

**Shelter Is. Assoc. v Zoning Bd. of Appeals of the  
Town of Shelter Is.**

2007 NY Slip Op 34446(U)

January 2, 2007

Supreme Court, Suffolk County

Docket Number: 16778-06

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 8/4/06 (#001,002)  
MOTION DATE 9/20/06 (#003)  
ADJ. DATES 9/22/06  
Mot. Seq. # 001 - MD  
Mot. Seq. # 002 - MG  
Mot. Seq. # 003 - MD; CDISP

-----X  
THE SHELTER ISLAND ASSOCIATION, JAMES:  
JAHRSDOERFER, DORIS A SCHULTZ, and  
CHARLES OLTON,

PROKOP & PROKOP  
Attys. For Petitioners  
175 Rte. 25A  
East Setauket, NY 11733

Petitioners,

LAURY L. DOWD, ESQ.  
Town Attorney - Town of Shelter Island  
Atty. For Respondents  
P.O. Box 970  
Shelter Island, NY 11030

For a Judgment pursuant to Article 78 and Section  
3001 of the Civil Practice Laws and Rules and  
Article 8 and Part 617 of Title 6 of the NYCRR,  
determining that negative declaration for SEQRA  
purposes and the decision of the respondents dated  
May 24, 2006 granting a Use Variance was  
arbitrary and capricious, illegal, improper and not  
based on law or the evidence,

-against-

ZONING BOARD OF APPEALS OF THE TOWN  
OF SHELTER ISLAND, JOANN PICCOZZI,  
WILLIAM JOHNSON, III, DOUG MATZ,  
PATRICIA SHILLINBURG and PETER  
RUIG, constituting the Zoning Board of Appeals  
of the Town of Shelter Island, JOHN PETER  
MEISTER, GARY F. FEELY and the MEISTER-  
FEELY REALTY TRUST,

Respondents.

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Upon the following papers numbered 1 to 20 read on this Article 78 Petition, motion for dismissal and a second Article 78 Petition; Notice of Petition and supporting papers 1 - 4; Notices of Motion and supporting papers 5-7; 8-18; Affidavits and supporting papers 19-20; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this Article 78 petition (#001) seeking, among other things, a judgment pursuant to CPLR Article 78, CPLR Article 8, CPLR 3001 and 6 NYCRR § 617, vacating and setting aside a decision of the Zoning Board of Appeals of the Town of Shelter Island, dated May 24, 2006, which illegally and improperly granted a use variance to the individual respondents herein, is denied; and it is further

**ORDERED** that this motion (#002) by the respondents, for an Order pursuant to CPLR 7804(f) and CPLR 3211(a)(5), dismissing this proceeding, on the grounds that the petitioners lack standing to bring the petition, is granted; and it is further

**ORDERED** that the Order To Show Cause (#003) seeking, among other things, an Order (1) affirming the amendment of the verified petition, service of the verified amended petition and the joinder of the Town of Shelter Island and the Building Inspector of the Town of Shelter Island as respondents in this action pursuant to CPLR 3025, CPLR 1001, CPLR 1002 and CPLR 1003, or in lieu thereof, granting the petitioners leave to serve the verified amended petition pursuant to CPLR 3025(b); and (2) denying the respondents' motion to dismiss for lack of standing, is denied; and it is further

**ORDERED AND ADJUDGED** that respondents shall recover from petitioners costs and disbursements in the sum of \$ \_\_\_\_\_ as taxed by the Clerk and respondents shall have execution therefor; and it is further

**ORDERED** that counsel for the petitioners shall serve a copy of this Order with Notice of Entry upon counsel for respondents within twenty (20) days of the date herein pursuant to CPLR 2013(b)(1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court.

Petitioners brought this Article 78 Petition (#001) for an Order to annul a determination of the Zoning Board of Appeals of the Town of Shelter Island (hereinafter "Board"), dated May 24, 2006, which granted a variance to the respondents allowing them to construct an accessory apartment in a existing garage located on their property. Respondents served a pre-answer motion (#002) pursuant to CPLR 3211(a)(5) to dismiss the petition on the grounds that the petitioners lack standing to bring the petition (*see* Siegel Practice Commentaries, McKinney's Cons Laws of NY, Book 7B C3211:13 ). In direct response to the respondents' motion and before a decision was rendered on petitioners' application, petitioners filed an amended petition (#003) with the Clerk of the Court on August 4, 2006 as confirmed by the Clerk's time stamp (*see Grant v Senkowski*, 95 NY2d 605, 721 NYS2d 597 [2001]; Alexander. Practice Commentaries, McKinney's Cons Laws of NY, Book 7B C304:1, C304:2 2005 Supp Pamphlet at 74-77). This filed verified amended petition was served, according to counsel for the petitioners, pursuant to CPLR 3025(a) on the named respondents shortly after filing, the exact date, however, is unknown as no affidavits of service were submitted to the Court confirming service. However, counsel for the Board has submitted an affirmation in opposition to this amended petition, with a clerk's date stamp of August 18, 2006.

Petitioners subsequently brought an Order To Show Cause, originally signed by Justice Cohalan on August 21, 2006 and then signed by Justice Pitts on September 5, 2006.<sup>1</sup> This Order To Show Cause sought leave of the Court to serve the amended petition pursuant to CPLR 3025(b) and joinder of additional parties and for a preliminary injunction. A Temporary Restraining Order, which sought to restrain the named respondents, Town of Shelter Island and the Building Inspector of the Town of Shelter Island, from issuing a building permit or approval of same, was denied by both justices.

The record before this Court indicates that the verified amended petition was not signed by the additionally added petitioners, as individuals, until July 28, 2006 and the individual affidavit of Jerry Zisfein, a new petitioner on the amended petition served with the Order To Show Cause, was not signed until August 14, 2006. The petitioners were not entitled to serve the amended petition pursuant to CPLR 3025(a) where

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<sup>1</sup> The record before the Court does not indicate why the petition was redated by Justice Pitts.

a new cause of action was added against a new party (*see Badger v Lehigh Valley R. Co.*, 45 AD2d 601, 360 NYS2d 523 [4<sup>th</sup> Dept 1974]; 84 N.Y. Jur2d Pleadings, § 228 Supplemental and Amended Pleadings (2006)).

The respondents, in opposition to the original petition, questioned petitioners' right to bring the petition based upon their standing in the matter due to their lack of physical proximity to the subject property. It has become well settled law that in order for a party to establish standing to annul or review an administrative determination, a petitioner must show that he or she will "suffer direct harm, injury that is in some way different from the that of the public at large" (*Society of Plastic Indus. v County of Suffolk*, 77 NY2d 761, 774, 570 NY2d 778 [1991] *citations omitted*). It has also been recognized that "an allegation of close proximity alone may give rise to an inference of damage or injury that enables a nearby owner to challenge a zoning board decision without proof of actual injury" (*Sun-Brite Car Wash v Board of Zoning & Appeals of the Town of North Hempstead*, 69 NY2d 406, 515 NYS2d 418 [1987] *citations omitted*).

In the original petition, counsel for the respondent Board in her affirmation as an officer of the Court enclosed as an exhibit a map of the Town of Shelter Island. Counsel in her affirmation stated that the petitioner Charles Olton is the residential owner of 11 Point Lane, Shelter Island which is 3.5 miles from the subject premises and is not proximate to the premises. Counsel also states that the petitioner Doris A. Schultz is the residential owner of 20 Margarets Drive, Shelter Island which is over a quarter a mile away and is not proximate to the premises. The third petitioner, James Jahrsdoerfer according to counsel is the residential owner of 4 Simpson Road, Shelter Island which is over a half a mile away and not proximate to the subject property. Counsel indicates in his affirmation that there are approximately within a quarter mile of the subject property thus indicating that the damage claims of the petitioners herein are not unique. Counsel states that the distances were established by using Google Earth and the distances are as the crow flies and if measured by actual roadway distances the distance would be greater.

Where the courts have found standing as a matter of law due to proximity, the distances to the subject property have been much closer than the distances involved herein. (*see Manupella v Troy City Zoning Board of Appeals*, 272 AD 2d 761, 707 NYS 2d 707 [3d Dept 2000])(301 feet and 714 feet were held to be close proximity to a proposed residence); *Matter of Sopchak v Guernsey*, 176 AD 2d 403, 574 NYS 2d 110 [3d Dept 1991]) (500 feet was held to be in close proximity); *cf Rediker v Zoning Bd. of Appeals of Town of Philipstown*, 280 AD 2d 548, 721 NYS 2d 77 [2d Dept 2001]; *lv. app. den.* 96 NY 2d 716, 730 NYS 2d 32 [2001](1/3 of a mile negated inference of injury); *Matter of Burns Pharmacy of Rensselaer v Conley*, 146 AD 2d 842, 536 NYS 2d 248 [3d Dept 1989])(1,000 to 1,500 feet was held to negate an inference of injury).

In the original petition, the nearest named petitioner lives over a quarter of a mile and more from the subject property and the other petitioners live even further. Thus, the lack of proximity to the subject premises of the original petitioners deprive them of any claimed benefit of inference of injury in fact (*see Casement v Town of Poughkeepsie Planning Bd.*, 162 AD2d 685, 557 NYS2d 400 [2d Dept 1990]; *app. dismiss* 76 NY2d 930, 563 NYS2d 56 [1990]; *reargument den.* 76 NY2d 930, 563 NYS2d 56 [1990]; *Matter of Kucinski v Zoning Bd. of Appeals of the Town of Dover*, 148 AD2d 612, 539 NYS2d 77 [2d Dept 1989]; *cf. Coppola v Good Samaritan Hosp.*, 309 AD2d 862, 765 NYS2d 888 [2d Dept 2003] [plaintiff owned a home adjacent to the hospital]). The petition does not allege any special injury which the petitioners would suffer over and above that of the general community (*see Matter of Long Island Contr. Assoc. v Town of Riverhead*, 17 AD3d 590, 793 NYS2d 494 [2d Dept 2005]; *Matter of Big v Supermarkets v Town of Wallkill*, 154 AD2d 669, 546 NYS2d 668 [2d Dept 1989]).

The Shelter Island Association (hereinafter "Association") was an additionally named petitioner in the original petition and claimed to represent several hundred residents and property owners in the Town of Shelter Island, who are aggrieved by the action of the Board. Other than the attorney's affirmation and being named as a petitioner, there is no affidavit from any natural person stating that they are a member of the Association to support the Association's contention of "injury in fact" (*see Nassau Point Prop. Owners Assoc., Inc. v Tirado*, 29 AD3d 754, 815 NYS2d 674 [2d Dept 2006]; *New York State Propane Gas Assoc.*

*v Department of State*, 17 AD3d 915, 793 NYS2d 601 [2d Dept 2005]; *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 810 NYS2d 405 [2004]; *Wyman v Braman*, 298 AD2d 787, 750 NYS2d 655 [3d Dept 2002]; *lv app disp* 99 NY2d 578, 755 NYS2d 713 [2003]; *Matter of Colella v Board of Assessors of County of Nassau*, 95 NY2d 401, 718 NYS2d 268 [2000]; *Society of Plastic Indus. v County of Suffolk*, 77 NY2d 761, *supra*; *Matter of Long Is. Pine Barrens Soc. v Supervisor of Town of Southampton*, 301 AD2d 528, 753 NYS2d 734 [2d Dept 2003]; *Save Our Main St. Buildings v Greene County Legislature*, 293 AD2d 907, 740 NYS2d 715 [3d Dept 2002]; *lv app den* 98 NY2d 609, 747 NYS2d 409 [2002]; *Matter of Long Is. Pine Barrens Soc. v Planning Bd. of the Town of Brookhaven*, 213 AD2d 484, 623 NYS2d 613 [2d Dept 1995]; *Matter of Dental Soc. v Carey*, 61 NY2d 330, 474 NYS2d 262 [1984]; *cf. Matter of Center Square Assoc., Inc. v City of Albany Bd. of Zoning Appeals*, 9 AD3d 651, 780 NYS2d 203 [3d Dept 2004]; *Manupella v Troy City Zoning Board of Appeals*, 272 AD2d 761, *supra*; *Matter of Committee to Preserve Brighton Beach and Manhattan Beach, Inc. v Council of the City of New York*, 214 AD2d 335, 625 NYS2d 134 [1<sup>st</sup> Dept 1995]; *lv app den* 87 NY2d 802, 638 NYS2d 425 [1995]).

Thus, the individual petitioners and the Association failed to establish their standing to bring the original petition (*see Long Island Business Aviation Assn., Inc. v Town of Babylon*, 29 AD3d 794, 815 NYS2d 217 [2d Dept 2006]). Therefore, in the absence of a qualifying injury due to the lack of standing, the petition must be denied and the matter dismissed.

The Court will not speculate on the petitioners' reasons for filing the verified amended complaint or for bringing the Order To Show Cause while the original petition was still before the Court and a decision not rendered. However, it is patently plain that the verified amended petition was seeking to ameliorate what petitioners felt could possibly be an adverse decision based upon respondents' pre-answer motion. The inclusion of the four additional petitioners was solely intended to give a blessing of standing to the verified amended petition. The addition of the new petitioners in the amended petition would succulently and effectively nullify respondents' standing defense in opposition to the original petition as three of them live within a distance to enable them to individually challenge the Board's decision without proof of actual injury (*see Sun-Brite Car Wash v Board of Zoning & Appeals of the Town of North Hempstead*, 69 NY2d 406, 414, *supra*). The amended verified petition also fails to set forth an affidavit from a single individual attesting to that individual's membership in the Association (*see Matter of Long Is. Pine Barrens Soc. v Planning Bd. of the Town of Brookhaven*, 213 AD2d 484, *supra*).

The original notice of petition and petition was timely filed on June 23, 2006 within the limitations period to file with the court from the adverse determination of the Board rendered on May 24, 2006 and filed with the Town Clerk on May 25, 2006 as stated in the affirmation of counsel for the Board as an officer of the Court in her opposition papers. Pursuant to Town Law § 267-c(1), any party aggrieved by a determination of the Board may bring a proceeding in the Supreme Court. However, the proceeding must be instituted within thirty days after the filing of the decision in the office of the town clerk (*see Cuyle v Town Bd. of the Town of Oxford*, 301 AD2d 838, 753 NYS2d 613 [3d Dept 2003]; *lv app den* 100 NY2d 501, 760 NYS2d 764 [2003]; *O'Connell v Zoning Bd. of Appeals of the Town of New Scotland*, 267 AD2d 742, 699 NYS2d 775 [3d Dept 1999]; 12 N.Y. Jur2d Buildings, § 440 Zoning and Land Controls [2006]). Thus, the last day in which the petition could have been brought was June 27, 2006. The original petition by the named petitioners therein filed on June 23, 2006 was timely as it was within the statute of limitations time period.

As noted, the verified amended petition was filed on August 4, 2006, seventy-one days after the Board's decision was filed and was subsequently served upon the respondents by petitioners pursuant to CPLR 3025(a). The Order To Show Cause was not submitted to the Court until August 21, 2006, eighty-eight days after the Board's decision was filed. The Court notes for the record that the amended petition was not signed by the additional and later added petitioners as individuals until July 28, 2006 and the individual affidavit of a Jerry Zisfein, a new petitioner on the amended petition served with the Order To Show Cause, was not signed until August 14, 2006. The statements in his affidavit "are insufficient without more to confer standing" (*Matter of Many v Village of Sharon Springs Bd. of Trustees*, 218 AD2d 845, 629 NYS2d

868 [3d Dept 1995]). His affidavit states that he lives about 1200 feet from the subject property and by his own statements has failed to establish that he “will suffer an environmental impact in fact” (*Matter of Piela v Van Voris*, 229 AD2d 94, 95, 655 NYS2d 105 [3d Dept 1997]).

Under Town Law 267-c(1), the statute of limitations lapsed on June 27, 2006. The addition of the four petitioners in the verified amended petition transparently seeks to avoid the standing issue which resulted in the original petition of June 23, 2006 being dismissed as noted herein. Contrary to any perceived intention of counsel, it does not revive the action or the protection of CPLR 205. The four additional petitioners were not petitioners when the original petition was brought to annul the Board’s determination and are, therefore, not entitled to the saving provisions of CPLR 205. The additional petitioners are new parties on a new petition despite it being called an amended petition served after the expiration of the statute of limitations and as such, any perceived protection by CPLR 205 may not be invoked.

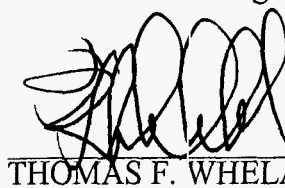
The addition of the four new petitioners to an amended petition under the guise of a CPLR 3025 application before the Court decided the original petition is a blatant and thinly veiled, improper and impermissible attempt to circumvent the statute of limitations (*see Atton v Steven J. Bier, M.D.*, 12 AD3d 240, 785 NYS2d 426 [1<sup>st</sup> Dept 2004]; *Valenti v Cabrini Health Care Ctr. a/k/a Columbus Italian Hosp. Div.*, 59 NY2d 736, 463 NYS2d 440 [1983]; *see e.g. Galatowitsch v New York City Gay & Lesbian Anti-Violence Project*, 1 AD3d 137, 766 NYS2d 206 [1<sup>st</sup> Dept 2003]; *Gersen, as Supt. of Schools of Wappingers Central School Dist., v Richard P. Mills as Commissioner of Ed. of the State of New York* 290 AD2d 839, 737 NYS2d 137 [3d Dept 2002]; *Ferguson v Barrios-Paoli, as Personnel Director of the City of New York*, 279 AD2d 396, 720 NYS2d 43 [1<sup>st</sup> Dept 2001]; *Manfredi v Philip J. Coomber, Jr. as Commissioner of the New York State Dept. of Correctional Services*, 238 AD2d 635, 656 NYS2d 960 [3d Dept 1997]).

Furthermore, the additional joinder pursuant to CPLR 1001, CPLR 1002 and CPLR 1003 of the Town of Shelter Island and the Town of Shelter Island Building Inspector is untimely having been made after the statute of limitations expired (*see Wittenberg Sportsmens Club, Inc. v Town of Woodstock Planning Board*, 16 AD3d 991, 792 NYS2d 661 [3d Dept 2005]; *Brancato v New York Board of Real Prop. Serv.*, 7 AD3d 865, 776 NYS2d 343 [3d Dept 2004]; *LoCicero v Metropolitan Trans. Auth.*, 288 AD2d 353, 733 NYS2d 477 [2d Dept 2001]; *McNeill v Town Board of the Town of Ithaca*, 260 AD2d 829, 688 NYS2d 747 [3d Dept 1999]; *lv app den* 93 NY2d 812, 615 NYS2d 540 [1999]). The petitioners’ application in seeking joinder does not invoke the relation back doctrine pursuant to CPLR 203 to avoid the statute of limitations. The Board and the Town of Shelter Island and the Town of Shelter Island Building Inspector’s powers and functions are different (*see Emmett v Town of Edmeston*, 3 AD3d 816, *supra*; *Matter of Commco Inc. v Amelkin*, 62 NY2d 260, 476 NYS2d 775 [1984]) in that “the ZBA and the Town cannot be considered to be united in interest since they do not stand or fall together and a judgment concerning the variance will not similarly affect both parties” (*Emmett v Town of Edmeston*, 3 AD3d 816 at 819, *supra*).

Since the Statute of Limitations has expired, the Court lacks the authority to permit the petitioners leave to serve the amended petition (*see Vega v Scheyer*, 18 AD3d 664, 795 NYS2d 670 [2d Dept 2005]; *Mosher v Town of Southport Zoning Board of Appeals*, 5 AD3d 840, 772 NYS2d 640 [3d Dept 2004]), the amended petition is denied with prejudice.

Accordingly, the petitions (#001) and (#003) are denied for the reasons noted herein and the cross motion is granted. The action is dismissed. This constitutes the Order and Judgment of the Court.

DATED: 1/2/07



THOMAS F. WHELAN, J.S.C.