To be Argued by:
LAWRENCE J. VILARDO, 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.

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 THE TOWN OF WEST SENECA, ZONING BOARD OF APPEALS OF THE TOWN OF WEST SENECA, TOWN OF WEST SENECA BUILDING DEPARTMENT and WILLIAM CZUPRYNSKI as the Code Enforcement Officer of the Town of West Seneca

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QUESTIONS PRESENTED

1. May a trial court decline to exercise jurisdiction over purported pro se petitioners whose names are on the pleading that initiates the action but who have not signed that pleading or otherwise appeared as parties?

The trial court answered in the affirmative.

2. Is it within the discretion of the trial court to decline to enter a default, or to hold defense counsel and respondents in contempt of court, for failing to serve responding papers in a timely fashion when the movant suffers no prejudice and the court set the original briefing schedule?

The trial court answered in the affirmative.

3. May the trial court decline to disqualify counsel for an alleged conflict of interest when the party who raises the alleged conflict is not affected by it and when the parties who are affected by the alleged conflict know about the facts giving rise to the conflict and consent to counsel's continued representation?

The trial court answered in the affirmative.

4. May the trial court deny a motion for a preliminary injunction and temporary restraining order when the petitioner fails to show a likelihood of success on the merits, and is the issue moot when the petition is ultimately denied?

The trial court answered in the affirmative.

5. Is it within the discretion of the trial court to grant or deny discovery in an Article 78 proceeding?

The trial court answered in the affirmative.

6. May a municipal zoning board grant a building permit for an accredited high school to build a building with a classroom, an athletic field, and a running track on property that is zoned for uses that include educational uses?

The trial court answered in the affirmative.

7. When a town, designated as the lead agency under the New York State Environmental Quality Review Act ("SEQRA"), reviews and analyzes a Full Environmental Assessment Form that includes hundreds of pages with analyses and studies addressing the impact of a proposed project on land, water, air, plants and animals, agricultural land resources, aesthetic resources, open space and recreation, and other environmental considerations, has the lead agency taken the required hard look at the project's potential environmental impact?

The trial court answered in the affirmative.

PRELIMINARY STATEMENT

Taking a machine-gun approach, petitioner raises more than a dozen issues and sub-issues as he challenges the construction of a high school athletic facility, and a building with a classroom on land that is zoned for educational uses. He ignores the fact that two of the three individuals listed as pro se petitioners never signed the petition or otherwise appeared in the action, and he insists that the court erred in not allowing those individuals to participate in the proceeding. He ignores the court's inherent discretion to accept late filings, to excuse defaults, and to decide when and whether it is appropriate to hold a party in contempt, and he insists that default and contempt were required here. He argues that he demonstrated a likelihood of success on the merits entitling him to a temporary restraining order and preliminary injunction despite the fact that the relief he requested was ultimately denied. He raises issues regarding the disqualification of counsel that do not affect him in any way and that the affected party knew about and consented to. And when he finally gets to the substance of the argument halfway through his brief, he fails to explain why a town cannot permit a school to build an athletic facility and a building with a classroom on property zoned for educational uses or why reviewing hundreds of pages of environmental studies does not satisfy SEQRA's requirement that a "hard look" be taken at environmental issues.

Because petitioner represents himself pro se, he is entitled to deference, especially on procedural issues. But his utter failure to raise any real issues with

respect to an educational project undertaken by one of Western New York's most respected secondary schools and supported by the municipality in which the project is located can lead to only one conclusion: every order issued by the trial court in this matter must be affirmed.

STATEMENT OF FACTS

Canisius High School is an accredited secondary school for young men located in the City of Buffalo, New York. Record ("R.") at 649-650. Since it was founded in the nineteenth century, Canisius has been operated by the Society of Jesus (Jesuits), an order of Roman Catholic priests. R. at 653, 665, 778. Like all Jesuit schools, Canisius is committed to provide care and concern for the whole person. *See* R. at 664-665 (Canisius High School Mission Statement). That includes physical education, which is mandated as part of the curriculum of all high schools by the State of New York. 8 NYCRR §§ 135.2, 135.4, reprinted in R. at 656-661; R. at 778, 782; *see also* R. at 667-668. At Canisius, the physical education requirement can be fulfilled by participating in a school sport. R. at 667-670. But as a land-locked school in the City of Buffalo, Canisius did not have enough space on its campus for sports fields. R. at 613, 778-779; *see also* R. at 748-749.

Canisius found that space in the Town of West Seneca. More specifically, it purchased property on land explicitly zoned for educational use. R. at 686, 698-699. Canisius then began the process of planning and building a football field and track, together with a building that would include a classroom to be used in connection with physical education and an environmental studies class that would take advantage of the nearby wetlands. R. at 704, 720, 761-767, 779.

Canisius applied to the Town of West Seneca for the required building permit. R. at 693, 699, 704. The property at issue was zoned R-100A, R. at 693, 698, 704, with "permitted uses" including a "[p]rivate, nonprofit elementary or secondary school accredited by the New York State Department of Education." West Seneca Town Code §§ 120-17, 120-14A, and 120-13A, reprinted in R. at 627-629 (§ 120-17 includes uses permitted in § 120-14A, which includes uses permitted in § 120-13A). The town handled that permit application in due course and held several open hearings on the Canisius project. R. at 49-50, 81, 169, 603-608, 696, 700. After notifying eight federal, state, and county agencies and receiving no objections, R. at 250, 694, 700, the town also took the responsibility of serving as "lead agency" under the State Environmental Quality Review Act, Environmental Conservation Law, Article 8 ("SEQRA"). R. at 250, 694, 700. The New York State Departments of Environmental Conservation and Transportation, and the County of Erie, expressly agreed with the town's designation as lead agency. R. at 296-297, 300-302.

Canisius submitted its portion of the Full Environmental Assessment Form with hundreds of pages of analyses and studies addressing environmental issues. R. at 259-565, 694-695. Those studies included a Traffic Analysis and Report, R. at 118-130; an Exterior Lighting Systems Analysis, R. at 287-295; a Phase I Environmental Site Assessment Report, R. at 304-412; a Phase I Cultural Investigation Report, R. at 413-483; and a Phase II Archeological Investigation Report, R. at 484-565. Any potentially large environmental impact -- on

"agricultural land" and on "aesthetic resources" including lighting and noise -- were addressed explicitly and in detail. *See, e.g.,* R. at 107-117. When questions were raised about such issues as endangered plant life, lighting, and archeological artifacts, *see* R. at 277, 301, 303, Canisius conducted studies to answer those questions. *See, e.g.*, R. at 281-282, 284-285.

The town appointed a Technical Advisory Committee to assist the town's Code Enforcement Officer in his review and assessment of the environmental impact of the project and the methods of mitigating any potential adverse impact. R. at 694, 700. The Code Enforcement Officer held a public meeting with the Technical Advisory Committee as part of that review and assessment. R. at 700.

After a careful analysis of the detailed and voluminous submissions, the town completed the Full Environmental Assessment Form. R at 568-577. The town expressly found that the project would not result in any potentially large impact on the environment and issued a negative declaration. R. at 568-577, 580-581. The town then detailed the reasons for its negative declaration, referencing the "several studies undertaken over a 6-month period," such as a cultural investigation, an archeological investigation, a traffic assessment, and the "additional studies and analyses associated with development and operation of the Athletic Field." *See* R. at 581. The town also referenced the input it received from the public and from other representatives and departments of the town. R. at 581. The town's negative declaration specifically explained why the athletic facility would not have any significant adverse impact on (1) land, (2) water, (3) air quality, (4) plants and

animals, (5) aesthetic resources, (6) any site or structure of historic, prehistoric or paleontological importance, (7) open space or recreation, (8) transportation, (9) noise or odors, and (10) the growth and character of the community and neighborhood. R. at 582-589.

In light of the negative declaration, and because the project was an educational use on property zoned for educational uses, the town issued a building permit. R. at 695, 701. Donald Grasso appealed that decision. R. at 598. The Zoning Board of Appeals held an open meeting to consider the issues raised by Mr. Grasso, and it heard presentations by Mr. Grasso and others. R. at 603-608. In a written decision explaining its reasoning, the Zoning Board upheld the building permit. R. at 177-178.

Petitioner Daniel T. Warren then commenced this Article 78 proceeding, challenging both the building permit and the negative declaration under SEQRA. R. at 12-32. Although the petition also included the names of Mr. Grasso and David Monolopolus, neither Mr. Grasso nor Mr. Monolopolus signed the petition or submitted any papers joining in the petition until they attempted to submit purported "reply papers" on the day of oral argument. R. at 32, 190. Because Mr. Warren is not an attorney, he could appear pro se on his own behalf, but he could not represent Mr. Grasso and Mr. Monolopolus. R. at 190. The court therefore declined to hear from Mr. Grasso and Mr. Monolopolus but allowed Mr. Warren to present oral argument on his own behalf. R. at 190-195, 198-202.

After hearing from both sides, the court denied and dismissed the petition. R. at 8, 11, 210-211. The court also denied petitioner's request for discovery in this Article 78 proceeding. R. at 11, 197. The court declined to impose sanctions or render a default judgment against respondents for allegedly filing a late response. R. at 11, 197. The court also declined to disqualify counsel for respondent Canisius High School for an alleged conflict that Canisius High School knew about but consented to and denied petitioner's application for a temporary restraining order and preliminary injunction. R. at 11, 197, 210-211.

This appeal followed, as did several motions to renew, reargue, and settle the record. R. at 1-4.

ARGUMENT

I. THE COURT CORRECTLY DECLINED TO HEAR ARGUMENT FROM TWO INDIVIDUALS WHOSE NAMES APPEARED ON THE PETITION BUT WHO DID NOT SIGN THE PETITION OR OTHERWISE APPEAR PRIOR TO ORAL ARGUMENT.

The names of three individuals are in the caption of the petition. But only one of those three, Daniel T. Warren, signed the petition. R. at 32. Because Mr. Warren is not a lawyer, *see* R. at 190, he could not represent Donald Grasso or David Monolopolus, the other individuals whose names are on the petition. *See* Judiciary Law §§ 478, 484.

Until the actual oral argument of the petition, Mr. Grasso and Mr. Monolopolus did not submit any paperwork in connection with the petition or otherwise appear as petitioners. R. at 190. At oral argument, however, they appeared in court and submitted purported "reply" papers. *Id.* The court correctly declined to accept those papers and to hear argument from Mr. Grasso and Mr. Monolopolus.

First, Mr. Grasso and Mr. Monolopolus were not parties to the proceeding. They were not represented by counsel, and they did not appear pro se. *See* Civil Practice Law and Rules (CPLR) 321(a). Indeed, other than the fact that their names were in the petition, they had no connection to the Article 78 proceeding.

Under the CPLR, the official "appearance" of a party is the mechanism by which he subjects himself to the court's jurisdiction. *See* CPLR 320. For example,

the CPLR requires that a defendant make an "appearance" within a certain time period after service of the summons. CPLR 320(a) provides that the "defendant appears by serving an answer or a written notice of appearance, or by making a motion which has the effect of extending the time to answer." Of course, a plaintiff or petitioner appears by his or her petition or complaint.

Subject to certain exceptions, a party may "appear" either by an attorney or *pro se* -- referred to as "in person." Thus, CPLR 320(a), titled "appearance in person or by attorney," provides that a party "may prosecute or defend a civil action in person or by attorney." Of course, an attorney may appear for a party, and the CPLR expressly contemplates a "notice of appearance" document to do just that. *Id.*

In this case, Mr. Grasso and Mr. Monolopolus did not appear through an attorney. They also did not file their own signed petition but instead tried to rely on the petition signed and filed by Mr. Warren. In essence, they relied on Mr. Warren to appear on their behalf, *i.e.*, in a representative capacity. But Mr. Warren is not an attorney and could not lawfully represent anyone other than himself. For that reason, Mr. Warren could not and did not appear for Mr. Grasso and Mr. Monolopolus.

When Mr. Grasso and Mr. Monolopolus showed up in court on the day of oral argument and tried to submit "reply" papers, they had not appeared in the proceeding or submitted themselves to the court's jurisdiction. Consequently, the court correctly declined to consider the "reply" papers submitted by them and declined to hear oral argument from them. On the other hand, because Mr. Warren

signed the petition and thus had appeared pro se, the court correctly accepted all submissions from him and permitted him to argue.

On appeal, Mr. Warren argues that because the verification procedure of CPLR 3020(d) permits a party united in interest with other parties to verify on behalf of all parties, his verification was sufficient for Mr. Grasso and Mr. Monolopolus. But the issue was not verification: the petition was not rejected as improperly or incorrectly verified. Rather, the issue is whether the court was required to accept reply papers from, and hear oral argument by, non-lawyers whose names appear in the pleadings but who have not indicated -- by their signatures or otherwise by appearing pro se or through an attorney -- that they are part of the proceeding. Of course, the court was not required to accept the purported reply papers from, or hear argument by, individuals who simply show up in court on the return date.

Moreover, to the extent that the verification statute is at issue, that statute assumes that all individuals on whose behalf a single individual submits a verification are both (1) parties to an action and (2) united in interest. Here, the court had no reason to find either. Stated another way, the court had nothing upon which to base a finding that Mr. Warren, who is not an attorney, was authorized to sign the petition on behalf of Mr. Grasso and Mr. Monolopolus. *See* Judiciary Law §§ 478, 484.

Alternatively, if the Court should have exercised jurisdiction over Mr. Grasso and Mr. Monolopolus, and if Mr. Warren could verify the petition on behalf of all

three of them, the court still did not err in hearing hear oral argument from Mr. Warren and not from the others. It is axiomatic that the court has discretion to control its proceedings and to set limits on oral argument. *See, e.g., Feldsberg v. Nitschke*, 49 N.Y.2d 636, 643, 427 N.Y.S.2d 751, 754-755 (1980); *Syndicated Communication Venture Partners IV, LP v. BayStar Capital, L.P.*, 51 A.D.3d 546, 547, 859 N.Y.S.2d 125, 127 (1st Dep't 2008). If parties are united in interest, then the court does not have to hear from each of those parties. *See generally Syndicated Communication Venture Partners IV, LP*, 51 A.D.3d at 547, 859 N.Y.S.2d at 127 (trial court has broad discretion to control the courtroom, expedite the proceedings, etc.). Consequently, because the court permitted Mr. Warren to make a complete oral argument on behalf of petitioners, the court was not required to provide the same opportunity to Mr. Grasso and Mr. Monolopolus. Likewise, no harm resulted from the court's refusal to accept purported "reply" papers from Mr. Grasso and Mr. Monolopolus because those papers addressed not the substantive issues but the alleged lateness of defendants' papers, an argument that the court summarily rejected for good reason. *See infra* at 14-17.

II. THE COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ENTER A DEFAULT JUDGMENT AGAINST RESPONDENTS OR TO HOLD RESPONDENTS IN CONTEMPT.

Petitioner suggests that both respondents were late in filing and serving their reply papers. That argument elevates form over substance and is utterly without merit. But even if it were well founded, the court still had the discretion to forgive any late filing and service and was not required to impose sanctions or enter a default judgment.

A. The Respondents' Submissions Were Not Late.

This proceeding was commenced by an order to show cause granted on August 10, 2007. R. at 212-216. That order set the original return date for oral argument as September 6, 2007, and provided that answering papers should be filed by September 4, 2007 -- that is, two days before the return date. *See id.* Counsel for respondents were unavailable and could not complete responding papers by their due date; for that reason, over Mr. Warren's objection, the court adjourned the return date until September 18, 2007. R. at 191-192, 850, 853. While the adjournment did not specifically address the due date for answering papers, counsel for respondents reasonably assumed that the due date for their papers would be adjourned the same amount of time as the return date was adjourned. R. at 197. In fact, they served their answering papers on September 13,

2007, five days before the return date. R. at 876, 901, 904. In other words, under the original order to show cause, Mr. Warren would have had the responding papers *two* days before the return date; in light of the adjournment, he had them *five* days before the return date.

Mr. Warren argues that because the adjournment did not expressly address the due date of the responding papers that had been set in the order to show cause, those papers were technically late; he insists that the court was therefore required to enter a default judgement or to hold counsel in contempt. But litigation is not a game of "gotcha." When the court adjourned the return date, custom and practice in Western New York dictated that the due date for reply papers would be adjourned in a corresponding fashion. And that custom and practice has a basis in law: the CPLR sets the due date of responding papers based on the return date, so when the return date is adjourned, so is the due date of any responding papers. *See* CPLR 2214(b). Indeed, because that custom and practice is so well settled, there was no need to address it explicitly.

Perhaps because Mr. Warren does not practice law in Western New York, he is unfamiliar with that custom and practice. But one need not be an attorney to recognize that Mr. Warren's argument is unreasonable and elevates form over substance to an absurd conclusion. Simply stated, the respondents' papers were not late by any reasonable interpretation of the court's adjournment.

B. Even if the Papers Were Late, the Court Had the Discretion to Accept the Late Filing and to Require Petitioner to Accept the Late Service.

Even if Mr. Warren is correct in arguing that the deadline for responding papers was not adjourned because the court did not address that deadline explicitly, there is absolutely no doubt that the court had the discretion to forgive the late service and filing of the papers. *See Dinnocenzo v. Jordache Enterprises, Inc.*, 213 A.D.2d 219, 624 N.Y.S.2d 6 (1st Dep't 1995); *Leogrande v. Glass*, 106 A.D.2d 431, 432, 482 N.Y.S.2d 525, 527 (2d Dep't 1984). Courts favor resolution of a case on the merits when there is no prejudice to a party. *See Constable v. Matie*, 145 A.D.2d 987, 987-988, 536 N.Y.S.2d 357, 358 (4th Dep't 1988). Here, there was absolutely no prejudice to petitioner: in fact, he had the papers three days longer than he would have had them if the return date had not been adjourned. Thus, the respondents' service of the papers "did not defeat, impair, impede or prejudice plaintiff's rights," and the court did not abuse its discretion in declining to enter a default or hold the respondents in contempt. *See Fernandez v. Fernandez*, 278 A.D.2d 882, 883, 718 N.Y.S.2d 509, 511 (4th Dep't 2000); *Lolly v. Brookdale Hosp. Medical Center,* 37 A.D.3d 428, 428, 829 N.Y.S.2d 617, 618 (2d Dep't 2007); *see also Bunch v. Dollar Budget, Inc.*, 12 A.D.3d 391, 391, 783 N.Y.S.2d 829, 830 (2d Dep't 2004) (court providently exercised its discretion in denying plaintiff's cross-motion for a default judgment and granting defendant's motion to extend time to answer

because defendant's delay in appealing and answering was brief and there was no evidence that plaintiff was prejudiced).

Indeed, under any circumstances, the court has the discretion to accept papers late without entering a default or imposing a sanction against the offending party. *See Fernandez,* 278 A.D.2d at 882, 718 N.Y.S.2d at 510 ("An application to punish a party for contempt is addressed to the sound discretion of the court") (internal quotation marks and citation omitted); *see also Semler v. County of Monroe,* 90 A.D.2d 689, 690, 456 N.Y.S.2d 32, 32 (4th Dep't 1982) ("A seven-day delay, which was not willful and cannot be described as lengthy, is hardly a justification for entering a default judgment."). Here, if the papers were served and filed late, that resulted not from neglect or disobedience of a court order, but rather from the reasonable assumption -- supported by custom and practice -- that even if the due date for responding papers were set by an order to show cause, adjourning a motion's return date would adjourn the deadline for papers by a corresponding period of time. Surely, the court had the discretion to forgive any allegedly late filing under such circumstances.

In sum, there is no reason that the court was required to enter a default or hold the respondents in contempt. Even if the papers were late, the court had the discretion to forgive that lateness. Mr. Warren's insistence that the court erred by not entering a default and/or holding the respondents in contempt is therefore without merit.

III. THE COURT DID NOT ERR IN DECLINING TO DISQUALIFY COUNSEL FOR CANISIUS HIGH SCHOOL WHEN CANISIUS HIGH SCHOOL KNEW ABOUT THE FACTS THAT ALLEGEDLY CREATED A CONFLICT AND CONSENTED TO COUNSEL'S CONTINUED REPRESENTATION.

Petitioner argues that counsel for Canisius High School was faced with a conflict of interest and therefore should have been disqualified from representing Canisius. But if there were a conflict, it was Canisius's conflict to raise. Canisius knew about the facts that petitioner alleges gave rise to the conflict, and Canisius consented to continued representation by its counsel. R. at 196, 877. Petitioner should not be permitted to require Canisius to do otherwise.

Indeed, petitioner did not have standing to raise the conflict. *See A.F.C. Enterprises, Inc. v. New York City School Construction Authority*, 33 A.D.3d 736, 736, 823 N.Y.2d 433, 434 (2d Dep't 2006); *Bison Plumbing City, Inc. v. Benderson*, 281 A.D.2d 955, 722 N.Y.S.2d 660 (4th Dep't 2001); *Corbelli v. General Accident Insurance Company of America*, 198 A.D.2d 760, 760, 604 N.Y.S.2d 402, 403 (4th Dep't 1993). But even if he did, Canisius knew about the facts that supposedly created the conflict and still wanted to be represented by the same counsel. R. at 196, 877. The trial court therefore had no reason to require Canisius to retain new counsel and providently exercised its discretion in denying petitioner's request to disqualify counsel for Canisius. *See Hall Dickler Kent Goldstein & Wood, LLP v. McCormick*, 36 A.D.3d 758, 759-760, 830 N.Y.S.2d 195, 196 (2d Dep't 2007) ("Supreme Court providently exercised its discretion in denying the defendant's

cross motion to disqualify counsel. It is undisputed that the plaintiff and the third-party defendants were fully informed of the potential for a conflict of interest ... and that they consented to the continued representation. The defendant's conclusory assertions and speculation as to the existence of a conflict of interest were insufficient to meet her burden of demonstrating that the disqualification of counsel was warranted."); *see also Christensen v. Christensen*, 55 A.D.3d 1453, 1453, 867 N.Y.S.2d 580, 582 (4th Dep't 2008).

IV. THE COURT'S DECISION DENYING A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION IS MOOT.

A party seeking a temporary restraining order or a preliminary injunction must demonstrate, among other things, a likelihood of success on the merits. *See, e.g., Holdsworth v. Doherty*, 231 A.D.2d 930, 930, 647 N.Y.S.2d 633, 634 (4th Dep't 1996). Here, the merits have been decided, and the party who sought a temporary restraining order and preliminary injunction lost. As a matter of simple logic, then, that party did not show a likelihood of success on the merits. In any event, now that the petition has been dismissed on the merits without affording petitioner any relief, the question of whether petitioner was entitled to a temporary restraining order or preliminary injunction is moot.

V. THE COURT DID NOT ERR IN REFUSING TO COMPEL DISCOVERY IN AN ARTICLE 78 PROCEEDING.

Unlike conventional litigation in which discovery is the rule, an Article 78 proceeding is a "special proceeding" in which discovery is the exception. *See* CPLR 408, 7804(a). In an Article 78 proceeding, discovery is available only by leave of the court, and the court has broad discretion to grant or deny discovery after balancing the needs of the party seeking discovery against opposing interests such as expediency and confidentiality. *See Zulu v. Egan*, 1 A.D.3d 649, 650, 766 N.Y.S.2d 610, 610 (3d Dep't 2003); *Grossman v. McMahon*, 261 A.D.2d 54, 57, 699 N.Y.S.2d 582, 584 (3d Dep't 1999).

Here, as the record attests, petitioner had all the information he needed to bring his claim. He had the lengthy and detailed submissions by Canisius High School for a building permit and in connection with the assessment of the environmental impact of the project. *See, e.g.,* R. at 96-145, 174, 250-565, 611, 643-684. He had the minutes of the town meetings addressing these issues. R. at 34-84, 150-172. 601-608. He had the complete analysis of the town addressing the high school's applications. R. at 177-178, 567-590. Petitioner's request for additional materials was nothing more than a fishing expedition that would have been inappropriate even in conventional litigation. *See Oak Beach Inn Corp. v. Town of Babylon*, 239 A.D.2d 568, 658 N.Y.S.2d 72 (2d Dep't 1997). In this Article

78 proceeding, the court was well within its discretion in declining to compel discovery.

Petitioner's argument that this is a hybrid Article 78/declaratory judgment action and that discovery is permitted in the declaratory judgment action is without merit. Although petitioner styled his proceeding as both an Article 78 proceeding and a declaratory judgment action, the proper procedural vehicle for challenging an administrative determination is an Article 78 proceeding. *See Concetta T. Cerame Irrevocable Family Trust v. Town of Perinton Zoning Bd. of Appeals*, 27 A.D.3d 1191, 1192, 811 N.Y.S.2d 852, 853-854 (4th Dep't 2006). In other words, declaratory relief is not available to petitioner, *see id.*, and the court was correct in treating this proceeding as only an Article 78 proceeding. *See Schweichler v. Village of Caledonia*, 45 A.D.3d 1281, 1282, 845 N.Y.S.2d 901, 903 (4th Dep't 2007). Therefore, discovery was available only by leave of court and in the court's discretion, *see* CPLR 408, 7804(a), and for the reasons noted above, the court did not abuse that discretion here.

VI. THE COURT DID NOT ERR IN FINDING THAT THE TOWN APPROPRIATELY GRANTED A BUILDING PERMIT TO AN EDUCATIONAL INSTITUTION TO USE PROPERTY ZONED FOR EDUCATIONAL USE TO SERVE AN EDUCATIONAL PURPOSE.

Towns are given the discretion to enforce their zoning regulations. In fact, as long as a zoning decision is rational and not arbitrary and capricious, the courts will not intervene. *See, e.g., Conway v. Town of Irondequoit Zoning Bd. of Appeals*, 38 A.D.3d 1279, 1280, 831 N.Y.S.2d 818, 819 (4th Dep't 2007). Here, for several reasons, the town's decision was anything but arbitrary and capricious.

First, as petitioner concedes, the property here is zoned for uses that include a "[p]rivate, nonprofit elementary or secondary school accredited by the New York State Department of Education." *See* West Seneca Town Code § 120-17, reprinted at R. at 627-629 (permitted uses in R-100A districts include uses permitted in § 120-14A, which include uses permitted in § 120-13A); R. at 20 (petition alleges that property is zoned R-100A). Canisius High School is a private, nonprofit secondary school accredited by the New York State Department of Education. R. at 649-650, 733, 734. Consequently, the use of the property as part of Canisius High School is a permitted use on its face.

Petitioner argues that because Canisius will operate only a small part of the school on the premises at issue, it is not operating a "school" on the property and is therefore using the property for a use that is not permitted. But that argument is both logically and legally unsound.

Under petitioner's analysis, the zoning board could approve Canisius's move of the entire school -- including an athletic field and multiple classrooms -- to the site, but the zoning board could not permit Canisius to move part of its facility -- an athletic field and a building with a classroom -- to that same site. That makes no sense. And in analogous situations, the courts have found that a portion of an educational institution should be treated like the educational institution for zoning purposes. *See, e.g., Rorie v. Woodmere Academy*, 52 N.Y.2d 200, 437 N.Y.S.2d 66 (1981) (summer day camp run by a school treated as a school for zoning purposes); *Town of Islip v. Dowling College*, 275 A.D.2d 366, 712 N.Y.S.2d 160 (2d Dep't 2000) (driver's education courses for nonmatriculating students are permitted educational uses under town zoning code); *New York Institute of Technology, Inc. v. Ruckgaber*, 65 Misc. 2d 241, 244, 317 N.Y.S.2d 89, 93 (Sup. Ct., Nassau Co. 1970) (for zoning purposes, school includes "dormitories and athletic facilities for interscholastic as well as intramural contests, including seating for spectators"); *cf. Harvey School v. Town of Bedford*, 34 A.D.2d 965, 965, 312 N.Y.S.2d 586, 587 (2d Dep't 1970) (school's ice skating rink is an "educational" use for tax purposes, even though individuals other than students are permitted to use the rink during non-school hours); *see generally, Association of Zone A & B Homeowners Subsidiary, Inc. v. Zoning Bd. of Appeals of City of Long Beach*, 298 A.D.2d 583, 749 N.Y.S.2d 68 (2d Dep't 2002) ("educational institutions are generally permitted to engage in activities and locate on their property facilities for such social,

recreational, athletic and other accessory uses as are reasonably associated with their educational purpose") (internal quotation marks and citation omitted).

Petitioner argues that a field used for an athletic purpose -- as opposed to a building used for an academic purpose -- is not an educational use. But that argument misunderstands both the mission of Canisius High School and the requirements of secondary school education in New York. As its mission statement attests, Canisius High School is dedicated to educating "the whole person," and that includes physical education. R. at 664-665, 778, 782. In fact, physical education is a mandated component of secondary school education in New York State. *See* 8 NYCRR §§ 135.2, 135.4, reprinted in R. at 656-661. And students at Canisius can fulfill that physical education requirement by playing on sports teams, including those teams that play and practice at the facility in West Seneca. R. at 667-670.

What is more, even if the property were not zoned for educational use, the zoning board may well have been required to give Canisius a variance. In New York State, educational and religious institutions are given special treatment with respect to zoning ordinances and are presumed to have a beneficial effect, requiring a variance unless exceptional circumstances are present. *See Cornell University v. Bagnardi*, 68 N.Y.2d 583, 593-594, 510 N.Y.S.2d 861, 865-867 (1986). As the courts of this state have held, "schools, public, parochial and private, by their very nature, singularly serve the public's welfare and morals." *Id.*, 68 N.Y.2d at 593, 510 N.Y.S.2d at 866. Therefore, schools are presumed to be entitled to an exemption from zoning laws, and that presumption may be rebutted only "with evidence of a

significant impact on traffic congestion, property values, municipal services and the like." *Id.*, 68 N.Y.2d at 595, 510 N.Y.S.2d at 867. Here, not only has petitioner failed to produce any evidence that might rebut the presumption, but the municipality itself actually supports the proposed educational use.

Petitioner makes much of the fact that the town's Code Enforcement Officer originally said that the sports facility was limited to a location zoned for "amusements." *See* Appellants' Brief on Appeal at 50-51. But a town is certainly not bound by an official's preliminary thoughts on an issue, especially when that official recognizes that his preliminary thoughts were incorrect. Indeed, if the town were estopped by its Code Enforcement Officer's initial mistaken conclusion here, a school would be prevented from building an integral part of its facilities on land zoned to explicitly permit educational uses. Surely, the law does not require such a nonsensical result.

Petitioner also makes much of the fact that the Code Enforcement Officer called the facility an "accessory" school use. *See* Appellants' Brief on Appeal at 34-35. Petitioner correctly points out that under the Town Code, an accessory use must be located on the same property as the principal use. But the Code Enforcement Officer did not use the word "accessory" as a term of art within the meaning of the Town Code. In fact, what he actually said was that the sports field was "an accessory use *or part of a school.*" R. at 81 (emphasis added). Moreover, Canisius made it explicit that the proposed use was "a primary (not accessory) use" for zoning purposes. R. at 725. The point is that the sports facility, including a

building with a classroom, was one of several facilities that make up the entire school. Therefore, the use of the land was educational, as permitted by the town's zoning ordinance.

Finally, petitioner claims that the Zoning Board of Appeals did not indicate its vote on the appeal or indicate whether its "determination was reached as a body after deliberations." *See* Appellants' Brief on Appeal at 49. For that reason, petitioner asserts that the determination violated the West Seneca Town Code and the Public Officers Law. *Id.* But as the record makes clear, the Zoning Board indeed indicated both the vote and the circumstances of the vote: in executive session after a motion duly made at the public hearing. *See* R. at 847-848.

In sum, even if the property here were not zoned for educational uses, Canisius High School would be presumptively permitted to use the property for an athletic field and classroom. But the property *is* zoned for educational uses. And the municipality's zoning board both supports, and used proper procedures to approve, the specific use at issue. There is nothing irrational, arbitrary, or capricious in the zoning board's decision, and there is no merit to the petitioner's position.

VII. THE COURT DID NOT ERR IN FINDING THAT THE TOWN, AS THE LEAD AGENCY UNDER SEQRA, APPROPRIATELY AND CORRECTLY ISSUED A NEGATIVE DECLARATION WHEN THE TOWN CONSIDERED ALL ENVIRONMENTAL ISSUES, REVIEWED VOLUMINOUS SUBMISSIONS ON THOSE ISSUES, AND GAVE DETAILED REASONS FOR ITS DECISION.

In reviewing a lead agency's negative declaration under SEQRA, the courts will not substitute their judgment for that of the agency but rather will ask "whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." *Anderson v. Town of Chili Planning Bd.*, ___ A.D.3d ___, 2009 WL 281297 *2 (4th Dep't 2009) (internal quotation marks and citations omitted); *see Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 416, 503 N.Y.S.2d 298, 304 (1986). The court must defer to the agency if the agency took a sufficiently careful look at the relevant areas of environmental concern. *See H.O.M.E.S. v. New York State Urban Development Corp.*, 69 A.D.2d 222, 231, 418 N.Y.S.2d 827, 832 (4th Dep't 1979). Here, the town, which served as lead agency after notifying the appropriate federal, state and county departments, took that requisite "hard look" and provided a "reasoned elaboration" of the basis for its determination. *See Maidman v. Incorporated Village of Sands Point,* 291 A.D.2d 499, 501, 738 N.Y.S.2d 362, 364 (2d Dep't 2002); *Bolton v. Town of South Bristol Planning Board,* 38 A.D.3d 1307, 1308, 832 N.Y.S.2d 729, 739 (4th Dep't 2007). In fact, contrary to the

conclusory assertions in petitioner's brief, the town engaged in a careful analysis of all potential environmental impacts.

More specifically, the town appointed a Technical Advisory Committee to assist the Code Enforcement Officer in conducting the SEQRA analysis. R. at 698-700. Together, the Code Enforcement Officer and Technical Advisory Committee received hundreds of pages of detailed reports addressing traffic, lighting, and archeological issues, as well as more traditional environmental issues involving land and water. R. at 260-578. Those submissions included detailed studies and analyses addressing specific questions that had been raised about lighting, archeological artifacts, and the possibility of affecting endangered plant life. R. at 281-295. The Code Enforcement Officer and the Technical Advisory Committee jointly held a public meeting to review the environmental impact of the project and the methods of mitigation. R. at 694-695, 700. It is difficult to fathom what more the town could have done to take a "hard look" at environmental issues. *See Schweichler*, 45 A.D.3d at 1283, 845 N.Y.S.3d at 904; *Village of Tarrytown v. Planning Bd. of Village of Sleepy Hollow*, 292 A.D.2d 617, 618-620, 741 N.Y.S.2d 44, 47 (2d Dep't 2002) (planning board received input on project from members of the public, interested and involved agencies and the municipality, and took the appropriate hard look at the areas of concern).

Indeed, this Court recently found that a municipality took the requisite "hard look" at environmental issues even though it did not address a "precise concern" raised by the petitioner. *See Anderson*, 2009 WL 281297 at *2. If the review in

that case satisfied SEQRA, then certainly the review here -- which included detailed archeological studies, lighting analysis, endangered plant analysis, etc., to address environmental questions that had been raised -- must likewise satisfy SEQRA.

Petitioner also suggests that the lead agency failed to give reasons for its negative declaration and its conclusions that the proposed project would not have a significant impact on the environment. But the record belies that conclusory assertion.

For example, the lead agency found that the facility "will not result in any adverse impacts to the land." *See* R. at 583 (emphasis in original). The lead agency explained that the site currently was occupied by open fields which had been, but were not at the time, used for agriculture. Therefore, while more than ten acres of agricultural land was being converted into the sports field, that land had not been used for agriculture for a number of years, and most of the land in the area was not being used for agriculture. R. at 583-584.

Similarly, the lead agency noted that while development of the athletic fields might impact an archeological site, Canisius High School would mitigate any such impact by undertaking appropriate measures to preserve archeological resources. R. at 586. In fact, extensive surveys and excavations were conducted on the property to accomplish just that, R. at 413-564, 586-587, and the New York State Office of Parks, Recreation, and Historic Preservation issued a "No Adverse Impact" determination upon completion of those extensive studies. *See* R. at 283-285, 705-706.

The lead agency referenced a traffic report prepared by FRA Engineering, R. at 587, which concluded that the athletic field would not have an adverse impact on traffic. R. at 118-130. It also noted that any traffic impact for unusual events attracting larger crowds would be mitigated by the retention of security to direct traffic. R. at 587.

Contrary to the assertion in petitioner's brief, *see* Appellants' Brief on Appeal at 61, the lead agency indeed addressed the issue of noise after the construction of the sports facility was complete. The lead agency explicitly noted that the sports facility would utilize a public address system "to provide informational updates to spectators during sporting events," but that "care will be taken to ensure that any noise impacts are limited to the area of the athletic field." R. at 588. More specifically, the lead agency noted that "speakers used for the public address system shall be directional and positioned at each end of the bleachers so as to be heard by spectators" thus limiting the effect "of ambient noise away from the Site." R. at 588.

The negative declaration similarly addressed the effect of the project on any body of water, on air quality, on plants and animals, on aesthetic resources, on open space or recreation, and on the growth and character of the community or neighborhood. R. at 583-589. Based on its analysis of each of these ten criteria, and for the reasons specifically stated in the negative declaration, the lead agency found that the development of the facility would not have any significant adverse impact on the environment and that the requirements of SEQRA had therefore been

satisfied. That detailed analysis, based on hundreds of pages of environmental studies and analyses submitted by Canisius High School, gave more than the required hard look to environmental concerns.

Petitioner also suggests that the development of the football field and track is actually part of a larger plan that Canisius High School currently has and that the environmental review therefore has been improperly "segmented." But that claim was never raised at the administrative level or in the petition; *see* R. at 12-32, 598, 603-608, 610-641; it certainly is not properly raised for the first time on appeal. *See Williams v. State*, 56 A.D.3d 1208, 1208, 866 N.Y.S.2d 917, 917-918 (4th Dep't 2008) (issued raised for first time on appeal is not properly before the court); *see also Long Island Pine Barrens Soc., Inc. v. Planning Bd. of Town of Brookhaven*, 204 A.D.2d 548, 550, 611 N.Y.S.2d 917, 918 (2d Dep't 1994) (petitioners improperly raised segmentation argument for first time in petition and not during the administrative proceedings).

What is more, as support for this assertion, petitioner offers only press releases that indicate that Canisius High School may want to develop additional sports fields in the future. Such a "wish list" is far from a short term or long term plan that would require additional environmental analysis. *See Long Island Pine Barrens Soc., Inc.*, 204 A.D.2d at 551, 611 N.Y.S.2d at 919 (because it was uncertain "when, if ever" proposed lot would be developed, "it was not feasible or necessary" to conduct "a more exhaustive and speculative evaluation."); *Residents for a More Beautiful Port Washington, Inc. v. Town of North Hempstead*, 155 A.D.2d 521, 545

N.Y.S.2d 297, 303 (2d Dep't 1989) (no segmentation when "specific project" was not "actually proposed"). In fact, the very record citations upon which petitioner relies refer to any additional development as a "hope" -- not a plan -- and expressly note that plans for development of the property beyond a football field and track "remain up in the air." *See* R. at 907-08, 910.

Petitioner has offered nothing more than unsupported conclusions that the lead agency did not take a "hard look" at environmental concerns and unfounded allegations that Canisius High School has some sort of secret plan to build more than a football field and track. The trial court correctly rejected those conclusory assertions and dismissed the petition. This Court should affirm that finding.

CONCLUSION

Petitioner's brief raises more than a dozen issues and sub-issues, apparently with the hope that this Court will find at least one of them to have merit. But that machine-gun approach simply evidences the weakness of petitioner's position. Even giving petitioner the benefit of the doubt that every pro se litigant should get, there is no merit to any of the substantive or procedural arguments raised on appeal. This Court should therefore affirm the judgment below in all respects.

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