

# COPY

At an IAS Term of the Supreme Court,  
Part II, held in and for the County of  
Columbia, in the City of Hudson, New  
York, on the 14<sup>th</sup> day of January 2010.

PRESENT: HON. PATRICK J. McGRATH  
Justice

SUPREME COURT STATE OF NEW YORK  
COUNTY OF COLUMBIA

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DeWAYNE POWELL, CARSTEN OTTO,  
KATHERINE JENNINGS, STEVEN JENNINGS,  
JOSEPH HALEY, DIANE HALEY, JEFFREY ROBINSON,  
BARBARA ROBINSON, MARCELLA HEINTZ,  
DeWITT HEINTZ, DAVE KING and FRANKLIN  
TARTAGLIONE,

Petitioners.

DECISION AND ORDER

-against-

INDEX NO. 7050-09

PLANNING BOARD OF THE TOWN OF  
GHENT, VINCENT MOLINARI and  
LISA MOLINARI.

Respondents.

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APPEARANCES: YOUNG, SOMMER, WARD, RITZENBERG, BAKER & MOORE, LLC  
Attorneys for the Petitioners

FITZSIMMONS & MACK, PC  
Attorneys for the Respondent Planning Board of the Town of Ghent

DAVID SETH MICHAELS, ESQ.  
Attorney for the Respondents Vincent Molinari and Lisa Molinari

McGRATH, PATRICK J. J.S.C.

Petitioners bring this Article 78 proceeding to annul a Resolution of the Respondent Planning Board of the Town of Ghent (hereinafter "the Board") dated August 5, 2009. The resolution granted

the application by Respondents Vincent and Lisa Molinari for a special use permit under the Town of Ghent Zoning law allowing for the excavation of a pond and sale of sand and gravel from their property on Carpenter Road.

It is undisputed that Ghent has adopted a local law which regulates mines and mining operation as local law 3 of 2005. These regulations were codified within the town zoning laws at Article XII, 190-74 *et seq.* Pursuant to the regulations, any applicant for a proposed mine must obtain a special use permit. On August 2, 2006, the Molinaris submitted an application for a special use permit to allow for the removal of sand and gravel from their property on Carpenter Road. The proposed mine would, for the first time, introduce heavy trucks to Carpenter Road on a daily basis. On the date of the application, the record establishes that the board reviewed Section 190-76 of the Town Laws. The law states, in relevant part:

With regard to all special permits which are subject to the applicant having to obtain a permit from DEC, the Planning Board, in granting such special permit shall consider the health, safety and welfare of the community and shall address the following issues:...Adequacy of public roads or rights of way providing direct access to and from the site. In this regard, if town roads are used for ingress and egress, these roads need to be constructed in accordance with the latest version of the Town of Ghent's Highway design standards with regard to adequate shoulders, adequate pavement and adequate sub-base. If the existing town roadway proposed to be utilized for direct access to and from any site does not meet these standards, then mining at the proposed site shall not be permitted, unless suitable arrangements are made by the applicant to improve the Town roadway to meet these requirements upon permission from the Town and without any significant expense to the Town.

On September 6, 2006, the board chairman read into the record a letter, dated August 25, 2006, from the Ghent Highway Superintendent Mike Losa which stated that the "[t]own highway specifications call for a blacktop surface on all new Town roadways", but that Carpenter Road was "not blacktopped." It did have a "hard surface, which is oil and stone." The letter also stated that Carpenter Road had "adequate shoulders." It further stated that "with respect to the subbase, the exact thickness is not known." The letter concluded that Carpenter Road was "adequate" to support the proposed mining operation. The Town Attorney provided a letter to the Board, dated September 28, 2006, that stated his opinion that the aforementioned letter from the Highway Superintendent was adequate to satisfy the requirements of the mining laws.

A public hearing was conducted on October 4, 2006, and continued on December 6, 2006, where the Molinaris' representative Nick Demos stated that he would check with the Highway Superintendent regarding road requirements. On January 3, 2007, the highway superintendent informed the board and the public that Carpenter Road was safe for legally weighed trucks. Further review was conducted on March 7, 2007; on that date, the town engineer stated that he was reviewing the entire project, including but not limited to, the adequacy of the road. On May 6, 2009, the Board received information from an engineering firm, Ingalls & Associates LLP, retained by the Molinaris. The Ingalls report makes reference to Mr. Losa's letter regarding adequate road composition, with no independent investigation into the highway construction. The report also noted

that the Town painted double yellow lines and white lines along carpenter Road, to clearly identify the existing travel lanes and shoulders.

At the June 3, 2009 board meeting, the applicants stated that the plan had been significantly scaled back. The Board elected to hold more public comment, and a hearing was held on June 17, 2009. At that meeting, a resident and current petitioner Jeffrey Robinson noted that Carpenter Road did not meet highway specification standards, and suggested methods to determine the road's composition. He also insisted that Ghent "abide by the letter of the law." Petitioners hired a consultant to assist them with a review of the Molinari application. Resource Systems Group, Inc. ("RSG") provided a report to the Board, which found that Carpenter Road does not meet the Town Highway specifications. The typical roadway section described in the Town Road specifications indicates a standard width of 22.0 feet with a 4 foot shoulder. There are several segments of Carpenter Road that do not meet this standard. Further, the report stated that the structure of the sub-grade and sub-base are not well known, and it was impossible to determine whether Carpenter Road is constructed to the Town's design standards. The report states that the typical method to resolve such questions is to order a geotechnical investigation of the road that will describe the road's structural profile. The RSG report found that there was inadequate "stopping sight distance" for trucks and automobiles at two locations along Carpenter Road.

By letter dated August 3, 2009, the town engineer wrote to the planning board and stated that his office had continued its review of the project application, and shared information that would be relevant to the board's consideration. The letter contained information about bus traffic, an accident history, information regarding the Carpenter Road bridge, and a noise study. With regard to the actual road itself, it was recommended that the applicant be required to post a maintenance bond or similar surety for the repair of the roadway and shoulder areas. The next planning board meeting was on July 1, 2009, and the application was continued until August 5, 2009. At that meeting, the Chair stated that he had requested the highway superintendent to provide a new letter based on information that had been provided to him since his letter of August 25, 2006. This new letter, dated July 23, 2009, confirmed that Carpenter Road "[met] the specification for roads in the Town of Ghent." The Chair noted that the highway superintendent's knowledge of Ghent's roads was "unsurpassed. Mr. Losa has lived and worked in Ghent all of his life, he has been a trucker, has worked on Ghent roads for the past four years, and is extremely public-safety conscious, as proven by his volunteer firefighter services. For these reasons, Chair Walters chose to defer to Mr. Losa's 23 July 2009 letter that states in part, that Carpenter Road is adequate." Certified Record, p. 51. At that meeting, a motion to grant the special use permit was unanimously approved.

Petitioners all reside on or near Carpenter Road. They argue that the resolution is arbitrary and capricious, contrary to law, and not supported by substantial evidence in the record. Specifically, it is alleged that the resolution was issued in violation of the Town's Zoning Laws and the Town's Road Specifications in that Carpenter Road does not comply with the Town's highway design standards with regard to shoulders, pavement and sub-base, and that there is inadequate "stopping sight distance" for trucks and automobiles at the proposed access to the mining operation where it intersects Carpenter Road, and at a bridge on Carpenter Road. Petitioners also argue that no "operator" has been specified for the mining operation.

Petitioners acknowledge, and the court agrees, that the “key issue” in this proceeding is the condition of Carpenter Road. Petitioners refer to Town Zoning Law §190-76[e], which states that in order to be an access road for heavy mining, Carpenter Road must be constructed in accordance with the Town’s “highway design standards.” If it does not meet these standards, the proposed mine “shall not be permitted.” Petitioner states that the board’s non-compliance with the Town Zoning Law and highway design standards is per se arbitrary and capricious.

A copy of the Town Road’s specifications are attached to the petition, and petitioners argue that they are clear and unambiguous; they provide details and illustrations on the required dimensions and design standards to which the shoulders, pavement and sub-base must be constructed, as well as a list of the required paving/construction materials. The pavement must be constructed to a 1 inch compacted thickness of Type 6F asphalt. The subbase must be constructed to a minimum compacted thickness of 12 inches of New York State Department of Transportation approved item 304.02 material. Finally, the shoulders must be 4 feet in width. Petitioners state that guessing on compliance with these standards is not permissible; either the road complies with the standards or it does not. If it does not, the Ghent Town Laws state that the mine “shall not be permitted.” Petitioners state that the town seeks to rely on a subjective standard, based on the “unfettered discretion” of the Town Highway Superintendent, rather than the objective and unambiguous terms of the town law.

The board argues that it considered the issue of road construction from the inception of the application. Specifically, the board considered the Superintendent’s first letter, dated August 25, 2006, his follow-up confirmation, the applicant’s engineering report, the opinion of the town attorney, and the town’s consulting engineer. It is not disputed that the applicant’s engineer merely relied on the superintendent’s letter, without independent analysis. Further, the second “confirmatory” letter from the Superintendent contains no additional evidence or investigation.

The town attorney, Robert J. Fitzsimmons, Esq., has submitted an Affidavit in Opposition, and states that the RSG report is inadequate to support the claims that the road composition is inadequate. He states that the report was based on documentation submitted to the board from the years 2005-2006, not upon information as reviewed and approved by the board in 2009. Furthermore, he states that the highway superintendent is “charged pursuant to New York State Highway Law to care for and maintain all town highways. It is not in his interest to allow operations upon roads that exceed the road capacity.” He notes that the superintendent confirmed that he had no concerns about the mining operation. He states that the petitioners argue that there has not been literal compliance with the mining regulations, but disregards this argument because the highway superintendent and consulting engineers (who simply relied on the highway superintendent) state that Carpenter Road meets or exceeds road specification for the operation.

The Molinaris argue that the last sentence of Ghent Town Law 190-76 supports the board’s findings. That sentence reads, “[i]f the existing town roadway proposed to be utilized for direct access to and from any site does not meet these standards, then mining at the proposed site shall not be permitted, unless suitable arrangements are made by the applicant to improve the Town roadway to meet these requirements upon permission from the Town and without any significant expense to the Town.” Respondents note that they reduced the scope of their original plans, and took efforts to

limit truck traffic as well as the capacity of the loading buckets. The resolution of approval also required a separate security to cover damage to the road due to truck traffic. Respondents argue that these precautions constitute "suitable arrangements" made by the applicant so that the applicant would be responsible to remedy any defects to the road as a result of truck traffic.

A Court may not substitute its own judgment for that of the reviewing board. See Janiak v. Planning Board of the Town of Greenville, 159 A.D.2d 574 (2d Dept. 1990), appeal denied, 76 N.Y.2d 707 (1990). Therefore, if the decision rendered by the reviewing board is within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is arbitrary, capricious or unlawful. See Castle Properties Co. v. Ackerson, 163 A.D.2d 785 (3d Dept. 1990). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified...and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Pell v. Board of Education, 34 N.Y.2d 222 (2d Dept. 1994) (internal citations omitted).

"Entitlement to a special exception is not a matter of right...the stated standards in the ordinance guiding the board's consideration of special exception applications condition availability of a special exception, and compliance with those standards must be shown before any exception can be secured." Matter of Tandem Holding Corp. v. Board of Zoning Appeals, 43 N.Y.2d 801, 802 (1977); see also Matter of Lee Realty Co. v. Village of Spring Val., 61 N.Y.2d 892 (1984).

In this case, the Board did not adhere to Town laws which delineate specific road composition and shoulder widths. The Board instead relied upon the highway superintendent's opinion that the roads were "adequate" to support the proposed use. Regardless of how knowledgeable and experienced Mr. Losa is, the town has adopted laws that are not satisfied by his mere opinion. As stated above, his letter of August 25, 2006 states that the town highway specifications call for a blacktop surface on all new Town roadways", but that Carpenter Road was "not blacktopped." It further stated that "with respect to the subbase, the exact thickness is not known." The town's own laws state that if town roads are used for ingress and egress, these roads need to be constructed in accordance with the latest version of the Town of Ghent's Highway design standards with regard to adequate shoulders, adequate pavement and adequate sub-base. If the existing town roadway proposed to be utilized for direct access to and from any site does not meet these standards, then mining at the proposed site shall not be permitted, unless suitable arrangements are made by the applicant to improve the Town roadway to meet these requirements upon permission from the Town and without any significant expense to the Town. (Emphasis supplied).

Respondents argues that suitable arrangements have been made by the applicant to address any issues that may arise regarding damage to the road. However, the law states that arrangements can be made by the applicant to improve the Town roadway to meet the latest version of the Town of Ghent's Highway design standards. Section 190-76 is very precise, and does not allow for less than these design standards, even on roads that existed prior to the enactment of the law. The applicant is permitted to spend his or her own money to improve the road, and bring it up to the existing requirements, but short of that, there are no provisions that allow for less than the exact Town Road's specifications. There is no factual basis in this record that the road composition and shoulder width meet the standards set forth in the specifications. The only evidence on these issues

are two letters from the town superintendent. The first letter concedes that the road does not meet the highway specifications; for instance, there is no dispute that the road is unpaved. Further, the sub-base composition is unknown, so there is no basis for Mr. Losa to state that it is "adequate," since adequacy is specifically defined and quantified in the highway specifications. There is no evidence that Mr. Losa obtained any new information between the time he wrote his first and second letter. The Ingalls report relies on the highway superintendent, and the town's engineer does not address the issue at all.

It is clear that the board spent many hours on their decision, and the applicants were more than willing to address the potential problems that petitioners have raised during the process, and in this petition. The board imposed many precautions to ensure the safety of those driving on Carpenter Road, and the people who live near it. Nonetheless, it is well settled law that an agency acts arbitrarily and capriciously by failing to comply with its own rules and regulations. See Matter of Frick v. Bahou, 56 N.Y.2d 777 (1982); Matter of Brooks v. Forsythe, 189 A.D.2d 26 (3d Dept. 1993); Matter of Era Steel Constr. Corp. v. Egan, 145 A.D.2d 795 (3d Dept. 1988); Mullen v. County of Suffolk Police Dept., 307 A.D.2d 1036 (2d Dept. 2003); Matter of Church v. Wing, 229 A.D.2d 1019 (4<sup>th</sup> Dept. 1996); Matter of Garner v. Tuckahoe Hous. Auth., 81 A.D.2d 915 (2d Dept. 1981).

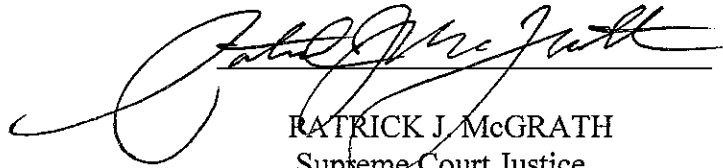
These town highway specifications are self-imposed regulations, and there is nothing in Ghent's laws that allow for the very precise requirements to be overlooked, or for an experienced highway superintendent to insert his own judgment, no matter how sound, in place of the existing law. The laws must be adhered to, or changed. As noted above, compliance with those standards guiding the board's consideration of a special exception application must be shown before any exception can be secured. Matter of Tandem Holding Corp. v. Board of Zoning Appeals, *supra*. At this point, the Board has failed to follow its own rules, and therefore, the determination must be annulled, without costs. The matter is remitted for further proceedings not inconsistent with this court's decision.

All other matters not herein addressed are denied.

This shall constitute the Decision, Order and Judgment of the Court. This Decision, Order and Judgment is being returned to the attorneys for respondent. All original supporting documentation is being filed with the County Clerk's Office. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

SO ORDERED AND ADJUDGED.  
ENTER.

Dated: January 13, 2010  
Hudson, New York



RATRICK J. McGRATH  
Supreme Court Justice

Papers Considered:

1. Notice of Petition, dated September 2, 2009; Verified Petition, dated September 2, 2009, with annexed Exhibit A.
2. Petitioner's Memorandum of Law, dated September 2, 2009.
3. Verified Answer of the Respondent Planning Board, dated October 28, 2009.
4. Affidavit in Opposition, Jonathan Walters, dated October 22, 2009.
5. Affirmation in Opposition, Robert J. Fitzsimmons, Esq., undated.
6. Respondent Planning Board's Memorandum of Law, dated October 24, 2009.
7. Certification of the Record, certification dated October 28, 2009.
8. Memorandum of Points and Authorities in behalf of Respondents Vincent and Lisa Molinari, dated October 31, 2009.
9. Reply Affidavit of Jeffrey E. Robinson, dated November 9, 2009.
10. Reply Affidavit of Michael J. Moore, Esq., dated November 10, 2009, with annexed Exhibit 1.
11. Reply Affidavit of Marcella Heintz, dated November 10, 2009.
12. Petitioner's Reply Memorandum of Law, dated November 10, 2009.