

To commence the statutory period for appeals as of right under CPLR 5515[a], you are advised to serve a copy of this judgment and order, with notice of entry, upon all parties.

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**SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, PUTNAM COUNTY**

**Present: Hon. Francis A. Nicolai
Justice of the Supreme Court**

-----X
ANN FANIZZI

Petitioner/ Plaintiff.

for a Judgment pursuant to CPLR Articles 78 and Article 30

- against -

PLANNING BOARD OF PATTERSON, TOWN
CLERK OF PATTERSON and PATTERSON
CROSSING REALTY COMPANY, LLC.,

Respondents/Defendants.
-----X

The following documents, numbered 1 to 38, were read on (A) Petitioner/Plaintiff's Petition and Complaint pursuant to CPLR §§ 7806 and 3001 for a Judgment (1) declaring that the Patterson Planning Board violated the state Arts and Cultural Affairs Law and Education regulations by returning drawings, site plans or architectural plans relating to Patterson Crossing that were reviewed by the Planning Board on May 31, 2012; (2) Ordering the Town Clerk to retrieve and/or the respondent permittee to return to the Town all records consisting of any site plans, drawings or architectural renderings received by the Patterson planning staff in May 2012 in relation to Patterson Crossing; (3) Ordering the Town Clerk to fully comply with Petitioner's Freedom of Information Law request dated June 4, 2012; (4) scheduling an inquest or trial under CPLR 7804 to obtain sworn testimony if any material fact is disputed; (5) enjoining further consideration of Patterson Crossing by the Planning Board until the State Arts and Cultural Affairs Law, state Education regulations and FOIL laws are satisfied; and (6) awarding attorneys fees and costs; (B) the motion to dismiss the Petition by Respondents/Defendants Planning Board and Town Clerk of the Town of Patterson (Patterson Respondents) for failure to state a cause of action, for failing to exhaust administrative remedies and seeking sanctions; and (C) Respondent/Defendant Patterson Crossing Realty Company's (Patterson Crossing) motion to dismiss and for sanctions::

Papers:

Numbered

Mot Sequence No. 1

Notice of Petition/Verified Petition and Complaint/Affidavit/
Memorandum of Law/Exhs. A-I

that the municipal officials failed to retain the subject revised plans for a period of ten years "after submittal to the municipality" in accordance with Department of Education Regulations that require retention of planning records involving proposed revised site plans (8 NYCRR §815.11). She further alleges they violated these regulations when they returned the records to the developer (Not of Pet. Petition ¶¶27-35).

In the Second Cause of Action, Fanizzi alleges that Respondents Planning Board and Town Clerk violated FOIL by conspiring to deny her request for these documents and "deliberating disposing of Town Records to frustrate Petitioner's June 4, 2012 FOIL request" (*id.*, ¶35). She contends that these records constituted agency records since they were "reviewed by the Planning Board on May 31, 2012" and must be returned by Patterson Crossing and/or retrieved by the Town Clerk (*id.*, ¶38). In the third cause of action, Petitioner seeks sanctions for this deliberate FOIL violation.

Upon the Respondents' motions, Petitioner's combined article 78 proceeding and action is dismissed. There is no dispute that the Town Respondents did not possess any proposed site plan revisions submitted upon application to the Town for official review. The Patterson Respondents satisfied their FOIL obligations by conducting a diligent search of their files and, in fact, by giving Petitioner access to the entire file and its contents possessed by the Town, in response to her FOIL request (*Matter of Lugo v Galperin*, 269 AD2d 338, 338-339 [1st Dept 2000], *lv denied* 95 NY2d 755). Thus, the Patterson Respondents did not deny Petitioner's FOIL request by disposing of any Town documents. The documentary proof submitted on these motions establishes without refute that Patterson Crossing never formally filed any proposed site plan or other revisions for Planning Board review and thus no such revised plans ever became

Town or agency records.

The informal and advance review of Patterson Crossings' draft proposals by one Town staff planner, Richard Williams, did not constitute a formal application to the Board, or submission of any documents that became agency records. Nor did Mr. Williams' mention of his informal review of the proposal at a Town Board work session constitute "review" of the proposal by the Planning Board. Williams merely gave advance notice that a proposal was likely forthcoming. Thus, Petitioner has failed to state a claim upon which relief can be granted. Her FOIL application was undeniably premature.¹ It follows that her claim for sanctions for FOIL violations is similarly denied.

The Court has given serious consideration to the cross-motions of all Respondents seeking counsel fees incurred in opposing Plaintiff's motion as a sanction. Such relief would be appropriate on a finding that Plaintiff's motion was "frivolous" (22 NYCRR §130-1.1; *Muller v Muller*, 233 AD2d 486, 487-488 [2d Dept 1996]). Under the governing Rule of the Chief Administrator of the Courts, conduct is "frivolous" if (1) "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation or to harass or maliciously injure another; or (3) it asserts material factual statements that are false"

¹ As Mr. Williams stated, he could not imagine "Petitioner's motivation to persist in requesting documents which do not exist, however, if and when plans are submitted she, like any other interested members of the public, will have an opportunity to review the drawings and provide comments to the Planning Board" (Williams Aff in Support, ¶17).

Even assuming the validity of Petitioner's characterization that her FOIL request was "denied," she did not appeal the purported denial administratively, and thus has not exhausted administrative remedies. In that event, this Court would lack jurisdiction and dismissal of this premature article 78 proceeding/action would similarly be warranted (*Matter of Braxton v Commissioner*, 83 AD2d 253 [1st Dept 2001]).

undertaken by Petitioner to delay or thwart this specific development project. Under these circumstances, the Court finds that this proceeding was undertaken primarily to harass Respondents with the intent of delaying the progress of the Patterson Crossing project. Her demand in her Petition that this Court grant Judgment "enjoining any further consideration of Patterson Crossing by the Planning Board until the state Arts and Cultural Affairs Law, state Education regulations and state Freedom of Information law are satisfied" lends support to this conclusion. Thus, as a sanction for frivolous conduct by Petitioner, Respondents shall be entitled to recover their reasonable attorneys fees in connection with this litigation. Accordingly, based on all the foregoing, it is hereby

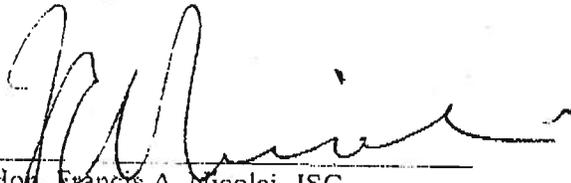
ORDERED that Petitioner's Petition/Complaint is denied; and it is further

ORDERED that Respondents' cross-motions to dismiss the proceeding are granted, the Petition/Complaint is dismissed, and Petitioner shall pay Respondents reasonable attorney's fees and costs as a sanction pursuant to 22 NYCRR §130-1.1; and it is further

ORDERED that, the award of attorney's fees is held in abeyance, pending further submissions of the parties. Within twenty (20) days of entry of this Decision and Order, counsel for each Respondent shall submit to the Court, on notice to Petitioner, an Affirmation of reasonable counsel fees and costs expended in connection with opposing this Petition. Within twenty (20) days of receipt of said Affirmations, Petitioner shall submit to the Court and opposing counsel any objections thereto. The Court shall issue a supplemental Order regarding the attorney's fee awards.

The foregoing constitutes the Decision and Order of this Court.

Dated: Carmel, New York
April 4, 2013



Hon. Francis A. Nicolai, JSC

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