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SHORT FORM ORDER

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**SUPREME COURT - STATE OF NEW YORK**

*Present:*

HON. UTE WOLFF LALLY,

*Justice*

TRIAL/IAS, PART 11  
NASSAU COUNTY

In the Matter of the Application of  
SHARI IACONE, JOHN IACONE,  
MARY AUERSPERG and PAUL AUERSPERG,

Petitioner(s),

MOTION DATE: 9/9/05

INDEX NO.: 7424/05

-against-

SEQ. NO.5

BUILDING DEPARTMENT OF OYSTER BAY  
COVE VILLAGE, BOARD OF TRUSTEES OF OYSTER BAY  
COVE VILLAGE, JOSEPH BELLANTUONO and MRS.  
JOSEPH BELLANTUONO,

Respondant (s)

The following papers read on the motions to dismiss :

Notice of Motion/ Order to Show Cause.....	1-3
Answering Affidavits.....	4-7
Replying Affidavits.....	8,9
Briefs: .....	

This application by petitioners for an order pursuant to CPLR 2221 granting them leave to reargue and/or renew the motion which resulted in this court's order dated August 15, 2005, which granted respondents' motion to dismiss this Article 78 proceeding is granted, and upon reargument, this Court adheres to its original determination.

In seeking reargument, petitioners maintain that this court made errors of both fact and law in its order dated August 15, 2005. Specifically, petitioners seek review only of so much of the August 15, 2005 determination as applied to Building Permit 05-910,

issued by the respondent Building Department on February 23, 2005, and the "Article 20" permit approval issued by the Village Board of Trustees on January 15, 2005. Building permit 05-910 authorized the Bellantuono respondents to construct a combination basketball/hockey court. The "Article 20" permit authorized the removal of various trees on the subject premises.

While the Village's motion to dismiss the Article 78 proceeding was pending before this Court, petitioners filed an appeal from Building Permit 05-910 with the Village Zoning Board of Appeals on July 1, 2005. The hearing in this appeal was scheduled to be heard on September 27, 2005.

On or about August 22, 2005, petitioners filed a notice of appeal to the Appellate Division, Second Department, from our order dated August 15, 2003. Simultaneously therewith, petitioners requested the Appellate Division to grant a preliminary injunction pursuant to CPLR 5518 enjoining the Bellantuonos from proceeding with the construction of the sports court pending appeal. Although the Appellate Division initially declined to grant a temporary restraining order, the Court eventually decided to grant the requested application.

On September 7, 2005, the Appellate Division issued an order stating, in pertinent part, that:

"the respondents Bellantuono and Mrs. Bellantuono are enjoined from performing any work to construct a 'sports court' at the premises located at 5 Tall Oak Court, Oyster Bay Cove, New York, pending hearing and determination of the appeal on condition that the appeal is perfected on or before October 7, 2005."

"Motions for reargument are addressed to the sound discretion of the court . . . and may be granted upon a showing that the court overlooked or misapprehended the facts or law or mistakenly arrived at its earlier decision (citations omitted)." (**Viola v City of New York**, 13 AD3d 439, lv to appeal denied \_\_\_ NE2d \_\_\_ [NY June 30, 2005]; **Pryor v Commonwealth Land Title Ins. Co.**, 17 AD3d 434;

see also **Marini v Lombardo**, 17 AD3d 345). Furthermore, the purpose of a motion for reargument is "not to serve as a vehicle to permit the unsuccessful party to reargue once again the very questions previously decided" (**Foley v Roche**, 68 NY2d 558, 567; **Simon v Mehryari**, 16 AD3d 664; **McGill v Goldman**, 261 AD2d 593; **Ganci v Cape Canaveral Tour & Travel, Inc.**, 4 Misc3d 1003 [A]).

To the extent that petitioners seek reargument of this Court's order which determined the "Article 20" Permit, such relief is denied as moot (**Driekausen v Zoning Board of Appeals of the City of Long Beach**, 98 NY2d 168). All of the tree removal pursuant to Article 20 has been completed. Hence, an injunction barring additional tree removal is unwarranted.

With respect to Building Permit 05-910, this Court correctly held that petitioners' failure to obtain administrative review as to the issuance of the challenged building permit forecloses their ability to raise this issue before this Court ( **Matter of Hays v Walroth**, 271 AD2d 744; **Matter of Perisella v Zoning Board of Appeals of Town of Fishkill**, 188 AD2d 712, 713, lv denied 82 NY2d 603). Having failed to exhaust their administrative remedies, the petition was properly dismissed (**Matter of Joseph A. Camardo v Michelman**, 12 AD3d 1176; **Village Law §7-712-c**; **Sabitini v Incorporated Village of Kensington**, 204 AD2d 320).

The fact that petitioners filed an appeal to the Village Zoning Board challenging the issuance of the sports court does not alter our decision. This appeal was filed after the petitioners sought judicial review of the building inspector's determination.

In view of the foregoing, this Court adheres to its original determination and the proceeding is hereby dismissed.

Dated:           OCT 19 2005          

**ENTERED** *Whel*  
\_\_\_\_\_  
J.S.C.

OCT 25 2005  
**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**