

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : THIRD DEPARTMENT**

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**THE GRANGER GROUP, STONE MOUNTAIN
BROTHERS I, LLC, GEORGE BARIMO, BEN
SHECTER, SALI WOHLBACH, ANNE G.
HOFFMAN, LEON HOFFMAN, DIANE RODRIGUEZ,
JOSE RODRIGUEZ, MARY BARTLETT, GEORGE
BARTLETT and CHRISTINA WING,**

**AFFIDAVIT IN
SUPPORT OF
MOTION FOR
RE-ARGUMENT,
LEAVE TO APPEAL
AND FOR A STAY**

Plaintiffs-Respondents,

-against -

**Appellate Division
Docket No.: 508776**

**TOWN OF TAGHKANIC, TOWN OF TAGHKANIC
ZONING BOARD OF APPEALS, TOWN OF
TAGHKANIC PLANNING BOARD, ALAN WILZIG
and DENNIS CALLAHAN, AS CODE ENFORCEMENT
OFFICER AND BUILDING INSPECTOR FOR THE
TOWN OF TAGHKANIC,**

Defendants-Appellants.

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**THE GRANGER GROUP, STONE MOUNTAIN
BROTHERS I, LLC, GEORGE BARIMO, BEN
SHECTER, SALI WOHLBACH, ANNE G.
HOFFMAN, LEON HOFFMAN, DIANE RODRIGUEZ,
JOSE RODRIGUEZ, MARY BARTLETT, GEORGE
BARTLETT and CHRISTINA WING,**

Petitioners-Respondents,

-against -

**TOWN OF TAGHKANIC PLANNING BOARD,
ALAN WILZIG and KARIN WILZIG,**

Respondents-Appellants.

=====X

pending hearing and determination of this motion, to preserve the status quo; and (iv) in the event that the motion for re-argument is granted or Respondents' leave to appeal to the Court of Appeals is granted, for an order staying that portion of this Court's Order dated October 21, 2010 vacating the permanent injunction, to preserve the status quo until this case is finally decided.

4. Annexed to this affidavit, as Exhibit "A", is a copy of the Memorandum and Order of this Court decided and entered October 21, 2010 which reversed the determination of the Court below (McGrath, J.), vacated the permanent injunction issued by the Court below and dismissed the Petition in its entirety.

MOTION TO RE-ARGUE

5. It is respectfully submitted that this Court, in its determination, overlooked or misapprehended certain essential facts and/or misapplied certain controlling principles of law. For purposes of this motion, Respondents' arguments shall be limited to two portions of this Court's determination.

The Court in its determination failed to consider the res judicata/collateral estoppel effect of Justice Hummel's September 17, 2007 ruling on Wilzigs' Declaratory Judgment action, which raised the same issues being raised by the Wilzigs on this appeal

6. As demonstrated in the record before this Court below, in 2006 the Wilzigs filed an Article 78 Petition appealing the Zoning Board of Appeals' ("ZBA") December 18, 2006 determination upholding the July 12, 2006 Order to Remedy which had been issued by the Town's Code Enforcement Officer ("CEO") on the grounds that the motorcycle racetrack, which the Wilzigs had illegally constructed without any permits or approvals from the Town, was a use not permitted by the Zoning Ordinance. Thereafter, the Wilzigs amended their Petition to convert the Article 78 Petition into a Hybrid Article 78/Declaratory Judgment action. A copy of Wilzigs' Amended Petition is annexed hereto as Exhibit "B."

7. In their Declaratory Judgment action, the Wilzigs expanded their cause of action and requests for relief by naming the Town as a party respondent to the action and seeking a ruling and declaration from the Supreme Court that the Town of Taghkanic Zoning Ordinance did not prohibit their proposed motorcycle racetrack on their residential property.

8. As demonstrated in the Record, Justice Hummel in his September 17, 2007 Decision and Order (annexed hereto as Exhibit "C") not only upheld the ZBA's determination that the Order to Remedy was properly issued and that the Wilzigs' racetrack was not a valid accessory use to their residential property, but also determined (at the request of the Wilzigs) that the Town of Taghkanic Zoning Ordinance prohibited the placement and use of a motorcycle racetrack on their residential property. In so ruling, Justice Hummel held as follows:

"The Amended Petition seeks judgment declaring that the Zoning Ordinance of the Town of Taghkanic does not prohibit a proposed sport racetrack on his residential property, or in the alternative declaring that to the extent that the Ordinance does prohibit such use, it is null and void and annulling and vacating the findings and resolution adopted by the ZBA and remitting the matter to the ZBA for a new determination." (emphasis added)
(R.145)

"Petitioner's constitutional challenge to this Ordinance is similarly unavailing. Petitioner claims that the language of the Ordinance is unconstitutionally vague because it fails to define a sports racetrack as a prohibited use and as such it does not warn citizens

that the proposed conduct is unlawful. Failure to comply with this Zoning Ordinance are considered violations only and carry no criminal penalties. (sic.) **As has already been discussed, failure to list a sports racetrack as a use for which a special permit may be obtained is notice that such use is not permitted.** Petitioner has failed to demonstrate that this Ordinance was not designed to accomplish a governmental legitimate purpose and his constitutionality argument must fail." (emphasis added) (R.144)

9. The Wilzigs filed a Notice of Appeal from Justice Hummel's Order, but the appeal was deemed abandoned and was dismissed by this Court pursuant to Third Department Rule §800.12 for want of prosecution on February 15, 2008. As a result, by application of the holdings in *Bray v. Cox*, 38 NY2d 350, 355 (1976) and *Martin v. Bixby*, 40 AD3d 1277, 1278 l'v denied 9 NY3d 811 (2007), the 2007 determination of Justice Hummel that Wilzigs proposed motorcycle racetrack (or sport track) was not a use permitted by the Town of Taghkanic Zoning Ordinance became final and binding and, as a result, the doctrine of res judicata/collateral estoppel foreclosed all claims and issues which could have been litigated had the appeal been perfected.

10. The Court below in its Decision and Order (a copy of which is annexed hereto as Exhibit "D") determined not only that Wilzigs' 2008 application for the same motorcycle racetrack was barred by application of the principles of administrative res judicata/collateral estoppel, but that the application was also barred by application of principles of judicial res judicata/collateral estoppel as a result of Justice Hummel's 2007 declaratory judgment Decision and Order that the racetrack was a use not permitted by the Town's Zoning Ordinance.

11. Respondents, in their brief filed with this Court, argued that the Court below correctly applied the well-established law in the State of New York that the doctrine of res judicata/collateral estoppel applies equally to administrative as well as judicial tribunals to foreclose “not only matters litigated, but also those which might have been litigated in the prior forum” (*Schuykill Fuel Corp. v. B & C Nieberg Realty Corp. Inc.*, 250 NY 304, 306 (1929); *Mtr. of Freddolino v. Village of Warwick ZBA*, 192 AD2d 839 (3d Dept. 1993); *Town of Wallkill v. Lachmann*, 27 AD3d 724 (2d Dept. 2006)) and, as a result, the Decision and Order of the Court below should be affirmed. Relevant portions of Respondents’ brief are annexed hereto as Exhibit “E.”

12. This Court in its Decision only addressed the issue of the res judicata/collateral estoppel effect of the ZBA’s 2006 determination. This Court concluded that in 2006 the ZBA ruled only on the issue of whether or not the Wilzigs’ racetrack constituted a valid accessory use to the Wilzigs’ residential property and did not, and could not, rule on the issue of whether the racetrack could be permitted under another section of the Zoning Ordinance - specifically, as a “recreation” use.

13. Assuming, *arguendo*, the rectitude of this Court’s determination on this issue, it is clear this Court did not rule upon, or even address, the most essential legal and factual issue raised by Respondents, to wit, whether the Wilzigs’ 2008 application was barred by virtue of the res judicata/collateral estoppel effect of Justice Hummel’s 2007 final and binding declaratory

ruling that the racetrack did not constitute a use permitted by the Town of Taghkanic Zoning Ordinance (See p.4 of this Court's Memorandum and Order).

14. It is clear that the 2007 determination of Justice Hummel in the Declaratory Judgment portion of his decision that the racetrack was not a use permitted by the Town's Zoning Ordinance was separate and distinct from, and was in addition to, his holding in the Article 78 Petition that the racetrack did not constitute a valid accessory use of the property. If the Wilzigs disagreed with Justice Hummel's determination, or felt that such determination was incorrect or exceeded the court's authority, these issues should have been raised by direct appeal, rather than collaterally attacked in this case.

15. It is noteworthy also that the case cited by this Court in its Memorandum and Order, *Bonded Concrete Inc. v. Town of Saugerties*, 24 AD3d 943 (3d Dept. 2005), is supportive of the determination made by the Court below on the issue of the res judicata/collateral estoppel effect of Justice Hummel's 2007 decision. In *Bonded Concrete* this Court addressed the issue as to whether a party could be precluded from raising in the instant case the argument that their proposed structure was under 2,000 sq. ft. in size and did not, as a result, require site plan approval. This Court, relying on the holding of the Court of Appeals in *O'Brien v. City of Syracuse*, 54 NY2d 353 (1981), held that "there is no question that they could have raised that alternative argument... (in the prior lawsuit)... and they are now precluded from doing so."

16. In a similar fashion, there is no question but that the Wilzigs could have argued both before the ZBA and, most importantly, before the Supreme Court in their 2006 Declaratory Judgment action that the proposed racetrack was a permitted use under alternative sections of the

Town's Zoning Ordinance.* This they failed to do and clearly their 2008 application was barred by application of the principles of res judicata/collateral estoppel.

17. It should be noted, as demonstrated previously, that Justice Hummel did not raise and address the issue of whether the Wilzigs' racetrack was a use permitted under the Town's Zoning Ordinance *sua sponte*. He did so at the request and urging of the Wilzigs in their Declaratory Judgment action.

18. These unaddressed and unresolved questions of law and fact are significant. If, in fact, the ruling of the Court below that Justice Hummel's 2007 determination that the Wilzigs' racetrack was not a use permitted by the Town's Zoning Ordinance is to be given res judicata/collateral estoppel effect was correct, the Wilzigs' 2008 application for the same racetrack would have been barred.

This Court misconstrued applicable law and Zoning Board of Appeals procedures in determining that a Zoning Board of Appeals before determining whether a use is, or is not, permitted under a Zoning Law, must first await a determination of the Planning Board to grant or deny site plan approval

19. The Court below held, in relevant part, that it was incumbent upon Wilzigs in their 2006 appeal to the ZBA from the CEO's Order to Remedy to identify and argue to the ZBA all sections of the Zoning Ordinance (not just the accessory use section) which would permit their motorcycle racetrack to be established on their residential property.

*The Order to Remedy made no mention of the racetrack not constituting an accessory use, only that the track was in violation of the Use Regulations of the Zoning Ordinance. (R105) It was the Wilzigs who chose to limit their argument to the ZBA that the track constituted a permitted accessory use.

20. This Court, in its Memorandum and Order, determined that the Court below erred in this regard because, in ruling on Wilzigs' 2006 appeal, the ZBA could not determine whether the Wilzigs' racetrack could be properly classified as a "recreation" use under the Town's Zoning Ordinance because approval of a recreation use required Site Plan Approval and SEQRA Review by the Planning Board, which had not yet occurred. It is respectfully submitted that this determination is not in accord with well-accepted principles of zoning law and procedure. The imposition of such a restriction on the ZBA's authority would, in effect, be placing the proverbial cart before the horse.

21. Town Law §267-b (1) vests a Zoning Board of Appeals with the power to interpret its Zoning Ordinance in deciding appeals from determinations or interpretations made by administrative officials. As is aptly demonstrated by the cases cited both in Appellants' brief and Respondents' brief, Zoning Boards of Appeals are called upon all the time to make determinations as to whether a use is, or is not, permitted under a municipality's zoning law. (See, Appellants' Brief, pp. 33-36; Respondents' Brief, pp. 31-34).

22. The Town of Taghkanic Zoning Ordinance, as is the case with most zoning ordinances, sets forth the uses which are permitted in the Town of Taghkanic. Those uses are listed as uses permitted as a matter of right; uses permitted subject to the issuance of a Special Use Permit by the Zoning Board; or uses which are permitted pursuant to the issuance of Site Plan Approval by the Planning Board (R. 1177-1179).

23. Zoning Boards, and not Planning Boards, are vested by law with the authority to interpret the provisions of a zoning law and determine which uses are, and are not, permitted under that law. See, *Mtr. of Jamil v. Village of Scarsdale Planning Board*, 24 AD3d 552 (2d Dept. 2005). As noted by this Court, Site Plan Review by a Planning Board of a project is

limited to review of the arrangement, layout and design of a proposed use of a parcel of land. See, Town Law §274-a(1). It is not a determination of whether a use is, or is not, permitted under a zoning law.

24. No citations need be provided to support the proposition that a Planning Board is without power or authority to grant Site Plan Approval, or other approval, to a proposed use which is prohibited by the municipality's Zoning Law.

25. It was, therefore, inconsequential to the ZBA's 2006 determination on Wilzigs' appeal of the CEO's Order to Remedy (issued on the grounds that the racetrack was not permitted under the Zoning Law) whether the Wilzigs' plans for their motorcycle racetrack could later obtain Site Plan Approval and pass environmental review muster. The only issue for the ZBA to determine in 2006 was whether or not the proposed motorcycle racetrack constituted a "recreation" use under the Zoning Ordinance. This merely required the ZBA's interpretation of the use provisions of the Zoning Ordinance. Had the ZBA had made a determination that the racetrack constituted a "recreation" use, the Wilzigs could then have gone to the Planning Board and obtained Site Plan Approval for the racetrack.

26. As argued by the Respondents in their brief, a use which is not permitted under a municipality's zoning ordinance cannot become a permitted use simply because that use is able to, or has, received Site Plan Approval from the Town's Planning Board.

27. The holding of this Court in the instant case has the potential to throw the normal, customary and statutory procedures of Zoning Boards of Appeals throughout the State into chaos. If followed, this holding would mean that zoning boards no longer have the power to determine on appeal whether or not a use is permitted pursuant to issuance of a Special Use

Permit* and/or Site Plan Approval under the provisions of its Zoning Law, but must await application to and approval by, the Planning Board of the Special Use Permit and/or Site Plan before making its interpretation of the law. Assuming, *arguendo*, that under those circumstances Zoning Boards would not have the requisite jurisdiction to entertain such applications until the Planning Board has acted, applicants could spend months or years in the Special Use Permit or Site Plan Review process before learning from the ZBA that their use is not, in fact, permitted under the Zoning Law.

28. For all of these reasons, it is respectfully requested that the Court reconsider its determination.

**IF THE EVENT THIS COURT DENIES RESPONDENTS' MOTION FOR RE-
ARGUMENT, LEAVE SHOULD BE GRANTED TO APPEAL
TO THE COURT OF APPEALS**

29. As demonstrated herein, this Court has not, to date, ruled upon the most significant issue presented in this case, to wit, whether the ruling of Justice Hummel in Wilzig's 2007 Declaratory Judgment action that the racetrack was not permitted under the Town of Taghkanic Zoning Ordinance barred Wilzigs' 2008 application for approval of that track by application of the doctrines of res judicata/collateral estoppel. As demonstrated herein, the Court below placed great reliance on the 2008 Decision and Order of Justice Hummel in the Declaratory Judgment action in making its decision. If this Court chooses not to decide, or reconsider, that aspect of this case the Respondents should be given an opportunity to have that significant issue decided by the Court of Appeals.

*Many zoning ordinances provide that Special Use Permits are issued by the Planning Board. See, Town Law §274-a(2).

30. The issues involved in this case are novel, significant and are of statewide importance. A ruling by this Court that Justice Hummel's Declaratory Judgment determination should not be given res judicata/collateral estoppel affect would be contrary to the holding of the Court of Appeals in *O'Brien v. City of Syracuse*, 54 NY2d 353 (1981) and its progeny. Such a holding, if followed, could effectively eviscerate well accepted judicial principles of administrative and judicial res judicata/collateral estoppel.

31. In addition, the holding of this Court that the ZBA is powerless to rule on an application for an interpretation of the Zoning Law and determine whether, or not, a specified use is permitted under the Zoning Law until the Planning Board has issued Site Plan Approval for the proposed use is a holding which has never previously been issued by an appellate court in the State of New York. As such, the holding involves issues which are significant, novel and of statewide importance, and should be finally determined by the Court of Appeals.

APPLICATION FOR A STAY

32. It is respectfully requested that this Court issue a stay of that portion of the Order which vacates the permanent injunction imposed by the Court below on an interim basis until this motion can be heard and decided, and if permission to re-argue or leave is granted, until final disposition of this case.

33. The Wilzigs acknowledged in the Court below that the motorcycle racetrack, which was constructed without any building permits or other approvals from the Town, is, at this point, 90% to 95% complete and that the only work needed to complete construction is the paving of the track. Once the permanent injunction is lifted, the Wilzigs will be free to complete the paving of the racetrack and will be in a position to argue to this Court and/or the Court of Appeals that the appeal should be dismissed on the grounds of mootness and laches as they did

in the related storage facility case. See, *Mtr. of Granger Group v. Zoning Board of Appeals of the Town of Taghkanic*, 62 AD3d 1102 (3rd Dept. 2009). It is clear, therefore, that a stay of that portion of this Court's Order vacating the permanent injunction is necessary to preserve the status quo and prevent irreparable harm to the Respondents.

34. No previous application has been made for the relief herein sought.

WHEREFORE, it is respectfully prayed that this Court grant re-hearing of the above-entitled appeal or, in the alternative, grant Respondents leave to appeal to the Court of Appeals and that an interim stay be issued in this case until such time as this motion can be heard and decided and that a stay be issued in the event Respondents' motion for re-argument or leave to appeal is granted.


WARREN S. REPLANSKY

Sworn to before me this
25th day of October, 2010


NOTARY PUBLIC

BARBARA J. LOKOS
Notary Public, State of New York
No. 01LO6125636
Qualified in Ulster County
Commission Expires April 18, 2013