

**Oaks v Town of Phelps**

2007 NY Slip Op 30303(U)

March 7, 2007

Supreme Court, Ontario County

Docket Number: 0098293

Judge: John J. Ark

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SUPREME COURT STATE OF NEW YORK  
COUNTY OF ONTARIO

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ROBERT OAKS, GAIL GITTENS  
and DONALD ROULAND,

Petitioners,

Index No. 98293

v

DECISION

TOWN OF PHELPS, TOWN OF PHELPS  
ZONING BOARD OF APPEALS,  
GARY PALONE and SCOFF FREMOUW,  
Respondents.

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Petitioners, Robert Oaks, Gail Gittens and Donald Rouland, seek review of a September 21, 2006 decision of the Zoning Board of Appeals to grant a use variance to respondent Gary Palone to allow a pit for his racetrack to be constructed on land adjacent to and to the north of the existing racetrack. The land is currently zoned for agricultural use.

Petitioners allege that the granting of the use variance was arbitrary and capricious and had no rational basis. Petitioner also contends that respondent Scott Fremouw should have recused himself inasmuch as he was respondent Palone's former employee and has a personal relationship with respondent Palone.

Respondent Palone requested a use variance to move the racing pits from the south part of the racetrack to the north. A use variance is required because the land is currently zoned agricultural.

In order to establish entitlement to a use variance, respondent Palone was required to establish that: "(1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to

the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality” ( *Matter of Village Bd. of Vil. of Fayetteville v Jarrold*, 53 NY2d 254, 257).

“[A]s long as the Board’s determination has a rational basis supported by substantial evidence, a court should not substitute its judgment for that of the Board when the Board has not abused its discretion or acted arbitrarily” ( *Matter of M & M Partnership v Sweenor*, 210 AD2d 575, 576-577). “[T]he determination of the responsible officials in the affected community will be sustained if it has a rational basis and is supported by substantial evidence in the record [citations omitted]” ( *Matter of Cowan v Kern*, 41 NY2d 591, 598).

It is clear from the minutes of the meeting that respondent Zoning Board of Appeals carefully considered each of the factors. The Board determined that the land could not yield a reasonable return because respondent Palone had cleared the land prior to Judge Harvey’s decision. He would have been required to invest \$50,000 to return the land to a condition where it could be used for agricultural purposes. The Board found that this hardship was not self-imposed as respondent Palone had relied upon decisions made by the Town that were reversed by Judge Harvey. Finally, the Board found that the character of the neighborhood would not be changed inasmuch as the racetrack has existed for 40 years.

The minutes from the September 21, 2006 meeting of the Zoning Board of Appeals shows that the Board thoroughly considered each of the factors set forth in *Matter of Village Bd. of Vil. of Fayetteville v Jarrold* (53 NY2d 254, supra at257).

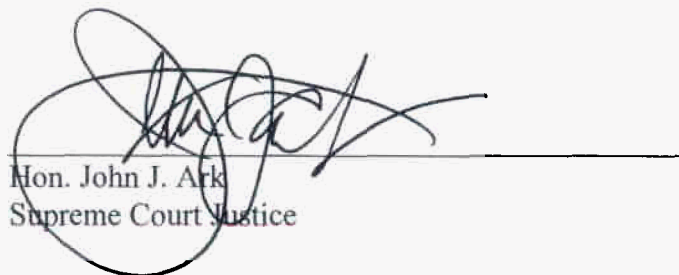
With respect to petitioner’s argument that Zoning Board of Appeals member Fremouw should have recused himself from the proceedings due to a relationship with Respondent Palone,

it is also clear from the minutes of the September 21, 2006 meeting that this issue was fully discussed. After the issue was raised, Chairman Wilkes and Mr. Fremouw stated that they believed that Mr. Fremouw could be objective and render an unbiased opinion.

“The law is clear that a complaining party cannot merely allege the conflict, but must demonstrate a factual basis that the actions of the board were prejudiced, and that the determination of the board was affected [citation omitted]. Furthermore, complainant must prove that the action that was alleged to have been improperly permeated the board so as to make the decision or action unfair [citations omitted]” (*Sterling Basin Neighborhood Ass'n v Zoning Bd. of Appeals of Village of Greenport*, 2006 WL 2872576). The relationship between Mr. Fremouw and respondent Palone, as alleged by petitioners is insufficient to require recusal (see *Lucas v Board of Appeals of Village of Mamaroneck*, 2007 WL 62691).

The petition is in all respects denied.

This constitutes the Decision of the Court. Submit Order accordingly.



Hon. John J. Ark  
Supreme Court Justice

Dated at Canandaigua, New York  
this 7<sup>th</sup> day of March 2007