

To be submitted

Appellate Division Docket No. CA 13-01917
Wayne County Index No. 75906-2013

**New York State Supreme Court
Appellate Division – Fourth Department**

Jack Bailey, Andrew DeWolf, Stephen Corcoran,
Stephen VanDuyne, John Murtari

Petitioners-Appellants

-against-

Village of Lyons Board of Trustees,

Respondents-Respondents

Reply Brief for Appellants – In reply to Respondent’s Brief

Submitted by:
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Please accept this Reply to the Respondent's Brief dated December 16, 2013 on behalf of Appellants. Appellants continue to assert all Arguments and facts established in both the Appellate Brief and the Reply to Motion of dismissal.

The RESPONDENT BRIEF is full of glaring errors and omission of facts. When taken into context along with the complete RECORD and papers already filed by Appellants, these glaring errors and omissions paint a picture that the Respondents wish to avoid the Appellate Court reviewing the complete facts of the case and reviewing De NOVO the rationality of the decisions reached based upon the full facts of the case.

ARGUMENT 1:

Appellants did not receive the complete relief requested, preserving active controversy in the case. IF the case is ruled Moot due to Respondents complying with a Mandamus to Compel Order, then according to HEARST v. CLYNE, as well as exhibits already in the RECORD, the appeal should be continued because the case meets all of the three part exemptions established for continuing Moot Cases in the courts.

Point 1: Petitioner-Appellants did not receive the declaratory relief requested, while they did partially receive the Mandamus to Compel request after leniency was granted. Thus, active controversy continues to exist from the original petition and the underlying arguments are preserved.

A: Reference RECORD 9A-10A, 14A. All relief allowed under 786 of the law was not granted, and Appellants contend that the declaratory relief granted will further not only their rights in the case but also establish precedent for future cases.

B: Section 786 paragraph number 1 establishes Petitioner's right to petition the court for both a Mandamus to Compel for failing to fulfill duty and for declaratory judgment that Respondents were UNWILLING and UNABLE to complete their duties.

C: The court was petitioned to review the full facts of the case and decide the merits, unwilling and unable, and sustained good faith effort. Instead, the Court ignored the Unwilling and Unable clause as well as the questions of good faith effort, and decided to grant leniency in the case contrary to the intent of the legislature and the facts of the case.

Point 2: All 3 exemptions to mootness apply in this case.

A: Appellants reference and fall back on our defense and arguments already established in the "Reply to Motion to Dismiss" dated November 20, 2013 and already reviewed by the court on December 4, 2013.

B: We assert that all three exemptions to the threshold doctrine of mootness have been established in this case, and request a full hearing before the Appellate Division on the merits of the case and our arguments.

Point 3: Respondent's Brief **affirms** our current and previous arguments to both Supreme Court and to this Appellate Court that the case meets all three parts to the mootness exemptions.

A: Respondents concede on page 3 of the Respondent Brief that GML 17-A is a new statute without any history in the courts. They concede that it is possible that another municipality may exceed the statutory 180 day deadline, and they concede the likely hood that another Judge would follow the same procedures and case law established in our case.

B: By conceding the above points, Respondents also buffer our argument in the referenced Reply that it is also reasonable to deduce that cases like this will continue to evade court review short of grave or extreme circumstances that arise to claim the court's attention due to similar circumstances and arguments established by this case. In fact, many of the core issues in this case appear to have evaded a full ruling in municipal matters, thus evading court review.

Point 4: Respondents cited cases affirm that exceptions to mootness exist in this case.

A: Gannet v. Doran: Essentially declared that if all 3 prongs of the exemption are not established as declared in Hearst, then the exemption is null and the case is moot. Respondents concede two prongs are present, and we continue to assert the third prong - that cases like this will evade review and continuing this case will be good policy, meet the goals of Micelli v State Farm, and will establish future precedent that is good for both the courts and the electors in future cases.

B: Matter of Dreikausen v. Zoning Bd of Appeals of City of Long Beach: This cited case fails to support Respondent arguments. They note that "absent arbitrariness, it is for local officials to determine where the public interest in zoning lies." We agree, and note that there was arbitrariness in this case, the full facts were not considered, the local officials illustrated a continuous pattern of failing to act in sustained good faith while arguing that the courts will grant municipalities' leniency, which is what happened in this case. As a result, the will of the local Electors was ignored without good cause until court intervention. Further, by "Rubber Stamping" this lower court decision without reviewing the complete and accurate facts of the case and the rationality of the decisions pursuant to law and facts, then the courts would make a mockery of the Appellate Review system.

C: Pell v. Board of Ed. Of Union Free School District #1.....: This case does center on the complete and accurate facts of the case and whether they were properly considered, as we contend they were not. Essentially, was complete substantial evidence considered? Further, we contend there was not a rational basis for the court to grant leniency given the complete facts, and that the decision

was arbitrary and capricious, making this case hearable on the merits before the full court. Further, in deciding that Petitioners substantially prevailed, proof of continued good faith effort was lacking, and that Respondents own actions caused the result of not having the information needed to continue, the Court overrode reasonable discretion and irrationally decided to grant an additional 60 days for Respondents to complete their statutory duties.

ARGUMENT 2:

The Supreme Court failed to consider the full facts of the case in which Respondents continue to attempt to omit the December 3, 2012 Village Board meeting from any filings and considerations as the events that transpired at that meeting WOULD call into question the rationality and reasonableness of the cited decision granting leniency.

Point 1: We reference all Appellant arguments and Facts already established in previous submissions, and note that Respondents continue to omit the December 3, 2012 Village Board meeting, and the Supreme Court Decision also fails to consider the meeting in question and it's critical relevancy to the case.

- A: Please Reference the RECORD Pages 4A, 11A paragraph (13), 16A paragraph (34), **95A-97A** (with major facts of dispute on page 97A 2/3 way down the page), 98A.
- B: As we previously argued and continue to assert, the full facts of this case were not considered by the court thus making the decision Arbitrary, Capricious, exceeding judicial discretion and unsupported by the complete facts of the case.

ARGUMENT 3:

The Supreme Court's decision cumulatively granted Respondents an additional approximate 120 days to complete statutory duty, was contrary to the spirit and intent of law, and caused harm on a local as well a state level.

Point 1: We the people are now held to a different standard versus municipalities in how this case has been reviewed and applied. Instead of protecting the people, affirming the law, and ensuring blind impartiality in the Judiciary, this case has now affirmed that there are two standards of review. One for governments and one for the people that governments are present to serve.

- A: The decision of the lower court has broken the trust of the people and harmed the integrity of the Judicial System in the eyes of the people. By granting an additional 60 days while the Village was almost 60 days late already, the Court

incredulously over rode the tripartite scheme of government with its system of checks and balances taken to ensure government would be accountable to the people, not themselves. The Judicial System is entrusted to protect the will and interests of the people and insure justice is applied equally, not to grant unwarranted and inequitable deference to the local governments or to the lower courts without good cause. The legislature passed this law, the executive signed this law and encouraged its use. When the duty and requirements of the law were ignored by our Village Board, petitioners used the only methods left to the people and sought refuge of last resort with the Supreme Court of NYS. Instead of treating both parties equally, the court deferred greatly to the local government contrary to the evidence of the case and granted leniency.

- B: Local Harm was caused. Taken into context of the entire case, both the legislative intent and electors goals for dissolution were thwarted first by the Respondents failing to complete their statutory duty for an additional 95 days. The delays made it unfeasible and irresponsible to attempt to complete dissolution by the end of 2014 as would have been the case. Now, electors are faced with an additional year of continued high taxes, costs, and regulatory burdens that they voted to absolve themselves of.
- B: If the dissolution plan was timely adopted on June 25, 2012 as envisioned by the legislature, then all processes and challenges would have been completely resolved before January 1, 2014; which was the start of the next fiscal year of the Town of Lyons. Thus, full dissolution could have been implemented at the end of 2014 in a smooth manner with adequate planning jointly with the Town. Because the proposed dissolution plan was not adopted until September 30, 2013 and a final plan was not adopted until November 4, 2013 with continued pending challenges; there was insufficient time to allow reasonable planning for dissolution at the end of 2014, especially with the foreseen possibility of a successful petition to revote which would push a final decision on dissolution into 2014. Thus, the entire dissolution process was decided to be pushed back into 2015 to the detriment of the electors.

ARGUMENT 4:

The Supreme Court decision was without sound basis in reason, made without regard to the facts, ignored unfavorable information, was contrary to the intent of the law, and exceeded judicial discretion.

POINT 1: The Court determined that Appellants substantially prevailed, that Respondents had failed to meet their statutory duty, and as a result of the delays were unable to complete a proposed plan due to waiting on critical information from the NYS Comptroller.

POINT 2: The Court acknowledged excessive delays by respondents and acknowledged legislative intent to avoid such delays, but continued on to grant Respondent request for leniency without rational or legal basis.

A: Reference 5A of the RECORD. “At least early on, huge chunks of time were lost due to inaction, which petitioners argue, suggest that the time problems are self inflicted and not due to the process in general or local issues in particular.”

B: Respondents were utilizing MRB since July 25, 2012, yet failed to start the actual process of completing a plan for 70 days after the December 27, 2012 board meeting. Respondents failed to submit time critical questions to NYS until 175 days into the process, and they failed to meet and negotiate with the unions until already under the scrutiny of the court and inside the courthouse doors.

C: *Peck v. Stone*, 304 N.Y.S.2d 881(1969) established that the Arbitrary and Capricious test was not to supplant the decision of the Appellate over that of the lower Judge, but to instead determine if the facts of the individual case supported the conclusions decided and whether the Judge exceeded the bounds of discretion based upon the factors of the individual case. We assert again that in this case, all relevant facts were not considered and thus the Judge did exceed his discretion in allowing leniency for 60 additional days. Further, the decision to grant Respondent request for additional time contrary to the above facts is not explained in the decision, thus supporting the conclusion that it was arbitrary and capricious.

POINT 3: Respondents have never directly explained the reasons for delaying the process 70 days on the dissolution committee or 175 days to meet with the NYS Comptroller. Without reasonable explanations, a rational person could not conclude that Respondents acted in sustained good faith, which would meet the Good Cause standard of CPLR 2004.

Point 4: The decision of the Court to grant an additional 60 days to the Village was contrary to the intent of GML-17A, or the “Good Cause Standard” of CPLR 2004. It was contrary to the doctrine of sustained Good Faith Effort, contrary to legislative and elector intents, and is without articulated basis in the decision or in GML 17-A.

Point 5: The Court failed to consider that MRB Group was utilized from July 25, 2012 onward due to their reported expertise on dissolution matters and they had already negotiated an entire dissolution process and were aware of what questions NYS would need to answer. Yet, MRB was not formally named the dissolution consultant until February 2013, which further and for unknown reasons slowed down the process.

Point 6: The Court disregarded exhibits establishing the continued hostility of Respondents and the Consultant to dissolution and motive for “back burning” the process as long as possible.

Point 7: The Court failed to consider that Respondents availed themselves of expert legal counsel and the full resources of the NYS Conference of Mayors, whom per their own admission

was intimately familiar with dissolution and the new GML 17-A law. This is contrary to Respondent assertions that this issue was of first impression in this case.

Conclusion:

The declaratory judgments requested in the case were never granted, leaving open active controversy to discuss. The Court completely ignored the December 3, 2012 Village Board meeting, which is critical to both sides arguments in the case. The case is not moot, and even if it is considered moot then all 3 prongs of the three part exemptions in HEARST v. Clyne make the case justiceable. Further, all relevant substantial facts of the case were never considered, making the decision arbitrary, capricious, and contrary to those that a reasonable layperson would draw from this case or reading the decision. Finally, a full Appellate Review in the case will go a long way towards restoring the trust of the people in the integrity of the Judicial System and upholding the rights of electors in their efforts to keep their governments accountable to its citizens.

Respectfully submitted:

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