

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

1148

CA 13-00572

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF GERALD STROBEL, FAITH STROBEL,
JAMES COLLINS, PATRICIA COLLINS, FREDERICK
MINTER AND BARBARA MINTER, PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, TOWN OF CLARENCE, ERIE COUNTY
DEPARTMENT OF HEALTH, JAMES BUONO AND KELLI
BUONO, RESPONDENTS-RESPONDENTS.

BLAIR & ROACH, LLP, TONAWANDA (DAVID L. ROACH OF COUNSEL), FOR
PETITIONERS-APPELLANTS.

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ENVIRONMENTAL CONSERVATION.

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MYERS, QUINN & SCHWARTZ, LLP, WILLIAMSVILLE (JAMES I. MYERS OF
COUNSEL), FOR RESPONDENTS-RESPONDENTS JAMES BUONO AND KELLI BUONO.

Appeal from a judgment of the Supreme Court, Erie County (Patrick
H. NeMoyer, J.), entered June 1, 2012 in a CPLR article 78 proceeding.
The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is
unanimously affirmed without costs.

Memorandum: Petitioners commenced this CPLR article 78
proceeding alleging, inter alia, that respondents acted in an
arbitrary and capricious manner in issuing a permit for and
undertaking the construction of a spillway at a freshwater pond in the
Town of Clarence (respondent). Inasmuch as respondent moved to
dismiss the petition pursuant to CPLR 3211 (a) (1), and a special
proceeding may be summarily determined "upon the pleadings, papers and
admissions to the extent that no triable issues of fact are raised"
(CPLR 409 [b]; see CPLR 7804 [a]; *Matter of Barreca v DeSantis*, 226
AD2d 1085, 1086), we reject petitioners' contention that Supreme

Court's consideration was limited to the issue whether the petition contained a cognizable legal theory (see CPLR 7804 [f]; *Matter of Conners v Town of Colonie*, 108 AD3d 837, 839). We further conclude that the court properly determined that none of petitioners' causes of action has merit (see generally *Held v Kaufman*, 91 NY2d 425, 430-431).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court