

**Matter of Pensis v Planning Bd. of the Town of
Riverhead**

2009 NY Slip Op 33181(U)

December 29, 2009

Supreme Court, Suffolk County

Docket Number: 44745/2008

Judge: Joseph Farneti

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 In the Matter of the Application of
 ALBERT PENSIS,

Petitioner,

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

-against-

THE PLANNING BOARD OF THE TOWN OF
 RIVERHEAD and PATRICK SHIELS,

Respondents.

ORIG. RETURN DATE: JANUARY 16, 2009
 FINAL SUBMISSION DATE: FEBRUARY 5, 2009
 MTN. SEQ. #: 001
 MOTION: MG

ORIG. RETURN DATE: FEBRUARY 4, 2009
 FINAL SUBMISSION DATE: FEBRUARY 5, 2009
 MTN. SEQ. #: 002
 MOTION: MD

ORIG. RETURN DATE: FEBRUARY 4, 2009
 FINAL SUBMISSION DATE: FEBRUARY 5, 2009
 MTN. SEQ. #: 003
 MOTION: MD

PLTF'S/PET'S ATTORNEY:
 ANTHONY B. TOHILL, P.C.
 12 FIRST STREET
 P.O. BOX 1330
 RIVERHEAD, NEW YORK 11901
 631-727-8383

**ATTORNEY FOR RESPONDENT
 THE PLANNING BOARD OF THE
 TOWN OF RIVERHEAD:**
 RICHARD A. EHLERS, ESQ.
 456 GRIFFING AVENUE
 P.O. BOX 387
 RIVERHEAD, NEW YORK 11901
 631-369-1155

**ATTORNEY FOR RESPONDENT
 PATRICK SHIELS:**
 PETER S. DANOWSKI, JR., ESQ.
 616 ROANOKE AVENUE
 RIVERHEAD, NEW YORK 11901
 631-727-4900

Upon the following papers numbered 1 to 10 read on this petition FOR A
JUDGMENT PURSUANT TO ARTICLE 78 AND THESE MOTIONS TO DISMISS.
 Order to Show Cause, petition and supporting papers 1-3; Notice of Motion and supporting
 papers 4-6; Notice of Motion and supporting papers 7, 8; Affidavit in Opposition and
 supporting papers 9, 10; it is,

ORDERED that this verified petition for a judgment, pursuant to Article 78 of the CPLR, annulling and setting aside a Resolution of respondent THE PLANNING BOARD OF THE TOWN OF RIVERHEAD, adopted on November 20, 2008, and restraining and enjoining respondent PATRICK SHIELS from constructing any residence or part thereof or performing any work incident to said construction at 474 Sound Shore Road, Jamesport, Town of Riverhead, New York, absent a proper legal basis to proceed, is hereby **GRANTED** for the reasons set forth hereinafter; and it is further

ORDERED that this motion by respondent PATRICK SHIELS for an Order dismissing the petition herein upon the grounds that petitioner has failed to exhaust his administrative remedy and is time barred, is hereby **DENIED** for the reasons set forth hereinafter; and it is further

ORDERED that this motion by respondent THE PLANNING BOARD OF THE TOWN OF RIVERHEAD for an Order dismissing the petition herein upon the grounds that petitioner has failed to exhaust his administrative remedy, is hereby **DENIED** for the reasons set forth hereinafter.

The Court has received an affidavit from petitioner's counsel in opposition to respondents' motions to dismiss.

Petitioner is the owner of an improved parcel of residential real property on Sound Shore Road, in the Town of Riverhead, State of New York, which is situate on the Long Island Sound and contiguous with the vacant waterfront premises owned by respondent PATRICK SHIELS ("Shiels"). Petitioner alleges that any construction of a residence on the Shiels parcel is subject to Chapter 12 of the Riverhead Town Code, the Coastal Erosion Hazards Law, and a Chapter 12 permit issued by THE PLANNING BOARD OF THE TOWN OF RIVERHEAD ("Planning Board") as Administrator of the Coastal Erosion Hazards Law.

Petitioner informs the Court that the Planning Board had issued Shiels a Chapter 12 permit on or about August 12, 2004, for the construction of a residence on his parcel. Prior thereto, by determination dated May 27, 2004, the Riverhead Zoning Board of Appeals granted Shiels area variance relief to enable construction of the residence. Petitioner alleges that pursuant to Riverhead Town Code § 12-23, the variance, and therefore the Chapter 12 permit upon which it was based, expired after one year from the date of the granting of the variance.

Notwithstanding the foregoing, petitioner alleges that on November 20, 2008, the Planning Board, during a work session conducted without public notice or public participation, voted on and passed a Resolution amending and extending the Chapter 12 permit, with certain terms and conditions ("Resolution"). Petitioner informs the Court that in a prior special proceeding commenced pursuant to Article 78, the Court (Costello, J.), by oral decision on the record on November 13, 2007, found, among other things, that the subject Chapter 12 permit had expired, the conditions of the permit were not followed, and the application should be resubmitted. Petitioner argues that no authority exists for the Planning Board to supercede or eliminate a condition in a Zoning Board of Appeals determination, or to conduct a rehearing on a Chapter 12 permit without public notice, public participation, or actual minutes. Moreover, petitioner alleges that the Planning Board ignored the jurisdictional referral requirements of both General Municipal Law § 239-m (referral of certain proposed town planning actions to the county planning agency or regional planning council for a report thereon), and Riverhead Town Code § 12-28 (B) (2) (referral to the Town's Conservation Advisory Council for an advisory report and recommendation).

In opposition, respondents have each filed a motion to dismiss the petition. Respondents both argue that petitioner's application should be denied because petitioner has failed to exhaust his administrative remedy. Specifically, respondents argue that pursuant to Riverhead Town Code §§ 12-25 and 12-26, petitioner should have filed an administrative appeal with the Riverhead Zoning Board of Appeals from the issuance of the complained of action by the Planning Board. Although Shiels also claims in his notice of motion that this proceeding is time-barred, he has not developed this argument. In any event, the Court finds this proceeding to be timely commenced within thirty (30) days after the filing of the Resolution in the office of the town clerk (see Town Law § 274-a; *Haggerty v Planning Bd. of Sand Lake*, 166 AD2d 791 [1990]).

Although respondents correctly argue that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law (see *Watergate II Apartments v Buffalo Sewer Authority*, 46 NY2d 52 [1978]; *Matter of Mirenberg v Lynbrook Union Free Sch. Dist. Bd. of Educ.*, 63 AD3d 943 [2009]; *NYCLT 1998-2 Trust v T. Jan Realty Corp.*, 63 AD3d 810 [2009]), petitioner argues that as this proceeding raises for the Court's review and determination questions of law only, there is no need to exhaust administrative remedies. This Court agrees (see *Cady v Clark*, 176 AD2d 1055 [1991]; *Sievers v New York Dep't of Bldgs.*, 146

AD2d 473 [1989]; *Rosenberg v 135 Willow Co.*, 130 AD2d 566 [1987]). As such, the Court must determine whether the actions of voting on and passing the Resolution at the November 20, 2008 work session of the Planning Board violated the Open Meetings Law (see Public Officers Law § 100, *et seq.*).

The Legislature, by enacting the Open Meetings Law, intended to affect the entire decision-making process, as well as the formal vote taking as it is the “deliberative process which is at the core of the Open Meetings Law” (*Matter of Orange County Publs. v Council of City of Newburgh*, 60 AD2d 409, 414 [1978], *affd* 45 NY2d 947 [1978]). Clearly, casual encounters by members do not fall within its purview (see *Matter of Orange County Publs. v Council of City of Newburgh*, 60 AD2d 409, *supra*), but informal conferences, agenda sessions and work sessions do invoke the provisions of the statute when a quorum is present and when the topics for discussion and decision are such as would otherwise arise at a regular meeting (*Id.*; see also *Matter of Oneonta Star Div. of Ottaway Newspapers v Board of Trustees*, 66 AD2d 51 [1979]).

In view of the foregoing, the Court finds that the Planning Board’s work session of November 20, 2008 was covered by the Open Meetings Law. A quorum of the Planning Board was present as evidenced by the roll of the vote taken on the Resolution, and the meeting was not a casual encounter but, rather, a planned work session where, at a minimum, a vote was taken and the subject Resolution was passed. Pursuant to Public Officers Law § 107, a court, in its discretion and upon good cause shown, may declare void any action taken by a public body in violation of the mandates of the Open Meetings Law. It is the challenger’s burden to show good cause warranting judicial relief (see Public Officers Law § 107 [1]; *Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668 [1996]).

Here, petitioner has alleged that the work session of November 20, 2008 was conducted without public notice, without public participation, and without actual minutes therefor. Notably, the Planning Board has not disputed any of these contentions. Therefore, the Court finds that the Planning Board violated the Open Meetings Law by voting on and passing the Resolution at the work session of November 20, 2008, as such actions should have taken place at a regular public meeting of the Planning Board (see *Matter of Orange County Publs. v Council of City of Newburgh*, 60 AD2d 409, *supra*).

Thus, the next question is whether petitioner has demonstrated "good cause" such that this Court will annul and set aside the Resolution. Petitioner contends, without opposition, that the Planning Board superceded or eliminated at least one condition in the prior determination of the Zoning Board of Appeals, and attempted to amend and extend a Chapter 12 permit that had expired in 2005. As discussed, such expiration was confirmed by the Court (Costello, J.) by oral decision on the record on November 13, 2007. Moreover, petitioner contends, also without opposition, that the Planning Board ignored the jurisdictional referral requirements of both General Municipal Law § 239-m and Riverhead Town Code § 12-28 (B) (2). As such, the Court finds, in its discretion, that petitioner has demonstrated good cause to declare void the Resolution passed at the work session.

Accordingly, these motions by respondents to dismiss are both **DENIED**, and this petition for a judgment annulling and setting aside the Resolution of the Planning Board adopted at a work session on November 20, 2008, and restraining and enjoining respondent Shiels from constructing any residence or part thereof or performing any work incident to said construction at 474 Sound Shore Road, Jamesport, Town of Riverhead, New York, absent a proper legal basis to proceed, is **GRANTED**. While the Resolution evinces the intention of the Planning Board with respect to a Chapter 12 permit for the Shiels parcel, such a Resolution must be passed pursuant to the procedures of the Open Meetings Law (see Public Officers Law § 100, *et seq.*).

The foregoing constitutes the decision and Order of the Court.

Dated: December 29, 2009


HON. JOSEPH FARNETI
Acting Justice Supreme Court