

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D21408
X/prt

_____AD3d_____

Argued - September 9, 2008

ROBERT A. SPOLZINO, J.P.
DAVID S. RITTER
FRED T. SANTUCCI
EDWARD D. CARNI, JJ.

2007-10669

DECISION & ORDER

In the Matter of Nora Lucas, et al., appellants,
et al., petitioners, v Village of Mamaroneck,
et al., respondents.

(Index No. 13033/07)

Nora Lucas, Anthony Weiner, Jeffrey Falk, Martha Falk, Stuart Tiekert, and Robert Balin, Mamaroneck, N.Y., appellants pro se.

Callahan & Fusco, LLC, New York, N.Y. (Christopher G. Fusco of counsel), for respondent Village of Mamaroneck.

Frank A. Acocella, Yonkers, N.Y., for respondents Paul Ferrante and Rosa Acocella.

Lawrence R. Mulligan, Scarsdale, N.Y., for respondent Benmar Properties, LLC.

In a proceeding pursuant to CPLR article 78, inter alia, (1) to review a determination of the Director of Building of Village of Mamaroneck dated July 6, 2007, granting a building permit authorizing the construction of a single-family home by Benmar Properties, LLC, and (2), in effect, to compel the Village of Mamaroneck to make a threshold determination as to whether the issuance of the building permit is a Type I, Type II, or Unlisted Action within the meaning of the regulations implementing the State Environmental Quality Review Act (ECL art 8), the petitioners Nora Lucas, Anthony Weiner, Jeffrey Falk, Martha Falk, Stuart Tiekert, and Robert Balin appeal, as limited by their brief, from so much of an order and judgment (one paper) of the Supreme Court, Westchester County (Cohen, J.), entered October 23, 2007, as denied the petition and dismissed the proceeding.

ORDERED that the order and judgment is modified, on the law, by deleting the provision thereof denying that branch of the petition which was, in effect, to compel the Village of

December 16, 2008

Page 1.

MATTER OF LUCAS v VILLAGE OF MAMARONECK

Mamaroneck to make a threshold determination as to whether the issuance of the building permit is a Type I, Type II, or Unlisted Action within the meaning of the regulations implementing the State Environmental Quality Review Act, and substituting therefor a provision granting that branch of the petition and remitting the matter to the Village of Mamaroneck for such a determination by the appropriate lead agency; as so modified, the order and judgment is affirmed insofar as appealed from, without costs or disbursements.

The petitioners alleged that the Director of Building of Village of Mamaroneck (hereinafter the Director) improperly granted a building permit to Benmar Properties, LLC. The Supreme Court properly denied that branch of the petition which was to annul the Director's determination on the ground that the petitioners failed to exhaust their administrative remedies. The petitioners were required to challenge the issuance of the building permit before the Village's Zoning Board of Appeals prior to commencing this proceeding (*see Matter of Levine v Town of Clarkstown*, 307 AD2d 997, 999; *Sabatini v Incorporated Vil. of Kensington*, 284 AD2d 320).

However, the Supreme Court erred in denying that branch of the petition which was, in effect, to compel the Village of Mamaroneck to make a threshold determination under SEQRA as to whether the issuance of the building permit is a Type I, Type II, or Unlisted Action within the meaning of the regulations implementing the State Environmental Quality Review Act (ECL art 8) (hereinafter SEQRA). Inasmuch as there has yet to be a determination as to whether, pursuant to SEQRA, the subject action is properly categorized as Type I (*see* 6 NYCRR 617.4), Type II (*see* 6 NYCRR 617.5), or Unlisted (*see* 6 NYCRR 617.2[ak]), that branch of the petition should have been granted and the matter remitted to the Village for such a determination by the appropriate lead agency, either the Village Planning Board, Zoning Board of Appeals, or the Village Board of Trustees.

The parties' remaining contentions are without merit.

SPOLZINO, J.P., RITTER, SANTUCCI and CARNI, JJ., concur.

2007-10669

DECISION & ORDER ON MOTION

In the Matter of Nora Lucas, et al., appellants,
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(Index No. 13033/07)

Cross motion by Benmar Properties, LLC, inter alia, to dismiss an appeal from an order and judgment (one paper) entered October 23, 2007, on the ground that the appeal and the underlying proceeding have been rendered academic. Separate motion by Paul Ferrante and Rosa Acocella, inter alia, to dismiss the appeal from the same order and judgment. By decisions and orders

December 16, 2008

Page 2.

MATTER OF LUCAS v VILLAGE OF MAMARONECK

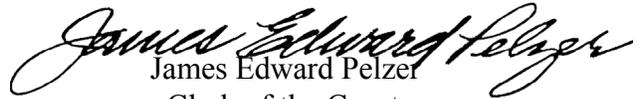
on motions of this Court dated January 8, 2008, and March 31, 2008, respectively, that branch of the cross motion of Benmar Properties, LLC, which was to dismiss the appeal and that branch of the separate motion of Paul Ferrante and Rosa Acocella which was to dismiss the appeal were held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the cross motion and the separate motion, the papers filed in opposition or relation thereto, and upon the argument of the appeal, it is

ORDERED that the branch of the cross motion and the branch of the separate motion which were to dismiss the appeal are denied.

SPOLZINO, J.P., RITTER, SANTUCCI and CARNI, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court