

STATE OF NEW YORK
SUPREME COURT COUNTY OF WASHINGTON
In the Matter of the Application of

MARY ANNE RICHARD and
DANIEL SMITH,

Petitioners

DECISION AND ORDER

-against-

R.J.I. No. 57-1-2009-0669
Index No. 16168

THE TOWN OF CAMBRIDGE; THE
CAMBRIDGE TOWN BOARD; AUDREY B.
HALL; SALLY J. WHITNEY; and TERRY E.
WHITNEY, SR.,

Respondents

For a Judgment Pursuant to Article 78 of the New York
Civil Practice Law and Rules and Declaratory Judgment
Ordering the Town Board to Revoke its Resolution
Authorizing the Conveyance of the Disputed Property and
Declaring the Town of Cambridge the Record Owner of
the Disputed Property.

APPEARANCES:

Miller, Mannix, Schachner & Hafner, LLC (Cathy L. Radner, Esq., of counsel) Attorneys
for Petitioners

John R. Winn, Esq., Attorney for Audrey B. Hall

Deily Mooney & Glastetter, LLP (Douglas J. Rose, Esq., of counsel) Attorneys for the
Town of Cambridge and the Cambridge Town Board

Law Offices of John V. Imhof (John V. Imhof, Esq., of counsel) Attorney for Sally J.
Whitney and Terry E. Whitney, Sr.

PRESENT: KROGMANN, J.

Petitioners bring this CPLR Article 78 proceeding (which they also style as a declaratory

judgment) seeking judgment annulling the conveyance of a small parcel of land which the Town of Cambridge (the "Town") made to Audrey B. Hall by deed dated September 8, 2008 and recorded September 16, 2008 in the Washington County Clerk's Office. They also seek an injunction requiring the grantees of Ms. Hall, the Whitney respondents, to refrain from clearing the subject parcel.

The petition shows the subject parcel to be pie shaped and to have been conveyed to the Town of Cambridge by one Leo O'Donnell by deed dated September 19, 1939 and recorded April 30, 1941. The Town Board passed a resolution reciting that the Town acquired the parcel in 1939 to re-route a portion of West Cambridge Road and that the Town "does not have any need for the land in question . . . and is willing to indicate in writing that it has no interest in said lands." The Town issued its quit claim deed to Ms. Hall (for no consideration) who then included the parcel in the sale of her adjoining parcel to defendants Sally J. Whitney and Terry E. Whitney, Sr. by deed of October 3, 2008.

The thrust of the petition, which sets forth various "causes of action," is that the Town violated Town Law section 64(2) which makes such a conveyance subject to a permissive referendum. It alleges that no notice describing the potential permissive referendum was posted or published. The complained of transaction is also described as an unconstitutional gift of town land.

The answers filed by the defendants other than the Town do not affirmatively deny the events described above and generally allege the statute of limitations defense (CPLR 217(1)) in that the proceeding was begun well beyond the four month period within which to challenge municipal acts under CPLR Article 78.

Respondent Audrey B. Hall claims that the Court does not have personal jurisdiction over

her but does not explain why. The Town adds affirmative defenses of laches, unclean hands, standing and estoppel. No party has submitted a memorandum of law, although respondent Hall's answer refers the Court to Bullock v. Essex County, 246 Ad2d 806 (3rd Dept 1998), which challenged a conveyance of county property previously held for highway use purposes. Notably, the Bullock court held that the petitioners, as here, had standing by their use of the parcel, its proximity to their land and direct injury they suffered different in degree from the general public. Bullock held that where petitioners first became aware of the challenged January, 1966 transaction in May of 1966 but did not initiate the proceeding until December, 1966, it was time barred by the four month statute of limitations.

We also know from People v. Haskell, 68 AD3d 1358 (3rd Dept 2009) that where a town makes a conveyance without following the proper procedures of Town Law section 64, such failure does not make the transaction void ab initio, but renders it voidable.

It appears from the petition itself that Petitioners became aware of the transaction at a time no later than their attorney's August 7, 2009 letter to the Town supervisor demanding the Town rescind its resolution and setting forth the improprieties of the transaction. That letter was followed by another attorney letter to the Town of September 22, 2009 wherein the Town attorney responded by letter of September 25, 2009 setting out that because the Town believed that it did not own the subject parcel, passing a quit claim deed was somehow not improper. This proceeding was filed on December 7, 2009, exactly four months after the drafting of petitioners' attorney's letter of August 7, 2009. That letter states that "Mr. Smith recently became aware..." While perhaps not likely, it is of course possible that such awareness occurred on the same date as the attorney letter. To the extent that petitioners propound a declaratory judgment from this proceeding, Solnick v. Whalen,

49 NY2d 224 would indicate that the time period for initiation thereof would be the same as would exist if a resolution existed in a different form (ie - four months if an Article 78 proceeding could have obtained the same relief). Also see Lenihan v. City of New York, 58 NY 679.

The argument here is that the Town was never advised of the need for posting notice of a permissive referendum until petitioners' attorney's letter dated Friday August 7, 2009. Presuming such advice was refused when received the next week (or ignored per the Town Attorney's letter dated September 25, 2009), the present proceeding/action was begun no later than four months thereafter.

To the extent that the present proceeding is in the nature of mandamus (ie - requiring an entity to perform a duty enjoined upon it by law), its timeliness is measured from "the respondent's refusal, upon demand... to perform its duty (CPLR7804(1)).

On the merits, Petitioners have attached non-certified copies of the Town's resolution and various deeds. They would indicate and support the occurrences set out in the petition. Almost shockingly, the town's verified answer either denies the allegations or alleges lack of knowledge or information sufficient to form a belief in regard to them. These include the making of the resolution, the making of the deed from the Town to Audrey B. Hall and the allegation that the transfer was without consideration.¹ Some of these "denials" are undermined by certain admissions set forth in the Town Attorney's letter of September 25, 2009.

Because the pleadings create issues regarding the facts alleged in the petition, the Court will hold a hearing pursuant to CPLR 7804(h) on December 23, 2010 at 9:30 a.m. wherein the Court will


¹ Respondent Audrey B. Hall admits that she paid no consideration in exchange for the quit claim deed from the Town.

hear testimony and receive documentary evidence (in admissible form) relative to the challenged transaction.

Pending further order of this Court, the parties hereto are temporarily enjoined from conveying, clearing or in any way improving the subject parcel.


The above constitutes the Decision and Order of this Court.

Dated: *NOVEMBER 10, 2010*



DAVID B. KROSMANN
JUSTICE OF THE SUPREME COURT

The Court is filing the original decision and order together with the original papers in the appropriate County Clerk's Office. Attorneys for the plaintiff to comply with CPLR 2220.


11-15-10

Received
County Clerks Office
Nov 15, 2010 01:52P
Washington County
Dona J. Crandall