Matter of Lafiteau v Guzewicz
2007 NY Slip Op 30143(U)
February 13, 2007
Supreme Court, Suffolk County
Docket Number: 0019664
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 06-19664

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 8/16/06
ADJ. DATES 1/26/07
Mot. Seq. # 002 - Petition Decided
CDISP

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Application of MARIANNE LAFITEAU, DAVID HUDSON, LISA CASE and ROBERT CASE,

Petitioners,

For a Judgment pursuant to Article 78 of the CPLR

-against-

DANIEL GUZEWICZ, as Chairman, and members KEVIN GUIDERA, RICHARD McMAHON, ROB DEVINNEY and GERRY FERRARA, constituting the Zoning Board of Appeals of the Village of Southampton,

Respondents

-and-

CHABAD OF SOUTHAMPTON, applicant,

Respondent

JONATHAN FOSTER, in his capacity as the Village of Southampton Building Inspector,

Respondent.

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Upon the following papers numbered 1 to 21 read on this Article 78 Petition ; Notice of Petition and supporting papers 1 - 5 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 6-7 ; Replying Affidavits and supporting papers 8-9 ; Other 10-11 (Chabad memorandum); 12-13 (Petitioners' memorandum); 14-15 (Petitioner's affidavit); 16-17 (Chabad memorandum); 18-19 (Board's memorandum); 20-21 (Certification of Board of Proceedings [Return including 82 items]) ; and after hearing counsel in support and in opposition to said petition on January 26, 2007, it is

ORDERED that this petition seeking an order pursuant to CPLR Article 78, vacating, annulling, and setting aside the Decision of respondent, the Village of Southampton Zoning Board of Appeals, dated June 22, 2006, which granted the application of respondent-applicant, Chabad of Southampton, for a special use permit and various substantial variances for property located at 214/218 Hill Street, Southampton, New York, is granted to the limited extent that the Decision is vacated and the matter is remanded to the respondent, the

Village of Southampton Zoning Board of Appeals, so that it may set forth in a new decision factual findings in proper form, including a discussion of the five factor balancing test of Village Law §7-725-b(3) and to determine the environmental impact of the second amended application, including examination under SEQRA of the effect of any possible mitigating measures, and in all other respects, the petition is denied.

Petitioners commenced this Article 78 proceeding seeking to annul the June 22, 2006 Decision of respondent, Zoning Board of Appeals of the Village of Southampton ("the Board"), which granted respondent, Chabad of Southampton ("Chabad"), a special use permit and numerous substantial variances for property located at 214/218 Hill Street, Southampton, New York, by a 4-1 vote, after a contentious two-year hearing process.

Previously, by Order dated September 20, 2006, this Court denied a request by petitioners for a preliminary injunction seeking to enjoin the use of the property at issue as a house of prayer of the Jewish faith. Familiarity with this Court's prior Order is assumed and reference to that decision must be made since this Court will not repeat the factual and legal issues within this decision.

In that September 20, 2006 Order, it was found that the petitioners offered sufficient proof that they were likely to ultimately succeed on the merits of the proceeding. That prior Order noted that petitioners limited their challenge to three basic points, that is, errors of law with respect to SEQRA and the accommodation standard under ***Cornell Univ. v Bagnardi***, 68 NY2d 583, 510 NYS2d 861 (1986), and the claimed arbitrary disregard of fire safety issues. This Court opined that based upon the limited record before the Court, it did appear that the Board failed to follow the appropriate legal standard in evaluating the Chabad permit request, in particular, the area variance requirements of Village Law § 7-712-b which requires a zoning board to undertake a five-part balancing test prior to the determination of a variance request.

In response to this Court's concern, the respondents have submitted detailed memoranda of law arguing that the five-factor balancing test is abrogated by the accommodation standard under ***Cornell Univ. v Bagnardi***, 68 NY2d 583, *supra*, or, that in any event, sufficient justification for the five factors can be found throughout the 35-page Decision under review. The Court cannot agree, particularly in light of the Court of Appeals holding in ***Matter of Sasso v Osgood***, 86 NY2d 374, 384, 633 NYS2d 259 (1995), which recognized the supremacy of the 1992 statutory standards in the field of area variances. While religious uses enjoy "a preferred status which curtails the permissible review authority of local administrative agencies" (Rice, Supp. Practice Commentaries, McKinney's Cons Laws of NY, Book 61, Town Law §267-a, 2007 Pocket Part, at 53), recent caselaw from the Appellate Division, Second Department sets forth a roadmap for zoning determinations that involve a religious use. These cases have examined the five factors under the balancing test for a variance when examining a special permit application for a place of worship (*see* ***Matter of Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Zoning Bd. of Appeals of Town/Village of Harrison***, 296 AD2d 460, 745 NYS2d 76 [2002]; ***Matter of Apostolic Holiness Church v Zoning Bd. of Appeals of the Town of Babylon***, 220 AD2d 740, 633 NYS2d 321 [2d Dept 1995]; *see also* ***Matter of Richmond v City of New Rochelle Bd. of Appeals on Zoning***, 24 AD3d 782, 809 NYS2d 110 [2d Dept 2005]; ***Matter of Rosenfeld v Zoning Bd. of Appeals of the Town of Ramapo***, 6 AD3d 450, 774 NYS2d 359 [2d Dept 2004]).

In the ***Church of Jesus Christ of Latter-Day Saints*** case, *supra*, the Second Department examined the Zoning Board's decision in light of the statutory factors and noted that the statute's direction to grant the minimum variance deemed necessary "does not relieve it from engaging in the balancing test mandated by Town Law §267-b(3)(B) for considering a requested variance" (296 AD2d at 462). Additionally, in the ***Apostolic Holiness Church*** case, *supra*, the court noted that the Zoning Board made findings against the Church with respect to each factor, but then examined, in detail, the variances requested in light of the five factors and the accommodation test. In fact, after agonizing over the substantiality of the variances requested, the court concluded that construction on smaller than code-size required lots was permitted and held that the religious use should be permitted with appropriate conditions relating to occupancy and parking.

A religious institution does not enjoy a "conclusive presumption of an entitlement to an exemption from zoning ordinances" (***Cornell Univ. v Bagnardi***, 68 NY2d at 594, *supra*). The Court of Appeals has reaffirmed the right of zoning boards, after the appropriate balancing process, to deny a special use permit,

when presented with evidence of significant impacts and where the use may actually detract from the public's health, safety, welfare, or morals (*see* ***Matter of Pine Knolls Alliance Church v Zoning Bd. of Appeals of the Town of Moreau***, 5 NY3d 407, 804 NYS2d 708 [2005] [denial of permission to construct a secondary driveway was appropriate where board directed widening of existing driveway as a mitigating condition]; *see also* ***McGann v Incorporated Vil. of Old Westbury***, 293 AD2d 581, 741 NYS2d 75 [2d Dept 2002]).

If a zoning board makes findings against the variance request with respect to the five factors, then the board must, whenever possible, make every effort to accommodate a religious use by the imposition of conditions (*see* ***Church of Jesus Christ of Latter-Day Saints,*** *supra*; ***Apostolic Holiness Church***, *supra* (conditions relating to occupancy and parking); ***Matter of Islamic Socy. of Westchester and Rockland, Inc. v Foley***, 96 AD2d 536, 464 NYS2d 844 [2d Dept 1983] (conditions that mitigate the detrimental or adverse effects upon the surrounding community); ***Cornell Univ. v Bagnardi***, 68 NY2d 583, *supra*).

As noted in its prior Order of September 20, 2006, the Board failed to follow the appropriate legal standard, set forth above, in evaluating the Chabad permit request. While the required balancing test of Village Law § 7-712-b(3) is acknowledged in the 35-page Decision of the Board (*see* Decision, p 3), there is no separate analysis of the five factors set forth in the determination. Respondents argue that the analysis is set forth throughout the Decision. The Court must disagree. At most, the third factor of whether the proposed variance is substantial is addressed at points throughout the Decision.

The special conditions for a place of worship pursuant to § 116-23(4) of the Village of Southampton Code set forth minimal conditions for lot area, structure set-backs, lot coverage, and off-street parking set back. Additionally, § 116-22 sets forth general standards that must be met in order for a special exception use to be granted. The Chabad application fails to satisfy a single condition and, in fact, varies so substantially from each criteria that petitioners claim that the Decision is a *de facto* repeal of the special use permit provisions. However, as previously noted in this Court's Order of September 20, 2006, the Court of Appeals held in ***Matter of Real Holding Corp. v Lehigh***, 2 NY3d 297, 778 NYS2d 438 (2004), that a zoning board had the authority to grant area variances from any requirements in the zoning regulations, including requirements for issuance of special use permits. In light of that holding, it becomes even more critical that a board examine the five factors under the balancing test for a variance when examining a special permit application. The required five-factor balancing test is not obvious to this Court upon its reading of the determination.

The Court's review of the entire Return supplied by the Board, discloses that the Board's ultimate conclusion that a limited church use, operating on a small, non-conforming lot with less on-site parking than required, while mitigating interference with the privacy and enjoyment of the neighboring properties, is obtainable. It is, of course, possible that the Board need not address the accommodation standard, if it finds that the variance request satisfied at least three of the five factors of the balancing test. Even if the Chabad application fails the five factor balancing test, the Board may be able to accommodate the religious use by issuing the necessary variances with appropriate conditions. However, as noted in this Court's Order of September 20, 2006, the Board's determination in this case was not unanimous and if the appropriate balancing test was undertaken, it may have had some effect on the Board's analysis of the accommodation standard and its final determination.

While the Board, in its Determination (p 5), concludes that the objectants failed to present "evidence showing that the requested variances will cause adverse impacts on the surrounding community of sufficient significance or magnitude so as to outweigh the presumed beneficial effect of religious use on the community" and then claims that "the objectants have ignored the 'accommodation standard,'" it is the Board that has ignored the required balancing test of Village Law § 7-712-b(3). If there is no evidence of any significant adverse impacts to the neighborhood, then such should be reflected in the appropriate statutory analysis.

Accordingly, the matter is remitted to the Zoning Board so that it may set forth in a new decision factual findings in proper form, including a discussion of the five factor balancing test of Village Law §7-725-b(3) (*see* ***Matter of Gabrielle Realty Corp. v Board of Zoning Appeals of Vil. of Freeport***, 24 AD3d

550, 808 NYS2d 258 [2d Dept 2005]).

Additionally, the Court agrees with petitioners' claim that the Board's Decision with respect to SEQRA (*see* 6 NYCRR Part 617), fails to comport with the required strict procedural compliance. In particular, the failure to include in the environmental review, the adjoining flag lot, that is, the newly acquired rear lot, commonly known by its Suffolk County Tax Map Number as lot 3.3, renders the Decision as violative of SEQRA.

As stated in the often cited ***Aldrich v Pattison*** (107 AD2d 258, 263, 486 NYS2d 23, 27 [2d Dept 1985]):

> SEQRA and its implementing regulations establish a procedural framework designed to incorporate the consideration of environmental factors into the existing planning, review and decision-making process of State, regional and local government agencies at the earliest possible time so as to minimize, to the greatest degree possible, the adverse environmental consequences of any project that is approved [citations omitted].

The Legislature has directed that, "to the fullest extent possible," SEQRA, its policies and regulations "should be interpreted and administered in accordance with the policies set forth in this article" (ECL § 8-0103[6]). The courts have interpreted this to require literal compliance with the review procedures set forth in SEQRA and its regulations (*see* ***Aldrich v Pattison***, 107 AD2d at 263, *supra*; ***Matter of McNally***, 90 NY2d 742, 750, 665 NYS2d 605 [1997]). At the same time, the courts have tempered this view with regard to substantive compliance with SEQRA. The Court of Appeals in ***Matter of Eadie v Town Bd. of the Town of N. Greenbush***, 7 NY2d 306,821 NYS2d 142 (2006), recently reaffirmed the 'rule of reason' standard with regard to substantive compliance and further declared that "[w]here an agency has followed the procedures required by SEQRA, a court's review of the substance of an agency's determination is limited."

The adequacy of an agency's consideration of environmental issues is generally a question of law because the issue is not whether effects are serious or harmful but whether the SEQRA process allowed for these issues to be adequately considered (*see* Weinberg, Practice Commentaries, McKinney's Cons Laws of NY, Book 17½, ECL C8-0109:6; ***Coalition Against Lincoln West, Inc. v City of New York,*** 60 NY2d 805, 469 NYS2d 689 [1983], *rearg denied* 61 NY2d 670, 472 NYS2d 1028 [1983]). Here, the Court finds a failure to comply with the required procedural compliance (*see* ***City of Watervliet v Town of Colinie***, 3 NY2d 508, 789 NYS2d 88 [2004]).

In September, 2005, based upon various expert reviews, including that of the Village Attorney (*see* memo, dated September 13, 2005), it appeared that the Chabad application was headed for denial. Prior thereto, in July of 2005, Chabad's representative filed an Environmental Assessment Form (EAF) Part 1 as part of the SEQRA compliance. As acknowledged by the Board, this matter involves an unlisted action under SEQRA. The Board's environmental consultant completed an EAF Part 2 and Part 3 on September 30, 2005. He identified one potential impact as a potential large impact and various other potential impacts as small to moderate impacts.[1] Additionally, that consultant, in a separate memo recommended denial of the application. The EAF was prepared and reviewed only with regard to the Chabad parcel.

In response, Chabad, through a limited liability corporation, acquired the adjourning rear lot, that is, lot 3.3. The Chabad property is commonly referred to as lot 3.2. The properties were kept in separate legal title and not merged. This Court's review of the Return reveals that Chabad did file a second amended application on December 15, 2005 which included the second parcel, lot 3.3. Chabad made its new

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[1] As noted in ***City of Watervliet v Town of Colinie***, 3 NY2d 508, 519, *supra*, "[a]fter reviewing the EAF, if the lead agency ... determines 'that the action may include the potential for at least one significant adverse environmental impact,' a positive declaration must be issued and completion of an EIS becomes necessary (6 NYCRR 617.7[a][1]; *see also* ECL 8-0109[2])."

presentation to the Board on January 26, 2006, the opponents offered their comments on February 23, 2006, with both sides offering arguments on March 23, 2006, at which time the hearing was closed. Written materials were permitted until April 27, 2006. However, when Chabad amended its application, a new or amended Environmental Assessment Form was not submitted.

The Board's Decision and suggested site plan requires, among other things, the relocation of the driveway that leads to lot 3.3, which driveway area is part of lot 3.3, to the east, and the use of the former driveway area as a 20 foot buffer to the adjoining property. The Decision requires the placement of a covenant and restriction on lot 3.3, for the benefit of lot 3.2. Additionally, the Decision calls for the creation of a parking lot in the rear of the Chabad property, that is, lot 3.2, with no buffer between the parking lot and lot 3.3. As a result, the Board's prior determination in 1989 that created the two lots out of a single parcel had to be altered and modified so as to grant relief from various conditions imposed at that time.

The Board did not render a separate SEQRA determination and instead, incorporated a negative declaration within its Decision. A review of that Decision references the September, 2005 review undertaken by its environmental consultant, however, the Decision then offers that subsequent to the consultant's review, extensive submissions and comments occurred, leading to the determination that the proposed action will not have a significant adverse impact on the environment (*see* Decision, p 22). The Decision goes on to note that "with respect to potential impacts, it is not reasonably feasible to directly address same in detail in this already lengthy decision"(Decision, p 22). The Decision (p 22) states that it credits the response of Chabad's representatives, except with regard to off-street parking impacts and the contention that Chabad's site plan would have a smaller impact (which contentions are central environmental considerations).

Petitioners claim in their verified petition that the environmental review did not include lot 3.3 and that no analysis of impacts associated with the conversion of lot 3.3, or even a part thereof, to a mixed use, that is, residential and place of worship use, was considered by the Board. As stated, lot 3.3 has been made a part of the Second Amended Application, since use of portions of lot 3.3 is necessary to grant the religious use for the Chabad parcel, lot 3.2. The importance of the acquisition of lot 3.3 to the approval of the application is stressed at page 23 of the Decision ("enabled us to consider and evaluate alternative site plans and mitigating conditions which could not have been realistically considered as of September of 2005").

The Board argues in its November 22, 2006 Memorandum of Law that it relied upon the September 30, 2005 EAF Part 2 and Part 3 (*see* p 40). However, that environmental review was of an EAF Part 1 that only involved the Chabad parcel, under the original application. Upon reviewing the entire Return, the Court can not find a separate analysis with regard to lot 3.3, or the potential impact on surrounding parcels by the use of lot 3.3 in conjunction with lot 3.2 for the religious use. Nor is there any discussion as to the suitability or advisability of utilizing a portion of one property to support the use on another lot. What is clear is that after the December 15, 2005 second amendment of the application, no new EAF Part 2 and Part 3 was undertaken by the Board, nor was a new Part 1 submitted reflecting the use of portions of lot 3.3 for the benefit of the Chabad parcel.

Respondents argue that the Board was not required to prepare an amended full EAF Part 2 form. The Court disagrees, since the prior review by its environmental consultant was based upon an EAF Part 1 for a different application. The Court can not accept the argument that the Board's June 22, 2006 Decision provides more analysis than or is the equivalent of an EAF Part 2 or Part 3. The cases relied upon by the Board are not relevant, since they deal with Type 1 action projects where open and public mitigation measures permitted the issuance of conditional negative declarations. Here, the procedural aspects of SEQRA are involved, that is, the submission by the applicant and the review by the municipality of the mandated forms.

It is disingenuous for the Board to argue that its "decision does <u>not</u> authorize use of Lot 3.3 for religious use" (Memorandum of Law, p 45), while conceding that the pole portion of lot 3.3 "is the only portion of Lot 3.3 proposed for use in connection with religious use on Lot 3.2" (Memorandum of Law, p 46). As previously stated, the acquisition of lot 3.3 by the entity controlled by the Chabad was critical to the Board's approval of the second amended application. Moreover, in a January 24, 2006 letter to an attorney for a petitioner, the Board's attorney notes "[i]n other words, despite any implication to the contrary in your

12/22/05 letter, the 'accommodation process' may include consideration of the adjoining flagpole lot [lot 3.3]."

The Court also rejects Chabad's argument that it "submitted a long form EAF Part 2 in its last submission to the Board" (Memorandum of Law, p 47). First, it is the governmental agency's responsibility to complete the EAF Part 2, not the applicant's. Additionally, the claimed long form EAF Part 2 was submitted as a part of an April 20, 2006 "Response to Memorandum of Law of Paul R. Hunt, Opponent," long after the close of the public hearing. As such, petitioners were not provided an opportunity to respond to this purported long form EAF Part 2. Where evidence has been received under circumstances which would deny a party the opportunity to appraise or rebut it, courts have expressed disapproval of the practice (*see* ***Matter of Stein v Board of Appeals of Town of Islip***, 100 AD2d 590, 473 NYS2d 535 [2d Dept 1984]; ***Matter of Sunset Sanitation Serv. Corp. v Board of Appeals of Town of Smithtown,*** 172 AD2d 755, 569 NYS2d 141 [2d Dept 1991]; ***Matter of Hampshire Mgt. Co. v Nadel***, 241 AD2d 496, 660 NYS2d 64 [2d Dept 1997]; ***Fulton v Board of Appeals of Town of Oyster Bay***, 152 NYS2d 974 [Sup Ct Nassau County, 1956]; *cf.*, ***Matter of W.W.W. Assocs., Inc. v Rettaliata***, 175 AD2d 133, 572 NYS2d 22 [2d Dept 1991]; ***Matter of Concerned Citizens Against Crossgates v Town of Guilderland Zoning Bd. of Appeals***, 91 AD2d 763, 458 NYS2d 13 [3d Dept 1982]).

The Court notes that as late as April 20, 2006, in its "Response to Memorandum of Law of Thatcher, Profitt, dated March 23, 2006," Chabad argued against the design adopted by the Board (*see* Response, p 17):

> The Zoning Board of Appeals itself proposed a third alternative which would significantly intensify the use of the lot. That proposal would require relocating the driveway to the eastern side of the property, widening it to 24 feet and constructing 16 on-site parking spaces. The plan would substantially damage the well established existing vegetation on-site. Given the number of proposed on-site parking spaces, it would significantly intensify the use of the property.

Additionally, at the January 26, 2006 presentation by Chabad on behalf of its second amended application, its planning consultant argued vigorously against the Board's concept (*see generally* Transcript. pp 43 - 82). In particular, with regard to the Board's concept, the consultant noted (Transcript, p76):

> If you are gonna say how many parking spaces can you jam on that piece of paper, you can probably find a way to jam them up to the front of the thing. But this is the minimum we think is necessary and appropriate.
> We preserve the hedge. We preserve the character of this property from the street, which we think is important in a village that's worried about the character of it.

As noted above, the Board argues that it relied upon the September 30, 2005 EAF Part 2 and Part 3. However, a review of those documents reveals that the environmental consultant addressed the issue of a easterly driveway in the Part 3 as follows:

> A new, easterly driveway is the only practical solution for the parking needed for both the rabbi's dwelling and the proposed religious use. However, a new driveway in this location will have the impacts discussed in the previous points and had been judged by the applicant's own traffic engineer as an unsafe location.

It is quite possible that once the procedural defects are corrected,[2] the Board will be able to issue a

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[2] The Court is left to speculate as to whether the retirement in December of 2005 of the Zoning Board's retained environmental consultant created the opportunity for the procedural

negative declaration that establishes that this project will not result in any significant adverse environmental impacts and that the required "hard look" at the environmental impacts associated with the inclusion of lot 3.3 into the second amended application was undertaken by the Board.

Accordingly, the matter is remitted to the Board to determine the environmental impact of the second amended application, including examination under SEQRA of the effect of any possible mitigating measures (*see* ***McGann v Incorporated Vil. of Old Westbury***, 293 AD2d 581, 584, *supra*). Chabad should submit an amended EAF Part 1 within thirty (30) days from the date of this Order. The Board, in its discretion, may conduct a limited SEQRA hearing based upon its completion of an amended EAF Part 2.

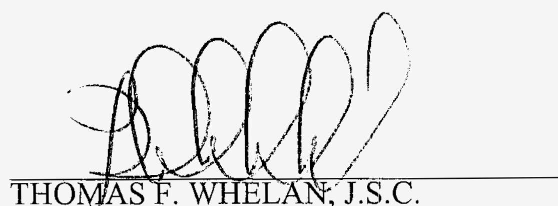
With regard to petitioners' additional claim concerning potential fire protection risks, a review of the Return reveals confusion as to whether or not the Chabad dwelling's sprinklers are commercial or residential in nature and whether the fire alarm system was appropriately installed or approved. Apparently, since July, 2005, documentation or plans have not been submitted to or approved by the Village Fire Marshal. While condition No. 15 of the June 22, 2006 Decision of the Board, requiring approval from the Village Fire Marshal, may be an appropriate zoning permit measure, here, the Board is aware that the Chabad is currently operating. While the Chabad may be correct in arguing that no credible evidence of any fire safety hazard has been disclosed in this record, the Village still owes a duty, to not only the occupants of the Chabad parcel, but to the Village's volunteer fire fighters and first responders, of ensuring compliance with fire safety regulations.

Finally, for all the reasons set forth in this Court's Order of September 20, 2006, petitioners have failed to demonstrate irreparable harm absent the granting of a permanent injunction. No proof is offered that Chabad substantially impairs the privacy, enjoyment, and use of the neighboring residential properties. Injunctive relief is denied.

The Court vacates the Board's Decision dated June 22, 2006 due to the procedural defects set forth above. While the merits of that determination are not addressed, it would appear, based upon the record before the Court, that petitioners have failed to submit convincing claims that the Board would be acting in an arbitrary or capricious manner in applying the requirements of the zoning code in a more flexible manner for this religious use (*see* ***Matter of Islamic Socy. of Westchester and Rockland, Inc. v Foley***, 96 AD2d 536, *supra*).

This Order is dictated by the principle that this nation is governed by the rule of law and the corresponding duty of the Court to ensure that, except in the most exceptional instances, the laws are applied equally to all. However, considering the now three-year long and bitterly contentious dispute that is reflected in the Return before the Court, one is reminded of the biblical verse, "The entire law is summed up in a single command: 'Love your neighbor as yourself'" (Galatians 5:14 [NIV]).

Accordingly, the petition is granted to the extent that the Decision is vacated and the matter is remanded to the Board so that it may set forth in a new decision factual findings in proper form, including a discussion of the five factor balancing test of Village Law §7-725-b(3) and that it may determine the environmental impact of the second amended application, including examination under SEQRA of the effect of any possible mitigating measures, and in all other respects the petition is denied. This constitutes the decision and Order of the Court.



DATED: 2/13/07

THOMAS F. WHELAN, J.S.C.

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missteps noted herein.