

Verified Petition to Annul Town Determination Denying Petitioner Access to Information Under New York State Freedom of Information Law

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF LIVINGSTON

Please Don't Destroy Geneseo, William S. Lofquist
and M. Corrin Strong,

Petitioners,

Index No. _____
Verified Petition

-against -

Weston Kennison, Supervisor of the Town of Geneseo,
and the Town of Geneseo,

Respondents.

Petitioners, for their Petition under Article 78 of the Civil Practice Law and Rules, state and allege as follows:

1. This is a combined Article 78 proceeding and declaratory judgment action to enforce the New York State Freedom of Information Law, N.Y. [Public Officers Law §§ 84](#) et.seq. ("FOIL") seeking injunctive and declaratory relief against respondent's unlawful withholding of access to certain records reasonably described and requested in writing by petitioners. Respondent's reasons for refusing to provide access to the records were based on claims that the requested records could not be located after a search by the Local Records Officer.

JURISDICTION AND VENUE

2. Jurisdiction is conferred on this court by [Judiciary Law § 140-b](#) and section 7801 of the CPLR. Venue is proper in this county pursuant to [section 506\(b\) of the CPLR](#).

PARTIES

A. Petitioners

3. Petitioner Please Don't Destroy Geneseo ("PDDG") is an unincorporated association of citizens formed to oppose the destruction of the National Historic Landmark Village of Geneseo by uncontrolled sprawl and Big Box commercial development. PDDG was organized to oppose the application of Newman Development Group of Vestal, N.Y. ("The Developer") to construct a Big

Box commercial development to be called the Gateway Town Center (“The Project”) which would be located at the north-east corner of State Rt. 20A and Volunteer Road in the Town of Geneseo.

The group gathered over 600 signatures and presented them to the Geneseo Town Board urging rejection of the application prior to its referral to the Town Planning Board on Dec. 8, 2005. Over 100 members of PDDG have attended various public meetings on the Project. Members of PDDG have testified before the Planning Board and urged the adoption of a Positive Declaration of Environmental Impact which was done on October 30, 2006. PDDG has raised funds in excess of \$10,000 from dozens of residents of the community. PDDG has sent out a town-wide mailing, and advertised in local media informing the public of developments in the Project. PDDG maintains a electronic mailing list of over 400 concerned citizens who are sent periodic updates on the Project.

4. Petitioner William Lofquist is a resident of the Town of Geneseo, a member of PDDG and the FOIL applicant whose denial is at issue in this litigation.
5. Petitioner Corrin Strong is a resident of the Town of Geneseo and a founding member of PDDG. He recently assumed the position of President of PDDG after retiring as editor and publisher of The Lake and Valley Clarion. The Clarion was a weekly newspaper that served northern Livingston County for over 17 years until being sold after the March 22, 2007 issue. As editor, Mr. Strong wrote numerous news accounts and editorial pieces on the events surrounding this controversy. He also attended almost every town board and town planning board meeting for the past two years and filed many of the FOIL requests that formed the basis for PDDG's research on the Project. Mr. Strong continues to publish www.clarioncall.com which is a news and opinion blog covering issues in Geneseo. He is interested in providing the fullest possible disclosure to his reading audience of the public records associated with the Project.

B. Respondents

6. Respondent Weston Kennison is the Supervisor of the Town of Geneseo and the local officer designated to make decisions and decide appeals of those decisions under FOIL.
7. Respondent, Town of Geneseo, is a municipal corporation organized and existing under New York Town Law. It receives applications for land use proposals under the town's Planned Development District (“PDD”) Law and other local land use laws and regulations.

THE RECORDS

8. The records at issue in this proceeding relate to an application by the Developer for PDD zoning to construct the Project.
9. Gateway Town Center is a proposal for the development of a Big Box Lowe’s Home Improvement Center and an adjacent pharmacy to be built on a site exceeding 20 acres of farm land. The sheer size of this development, totaling close to 200,000 square feet, is staggering. It raises important planning issues concerning the future of the Town of Geneseo and has raised widespread public concern about its impact on traffic and community character. The proposed Lowe’s building, by itself, is almost five times larger than the largest allowed commercial use of 35,000 square feet that was permitted under the zoning of the parcel that existed when the project was first proposed.
10. Upon information and belief, as described in further detail below, representatives of the Developer

first approached the Town of Geneseo in December of 2004. Subsequently, in July of 2005, the Town of Geneseo adopted a local PDD law allowing for the consideration of the application. In October of 2005, Newman filed an application for PDD zoning under the new law. Said application is currently undergoing SEQR review by the Town of Geneseo Planning Board. If approved for PDD status by the Planning Board it will have to come back to the Town Board for final approval of the PDD zoning.

11. Upon information and belief, as described in further detail below, the law firm of Underberg and Kessler, LLP (“UK”) of Rochester, N.Y. has represented the Town of Geneseo as Town Attorneys at all times during the consideration of this project. Attorney James Coniglio, Esq., a resident of Geneseo, has been the chief counsel to the town board, although other members of the firm including Ron Hull, Esq. and Helen Zamboni, Esq, have also represented and advised the town in this matter.
12. Petitioners have filed FOIL requests with the Town of Geneseo and as a result have received the itemized bills of UK for services rendered to the town in this matter. Copies of these bills, which are attached hereto as Petitioner's Exhibit A, show an extensive series of contacts between the aforementioned attorneys of UK and various persons involved with the project as employees or associates of the Developer, officers of interested government agencies or consultants to the town or the Developer.
13. On October 11, 2006, petitioner William Lofquist made a written request pursuant to FOIL for 36 reasonably described records which were identified as existing by reference to the itemized billing records of UK and were within the control of the Town or its attorneys. A copy of this request is attached hereto as Petitioner's Exhibit B. In its request Petitioner requested access to materials regarding the contacts between the town's attorneys and other interested parties including 8 documents listed as items a. through j. below, (as numbered) in Exhibit B.
 - a. (3) March 24, 2005: Email correspondence from James Coniglio to T. Ferrera and D. Jerum (partners of the Developer through their firm Ferrera/Jerum) regarding formal submittal of application;
 - b. (4.) March 26, 2005: Email from James Coniglio to D. Jerum and T. Ferrara regarding submittal issues;
 - c. (7.) April 21, 2005: Correspondence from K. Kamlet (in-house attorney for the Developer) to James Coniglio;
 - d. (8.) April 21, 2005: Correspondence from James Coniglio to K. Kamlet;
 - e. (11.) October 21, 2005: Correspondence from applicant’s counsel (presumably K. Kamlet) to James Coniglio;
 - f. (12.) October 25, 2005: Correspondence from applicant’s counsel (presumably K. Kamlet) to James Coniglio;
 - g. (15.) December 2, 2005: Correspondence of James Coniglio with N. Madden;
 - h. (16.) December 13, 2005: Correspondence of K. Kamlet to James Coniglio;

- i. (33.) May 17, 2006: Correspondence of K. Kamlet to James Coniglio;
 - j. (35.) July 19, 2006: Letter from T. Lucey of APD Engineering (consultant to the Developer)
14. Upon information and belief, all the records requested by petitioner are now, and at all times hereto have been, within the custody and control of the Town of Geneseo or its attorney.
15. Nonetheless, respondent Town, through its agent, Supervisor Kennison, denied access to the requested records by letter dated Nov. 14, 2006. (Attached as Petitioner's Exhibit C.)
16. By e-mail dated November 15, 2006, petitioner William Lofquist filed his administrative appeal of the denial of its request with respondent Kennison, who also serves as the Town's FOIL appeals officer. A copy of the Petitioners letter is attached hereto as Petitioner's Exhibit D.
17. By letter of December 1, 2006, the Town, through its agent, Supervisor Kennison, responded to petitioner's administrative appeal, denying access to the requested records. A copy of this letter is attached hereto as Petitioner's Exhibit E.
18. In the letter, Respondent admitted that the requested materials were records that should be made available under FOIL but asserted that the above referenced 8 items could not be located.
19. By a letter dated January 8, 2007, the New York State Committee on Open Government ("Committee") issued an advisory opinion as to whether FOIL required disclosure of the requested documents. A copy of the Committee's Advisory Opinion is attached as Petitioner's Exhibit F. The Committee is the primary state agency responsible for interpreting the provisions of FOIL.
20. The Committee pointed out that under Section 57.25 of the NYS Arts and Cultural Affairs Law, it is the responsibility of every local officer to maintain public records "for as long as the record are needed for the conduct of the business of the office." And further that the local officer could not destroy such records without the permission of the Commissioner of Education.
21. Subsequently, a letter was sent to Respondents on January 17, 2007, (attached as Petitioners Exhibit G), by Petitioner Lofquist re-asserting his appeal and further requesting that any records still missing be certified as such by the town's records officer as provided by law.
22. In a letter dated February 16, 2006 (Attached as Petitioner's Exhibit H) Respondent Kennison again failed to provide any of the 8 requested documents.
23. On February 20, 2007, the Town Clerk did finally certify that the records could not be found. (See attached certification marked as Petitioner's Exhibit I).
24. In a final effort to avoid litigation, Petitioners engaged the services of attorney Mindy Zoghlin, Esq. of the firm of Bansbach, Zoghlin & Wahl, P.C. of Rochester, N.Y. On February 23, 2007, Attorney Zoghlin wrote a final demand letter to the Town (attached as Petitioners Exhibit J).
25. In this letter, attorney Zoghlin wrote that, "the claim that the documents are missing or lost is suspect." She pointed out that under the law the town's attorney was required to maintain

documents for at least six years after a matter is concluded.

26. Attorney Zoghlin further recommended to Petitioner Lofquist that if the town did not produce the missing items by March 5, 2007, that he should bring an Article 78 action against the town seeking production of the missing materials.
27. On March 5, Ronald Hull, Esq., Senior Counsel for UK, sent a letter to Attorney Zoghlin (attached as Petitioners Exhibit K) in which he maintained that the town and the town attorney had the right to destroy “routine paper and electronic correspondence ... in the ordinary course of business.”
28. Respondents have supplied petitioners with some of the documents sought under FOIL. However, respondents have failed and refused to respond to the following FOIL requests numbered a. through j. below:
 - a. (3) March 24, 2005: Email correspondence from James Coniglio to T. Ferrera and D. Jerum (partners of the Developer through their firm Ferrera/Jerum) regarding formal submittal of application;
 - b. (4.) March 26, 2005: Email from James Coniglio to D. Jerum and T. Ferrara regarding submittal issues;
 - c. (7.) April 21, 2005: Correspondence from K. Kamlet (in-house attorney for the Developer) to James Coniglio;
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 - g. (15.) December 2, 2005: Correspondence of James Coniglio with N. Madden;
 - h. (16.) December 13, 2005: Correspondence of K. Kamlet to James Coniglio;
 - i. (33.) May 17, 2006: Correspondence of K. Kamlet to James Coniglio;
 - j. (35.) July 19, 2006: Letter from T. Lucey of APD Engineering (consultant to the Developer)
29. Under FOIL, N.Y. [Pub. Officers Law, § 89\(4\)\(b\)](#), petitioner has exhausted its administrative remedies with respect to this request.
30. Petitioners have no adequate remedy at law.
31. No previous application has been made for the relief sought herein.

FIRST CAUSE OF ACTION

RESPONDENTS' ACTS VIOLATE THE NEW YORK STATE FREEDOM OF INFORMATION LAW

32. The acts of respondents as aforesaid constitute continuing violations of FOIL and the regulations promulgated thereunder, insofar as respondents have arbitrarily withheld non-exempt records and portions of records from disclosure to petitioner and have not made the responsive records promptly available to petitioner, despite the Petitioners reasonable and sufficient description thereof and his compliance with all applicable procedures.
33. The materials sought are needed for Petitioners to review the land use application of the Developer and prevent the undue influences of wealthy private developers on the decisions of the town. Only by informing the public of what has been done in their name by town officials and agents, can Geneseo be protected from the pernicious effects of sprawl, traffic and commercial over development.
34. By reason of the foregoing, petitioners are entitled to an order directing respondents to produce the following items numbered a. through j. below:
 - a. (3) March 24, 2005: Email correspondence from James Coniglio to T. Ferrera and D. Jerum (partners of the Developer through their firm Ferrera/Jerum) regarding formal submittal of application;
 - b. (4.) March 26, 2005: Email from James Coniglio to D. Jerum and T. Ferrara regarding submittal issues;
 - c. (7.) April 21, 2005: Correspondence from K. Kamlet (in-house attorney for the Developer) to James Coniglio;
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 - i. (33.) May 17, 2006: Correspondence of K. Kamlet to James Coniglio;
 - j. (35.) July 19, 2006: Letter from T. Lucey of APD Engineering (consultant to the Developer)

SECOND CAUSE OF ACTION

RESPONDENT'S ACTS VIOLATE THE NEW YORK STATE ARTS AND CULTURAL AFFAIRS LAW

35. Petitioners repeat and reallege paragraphs 1 through 31.
36. The acts of respondents as aforesaid constitute continuing violations of Sec. 57.25 of the NYS Arts and Cultural Affairs Law and the regulations promulgated thereunder, insofar as local officers are required to maintain all significant public records, especially in a matter of such great public interest, and not destroy them without permission from the NYS Commissioner of Education.
37. Furthermore, the respondents have an even greater burden of proof to overcome because the primary agency responsible for interpreting FOIL has issued an Advisory Opinion that supports disclosure of the required information. See Petitioner's Exhibit E.
38. Petitioner has been and is aggrieved by the unlawful withholding of the requested records.
39. Petitioners do not have the resources to hire counsel to represent them in this matter and have elected to proceed pro se.
40. By reason of the foregoing, petitioners are entitled to an order directing respondents to produce the following items numbered a. through j. below:
 - a. (3) March 24, 2005: Email correspondence from James Coniglio to T. Ferrera and D. Jerum (partners of the Developer through their firm Ferrera/Jerum) regarding formal submittal of application;
 - b. (4.) March 26, 2005: Email from James Coniglio to D. Jerum and T. Ferrara regarding submittal issues;
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 - i. (33.) May 17, 2006: Correspondence of K. Kamlet to James Coniglio;
 - j. (35.) July 19, 2006: Letter from T. Lucey of APD Engineering (consultant to the Developer)

WHEREFORE, petitioners pray that this Court:

41.

- a. order respondents and their officers, agents, employees, representatives, attorneys and all persons acting in concert or participation with them, or any of them, forthwith to permit petitioner access to the requested records, and copies thereof;
- b. issue a declaratory judgment that petitioner is entitled to access to the requested records pursuant to FOIL;
- c. grant to petitioner judgment of its reasonable attorney's fees and other litigation costs incurred, pursuant to FOIL, N.Y. [Pub. Officers Law § 89\(4\)\(c\)](#); and;
- d. grant to petitioner such other and further relief as to this Court may appear just and proper.

Dated: Geneseo, New York

March 29 , 2007

M. Corrin Strong, President
Please Don't Destroy Geneseo
38 Main Street
P.O. Box 236
Geneseo, N.Y. 14454
585-243-3530

Please Don't Destroy Geneseo

by _____
Its President

William S. Lofquist

M. Corrin Strong,

STATE OF NEW YORK)
COUNTY OF LIVINGSTON) SS.:

_____, being duly sworn, deposes and says that deponent he is President of PLEASE DON'T DESTROY GENESEO, the unincorporated association and petitioner in the within

matter. Deponent has read the within Verified Petition and knows the contents thereof; that the same is true to deponent's knowledge except as to matters stated to be alleged on information and belief and that as to such matters deponent believes it to be true.

The grounds for deponent's belief as to such matters are personal inquiry and examination conducted in the course of deponent's duties as an officer of the organization. .

Sworn before me this _____
Day of March, 2007.

Notary Public

STATE OF NEW YORK)
COUNTY OF LIVINGSTON) SS.:

William S. Lofquist, being duly sworn, deposes and says that deponent is a petitioner in the within matter. Deponent has read the within Verified Petition and knows the contents thereof; that the same is true to deponent's knowledge except as to matters stated to be alleged on information and belief and that as to such matters deponent believes it to be true.

The grounds for deponent's belief as to such matters are personal inquiry.

William S. Lofquist

Sworn before me this _____
Day of March, 2007.

Notary PublicSTATE OF NEW YORK)
COUNTY OF LIVINGSTON) SS.:

M. Corrin Strong, being duly sworn, deposes and says that deponent is a petitioner in the within matter. Deponent has read the within Verified Petition and knows the contents thereof; that the same is true to deponent's knowledge except as to matters stated to be alleged on information and belief and that as to such matters deponent believes it to be true.

The grounds for deponent's belief as to such matters are personal inquiry.

M. Corrin Strong

Sworn before me this _____
Day of March, 2007.

Notary Public