Submitted on Brief

Erie County Supreme Court's Index # 2007-7685

Supreme Court of the State of New York
Appellate Division, Fourth Department
Docket # CA 07-02277, CA 07-02278 & CA 08-01389

Donald Grasso, David Monolopolus, and Daniel T. Warren
Appellants

-Against-

Town of West Seneca, Zoning Board of Appeals of the Town of West Seneca, Town of West Seneca Building Department, William Czuprynski as the Code Enforcement Officer of the Town of West Seneca and Canisius High School a/k/a The Canisius High School of Buffalo, New York, James P. Higgins, S.J. as President of Canisius High School
Respondents

Appellants' Joint Reply Brief on Appeal

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Applicable Standard

Petitioner-Appellants are proceeding in this mater pro se and as such a liberal and broad interpretation is afforded the papers submitted by them (see, e.g., Moore v County of Rensselaer, 156 A.D.2d 784, 785; Greenman v City of Cortland, 141 A.D.2d 910, 911; Matter of Salahuddin v LeFevre, 137 A.D.2d 937, 938) and should be afforded every favorable inference in the case at bar.

Did the trial court err in holding that it did not have jurisdiction over Petitioners Monolopolus and Grasso?

The Town Respondents assert that Appellant Warren intended to represent Appellants Grasso and Monoolopolus. However, there is simply no evidence of such and the Town Respondents conduct belies this assertion. Nowhere in the responding papers did the Respondents raise this assertion. Respondents served their respective responding papers on all three Appellants. Right up until the court raised the issue of jurisdiction over Appellants Grasso and Monolopolus no party raised or argued this issue.

There is nothing in CPLR § 321(a) (incorrectly cited by the Town Respondents as 320(a)) that requires any specific notice requirement on behalf of a plaintiff or petition and that the appearance of a plaintiff or petitioner must be set forth in any particular manner. At least one court has held that "[w]here the petition in a proceeding is a printed form, carrying no statement of an attorney's name and admittedly not filed by an attorney, the appearance is by plaintiff in

person and not by the attorney (Hillside Housing Corp. v. Eisenberger, 173 Misc. 75)." W. T. Grant Co. v. Payne, 64 Misc. 2d 797, 798 (N.Y. County Ct. 1970).

In this case the petition was sufficient to identify the Appellants as individual petitioners each representing themselves as demonstrated the respective answers that were served on each Appellant and identifying each appellant as “pro se” (R 182, 185).

Respondents also mischaracterize the motions as being brought only by Appellant Warren when in fact they were brought by all off the Appellants as joint motions. This is clear by ¶ 3 of the affidavits in support of the two order to show causes (R 217, R 795) which state that the affidavit is submitted “in support of Petitioners’ motion.”

Although the trial court has broad discretion to limit oral argument, it must do so in a fair and balanced way so as not to deprive a litigant of his right to be heard as required by due process. The Town Respondents cannot have it both ways, they cannot assert that Appellant Warren could not represent Appellants Grasso and Monolopolus in one breath and then assert that Appellant Warren could make a complete oral argument on behalf of the other petitioners. Although Appellant Warren is united in interest with Appellants Grasso and Monolopolus whether or not Appellant Warren made all of the arguments Appellants Grasso and Monolopolus would have made is mere speculation. Once the court permitted oral argument it was duty bound to offer each of the parties on each side to make non-duplicative presentations, but it simply could not allow one party to argue and deny another (See i.e., RZS Holdings AVV v. PDVSA Petroleo S.A., 506 F.3d 350; Askew v. Wachovia Bank of Del., 2008 U.S. Dist. LEXIS 81873).

Due to the Court’s erroneous decision raised sua sponte Petitioner-Appellants Monolopolus and Grasso where deprived of their opportunity to be heard and otherwise participate in this proceeding.

Absent this Court reversing the trial court's judgment and order in its entirety and granting the petition this matter must be remanded to afford them this opportunity.

Did the trial court err in denying Petitioner-Appellants' motion for a default judgment?

The Town Respondents assert that its is the custom and practice that an adjournment of the return date of a motion also adjourns the time to which to file responding papers since the time to respond to a motion and this custom and practice is well settled and has a basis in law under CPLR § 2214. However, CPLR § 2214 is inapplicable in this case because this was a special proceeding and the Order to Show Cause granted on August 10, 2007 was issued pursuant to CPLR §§ 403, 406 and set forth explicit dates, not dates relative to a future occurrence, to perform certain actions including filing of the administrative record and answering papers as well as reply papers. Likewise, the Order to Show Cause granted on September 7, 2007 was issued pursuant to CPLR § 406 and Judiciary Law § 756 and also provided explicit dates rather than relative dates.

The Town Respondents do not address the fact that even assuming their answering papers were timely they were properly rejected due to the answer not being verified and the return not being certified by an appropriate official of the Zoning Board of Appeals and were therefore a legal nullity. The Respondents did not make an application by way of written or oral motion on the return date to compel Appellants to accept the defectively verified and certified papers and the court erred in implicitly granting affirmative relief that was not requested.

The respondents also fail to address the argument that even if the court had the discretion to excuse the lateness in the absence of a request for affirmative relief that it should have done un

such terms as are just to minimize the prejudice to Appellants as set forth on pages 12 - 13 of their Joint Brief on Appeal.

The order of the trial court should be reversed and a default judgment should be entered granting the relief request in the petition either because the trial court erred in denying this relief or this court's exercise of its own discretion on this issue.

Did the trial court err in denying Petitioner-Appellants' motion to hold Respondents in contempt?

Respondents do not deny that there was an unequivocal mandate of the court in the form of the Order to Show Cause. The order to show cause required them to perform certain actions by certain dates. Respondents did not file and serve their responsive papers by the time set forth in the order to show cause. There was no order vacating any other mandate in the order to chow cause except for the date upon which oral argument was to be heard. This resulted in prejudice to Appellants as set forth on pages 12 - 13 of their Joint Brief on Appeal.

The order of the trial court should be reversed and a finding of civil contempt should be entered and imposing a fine in a sum of up to $250.00 together with the costs and disbursements of this appeal pursuant to Judiciary Law § 773 upon each respondent and/or a finding of criminal contempt should be entered and imposing a fine on each Respondent in a sum of up to $1,000.00 either because the trial court erred in denying this relief or this court's exercise of its own discretion on this issue.

Did the trial court err in denying Petitioner-Appellants' motion to disqualify Harris Beach from representing Respondent Canisius?

Respondents assert that Respondent Canisius has consented to this conflict (R 196 lines 14 – 15). However, this was not mentioned in their papers nor was any documentation of the client's alleged consent presented and counsel for Respondent Canisius was not testifying under oath when this statement was made.

The disqualification of an attorney is a matter which rests within the sound discretion of the court and will not be overturned absent a showing of abuse (Grant Co. v Haines, 531 F2d 671). Any doubt is to be resolved in favor of disqualification (Hull v Celanese Corp., 513 F2d 568, 571; Glueck v Jonathan Logan, Inc., 512 F Supp 223, 228, affd 653 F2d 746; cf. Narel Apparel v American Utex Int., 92 A.D.2d 913, 914).

In this case the Counsel for Respondent Canisius owns an interest in an entity that made statements to an administrative agency that is different from Respondent Canisius' current position. This entity also has information on the intended use and scope of the project and is therefore a witness that possesses evidence relevant and material to the issues in this proceeding. Specifically this evidence is related to the intended use of the subject property as discussed in Appellants' Joint Brief on Appeal relative the request for subpoenas duces tecums. This requires that Counsel for Respondent Canisius be disqualified.

In Kevlik v. Goldstein, 724 F.2d 844, a conflict of interest was present where defendant's counsel had privileged communications with a material witness to plaintiffs' case; therefore, the Court held that counsel was properly disqualified from continuing in the case.

In the event this matter is remanded it is respectfully requested that this Court order the disqualification of Harris Beach or direct the trial court to hold an evidentiary hearing on this issue either because the trial court erred in denying this relief or based on this court's exercise of its own discretion on this issue..

Did the trial court err in denying Petitioner-Appellants' application for a temporary restraining order and motion for a preliminary injunction?

The Town Respondents assert that this issue is moot since the merits were decided against Appellants. However, they fail to address its propriety if this court reverses the trial court's determination of the merits.

In the event this matter must be remanded it is respectfully requested that this Court grant a preliminary injunction enjoining any further development of the Subject Property pending the final determination of this matter either because the trial court erred in denying this relief or this court's exercise of its own discretion on this issue.

Did the trial court err in denying Petitioner-Appellants' application for a subpoena duces tecum for books and records possessed by the Codes Division of the NYS Department of State, FRA Engineering & Architicture, P.C., HB Cornerstone Partners, LLC, and Wendel Duchscherer Architects & Engineers, P.C.?

As set forth in Appellants' brief on appeal discovery in this proceeding was necessary to the extent it sought information on the intent of Respondent Canisius and the scope of the project since this information would not lie in the administrative record. The Town Respondents are now characterizing the evidence of record which consist of statements of officers and agents of

Respondent Canisius as to the planned scope and intended use of the property together with a letter within the administrative record alluding to segmentation from the Erie County Department of Environment and Planning (R 301 - 302) as a “wish list.”

By denying discovery in this proceeding the trial court denied the Appellants access to information on these issues that are material and necessary to prosecuting this proceeding, particularly the issue of segmentation.

Even assuming that the trial court did not abuse its discretion in denying discovery this court is vested with a corresponding power to substitute its own discretion for that of the trial court, even in the absence of abuse (*Andon v 302-304 Mott St. Assoc.*, 94 N.Y.2d 740, 745; *see*, *Phoenix Mut. Life Ins. Co. v Conway*, 11 N.Y.2d 367, 370; *Chamberlin v. Samaritan Medical Center*, 249 A.D.2d 956, 672 NYS2d 571).

Absent this Court reversing the trial court’s judgment and order in its entirety and granting the petition this matter must be remanded to afford them this opportunity to conduct discovery on these issues and present the evidence so obtained either because the trial court erred in denying this relief or this court’s exercise of its own discretion on this issue.

Did the trial court err in determining whether the use of the Subject Property as an athletic field is a permissible use under the West Seneca Town Code?

WAS THERE COMPETENT PROOF OF ALL THE FACTS NECESSARY TO BE PROVED IN ORDER TO AUTHORIZE THE RESPONDENT ZONING BOARD OF APPEALS TO REACH ITS DETERMINATION THAT THE INTENDED USE IS PERMISSIBLE UNDER THE WEST SENECA ZONING CODE FOR THE SUBJECT PROPERTY AND IF THERE WAS SUCH COMPETENT PROOF, WAS THERE, UPON ALL THE EVIDENCE, SUCH A PREPONDERANCE OF PROOF AGAINST THE EXISTENCE OF ANY OF THOSE FACTS THAT THE VERDICT OF A JURY AFFIRMING THE EXISTENCE THEREOF, RENDERED IN AN ACTION IN THE SUPREME COURT TRIABLE BY A JURY, WOULD BE SET ASIDE BY THE COURT AS AGAINST THE WEIGHT OF EVIDENCE?

The question before this court and the trial court was not whether or not the athletic fields has a school use, but whether or not the principle use of the property is as a school within the meaning of the West Seneca Town Code § 120-17(A) or is an athletic field that just happens to be owned by an educational organization that operates a school approximately 10 miles away in the City of Buffalo and is therefore not permitted in a residential zone. For the reasons set forth in Appellants' Joint Brief on this appeal it is the latter.

Respondent Canisius asserts that it should not be estopped from asserting that the principle intended use of the subject property is for business and/or storage and not as a school due to the administrative proceedings before the New York Department of State, Divisions of Code Enforcement and Administration because: 1) it did not involve and administrative proceeding; 2) no sworn statements or representations under oath. This is contrary to the evidence of record and legal precedence.

There was an administrative proceeding before the New York Department of State, Divisions of Code Enforcement and Administration because it was an administrative proceeding that was governed by 19 NYCRR Part 1205. Notice of the Respondent Canisius' petition, which

initiated the proceeding, was given to the public by publication in the State Register (R 630 – 631; 2005-37 N.Y. St. Reg. 77). According to the notice the public was given an opportunity to review the petition, provide comments and receive notices of further proceedings. This notice stated "Involved is the construction of an athletic building." (R 631; 2005-37 N.Y. St. Reg. 77).

There were sworn statements or representations made under oath. The application for the variance provides in Section 4 "I make this application pursuant to 19 NYCRR Part 1205 and I assert under penalty of perjury that the information furnished by me in support of this application is true and correct to the best of my knowledge" (R 633). Also it is well settled that the rules of evidence in an administrative proceeding are relaxed and even unsworn testimony is admissible (Brown v. Ristich, 36 N.Y.2d 183, 190) In this case the sworn testimony was, at least in part, the representations of fact made in Respondent Canisius' application for the variance.

These proceedings are "quasi-judicial" in the general sense required for application of the doctrine of estoppel. This is so notwithstanding the differences between these proceedings and a civil trial, such as: the absence of juries, the absence of CPLR article 31 disclosure and the inapplicability of the rules of evidence followed in a civil trial.

Just as an application for a variance before a zoning board of appeals is quasi-judical so to is an application to the Department of State for a variance to its regulations concerning the Uniform Fire Code is (Compare Executive Law § 381(1)(f) with Town Law § 267-b, Village Law § 7-712-b, and General City Law § 81-b; Malin v. Albany Uniform Code Bd. of Review, 224 A.D.2d 816).

The Town Respondents argue that Appellants' reading of the West Seneca Town Code to permit the movement of an entire school to the site rather than allow something less does not make sense. However, a zoning board of appeals is without authority to waive or modify explicit

conditions set forth in the town code (see Matter of Jewish Reconstructionist Synagogue v Levitan, 34 N.Y.2d 827, 829; Matter of Holy Spirit Assn. v Rosenfeld, 91 A.D.2d 190, 195; Matter of Independent Church v Board of Zoning Appeals, 81 A.D.2d 585, 586). It is not up to the court, the Zoning Board of Appeals or the Code Enforcement Officer to question, alter or expand the wisdom of the Town Board in enacting this statute in the form that it did, to do so would violate the very basic principles of the separation of powers doctrine.

The cases cited by the Respondents are either distinguishable from this case and/or not binding on this court or controlling on the issues presented. In Rorie v. Woodmere Academy, 52 N.Y.2d 200, the school was located on the same parcel. In this case the school is not only not on the same parcel but approximately 10 miles away in the City of Buffalo. Also the Court in *Rorie* defined the question presented to it as "not whether, considering only the summer program, it is a permitted use, but rather how far a private school summer program may deviate from its September to June curriculum before it functions not as a private school but as a day camp and, therefore, beyond what the zoning ordinance allows." Rorie v. Woodmere Academy, 52 N.Y.2d at 205. Likewise it appears from the decision in Town of Islip v. Dowling College, 275 A.D.2d 366, that the events at issue in that case were located on the same property as the school which is not the case here. In the case of New York Institute of Technology, Inc. v. Ruckgaber, 65 Misc.2d 24, although the court struck down certain provisions of the Village Code and it is not clear whether or not the parcel at issue border each other or not it specifically held that the issue of whether or not the project at issue in that case "is an 'educational' use or 'accessory' to an educational use as those terms have been used throughout this decision and the authorities cited herein, cannot be determined summarily upon this application." The case of Harvey School v. Town of New Bedford, 34 A.D.2d 965, is not even a zoning case, but rather a taxation case and

is therefore not applicable to issue to be determined because although what may be an educational use under RPTL § 420 does not control the issue of what is a school within the meaning of the West Seneca Town Code or any other zoning statute. This is evidenced by the fact that this case has not been cited in any case deciding a zoning issue. The last case cited, Association of Zone A & B Homeowners Subsidiary, Inc. et al v. Zoning Board of Appeals of City of Long Beach, et al, 298 A.D.2d 583, merely held that there was no provision in the Long Beach Code that requires that an accessory use must be housed in accessory buildings; which is not an issue in this case and the school in that case was located on the same parcel as the claimed accessory use.

The Town Respondents argue that even if their decision was incorrect they could have issued a variance. Even assuming, without admitting, that this is the case Respondent Canisius did not ask for such a variance. Appellants and others would have been denied, in the absence of such an application and its attendant notice and hearing requirements, of their right to due process.

With that said it is only the Zoning Board of Appeals that may grant a use variance and even then only when there is "a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located, (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence; (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and

(4) that the alleged hardship has not been self-created." Town Law § 267-b(2); West Seneca Town Code § 120-56(B). It is clear from the subject decision of Respondent Zoning Board of Appeals that it did not consider any of these factors from evidence presented at the hearing of Petitioner Grasso's appeal.

With regard to the first element, it is clear that "before a claim that a property is yielding less than a reasonable return may properly be interposed, the reasonable return for that property must first be known or at least be ascertainable" (Matter of Crossroads Recreation v Broz, 4 N.Y.2d 39, 45). Moreover, the courts have consistently required "proof, in dollars and cents form, of all matters bearing upon the return available under existing zoning" (Matter of Village Bd. v Jarrold, 53 N.Y.2d 254 at 257; see, Matter of DeBeer v Zoning Bd. of Appeals, 226 A.D.2d 721; Matter of Delmarco v Zoning Bd. of Appeals, 204 A.D.2d 447). Such evidence "must show that no permissible use will yield a reasonable return" (Matter of Village Bd. v Jarrold, supra, at 258; see, Matter of Miltope Corp. v Zoning Bd. of Appeals, 184 A.D.2d 565). In the instant case, the record is devoid of any evidence from which the reasonable return on the property could be determined. Although there is some evidence that Respondent Canisius may not be able to use the property for which they intended, there is simply no evidence regarding whether other permitted uses within the applicable zoning district would fail to yield a reasonable return (see, Matter of Forrest v Evershed, 7 N.Y.2d 256; Matter of Miltope Corp. v Zoning Bd. of Appeals, supra).

In fact it may be that a use variance is precluded as a matter of law because the record demonstrates that any claimed "hardship" was self-created. "Hardship is self-created, for zoning purposes, where the applicant for a variance acquired the property subject to the restrictions from which he or she seeks relief" (Matter of Eung Lim-Kim v Zoning Bd. of Appeals, 185 A.D.2d

346, 347; see, Matter of First Natl. Bank v City of Albany Bd. of Zoning Appeals, 216 A.D.2d 680; Matter of Tharp v Zoning Bd. of Appeals, 138 A.D.2d 906).

With regard to the Town Respondents' assertion that it may ultimately have to issue such a variance on constitutional grounds the Zoning Board of Appeals lacks the power to even consider immunity from code provisions which may be derived from constitutional considerations (Williamsville/Southeast Amherst Homeowner's Ass'n v. Zoning Bd. of Appeals, 188 A.D.2d 1008 (4th Dep't 1992)). This court cannot reach the merits of this contention because Respondent Canisius did not interpose a claim for this relief. Also, given the Town Respondents position on this appeal even if such claim was interposed it appears that it would be non-justiciable for lack of a case or controversy.

Even if this issue was properly raised and entertained by the court a determination on whether or not this project should be permitted cannot be determined on the record before this court. This is so because even assuming, for purposes of argument only, that this project is a school that fact alone is not determinative of this issue because the Town would have to consider whether there is any evidence that rebuts the presumption of beneficial use and other factors relating to the health and safety of the neighborhood, increased expenditures to the town in regard to police, sanitation, etc. (Cornell University v. Bagnardi, 68 N.Y.2d 583, 595)

This Court should reverse the trial court and vacate the issuance of the subject building permits and declare that this action is not a permissible use under the West Seneca Town Code.

ARE THERE SUFFICIENT FINDINGS OF FACT TO SUSTAIN THE DETERMINATION OF RESPONDENT ZONING BOARD OF APPEALS AND THE DETERMINATION OF THE TOWN RESPONDENTS OF PERMISSIBLE USE?

The Town Respondents' do not point to any findings of fact made by the Zoning Board of Appeal. While the Town Respondents assert that the vote and the circumstances surrounding the vote is set forth in the record they fail to address the fact that the decision which is dated later than the meeting and that the decision was not announced on the record at a public meeting after executive session. They also do not address whether the written decision was in fact the determination reached by the board as a whole and accurately reflected the rational and findings of fact that was voted on in executive session.

This Court should reverse the trial court and vacate the issuance of the subject building permits and remand this matter to Respondent West Seneca Zoning Board of Appeals.

RESPONDENT CZUPRYNSKI'S DECISION TO ISSUE THE CHALLENGED BUILDING PERMITS AND THE RESPONDENT ZONING BOARD OF APPEALS DECISION AFFIRMING HIS ACTS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

"[A] determination is regarded as being supported by substantial evidence when the proof is 'so substantial that from it an inference of the existence of the fact found may be drawn reasonably.'" 300 Gramatan Avenue Associates v. State Division of Human Rights, 45 N.Y.2d 176, 179-180, 408 N.Y.S.2d 54, 56, 379 N.E.2d 1183, 1185 (1978), quoting Matter of Stork Restaurant, Inc. v. Boland, 282 N.Y. 256, 273, 26 N.E.2d 247, 255 (1940). A reviewing court must determine whether there is a rational basis for the findings of fact supporting the decision in question by reviewing the whole record. 300 Gramatan Avenue Associates v. State Division of

Human Rights, 45 N.Y.2d at 182. Upon a review of the whole record in the instant case the evidence is insufficient, and therefore this court should find that the determination lacks a rational basis and must be annulled.

The subject determinations lack substantial evidence that Respondent Canisius intends to use the Subject Parcel principally as a private, nonprofit elementary or secondary school accredited by the New York State Department of Education and Respondent Czuprynski properly issued the subject building permit in absence of a use variance or zoning change being granted for the Subject Parcel. Even if one took the position that Respondent Zoning Board of Appeals took this opportunity to consider a use variance and in essence granted such application there is simply a lack of substantial evidence to meet the statutory criteria for granting such variance.

This Court should reverse the trial court and vacate the issuance of the subject building permits and remand this matter to Respondent West Seneca Zoning Board of Appeals.

RESPONDENT CZUPRYNSKI'S DECISION TO ISSUE THE CHALLENGED BUILDING PERMITS AND THE RESPONDENT ZONING BOARD OF APPEALS DECISION AFFIRMING HIS ACTS IS ARBITRAY AND CAPRICIOUS AS A MATTER OF LAW.

Respondent Czuprynski was the decisionmaker and he initially stated that his determination was "that the most common classification the project fell under was Amusements in a C-1 zoning" (R 50). Respondent Czuprynski changed his position and held "that it was an accessory use or part of a school" (R 81). Nowhere in the return of the proceedings before Respondent Zoning Board of Appeals or in this proceeding did Respondent Czuprynski set forth a valid and rational explanation for the departure from his prior holding that the project fell under was "Amusements in a C-1 zoning" (R 200 – 666).

The Courts of this State have held that an administrative determination "that neither adheres to its own prior precedent, nor indicates its reason for reaching a different result on essentially the same facts, is on its face arbitrary and capricious (See, Field Delivery Service, 66 N.Y.2d 516, 488 N.E.2d 1223, 498 N.Y.S.2d 111; Al Turi Landfill v NYS Department of Environmental Conservation, 289 A.D.2d 231, 735 N.Y.S.2d 61, aff'd 98 N.Y.2d 758, 781 N.E.2d 892, 751 N.Y.S.2d 827); and an agency's failure to provide a valid and rational explanation for the departure from its prior precedent mandates reversal, even though substantial evidence may exist in the record to otherwise support the determination (See, Al Turi Landfill v NYS Department of Environmental Conservation, supra; Field Delivery Service, supra)." East End Prop. Co. No.1 LLC v. Town Bd. of the Town of Brookhaven, 15 Misc.3d 1138A.

Contrary to the Town Respondents' repeated assertions the zoning ordinance applicable in this case does not permit any and all educational use, it permits the use of the property as a "private, nonprofit elementary or secondary school accredited by the New York State Department of Education." (West Seneca Town Code § 120-17(A)).

This Court should reverse the trial court and vacate the issuance of the subject building permits and remand this matter to Respondent West Seneca Zoning Board of Appeals.

Did the trial court err in dismissing Petitioner-Appellants' Petition as it relates to challenging the Negative Declaration issued by the Town Respondents pursuant to SEQRA?

DID THE RESPONDENTS ABANDONED OR FAILED TO PROVE THEIR AFFIRMATIVE DEFENSE OF LACK OF STANDING?

The Respondents fail to brief the issue of standing in addition to failing to argue this issue as asserted in their respective answers before the trial court and have therefore abandoned this affirmative defense.

ARE THERE SUFFICIENT FINDINGS OF FACT TO SUSTAIN THE DETERMINATION OF RESPONDENT ZONING BOARD OF APPEALS AND THE DETERMINATION OF THE TOWN RESPONDENTS TO ISSUE A NEGATIVE DECLARATION UNDER SEQRA?

In regard to the determination to issue a negative declaration under SEQRA (R. 568) there are no findings of fact just merely conclusory opinions based on assumptions relative to mitigation which are not clearly negated obviating the need for a complete Environmental Impact State and its attendant public participation requirement and is completely devoid of consideration of a "no action" option. What may be construed as findings of fact are not supported by substantial evidence of record.

Particularly missing is any findings of fact or conclusion relative to the issue of segmentation despite evidence in the record that it was a concern of at least one of the involved

agencies as evidenced by the letter from the Erie County Department of Environment and Planning regarding the segmentations issue (R 301 - 302).

This Court should reverse the trial court and vacate the issuance of the subject building permits together with the negative declaration and remand this matter to the Town Respondents.

WAS THERE COMPETENT PROOF OF ALL THE FACTS NECESSARY TO BE PROVED IN ORDER TO AUTHORIZE THE TOWN RESPONDENTS TO ISSUE A NEGATIVE DECLARATION UNDER SEQRA AND IF THERE WAS SUCH COMPETENT PROOF, WAS THERE, UPON ALL THE EVIDENCE, SUCH A PREPONDERANCE OF PROOF AGAINST THE EXISTENCE OF ANY OF THOSE FACTS THAT THE VERDICT OF A JURY AFFIRMING THE EXISTENCE THEREOF, RENDERED IN AN ACTION IN THE SUPREME COURT TRIABLE BY A JURY, WOULD BE SET ASIDE BY THE COURT AS AGAINST THE WEIGHT OF EVIDENCE?

The Respondents do not dispute that this is a Type I action. "When a proposed action is classified as Type I, the threshold for requiring an EIS is relatively low, for this classification carries with it a presumption that the action is apt to have a significant effect on the environment, and consequently that the detailed evaluation provided by an EIS is required prior to decisionmaking" (Matter of Watch Hill Homeowners Assn. v. Town Bd. of Town of Greenburgh, 226 A.D.2d 1031, 1033, lv. denied 88 N.Y.2d 811; see also Matter of Scenic Hudson v. Town of Fishkill Town Board, 258 A.D.2d 654, 655; Riverhead Bus. Improvement Dis. Mgt. Assn. v. Stark, 253 A.D.2d 752, 753 lv. denied 93 N.Y.2d 808). The record of the SEQRA process fails to rebut this presumption.

Accordingly, where a lead agency has failed to comply with SEQRA's mandates, the negative declaration must be nullified (see e.g. Chinese Staff & Workers Assn. v City of New York, 68 N.Y.2d 359, 368-369, (1986)).

The determination of Respondent Zoning Board of Appeals and the building permits issued by Respondent Czuprynski are in violation of lawful procedure, based on an error of law,

arbitrary and capricious and an abuse of discretion and must therefore be set aside, vacated, annulled and reversed.

WAS THE SEQRA PROCESS IMPERMISSIBLY SEGMENTED?

The adequacy of an agency's consideration of environmental issues is generally a question of law because the issue is not whether effects are serious or harmful but whether the SEQRA process allowed for these issues to be adequately considered (see Weinberg, Practice Commentaries, McKinney's Cons Laws of NY, Book 17 1/2, ECL C8-0109.6; Coalition Against Lincoln West, Inc. v. City of New York, 60 N.Y.2d 805, 457 N.E.2d 795, 469 NYS2d 689 [1983], rearg denied 61 N.Y.2d 670 [1983]).

The issue of segmentation was sufficiently alleged in the petition and asserted in the trial court to preserve this issue for appellate review particularly in light of the trial court's erroneous denial of Appellants' motion for discovery on the issues related to the scope and intended use of the property and its erroneous decision that it lacked jurisdiction of Appellants Grasso and Monolopolus from raising their issues at oral argument. As noted in Appellants' Joint Brief on Appeal the record on appeal is replete with evidence of conflicting descriptions of the scope of the project and the administrative record even includes a letter from the Erie County Department of Environment and Planning regarding the segmentations issue (R 301 - 302).

While, in general, an appellate court will not consider an issue that was not raised in the court below, the rule will not apply where the appellant is raising a question of law, without asserting new facts. See Chateau D'If Corp. v. City of New York, 219 A.D.2d 205 (1st Dept. 1986) (holding that the failure to raise an issue in an original summary judgment motion does not prevent appellate court's review of any legal issues, including those raised for the first time on

appeal); Daubman v. Nassau County Civil Service Commission, 195 A.D. 602 (2d Dept. 1993) (addressing for first time on appeal the appellant's argument that the facts alleged below brought the case within the Human Rights Law).

Moreover, a legal issue is reviewable for the first time on appeal where the question of law was apparent on the face of the record and could not have been avoided if raised below. See Rafa Enterprises, Inc. v. Pigand Management Corp, 184 A.D.2d 329 (1st Dept. 1992) (finding appellate review appropriate of legal argument raised for first time on appeal pertaining to statutory requirements for default judgment because omission apparent on record and could not have been avoided); Intershoe, Inc. v. Bankers Trust Company, 160 A.D.2d 520 (1st Dept. 1990) (argument apparent on the face of the record may be entertained on appeal).

Here, because Appellants allege no new facts concerning the issue of segmentation, because Appellants do not offer to expand the record, and because the legal argument concerning whether Respondents SEQRA process is rendered arbitrary and capricious due to impermissible segmentation, is apparent on the face of the record, and could not have been avoided by Respondents if raised below, this Court may consider this question of law on appeal.

Moreover, in furtherance of the resolution of a legal issue fundamental and determinative to this appeal, this Court may reach the argument in the exercise of its discretionary authority. "If a conclusive question is presented on appeal, it does not matter that the question is a new one not previously suggested. No party should prevail on appeal given an unimpeachable showing that he had no case in the trial court." Telaro v. Telaro, 25 N.Y.2d 433, 439 (1969), quoting Cohen and Karger, Powers of the New York Court of Appeals at 627-28.

There are issues of fact as to the intended use, size, and scope of this action that if this petition is not granted in its entirety on other grounds that warrant further discovery and trial and should be remanded for further proceedings.

Conclusion

WHEREFORE Appellants request that the trial court's order and judgment be reversed and the Petition be granted:

A. Declaring that the intended principal use of the Subject Parcel is not for a private, nonprofit elementary or secondary school accredited by the New York State Department of Education; and

B. Declaring that the intended principal use of the Subject Parcel is for an athletic field; and

C. Declaring that an athletic field is not a permitted use under West Seneca Town Code § 120.17; and

D. Declaring that an athletic field is not a proper accessory use under West Seneca Town Code § 120.17 when it is not incidental to a principal permitted use under West Seneca Town Code § 120.17; and

E. Declaring that when an athletic field is the principal intended use it may only be on property zoned C-1 if it is enclosed in a building under West Seneca Town Code § 120.19 or C-2 if it is not enclosed in a building under West Seneca Town Code § 120.19 or alternatively it is not a permitted principal use on any property and is not permitted as a principal use on any property in the Town of West Seneca until the West Seneca Town Code is amended to include this as a permitted use in an appropriate zoning district pursuant to West Seneca Town Code § 120-5(C); and

F. Reversing, annulling, and setting aside the August 3, 2007 decision of Zoning Board of Appeals of the Town of West Seneca regarding the issuance of a building permit to build an equipment room 56 ft wide by 56 foot long for Canisius High School and Bleachers 25 ft wide by 102 ft long for grandstand (2 permits) on the property of 2448-2869 Clinton Street in the Town of West Seneca as a result of an error in law, arbitrary and capricious, an abuse of discretion and not supported by substantial evidence and is improper in that it is in violation of West Seneca Town Code § 120-58(G); and

G. Declaring that the issuance of the subject building permit by the Respondents on March 26, 2007, is null and void, and directing that such building permit be rescinded and a stop work order issued for any work commenced pursuant to the subject building permit; and

H. Reversing, annulling, and setting aside the September 26, 2006, Negative Declaration of the West Senenca Building Department, a result of an error in law, arbitrary and

capricious, an abuse of discretion and not supported by substantial evidence as it was adopted in contravention of the procedural and substantive requirements of the State Environmental Quality Review Act ("SEQRA"); and

I. Directing Respondents to issue a Positive Declaration that the project may have a significant detrimental environmental effect and to proceed with the preparation of an Environmental Impact Statement ("EIS"); and

J. Preliminarily and permanently enjoining any and all land clearing, vegetation removal, bulldozing, grading, construction or issuance of grading or building permits, or any funding approval, or any other action with respect to the Subject Parcel until the State Environmental Quality Review Act has been fully complied with; and

K. Granting petitioners costs and disbursements of this action together with such other relief as the court deems proper.

DATED: March 18, 2009
Buffalo, New York

Yours, etc.

/S/ Daniel T. Warren

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