

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
In the Matter of the Application of
TOWN OF MONTAUK, INC.,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

**NOTICE OF MOTION
TO DISMISS THE
PETITION**

Index No. 04-27553

January 3, 2005


HON. GEORGE E. PATAKI, ESQ., GOVERNOR OF THE
STATE OF NEW YORK, and THE PEOPLE OF THE
STATE OF NEW YORK MET IN ASSEMBLY, and THE
TOWN BOARD GOV'T OF THE TOWN OF EAST
HAMPTON, and THE TRUSTEES OF THE
FREEHOLDERS AND COMMONALTY OF THE TOWN
OF EASTHAMPTON, and THE SUFFOLK COUNTY
WATER AUTHORITY, INC., and THE COUNTY OF
SUFFOLK, and THE BROOKLYN HISTORICAL SOCIETY,
INC., and 511 EQUITIES, INC., and THE NATURE
CONSERVANCY, INC.,

Respondents.
-----X

PLEASE TAKE NOTICE that upon the accompanying memorandum of law, and all prior pleadings, Respondents Suffolk County Water Authority and Suffolk County Legislature will move at a Special Term of the Supreme Court, held in and for the County of Suffolk, at the Supreme Court in Riverhead on January 3, 2005 at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order pursuant to CPLR 3211(a)(2, 3, 5, 7 & 8) and 7804, dismissing the petition in its entirety against the Respondents Suffolk County Water Authority and Suffolk County Legislature, and alternatively, in the event that the motion is denied, for leave pursuant to CPLR 7804(f) to serve an answer, within twenty days, and for such other and further relief as may be just and proper.

Dated: Hauppauge, New York
December 30, 2004

CHRISTINE MALAFI
Suffolk County Attorney
Attorney for the Petitioner
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P.O. Box 6100
Hauppauge, New York 11788-0099
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By: 
Christopher M. Gatto
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TO: Greg Allen, Esq.
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The Brooklyn Historical Society
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Brooklyn, N.Y. 11201

511 Equities, Corporation
A.K.A. Montauk Improvement Corp.
511 5th Avenue
New York, N.Y. 10018

The Nature Conservancy, Inc.
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Albany, N.Y. 12207

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
In the Matter of the Application of
TOWN OF MONTAUK, INC.,

Petitioner,

AFFIRMATION

For a Judgment Pursuant to Article 78
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-against-

January 3, 2005

HON. GEORGE E. PATAKI, ESQ., GOVERNOR OF THE
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TOWN BOARD GOV'T OF THE TOWN OF EAST
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CONSERVANCY, INC.,

Respondents.

-----X
Christopher M. Gatto, an attorney duly admitted to practice in the State of New
York, affirms the following under penalty of perjury:

1. I am an Assistant County Attorney in the Office of CHRISTINE
MALAFI, Suffolk County Attorney. I represent the County of Suffolk, sued herein as the
Suffolk County Water Authority and Suffolk County Legislature (hereinafter the
"Respondents").

2. I respectfully submit this affirmation in support of the Respondents'
motion to dismiss.

3. Upon information and belief, Petitioner failed to serve the Respondents by personal delivery to a designated official. It improperly mailed a copy of the petition to Respondents.

4. Petitioner's mail service was not used in conjunction with a statement of service of process by mail and an acknowledgment of receipt. The Respondents have not waived service here.

WHEREFORE, it is respectfully requested that the petition be dismissed in its entirety against the Respondents, and for such other and other further relief as may be just and proper.

Dated: Hauppauge, New York
December 30, 2004



CHRISTOPHER M. GATTO

Index No. 04-27553

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK**

In the Matter of the Application of
TOWN OF MONTAUK, INC.,

Petitioner,

For a Judgment Pursuant to Article 78
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-against-

**HON. GEORGE E. PATAKI, ESQ., GOVERNOR OF THE
STATE OF NEW YORK, and THE PEOPLE OF THE
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TOWN BOARD GOV'T OF THE TOWN OF EAST
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CONSERVANCY, INC.,**

Respondents.

**NOTICE OF MOTION TO DISMISS
AND AFFIRMATION**

**CHRISTINE MALAFI
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
In the Matter of the Application of
TOWN OF MONTAUK, INC.,

Petitioner,

For a Judgment Pursuant to Article 78
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January 3, 2003

HON. GEORGE E. PATAKI, ESQ., GOVERNOR OF THE
STATE OF NEW YORK, and THE PEOPLE OF THE
STATE OF NEW YORK MET IN ASSEMBLY, and THE
TOWN BOARD GOV'T OF THE TOWN OF EAST
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-----X

**RESPONDENTS' MEMORANDUM OF LAW
IN OPPOSITION TO ARTICLE 78 PROCEEDING**

CHRISTINE MALAFI
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By: Christopher M. Gatto
Assistant County Attorney

PRELIMINARY STATEMENT

Petitioner is the Montauk Friends of Olmsted Parks/Montauk Trustee Corporation on behalf of the Incorporated Township of Montauk. Petitioner claims that it is “lord of the fee over the grounds of the [historic] Montauk Association through the 1686 Dongan Patent.” 2004 Affidavit of Robert A. Ficalora, ¶ 26.

Petitioner seeks redress to achieve the “recovery, improvement, and protection of Montauk’s commonwealth and the franchises granted in the 1686 letters patent”; as well as “compensation for eighty years of injurious misrule...” 2004 Affidavit of Robert A. Ficalora, ¶ 2. It commenced this Article 78 proceeding seeking, *inter alia*, a judgment (i) enjoining the Town of East Hampton from taxing and governing Montauk, (ii) removing all claim by the Town of East Hampton to Montauk proprietors’ right to tax and to govern Montauk under the 1686 Dongan Patent, and liability for damages, (iii) ordering all claims into or over real property in Montauk by the Town of East Hampton, Suffolk County and the State of New York delivered to Petitioner, and (iv) compelling, reviewing and prohibiting actions of bodies politic operating pursuant to Article 78 of the CPLR.

Respondents Suffolk County Water Authority and Suffolk County Legislature (hereinafter the “Respondents”) now move to dismiss the petition pursuant to CPLR 3211(a)(2, 3, 5, 7 & 8) and 7804 on the following grounds:

- 1) Petitioner has failed to serve the Respondents;
- 2) Petitioner has failed to allege a justiciable controversy;
- 3) Petitioner has failed to show that it has standing;
- 4) Petitioner’s claims are time-barred.

For the reasons set forth below, the petition should be dismissed in its entirety.¹

POINT I

PETITIONER HAS FAILED TO SERVE THE RESPONDENTS.

In New York, personal service upon a county government such as Suffolk County shall be effected by personally delivering the summons “to the chair or clerk of the board of supervisors, clerk, attorney, or treasurer.” CPLR § 311(a)(4) (McKinney, 2004). Upon information and belief, the plaintiff failed to serve the Respondents by personal delivery to a designated official, as prescribed by CPLR § 311(a)(4). It improperly mailed a copy of the petition to the Respondents. (Gatto Aff. at ¶ 3). Mail service does not confer jurisdiction over the Respondents because it was not used in conjunction with a statement of service of process by mail and an acknowledgement of receipt. The Respondents have not waived service here. See CPLR § 312-a (McKinney, 2004); (Gatto Aff. At ¶ 4). The petition should be dismissed against the Respondents accordingly.

POINT II

PETITIONER HAS FAILED TO ALLEGE A JUSTICIABLE CONTROVERSY.

A party seeking legal relief must show that there is an actual case or controversy—a justiciable issue—to be decided by the court. See Mancuso v. Koch, 156 A.D.2d 209, 548 N.Y.S.2d 470 (1st Dept. 1989). A justiciable issue does not include the lawful acts of the executive or legislative branches of government. As implicated by the separation of powers doctrine, the executive and legislative branches should be free from

The instant motion is based on threshold procedural grounds and does not address the merits of Petitioner’s claims. Accordingly, the Court is respectfully referred to the Petition for a recitation of the relevant facts. See, e.g., Leon v. Martinez, 84 N.Y.2d 83, 87 (1994) (for purposes of a motion to dismiss the court must accept as true the allegations contained in the petition).

interference, in the lawful discharge of duties expressly conferred, by the judicial branch. See Matter of New York State Inspection, et al. v. Cuomo, 64 N.Y.2d 233, 485 N.Y.S.2d 719 (1984) (declining to review the management of the State correction system delegated to the State Department of Correctional Services). Here, Petitioners call for a remedy that would seek to “embroil the judiciary in the management and operation” of complex and fundamental issues of taxation and governance in Montauk. Id. Clearly, such policy matters have been delegated to the executive and legislative branches of local government. Thus, Petitioner has failed to state any cognizable legal claim against the Respondents, and has merely stated a non-justiciable “political” claim.

Because Petitioner has alleged only a “political” claim, Petitioner is not entitled to any form of relief via Article 78 in the nature of mandamus, certiorari, or prohibition. See Lambert v. Berman, 55 Misc.2d 99, 284 N.Y.S.2d 657 (1967) (mandamus generally does not lie to compel the executive or legislative branches to act); People ex rel. Hayes Waldo, 212 N.Y. 156, 105 N.E. 961, *reh. den.*, 212 N.Y. 588, 106 N.E. 1040 (1914) (certiorari does not lie to compel executive action); Neddo v. Schrade, 270 N.Y. 97, 200 N.E. 657 (1936) (certiorari does not lie to compel legislative action); McGraw v. Shapiro, 56 A.D.2d 624, 391 N.Y.S.2d 681 (2d Dept. 1977) (prohibition does not lie to enjoin legislative, executive or administrative action); see also N.Y. JUR.2d §§ 67, 72, 144 (2004). Thus, the Court should decline Petitioner’s improper invitation to review its non-justiciable “political” claim because it is not subject to Article 78 review.

POINT III

PETITIONER HAS FAILED TO SHOW THAT IT HAS STANDING.

Even if there is an actual case or controversy presented, Petitioner has failed to show that it has an “injury in fact” to show standing. The existence of an “injury in fact”—an actual legal stake in the matter being adjudicated—ensures that the party seeking review has some concrete interest in prosecuting an action. See Society of Plastics Industry v. County of Suffolk, 77 N.Y.2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991) (noting that standing is closely aligned to the court’s policy to not render advisory opinions). The courts do not find standing where a party claims a generalized grievance more appropriately addressed by the representative branches. For instance, in land use matters, such as in the present case, a plaintiff must show that it would suffer direct harm, injury that is in some way different from that of the public at large. Id.; see also Long Island Pine Barrens Soc’y v. Planning Bd., 213 A.D.2d 484, 623 N.Y.S.2d 613 (2d Dept. 1995).

Where an association or organization seeks redress of a grievance through the courts, it must show three elements to have standing. The organizational plaintiff must show that:

- 1) there is a harmful effect on at least one of its members;
- 2) the interests it asserts are germane to its purposes;
- 3) the case would not require the individual participation of the individual members.

See Rudder v. Pataki, 93 N.Y.2d 273, 711 N.E.2d 978, 689 N.Y.S.2d 701 (1999) (citing Society of Plastics Industry, supra). In this case, Petitioner, an organization of untold make-up or purpose, has not shown standing. Significantly, Petitioner has not plead who

it is, or how it is authorized to sue. Nowhere has it demonstrated that any of its members has been directly harmed by the alleged injuries to Montauk proprietors. Nor has Petitioner alleged that the interests it asserts are germane to its purposes. Conspicuously absent from the petition is any clear statement of what its purposes are so as to satisfy the court that it is an appropriate representative of those interests. Id.; see also Cioci v. Suffolk County Legislature, 212 A.D.2d 610, 622 N.Y.S.2d 544 (2d Dept. 1995). In sum, Petitioner has stated a generalized or tenuous grievance, which does not rise to the level of an "injury in fact" to show standing. Thus, the petition must be dismissed.

POINT IV

PETITIONER'S CLAIMS ARE TIME-BARRED.

Petitioner complains of acts or omissions by the Respondents that allegedly occurred at least seven years ago. For example, Petitioner claims that the Suffolk County Water Authority disregarded the October 25th, 1997 resolution served upon it, and that the Suffolk County Legislature participated in a 1991 conspiracy to defraud Montauk proprietors' rights. Petition ¶¶ 26, 31. Plainly, such historical claims exceed the four-month statute of limitations for an Article 78 proceeding. See CPLR § 217 (McKinney, 2004); see also Clerk v. Suffolk County Dept. of Civil Service, 216 A.D.2d 264, 628 N.Y.S.2d 377 (2d Dept. 1995) (dismissing an Article 78 petition for failure to commence it within four months). Accordingly, the claims against the Respondents should be dismissed as time-barred.


CONCLUSION

For the reasons set forth above, the petition should be dismissed in its entirety against the Respondents.

Dated: Hauppauge, New York
December 30, 2004

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