SUPREME COURT
STATE OF NEW YORK COUNTY OF MONROE

SUSAN FERRARI ROWLEY, GREGORY STOKOE and WILLIAM MCGUIRE,

Plaintiffs,

-vs-

TOWN OF WHEATLAND and MONROE COUNTY,

Defendants.

DECISION, JUDGMENT and ORDER

Index No. 2010/3999

Plaintiffs brought an action seeking various forms of declaratory relief and, ultimately, a permanent injunction restoring park land in Oatka Creek Park and prohibiting any future construction of soccer fields or an outdoor recreational facility in the park. This action follows an Article 78 proceeding previously heard by this Court, in which it was determined that the park's owner, the County of Monroe, had complied with SEQRA. An appeal of the Court's decision has apparently been filed, but not perfected.

Defendant County of Monroe ("County") moves for dismissal of the complaint under CPLR §3211 (a) and (c). Co-defendant Town of Wheatland ("Town") moves for dismissal of the complaint as against it or, in the alternative, for summary judgment. Plaintiffs cross-move for summary judgment.

Plaintiffs are represented by Bansbach Zoghlin P.C. (Mindy L. Zoghlin, Esq., of counsel). Defendant County of Monroe is represented by the Monroe County Department of Law (Sean T. Hanna, Esq., Senior Deputy County Attorney, of counsel). Defendant Town of Wheatland is represented by Fix Spindelman Brovitz & Goldman, P.C. (Reuben Ortenberg, Esq., of counsel).

Oral argument was heard by the Court on June 10, 2010. The Court has also reviewed the following submissions of counsel:

> defendant County's "Notice of Motion" (dated April 15, 2010), with Mr. Hanna's "Affirmation" (dated April 21, 2010), and attached exhibits; Mr. Hanna's "Memorandum of Law" with the "Affidavit of David Rinaldo" (both dated April 21, 2010); defendant Town's "Notice of Motion to Dismiss..." (dated April 21, 2010); Mr. Ortenberg's "Affidavit in Support (sic) Notice of Motion to Dismiss or in the Alternative, for Summary Judgment" (dated April 20, 2010), with attached exhibits; Mr. Ortenberg's "Memorandum of Law... Supporting Motion to Dismiss... or in the Alternative..." (undated); plaintiffs' "Notice of Cross-Motion" with Ms. Zoghlin's "Affirmation" and attached exhibits; the "Affidavit" of plaintiffs Susan Ferrari Rowley, Gregory Stokoe and William McGuire; and plaintiffs' three "Memoranda of Law," in opposition to defendants' motions and in support of their cross-motion (all dated May 19, 2010); Mr. Ortenberg's "Affidavit in Reply to Opposition Papers... and in Opposition to Cross-Motion..." (dated June 3, 2010); the "Affidavit" of Howard Hazelton (dated May 24, 2010); the "Affidavits in Reply... and in Opposition..." of Terry W. Rech, Thomas Dooling and G. Brett Boehm (all dated May 25, 2010); Mr. Ortenberg's "Affidavit Responding to Motion of Monroe County" (dated Jule 3, 2010); Mr. Ortenberg's "Memorandum of Law.. Replying to Plaintiffs' Opposition and Opposing Cross-Motion..." (Undated); Mr. Hanna's "Attorney's Reply Affirmation," the "Affidavit" of David Rinaldo (with attached exhibit) and Mr. Hanna's "Reply Memorandum of Law" (all dated June 7, 2010); "Plaintiffs' Reply Memorandum of Law in Support... and in Opposition..." (Dated June 8, 2010).

FACTUAL STATEMENT

On March 4, 2010, co-plaintiff Susan F. Rowley (also a co-petitioner in the earlier Article 78 proceeding), sent a letter by certified mail to the Town of Wheatland building inspector. She alleged violations of New York Town Law §268(2) and the Town zoning code. She demanded that the building inspector "...take action to restrain, correct or abate this violation." The gist of her complaint was that Monroe County was developing Oatka Creek Park into an "Outdoor Recreational Facility" without a special permit issued by the Wheatland Planning

Board.

Responding by letter dated March 11, 2010, Terry W. Rech, the Town building inspector, thanked Ms. Rowley for her concern. However, he opined, consideration of relevant facts and provisions of the Code of the Town of Wheatland yielded the conclusion that the proposed soccer fields constituted a "customary accessory use" for a public park. Hence, there was no code violation.

Although normal procedure allows for appeal of a decision by the Town building inspector to the Town of Wheatland Zoning Board of Appeals ("ZBA"), no such appeal was ever taken. Instead, this plenary action was instituted by plaintiffs, naming both Monroe County and the Town of Wheatland as co-defendants.

ARGUMENTS OF COUNSEL

COUNTY OF MONROE

Defendant County maintains that the previous Article 78 petition, dealing with alleged SEQRA violations, bars the instant action, on grounds of res judicata and collateral estoppel. All matters that were or could have been litigated in that proceeding, the County claims, are deemed to have been decided adversely to plaintiffs in this action. Mr. McGuire, who could have participated in the Article 78 proceeding, chose not to do so, but since his interests in that matter were aligned with those of his two current co-plaintiffs, he must be considered to have been in privity with them.

Defendant County further asserts that it is not subject to town zoning laws (though the Town of Wheatland claims no violation of its code), and that plaintiffs have failed to plead alleged diminution of property value.

TOWN OF WHEATLAND

Defendant Town advances five arguments in support of its motion for dismissal of the complaint:

1. The action against the Town is beyond the scope of Town Law §268(2). (Defendant Town argues that said section allows action directly against a violator if town officials fail or refuse to take action for ten days after having been requested to do so. In this instance, had the building inspector failed or refused to enforce the law, the Town would have been required to sue itself, a result not contemplated by the Town Law.)

2. Plaintiffs have not demonstrated standing: They have not shown that they are aggrieved. They have failed to exhaust administrative remedies. (The Town argues that plaintiffs have not shown unique damage unlike that experienced by the general public. Furthermore, plaintiffs have not exhausted available remedies, namely, an appeal to the ZBA, without whose determination the building inspector's finding of "no violation" is not final.)

3. Plaintiffs have failed to show that Town officials "failed or refused" to enforce the Town's zoning code. (The rendering of an undesired determination does not constitute a failure or refusal.)

4. Enforcement of the Town's zoning code is discretionary, and may not be compelled. (Plaintiffs may not circumvent the ZBA appeal and bring a civil action having the same effect as an Article 78 proceeding in the nature of mandamus.)

5. The claim based on public nuisance does not lie. Plaintiffs have not filed required General Municipal Law notices, or alleged compliance. Plaintiffs, having failed to plead special damages, lack standing. (Self-explanatory).

PLAINTIFFS

Plaintiffs, responding to the County's arguments, assert that different parties and different issues are involved in the earlier Article 78 proceeding and the current action. They maintain that the County is in fact subject to the Town's zoning code. They opine that they have shown

injury to an interest within the zone of interest to be protected by the Town zoning code, namely, aesthetic injury not common to the general public. Financial damage, they aver, is not the only form of injury envisioned by the Town Law.

Plaintiffs argue that, notwithstanding the building inspector's finding of no violation, Town Law §268(2) allows an action to enjoin actual substantive violations. They assert that the building inspector's decision of no violation in fact constituted a required "failure or refusal" justifying their action.

Plaintiffs argue that Town Law §268(2) allows an alternate avenue of attack, where an Article 78 proceeding in the nature of mandamus is unavailable. They deem an appeal to the ZBA, to exhaust their remedies, to be unnecessary, as the complete relief sought (here, a permanent injunction) could not be obtained through that vehicle.

Plaintiffs deny lack of compliance with the GML, since they only seek injunctive relief. They steadfastly maintain that they have established an injury in fact.

In support of their cross-motion, plaintiffs opine that no factual issues are present which would require a trial. They cite what they believe to be a clear violation of the Town zoning code, in that the County has not received, nor may it be granted, a special permit. Lack of park access by state or county roads is among the legal impediments cited by plaintiffs. Furthermore, prohibited commercial activities, in their opinion, would necessarily be conducted in the park if the soccer fields were made available for league and tournament play as envisioned.

DISCUSSION

A review of the papers in both legal proceedings (the previous Article 78 proceeding and the instant action), coupled with entertainment of oral argument, reveals one salient fact: the

Article 78 petitioners and current plaintiffs claim to have a special relationship with and unique ownership rights in Oatka Creek Park.

Clearly, the park offers a unique combination of pastoral settings and "low-impact" recreational activities such as hiking and jogging, bird watching and fly fishing. However, this fact does not preclude the County from encouraging and facilitating organized athletic activity for the general public. Notably, an exceedingly small percentage of the park would be affected by the development.

The County does not propose to erect any structures, of either a permanent or even a temporary nature. It has documented compliance with industry standards regarding provision of sufficient parking for the number of fields (2).

The Town, which has not participated in construction of the fields since September, 2009, does not oppose their construction, but rather encourages it.

Plaintiffs, obviously displeased with this Court's earlier decision in the Article 78 proceeding, have chosen another tack. Rather than attack the project on statutorily-sanctioned environmental grounds, they have elected to portray the cooperation between the County and the Town as an end-run around the Town zoning code. Normally welcome intergovernmental cooperation is here portrayed as evidence of unnamed sinister motives. Plaintiffs have added a public nuisance claim to bolster their charges of violation of local law and to underscore their personal grievance.

It is unfortunate that, in their zeal to prevent this project's realization, they have neglected the most cost-efficient, prompt and efficacious tool at their disposal, namely, the ZBA appeal. This mechanism, at a level of government closest and necessarily most responsive to residents'

desires, needs and concerns, allows for expeditious review of a disputed official decision.

Had Ms. Rowley filed a ZBA appeal, a panel of local governmental experts appointed as final arbiter of the Town's zoning code would have trained a spotlight on the building inspector's decision. Being familiar with the park land in question and the code's prescriptions and prohibitions, the ZBA members would have been in a unique position to render a fair decision on appeal.

The Court is of the opinion that the determination by the Town building inspector that no violation had been committed by the County should stand. The mere fact of having made said finding did not constitute a "failure or refusal" to uphold the Town zoning code.

While some variance may exist between the sets of issues present in the two legal proceedings, it is unquestioned that proper protocols were followed by Town officials. Absent a ZBA appeal of the building inspector's finding, there was no need or administrative platform for reconsideration of his decision.

The Court has not been presented with a rationale which would justify its second-guessing of an internal Town action. Similarly, Mr. McGuire's addition to the current roster of plaintiffs, while perfectly permissible, does not mandate relitigation of issues raised in the Article 78 petition.

The Court's decision in the Article78 proceeding gave a green light to the proposed soccer field construction. A ruling in this case enjoining construction of those fields would be tantamount to an unwarranted collateral attack on its earlier decision.

DECISION

The Court holds that the Town did not fail or refuse to uphold its zoning code. The

anticipated construction of two soccer fields is not in violation of the strictures of said code. Evidence of personalized harm or injury sufficient to allow civil prosecution of a public nuisance action has not been adduced by plaintiffs.

Accordingly, it is the Decision of the Court that the motions of defendants County of Monroe and Town of Wheatland, seeking dismissal of the complaint as to each of them, be, and they are hereby, GRANTED, in their entirety.

It is the further Decision of the Court that plaintiffs' cross-motion for summary judgment be, and it is hereby, DENIED, in its entirety, with prejudice.

This Decision shall constitute the Judgment and Order of the Court.

Dated: July 21, 2010

HONORABLE JOHN J. ARK
SUPREME COURT JUSTICE