To be Argued by:
RICHARD T. SULLIVAN, ESQ.
Estimated Time for Argument:
(10 Minutes)

STATE OF NEW YORK

Supreme Court

APPELLATE DIVISION—FOURTH JUDICIAL DEPARTMENT

Appellate Division Docket Numbers:
CA 07-02277, CA 07-02278 and CA 08-01389.

—0—

For a Judgment Pursuant to CPLR Article 78 Annulling and Setting Aside a Determination by Respondents to Issue, and Affirming the Issuance of, a Building Permit,

DONALD GRASSO, DAVID MONOLOPOLUS and DANIEL T. WARREN,

Petitioners-Appellants,

vs.

THE 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, CANISIUS HIGH SCHOOL a/k/a THE CANISIUS HIGH SCHOOL OF BUFFALO, NEW YORK and JAMES P. HIGGINS, S.J. as President of Canisius High School,

Respondents-Respondents.

Erie County Index No.: 2007-7685.

BRIEF FOR RESPONDENTS-RESPONDENTS CANISIUS HIGH SCHOOL a/k/a THE CANISIUS HIGH SCHOOL OF BUFFALO, NEW YORK and JAMES P. HIGGINS, S.J. as President of Canisius High School

HARRIS BEACH PLLC
Attorneys for Respondents-Respondents Canisius High School a/k/a The Canisius High School of Buffalo, New York and James P. Higgins, S.J. as President of Canisius High School
726 Exchange Street, Suite 1000
Buffalo, New York 14210
Telephone: (716) 200-5050

RICHARD T. SULLIVAN, ESQ.
Of Counsel

BATAVIA LEGAL PRINTING, INC.— Telephone (866) 768-2100

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Rules

QUESTIONS PRESENTED

1. Was the Decision of the Town of West Seneca Zoning Board of Appeals affected by error of law, arbitrary, capricious, or an abuse of discretion?

The Court Below answered in the Negative.

2. Did the Town of West Seneca Building Inspector, acing as Lead Agency, take the requisite "hard look" before adopting a Negative Declaration pursuant to the provisions of the State Environmental Quality Review Act?

The Court Below answered in the Affirmative.

I. STATEMENT OF THE NATURE OF THE CASE

This is an appeal from an October 4, 2007 Judgment of Erie County Supreme Court Justice Diane Devlin that dismissed an Article 78 Proceeding commenced, *pro se*, by the Petitioner, Daniel T. Warren, by Order to Show Cause granted August 10, 2007. The Petition, while alleging twelve, separate demands for relief, contained two "causes of action". The first cause of action sought to annul an August 3, 2007 Decision ("Decision") of the Town of West Seneca's Zoning Board of Appeals ("Zoning Board"). That Decision affirmed a determination of the Town's Building Inspector, William Czuprynski, to issue a Building Permit to Canisius High School ("Canisius") to construct an Athletic and Classroom Facility ("Facility") on vacant land located at 2448-2889 Clinton Street in the Town.

The Permit was issued after the Building Inspector, acting as "Lead Agency", issued a "Negative Declaration" for the Facility pursuant to the provisions of the State Environmental Quality Review Act ("SEQRA"). The second cause of action sought to annul that Declaration.

Canisius and its President, Rev. James P. Higgins, S.J., were named as Respondents in the Proceeding (Father Higgins died suddenly on January 20, 2009). While two other individuals, Donald Grasso and David Monolopolus, were named as Petitioners, Justice Devlin ruled that because she received "no paperwork" from them she had "no jurisdiction over any other Petitioners besides [Warren]".

Although Justice Devlin adjourned the return day of the Proceeding, and he received the Respondents' papers earlier than originally provided by the Order to Show Cause, Mr. Warren moved to hold all the Respondents in contempt and for a default judgment. He also moved to disqualify Canisius' counsel, Harris Beach PLLC. Justice Devlin denied those motions prior to dismissing the Petition.

It is Canisius' position that the Building Inspector, as "Lead Agency" under SEQRA, took more than the requisite "Hard Look" at the environmental impacts of the Facility. The Decision is supported by the provisions of the Town's Zoning Ordinance, the Regulations of the Commissioner of Education of the State of New York, and the courts of this State. Justice Devlin was correct in dismissing the Petition and denying the various motions made by the Petitioners.

II. STATEMENT OF FACTS

Canisius is a private, Catholic boys' high school located at the corner of Delaware Avenue and West Ferry Street in Buffalo, New York. Founded in 1870, Canisius is chartered by the New York State Department of Education and accredited by the Commission on Secondary Schools. As part of its Mission Statement, Canisius is committed to, "[I]ntegrating athletics with the care and development of the whole person-*cura personalis*" (R.778)

The Canisius Mission Statement is consistent with the Regulations of the Commissioner of Education that require schools to provide interscholastic athletic opportunities to students as part of an overall program of health and physical education. *See,* 8 NYCRR Part 135 § 135.2. Physical Education is a required part of the four year curriculum at Canisius. Sophomores, Juniors, and Seniors can satisfy the physical education requirement by participating in a Junior Varsity or Varsity sport (R.778).

Unlike most private and public schools in the area, Canisius has limited, on-campus, outdoor facilities for its athletic programs. It does not have a field or facilities for "home" football or soccer games or track and field meets. Indeed, a 2003 Study by the Middle States Association of Colleges and Schools found that,

> Canisius High School is landlocked and does not have adequate athletic facilities on site. The numerous sports programs are accommodated at nearby facilities. A proposal for purchase of property fell through recently, but pursuit of additional property for athletics remains a priority (R.778).

Confronted by the results of the Middle States Study, Canisius began the search to acquire property large enough to accommodate an athletic field, seating for spectators, and parking. After an unsuccessful attempt to purchase property in Buffalo, the School's real estate agent located a 33.4

acre, undeveloped site at 2488-2889 Clinton Street in the Town of West Seneca. It is located in a zoning district designated R-100A by the Town Zoning Ordinance (R.778-779).

The Town's Zoning Code is inclusive. A "private, nonprofit, secondary school accredited by the New York State Department of Education" is a permitted use in an R-100A District as it is included in a higher, or more restrictive, designation (R.627-629). The property is large enough to accommodate an athletic field with adequate parking and seating for spectators and a multi-use building. Because it is located along the Buffalo Creek, Canisius saw the property as providing a unique venue to teach an Advanced Placement course in Environmental Science (R.779).

In August 2005 Wendel Duchscherer, the Architects and Engineers for the Facility, applied to the Town Building Inspector for a Building Permit. The Plan called for a multi-use athletic field, seating for eight hundred spectators, a two hundred fifty car parking lot and service building. The building includes storage facilities, restrooms, and a classroom for the Environmental Science curriculum (R. 726-731). Because a secondary school is a permitted use in an R-100A District, the Zoning Ordinance did not require site plan review by the Town Planning Board. The decision to issue a Building Permit rests entirely with the Building Inspector (R.699).

Canisius submitted a Full Environmental Assessment Form with its application (R.251-275). The Building Inspector identified the project as a "Type 1 Action" under SEQRA and solicited Lead Agency status (R.250). He notified eight federal, state and local agencies and there was no objection to the Town acting as Lead Agency (R.700). The New York State Department of Environmental Conservation, the New York State Department of Transportation, and the Erie County Department of Planning all consented to designating the Town as "Lead Agency" for review under SEQRA (R.296-297, 300-302). The New York State Department of Parks, Recreation and Historical Preservation Sites issued a determination of "No Adverse Impact" for the project (R.285).

The Environmental Assessment Form was supplemented by a Traffic Analysis and Report (R.119-130), Exterior Lighting Systems Analysis (R.287-295), a Phase 1 Environmental Site Assessment Report (R. 304-412), Phase I Cultural Investigation Report (R.413-483), and a Phase II Archaeological Investigation Report (R.484-565). The New York State Department of Environmental Conservation issued a State Pollutant Discharge Elimination System ("SPDES") Permit. The Erie County Department of Environment & Planning issued the necessary permit for sanitary sewer construction.

Although not required by the Zoning Ordinance, the SEQRA issues were reviewed by a Technical Advisory Committee designated by the Town Board along with the Building Inspector, who, as a result of the declinations by State and County agencies and the provisions of the Zoning Ordinance, acted as SEQRA "Lead Agency" (R.698-700). After review of the information and reports submitted by Canisius, the Building Inspector completed the Full Environmental Assessment Form required by SEQRA (R.567-577). Mr. Czuprynski determined that, "The project will not result in any large and important impact(s) and, therefore, is one which will not have a significant impact on the environment, therefore a negative declaration will be prepared" (R.567). The Building Inspector's Notice of Determination of Non-Significance was thereafter published pursuant to the SEQRA regulations (R.700).

The Building Inspector issued a SEQRA "Negative Declaration" on March 23, 2007. He detailed his Findings in full compliance with SEQRA Regulations (R. 579-596). The Building Permit was issued on March 25, 2007.

Donald Grasso appealed the Building Inspector's decision to issue the Building Permit to the Zoning Board (R. 598). He claimed that, "A private school athletic facility is an accessory use to a school. Without the school an athletic facility should not be allowed" (R.598).

The Zoning Board conducted a public hearing on the appeal on July 25, 2007 (R. 603-07). Mr. Grasso made a presentation at that hearing. Canisius submitted a letter from its counsel that included a Site Plan, a Site Development Plan, a Floor Plan for the Classroom Building together with documents relating to its curriculum and status as a private, non-profit secondary school accredited by the New York State Department of Education (R.703-773).

The Zoning Board issued the Decision on August 3, 2007. It found that the Facility was part of a non-profit, private secondary school and it will "directly assist" Canisius accomplishing its educational objectives (R.177-178). The Zoning Board relied on several decisions of the courts of this State, including the Court of Appeals, which have repeatedly recognized the right of a private school to locate in residentially zoned areas (R.178).

The Petitioners commenced this Proceeding to declare, among other things, that the, "intended principal use of the Subject Property is not for a private, nonprofit elementary or secondary school accredited by the New York State Department of Education . . . " (R.213). The Petition demanded that the Decision be "set aside" on the grounds that it is the "result of an error of law", and is "arbitrary and capricious, an abuse of discretion and not supported by substantial evidence . . . " (R.213). In addition to requesting the issuance of a subpoena to the Codes Division of the New York State Department of State, the Petitioners also challenged the Building Inspector's Negative Declaration on the grounds that it was arbitrary and capricious, an abuse of discretion, not supported by "substantial evidence", and failed to comply with SEQRA Regulations (R.214).

The request for a subpoena related to an Application for a Variance made by the Engineer for the project to the Department of State's Codes Division. The variance sought permission to install a fire hydrant at a location further than permitted by the State Code. Although the variance was granted, it was never implemented because the plan for the Facility was amended to locate the fire

hydrant in compliance with that Code. The Petitioners claim that the Application estops Canisius from claiming the Facility will be used in conjunction with its mission as a private, non-profit secondary school.

Prior to the return day of the Petition, a return day that was re-scheduled by the Court upon request of Canisius' counsel, the Petitioners moved to have the Court enter a default judgment, find the Respondents in contempt, and disqualify Canisius' counsel.

Justice Devlin denied the motions and dismissed the Petition in its entirety (R.5-12).

It is Canisius' position that the Decision is factually and legally correct. In addition, the Building Inspector, as SEQRA Lead Agency, gave far more than the required "hard look" at the environmental impact of the project. Justice Devlin properly denied the motions and dismissed the Petition.

III. ARGUMENT

INTRODUCTION

While the Petitioners' Brief presents several arguments, there are really only two issues presented in this appeal: was the Decision of the Zoning Board affected by error of law, or arbitrary, capricious or an abuse of discretion, and did the Building Inspector comply with SEQRA? The "substantial evidence" claim is not before the Court as this Proceeding was commenced under Section 7803(3) of the Civil Practice Law and Rules, not Section 7803(4). There also is no claim relating to "segmentation" of the SEQRA process in this appeal.

The issue concerning the Court's jurisdiction over Petitioners Monolopolus and Grasso is resolved. When Justice Devlin began the Proceeding she correctly noted that "she received no paperwork with regard to the other two Petitioners in this case . . . I have no jurisdiction over any other Petitioner besides you" (R.190). Mr. Warren then attempted to submit affidavits from Messrs. Monolopolus and Grasso and Justice Devlin said, "It's too late" (R. 190).

The Respondents later stipulated to include those affidavits in the Record on Appeal (R.945-946, 933-941). They relate primarily to the motion for a default judgment. Mr. Grasso also claimed that Canisius failed to comply with Section 408-b of the Education Law. That Section (R. 639) has no application to this Proceeding as it clearly does not require approval of plans and specifications by local fire or law enforcement officials.

The Court is, of course, free to review the Monolopolus and Grasso affidavits in this appeal. They change nothing and have nothing to do with the substantive issues. This Record clearly establishes that the Zoning Board's Decision was sound and lawful. The Building Inspector had more than sufficient information before him to justify his issuance of a Negative Declaration.

Justice Devlin was correct in refusing to interfere with those determinations. This Court should affirm her Judgment in all respects.

This Brief will primarily address the two issues, and will also respond to the claims made on the motion for contempt, a default, disqualification of counsel, and the issuance of a subpoena.

A. THE DECISION OF THE ZONING BOARD WAS CORRECT

This Proceeding involves a zoning board's interpretation of a local zoning ordinance. It involved both a factual and legal analysis. The standard for judicial review is strict. The Zoning Board is authorized by the Town Zoning Code to interpret that Code. A court will interfere with a zoning board's interpretation of its code only if that interpretation is "unreasonable or irrational", *Conti v. Zoning Board of Appeals of Village of Ardsley*, 53 A.D.2d 545 (2d Dep't 2008). Unless it can be demonstrated that the Zoning Board's interpretation of the Zoning Code in this proceeding is affected by error of law, arbitrary, capricious or an abuse of discretion, a court will not substitute its judgment for the judgment of the local administrative body, *Fahst v. Foley*, 45 N.Y.2d 441 (1978); *Conway v. Town of Irondequoit Zoning Board of Appeals*, 38 A.D.3d 1279 (4th Dep't 2007).

The Decision is factually and legally sound. It is based upon the provisions of the Zoning Code and the decisions of the Courts of this state. A "private, nonprofit secondary school accredited by the New York State Department of Education" is a permitted use in an R-100A Zoning District in the Town. Indeed, it is a permitted use in *every* residential district. Canisius is a private, nonprofit secondary school accredited by the New York State Department of Education. It is required by the Commissioner of Education to, "[P]rovide a program of health, physical education and recreation in an environment conducive to healthful living." The program must include "Health and Safety education", "physical education including athletics", and "recreation". *See*, 11 NYCRR, Part 135, § 135.2.

It has long been the law of this state that educational uses,

> [E]njoy special treatment with respect to residential zoning ordinances because these institutions presumptively serve the public's welfare and morals. Educational institutions are generally permitted to engage in activities on their property facilities for such social, recreational, athletic, and other accessory uses as are reasonably associated with their educational purpose, *Town of Islip v. Dowling College,* 275 A.D.2d 366 (2d Dep't 2000) [citations omitted].

The Building Permit issued by the Building Inspector permitted construction of the Facility for educational and athletic uses. In determining whether there is a "school use", the law is clear and has been consistently explained by the Court of Appeals:

> What is essential is that the educational component of the program, the staff and the plant be of sufficient size to warrant the conclusion that the program involves a good faith effort on the part of the private school to accomplish serious educational aims and is not simply a fun and games recreational program in disguise, *Rorie v. Woodmere Academy,* 52 N.Y.2d 200 (1981).

The Court of Appeals' decision in *Rorie* should be dispositive of this Proceeding. The Respondent, Woodmere Academy, a private school, operated a summer program on its campus in the Town of Hempstead. The Town Zoning Ordinance permitted a private school to operate in a Residential District. The Petitioners claimed that the school was operating a "day camp" as a non-permitted use. That argument was quickly rejected by the Court in noting that,

> Carried to its logical extreme it would outlaw any program during the summer that did not exactly duplicate the School's September to June curriculum as to proportions of intellectual and physical stimulus. It [*the Zoning Ordinance*] does not require that a private school be devoted *solely* to academic instruction, nor indeed by use of the words "devoted to academic instruction" exclude entirely from the type of instruction that may be offered between September and June all phases of physical and training instruction, 52 N.Y.2d at 205 (1981).

Just like the Ordinance in *Rorie,* the West Seneca Zoning Code does not limit a "private, nonprofit secondary school" to academic instruction. The "educational component" of the Athletic and Classroom Facility cannot be disputed. Physical education is a core component of the Canisius curriculum. Participation in Junior Varsity and Varsity athletics satisfies that requirement, and most importantly the requirements of the State Department of Education.

The Court of Appeals gave clear direction to local governments concerning the treatment of educational uses in *Cornell University v. Zoning Board of Appeals of the City of Ithaca*, 68 N.Y.2d 583 (1986). The Court noted that over the years, "[C]ourts were thrust into the role of protecting educational institutions from community hostility". Schools, both public and private, "[B]y their very nature, singularly serve the public's welfare and morals", *Id.* at 593. It is for this reason that a "private, nonprofit secondary school" is permitted in all of the Residential Districts in the Town.

The proposed Athletic and Classroom Facility is as much a part of Canisius High School as its gymnasium, classrooms, science laboratories and other school facilities at the Delaware Avenue location. The Zoning Board properly interpreted the Zoning Ordinance and Justice Devlin was correct in not interfering with that determination.

B. THERE IS NO ESTOPPEL

The Petitioners' claim of "administrative estoppel" is factually and legally wrong. On August 16, 2005 Raymond Johnson II, one of the engineers for the project, applied to the New York State Department of State for a variance to extend the distance of a proposed fire hydrant to 525 feet (R. 86-91). The Application stated that the "proposed building is intended to service the athletic fields" (R.91). Although the variance was granted, the hydrant was not installed as the site was re-configured (R.790-792).

The Petition alleged that Canisius "represented to the NYS Department of State, Division of Code Enforcement and Administration . . . that the Subject Parcel was subject to [sic] was for business and storage not educational or residential" (R.17). That allegation was properly denied in the Canisius Answer (R.185) and the subject of an Objection in Point of Law (R.187).

The Petitioners' argument that the Variance Application should result in an estoppel is based upon the claim that Canisius represented in the Fire Hydrant Variance Application that proposed building was to be used for "storage". They also contend in their Brief that, "Canisius does not deny that both elements [of estoppel] have been established" (Brief p.36). Not only is that statement wrong, the authorities relied on by the Petitioners establish that, as a matter of law, there is no estoppel.

Tozzi v. Long Island Railroad Company, 170 Misc.2d 606 (Sup. Ct. 1996), the primary authority offered by Petitioners to support their claim of "administrative estoppel", is directly *contrary* to their position. *Tozzi* recognized that the doctrine of estoppel, "may be applied in this State to estop a party from making a factual assertion contrary to a factual assertion made in the course of an administrative proceeding", *Id.* at 613 [*citations omitted*]. The Fire Hydrant Variance Application did not involve an administrative proceeding. There were no "regulatory proceedings of any nature", and there are "no sworn statements or representations under oath", *Id.* at 614. Clearly, the "elements" of estoppel are not present in this proceeding.

The Petitioners' reliance on the remaining authorities in their Brief is similarly misplaced. *Ginor v. Landsberg*, 159 F.3d 1346 (2d Cir.1998), *Bono v. Cucinella*, 298 A.D.2d 483 (2d Dep't 2002), and *Paribas v. Chase Manhattan Bank*, 298 A.D.2d 167 (2d Dep't 2002) have little, if anything, to do with administrative, judicial or collateral estoppel. The same is true of *Naghavi v. New York Life Insurance Company*, 260 A.D.2d 252 (1st Dep't 1999). That case involved a motion

for summary judgment based upon representations in income tax returns. It has nothing to do with estoppel.

There can be no claim of estoppel in this proceeding. Clearly, the "elements" have not been established and the Court should give no consideration to this argument.

C. THE BUILDING INSPECTOR COMPLIED WITH SEQRA

The New York State Department of Environmental Conservation, the State Department of Transportation, and the Erie County Department of Environment and Planning all declined "Lead Agency" status for SEQRA review. Because the Zoning Ordinance did not require site plan review, the Building Inspector became the "Lead Agency" for SEQRA purposes.

Even though the issuance of a building permit could have been considered a "ministerial act" not subject to SEQRA compliance, *see, Incorporated Village of Atlantic Beach v. Gavalas*, 81 N.Y.2d 322 (1993), *Matter of Cokertown/Spring Lake Environmental Association v. Zoning Board of Appeals of the Town of Milan,* 169 A.D.2d 765 (2d Dep't 1991), Canisius nevertheless submitted a Full Environmental Assessment Form ("EAF") supplemented by Traffic, Lighting, Engineering Cultural and Archaeological Reports.

The Building Inspector became the Lead Agency for SEQRA purposes. *See, Matter of Pius v. Town of Huntington Building Inspector,* 70 N.Y.2d 920 (1987). He fully complied with the SEQRA Regulations. The EAF was afforded an additional review by the Town's Industrial Park Review Committee. The Building Inspector heard and considered input from Town residents and made a decision based upon substantial record presented to him.

The Record in this Proceeding provides overwhelming support for the conclusion that the Building Inspector took the requisite "hard look" before issuing the Negative Declaration. That Declaration details the reasons for the determination. The Building Inspector, "[I]dentified the areas

of environmental concern, took a hard look at them, and made reasoned elaboration of the basis for [*his*] determination", *Anderson v. Town of Chili Planning Board,* ___N.Y.S.2d___, 2009 WL 281297 (4th Dept., Feb.9, 2009), *see also, Coursen v. Planning Board of Town of Pompey,* 37 A.D.2d 1159 (4th Dep't 2007), *citing, Matter of New York City Coalition to End Lead Poisoning v. Vallone,* 100 N.Y.2d 337 (2000), *Matter of Settco, LLC v. New York State Urban Development Corporation,* 305 A.D.2d 1026 (4th Dept. 2003).

As is the case with a review of the Decision, the Court has a limited role in reviewing the determination of the Building Inspector to adopt a negative declaration. The Court of Appeals has explained that, "It is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively", *Matter of Jackson v. New York State Urban Development Corp.,* 67 N.Y.2d 400, 416 (1986), *see also, Gernatt Ashpalt Products, Inc. v. Town of Sardinia,* 87 N.Y.2d 668 (1996).

The Petition, although verbose, is asking the court to substitute its judgment for that of the local planning authorities. There is nothing before the Court to justify interference with the Building Inspector's determination, *see, Riverkeeper, Inc. v. Planning Board of Town of Southeast,* 9 N.Y.3d 219 (2007). The negative declaration was supported by a traffic analysis, cultural investigation, archaeological report, as well as State and County permits. The SEQRA issues were also reviewed by a special committee designated by the Town Board. Clearly this Record demonstrates that the requisite "hard look" was undertaken and the Building Inspector's decision should be sustained by the Court.

D. THERE WAS NO CLAIM OF SEGMENTATION IN THE PETITION

The Petitioners now claim that the SEQRA process was unlawfully segmented. Segmentation occurs, "[W]hen the environmental review of a single action is broken down into smaller stages or

activities, addressed as though they are independent and unrelated, needing individual determinations of significance", *Matter of East End Property Company # I, LLC v. Kessel, et al*, 46 A.D.3d 817, 822 (2d Dept.2007). There is no such claim in the Petition or any Affidavit of a Petitioner. It was not before Justice Devlin and has certainly not been preserved for appellate review.

E. THE MOTIONS WERE PROPERLY DENIED

1. Contempt and Default

Mr. Warren commenced the proceeding by Order to Show Cause granted August 10, 2007. It was originally scheduled for September 6, 2007 (R.212-216). At the time the Proceeding was commenced Counsel for Canisius and Father Higgins, who agreed to accept service of the papers on behalf of his clients (R.895), was engaged in a lengthy jury trial and a significant Election Law case that was to be argued before this Court on an expedited basis.

Mr. Warren would not agree to a brief adjournment of the return day of the proceeding unless Canisius agreed to stop work on the project (R.876). Counsel then requested and received an adjournment from the Court to September 18, 2008. Mr. Warren received confirmation of the adjournment (R. 899). Messrs. Warren, Monolopolus, and Grasso were all served with the Canisius reply papers on September 13, 2007, five days before the return day of the proceeding.

Mr. Warren then moved for a default judgment and to hold Canisius in contempt for failure to serve the reply papers on the date included in the Order to Show Cause (R.792-794). The motion was supported by an Affidavit of Mr. Warren (R.795-873).

There was no contempt or default. The three named Petitioners all received reply papers five days before the Proceeding was to be heard and three days earlier than provided by the Order to Show Cause. The Court adjourned the return day of the Proceeding which was commenced by its

Order. Mr. Warren was certainly aware of the adjourned date as he returned his motions on that day. The Court found no contempt of its Order and Justice Devlin was correct to deny these frivolous motions.

2. Disqualification

Mr. Warren also moved to disqualify counsel for Canisius and Father Higgins, Harris Beach PLLC, because of an alleged "conflict of interest". That conflict apparently related to HB Cornerstone, the construction manager for the project. HB Cornerstone is owned by Harris Beach. It offers architectural including construction management services to clients. Harris Beach was never representing conflicting interests in this Proceeding. HB Cornerstone is not a party to or in any way in conflict with the interests of Canisius. If anything, they are identical. It is simply advising Canisius on development and construction issues.

The cooperative business arrangement between Harris Beach and HB Cornerstone is specifically permitted under Canon 1 of the Code of Profession Responsibility, Disciplinary Rule 1-107, as well Part 1205 of the Rules of Supreme Court, Appellate Division, All Departments. There is no conflict. Mr. Warren's uninformed allegations about Harris Beach and HB Cornerstone have nothing to do with the issues in the Proceeding, *i.e.*, whether the Decision of the Zoning Board was affected by error of law or was arbitrary, capricious, or an abuse of discretion, and whether the Building Inspector complied with SEQRA.

3. Discovery

There was no need for the Court to address issuance of a subpoena to the Department of State. The Court addressed the merits of the Petition and properly dismissed the Proceeding.

IV. CONCLUSION

The Decision is factually and legally correct. The Facility is a permitted use under the Town of West Seneca Zoning Code. As Lead Agency, the Building Inspector took the requisite hard look at the environmental impact of the project and properly issued a Negative Declaration. There is no basis in the Record for the Court to interfere with the Decision or the issuance of the Negative Declaration.

The Judgment and Order of the Court Below should be affirmed with costs to the Respondents.

Dated: March 5, 2009

Respectfully Submitted,

HARRIS BEACH PLLC

By: _____
Richard T. Sullivan
Attorneys for Respondents-Respondents
The Canisius High School of
Buffalo and James P. Higgins, S.J.
726 Exchange Street
Buffalo, New York 14210
(716) 200-5050