

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

1663

CA 09-01457

PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, AND CENTRA, JJ.

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IN THE MATTER OF BENDERSON DEVELOPMENT  
COMPANY, LLC, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

ZONING BOARD OF APPEALS OF CITY OF UTICA,  
RESPONDENT,  
AND KESSEL BRENT CORPORATION,  
RESPONDENT-APPELLANT.

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RICHARD E. KAPLAN, UTICA, FOR RESPONDENT-APPELLANT KESSEL BRENT  
CORPORATION.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (JOHN J. HENRY OF COUNSEL), FOR  
PETITIONER-RESPONDENT.

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Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered November 24, 2008 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Oneida County, for further proceedings on the petition in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of respondent Zoning Board of Appeals of the City of Utica (ZBA) approving "the request for the appeal of the decision of the Planning Board's Preliminary Site Plan approval" and directing petitioner to submit a new preliminary site plan. In its decision, Supreme Court stated that it "will grant the petition to the extent that the determination of the [ZBA] to require the petitioner to submit additional plans or new plans is annulled as being arbitrary and capricious; and otherwise, the petition is denied." We note that at the outset that, although the judgment conflicts with the decision, the decision controls (see *Matter of Edward V.*, 204 AD2d 1060, 1061; see also *Gui's Lbr. & Home Ctr., Inc. v Mader Constr. Co., Inc.*, 13 AD3d 1096, 1097, lv dismissed 5 NY3d 842; *Matter of Calm Lake Dev. v Town Bd. of Town of Farmington*, 213 AD2d 979, 980). Here, however, the decision itself is internally inconsistent inasmuch as the sole basis for the court's determination was the failure of respondent Kessel Brent Corporation (Kessel Brent) to comply with certain procedural requirements in appealing the determination of the City of Utica Planning Board to the ZBA, thereby rendering the ZBA's

determination arbitrary and capricious. Such a failure by Kessel Brent would only justify granting the petition, rather than denying it in part while at the same time annulling the requirement that a new site plan be submitted.

Furthermore, the evidence in the record does not support the sole basis for the court's determination. In its decision, the court concluded that the determination of the ZBA was arbitrary and capricious because it failed to follow the procedural requirements in General City Law § 81-a concerning hearings, notice and timeliness of decisions. The ZBA was required to decide the appeal within 62 days unless "extended by mutual consent of the applicant [here, Kessel Brent] and the" ZBA (§ 81-a [8]), and the ZBA and Kessel Brent were required to meet certain other procedural requirements concerning the filing and consideration of the appeal from the Planning Board's determination (see e.g. Utica City Code §§ 2-29-101, 2-29-108, 2-29-571 [3]). The only relevant evidence in the record with respect to the issue of consent establishes that Kessel Brent consented to the delay in determining the appeal, but there is no competent evidence in the record concerning whether the other procedural requirements were met. Moreover, the court did not explore the need for review under article 8 of the Environmental Conservation Law (State Environmental Quality Review Act), or the other issues raised in the petition. We note that, although this Court may make its own findings, here the court decided the petition on procedural grounds without reaching the merits and the record is insufficient to enable us to do so. We therefore reverse the judgment and remit the matter to Supreme Court for further proceedings on the petition consistent with our decision.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court