Ungerland v Town of Wayne
2017 NY Slip Op 31300(U)
June 15, 2017
Supreme Court, Steuben County
Docket Number: 2016-810 CV
Judge: Marianne Furfure

State of New York **Supreme Court**
County of Steuben

PETER UNGERLAND and
MARIANNE UNGERLAND,

Petitioners/Plaintiffs,

DECISION

vs.

Index No. 2016-810 CV

TOWN OF WAYNE, STEPHEN T. BUTCHKO,
TOWN OF WAYNE ZONING BOARD OF APPEALS,
WILLIAM A. FEINSTEIN, CANDACE A. DIETRICH,
WAYNE HAND, GILL HARROP,

Respondents/Defendants.

Appearances: *Scott D. Moore Law Office, P.C.*, Elmira (*Scott D. Moore,* of counsel) for Petitioners/Plaintiffs

Harter, Secrest & Emery, LLP, Rochester (*Leslie M. Mauro,* of counsel) for Respondents/Defendants

This proceeding comes before the Court on respondents' motion for summary judgment seeking dismissal of petitioners' hybrid action for damages and an Article 78 petition in which they claim that the Town of Wayne Zoning Board of Appeals (ZBA) incorrectly applied and interpreted the Town Code and, as a result, erroneously refused to vacate a Stop Work order improperly issued by the Town Code Zoning Officer (ZO). Petitioners also seek money damages for the claim that the Town's action violated petitioners' constitutional rights to due process. Petitioners cross move for summary judgment in the Article 78 proceeding and oppose respondents' motion to dismiss their constitutional claims.

Respondents contend that the ZO properly issued the Stop Work order because petitioners' building exceeded the Town's height restrictions, petitioners misrepresented various claims on their building permit application, failed to commence site construction within 90 days of issuance of the permit thereby causing their building permit to lapse, and failed to obtain a Special Permit needed for the extensive excavation their construction project required. Respondents contend that the ZBA, in reviewing the ZO's decision and order, applied the appropriate Town Code section and properly interpreted it, and, therefore, its decision was not arbitrary and capricious, and did not violate respondents' constitutional rights.

Respondents have raised objections in point of law to the petition, claiming that petitioners' Article 78 petition must be dismissed because the proceedings are not ripe for judicial review and, furthermore, petitioners have failed to exhaust their administrative remedies. Respondents claim that petitioners had the option of filing an application for a variance which, if granted, would have overridden the Town Code restrictions and allowed them to construct their barn. Finally, respondents claim that petitioners have failed to establish that they have a vested property interest in the building permit sufficient to support a constitutional claim of violation of due process.

Petitioners assert that they were entitled to rely upon the building permit which was issued by the ZO and that they complied with all the Code requirements requested of them. They dispute that their building exceeded the height restrictions

in the Code and claim the ZBA incorrectly interpreted the Town Code when they upheld the Stop Work Order.

Petitioners applied for a building permit and presented a site development plan to the Town Planning Board in November of 2015 so they could get a building permit to construct a barn to store a motor home, a pontoon boat, mowers, and other personal property on their property which was zoned A-R. Petitioners used a building permit application for a similar barn structure that the Planning Board had recently approved as a reference. After the Planning Board held a hearing to review their application on December 7, 2015, during which the ZO spoke in support of the project, petitioners' application was granted and they were issued a building permit for construction of the barn.

In reliance on the permit, petitioners laid out the location of the barn, ordered construction materials, hired an excavation contractor who prepared the site for construction and began construction. After petitioner's uphill neighbors protested the construction of the barn, the ZO issued a Stop Work Order citing petitioners for failure to commence site preparation within 90 days of the issuance of the building permit, as required by the Town Code. Subsequent to the original Stop Work order, the ZO additionally cited petitioners for lack of a Special Permit and variances which, he claimed, were required because of the amount of soil excavated from the site in preparation for construction and the height of the building.

Petitioners appealed the issuance of the Stop Work order to the ZBA. A hearing was held during which several neighbors and area residents voiced opposition to petitioners' construction project. They claimed that the height of the barn, if completed, would interfere with their lake view. At the conclusion of the hearing, the ZBA found that Town Code Section 7.8.11 was applicable to petitioners' construction project and interpreted that section to mean that non-agricultural accessory use buildings in the A-R district could not exceed a height of 18 feet. As a result, the ZBA upheld the ZO's decision to issue the Stop Work order and advised petitioners that they needed to apply for a variance, if they wanted to continue construction of the barn. The ZBA refused to consider any of the other reasons given for the Stop Work order, claiming that because of the height restriction violation the other reasons were rendered moot.

A party seeking summary judgment must set forth sufficient evidence to demonstrate the absence of any material issue of fact *(Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]). If the proponent fails to make this showing, the motion for summary judgment must be denied regardless of the adequacy of the opposing papers (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). However, once this showing has been made, the burden then shifts to the opponent of the motion to come forward with evidence in admissible form to establish the existence of material issues of fact which require a trial *(Gonzalez v. 98 Mag Leasing Corporation,* 95 NY2d 124, 129 [2000]; *Alvarez v. Prospect Hospital*, Id.). In reviewing a motion for summary judgment, the evidence must be

considered in the light most favorable to the opponent and that party is given the benefit of every reasonable inference to determine whether any triable issues of fact exist (*Houston v. McNeilus Truck and Manufacturing, Inc.*, 124 AD3d 1210 [4th Dept. 2015]; *Ruzycki v. Baker*, 301 AD2d 48, 50 [4th Dept. 2002]).

RIPENESS DOCTRINE/EXHAUSTION DOCTRINE

Respondents' first objection in point of law is that this Article 78 proceeding must be dismissed as the proceeding is not ripe for judicial review. To be ripe for judicial review, the Court must find that the challenged action is final and determinative, and that the harm that will follow from the action cannot be prevented or cured by administrative means available to the plaintiff (*Church of St. Paul & St. Andrew v. Barwick*, 67 NY2d 510, 521 [1986], citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 [1967]; *Hilburg v. New York State Department of Transportation*, 138 AD3d 1062, 1063 [2nd Dept. 2016]; *East End Resources, LLC v. Town of Southold Planning Bd.*, 135 AD3d 899,900 [4th Dept. 2016]; *Ranco Sand and Stone Corp. v. Vecchio*, 124 AD3d 73, 80-81 [2nd Dept. 2014]). Determining at the outset that a matter is ripe for judicial review prevents courts from becoming involved in disagreements over administrative policies and protects municipal agencies from court intervention until the agency has reached a final determination which affects the challenging parties (*Ranco Sand and Stone Corp. v. Vecchio*, Id. at 80).

Additionally, a petitioner may seek Article 78 review of an administrative determination that is final and binding and when petitioner has shown that he has exhausted his administrative remedies (*Walton v. New York State Dept. Of Correctional Servs.*, 8 NY3d 186, 194 [2007]). An Article 78 proceeding "shall not be used to challenge a determination . . . [that] is not final or can be adequately reviewed by appeal to a court or to some other body or officer" (CPLR 7801(1); *Greece Town Mall, LP v. Mullen*, 87 AD3d 1408, 1408-1409 [4th Dept. 2010]).

"The finality and exhaustion of remedies requirements are drawn from case law on ripeness for judicial review" (*Walton v. New York State Dept. Of Correctional Servs*, Id. at 195, citing *Matter of Essex County v. Zagata*, 91 NY2d 447, 453-454, 454 n [1998]; *Church of St. Paul & St. Andrew v. Barwick*, Id. at 510). The two requirements, although similar, are conceptually distinct. "Ripeness pertains to the administrative action which produces the alleged harm to plaintiff; the focus of the inquiry is on the finality and effect of the challenged action and whether harm from it might be prevented or cured by administrative means available to the plaintiff. The focus of the 'exhaustion' requirement, on the other hand, is not on the challenged action itself, but on whether administrative procedures are available to review that action and whether those procedures have been exhausted" (*Church of St. Paul & St. Andrew,* Id. at 521; *see also Williamson County Regional Planning Comm'n*, 473 US at 192-193 [1985]).

A determination is final and binding when the agency has reached a definitive position on the issue that inflicts actual, concrete injury and the injury inflicted may not be ameliorated by further administrative action or by steps available to the complaining party (*Matter of Best Payphones, Inc. v. Department of Info, Tech. & Telecom. of City of N.Y.*, 5 NY3d 30,34 [2005]; *East End Resources, LLC v. Town of Southold Planning Bd.*, Id.) An agency's action is not definitive, and the injury is not actual or concrete, if the harmful effects of the decision can be prevented, significantly ameliorated, or rendered moot by further administrative action or by steps available to the complaining party (*Stop-the-Barge v. Cahill*, 1 NY3d 218, 223 [2003]; *Matter of Essex County v. Zagata*, Id.; *Matter of Patel v. Board of Trustees of Inc. Vil. of Muttontown*, 115 AD3d 862 [2nd Dept. 2014]).

Respondents argue that this matter is not ripe for judicial review because the effects on petitioners of the ZBA's refusal to vacate the Stop Work order may be prevented or lessened by applying for a variance from the Town Code height restriction. Petitioners argue that, if the Town Code had been properly applied and interpreted, they would not need a variance because the height of their building fell within the Town Code height requirements.

The ZBA selected the Town Code section it believed applied to the facts of this case, interpreted the section, and rendered a decision based on that. The ZBA's determination of which Town Code section to apply and its determination of

what that section means is a definitive position on application of the Town Code in this case and was a final determination on the building permit previously issued to petitioners. Petitioners argue that the ZBA's application of the Town Code has inflicted actual, concrete injury because petitioners have expended sums to start construction and will suffer the delay for a variance that they would not need, if the Town Code had been properly applied to their case. By upholding the Stop Work Order on the grounds that the structure violated the Town Zoning Code, respondent put an end to petitioners' construction, revoked their building permit and told them to file a new application on other grounds. This ruling was a final determination on the application for a Land Use Permit filed by petitioners and resulted in petitioners being unable to proceed on their project. An application for a variance would subject petitioners to additional expense and requires a different standard of review by the Town which would not be necessary should there be a finding that the Town acted erroneously. This harm cannot be prevented by further administrative action. Therefore, this issue is ripe for judicial review and petitioners have no other administrative remedies to exhaust. The decision by the ZBA was final and binding. Respondent's motion to dismiss the Article 78 proceeding on these grounds is denied.

HEIGHT RESTRICTION

Petitioners claim that the ZBA's refusal to vacate the Stop Work Order was arbitrary and capricious, as the ZBA erroneously determined that a Special Use

Permit or Variance was required before construction could proceed. Respondents claim that Town Code Section 7.8.11 is applicable to petitioners' building project because it specifically addresses accessory buildings in the A-R district. This section provides that:

> "Except as provided herein, accessory buildings including overhang, not greater than eighteen (18) feet in height, shall not be located closer than five (5) feet from lot lines, and shall be located within a rear or side yard."

Respondents argue that this section is interpreted to mean that an accessory building such as the one petitioners seek to build cannot be higher than 18 feet and must be located in a rear or side yard, no closer than 5 feet from the lot line. Respondents argue that the Court must take into account the Town Code as a whole to make sense of what this section is trying to accomplish. Respondents claim that, although this section was poorly drafted, the clear intent of Section 7.8.11 is to limit the height of non-agricultural accessory buildings on any lot. The Town argues that the Zoning Code reflects the Town's Policy to protect the natural scenic views of property owners within the Town, as a view of the lake enhances the value of the properties and adds to the bucolic character of the Town.

Petitioners argue that Section 7.8.11 does not apply to an accessory building built within the setback requirements and that, at best it would restrict buildings higher than 18 feet from being placed closer than 5 feet to a lot line or in a front yard. Petitioners claim that the ZBA interpretation of this section "makes no sense"

and that they misinterpreted the section because it is poorly written. Petitioners argue that Town Code Section 6.3, which governs allowable uses and densities in all Town districts, is the applicable section that governs the height of accessory use structures. Petitioners argue, however, that, even if Section 7.8.11 does apply to their construction project, the section is unclear and ambiguous and, therefore, must be interpreted against the Town and in favor of petitioners.

"Generally, a zoning board's interpretation of a zoning law is afforded great deference and will only be disturbed 'if it is irrational or unreasonable' " (*Matter of Meier v. Village of Champlain Zoning Bd. of Appeals*, 129 AD3d 1364, 1365 [3rd Dept. 2015]; quoting *Matter of Mack v. Board of Appeals, Town of Homer,* 25 AD3d 977, 980 [2006]). However, if the question is merely the legal interpretation of an ordinance, such deference is not required (*Matter of Meier v. Village of Champlain Zoning Bd. of Appeals*, Id. at 1365; *Matter of Salton v. Town of Mayfield Zoning Bd. of Appeals,* 116 AD3d 1113, 1113-1114 [3rd Dept. 2014]; *Matter of Blalock v. Olney*, 17 AD3d 842, 843-844 [3rd Dept. 2005]). Zoning regulations are in derogation of the common law and, therefore, must be strictly construed against the enacting municipality and any ambiguity must be resolved in favor of the property owner (*Matter of Salton v. Town of Mayfield Zoning Bd. of Appeals,* Id.; *Matter of Subdivisions, Inc. v. Town of Sullivan,* 92 AD3d 1184, 1187 [3rd Dept. 2012]).

Although a municipality cannot be expected "to anticipate each and every potential use to which a property owner may wish to put his or her property" (*Matter of Subdivisions, Inc. v. Town of Sullivan,* Id.]), the wording of Section 7.8.11 is

inartful and, without adding additional language that does not appear in the ordinance, the intent of the section is unclear and "nonsensical," as admitted by a member of the ZBA during petitioners' appeal hearing (Certified Return, R-151). The plain wording of the code section appears to regulate accessory buildings, not higher than 18 feet, from being built 5 feet from the lot line or in a front yard. Respondents' interpretation that this section restricts all accessory buildings from being higher than 18 feet and any construction within 5 feet of the lot line or front yard is not how the section is worded and contradicts other provisions of the code.

Town Code Section 6.3 establishes minimum residential lot sizes in each district, as well as minimum allowable depths of yards for any use, and the maximum allowable height of buildings for any use. Respondents argue that the maximum height limitation in this section only applies to residential structures, such as mobile homes and single or multiple-family dwellings, because Section 6 only applies to residential uses. Initially, respondents' claim appears to be supported by the schedules contained in Section 6, given that the lot area per dwelling unit and minimum yard depths all refer to single-family dwellings. However, respondents' claim that only residential structures can be up to 34 feet high is not supported by language within Section 6.3 which states that, *in each district*, the maximum allowable height of buildings *for any use* shall be 34 feet (emphasis added). Accessory uses are defined in the Town Code to include "(a) use of land, building, or other structure on the same lot as, and of a nature customarily and

clearly incidental and subordinate to, the principal use" (Town Code Section 2.3). The term "Principal Use" is defined to mean "(t)he primary or dominant use of premises" (Id.)

Although respondents argue that the Court must take into account the Town Code as a whole to make sense of what the regulation is trying to accomplish, the Court cannot ignore one part of the Town Code in favor of another, but must read the regulation as a whole. If the Town Code is interpreted to mean that only residential homes, and no other accessory use structures, could be built to a height of 34 feet, there would be no need to include the language setting forth the maximum allowable building height of 34 feet "for any use." Further, Section 6.3, the schedule that contains this language, has a section entitled "Residential Uses" and a separate section entitled "Any Allowed Use." The second section would not be necessary if the only allowed use under "Allowable Densities" was residential structures.

Respondents argue that Town Code Section 7 overrides the provisions of Town Code Section 6 when there is a difference between the two (Section 7.1). But, even with the Boards' interpretation that the section limits building height to 18 feet, the section appears to only restrict these structures from being placed within 5 feet of the lot line or in a front yard. Given that ambiguities must be resolved in favor of the property owner (*Matter of Salton v. Mayfield Zoning Bd. of Appeals*, Id.), the only potential conflict between the two sections deals with the Section 7

requirements governing accessory buildings built within 5 feet of the lot line or in the front yard. As petitioners' structure is not within these areas, Section 7.8.11 does not apply.

When an agency's interpretation of a statute runs counter to the clear wording of a statutory provision, its determination must be given little weight (*Matter of Raritan Development Corp. v. Silva,* 91 NY2d 98, 103 [1997]). Therefore, the ZBA's determination that petitioners structure violated the Town Code's height restrictions and required a variance was in error and their decision to uphold the stop work order for this reason was arbitrary and capricious (accord *Matter of Bonded Concrete Inc. v. Zoning Board of Appeals.* Id.).

ABSENCE OF GRADING PLAN

This does not end the matter however, as respondents claim that petitioners did not have a valid building permit when they commenced construction because petitioners misrepresented the extent of the construction project on their building permit application by failing to disclose that 100 cubic yards or more of material would need to be excavated to construct the barn. Respondents claim that, had this information been properly disclosed, petitioners would have needed to obtain a Special Permit as required by Town Code Sections 7.3.5(1)(c) and (d) and therefore, the Stop Work Order was properly issued.

Petitioners contend that they did not make a knowing misrepresentation on their building permit application because, at the time the application was submitted,

their excavation contractor did not realize that he would have to excavate more soil than he originally believed would be necessary.

First, it should be noted that, under the Town Code, no Special Permit is initially required by the Town Code to build an accessory structure in the A-R district. Only construction of a private airstrip in the A-R district requires a Special Permit (Section 6.2.6). Therefore, petitioners did not need to apply for a Special Permit as part of the initial building permit application, nor did the ZO or members of the Planning Board indicate otherwise. Second, Section 7.3.5 which governs grading and erosion control puts the onus on the ZO to determine whether a Special Permit is required. That section provides that "(a)n application for a Special Permit shall be supplemented by a grading plan and an erosion control plan . . where the Zoning Officer finds that site preparation for the proposed development probably will include . . . excavation ... (of) one hundred (100) cubic yards or more of excavated . . . material." In this case, petitioners only needed a Land Use permit to construct the barn. Petitioners were told by the ZO that the excavator should construct a silt fence for erosion control. Petitioners complied with this requirement. Petitioners have submitted evidence that no additional erosion control was needed for this project. Respondents have not submitted any evidence that the submission of a grading plan and erosion control plan would have resulted in any additional requirements. There was no evidence that petitioners misrepresented the site preparation at the time the plan was approved and no

showing that the Zoning Officer abused his discretion in not requiring a grading plan and erosion control plan before the permit was issued. If the ZO determined, while construction was ongoing, that the removal of 100 cubic yards of fill required a special permit or an erosion or grading plan, he was required by Town Code 1.3.2(3) to notify petitioners of such and give them time to correct the violation. There is no evidence that this was done. Therefore, the Town's position that the Building Permit was void for failure to disclose that 100 cubic yards of material would be removed is in error.

FAILURE TO TIMELY COMMENCE CONSTRUCTION

Respondents also contend that the Stop Work Order was properly issued because petitioners' building permit had lapsed by the time they commenced site preparation. Respondents point to Town Code Section 4.1.3(2) which requires site preparation to commence within 90 days of issuance of a building permit. If this is not done, the permit lapses. In this case, petitioners' permit was issued December 8, 2015. Therefore, although the permit stated that it would expire on December 8, 2016, respondents contend it lapsed on March 8, 2016, as site preparation had not yet begun. Respondents submitted an affidavit from petitioners' next-door neighbor that she did not observe any site preparation activities on the property until March 26, 2016, when she saw and heard excavation work commence. Petitioners have submitted an affidavit from the excavator who states that he did commence site preparation by digging test holes prior to the deadline. When the

petitioners went before the ZBA and asked to address this issue, they were denied the opportunity to do so. The ZBA found that it was not necessary to address this issue, as the building exceeded the height restrictions imposed by the Town and building could not proceed. As a result of the erroneous determination on the height restriction, the issue of whether petitioners had commenced site preparation before the permit lapsed or whether petitioners had good cause to extend the permit was not fully explored by the ZBA. This Court cannot substitute its judgment and decide factual questions which have not been ruled on by the agency charged with such responsibility (*Matter of Main Street Makeover 2 Inc. v. Srinivasan*, 55 AD3d, 910, 915 [2nd Dept. 2008]). Therefore, this issue of the timeliness of the permit must be remitted to the ZBA for further action.

VIEW SHED

Respondents also claim that the building permit was improperly issued because the petitioners misrepresented the impact the building would have on the surrounding property owner's view shed, by stating there was no impact. At the public hearing held by the ZBA there was testimony presented that the proposed building would block the adjoining neighbors' view of Keuka Lake. Town Code Section 4.1.1(4) requires that, before any building permit for new construction could be issued, site plan approval had to be secured from the Town Planning Board. Code Section 4.1.1(4) also requires that the application submitted to the Planning Board disclose the location, proposed height of all buildings and the effect on surrounding property view sheds. Petitioners maintain that they did not believe

there was any impact when they submitted their application and that the ZO had visually inspected the site and submitted a photograph to the Planning Board before the Planning Board approved the issuance of the Building Permit on December 7, 2015. The Planning Board minutes did not specifically address this issue. After the adjacent neighbor complained, the ZO issued the stop work order, eventually citing this as one of the reasons for revoking the building permit.

When a building permit is issued in error either due to misrepresentation by the applicant or oversight by the municipality, it can be revoked (*Village of Wappinger Falls v. Tomlins*, 97 AD2d 630, 631 [2nd Dept. 2011]). A town is not estopped from correcting the erroneous issuance of a permit due to laches (*Parkview Associates v. New York,* 71 NY2d 274, 282). Although there was some discussion of the view shed at the ZBA public hearing, the ruling by the ZBA focused only on the Code's height restriction. Given this erroneous interpretation, the view shed issue must be returned to the ZBA for further consideration of whether the proposed construction will have an impact on view shed and whether the impact, if any, justifies denial of the building permit. As the ZBA did not determine this issue, any judicial review is premature (*Matter of Main Street Makeover 2 v. Srinivasan,* Id.). Petitioners should be afforded the opportunity to produce information to support their claim that there is no visual impact or that the impact does not justify denial of the building permit. Therefore, this issue is also remitted to the ZBA for further action.

DUE PROCESS

Respondents also move for summary judgment dismissing petitioners' constitutional due process claim, contending that petitioners cannot prove that they have a vested property interest in the building permit, or that the ZBA's refusal to vacate the Stop Work order was wholly without legal justification.

Petitioners claim that the ZBA's failure to vacate the Stop Work order prevented them from using their property in the way they intended, in violation of their constitutional right to procedural due process. Further, petitioners argue that their building permit was validly issued and their project was proceeding in compliance with the permit, and, therefore, the Stop Work order was erroneously issued and the ZBA's failure to vacate the decision was arbitrary and capricious and violated their right to substantive due process.

Even if the petitioners are successful in their claim that respondents erroneously upheld the ZO's stop work order, petitioners cannot recover on their cause of action for violation of their rights to due process.

A violation of procedural due process occurs when a municipality over regulates a parcel of property to the point that the owner is completely deprived of the economic benefit of the property and the property is, thus, "taken" by the municipality (*Town of Orangetown v. Magee,* 88 NY2d 41, 50 [1996]). However, such a claim is not judicially reviewable until petitioner has presented proof that alternative uses for the property have been considered and rejected, or that

compensation has been sought for the property (*Town of Orangetown v. Magee*, Id.; *Matter of Ken Mar Dev., Inc. v. Department of Pub. Works of City of Saratoga Springs*, 53 AD3d 1020, 1024 [3rd Dept. 2008], citing *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*). In this case, petitioners have not established that other uses for the property were considered and rejected as unworkable and therefore, their taking claim is not ripe for judicial review. Respondents' motion for summary judgment dismissing this claim is granted.

Petitioners also raise a substantive due process claim based on their allegations that the ZBA's decision to uphold the Stop Work order, based on its application and interpretation of the Town Code, was arbitrary and capricious conduct. To prevail on a substantive due process claim, petitioners must establish that they have a vested right in the building permit and that the municipal action taken "was wholly without legal justification" (*Bower Assoc. v. Town of Pleasant Val.*, 2 NY3d 617, 627 [2004]; *Town of Orangetown v. Magee*, Id. at 52; *Harlen Associates v. Incorporated Village of Mineola*, 273 F.3d 494, 503 [2nd Circuit, 2001]).

A property owner can establish a vested property interest in a building permit when the owner proves that, in reliance on a legally issued permit, he has effected substantial changes and has incurred substantial expenses to develop the property (*Bower Assoc. v. Town of Pleasant Val.*, Id. at 628; *Town of Orangetown v. Magee*, Id. at 52; *Upstate Land and Properties, LLC v. Town of Bethel*, 74 AD3d 1450,

1452 [3rd Dept. 2010]). The record in this case establishes that, in reliance on the building permit, petitioners ordered building materials, hired an excavator to dig the foundation for the barn, and hauled gravel onto the site to be used for drainage purposes and to prepare the site for the construction project. Petitioners submitted an invoice from the excavator to establish that petitioners were billed $16,726.46 for this preparatory work.

Although substantial improvements and expenditures made in reliance on a validly issued building permit may support a finding that the property owner has a vested right in the permit which can be enforced, substantial improvements and expenditures alone are not enough. The landowner must establish that the expenditures were so substantial that the "municipal action results in serious loss rendering the improvements essentially valueless" (*Matter of Sterngass v. Town Bd. of Town of Clarkstown*, 10 AD3d 402, 405 [2nd Dept. 2004], citing *Town of Orangetown v. Magee*, Id.). In this case, although petitioners were billed for site preparation, they presented no other evidence of improvements that were made to the property, or the amount of funds expended in reliance on their belief that they had a valid building permit. However, even if petitioners' evidence could support a finding that they made substantial improvements and spent substantial funds to do so, they have presented no evidence to establish that they have suffered a serious loss that renders the improvements made essentially valueless (*Upstate Land and Properties, LLC v. Town of Bethel*, Id. at 1453; *Matter of Sterngass v.*

Town of Clarkstown, Id.). To the contrary, the site has been prepared for the construction of an accessory use building and only preliminary construction of the pole barn had begun. This is far different from the substantial improvements and expenditures made in reliance on a validly issued permit that courts have found will support a finding of a vested right (*see, Glacial Aggregates LLC v. Town of Yorkshire*, 14 NY3d 127,135-136 [2010]; *Town of Orangetown v. Magee*, Id.). Therefore, based on the above, petitioners have failed to establish that they have a vested property interest in the building permit.

Even assuming that petitioners had been able to prove that they had a vested property interest in the building permit, they also must prove that the ZO's issuance of the Stop Work order and the ZBA's refusal to vacate that order is so outrageously arbitrary as to constitute a gross abuse of governmental authority and was wholly without legal justification (*Harlen Associates v. Incorporated Village of Mineola*, Id.). Constitutional due process violations are not simply "an additional vehicle for judicial review of land-use determinations" (*Bower Assoc. v. Town of Pleasant Val.*, Id. at 627). "(O)nly the most egregious official conduct can be said to be arbitrary in the constitutional sense" (*City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Found.*, 538 US 188, 198 [2003]; *Bower Assoc. v. Town of Pleasant Val.*; *Harlen Associates v. Incorporated Village of Mineola*, Id. At 501; *Lisa's Party City, Inc. v. Town of Henrietta,* 185 F.3d 12,17 [2nd Cir. 1999]; *Schlossin v. Town of Marilla,* 48 AD3d 1118, 1120 [4th Dept. 2008]).

The ZBA's erroneous interpretation of the Town Code is not enough to support petitioners' claim of a substantive due process violation (*Harlen Associates v. Incorporated Village of Mineola*, Id. at 505). In this case, the Town contends that the building permit was mistakenly issued, and that they were justified in revoking the permit to correct the error and to protect and promote the natural resources and scenic areas of the Town. This establishes that the Town had a legitimate concern and did not act in an outrageously arbitrary manner. Therefore, respondents' motion for summary judgment dismissing petitioners' action for money damages is granted.

Petitioners' counsel to submit order.

Dated: June 15, 2017.

ENTER:

Marianne Furfure

Hon. Marianne Furfure
Acting Supreme Court Justice