

TO BE ARGUED BY:
JOHN T. McCARRON, ESQ.
TIME: 15 MINUTES

Supreme Court of the State of New York
Appellate Division: Second Department

TOWN OF MONTAUK, INC.,
Petitioner-Appellant,

-against-

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-Respondents.

**Appellate
Division
Case No.
2005-10912**

**BRIEF FOR RESPONDENT-RESPONDENT
THE SUFFOLK COUNTY WATER AUTHORITY**

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QUESTIONS PRESENTED

1. Did the Amended Petition state a claim for relief pursuant to CPLR Article 78?

The lower Court held that the Amended Petition was in the nature of a plenary action and not a CPLR Article 78 proceeding.

2. Did Petitioner establish its entitlement to any relief under CPLR Article 78?

The lower Court held that it did not.

3. Is an Article 78 proceeding the proper vehicle to challenge the constitutionality of a statute?

The Lower Court did not specifically rule on this issue but it can be inferred from its decision that it did not believe that an Article 78 proceeding was the proper vehicle to challenge the constitutionality of a statute.

4. Did Petitioner have standing to commence the underlying special proceeding?

The Lower Court did not rule on this argument as it denied the Amended Petition on other grounds.

NATURE OF THE CASE

Petitioner-Appellant, Town of Montauk, Inc. (hereinafter "Petitioner"), commenced this special proceeding pursuant to CPLR Article 78 by the filing of a Notice of Amended Petition and Amended Petition on March 30, 2005.¹ The Amended Petition, which was found by the lower Court to be largely incomprehensible, appears to seek no less than ten (10) different claims for relief in ¶¶ 1 through 10. Only one of those paragraphs, however, ¶9, refers to relief under CPLR Article 78. Petitioner states at ¶9 that it seeks to "compel, review and prohibit actions of bodies politic operating pursuant to statute using the court's prerogative powers consolidated under Article 78 of the CPLR, and then to convert this special proceeding into an action for declaratory judgment".

The Amended Petition does not identify who Petitioner is, what type of entity it is or why Petitioner would be entitled to the relief sought therein if said relief were appropriate. The Amended Petition refers to other parties not named in the caption

¹Petitioner had previously sought to commence the proceeding by the filing of an Order to Show Cause and Petition. The Order to Show Cause was never signed by a Justice of the Supreme Court.

of this action, specifically, The Montauk Friends of Olmsted Parks / Montauk Trustee Corporation and The Incorporated Township of Montauk and it appears Petitioner is claiming that these parties have been aggrieved by the acts of Respondents. But again the Amended Petition does not identify who these parties are or why they would be entitled to the requested relief or what relationship, if any, they have to Petitioner.

Respondent-Appellee, Suffolk County Water Authority (hereinafter the "SCWA"), is a public benefit corporation operating pursuant to the Public Authorities Law of the State of New York, §§1074, et. seq. The SCWA is charged with, among other things, providing water to the residents of Suffolk County.

There are no allegations in the Amended Petition of any relationship between Petitioner and the SCWA or that the SCWA has made any decisions, committed any specific acts, taken any action against or failed to carry out any duties affecting Petitioner.² Nor does the Amended Petition seek any particular relief as to the SCWA under CPLR Article 78 or any other theory of law.

²In fact, the Amended Petition is devoid of any allegations or claims of any conduct or wrongdoing related to this Petitioner and any of the Respondents-Appellees.

The only reference to the SCWA in the Amended Petition is at ¶¶25 through 27 wherein it is alleged that the SCWA operated and extended a fresh water extraction and distribution system in Montauk without any authorization or authority from the Montauk Trustee Corporation (as opposed to the Petitioner herein).

As there are few if any specific references to actions of any of the Respondents it is nearly impossible to determine with any specificity what the actual acts complained of are with respect to any of the Respondents.

Finding the Amended Petition largely incomprehensible and not seeking relief pursuant to CPLR Article 78, the Amended Petition was denied by the Supreme Court.

Petitioner thereafter sought to appeal directly to the Court of Appeals claiming that the only question involved on appeal was the constitutional validity of a statutory provision of the State of New York. The Court of Appeals decided to examine the subject matter jurisdiction of the Court sua sponte and invited all Respondent-Appellees to weigh in on that issue.

After receiving submissions related to the Court's subject matter jurisdiction over Petitioner's direct appeal, the

Court of Appeals determined that a direct appeal did not lie in this matter as there were questions other than the constitutional validity of a statutory provision involved.

The Court of Appeals transferred the appeal to this Court for review.

ARGUMENT

POINT IPETITIONER IS NOT ENTITLED
TO THE RELIEF REQUESTED
PURSUANT TO CPLR ARTICLE 78

A special proceeding may be commenced against a body or officer to review a determination made by that body or officer or to compel or prohibit certain action by the body or officer. CPLR §7803 states, in part, as follows:

Questions raised

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, ... ; or
4. whether a determination made as a result of a hearing held, ...

The caption of the Amended Petition contains a reference to CPLR §7803(2), relief in the nature of prohibition, therefore it

is assumed that Petitioner is seeking to prohibit the SCWA from taking some action.³ The Court of Appeals, in Matter of Dondi v. Jones, 40 N.Y.2d 8, 13, 351 N.E.2d 650, 386 N.Y.S.2d 4, 8 (1976), stated with respect to the remedy of prohibition:

"The extraordinary remedy of prohibition lies only where there is a clear legal right and only when the body or officer 'acts or threatens to act without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction' (citations omitted)."

"It must be directed to some inferior judicial tribunal or officer and lies to prevent or control judicial or quasi-judicial action only, as distinguished from legislative, executive or ministerial action (citations omitted)."

Matter of Vega v. Bell, 47 N.Y.2d 543, 547, 393 N.E.2d 450, 419 N.Y.S.2d 454, 456 (1979).

There are no allegations in the Amended Petition that the

³ The body of the Amended Petition does not state whether it is challenging a determination made by the SCWA in violation of lawful procedure, a determination made after a hearing, or whether it is seeking relief in the form of mandamus or prohibition.

SCWA was acting in a judicial or quasi-judicial capacity. To the contrary, Petitioner has alleged that the SCWA was carrying out the duties bestowed upon it by the Public Authorities Law, to wit, maintaining a water distribution system to supply water to the residents of Montauk in Suffolk County (see ¶¶25 and 26 of the Amended Petition). Such conduct is explicitly authorized by §1078 of the Public Authorities Law which states, in part, as follows:

Powers

The powers and duties of the authority shall be as follows:

(4)(c) To construct, develop and operate any water supply system, water distribution system, ... within the county of Suffolk, ...

"Prohibition is not available to prevent administrative action unless the agency is acting in a judicial or quasi-judicial capacity and even then it is generally not appropriate if another avenue of judicial review may be pursued without irreparable injury to the applicant." Matter of American Transit Insurance Company v. Corcoran, 65 N.Y.2d 828, 482 N.E.2d 918, 493 N.Y.S.2d 122 (1985). Matter of the City of Newburgh v. Public Employment Relations Board, 63 N.Y.2d 793, 471 N.E.2d 140, 481 N.Y.S.2d 327 (1984).

Petitioner has not demonstrated that it would be irreparably harmed if prohibition is not granted or that there is no alternate method of reviewing the conduct of the SCWA. Accordingly, the Amended Petition brought pursuant to CPLR §7803(2) to prohibit the SCWA from providing water service to the residents of Suffolk County must be denied and the proceeding dismissed.

POINT II

PETITIONER CANNOT CHALLENGE
THE CONSTITUTIONALITY OF A
STATUTE IN AN ARTICLE 78 PROCEEDING

Petitioner has alleged in its direct appeal to the Court of Appeals that it is challenging the constitutionality of a statute of the State of New York. While it is unclear from the Amended Petition what statutes are being challenged, there are no allegations which provide a nexus between such a claim and the SCWA. The Petitioner has not challenged the validity of the SCWA or the Public Authorities Law.

Moreover, the proper vehicle for challenging the validity or constitutionality of a statute is a declaratory judgment action, not an Article 78 proceeding. See, CPLR 3001; Board of Education of Belmont Central School District v. Gootnick, 49 N.Y.2d, 404 N.E.2d 1318, 427 N.Y.S.2d 777 (1980).

While an Article 78 proceeding which challenges the constitutionality of a legislative enactment may be converted to a declaratory judgment action, such a conversion was not appropriate here where the lower Court found the Amended Petition to be largely incomprehensible. Converting the proceeding to a

declaratory judgment action would not have made the Amended
Petition any clearer.

POINT III

PETITIONER LACKS STANDING
TO COMMENCE AN ARTICLE 78
PROCEEDING AGAINST RESPONDENTS

Petitioner has failed to demonstrate that it is an aggrieved party or that it has been injured by the actions of the SCWA. Other than unsubstantiated allegations that Petitioner is the heir to all claims of Montauk property owners and is entrusted to the stewardship of the lands of Montauk, there is no nexus between this Petitioner, Town of Montauk, Inc., and any of the acts alleged to have been undertaken by the SCWA.

Furthermore, the Amended Petition fails to even identify who Petitioner is, what type of entity Petitioner is, or that it has the capacity to institute legal proceedings in this State.

Standing is a threshold determination which must be considered at the outset of any litigation. The question of whether Petitioner is a proper party to seek the relief requested in the Amended Petition must be answered before proceeding to the merits of the Amended Petition.

Petitioner has failed to establish, or even allege, that it has or will suffer injury as a result of the conduct alleged in

the Amended Petition. Having failed to establish this essential principle of standing, the Amended Petition must be denied. Society of the Plastics Industry v. County of Suffolk, 77 N.Y.2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991).

CONCLUSION

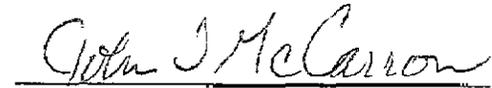
Based on the foregoing, it is respectfully requested that the Order of the Supreme Court, Suffolk County be affirmed and for such other and further relief as the Court deems just and proper.

Dated: June 23, 2006

Respectfully submitted,

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By:



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SUFFOLK COUNTY WATER AUTHORITY

CERTIFICATE OF COMPLIANCE

PURSUANT TO 22 NYCRR § 670.10.3 (f)

The foregoing brief was prepared on a computer. A mono spaced typeface was used as follows:

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