

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1558

TP 10-01593

PRESENT: SCUDDER, P.J., SMITH, GREEN, PINE, AND GORSKI, JJ.

IN THE MATTER OF DEBORAH BURNS AND BRUCE HENRY,
PETITIONERS,

V

MEMORANDUM AND ORDER

CARLOS CARBALLADA, AS COMMISSIONER OF
NEIGHBORHOOD AND BUSINESS DEVELOPMENT OF CITY
OF ROCHESTER AND CITY OF ROCHESTER, RESPONDENTS.

DAVIDSON FINK LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR
PETITIONERS.

THOMAS S. RICHARDS, CORPORATION COUNSEL, ROCHESTER (IGOR SHUKOFF OF
COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Thomas A. Stander, J.], entered July 22, 2010) to review a determination of respondents. The determination found petitioners guilty of violating the Code of the City of Rochester.

It is hereby ORDERED that the order so appealed from is unanimously vacated without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: Supreme Court erred in transferring this CPLR article 78 proceeding to this Court pursuant to CPLR 7804 (g) because, contrary to the court's determination, the petition does not raise a substantial evidence issue (*see id.; Matter of Cram v Town of Geneva*, 182 AD2d 1102), and we decline to review the merits of the petition in the interest of judicial economy (*see e.g. Matter of Wearen v Deputy Supt. Bish*, 2 AD3d 1361; *Matter of Nieves v Goord*, 262 AD2d 1042). In their petition, petitioners sought to annul the determination "on the grounds that [their] convictions [under the Municipal Code of the City of Rochester] violate the Fourth Amendment and Article 1 section 12 of the New York Constitution, unlawfully deprive [p]etitioners of the beneficial enjoyment of their property and the right to derive income therefrom, and are therefore in violation of lawful procedure, affected by an error of law and were arbitrary and capricious." Furthermore, in their reply brief to this Court, petitioners state that a substantial evidence issue was "not advanced below" and was "irrelevant." Under these circumstances, we conclude that Supreme Court should have addressed the issues raised in the petition in the first instance rather than transferring the matter

to this Court.

Entered: December 30, 2010

Patricia L. Morgan
Clerk of the Court