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 Brief on Appeal

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Did the trial court err in dismissing the portion of the Petition that seeks review of the Zoning Board of Appeals determination that Respondent Canisius' intended use of the property is a permissible use under the West Seneca Town Zoning Code and not declaring the rights of the parties pursuant to CPLR § 3001? The Court below implicitly held that it had not.

Did the trial court err in dismissing the portion of the Petition that seeks review of the Negative Declaration under SEQRA by the Town of West Seneca? The Court below implicitly held that it had not.

Preliminary Statement

Respondent Canisius operates a private high school in the City of Buffalo, New York. In or about October 2004 Respondent Canisius announced its intent to acquire property in the Town of West Seneca, New York for its athletic facilities (R 613 – 615). (References to the Record on Appeal are denoted "(R___)") Respondent Canisius ultimately did acquire property (hereinafter "Subject Property") in or about July 2005 and in August 2005 submitted an application for a building permit together with an Environmental Assessment Form to Respondent Czuprynski (R 261 – 265). Respondent Canisius also applied for a variance from the Division of Code Enforcement and Administration of the New York Secretary of State stating that the use of the Subject Property would be for business and storage, not educational (R 86 – 91, & R 632 – 638). Respondent Czuprynski issued a negative declaration under SEQRA on or about March 21, 2007 (R 580 – 590). On or about March 26, 2007, Respondent Czuprynski issued a building permit to Respondent Canisius for the subject property (R 174) On or about June 14, 2007, Petitioner-Appellant Grasso appealed the issuance of the building permit to Respondent Zoning Board of Appeals (R 598) On July 25, 2007 Respondent Zoning Board of Appeals held a hearing on this appeal (R 578 – 582). By letter dated August 3, 2007 Petitioner-Appellants were notified of the decision of Respondent Zoning Board of Appeals (R 176 – 178).

It is a "fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it" (FGL & L Prop. Corp . v City of Rye, 66 N.Y.2d 111, 116 [1985]). The Court of Appeals noted that "where a zoning change such as a variance or special permit is sought, there is ordinarily a specific project sponsored by a particular developer that is the subject of the application and that, as a consequence, attention generally focuses on the reputation of the applicant, the applicant's relationship to the community and the particular

intended use, so that 'all too often the administrative or legislative determination seems to turn on the identity of the applicant or intended user, rather than upon neutral planning and zoning principles' (Matter of Dexter v Town Bd., 36 N.Y.2d, at 105, supra). We characterized this approach as error, however, and a 'lack of adherence to the fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it.' (Matter of Dexter v Town Bd., 36 N.Y.2d, at 105, supra; FGL & L Prop. Corp. v City of Rye, 66 N.Y.2d 111, 116; Matter of Weinrib v Weisler, 27 N.Y.2d 592, affg 33 A.D.2d 923; Vernon Park Realty v City of Mount Vernon, 307 NY 493, 500)." (St. Onge v. Donovan, 71 N.Y.2d 507, 515 (N.Y. 1988)).

It appears in this case that the issue arises from the Town Respondents making the challenged determinations not based on neutral planning and zoning principles, but rather the character and reputation of the land owner.

Petitioner-Appellants commenced this hybrid action for declaratory judgment and Article 78 proceeding by the filing of a verified petition in the Office of the Erie County Clerk on August 8, 2007. (R 12 – 178) Petitioner-Appellants submitted to the trial court a proposed order to show cause supported by the affidavit of Petitioner-Appellant Warren and the Verified Petition seeking a temporary restraining order pending the determination of Petitioner-Appellants' application for a preliminary injunction and the issuance of a subpoena duces tecum to the Codes Division of the New York Department of State. The order to show cause was granted by the trial court without the temporary restraining order and set September 4, 2007 as the date for Respondents to file and serve their answering papers and the certified return of the proceedings being challenged (R 212 – R 216). Counsel for Respondent Canisius requested an adjournment of the return date of the order to show cause and the Petitioner-Appellants would not consent to such adjournment unless Respondent Canisius voluntarily ceased work on the

subject parcel pending the hearing of the application for a preliminary injunction (R 850 – 851). The trial court adjourned the return date over Petitioner-Appellants' objection, but did not set any new dates for the filing and service of answering papers or reply papers (R 853). On September 7, 2007, Petitioner-Appellants moved for an order adjudging Respondents in contempt of court, for a default judgment, or alternatively for the disqualification of Respondent Canisius' counsel and the issuance of subpoena duces tecums (R 792 – 873). On or about September 14, 2007 each of the Petitioner-Appellants rejected the papers of Respondent Canisius as untimely served and the Town Respondents' papers were rejected as untimely and lacking any verification on the Answer and Certification of the Return (R 924, 936, 941). On September 18, 2007 after oral argument the trial court denied all of the Petitioner-Appellants' motions and dismissed the petition (R 5 – 11). Petitioner-Appellant timely appealed (R 1 – 4) and moved this court for an order consolidating the appeals, summary reversal or alternatively for a preliminary injunction pending appeal. By order dated November 28, 2007 this court granted the motion insofar as it sought consolidation of the appeals and denied all other requested relief. A dispute amongst the parties then developed over the Record on Appeal which culminated in Petitioner-Appellants moving to settle the record. Dissatisfied with the trial court's settlement of the record Petitioner-Appellants sought to appeal from the order settling the record on appeal. Petitioner-Appellants then moved in this court to consolidate the appeals and to extend the time in which to perfect the appeals. By order dated July 23, 2008 this court granted leave to appeal from the order settling the record on appeal, consolidated the appeals and extended the time to perfect the appeals to September 22, 2008. By stipulation the parties to this appeal have settled the issues regarding the record on appeal and the appeal from the trial court's March 28, 2008 order is withdrawn. Petitioner-Appellants then moved this court to appeal and order entered by

the trial court deciding a motion to vacate the judgment and order entered October 23, 2007, consolidate the appeals and for an extension of time. By order dated October 24, 2008 this court denied Petitioner-Appellants' motion for leave to appeal and extended the time to perfect this appeal to December 21, 2008.

Argument

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. This is a consolidated appeal of a final judgment rendered after oral argument in a hybrid Article 78 proceeding and declaratory judgment action and the subsequent order of the trial court determining a motion to settle the record on appeal and resettlement of the order of October 4, 2007. The scope of review possessed by this court extends to questions of fact as well as to questions of law (see, CPLR § 5712(c) (2); CPLR § 5501(c); Bonnette v Molloy, 209 NY 167; Maritime Fish Prods. v World Wide Fish Prods., 100 A.D.2d 81, 90) and that this court has the power to take a different view of the weight of the evidence, and to reverse a judgment or order on the facts, even where the trial court's findings are not clearly erroneous (see generally, York Mtge. Corp. v Clotar Constr. Corp., 254 NY 128; Matter of McMillan, 218 NY 64). This court is vested with the same power and discretion as the trial court possesses (Phoenix Mut. Life Ins. Co. v Conway, 11 N.Y.2d 367, 370; see also, Matter of Attorney-General of State of N.Y. v Katz, 55 N.Y.2d 1015; Wyda v Makita Elec. Works, 162 A.D.2d 133; VanDussen-Storto Motor

Inn, Inc. v Rochester Tel Corp., 63 A.D.2d 244; 7 Weinstein-Korn-Miller, NY Civ Prac, P 5501.22), it is clear that there is in fact no limitation on this court's power of review, and that a de novo review of the facts, and an independent exercise of its own discretion are not only permitted, but required particularly in a case such as this where the trial court does not express its findings of fact, conclusions of law or reasoning that serve as the basis for its determination.

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

Short answer, yes.

The trial court had jurisdiction over Petitioner-Appellants Monolopolus and Grasso because they consented to personal jurisdiction upon filing the verified petition commencing this action/proceeding. Both Respondents considered Appellants Grasso and Monolopolus as petitioners as they served answering papers on them (R 179 – 192 & R 193 – 186). Petitioner-Appellants Monolopolus and Grasso appeared on the return date of the proceeding and motion and stated their appearances on the record (R 190). Petitioner-Appellants are referred to in both the order and judgment that were prepared by the attorneys for Respondent Canisius as moving for relief in this proceeding (R 5, R 9). Incontestably Petitioner-Appellants Grasso and Monolopolus submitted themselves to the jurisdiction of the court (see, Siegel, NY Prac § 112, at 177-178 [2d ed]; see also, Matter of Dewar v Cigarette Serv., 5 A.D.2d 764; Matter of Gem Credit Corp. v Consolidated Edison Co., 25 Misc.2d 359, 360, mod on other grounds 13 A.D.2d 535, appeal dismissed 11 N.Y.2d 876; 5 NY Jur 2d, Article 78 and Related Proceedings, § 147, at 572).

The trial-court lacked the authority to dismiss Petitioner-Appellants Grasso and Monolopolus from this action/proceeding sua sponte. No party to this action or proceeding

raised any objections to personal jurisdiction over any party and such objections are deemed waived (CPLR § 3211(e)).

The Petition was verified by Petitioner-Appellant Warren (R 32) who is united in interest with Petitioners Grasso and Monolopolus and is acquainted with the facts set forth in the Petition. A Petition is a pleading and pursuant to CPLR § 3020(d) "[t]he verification of a pleading shall be made by the affidavit of the party, or, if two or more parties united in interest are pleading together, by at least one of them who is acquainted with the facts." One court has held that "[t]he phrase 'united in interest' refers to the identity of legal rights and interests of the petitioners (Matter of Maniscalco v Power, 4 A.D.2d 479, affd 3 N.Y.2d 918). Since such unity is present here, all parties need not verify (and see Finn Hannevig & Co. v Frankel, 207 App Div 180, 182). In any event, the remedy for a pleading deemed insufficiently verified is to treat it as a nullity and '[give] notice with due diligence to the attorney of the adverse party that he elects so to do' (CPLR 3022). 'Due diligence' has been held to mean within 24 hours, and noting the lack of complete verification some two months later is not timely notice (see, e.g., Matter of O'Neil v Kasler, 53 A.D.2d 310, 315; Matter of Nafalski v Toia, 63 A.D.2d 1039). Any failure by all of the petitioners to verify the pleading has therefore deemed waived by the respondents." Betzler v. Carey, 109 Misc.2d 881, 886 affd 91 App Div 2d 1116.

Any alleged defects in the verified petition have been waived by Respondents since they did not comply with CPLR § 3022 (Clark v. State, 302 A.D.2d 942 (4th Dept. 2003)). Additionally there was no prejudice to any party to the proceeding and any irregularity should have been disregarded. CPLR § 104, provides that "the civil practice laws and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding." This philosophy is continued in CPLR § 2101(f), which directs the Court to

disregard defects in the form of a paper if a substantial right of a party is not prejudiced. CPLR § 3026 provides that pleadings shall be liberally construed with defects being ignored if a substantial right of a party is not prejudiced.

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?

Short answer, yes.

"[A] default admits all factual allegations of the [petition] and all reasonable inferences therefrom" (Fleet Bank v Powerhouse Trading Corp., 267 A.D.2d 276, 277; see, Silberstein v Presbyterian Hosp., 96 A.D.2d 1096; see also, Kessler v Atlantic Ave. CVS, 271 A.D.2d 655; Rosenberg v Litas Investing Co., 212 A.D.2d 686).

In the case at bar the Order to Show Cause and Verified Petition were to be served on or before August 17, 2007 (R. 212 – R 216). The Town Respondents were served on August 15, 2007 (R. 819 – R 820) and counsel for Respondent Canisius waived formal service of the Order to Show Cause and verified petition and accepted service by mail on August 15, 2007 (R. 822, R 875). By order to show cause granted on September 10, 2007 (R 792 – 794) Petitioner-Appellants moved for among other relief a default judgment. This order to show cause and supporting papers were served on Respondents on September 13, 2007 (R 918 – 920). The Respondents' answering papers were not even served until September 13, 2007 at the earliest (R

876, R 901) and were promptly rejected due to defective verification and timeliness by each of the Petitioner-Appellants (R 924, 936, 941).

The Town Respondents despite being served with the order to show cause granted on August 10, 2007 and the Verified Petition did not file a certified copy of the return, verified answer or objections in point of law as directed. Therefore their failure to answer or move to dismiss the petition was either intentional in which a default judgment should be entered or they have willfully resisted this Court's order and is in criminal contempt of this Court's order as discussed, infra.

Respondent Canisius despite being served with the order to show cause granted on August 10, 2007 and the Verified Petition did not file a verified answer or objections in point of law as directed. Therefore their failure to answer or move to dismiss the petition was either intentional in which a default judgment should be entered or they have willfully resisted the Court's order and is in criminal contempt of the Court's order as discussed, infra.

It was only after Petitioner-Appellants had moved to hold the Respondents in contempt of this Court's August 10, 2007, order and for the entry of a default judgment and other relief and after the first Respondent was served with this application did the Respondents even attempt to comply with the Court's August 10, 2007, mandate to file and serve their respective responsive papers on or before September 4, 2007. Even then the Town Respondents' attempt consisted of an unverified answer and an un-certified return which were promptly rejected and Petitioners elected to treat the as a nullity and the balance of the Town Respondents' submissions as well as those of Respondent Canisius were rejected and returned as untimely. The practice in New York permits a party who is served with a pleading that is late to reject it (Dobbins v. County of Erie, 65 A.D.2d 934 (4th Dep't 1978); Weinstein v. General Motors Corp., 51 A.D.2d 335, (1st Dep't

1976) (defendant's attorney acted properly in returning a complaint served late, since retention might have constituted waiver of objection to the lateness)). CPLR § 3022 provides that: "A defectively verified pleading shall be treated as an unverified pleading. Where a pleading is served without a sufficient verification in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity, provided he gives notice with due diligence to the attorney of the adverse party that he elects so to do." CPLR §§ 3020, 3022 are applicable in an Article 78 proceeding (Colon v. Vacco, 242 A.D.2d 973 (4th Dept. 1997)).

The adjournment of the return date set forth in the order to show cause granted on August 10, 2007, by the court over Petitioner-Appellants' objections, did not alter the date the Respondents were to file and serve their respective responsive papers, objection in point of law or the certified return as set forth in the Order to Show Cause granted on August 10, 2007. An extension of time to serve any papers was not requested as evidenced in the exchange of e-mails between counsel for Respondent Canisius and Petitioner-Appellant Warren (R 850 – R 851) nor was such relief granted or consented to as evidenced by the letter of Ms. Colaiacovo (R 853). Research has not located any authority for this position that is directly on point in the context of an Article 78 proceeding. However, instructive is the holding of the Court in Gluck v. Wiroslaw, 113 Misc.2d 499, in deciding this precise issue in the context of a proceeding under RPAPL article 7 held that "Where the three-day demand is made, respondent's answer is due before the initial court appearance. Thus, an adjournment of the hearing will not automatically extend the time for answer. This must be accomplished by separate stipulation." (See also Kirschenbaum v. Gianelli, 63 A.D.2d 1057).

The Appellate Division, Second Department in Kurth v. Susskind, 200 A.D.2d 572, affirmed a default judgment when the respondents purportedly served a timely motion to dismiss,

but failed file proof of service, and the filing of the motion was rejected by the Court Clerk and respondents failed to move to vacate their default.

Respondents did not move, despite ample time to file a motion or cross-motion, for any affirmative relief to excuse and vacate their default or to compel Petitioner-Appellants to accept the papers that were properly rejected. Respondents did not even make an oral motion on the return dated of this matter (R 187 – 211). Furthermore, in the absence of such request for affirmative relief the court was without jurisdiction to grant any. The trial court erred in implicitly compelling the acceptance of the rejected papers (Allstate Ins. Co. v. Marrano Dev. Corp., 26 A.D.3d 727 (4th Dept. 2006)).

Although CPLR §§ 2005, 3012(d), 5015 empower the courts to exercise discretion in determining properly and duly made motions to vacate defaults emanating from law office failure (Stolpiec v Weiner, 100 A.D.2d 931), the legislation did not intend the routine vacatur of such defaults (La Buda v Brookhaven Mem. Hosp. Med. Center, 98 A.D.2d 711, affd 62 N.Y.2d 1014). Law office failure may be considered along with several other relevant factors in determining motions to open defaults. However, where, as here, no justifiable excuse is presented and the default remains unexplained, the moving party is not entitled to a vacatur of its default, regardless of the meritorious nature of its defense. "A party seeking to vacate a default judgment is 'required to demonstrate both a reasonable excuse for the default and a meritorious defense to the action' (Fennell v Mason, 204 A.D.2d 599; see, CPLR § 5015(a)(1)). A 'vague and unsubstantiated claim of law office failure' is insufficient to constitute a reasonable excuse (Fennell v Mason, supra, at 599; see, Korea Exch. Bank v Attilio, 186 A.D.2d 634)." Brown v. Baghdady, 226 A.D.2d 1137 (4th Dept. 1996); De Simone v. Barry, Bette & Led Duke, Inc., 252 A.D.2d 948. Likewise an attorney's failure to serve a timely answer because of the pressure of

his various employments does not constitute reasonable law office failure. (See Bowdren v. Peters, 208 A.D.2d 1020 (3rd Dept 1994)). Although the determination of what constitutes a reasonable excuse lies within the sound discretion of the trial court (see, Matter of Gambardella v Ortov Lighting, 278 A.D.2d 494; Parker v City of New York, 272 A.D.2d 310; De Vito v Marine Midland Bank, 100 A.D.2d 530), the party in default must submit supporting facts in evidentiary form sufficient to justify the default (see, Bravo v New York City Hous. Auth., 253 A.D.2d 510; Peterson v Scandurra Trucking Co., 226 A.D.2d 691; American Sigol Corp. v Zicherman, 166 A.D.2d 628). Nor is conduct that constitutes an intentional default or a default in bad faith excusable (see Eretz Funding v Shalosh Assoc., 266 A.D.2d 184; Roussodimou v Zafiriadis, supra; Perellie v Crimson's Rest., 108 A.D.2d 903). It has been held that the “The affirmation of counsel, that his office 'failed to properly follow for the adjourned Small Claims Trial date, and accordingly failed to appear in Court on July 15, 2004' lacked the requisite 'detailed explanation' of the reason for such failure (King's Med. Supply Inc. v Response Ins. Co., 5 Misc.3d 135A[A], 799 N.Y.S.2d 161, 2004 NY Slip Op 51493[U] [App Term, 2d & 11th Jud Dists]). Rather, it is precisely the sort of conclusory affirmation, amounting to little more than a confession of neglect, which the courts consistently reject as a basis to vacate a default judgment (e.g. Solomon v Ramlall, 18 A.D.3d 461, 795 N.Y.S.2d 76 [2005] [plaintiff's 'undetailed and uncorroborated' excuse for its law office failure insufficient]; Juarbe v City of New York, 303 A.D.2d 462, 756 N.Y.S.2d 427 [2003] [counsel's bare explanation that an attorney 'was late for a motion calendar call' was 'conclusory and devoid of any detailed factual allegations, and thus did not constitute a reasonable excuse']; see also Incorporated Vil. of Hempstead v Jablonsky, 283 A.D.2d at 554, 725 N.Y.S.2d 76; Gourdet v Hershfeld, 277 A.D.2d 422, 716 N.Y.S.2d 714 [2000]).” Escobar v. Koeppel Volkswagen, Inc. Used Cars, 10 Misc.3d 127A.

"While a court can in its discretion accept late papers, CPLR 2214 and 2004 mandate that the delinquent party offer a valid excuse for the delay" (Thermo Spas v Red Ball Spas & Baths, 199 A.D.2d 605, 606 [1993] [citations omitted]). Additional factors relevant when essentially extending the return day by accepting late papers include, among others, the length of the delay and any prejudice (see Matter of Burkich, 12 A.D.3d 755, 756 [2004]; Saha v Record, 307 A.D.2d 550, 551 [2003]).

Even if the Court's granting the respondents' relief from their untimely and defective answering papers is appropriate it should have been on such terms as are just, justice and due process required the court to adjourn the matter to give Petitioner-Appellants time to review and prepare arguments based on the belatedly served papers. Petitioner-Appellants were prejudiced by the late filing and defective nature of the answering papers. Specifically had the answering papers been timely filed and served Petitioner-Appellants could have referenced the inconsistent descriptions of the project contained therein and brought them to the attention of the Court on our motion for discovery as discussed, infra. It is well settled that CPLR § 7804(e) requires that a certified transcript of the hearing be filed with the respondents' answer or separately with the clerk of the court. It has been consistently held that it is error to pass on a question based upon such an incomplete record (see, CPLR § 7804(e); Matter of Jacob v Winch, 121 A.D.2d 446; Matter of Dupree v Scully, 100 A.D.2d 966, 967). It appears that the administrative record produced by the Town Respondents is, in fact, incomplete. The studies relative to traffic (R 118 – R 130), noise, air pollution (R 100 – R 111) that are attached to the Verified Petition were submitted to, and apparently considered by, the Town Respondents by respondent Canisius relative to noise and traffic do not appear in the Record filed by the Town Respondents despite

the fact that they are directly and indirectly referred to in the resolution adopting the negative declaration (R 580 – R 590).

Petitioner-Appellants were thereby deprived of the opportunity to ascertain whether, or to argue that, respondent's determination was not based upon substantial evidence or is arbitrary and capricious or irrational or that the record was inadequate or incomplete and whether a reply was required.

The untimely and defectively verified answer and uncertified return were not properly before the court since they were properly rejected by the Petitioner-Appellants pursuant to CPLR § 3022 and the Respondents did not move to vacate their default or to compel the acceptance of the rejected papers.

It appears from Respondents conduct that their default was either willful or in bad faith in order to allow Respondent Canisius to further construction of the challenged project and to prejudice Petitioner-Appellants in preparation of their case. Even if law office failure is established sufficiently to excuse a default a showing of a meritorious defense is also necessary (Klenk v. Kent, 103 A.D.2d 1002 (4th Dept. 1984)).

Additionally, even if the court finds that a default judgment is not appropriate for that part of this hybrid action/proceeding seeking relief under CPLR article 78, default judgment is proper as to that part seeking declaratory relief (See Am. Transit Ins. Co. v. Wilfred, 296 A.D.2d 360) which would be dispositive of the issues raised under Article 78 by reason of law of the case, collateral estoppel or res judicata.

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?

Short answer, yes.

The willful conduct contemplated by Judiciary Law §§ 750, 753 may be committed through acts of commission or omission. People v Solomon (1934) 150 Misc 873. A Court order must be obeyed, no matter how erroneous, so long as the court is possessed of jurisdiction and its order is not void on its face. Power Authority of New York v Moeller, 57 A.D.2d 380, app den (1977) 42 N.Y.2d 806 and stay den (1977) 42 N.Y.2d 975. Proof of noncompliance establishes a prima facie case of criminal contempt and the burden then shifts to Respondents to establish good cause for their noncompliance, thereby negating the inference of willfulness (see, Ferraro v Ferraro, 272 A.D.2d 510, 512; Matter of Department of Envtl. Protection of City of N.Y.Department of Envtl. Conservation of State of N.Y., 70 N.Y.2d 233; People v D'Amato, 12 A.D.2d 439).

While law office failure may be sufficient to excuse a default it does not constitute "good cause" sufficient to negate the inference of willfulness. A delay in service resulting from neglect or mistake by a litigant's attorney does not constitute good cause (Leader v. Maroney, Ponzini & Spencer, 276 A.D.2d 194)

Respondents willfully disobeyed the direction that they serve and file their respective answering papers contained in the Court's mandate in the order to show cause granted on August 10, 2007. The Respondents willfully resisted taking any action to comply with this mandate until after they were served with the instant application to hold them in contempt and for the entry of a default judgment.

If the Court finds that the Respondents did not intentionally default by failing to serve and file either a verified answer or objections in point of law then Respondents have willfully resisted the Court's order to file and serve such papers by September 4, 2007 and is in criminal contempt of this Court's order.

The Town Respondents have willfully and intentionally disobeyed the Court's unequivocal mandate in the order to show cause granted on August 10, 2007, that they "shall make and file with the Court its return hereto and serve a copy upon Petitioners on or before the 4th day of September, 2007."

Based on the belated service and filing of their respective papers it is clear that the Respondents willfully resisted this Court's mandate that they serve and file them by September 4, 2007 and the Respondents should be found in criminal contempt of the order to show cause granted by this Court on August 10, 2007.

It is undisputed that the Order to show Cause granted on August 10, 2007, contained a clear and unequivocal mandate that the return and answering papers be served and filed by the respondents on or before September 4, 2007. The Defendants were served this Order to Show Cause according to its terms, and the Respondents did not serve and file there return and answering papers by September 4, 2007. The Petitioner-Appellants were prejudiced as set forth, supra, due to the late service of these defective a papers.

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?

Short answer, yes.

The law firm of Harris Beach, PLLC has appeared in this proceeding on behalf of Respondent Canisius (R 183 – R 186) and owns an interest in HB Cornerstone, Inc. who is the project manager for the project that is the subject of this litigation (R 824 – 825, R 876 – 877). Petitioner-Appellants had requested that a subpoena duces tecum be issued to HB Cornerstone to in order to discover the intention of Respondent Canisius as to the scope and intended uses of the property that is the subject of this litigation and to determine whether it was authorized by Respondent Canisius to authorize others to make the representations in the application filed with the Codes Division of the New York Department of State in obtaining a variance for the subject project. (R 86 – 91, R 632 – 638, R 816 – 817). Counsel for Respondent Canisius has admitted that it owns an interest in HB Cornerstone and that HB Cornerstone is the project manager for Respondent Canisius (R 877 ¶ 14 of the Affimration of Richard T. Sullivan, Esq.). In an apparent recognition of at least the appearance of a conflict counsel for Respondent Canisius asserted at oral argument 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).

22 NYCRR § 1200.24(a) provides in pertinent part that "A lawyer shall decline proffered employment if the exercise of independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests."

22 NYCRR § 1200.20(a) provides in pertinent part that a "lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests."

22 NYCRR § 1200.22(a) provides in pertinent part that a "lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he or she is conducting for a client."

Ethical Consideration 5-1 provides, in pertinent part, that, "[the] professional judgment of a lawyer should be exercised * * * solely for the benefit of his client and free of compromising influences and loyalties" (Code of Professional Responsibility, EC 5-1). Ethical Consideration 5-3 states, in relevant part, that "a lawyer should not acquire property rights that would adversely affect his professional judgment in the representation of his client" (Code of Professional Responsibility, EC 5-3).

Disciplinary rules are not to be mechanically applied in considering motions to disqualify counsel (United States ex rel. Sheldon Elec. Co. v Blackhawk Heating & Plumbing Co., 423 F Supp 486), nor will a violation of professional ethics automatically result in disqualification (

Grant Co. v Haines, 531 F2d 671, 677). However, the Court of Appeals has noted that "with rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship" (Matter of Kelly, 23 N.Y.2d 368, 376). Harris Beach LLP's possession of the interest at bar in a key witness even if not in fact, could give such an appearance, especially as Canisius, to whom Harris Beach LLP apparently owes its allegiance, is a Respondent and the witness in which it has an interest in possesses information and made representations contrary to the interest of Respondent Canisius.

In opposing this motion counsel for Respondent Canisius asserted that Petitioner-appellants lack standing to raise this issue. The purpose of the Code of Professional Responsibility in situations involving adverse interest representation is to protect clients, ignorant and sophisticated, maintain the integrity of the legal system and prevent even honest attorneys from serving mutually antagonistic interests. (7A CJS, Attorney and Client, § 150; see, Moore, Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy, 61 Tex L Rev 211 [1982].) "The function of the court on such a motion [i.e., for disqualification] is restricted to the taking of such action as may be necessary to insure a proper representation of the parties and fairness in the conduct of the litigation". (Young v Oak Crest Park, 75 A.D.2d 956, 957 [3d Dept 1980].) Petitioner-Appellants are aggrieved by the unfairness of allowing an attorney to represent a party to this litigation and a witness to material events to the subject litigation. Petitioner-Appellants therefore have standing to make this application in order to protect the fairness of the conduct of this litigation.

In any event, public policy absolutely demands that the principles governing the attorney-client relationship, which involves a high trust, not be weakened (Loew v. Gillespie, 90 Misc. 616, 619, App. Term 1st Dept., Lehman, J., aff'd on op. below 173 App. Div. 889); and the power to compel attorneys to adhere to their professional obligations is of a continuous nature which "may be exercised at any time when the occasion arises" (Leviten v. Sandbank, 291 N. Y. 352, 357). Accordingly, the judiciary will not close its eyes when the suggestion of impropriety appears on the record and the issue may be raised sua sponte (Porter v. Huber, 68 F. Supp. 132, W. D. Wash.; Seifert v. Dumatic Industries, 197 A. 2d 454, Pa., see Erie Co. Water Authority v. Western N. Y. Water Co., 304 N. Y. 342, 351, 353; Pomona Enterprises, Ltd. v. Mellen, 30 A. D. 2d 704 [2d Dept.]; Mtr. of Sociedad Maritima [Pangalante Co.], 21 A. D. 2d 43, mot. for lv. to app. den. 14 N. Y. 2d 485).

It has been held that "the adverse party may properly move to disqualify the attorney for an opposite party on the ground of conflict of interest." (7A CJS, Attorney and Client, § 157, at 224; SMI Indus. Canada v Caelter Indus., 586 F Supp 808, 815 [ND N.Y. 1984] [lack of standing argument "must give way to a maxim that adequately addresses the need to ensure both clients and the general public that lawyers will act within the bounds of ethical conduct"]; Vegetable Kingdom v Katzen, 653 F Supp 917, 923, n 4 [ND N.Y. 1987]; Code of Professional Responsibility DR 1-103 [22 NYCRR § 1200.4 (a)].)

Similarly instructive is Justice Lazer's opinion in Island Pa-Vin Corp. v Klinger, 76 Misc.2d 180 [Sup Ct, Suffolk County 1973], revd on other grounds 47 A.D.2d 627 [2d Dept 1975]. There, plaintiff's attorney did not make a motion. The court sua sponte raised the conflict of interest issue during trial when defense counsel began cross-examination of plaintiff's witness. The witness had previously been represented by defense counsel on other matters. Justice Lazer

granted a mistrial and disqualified defense counsel. He stated: “Since what is involved is a matter of public interest relating to the integrity of the Bar ... [citing case], the courts, as well as the Bar, have a responsibility to maintain public confidence in the legal profession ... [citing case]. The exercise of such responsibility cannot be deemed dependent upon the disposition of the parties or their attorneys to press an issue of impropriety by formal motion when the court itself has become aware of its existence” (76 Misc.2d, at 186, (supra)). The reversal was predicated upon the ground that the prior representation of the witness on unrelated matters had ended and, therefore, defense counsel was not representing adverse interests at the time of trial.

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, infra, relative the request for subpoenas duces tecums. This requires that Counsel for Respondent Canisius be disqualified.

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 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?

Short answer, yes.

A preliminary injunction or a stay pursuant to CPLR § 7805 should be granted when the applicant establishes a likelihood of success on the merits, irreparable injury if the injunction is not granted and a balancing of equities in favor of the movant (see, Clark v Cuomo, 103 A.D.2d 244, 245, affd 63 N.Y.2d 96).

The petitioners' arguments on the merits as set forth, infra, established a likelihood of success on the merits.

Petitioner-Appellants will, and have, suffered irreparable injury because the temporary restraining order and injunction was not granted. According to Respondent Canisius' own submissions the subject project involves irreversibly converting over 10 acres of agricultural land and will result in changes to the ground water quality and quantity; the proposed action will alter drainage flow or patterns or surface water runoff; the action may cause substantial erosion; proposed action will affect aesthetic resources; proposed land uses, or project components are obviously different from or in substantial contrast to current surrounding land use patterns, whether man-made or natural; the proposed action will affect the character of the existing community; it will cause a change in the density of land use and other environmental harms. These environmental harms will have a negative environmental impact on the property of petitioners which are located in or in close proximity to the same 100 year floodplain as the Subject Parcel. These very same environmental harms will affect the federal wetlands that are

within a few feet of the Subject Parcel and located within the same 100 year floodplain (R 100 – 108).

Equitable relief is particularly important in SEQRA and zoning litigation where a petitioner seeks to annul a permit to prevent the implementation of a project and maintain the status quo. If a permit holder or government agency, however, were to proceed with construction, any judgment a petitioner may subsequently obtain might be rendered moot. In such a case, the project would almost certainly by that time have gained an irreversible momentum. Any initial determination rendered in retrospect upon remand would be little more than an idle gesture. Even if petitioners were successful upon remand, the utility of the resultant environmental impact statement might be severely curtailed because the project will have progressed to a point that will foreclose any meaningful considerations of alternatives as required under ECL § 8-0109(2).

It is clear from the differences between the descriptions of the project in Respondent Canisius' press releases and other statements and the EAF (discussed in the next question) that future work in furtherance of this action is contemplated and not speculative.

Balancing of equities tipped in favor of Petitioner-Appellants in this case because of the erroneous decision below, could possibly forever change the entire environmental impact upon the contested area. Moreover, as the Appellate Division, Second Department stated in Matter of Sun Beach Real Estate Dev. Corp. v Anderson (98 A.D.2d 367, 375-376, affd 62 N.Y.2d 965), "[we] have no difficulty in according priority to SEQRA because the legislative declaration of purpose in that statute makes it obvious that protection of 'the environment for the use and enjoyment of this and all future generations' (ECL 8-0103, subd 8) far overshadows the rights of developers to obtain prompt action on their proposals." Additionally whatever action

Respondent Canisius took in reliance on the subject building permit it did so at its own peril. Respondent Canisius had notice of Petitioners' objections and participated in the appeal of its' building permit before Respondent Zoning Board of Appeals and even consented to a stay during those proceedings which ended on August 3, 2007. This proceeding was commenced on August 8, 2007 and Respondent Canisius' attorneys had notice of it on that day and refused to consent to a stay pending the hearing of this application. The Court denied Petitioners a temporary restraining order pending the hearing of this application and Respondent Canisius has had its contractors proceed at full speed towards completion of the project. Petitioners' repeated and consistent objection is that SEQRA has not been complied with and the property is not properly zoned for its intended principal use and therefore any building permit that was issued to Respondent Canisius is invalid. An invalidly granted permit "vests no rights in contravention of a zoning ordinance in the person obtaining that permit" (Matter of Cowger v Mongin, 87 A.D.2d 932, 934, lv denied 57 N.Y.2d 601, appeal dismissed, cert denied 459 US 1095). Even substantial construction does not create a vested right in an invalidly issued building permit. Parkview Assocs. v. City of New York, 71 N.Y.2d 274, cert. denied, 488 U.S. 801.

Due to these delays and despite actual knowledge that Petitioners were seeking a preliminary injunction against further work on the subject parcel based on the premise that the building permit was invalidly issued in violation of the applicable zoning code and that the SEQRA negative declaration underlying the issuance of the building permit should be vacated and a complete Environmental Impact Statement be prepared Respondent Canisius proceeded to work on the subject project. Such work has and will continue to irreparably change the SEQRA process and will have irreversible environmental changes to the surrounding area.

In addition to protecting the status quo pending this action the TRO and Preliminary injunction may have protected Respondent Canisius from expending money and resources in moving forward on a project that may not be lawful and protect its stakeholders, donors and benefactors from the loss thereof.

CPLR § 6312(b) incorporated into CPLR § 7805 requires the Court to fix the undertaking in an amount sufficient to compensate Defendant for damages sustained if it is determined that the preliminary injunction was improvidently granted. (See, Margolies v. Encounter, Inc., 42 N.Y.2d 475 (1977)) Therefore the amount of the undertaking should be inversely proportional to the Court's assessment on the issue of Petitioners' likelihood of success. (the greater the likelihood the lower the undertaking). Petitioners need not demonstrate a willingness or ability to post an undertaking prior to the issuance of a preliminary injunction. In fact it is the Respondents' burden of proof to demonstrate what damages it would suffer that would be proximately related to the issuance of the preliminary injunction (MonsterHut, Inc. v. PaeTec Communications, Inc., 294 A.D.2d 945 (4th Dept. 2002)). Respondent did not assert let alone establish that they would suffer any damages related to the issuance of a preliminary injunction.

In Johnson v. City of New York, 152 Misc.2d 576, the court set the undertaking at $100.00 when it enjoined renting of a single apartment. In Nigra v. Young Broadcasting of Albany Inc., 177 Misc.2d 664, the court enjoined defendant from enforcing a restrictive covenant and waived the requirement of an undertaking. However, see Rourke Developers Inc. v. Cottrell-Hajeck, Inc., 285 A.D.2d 805, which holds that an undertaking may not be waived.

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.?

Short answer, yes.

In this hybrid Article 78 proceeding and action for declaratory judgment the issuance of these subpoenas were, and are, proper under CPLR article 31 since the subpoenas seek relevant and necessary material to prosecute the declaratory judgment portion of this matter. In Price v. New York City Bd. of Educ., 16 Misc.3d 543, the Supreme Court, New York County, held that "[a]lthough the Article 78 and Action for Declaratory Judgment may proceed together, the Court must apply the usual rules relating to discovery to them as if they were separate matters. Thus, discovery under each must be considered solely with respect to the propriety of discovery vis a vis the issues and claims under such rubric. Under its 'Article 78 hat,' the Court must determine, for such purposes, whether to allow such discovery as a matter of the proper exercise of its discretion. Under its 'declaratory judgment hat,' the Court must apply the usual rules applicable to ordinary actions to determine whether such discovery should proceed."

Petitioners in a proceeding seeking mandamus to review, are free to submit to the court any "competent and relevant proof * * * showing that any of the underlying material on which the [Board] based its determination has no basis in fact," or challenging the expertise of the members of the Board, or in support of his contention that the Board's determination was

irrational or arbitrary (Matter of Mandle v. Brown, 5 N.Y.2d 51, 65; Matter of Newbrand v City of Yonkers, 285 NY 164, 178; Matter of Hodgins v. Bingham, 196 NY 123, 126-127; Matter of Holy Spirit Assn. for Unification of World Christianity v. Tax Comm. of City of N.Y., 62 A.D.2d 188; cf. Matter of Simpson v. Wolanksy, 38 N.Y.2d 391, 395-396).

Petitioner-Appellants requested the issuance of three subpoenas duces tecum in addition to the one requested in the order to show cause granted on August 10, 2007 (R 858 – 862). Counsel for Respondent Canisius objected to the issuance of these subpoenas (R 866 – R 867). Petitioner-Appellant Warren responded to the objection by letter dated September 5, 2007 (R 869). By letter dated September 4, 2007 the Court informed the parties that it will not issue the subpoenas except on motion (R 872). This forced Petitioner-Appellants to make a motion seeking leave of court to conduct discovery (R 792 – R 873).

In the affidavit in support of court ordered discovery (R 795 – 803) it was avered in ¶ 22 that "[t]he intention of what the subject property was and is intended to be used as and in what manner and to what degree will be a contested issue in this action and proceeding." Also in ¶ 33 of the affidavit it was avered that "[evidence obtained through discovery] will be further evidence that the SEQRA process was flawed because it did not adequately take into account the true intended use of the subject parcel."

At the time this affidavit was executed Petitioner-Appellants did not have the benefit of having the Town Respondents' Record of Proceedings which was not filed, even in its defective form, until September 13, 2007. There is further evidence of segmentation in it. There is a great variation of the description contained in the EAF (R 257) and in the press releases and accounts (R 613 – 615, R 907 – R 908, R 910). From the press releases and reports Respondent Canisius plans in addition to the football field with running track, parking lot, and comfort station and

bleachers also has plans for baseball diamonds, a lacrosse field, and a soccer field. Even in the studies considered by the Town Respondents some of them considered all of the property owned by Respondent Canisius on Clinton Street in West Seneca like the Phase I Environmental Site Assessment Report (R 306 – R 412) while others only examine the effect of the project located on one parcel were described in the EAF (R 257) such as the Phase I Cultural Resources Investigation Report (R 413 – R 483) studies relative to traffic (R 118 – R 130), noise, air pollution (R 100 – R 111). Although these documents (R 100 – R 130) that are attached to the Verified Petition were submitted to, and apparently considered by, the Town Respondents by Respondent Canisius the material relative to noise and traffic do not appear in the Record filed by the Town Respondents despite the fact that they are directly and indirectly referred to in the resolution adopting the negative declaration (R 580 – R 590). The town respondents were also warned by the Erie County Department of Environment and Planning of the segmentations issue by letter dated November 7, 2005 (R 301 - 302).

Courts have "broad discretion in granting or denying disclosure," and are called upon to "balance the needs of the party seeking discovery against such opposing interests as expedition and confidentiality" (Zulu v. Egan, 1 A.D.3d 649 [3rd Dept. 2003]; Niagara Mohawk Power Corp. V. City of Saratoga Springs Assessor, et al., 2 A.D.3d 953 [3rd Dept. 2003]). Discovery on these issues are material and necessary to the prosecution of this proceeding. The Court of Appeals has determined that "material and necessary" should be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (Allen v. Crowell-Collier Publ. Co., 21 N.Y.2d 403, 406). The Respondents have not demonstrated that permitting the requested discovery would be prejudicial or unduly

burdensome, would violate confidentiality, or would unduly delay the case. In the absence of such contravening interests, any discovery that is relevant to the controversy at issue qualifies as material and necessary and should be allowed.

To deny discovery on the issue of the scope of the project in not only size, but its intended uses and other elements and indicia of segmentation, will render the prohibition of segmentation in SEQRA meaningless and unenforceable because evidence of segmentation by its very nature will not be in the administrative record and is typically in the custody and control of the respondents. Instead of furthering the legislative intent of SEQRA against segmentation the court by not permitting discovery on this issue is believed to have aided in the circumvention of SEQRA.

The denial of Petitioner-Appellants' motion for the issuance of the requested subpoenas prevented the presentation of evidence in support of their segmentation and permissible use claims and acted to deprive them of their due process rights.

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?

Where "the question is one of pure legal interpretation of statutory terms, deference to the [Board of Appeals] is not required" (Matter of Toys "R" Us v Silva, 89 N.Y.2d 411, 419). On the other hand, when applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference (see, Matter of Jennings v New York State Off. of Mental Health, 90 N.Y.2d 227, 239; Kurcsics v Merchants Mut. Ins. Co., 49 N.Y.2d 451, 459). Even in those situations, however, a determination by the agency that "runs counter to the clear wording of a statutory provision" is given little weight (Kurcsics v Merchants Mut. Ins. Co., 49 N.Y.2d, at 459; see also, Matter of Toys "R" Us v Silva, 89 N.Y.2d, at 418-419).

West Seneca Town Code § 120-50 provides "No building permit shall be issued unless the provisions of this chapter are complied with."

The purpose of the West Seneca Town Code relative to Zoning "[a]s part of the Comprehensive Development Plan for the Town of West Seneca, this Zoning Ordinance, set forth in the text and maps which constitute this chapter, is adopted in order to promote public

health, safety, morality and the general welfare. These general goals include, among others, the following specific purposes: to provide for adequate light, air and convenience of access; to prevent overcrowding of the land and undue concentration of population; to secure safety from fire, flood, panic and other dangers; to lessen congestion in the streets and to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements; to encourage the most appropriate use of land in order to protect and conserve property values throughout the town; and to bring about the gradual conformity of land and buildings to the Comprehensive Master Plan." West Seneca Town Code § 120-1.1

West Seneca Town Code § 120-5 governs the interpretation of permitted uses and provides that: "A. If a use which is specifically named as a permitted use could also be construed as being incorporated within a more general listing, the more specific listing shall control and such use shall not be deemed to be included in the more general listing; B) No use shall be permitted in any zoning district unless it is listed specifically or generally as a permitted use in said zoning district; C. In the case of a use not listed separately or in a general use listing as a permitted use in any zoning district, no building permit or certificate of zoning compliance shall be issued for such use unless and until this chapter has been amended to include such use as a permitted use in an appropriate zoning district."

The West Seneca Town Code § 120-10(B) provides that "Whenever any provision of this chapter is at variance or in conflict with any other provision of this chapter or any other statute, local ordinance or regulation covering any of the same subject matter, the most restrictive provision or the one imposing the higher standard shall govern."

West Seneca Town Code § 120-17(A) provides for a permitted use for a "private, nonprofit elementary or secondary school accredited by the New York State Department of Education."

Elementary or secondary school is not defined in the Town Code so they must be given their ordinary and consistent meaning (Matter of New York & Brooklyn Bridge, 72 N. Y. 527; Matter of Smathers, 309 N.Y. 487). The reason for this is clear, Courts are not supposed to legislate under the guise of interpretation, and in the long run it is better to adhere closely to this principle and leave it to the Legislature to correct evils if any exist. It is clear that Respondent Canisius does not intend to construct on the Subject Property an elementary or secondary school.

No where in § 120-17(A) does it expand the meaning of "private, nonprofit elementary or secondary school" to ***any use*** by such educational organizations because to do so would run afoul of the fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it. Even assuming, without admitting, that it can be read in such a manner an athletic field is not permitted on the Subject Parcel as currently zoned because West Seneca Town Code § 120-5(A) provides that if a use is specifically named and can also be construed to be permitted under a more general listing the specific listing controls and the use is not permitted under the more general listing. Respondent Czuprynski stated at the September 19, 2005 meeting of the West Seneca Town Board "that the most common classification the project fell under was Amusements in a C-1 zoning." (R 50).

In the present case the use of the Subject Parcel is not a permitted use nor an accessory use as defined in West Seneca Town Code § 120-64 because the school that its use is claimed to be an accessory to is not located on the same lot. In fact the school is not even located within the

Town of West Seneca but over ten miles away in the City of Buffalo. Therefore it fails to meet the first prong of the two-prong test.

The Court in Brookville v. Paulgene Realty Corp., 24 Misc.2d 790, 792-793 (N.Y. Misc. 1960) stated "[i]n short, the defendant has the three prime requisites which all the experts who testified agree are essential to make up a school: a curriculum, a plant consisting of adequate physical facilities, and a qualified staff to carry into effect its educational objectives. Supervised physical training and instruction by competent personnel is nonetheless educational because it trains the body as well as the mind. What the proportion must be between the two types of education, in order to qualify a school for the preferred position accorded private schools to carry on their operations in a residence zone under the decision in Matter of Diocese of Rochester v. Planning Bd. of Town of Brighton (1 N Y 2d 508), I am not called upon to decide."

Petitioner-Appellants believe that the trial court nor this court need to decide the proportion between the two types of education either because all three elements are not and will not be present on the subject parcel. Alternatively if this Court determines that all three prime requisites are present then Petitioner-Appellants believe that it does not meet the proportional test because the education of the mind in this case is deminimus.

The term curriculum is defined by the New York State Department of Education as "a sequence of courses which together comprise a program of instruction." (8 NYCRR § 126.1(d)) The term course is defined as "a sequence of units of instruction in a given subject area which is a component of a program of instruction or curriculum." (8 NYCRR § 126.1(e)) Based on the record there is no way a student can complete the entire curriculum on the subject parcel only certain curricula or course or parts of a curricula or course.

The asserted curriculum for this sight, if you accept Respondent Canisius' contentions (which is secondary to its use for recreational, non-mandated interscholastic sports) are physical education and according to them potentially an occasional science class this hardly meets the standard curriculum for any school under 8 NYCRR § 126.4 or Respondent Canisius' curriculum.

It will not have a plant consisting of adequate physical facilities. All that will be on the property are athletic fields and a 1300 square foot storage structure with restrooms and a comfort station. It appears that Respondent Canisius has not complied with Education Law § 408-b (R 940) or 8 NYCRR § 126.5 in regards to the subject parcel. They have stated in submissions in another administrative proceeding that the use of the subject parcel is for business and storage use rather than educational.

Other Courts have held that a tract of land leased by a board of education for use as a football field and playground, the entrance to the field being less than three hundred feet from the building in which an applicant for a non-intoxicating beer license proposed to conduct his business, is not a "school" within the meaning of a statute prohibiting a license for such a business where the building in which it is to be conducted "is not within three hundred feet of any school or church, measured from front door to front door, along the street or streets." Thacker v Crow, 141 W. Va. 361, 90 SE2d 199.

The Appellate Division Second Department has held that "[w]hile an educational use may not be wholly excluded from a residential district (Matter of New York Inst. of Technology v Le Boutillier, 33 N.Y.2d 125, 130), case law in this State reveals that the concept of 'educational use' does not include activities which are primarily recreational in nature (see, Matter of Schoen v Bowne, 298 NY 611, affg 273 App Div 1020; Matter of 4M Club v

Andrews, 11 A.D.2d 720; 12 NY Jur 2d, Buildings, Zoning, and Land Controls, § 179, at 178). Moreover, it has been held that instructional programs involving classes in ceramics and horsemanship are not educational in nature (Matter of Schweizer v Board of Zoning Appeals, 8 Misc 2d 878; Village of E. Hampton v Mulford, 188 Misc 1037; see also, Matter of Donegan v Griffin, 270 App Div 937 [where an order granting a variance for a limited time to permit the operation, on property in a residential zone, of a riding academy was reversed on the ground that the record failed to disclose adequate facts for the determination]). More recently, courts have recognized, albeit in dictum, that the activities of a riding academy are not educational in nature (see, Matter of Imbergamo v Barclay, 77 Misc 2d 188, 191-192; Incorporated Vil. of Muttontown v Friscia, 58 Misc 2d 912, 913). Such instruction does not constitute a school in the sense intended by the use of that term in zoning regulations, where the emphasis is on the academic rather than the recreational (1 Anderson, New York Zoning Law and Practice §§ 11.17, 11.19 [3d ed 1984]).” Asharoken v. Pitassy, 119 A.D.2d 404, 412-413 (N.Y. App. Div. 1986)”

West Seneca Town Code § 120-64 defines the terms “accessory use or structure” as “A use or structure customarily incidental and subordinate to the principal use or building and (except as otherwise provided) located on the same lot with such principal use or building.”

The aforementioned provision sets forth a two-prong test for determining whether a use qualifies as an accessory one: first, it must be conducted on the same zoning lot as the principal use and second, it must be “clearly incidental to, and customarily found in connection with” the principal use.

The Respondent Czuprynski’s reasoning at the October 17, 2005 meeting that the athletic field is an accessory use to Canisius High School and therefore is permitted to be constructed on

the Subject Parcel (R 81) and used as such fails the two-prong test set forth in the West Seneca Town Code.

It fails the first prong because there is no school on the Subject Parcel and Respondent Canisus' nearest school is approximately 10 miles away in the City of Buffalo. Therefore there is no permitted principal use on the Subject Parcel.

It also fails to meet the second prong of the two part test for accessory uses. Even if you credit the conclusory and equivocal statements in the record to a classroom in the structure referred to as a storage building in the subject building permit issued by respondents the use of the Subject Parcel as an athletic field is not incidental to the structure's use as a classroom.

The principal activity that Respondent Canisius intends to use the Subject Parcel is for recreational athletics for its students and others and the use of the athletic field for mandated physical educational use will be, if at all, merely occasional. The evidence in the record makes this abundantly clear. First and foremost in or about August 15, 2005 Respondent Canisius through its authorized agent applied to the Codes Division of the Department of State for a variance in the placement of fire hydrants relative to the Subject Parcel. In this application the intended use was stated to be business or storage not educational (R 607 – 613). According to Appendix A of Part 1 of the EAF dated August 19, 2005 (R 593) Respondent Canisius described this facility as "The grounds will be utilized for team practices and sporting events generally before and after school and on weekends." Respondent Canisius also described the facility as "Canisius High School intends to construct a football field and running track to accommodate sporting events and routine team practices. The grounds will include an asphalt access road and a 275-car parking lot, landscaped areas, concrete walkways, bleacher seating for 800 spectators, and a comfort station where refreshments will be sold and restrooms located. . ." Even when

presenting its case to the Zoning Board of Appeals Respondent Canisius refers to this facility as the "Clinton Street Athletic Fields" (R 643, 725).

Respondent Canisius eventually obtained the variance requested from the Codes Division of the New York State Department of State based on their representations of fact that the intended use of the Subject Parcel is for business or storage use and not educational and is free to enjoy the benefit of this administrative decision. Respondent Canisius is estopped from asserting that the intended principal use of the Subject Parcel is for educational use based on the doctrine of inconsistent positions (see Tozzi v. Long Island R.R., 170 Misc.2d 606) alternatively these statements are either informal judicial admissions or statements of a party admissible to demonstrate state of mind. It is well settled that the doctrine of judicial estoppel is limited to only those instances where the non-moving party (1) advanced an inconsistent factual position in a prior legal proceeding; and (2) secured a favorable judgment as a result of the inconsistent position (BNP Paribas (Suisse) S.A. v Chase Manhattan Bank, 298 A.D.2d 167 [1st Dept 2002]; Bono v Cucinella, 298 A.D.2d 483 (2d Dept 2002). Respondent Canisius does not deny that both elements have been established and merely asserts that they will not be using the benefit so obtained (R 790 – 791).

The form of estoppel that is applicable here is not classic judicial estoppel. The same policies and principles underlying classic judicial estoppel have been extended to non-judicial circumstances by courts throughout the United States, including New York, where parties have been precluded from asserting inconsistent positions in a variety of situations, including positions taken on tax returns.

For instance, in Estate of Ginor v Landsberg, 1998 WL 514304 [2d Cir 1998], the Court held that a party who obtained a tax deduction by representing to the IRS on his tax returns that a

wrap note was included in a partnership's property was estopped, in a subsequent litigation, from claiming that the note was not a genuine partnership obligation. Similarly, in Naghavi v NY Life Ins. Co., 260 A.D.2d 252 [1st Dept 1999], the First Department held that the plaintiff was estopped from adopting a position different from that taken on his tax returns. The plaintiff sued to recover under a disability policy. The insurer showed that it would not have issued a policy of that type to anyone with income under $16,000, and that the plaintiff had misrepresented his income as $100,000, when it was actually less than $16,000. In affirming the trial court's dismissal of the plaintiff's claim, the Court held that the plaintiff was precluded from asserting that his income was more than that which he had declared on his tax returns. The holdings set forth in these cases are dispositive, and compel estoppel against Respondent Canisius in the present case.

Additionally in the December 7, 2005 letter from FRA engineering, P.C. included in Respondents June 28, 2006 submission (R 119) stated the uses that the traffic study was based upon was for ". . . Canisius High School football games, track meets, practices and occasional physical education classes." Clearly any intended use of this facility for state mandated physical education classes is de minimis compared to the recreational non-mandated interscholastic sports.

In an article that appeared in The Buffalo News dated October 8, 2004 Respondent Higgins is quoted as stating that "Canisius High School has been challenged for many, many years to provide adequate athletic facilities -- especially fields and a track -- for our students." (R 907 – 908) Respondent Higgins is quoted in the same article as stating: "We are landlocked, and as a result, our students are disadvantaged in terms of access to facilities for fitness and interscholastic athletic competition. We would like our students to be able to practice and

compete on the same fields." According to an article that appeared in Buffalo Business First on November 11, 2005 entitled "Canisius H.S. scores with land deal" (R 910) Respondent Canisius "has a 100-yard sports field as part of its Delaware Avenue campus that has been used primarily for practices and regular gym classes." Also according to this article the "[i]nitial plans call for 11 acres to be built into a football field that will be surrounding by a running track. The complex will also be used for track and field events. A 500-seat bleacher is part of the complex as is a small building that will house lavatories, basic training and first aid rooms and equipment storage."

The occasional and equivocal references to a classroom or educational use only started to come out at the October 17, 2005 meeting of the West Seneca Town Board after the issue relative to whether the Subject Parcel was properly zoned for this stated intended use at the September 19, 2005 and appears to be a post hoc rationalization on why an application for a use variance or an application to have the Subject Parcel rezoned was not necessary.

According to the minutes of the September 19, 2005 meeting (R 50) of the West Seneca Town Board reflects the following exchange between Petitioner Grasso with the Town Respondents:

> "Don Grasso, 64 Lexington Green, questioned the status of the project and if anything could be done to stop it. He commented on Canisius High School's tax exempt status and the number of services that the town would have to provide. Mr. Grasso understood that the town had asked to be Lead Agency with regard to SEQR, and he questioned where that stood at this point.
>
> Town Attorney Tim Greenan stated that when the town received the permit application, any interested or involved agency would receive notice and be requested to comment. The long environmental assessment form would indicate the permits the project was subject to.
>
> Councilman Osmanski noted that after the letter was sent to the various agencies there was a 30-day waiting period for receipt of comments.

Mr. Grasso stated that he was reviewing the town's Zoning Ordinance and did not find any specific zoning for a football stadium. He questioned what the project would fall under and if a special permit would be required.

Mr. Czuprynski responded that the most common classification the project fell under was Amusements in a C-1 zoning.

Mr. Greenan advised that the only part of the Town Code that had a special use permit requirement had to do with automotive uses.

Mr. Grasso asked that the Town Board seriously look at the project and consider the town services it would require with no return.

Councilman Osmanski stated that this project did not require any approval action by the Town Board. Mr. Czuprynski had to approve the plans for the project if they met the Town Code and the board members could receive comments on the project through the SEQR process, but even if the board gave the project a positive declaration for SEQR, Canisius High School could come back and make accommodations to minimize the effect of the project on the public.

Mr. Grasso questioned if there would be a public comment period. Councilman Osmanski responded that there might not be a public hearing, but the public would at least be able to give written comments.

Mr. Greenan suggested that any public comments be submitted in writing to Mr. Czuprynski so they could be considered as part of the SEQR process."

According to the minutes of the October 17, 2005 meeting (R 81) of the West Seneca Town Board the following exchange occurred between Petitioner Grasso:

"Don Grasso, 64 Lexington Green, referred to the proposed Canisius High School project on Clinton Street and stated that Code Enforcement Officer William Czuprynski had stated that he would consider the project under the zoning for amusements. Mr. Grasso did not believe the project was an amusement, but noted that the property was zoned R-65 and there were no amusements included under the R-65 zoning. He thought that the property would have to be rezoned for the project, and since there was no zone within the Town Code that included athletic fields, a zone would have to be created with all the requirements and restrictions of an athletic field.

Mr. Czuprynski stated that there was a mistake on the SEQR report and the property was actually zoned R-100A, which included school use.

> Mr. Grasso responded that the project was not a school it was an athletic facility.
>
> Mr. Czuprynski advised that it was an accessory use or part of a school.
>
> Mr. Grasso noted that Mr. Earsing was required to get a special use permit for a driving range in the M-1 zone on Clinton Street. He questioned why a special use permit was necessary.
>
> Mr. Czuprynski responded that the Zoning Ordinance specifically stated that a driving range required a special use permit in an M-1 zoning.
>
> Town Attorney Timothy Greenan advised that Father Higgins of Canisius College had written a letter to the town stating that they were a public secondary accredited school and the use of the property was part of their curriculum. Under the New York State Education Law, they were required to provide physical education.
>
> Mr. Grasso stated that the proposed project was not Canisius' physical education facility; it was their extracurricular football/athletic field. They would be using the facility for practices after school, games, etc. Canisius was not required by law to have extracurricular activities at school. Mr. Grasso thought that the town was trying to find every way possible for the facility to locate in West Seneca by attempting to find a zoning that it fell under. He thought that the town should be fighting for what the residents wanted. Mr. Grasso questioned if the building permit for the facility had been issued yet.
>
> Mr. Czuprynski responded that no building permit had been issued for the facility."

Even after the issue relative to zoning was brought up in September and October 2005 Respondents did not apply for a use variance or request a zoning change of the Subject Parcel. Instead they chose to use the subterfuge of a post hoc rationalization of school/educational use and/or it being a proper accessory use.

As the Appellate Division, Second Department has stated "While recognizing that the courts of this State have been very flexible in their interpretation of religious uses under local zoning ordinances (see, e.g., Matter of Faith For Today v Murdock, 11 A.D.2d 718, affd 9 N.Y.2d 761; Matter of Community Synagogue v Bates, supra; Matter of Diocese of Rochester v

Planning Bd., supra; Shaffer v Temple Beth Emeth, 198 App Div 607; Westbury Hebrew Congregation v Downer, 59 Misc 2d 387; Matter of Unitarian Universalist Church v Shorten, 63 Misc 2d 978; Slevin v Long Is. Jewish Med. Center, 66 Misc 2d 312), the flexibility has been directed to ancillary or accessory functions of religious institutions whose principal use is a place of worship. Affiliation with or supervision by religious organizations does not, per se, transform institutions into religious ones. 'It is the proposed use of the land, not the religious nature of the organization, which must control' (Bright Horizon House v Zoning Bd. of Appeals, 121 Misc 2d 703, 709)" in Yeshiva & Mesivta Toras Chaim v. Rose, 136 A.D.2d 710, 711 (N.Y. App. Div. 1988). This is equally applicable to educational organizations since they along with religious organizations share the same presumption of beneficial use.

However, Respondent Canisius does not intend to build a school on the Subject Parcel, it intends to build an athletic field with a storage facility and comfort station that they assert may possibly be used for gym class occasionally. However even assuming, without admitting, that it may occasionally be used for gym class that does not transform the athletic field into a school any more than a chapel located within a hospital transforms the hospital into a church (See Bright Horizon House, Inc. v. Zoning Bd. of Appeals, 121 Misc.2d 703, 708).

Although the purpose to which Respondent Canisius plans to put its premises may be a laudable use, it is not principally an educational use, but simply a recreational use, and as such, is subject to the same regulations as any other recreational or athletic facility and cannot be located in a residentially zoned area.

As set forth above this athletic field is not a permitted principal use and fails the two-prong test for it to be an accessory use on the Subject Parcel.

As stated by the Appellate Division, Second Department a "zoning code must be construed according to the words used in their ordinary meaning (see Matter of Chrysler Realty Corp. v Orneck, 196 A.D.2d 631, 632, 601 N.Y.S.2d 194 (1993)) and may not be extended by implication (see 1 Anderson, New York Zoning Law & Prac., § 9.39, at 466 [3d ed. 1984]; see also Matter of KMO-361 Realty Assocs. v Davies, 204 A.D.2d 547, 611 N.Y.S.2d 660 (1994); Gillen v Zoning Bd. of Appeals of Town of Cortlandt, 144 A.D.2d 433, 436, 533 N.Y.S.2d 1003 (1988)). Where the interpretation of a zoning code is irrational or unreasonable, the administrative agency's determination will be annulled (see Matter of Tallini v Rose, supra; Matter of KMO-361 Realty Assocs. v Davies, supra; Matter of Chrysler Realty Corp. v Orneck, supra)." (Baker v. Town of Islip Zoning Bd. of Appeals, 20 A.D.3d 522, 524 (N.Y. App. Div. 2005)) Further, A zoning board's interpretation of a zoning code is "not entitled to unquestioning judicial deference, since the ultimate responsibility of interpreting the law is with the court" (Matter of Exxon Corp. v Board of Stds. & Appeals, 128 A.D.2d 289, 296).

At oral argument of the matter counsel for Respondent Canisius argued "if Canisius High School moved lock, stock and barrel the entire school to this site it would be a permitted use." (R 206 line 10 through 14) This implies that something that would be considered an accessory use should be a permitted principal use so long as the accessory use would be less bothersome to the neighborhood than a proper permissible use. This is contrary to the relevant provisions of the town code. 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), and lacks the power to even consider immunity from code provisions which may be derived from

constitutional considerations (see Matter of Nassau Children's House v Board of Zoning Appeals, 77 A.D.2d 898, 900). 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 manner that it did.

A building inspector has no discretion to issue a building permit which authorizes a use prohibited by the zoning ordinance (see, Matter of Rejman v Welch, 112 A.D.2d 795 appeal dismissed 66 N.Y.2d 916; see also, Matter of Parkview Assocs. v. City of New York, 71 N.Y.2d 274, 281). Respondent Czuprynski avers that this use is consistent with the Comprehensive Plan for the Town of West Seneca (R 701 ¶ 25) however, this is irrelevant because what is controlling is the applicable zoning code for the subject property which is R 100-A. While all zoning codes must be consistent with the Comprehensive Plan they are not required to offer all the uses available under it (Town Law § 272-a(11)(a)).

Respondent Czuprynski acted ultra vires and in excess of his authority in issuing the building permit in the absence of Respondent Canisius being granted a use variance or the zoning of the Subject Parcel having been changed upon proper application to the appropriate authority (see; Bayley v. Adams, 278 A.D. 962 aff'd 303 N.Y. 967; Nassau Children's House, Inc. v. Board of Zoning Appeals, 77 A.D.2d 898). Respondent Zoning Board of Appeals decision under its appellate jurisdiction affirming Respondent Czuprynski's ultra vires act constitutes a de facto unlawful delegation of its authority as part of the legislative branch of town government to the executive branch of town government to grant use variances.

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.

It is even questionable that a use variance is available to Respondent Canisius because where a zoning restriction effects the same hardship within the entire zone, a use variance is not available, one whose use would be denied must seek rezoning, and a zoning board may not amend the zoning regulation under the guise of a variance. Clark v. Zoning Bd. of Appeals of the Town of Hempstead, 301 N.Y. 86, 90-91, 92 N.E.2d 903, 904 (1950); Silverman v. Keating, 52 A.D.2d 1076 (4th Dept. 1976); Ahmad v. Zoning Bd. of Appeals of City of Binghamton, 194, 99 A.D.2d 634 (3rd Dept. 1984), appeal denied 62 N.Y.2d 602, 465 N.E.2d 375 (1984) ("the board acted beyond its authority in granting a [use] variance for a use neither permitted nor contemplated in an R-10 zone by the legislative body of the city as declared in the city's zoning ordinance"); Van Deusen v. Jackson, 35 A.D.2d 58, 60 (2nd Dept. 1970); Northampton Colony, Inc. v. Board of Appeals of the Incorporated Village of Old Westbury, 30 Misc.2d 469, 470-471 (Nassau Co. 1961), order aff'd, 16 A.D.2d 830, 230 N.Y.S.2d 668 (2nd Dept. 1962) (ZBA "lacked the power to grant the [variance] application because to do so would be to effect a

rezoning of the property"). See also 3 Salkin, N.Y. ZONING LAW AND PRACTICE, 4th ed., § 29:51 (West 2007).

The case law referred to by Respondent Zoning Board of Appeals in its decision of August 3, 2007 do not support its position and in fact belies it. The cases cited do not grant any per se exemption from reasonable zoning requirements that are applicable to the public at large. The first case relied on by them specifically held "The order to be entered herein, granting plaintiff summary judgment declaring these restrictions (art. V, § 5.0 [h] [8] [1] through [6]) invalid, does not mean, however, that the village Board of Trustees is not empowered to regulate by reasonable standards the use of residentially zoned property for educational purposes and the structures and uses accessory thereto. Nor does it mean that plaintiff is free to build and operate the proposed conference center. Whether that 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." (New York Institute of Technology, Inc. v. Ruckgraber, et al., 65 Misc.2d 241 at 245). The second case the decision cites, The 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. The third case relied on by Respondent Zoning Board of Appeals, Town of Islip v. Dowling College, 275 A.D.2d 366, is factually distinguishable in that the school was located on the property wherein it sought to provide nonmatriculated students driver education courses which the court found to be a permitted accessory use of the school; however in this case the school is not located on the same property and in fact not even within the Town of West Seneca. The fourth case cited Cornell University v. Bagnardi et al., 107 A.D.2d 398 is similarly distinguishable in that case the zoning ordinance unreasonably discriminated between levels of educational institutions

permitted to be located in a particular zone it is further distinguishable in that the educational institution wanted to place one of its small academic programs in a building on land that abutted its main campus.. The fifth case cited Rorie et al v. Woodmere Academy, 52 N.Y.2d 200, is also distinguishable in that it involved a school that operated from September through June offering a summer program at the school during the summer months which was an incidental accessory use not a principal use of the land. The sixth case relied on by Respondent Zoning Board of Appeals Incorporated Village of Asharoken v. Pitassy et al., 119 A.D.2d 404 simply does not support their position, in that case the court held "While an educational use may not be wholly excluded from a residential district (Matter of New York Inst. of Technology v Le Boutillier, 33 N.Y.2d 125, 130), case law in this State reveals that the concept of 'educational use' does not include activities which are primarily recreational in nature (see, Matter of Schoen v Bowne, 298 NY 611, affg 273 App Div 1020; Matter of 4M Club v Andrews, 11 A.D.2d 720; 12 NY Jur 2d, Buildings, Zoning, and Land Controls, § 179, at 178)." The seventh case cited as a basis for the decision, Cornell University v. Bagnardi, 68 N.Y.2d 583 is distinguishable for the same reason as this case was at the Appellate Division; additionally to the extent that it appears that West Seneca Town Code may appear to run afoul to the constitutional issue decided in this case Respondent Canisius is not aggrieved by it since it is within the class permitted to operate a school in a residential district and the Respondent Zoning Board of Appeals lacks the authority to determine the constitutionality of the zoning ordinances of the Town of West Seneca. The eighth case cited by the subject decision, 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 accessory uses must be housed in accessory buildings; which is not an issue in this case. The ninth case cited in the

subject decision Richmond, et al v. City of New Rochelle Board of Appeals on Zoning, 24 A.D.3d 782, is not relevant since it merely decided that several area variances to a congregation seeking to construct a synagogue that is permitted as of right in the relevant zoning district were not arbitrary and capricious. The tenth and final decision cited by Respondent Zoning Board of Appeals in the underlying decision, Albany Preparatory Charter School, et al, v City of Albany, 31 A.D.3d 870, simply decided that a school may not be wholly excluded from a zoning district; which differs from the instant case in which a school is not wholly excluded.

The Determination of Respondent Zoning Board of Appeals upholding the underlying determination of Respondent Czuprynski to issue the subject building permit is based on an error of law, arbitrary and capricious and an abuse of discretion and must therefore be set aside, vacated, annulled and reversed.

The trial court erred in dismissing the complaint and in failing to declare the rights of the parties (Maurizzio v Lumbermens Mut. Cas. Co., 73 N.Y.2d 951, 954; Pless v Town of Royalton, 185 A.D.2d 659, 660, affd 81 N.Y.2d 1047).

This Court should reverse the trial court and vacate the issuance of the subject building permits and declare that the use of the property as an athletic field 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?

Administrative decisions must be accompanied by findings of fact supporting the determination of the reviewing agency, therefore if the decision rendered by a planning board or zoning board regarding an application fails to be supported by findings of fact substantiating its

determination it should be invalidated as arbitrary (See, Dean Tarry Corp v Friedlander, 78 A.D.2d 546 (2nd Dept 1980); Sherman v Frazier, 84 A.D.2d 401 (2nd Dept 1982); Highland Brooks v White, 40 A.D.2d 178 (4th Dept 1972); Asma v Curcione, 31 A.D.2d 883 (4th Dept 1972); Lemir Realty v Larkin, 8 A.D.2d 970 (2nd Dept 1959)).

Pursuant to West Seneca Town Code § 120-56(A) "The Board of Appeals may reverse, modify or affirm, in whole or in part, any such appealed order, requirement, decision or determination appealed from, and may make such order, requirement, decision or determination as in its opinion ought to be made in *strictly applying and interpreting the provisions of this chapter*, and for such purposes shall have all the powers of the officer from whom the appeal is taken." (emphasis added)

Pursuant to West Seneca Town Code § 120-58(G) the determination of Respondent Zoning Board of Appeals was required to "set forth each required finding, supported by substantial evidence or other data considered by the Board of Appeals in each specific case, or in the case of denial, the decision shall include the findings which are not satisfied." There is a complete lack of findings of fact within the decision to determine what facts Respondent based its determination on what the principal use of the property is intended for.

The decision of Respondent Zoning Board of Appeals (R 686 – 687) merely states in conclusory terms that "Related to its mission, the school has a curriculum, a plant consisting of adequate facilities and a staff appropriately qualified to meet educational objectives." Although this may describe Respondent Canisius as an entity, the appropriate inquiry in this matter is whether or not all of these are present on the Subject Parcel. There are no findings of fact to support these conclusions set forth in the decision. For example it does not state what percentage

of academic versus athletic education will occur on the subject parcel or what findings of facts it relied on in making the determination that there is a plant consisting of adequate facilities.

Additionally the decision rendered by Respondent Zoning Board of Appeals does not indicate the vote of the members and whether the determination was reached as a body after deliberations and was rendered in violation of West Seneca Town Code § 120-58 and therefore either such deliberation took place in an executive session or other meeting(s) in violation of Public Officers Law article 7 in that such executive session was not properly convened by motion in a duly noticed public meeting and Petitioners' due process rights to notice or the decision was not based on or voted on by a majority of the members or the members made their individual determinations in a vacuum when they were required to deliberate the issue as a body which would seriously undermine the appeal process (see Harris v. New York State Div. of Parole, 211 A.D.2d 205)

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.

Initially Respondent Czuprynski stated that "that the most common classification the project fell under was Amusements in a C-1 zoning" (R 50). At the next Town Board meeting 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 did Mr. 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). Even

in this proceeding Respondent Czuprynski fails to articulate any valid and rational explanation for his change in opinion (R 673 – 677). The only such attempt at putting forth such an explanation was during the October 17, 2005 West Seneca Town Board meeting where the Town Respondents asserted that it was "an accessory use or part of a school" and Mr. Greenan the Town Attorney stated that they received a letter from Respondent Canisius stating that it was an accredited secondary school (R 81), however it was known to all that it was Canisius High School from the September 19, 2007, meeting (R 49)

Respondent Czuprynski attempts another post hoc rationalization by stating in his affidavit submitted to the trial court that in November 2006 the Town of West Seneca adopted a new Comprehensive Master Plan that places the subject property in the Recreational – Tourism District (R 701 ¶ 25). The fact that this "property is located in an area in which such a use may have been contemplated by the comprehensive plan does not render invalid the zoning law that does not permit such a use." Bergstol v. Town of Monroe, 15 A.D.3d 324, 326 (2nd Dept. 2005). This fact may be relevant if Respondent Canisius applied to have the zoning of the subject property changed, but is irrelevant in the case at hand because the Town Board did not amend the West Seneca Town Code § 120-17(A) which governs the permitted uses on the subject property.

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.

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?

Short answer, yes.

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

Both the Town Respondents and Respondent Canisius alleged in their respective Answers that the Petitioners lack standing to prosecute this proceeding (R. 181, 184). Lack of Standing of a party is an affirmative defense that must be pled and proven (Charles Offset Co. v. Hobart-McIntosh Paper Co., 192 A.D.2d 419 (1st Dept.. 1993)).

Respondents never moved to dismiss on this ground, address it at oral argument (R 187 – 211) and indeed never mentioned it again and they therefore abandoned this affirmative defense.

“Affirmative defenses plead as conclusions of law that are not supported by any facts are insufficient and should be stricken. Petracca v. Petracca, 305 A.D.2d 566, 760 N.Y.S.2d 513 (2nd Dept. 2003); and Bentivegna v. Meenan Oil Co., 126 A.D.2d 506, 510 N.Y.S.2d 626 (2nd Dept. 1987). Thus, the first affirmative defense cannot serve as a basis for dismissal and must be stricken.” Gill Constr. & Bldrs. v. Bellmore Fire Dist., 12 Misc.3d 1175A. The affirmative

defense pled in the Respondents' respective answers do not plead the factual basis that is relied upon to establish Petitioners' alleged lack of standing and therefore must be stricken and cannot serve as a basis for the dismissal of the proceeding.

Even if the Court concludes that the Respondents have sufficiently raised and preserved their affirmative defense the defense should be stricken due to a failure of proof. A proceeding under CPLR Article 78 partakes of the character of a motion for summary judgment, in which the court must determine whether or not there is a triable issue of fact (CPLR § 7804(h)). (Matter of Gagnon v. Board of Education of Manhasset Union Free School District, 119 A.D.2d 674 (2d Dept. 1986)) "Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted (Laye v Shepard, 48 Misc 2d 478, affd 25 A.D.2d 498; Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 3212:16, p 437), and where there are cross motions for summary judgment, in the absence of either party challenging the verity of the alleged facts, as is true in the instant case, there is, in effect, a concession that no question of fact exists (cf. Schifter v Commercial Travelers Mut. Acc. Assn ., 183 Misc 74, affd 269 App Div 706; see, also, Ann., 36 ALR2d 881)." Kuehne & Nagel, Inc. v. Baiden, 36 N.Y.2d 539, 544 (N.Y. 1975).

It is well settled that "[t]o establish standing [under SEQRA], the petitioners must show (1) that they will suffer an environmental 'injury that is in some way different from that of the public at large,' and (2) that the alleged injury falls within the zone of interest sought to be protected or promoted by the statute under which the governmental action was taken." (Matter of Blue Lawn, Inc. v. County of Westchester, 293 A.D.2d 532, 533, app. denied, 98 N.Y.2d 607; citing The Society of Plastics Indus., Inc. v. County of Suffolk, 77 N.Y.2d 761, 772-772; Long Island Pine Barrens Society, Inc. v. Town of Islip, 261 A.D.2d 474; Long Island Pine Barrens

Society, Inc. v. Planning Bd. of the Town of Brookhaven, 213 A.D.2d 484, 485). Thus, for proceedings asserting SEQRA violations, a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature. (See Matter of Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 76 N.Y.2d 428; Matter of Bridon Realty Co. v. Town Bd. of the Town of Clarkstown, 250 A.D.2d 677, app. denied, 92 N.Y.2d 813; Matter of Empire State Rest. & Tavern Ass'n v. Rapoport, 240 A.D.2d 576, 577; Matter of Fox v. Favre, 218 A.D.2d 655). On a motion to dismiss a petition upon objection in point of law on standing grounds, all allegations contained in the petition are deemed to be true and are construed in a light most favorable to the petitioner. See, Massiello v. Town Board of the Town of Lake George, 257 A.D.2d 962 (3d Dept. 1999)

In the context of zoning, aggrievement may be inferred from the close proximity of the petitioners' property to the area of administrative action, and it permits an inference that the challenger possesses an interest different from other members of the community at large. (Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 N.Y.2d 668 (1996); Matter of Stephens v Gordon, 202 A.D.2d 437 (2d Dept 1994)). In such circumstances, a petitioner need not show actual injury (Cremosa Food Co. v Petrone, 304 A.D.2d 606 (2d Dept 2003)).

The Court of Appeals' has directed that principles of standing not be applied in a "heavy-handed" manner (Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead, 69 N.Y.2d 406 at 413).

It is undisputed that Petitioner Monolopolus' property is approximately 250 feet from Respondent Canisius' property that is the subject of this proceeding (R. 15, Petition ¶ 14). Petitioner Grosso's property is approximately 600 feet from Respondent Canisius' property that is the subject of this proceeding (R. 15, Petition ¶ 15). Petitioner Warren's property is

approximately 2530 feet (.4791 of a mile) from Respondent Canisius' property that is the subject of this proceeding (R. 15, Petition ¶ 16) and within 680 feet of the 100 year floodplain the Subject Parcel is substantially located in (R. 14, Petition ¶ 4).

Thus, they are "arguably within the zone of interest to be protected by the statute" (Matter of Dairylea Coop. v Walkley, 38 N.Y.2d 6, 9) and have standing to seek judicial review "without pleading and proving special damage, because adverse effect or aggrievement can be inferred from the proximity" (Matter of Sun-Brite Car Wash v Board of Zoning & Appeals, 69 N.Y.2d 406, 410; see, Matter of Manupella v Troy City Zoning Bd. of Appeals, 272 A.D.2d 761, 762; Matter of McGrath v Town Bd. of Town of N. Greenbush, 254 A.D.2d 614, lv denied 93 N.Y.2d 803 [500 feet held to be close proximity to proposed shopping center]; Matter of Parisella v. Town of Fishkill, 209 A.D.2d 850 [1,700 feet held to be close proximity to proposed asphalt plant]; Matter of Sopchak v. Guernsey, 176 A.D.2d 403 [500 feet held to be close proximity to proposed mobile home]).

Therefore if the court finds that due to the close proximity of at least one of the Petitioners' property to the Subject Parcel or the 100 year floodplain that the Subject Property is substantially within then the court need not continue to evaluate the standing of the other Petitioners and may proceed to the other issues. (See Huron Group, Inc. v. Pataki, 5 Misc.3d 648 and Concern Inc. v. Pataki, 7 Misc.3d 1030(A), [Standing established for some of the plaintiffs therefore no need to determine standing of remaining plaintiffs])

However, the Petitioners in this case have pleaded in the Verified Petition and uncontroverted special damages that are not shared by the public at large.

It is undisputed that the Petitioner-Appellants' respective properties are either in or in close proximity to the 100 year floodplain that the Subject Parcel is partially situated in (R. 15,

Petition ¶ 18). Petitioners' concerns include the impact of the proposed use of the Subject Parcel on their scenic view and property value, the blight that such a facility may cause them to be exposed to, exposure to, and the increased risk of being a victim of crime that will emanate from such a facility, the lack of parking and the increase in traffic and its attendant risks, air pollution, water pollution, changes in the quantity and quality of the groundwater, the effect upon the nearby federal wetlands due to erosion and runoff caused by the development and facility as planned, and noise as well as other negative environmental, health and social consequences that are attendant by the proposed development and use of the subject lands and the adverse impact on the continued use and enjoyment of their homes (R. 15-16, Petition ¶¶ 19-21) .

These potential injuries will affect the petitioners, as adjacent landowners and landowners in close proximity to the Subject Parcel, is different in kind and to a far greater degree than they would other members of the public at large who own businesses or residences situated farther from the Subject Parcel and the 100 Year floodplain in which it substantially sits in. It is reasonable to assume that, when the use of the property is changed, as "[persons] with property located in the immediate vicinity of the subject property [petitioners] will be adversely affected in a way different from the community at large; loss of value of individual property may be presumed from depreciation of the character of the immediate neighborhood" (Matter of Sun-Brite Car Wash, Inc. v. Board of Zoning & Appeals of Town of N. Hemptstead, 69 N.Y.2d at 414).

With regard to the remaining elements of standing, it is evident that the interests Petitioners' are asserting are within the zone of interests protected by SEQRA and Zoning Laws, and respondents cannot seriously assert otherwise.

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?

Administrative decisions must be accompanied by findings of fact supporting the determination of the reviewing agency, therefore if the decision rendered by a planning board or zoning board regarding an application fails to be supported by findings of fact substantiating its determination it should be invalidated as arbitrary (See, Dean Tarry Corp v Friedlander, 78 A.D.2d 546 (2nd Dept 1980); Sherman v Frazier, 84 A.D.2d 401 (2nd Dept 1982); Highland Brooks v White, 40 A.D.2d 178 (4th Dept 1972); Asma v Curcione, 31 A.D.2d 883 (4th Dept 1972); Lemir Realty v Larkin, 8 A.D.2d 970 (2nd Dept 1959)).

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.

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?

Judicial review of a lead agency's negative declaration is restricted to "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (Matter of Jackson v New York State Urban Dev. Corp., 67 N.Y.2d 400, 417 (1986); see Matter of Merson v McNally, 90 N.Y.2d 742, 751 (1997)). As was observed in *Jackson*, SEQRA guarantees that agency decision makers “will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices” (67 N.Y.2d at 414-415).

SEQRA's policy of injecting environmental considerations into governmental decision-making (see Matter of Coca-Cola Bottling Co. v Board of Estimate of City of N.Y., 72 N.Y.2d 674, 679 (1988)) is “effectuated, in part, through strict compliance with the review procedures outlined in the environmental laws and regulations” (Matter of Merson, 90 N.Y.2d at 750). Strict compliance with SEQRA is not “a meaningless hurdle. Rather, the requirement of strict compliance and attendant spectre of de novo environmental review insure that agencies will err on the side of meticulous care in their environmental review. Anything less than strict compliance, moreover, offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment” (Matter of King v Saratoga

County Bd. of Supervisors, 89 N.Y.2d 341, at 348; see Matter of E.F.S. Ventures Corp. v Foster, 71 N.Y.2d 359, 371 (1988)).

As noted by the Court of Appeals "[a] SEQRA review process conducted through closed bilateral negotiations between an agency and a developer would bypass, if not eliminate, the comprehensive, open weighing of environmentally compatible alternatives both to the proposed action and to any suggested mitigation measures." Merson v. McNally, 90 N.Y.2d 742, 750

"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).

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 West Seneca Town Code § 67-2 specifically incorporates SEQRA and provides "No decision to carry out or approve an action other than an action listed in § 67-3B hereof or Section 617.12 of Title 6 of NYCRR as a Type II action shall be made by the Town Board or by any department, board, commission, officer or employee of the town until there has been full compliance with all the requirements of this chapter and Part 617 of Title 6 of NYCRR; provided, however, that nothing herein shall be construed as prohibiting the following: A. The conducting of contemporaneous environmental, engineering, economic feasibility or other

studies and preliminary planning and budgetary processes necessary to the formulation of a proposal for action which do not commit the town to approve, commence or engage in such action; or B. The granting of any part of an application which relates only to technical specifications and requirements, provided that no such partial approval shall entitle or permit the applicant to commence the action until all requirements of this chapter and Part 617 of Title 6 of NYCRR have been fulfilled." Therefore Respondent Czuprynski was required to comply with SEQRA as incorporated into the West Seneca Town Code prior to approving the subject building permit which is not issued "as of right" and therefore not exempt from SEQRA (See Pius v. Bletsch, 70 N.Y.2d 920; Atlantic Beach v. Gavalas, 81 N.Y.2d 322).

The potential adverse environmental effects of the subject action were not sufficiently addressed in the negative declaration and its supporting documents. The subject negative declaration and its supporting documents impermissibly failed to identify or analyze areas of environmental concern, such as the submissions of Respondent Canisius to the Town Respondents specifically state that the project will result in numerous significant environmental impacts. These statements include but is not limited to, those in their supplemental submission dated June 28, 2006 (R 100 – 141) where it is stated on page 3 item II(4) that the "proposed action will affect surface or groundwater quality or quantity." which is one of the enumerated criteria at 6 NYCRR § 617.7(c)(1)(i) ; page 3 item II(5) that the "proposed action will use water in excess of 20,000 gallons per day. (Note: 4,000 gallons per day of water will be used it irrigate the playing field approximately 30 times per year)"; page 3 item II(7) that the "proposed action will alter drainage flow or patterns or surface water runoff. The action may cause substantial erosion. (Note: During construction, potential erosion will be mitigated in accordance with the project Sedimentation and Erosion Control Plan.)" which is one of the enumerated criteria at 6

NYCRR § 617.7(c)(1)(i) and although it addresses erosion mitigation in this item it does not state how erosion will be mitigated, if at all, on a long term basis; page 4 item III(1) that the "proposed action will have small affect air quality."; page 4 item V(1) that the "proposed action will affect agricultural land resources. The action would irreversibly convert more than 10 acres of agricultural land or, if located in an Agricultural District, more than 2.5 acres of agricultural land." which is one of the enumerated criteria at 6 NYCRR § 617.7(c)(1)(ii); page 5 item VI that the "proposed action will affect aesthetic resources. Proposed land uses, or project components are obviously different from or in substantial contrast to current surrounding land use patterns, whether man-made or natural." which is one of the enumerated criteria at 6 NYCRR § 617.7(c)(1)(v); page 6 item X(2) states that the "Proposed action will cause a greater than 5% increase in the use of any form of energy in the municipality." which is one of the enumerated criteria at 6 NYCRR § 617.7(c)(1)(vi); page 6 item XI(1) states that there "will be objectionable odors, noise, and vibration as a result of construction of the proposed action. The proposed action will produce operating noise exceeding the local ambient noise levels for noise outside of structures."; on page 7 item XIII(1) it states that the "proposed action will affect the character of the existing community. It will cause a change in the density of land use. (Note: The project will convert 11 acres of vacant land into educational/recreational use.)" which is one of the enumerated criteria at 6 NYCRR § 617.7(c)(1)(viii)

The subject negative declaration and its supporting documents address some of the above mentioned significant environmental impacts it does not address all of them, these include but is not limited to, the above identified change in surface and ground water, drainage flow patterns and continued erosion. Additionally what is not addressed in the submission relative to part 2 is the increase in noise after construction is completed since it will be used as a recreational facility

for sports games. On the items that the negative declaration and its supporting documents does address it does not clearly negate the continued potentiality of the adverse effects of the proposed action and addresses them in a conclusory fashion, if at all.

While the negative declaration and its supporting documents discuss some mitigating measures they "will not obviate the need for an EIS unless they clearly negate the continued potentiality of the adverse effects of the proposed action." Merson v. McNally, 90 N.Y.2d at 754 (N.Y. 1997). Even an “Expanded Full EAF” cannot “legitimately serve as a substitute for an EIS and the attendant analysis and public discussion entailed in a proper SEQRA review” (Matter of West Branch Conservation Assn. v Planning Bd. of Town of Clarkstown, 207 A.D.2d 837 at 840). To confirm the negative declaration would permit the circumvention of SEQRA's open and comprehensive review process (see, Matter of Merson v McNally, 90 N.Y.2d 742). Consequently the Town Respondents’ determination was not made in accordance with lawful procedure and was arbitrary, capricious, and irrational (see Akpan v Koch, 75 N.Y.2d 561).

As detailed in ¶ 74 of the Verified Petition (R 27 – 28) Respondents failed to adequately consider the related long-term, short-term, direct, indirect and cumulative effects of the proposed project, including the assessment of the significance of a likely consequence in connection with its duration; its irreversibility; its geographic scope; and its magnitude (6 NYCRR § 617.7(c)(3)(iii) – (v); see 6 NYCRR § 617.7(c)(2)).

The Determination of Respondent Zoning Board of Appeals and the building permit 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?

Segmentation is defined as the division of the environmental review for an action such that various activities or stages are addressed under SEQR as though they were independent, unrelated activities. Forman v. Tr. of State Univ. of New York, 303 A.D.2d 1019, 1020 (4th Dept. 2003); see also, Stewart Park and Reserve Coalition v. Slater, 225 F. Supp. 2d 219, 232 (N.D.NY 2002); City of Buffalo v. New York State Dept. of Envtl. Conservation, 184 Misc 2d 243, 250 (Sup. Ct. Erie County, 2000). "Segmentation is disfavored based on two perceived dangers. First is the danger that in considering related actions separately, a decision involving review of an earlier action may be practically determinative of a subsequent action. The second danger occurs when a project that would have a significant effect on the environment is broken up into two or more component parts that, individually, would not have as significant an environmental impact as the entire project, or indeed, where one or more aspects of the project might fall below the threshold requiring any review." (Concerned Citizens for the Env't v. Zagata, 243 A.D.2d 20, 22)

SEQRA requires a lead agency to consider all "reasonably related long-term, short-term, direct, indirect and cumulative impacts, including other simultaneous or subsequent actions which are: (i) included in any long range plan of which the action under consideration is part; (ii) likely to be undertaken as a result thereof; or (iii) dependent thereon." 6 NYCRR § 617.7(c)(2); see also, ECL § 8-0109(2); Sun Co. v. Syracuse Indus. Dev. Agency, 209 A.D.2d 34, 47 (4th Dept.), appeal dismissed, 86 N.Y.2d 776 (1995).

The SEQR handbook, a publication of the New York State Department of Environmental Conservation establishes a number of factors that should be considered by a lead agency in

determining whether two activities should be considered as a single action for purposes of an environmental review:

1. Purpose: Is there a common purpose or goal for each segment?

2. Time: Is there a common reason for each segment being completed at or about the same time?

3. Location: Is there a common geographic location involved?

4. Impacts: Do any of the activities being considered for segmentation while not necessarily significant by themselves, contribute towards significant cumulative or synergistic impacts?

5. Ownership: Are the different segments under the same ownership or control?

6. Planning: Is a given segment a component of an identifiable overall plan?

7. Utility: Can any of the interrelated phases of various projects be considered functionally dependent on each other?

8. Inducement: Does the approval of one phase or segment commit the agency to approval of other phases?

If different activities are sufficiently related based on the enumerated NYSDEC Factors, a single environmental review is generally required. However, such cumulative review is not required and a segmented review is permissible if a lead agency believes that segmentation is warranted under the circumstances, provided that the agency: (i) clearly states its reasons therefore; and, (ii) demonstrates that a segmented review will be no less protective of the environment. Concerned Citizens for the Env't v. Zagata, 243 A.D.2d at, 22 (citing, 6 NYCRR § 617.3(g)(1)). No such statement or finding was made by the Town Respondents that segmented review was appropriate.

SEQRA requires review of an entire set of activities or steps that constitute a project, whether the agency decision-making relates to the project as a whole or to only part of it.

In the case at bar the Town Respondents only looked at a small part of a mutli-phase project that spans a number of parcels of property on the same street within a one mile radius within the Town of West Seneca (R 330, 332). There is a great variation of the description contained in the EAF (R 257) and in the press releases and accounts (R 613 – 615, R 907 – R 908, R 910). From the press releases and reports Respondent Canisius plans in addition to the football field with running track, parking lot, and comfort station and bleachers also has plans for baseball diamonds, a lacrosse field, a soccer field. Even in the studies considered by the Town Respondents some of them considered all of the property owned by Respondent Canisius on Clinton Street in West Seneca like the Phase I Environmental Site Assessment Report (R 306 – R 412) while others only examine the effect of the project located on one or two parcels were described in the EAF (R 257) such as the Phase I Cultural Resources Investigation Report (R 413 – R 483) studies relative to traffic (R 118 – R 130), noise, air pollution (R 100 – R 111). Although these documents (R 100 – R 130) that are attached to the Verified Petition were submitted to, and apparently considered by, the Town Respondents by respondent Canisius relative to noise and traffic do not appear in the Record filed by the Town Respondents despite the fact that they are directly and indirectly referred to in the resolution adopting the negative declaration (R 580 – R 590). It appears therefore that the Administrative Record is incomplete, to what extent cannot be determined at this point.

The town respondents were warned by the Erie County Department of Environment and Planning of the segmentations issue by letter dated November 7, 2005 (R 301 - 302). The Administrative Record does not reflect what, if anything, the Town Respondents did to insure

that it was reviewing the project as a whole. It appears based on the present record that the Town Respondents failed to conduct an adequate inquiry into scope of the action.

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: December 14, 2008
Buffalo, New York

Yours, etc.

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