll moved pursuant to CPLR §§7804 3211 to dismiss the petition. Respondent Commissioner of General Services of the State of New York ("OGS"), filed a verified answer and cross claim dated September 7, 2007.[8] In this Court's Decision, Order and Judgment dated August 8, 2008, the motions were granted to the extent that the Court dismissed: 1) the entire petition with respect to Suzanne McCrory, Leonard Weiss and Eleanor Weiss based upon their failure to exhaust their administrative remedies; 2) the first cause of action for failure to exhaust administrative remedies; 3) the fourth and fifth causes of action for lack of subject matter jurisdiction; and 4) the entire petition with respect to Charles Scher, Michael W. Finkbeiner and Richard Carroll on the ground that they were not proper parties to the proceeding.

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[7]The ZBA unanimously found that the proposed structures as indicated in the application encroached on required setbacks "and to the extent the building permit approved the encroachment of such structures the permit was not valid," and that no proper and complete application was submitted for the proposed pool and to the extent the permit was issued for the pool it was invalid. In accordance with the ZBA's determination, the building inspector issued an Order to Remedy Violation dated June 8, 2007, which provided that no work was to continue in either the setback areas or the pool site. The Ottingers were further instructed to remove all structures from the setback area or file for a variance, and to complete the necessary paperwork for the swimming pool. The Ottingers have not sought judicial review of this portion of the ZBA's determination.

[8]A stipulation of discontinuance as to respondent Westchester County Clerk was filed with the Chief Clerk of the Westchester Supreme and County Courts on September 7, 2007.

LEGAL ANALYSIS

CROSS CLAIM OF RESPONDENT OGS

The Court will first address the Ottinger's motion to dismiss respondent OGS's cross claim in which a declaration of the rights to the property located below the high water line is sought.

The pleadings in a special proceeding are limited to a petition, an answer, and a reply to any counterclaim asserted and/or a reply to any new matter in the answer (CPL §402; *Matter of O'Connor v. Lynett*, 156 A.D.2d 610, 612, 549 N.Y.S.2d 424; *Matter of Zenosky v. Graziani*, 288 A.D.2d 843, 843, 735 N.Y.S.2d 436; *Matter of Koplen v. Austin*, 5 A.D.3d 515, 516, 772 N.Y.S.2d 829). A cross claim is not permitted without leave of court (*Matter of O'Connor v. Lynett*, 156 A.D.2d at 612), and since respondent OGS did not request, and was not granted, leave to file a cross claim, the Ottingers' motion to dismiss the cross claim is granted (*Matter of Hyde Park Assoc. v. Higgins*, 191 A.D.2d 440, 442, 594 N.Y.S.2d 57).

PETITIONERS' SECOND AND THIRD CAUSES OF ACTION

Petitioners allege in their second cause of action that the ZBA's determination that the lot area of the Property comports with the 15,000 square foot requirement of the Code is illegal, arbitrary and capricious, and unsupported by substantial evidence. Specifically, petitioners argue that, in rendering its determination, it was error for the ZBA to rely on: 1) the survey of the one-acre "parent lot" prepared in 1958 and updated in 1968; and 2) the applications submitted by a prior owner of the Property in 1973 for front and rear area variances.

Petitioners further claim in the third cause of action that the ZBA misinterpreted and misapplied the Code in determining that the proposed dwelling was within the FAR requirements of the Code. Petitioners claim that the ZBA erred in its calculation of the FAR by: 1) eliminating the garage from the calculation; 2) eliminating the cathedral ceiling area; and 3) applying a lot area of 15,000 square feet.

It is well settled that under a zoning ordinance which authorizes interpretation of its requirements by a board of appeals, such as §342-91 of the Code, a "zoning board's interpretation of its zoning ordinance is entitled to great deference, and judicial review is generally limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion" (*Matter of Brancato v. Zoning Bd. of Appeals of City of Yonkers*, 30 A.D.3d 515, 515, 817 N.Y.S.2d 361[citations omitted]; see also *Matter of Conti v. Zoning Bd. of Appeals of Vil. of Ardsley*, 53 A.D.3d 545, 546, 861 N.Y.S.2d 140). A reviewing court cannot substitute its judgment for that of the zoning board since "judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them" (*Matter of Pecoraro v. Board of Appeals of Town of Hempstead*, 2 N.Y.3d 608, 613, 781 N.Y.S.2d 234, 814 N.E.2d 404, quoting *Matter of Cowan v. Kern*, 51 N.Y.2d 591, 599, 394 N.Y.S.2d 579, 363 N.E.2d 305 [internal quotations omitted]). Accordingly, such a determination should be sustained on judicial review if it has a rational basis and is supported by substantial evidence (*Id*; *Matter of Ifrah v. Utschig*, 98 N.Y.2d 304, 746 N.Y.S.2d 667, 774 N.E.2d 732).

It is undisputed that, at the time the ZBA granted the Ottingers' predecessor-in-interest's applications for a subdivision and area variance in 1969 and 1973, the Property was located in the R-15 zoning district. Accordingly, the ZBA correctly interpreted the granting of the subdivision and area variance as binding upon a determination that the Property was in compliance with the Code's 15,000 square foot requirement (see *Matter of Knight v. Amelkin*, 68 N.Y.2d 975, 977, 510 N.Y.S.2d 550, 503 N.E.2d 975; *Matter of Civic Assoc. of Setaukets v. Trotta*, 8 A.D.3d 482, 778 N.Y.S.2d 524; *Matter of Aliperti v. Trotta*, 35 A.D.3d 854, 827 N.Y.S.2d 274; *Matter of Campo Grandchildren Trust v. Colson*, 39 A.D.3d 746, 834 N.Y.S.2d 295; *Matter of Bassano v. Town of Carmel Zoning Bd. of Appeals*, 56 A.D.3d 665, 868 N.Y.S.2d 677). Since substantial evidence exists to support the ZBA's finding, the determination that the Property complies with the square footage requirement of the Code has a rational basis and can not be considered arbitrary or capricious.

Turning now to the determination regarding FAR, after finding that the building inspector's calculation of FAR was in error, the ZBA, pursuant to the provisions of Village Code §342-90[9] and Village Law §7-712-b, proceeded to analyze the conflicting FAR calculations which had been presented during the hearing.[10] Relying on the

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[9]Section 342-90 of the Code provides as follows:

> "The Board shall hear and decide appeals from and review from any order, requirement, decision, interpretation or determination made by any administrative official or board charged with the implementation or enforcement of this chapter and may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and make such determination and order as in its opinion, ought to be made in the premises."

[10]The petitioners do not challenge the ZBA's determination that it had the capacity, upon finding the building inspector's calculation to be in error, to conduct their own calculation of the FAR. Rather, they contend that the ZBA's calculation was also in error.

calculations of the independent consultant, BFJ, the ZBA determined that there was compliance with the .40 FAR requirement when the 15,000 square foot lot area was utilized.

During the pendency of the instant proceeding, on May 12, 2008, the Village of Mamaroneck amended the Code in several respects.[11] Petitioners' claim in their reply affidavit that, based upon applicable case law, this Court is bound to apply the provisions of the Code as amended in rendering its determination.

As a general rule, a court must apply a local government's zoning ordinance as it exists at the time of judicial review (*Matter of Pokoik v. Silsdorf*, 40 N.Y.2d 769, 772-773, 390 N.Y.S.2d 49, 358 N.E.2d 874; *Matter of Wiehe v. Town of Babylon*, 169 A.D.2d 728, 564 N.Y.S.2d 193, *appeal denied* 77 N.Y.2d 809, 570 N.Y.S.2d 489, 573 N.E.2d 577; *Matter of Millerton Properties Assoc. v. Town of North East Zoning Bd. of Appeals*, 227 A.D.2d 562, 643 N.Y.S.2d 169, *lv. denied* 90 N.Y.2d 803, 660 N.Y.S.2d 869, 683 N.E.2d 775; *Matter of Greene v. Zoning Bd. of Appeals of Town of Islip*, 25 A.D.3d 612, 806 N.Y.S.2d 880; *Matter of Denton v. Town of Brookhaven*, 32 A.D.3d 395, 819 N.Y.S.2d 547). This rule, however, is subject to certain limitations (*Matter of Jaffee v. RCI Corp.*, 119 A.D.2d 854, 856, 500 N.Y.S.2d 427, *appeal denied* 68 N.Y.2d 607, 506 N.Y.S.2d 1032, 498 N.E.2d 434). Specifically, zoning amendments are not applicable to property owners in those instances where vested rights have been acquired (*Matter of Temkin v. Karagheuzoff*, 34 N.Y.2d 324, 329, 357 N.Y.S.2d 470, 313 N.E.2d 770; *Matter of Lawrence School Corp. v. Morris*, 167 A.D.2d 467, 562

[11]These amendments became effective on May 15, 2008, three months prior to this Court's Decision, Order & Judgment on the motions to dismiss.

N.Y.S.2d 707; *Matter of Lombardi v. Habicht*, 293 A.D.3d 474, 475, 740 N.Y.S.2d 101, citing *Best & Co. v. Village of Garden City*, 247 App.Div. 893, 286 N.Y.S. 980, *affd.* 273 N.Y. 564, 7 N.E.2d 694). Such rights are acquired when "the owner has undertaken substantial construction and made substantial expenditures prior to the effective date of the amendment" (*Id.* at 475-476, quoting *Matter of Ellington Constr. Corp. v. Zoning Bd. of Appeals of Inc. Vil. of New Hempstead*, 77 N.Y.2d 114, 122, 564 N.Y.S.2d 1001, 566 N.E.2d 128 [internal quotation omitted]).

While the Ottingers would not have acquired a vested right in the mere planned construction of the dwelling (*Matter of Calverton Indus. v. Town of Riverhead*, 278 A.D.2d 319, 718 N.Y.S.2d 707, *lv. denied* 96 N.Y.2d 707, 725 N.Y.S.2d 638, 749 N.E.2d 207; *Matter of Jul-Bet Enterprises v. Town Bd. of Town of Riverhead*, 48 A.D.3d 567, 852 N.Y.S.2d 242), at the time the instant proceeding was commenced, the structure had already been completed. Respondent Ottingers obtained the necessary approval pursuant to the law then in effect and completed construction of the dwelling, thereby acquiring vested rights which were not affected by the subsequent amendment of the Code. Under the unique circumstances of this case, the Court finds that the amended Code is not applicable to a determination in the instant proceeding.

Prior to the amendment, FAR was defined in §342-3(B) of the Code as the "[n]umerical value obtained by dividing the gross floor area, exclusive of cellars or basements used only for storage utilities, within a building or buildings on a lot by the area of the lot. The term "gross floor area" was defined as:

> "The sum of gross horizontal areas of the several floors of the building or buildings on a lot, measured from the exterior

faces of exterior walls or from the center line of party walls separating two buildings, excluding:

(1) Roof Areas.

(2) Cellar areas used only for incidental storage or for the operation or maintenance of a building.

Any areas devoted only to accessory off-street parking or loading."

Based upon a literal reading of the language of the Code, the ZBA found that the storage, mechanical areas and areas with a ceiling height below seven feet were improperly excluded by the building inspector in his calculation of FAR. While these areas were included in the ZBA's calculation, the ZBA did, however, exclude the open areas above the first floor, as well as the garage. These determinations were based upon the ZBA's finding that: 1) in order to constitute "floor space" there must actually be a floor; and 2) the garage constituted an "area devoted only to accessory off-street parking." Lastly, the ZBA determined that, since the Code was silent as to the use of land under water for determining compliance with the Code's area and bulk requirements, controlling case law permitted its inclusion in the calculation of lot size and FAR (see *Matter of Pagnozzi v. Planning Bd. of Vil. of Piermont*, 292 A.D.2d 613, 613, 739 N.Y.S.2d 742).[12]

Here, the clear wording of the Code is unambiguous, the ZBA's interpretation thereof is reasonable and rational (see *Matter of Kennedy v. Zoning Bd. of Appeals of*

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[12]In *Pagnozzi*, the Appellate Division, Second Department specifically held that, since the Village of Piermont's zoning code did not address the use of land that is under water to satisfy bulk area zoning requirements, the property owner was permitted to use the area of land located under water to satisfy those requirements.

Vil. of Patchogue, 57 A.D.3d 546, 868 N.Y.S.2d 309, 310), and does not conflict with the "clear wording" of the relevant provisions of the Code (see *Matter of Toys "R" Us v. Silva*, 89 N.Y.2d 411, 418-419, 654 N.Y.S.2d 100, 676 N.E.2d 862). Accordingly, it is hereby

ORDERED, that the petition is dismissed in its entirety.

This constitutes the decision, order and judgment of this Court.

Dated: White Plains, New York
March 17, 2009

HON. LESTER B. ADLER
SUPREME COURT JUSTICE

GEORGE and IRENE HENDERSON
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