Nocro, Ltd. v Russell
2010 NY Slip Op 31731(U)
June 15, 2010
Sup Ct, Suffolk County
Docket Number: 09-19101
Judge: Peter Fox Cohalan
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SHORT FORM ORDER

INDEX No. 09-19101

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 6-30-09 (#001)
MOTION DATE 8-26-09 (#002)
ADJ. DATE 1-20-10
MNEMONIC: # 001 - Continued
002 - MotD

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NOCRO, LTD. and THE HERITAGE AT CUTCHOGUE, LLC,

Petitioners/Plaintiffs,

- against -

SCOTT A. RUSSELL, LOUISA P. EVANS, THOMAS H. WICKHAM, ALBERT J. KRUPSKI, JR., WILLIAM P. RULAND, and VINCENT M. ORLANDO, individually and as members of the TOWN BOARD OF THE TOWN OF SOUTHOLD; TOWN BOARD OF THE TOWN OF SOUTHOLD; JERILYN B. WOODHOUSE, GEORGE SOLOMON, JOSEPH L. TOWNSEND, KENNETH L. EDWARDS, MARTIN H. SIDOR, individually and as members of the PLANNING BOARD OF THE TOWN OF SOUTHOLD; PLANNING BOARD OF THE TOWN OF SOUTHOLD; and TOWN OF SOUTHOLD, Suffolk County, New York,

Respondents/Defendants.

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Upon the following papers numbered 1 to 34 read on this Article 78 proceeding and motion to dismiss; Notice of Petition and supporting papers 1 - 18; Notice of Motion and supporting papers 19 - 24; Answering Affidavits and supporting papers 25 - 32; Replying Affidavits and supporting papers 33 - 34; Other _; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by the respondents for an order dismissing the claims against the individual respondents and dismissing the ninth and fifteenth causes of action is granted solely to the extent of dismissing the petition as against the individual respondents in their individual and official capacities and dismissing the fourteenth cause of action; and it is further

ORDERED that the respondents are directed to serve and file their answer to the portions of the petition that have not been dismissed herein, and to file a certified return, within 10 days of service of a copy of this order with notice of entry; and it is further

ORDERED that pursuant to CPLR §7804 [f], any party may re-notice this matter for hearing upon appropriate notice.

This hybrid CPLR Article 78 proceeding and plenary action for declaratory relief arose from the petitioners' pursuit of the approvals required to develop a parcel of property (hereinafter subject parcel) located on the north side of School House Lane at its intersection with Griffing Street in the hamlet of Cutchogue, Town of Southold (hereinafter Town), Suffolk County, New York (hereinafter Cutchogue). The approximately 45.99 acre parcel is the largest of four other similarly situated undeveloped parcels in the Town Hamlet Density (HD) Residential District, which allows multiple dwellings and townhouses. The owner of said parcel, NOCRO, Ltd. (hereinafter NOCRO), and the successor by assignment of the contract vendee of said parcel, The Heritage at Cutchogue, LLC (hereinafter Heritage), have been attempting since June 2002 to obtain site plan approval for the development of a mixed residential housing plan.

In their petition, the petitioners allege that their original 202 unit site plan application was never processed by the Town despite their request for a waiver in August 2004, due to a Town-wide moratorium on consideration of such applications that continued until February 2005. According to the petitioners, in March 2006 the Town Board amended the restrictions of the Hamlet Density (HD) Residential District to include one family detached dwellings and two family dwellings as permitted uses.

The petitioners allege that they revised their application to propose 139 detached residential units ranging in size from 2,305 square feet to 2,738 square feet, 14 designated as "affordable," for persons 55 years of age or older, and submitted it to the Town Planning Board (hereinafter Planning Board) in August 2006 after discussions with Town Board member Scott A. Russell (hereinafter Russell), then Town Supervisor, who allegedly stated his interest in a suitable living unit for his mother and that the petitioners' units were too large and expensive for her, and Town Board member Thomas H. Wickham (hereinafter Wickham), both of whom purportedly indicated that they would not accept the original plan due to its size and price range.

In December 2006 the Planning Board initiated a coordinated State Environmental Quality Review Act (hereinafter SEQRA) review of the application as the lead agency under SEQRA. The petitioners allege that following one or more private meetings, held allegedly at the behest of Russell, between the Town's Principal Planner and public opponents of the application, the Planning Board went against its environmental consultant's finding of a negative declaration and in July 2007 designated said application as a "Type I" action and issued a positive declaration requiring the preparation of a full environmental impact statement.

Heritage submitted copies of its proposed Draft Environmental Impact Statement (hereinafter DEIS) to the Town's Planning Department in December 2007. The petitioners allege that opponents of their site plan application appeared at several Town Board meetings starting in January 2008 to urge the Town Board to take steps to prevent its approval or the subject parcel from being developed including imposition of a further moratorium, acquisition of the parcel and Town Zoning Code modifications.

According to the petitioners, since January 2006 the subject parcel had been listed by the Town as a parcel eligible for preservation due to its open space and agricultural character and in January 2008 Russell allegedly contacted the Town's Land Preservation Coordinator on the possible acquisition of the subject parcel and Town Board member Albert J. Krupski, Jr. (hereinafter Krupski), liaison to the Town's Land Preservation Committee, indicated at a Town Board meeting that he would raise the topic of possible acquisition of the subject parcel at the next committee meeting. Subsequently, the petitioners received a letter from the Town's Land Preservation Coordinator exploring preservation options for the subject parcel and Russell spoke to Heritage concerning purchase by the Town of a portion of the subject parcel as vacant farmland but the petitioners were not interested.

On March 10, 2008 the Planning Board allegedly adopted a resolution that the DEIS was inadequate and required revision. The petitioners point out that the next day at a Town Board meeting Russell allegedly stated that it was his "goal to scale and to shape" the subject parcel "into something along the size and scale of Founders Village" to meet the needs of local seniors, many of whom had told him that they wanted to see something they could afford and that the Heritage project fell short due to its price range. The petitioners point out that the Founders Village development has 92 units on approximately 23 acres with a development density of 4 units per acre, substantially denser than the Heritage project which proposes approximately 3 units per acre.

A revised proposed DEIS submitted by Heritage to the Town's Planning Department in May 2008 was again allegedly rejected by the Planning Board in June 2008 as inadequate and a further revised proposed DEIS was submitted in September 2008. At its October 21, 2008 meeting, the Town Board adopted resolutions allegedly classifying each of three proposed Local Laws that had the effect of modifying the Town Code concerning residential site plan regulations by, among other things, changing setbacks and buffers, limiting the size of proposed dwelling units and imposing mandatory "clustering" requirements. By December 2008 the Town Board had allegedly amended two of the three proposed Local Laws, one relating to design standards and regulations for residential site plans and another relating to zoning amendments limiting the size of dwelling units in the Hamlet Business (HB) and Hamlet Density (HD) Districts.

Heritage submitted another revised DEIS in January 2009 and the Planning Board's report allegedly indicated that said DEIS was complete and adequate for public review. The petitioners allege that the Chairwoman of the Planning Board, Jerilyn B. Woodhouse (hereinafter Woodhouse) indicated in a memo, dated January 6, 2009, to all Town Board members that the Planning Board had reviewed the proposed Local Laws whose intent was "to provide for some moderate-size housing in the Town to balance what appears to be the predominant trend of building large homes to the exclusion of any moderate-sizes."

Then, on January 20, 2009, the Town Board adopted three resolutions that enacted said three Local Laws, known as Local Laws Nos. 1, 2 and 3 of the year 2009. Said Local Laws were filed with the New York Secretary of State on February 2, 2009. The Local Laws statement of legislative intent allegedly indicated that two proposed projects whose site plan applications were currently before the Planning Board, one in Cutchogue and another in the hamlet of Southold, would yield a significant change in the character of the hamlets if approved in their present form

and that the Cutchogue project contained the second-largest number of residential units proposed in a single development in the Town's recent memory and that its impact on the existing community and character of the hamlet was likely to be profound.

By letter, dated February 18, 2009, to Heritage's counsel, the Town's Planning Director indicated that two of the three newly enacted Local Laws applied to Heritage's site plan application which in its current form did not meet the new Town Code, and that if Heritage wished to proceed, it could submit a new or amended application.

The petitioners commenced this hybrid CPLR Article 78 proceeding on May 15, 2009 against the Town Board, the Planning Board, their individual members and the Town alleging fifteen causes of action which include violations of procedural and substantive due process rights and the petitioners' rights to equal protection and a taking of their property without just compensation. The petitioners argue that said Town Code modifications created by the three Local Laws specifically targeted their site plan application because, despite the expressed legislative intent, the Local Laws had no effect on lands in the Hamlet Business (HB) zoning use district such as the proposed 27 unit Southold project. The petitioners further argue that the Local Laws rendered their application incapable of approval, were intended to appease persons opposed to the application and to compel the petitioners to leave the subject parcel undeveloped or to sell all or part of the subject parcel to the Town or to develop the subject parcel solely with moderately sized and priced housing. The petitioners emphasize that they cannot realize a reasonable return on their investments with the limited livable floor area and other restrictions imposed by the Local Laws.

The respondents now bring a pre-answer motion to dismiss the claims against the individual respondents in their personal capacities as they possess absolute and qualified immunity and a failure to state a claim and in their official capacities based on duplication of claims. The respondents also move to dismiss the ninth and fifteenth causes of action for reasons of statute of limitations and laches.

A CPLR Article 78 proceeding is the proper vehicle for seeking review of the procedures followed in the adoption of a statute, law, or ordinance (*see*, ***Save the Pine Bush v City of Albany***, 70 NY2d 193, 202, 518 NYS2d 943 [1987];*see also*, ***Highland Hall Apartments, LLC v New York State Div. of Hous. and Community Renewal***, 66 AD3d 678, 681, 888 NYS2d 67 [2nd Dept 2009]). However, where the substance of the law, "its wisdom and merit" (***Voelckers v Guelli***, 58 NY2d 170, 177, 460 NYS2d 8 [1983]), or its constitutionality, is challenged, then the proper procedure is to commence an action for a declaratory judgment (*see*, ***New York City Health & Hosps. Corp. v McBarnette***, 84 NY2d 194, 616 NYS2d 1 [1994]; ***P & N Tiffany Props., Inc. v Village of Tuckahoe***, 33 AD3d 61, 64, 817 NYS2d 345 [2nd Dept 2006]; *see also*, ***Highland Hall Apartments, LLC v New York State Div. of Hous. and Community Renewal***, 66 AD3d at 681).

On a motion to dismiss pursuant to CPLR §3211 and §7804 (f) in a hybrid proceeding and action, the petition-complaint alone must be considered, and all of its allegations are deemed true and afforded the benefit of every favorable inference (***Bloodgood v Town of Huntington***, 58 AD3d 619, 621, 871 NYS2d 644 [2nd Dept 2009]; *see*, ***1300 Franklin Ave. Members, LLC v***

Board of Trustees of Inc. Vil. of Garden City, 62 AD3d 1004, 880 NYS2d 133 [2nd Dept 2009]). Moreover, on a motion to dismiss a declaratory judgment action for legal insufficiency, "the test is not whether a party will succeed in getting a declaration of rights in accordance with a theory or contention advanced, but whether '[t]he allegations of the complaint * * * when considered as true, demonstrate the existence of a bona fide justiciable controversy which should be settled'" (***Schulz v New York State Legislature***, 230 AD2d 578, 582, 660 NYS2d 155 [3rd Dept 1997], *lv denied* 95 NY2d 769, 722 NYS2d 473 [2000], *quoting* ***Sysco Corp. v Town of Hempstead***, 133 AD2d 751, 751, 520 NYS2d 40 [2nd Dept 1987]). The Court must also accept as true all factual submissions made in opposition to the dismissal motion (*see*, ***Wohlgemuth v Lang Const., LLC***, 18 AD3d 650, 795 NYS2d 634 [2nd Dept 2005]).

Only two causes of action in the petition, the thirteen and fourteenth, assert claims against the individual respondents and said causes of action seek compensatory and punitive damages for violations under 42 USC § 1983. The thirteenth cause of action alleges violation of 42 USC § 1983 by the individual respondents in acting outside of their legislative capacities in their adoption of the subject Local Laws that specifically targeted and affected the petitioners, the subject parcel and Heritage's long pending site plan application and whose conduct was driven by bad motive or intent towards the petitioners in retaliation for the petitioners' exercise of their First Amendment rights under the United States Constitution.

42 USC § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ***, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ..."

"In the land-use context, 42 USC § 1983 protects against municipal actions that violate a property owner's rights to due process, equal protection of the laws and just compensation for the taking of property under the Fifth and Fourteenth Amendments to the United States Constitution" (***Bower Assocs. v Town of Pleasant Valley***, 2 NY3d 617, 626, 781 NYS2d 240 [2004], *citing* ***Town of Orangetown v Magee***, 88 NY2d 41, 49, 643 NYS2d 21 [1996]). However, "42 USC § 1983 is not simply an additional vehicle for judicial review of land-use determinations" (***Bower Assocs. v Town of Pleasant Valley***, 2 NY3d at 627).

To state a claim under the Equal Protection Clause of the United States Constitution a plaintiff must allege that: (1) compared with others similarly situated, the plaintiff was selectively adversely treated; and (2) such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith or intent to injure a person (*see*, ***Miner v Clinton County***, 541 F3d 464, 474 [2nd Cir 2008]; ***Bizzarro v Miranda***, 394 F3d 82, 86 [2d Cir 2005]; *see also*, ***Seymour's Boatyard, Inc. v Town of Huntington***, 2009 WL 1514610, *7 [ED NY 2009]). Alternatively, instead of alleging that the selective treatment was based on an impermissible consideration, a plaintiff may establish that there was no rational basis for the selective treatment (*see*, ***Village of Willowbrook v Olech***, 528 US 562, 564, 120 S Ct 1073 [2000]; *see also*, ***Seymour's Boatyard, Inc. v Town of Huntington***,

2009 WL 1514610, *7 [ED NY 2009]). Such a claim is commonly referred to as a "class of one" equal protection claim (*id.*).

The "rights to complain to public officials and to seek administrative and judicial relief from their actions are protected by the First Amendment" (***Dougherty v Town of North Hempstead Bd. of Zoning Appeals***, 282 F 3d 83, 91 [2nd Cir 2002]). Here, the petitioners allege that their project was singled out from the other similarly situated project in the Town because the petitioners exercised their rights to free speech under the First Amendment to the United States Constitution and have adequately pleaded their thirteenth cause of action for violation of equal protection of the laws (*see*, ***Sonne v Board of Trustees of Vil. of Suffern***, 67 AD3d at 204).

The Court notes that a suit against a municipal officer in his official capacity is functionally equivalent to a suit against the entity of which the officer is an agent (*see*, ***Orange v County of Suffolk***, 830 F Supp 701, 706 [ED NY 1993], *citing* ***Brandon v Holt***, 469 US 464, 471-72, 105 S Ct 873, 877-78, 83 [1985]; ***Kentucky v Graham***, 473 US 159, 166, 105 S Ct 3099, 3105 [1985]). Therefore, it would be redundant to allow the suit to proceed against the Town Board and the Planning Board as well as against the individual respondents in their official capacities (*see*, ***Orange v County of Suffolk***, 830 F Supp at 707). Inasmuch as the petitioners have a 42 UCS § 1983 cause of action against the Town Board and the Planning Board, their claims against the individual respondents in their official capacities are dismissed (*see*, *id.*; *see also*, ***Castanza v Town of Brookhaven***, ___ F Supp 2d ___, 2010 WL 1049238 [ED NY 2010]).

In a 42 USC § 1983 claim, a petitioner must demonstrate personal involvement of the individual respondents in the alleged constitutional deprivations (*see*, ***McKinnon v Patterson***, 568 F 2d 930, 934 [2nd Cir 1977]). Immunity, either absolute or qualified, is a personal defense that is available only when officials are sued in their individual capacities (*see*, ***Almonte v City of Long Beach***, 478 F3d 100, 106 [2nd Cir 2007]). Under the United States Supreme Court's functional test of absolute legislative immunity, whether immunity attaches turns not on the official's identity, or even on the official's motive or intent, but on the nature of the act in question (*id.*). More specifically, legislative immunity shields an official from liability if the act in question was undertaken " 'in the sphere of legitimate legislative activity' " (*id. quoting* ***Bogan v Scott-Harris***, 523 US 44, 54, 118 SCt 966 [1998]). Local legislators, like their counterparts on the state and regional levels, are entitled to absolute immunity for their legislative activities (*id.*; *see also*, ***Bogan v Scott-Harris***, 523 US at 49).

Legislative immunity is not limited to the casting of a vote on a resolution or bill; it covers all aspects of the legislative process, including the discussions held and alliances struck regarding a legislative matter in anticipation of a formal vote and meetings with people outside the legislature (*see*, ***Almonte v City of Long Beach***, 478 F3d at 107). That the discussions and agreements occurred in secret does not strip these activities of their legislative function (*id.*). However, courts have distinguished between situations where a single issue relevant to a single individual is resolved and a "'broad, prospective policymaking that is characteristic of legislative action'" (*id.* at 108 *citing* ***Harhay v Town of Ellington Bd. of Educ.***, 323 F3d 206, 211 [2nd Cir 2003]; *see*, ***Ruston v Town Bd. for Town of Skaneateles***, 2009 WL 3199194, *4 [ND NY 2009]).

Here, the thirteenth cause of action is limited to the legislative activity of the Town Board

and does not specifically mention the individual Planning Board respondents. Inasmuch as the individual Planning Board respondents were not voting members of the Town Board and, thus, were not personally involved in the enactment of the alleged unconstitutional legislation, the thirteenth cause of action is dismissed as against the individual Planning Board respondents for lack of personal involvement (*see*, ***Ruston v Town Bd. for Town of Skaneateles***, 2009 WL 3199194, *5 [ND NY 2009]).

Next, the Court notes that the petitioners have failed to allege any specific facts indicating how the respondent Town Board members Louisa P. Evans, William P. Ruland and Vincent M. Orlando may have been personally involved in the alleged constitutional violation other than in voting to enact said legislation. Inasmuch as the petitioners' thirteenth cause of action alleges that the Town Board members' constitutional violation occurred through the voting to enact said legislation and the adoption of said legislation, then the individual Town Board members' actions were legislative in nature, irrespective of their motives, and as such they are immune from 42 USC §1983 liability (*see*, ***Clark v City of Oswego***, 2007 WL 925724 [ND NY 2007]). In addition, the alleged statements by the respondent Town Board members Russell and Wickham that they would not vote for the petitioners' project due to its size and unit cost and by the respondent Town Board member Krupski concerning preservation were made "within the sphere of legitimate legislative activity" and related to potential legislation (*see*, ***Savoy of Newburgh, Inc. v City of Newburgh***, 242 Fed Appx 716, 720 [2nd Cir 2007];*see also*, ***Almonte v City of Long Beach***, 478 F3d 100 [2nd Cir 2007]). Therefore, the thirteenth cause of action is dismissed as against the respondent Town Board members in their individual capacities (*see*, ***Christian v Town of Riga***, 649 F Supp2d 84, 103-104 [WDNY 2009]; *see also*, ***Castanza v Town of Brookhaven***, ___ F Supp 2d ___, 2010 WL 1049238 [ED NY 2010]). Since said respondents are entitled to absolute legislative immunity in this case, the Court need not consider the respondents' assertion of qualified immunity (*see*, ***Stepien v Schaubert***, 2010 WL 1875763, *8 n11 [WD NY 2010]).

The fourteenth cause of action alleges that all of the respondents entered into an agreement with members of the public opposed to Heritage's site plan application to conspire and act in concert to prevent, delay and ultimately render the site plan application on the subject parcel incapable of being approved thereby denying Heritage's rights to equal protection of the laws in violation of 42 USC § 1983.

"In order to survive a motion to dismiss on a § 1983 conspiracy claim, the plaintiff must allege (1) an agreement between two or more state actors, (2) concerted acts to inflict an unconstitutional injury, and (3) an overt act in furtherance of the goal" (***Carmody v City of New York***, 2006 WL 1283125, *16 [SD NY 2006], *citing* ***Ciambriello v County of Nassau***, 292 F3d 307, 324-335 [2nd Cir 2002]; *see*, ***Crippen v Town of Hempstead***, 2009 WL 803117, *11 [ED NY 2009]). Vague and conclusory allegations that defendants have engaged in a conspiracy must be dismissed (*see*, ***Ciambriello v County of Nassau***, 292 F3d at 325; *see also*, ***Crippen v Town of Hempstead***, 2009 WL 803117, *11 [ED NY 2009]). "A plaintiff is not required to list the place and date of defendants['] meetings and the summary of their conversations when he pleads conspiracy, but the pleadings must present facts tending to show agreement and concerted action" (***Fisk v Letterman***, 401 F Supp2d 362, 376 [SDNY 2005] [citations and quotations omitted]; *see*, ***Crippen v Town of Hempstead***, 2009 WL 803117, *11 [ED NY 2009]).

Here, the fourteenth cause of action contains conclusory and general allegations of an agreement and a conspiracy and is insufficient to state a cause of action pursuant to 42 USC § 1983 (*see*, ***Scarfone v Village of Ossining***, 23 AD3d 540, 806 NYS2d 604 [2nd Dept 2005]; *see also*, ***Morpurgo v Incorporated Village of Sag Harbor***, ___ F Supp2d ___, 2010 WL 889778, *16 [ED NY Mar 05, 2010]). In addition, the petitioners are not entitled to discovery, which they request in their opposition papers, to ascertain whether facts exist to support a conspiracy cause of action (*see generally*, ***Houlihan-Parnes, Realtors v Cantor, Fitzgerald & Co., Inc.***, 58 AD2d 629, 395 NYS2d 684 [2nd Dept 1977]). Therefore, the fourteenth cause of action is dismissed in its entirety.

The ninth cause of action alleges in effect that the Town's two and a half year moratorium and the Town Board's enactment of the 2009 Local Laws severely restricted the subject parcel's development potential and were intended to depress the subject parcel's value to facilitate its acquisition by the Town, amounting to a "bad faith" taking of the subject property in violation of the State Constitution and the petitioners solely seek damages.

The respondents assert that the ninth cause of action challenging the 2004 moratorium is barred by the applicable four month statute of limitations of CPLR §217 (1) and laches. They point out that the petitioners did not seek judicial review of the denial of a waiver of the moratorium and that the time to do so has expired.

The petitioners contend in opposition that there was never any final formal determination by the Town Board on their waiver request so that the statute of limitations never began to run. They submit the results of a Freedom of Information Law (FOIL) request which include a letter, dated September 17, 2004, from Woodhouse, to the Town Clerk indicating that the Planning Board had reviewed the waiver request and recommended that the Town Board deny the request and that, although the Planning Board found that the proposed project was in keeping with the zoning district in which it was located, the Town Board had adopted a moratorium with the intent of addressing and implementing comprehensive initiatives with respect to residential projects of this kind.

It is the gravamen of the cause of action that determines the applicable statute of limitations (***Western Elec. Co. v Brenner***, 41 NY2d 291, 293, 392 NYS2d 409 [1977]). Inasmuch as the petitioners' ninth cause of action seeks damages based on a violation of the State Constitution, CPLR §213 (1) is applicable (*see*, ***Pauk v Board of Trustees of City University of New York***, 119 Misc2d 663, 464 NYS2d 953 [Sup Ct, New York County 1983], *affd as mod*,111 AD2d 17, 488 NYS2d 685 [1st Dept 1985], *affd* 68 NY2d 702, 506 NYS2d 308 [1986]). Therefore, the ninth cause of action is timely under the six year statute of limitations of CPLR §213 (1).

The gravamen of the fifteenth cause of action is that the respondents' conduct in intentionally delaying for more than six years Heritage's proposed development of the subject parcel in accordance with the Hamlet District (HD) Residential zoning classification constituted bad faith, oppression and malice such that there exists "special facts" under which Heritage should be allowed to develop the subject parcel in accordance with the zoning regulations that applied prior to the adoption of the 2009 Local Laws and the petitioners seek a declaration to the effect that they are entitled to develop the subject parcel and also seek to compel the Town and the Planning Board to complete environmental review of and to process their pending site plan application in

accordance with the zoning regulations that applied prior to the adoption of the Local Laws of 2009.

According to the respondents, the fifteenth cause of action, to the extent that it challenges the 2007 positive SEQRA declaration, is untimely and is barred by the applicable CPLR §217 (1) four month statute of limitations and laches. The respondents assert that the petitioners never challenged the issuance of the positive SEQRA declaration. In opposition, the petitioners point out that there is no specific claim regarding the 2007 positive SEQRA declaration in the fifteenth cause of action.

In order to determine the statute of limitations applicable to a particular declaratory judgment action, the Court must "examine the substance of that action to identify the relationship out of which the claim arises and the relief sought" (***Solnick v Whalen***, 49 NY2d 224, 229, 425 NYS2d 68 [1980]; *see*, ***Save the Pine Bush v City of Albany***, 70 NY2d at 202). If the Court determines that the underlying dispute can be or could have been resolved through a form of action or proceeding for which a specific limitation period is statutorily provided, that limitation period governs the declaratory judgment action (***Press v County of Monroe***, 50 NY2d 695, 701, 431 NYS2d 394 [1980]; ***Solnick v Whalen***, 49 NY2d at 230;*see*, ***Save the Pine Bush v City of Albany***, 70 NY2d at 202; ***Koerner v State of New York***, 62 NY2d 442, 446-447, 478 NYS2d 584 [1984]).

Given that the fifteenth cause of action seeks declaratory judgment and CPLR Article 78 relief, the Court finds that " 'the underlying dispute [is essentially a writ of mandamus against respondents. Since it] * * * could have been resolved through a [CPLR Article 78 proceeding] for which a specific limitation period is statutorily provided, that limitation period [must] govern[ ] the declaratory judgment action' " (*see*, ***Powell v Town of Coeymans***, 238 AD2d 788, 789, 656 NYS2d 460, 461 [3rd Dept 1997], *quoting* ***Save the Pine Bush v City of Albany***, 70 NY2d at 202; *see*, ***Slimrod Ventures v Town Bd. of Town of Amsterdam***, 243 AD2d 944, 947, 663 NYS2d 370 [3rd Dept 1997]). Therefore, the CPLR §217 (1) four month statute of limitations period applies to the fifteenth cause of action (*see*, CPLR 217 [1]; ***Zupa v Zoning Bd. of Appeals of Town of Southold***, 64 AD3d 723, 725, 883 NYS2d 139 [2nd Dept 2009]).

The fifteenth cause of action does not seek review of a final and binding determination, such as the 2007 positive SEQRA declaration, nor have the petitioners formally demanded that the Town and the Planning Board perform their duties in processing their pending site plan application. The petitioners never received a final determination on their site plan application and allege that following the adoption of the 2009 Local Laws, the Planning Board failed and refused to continue the review or processing of the site plan application. Therefore, whether this claim is ripe for judicial review must be examined.

Whether the agency action is ripe for review depends upon several considerations (***Gordon v Rush***, 100 NY2d 236, 242, 762 NYS2d 18 [2003]). First, the action must "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process" (***Essex County v Zagata***, 91 NY2d 447, 453, 672 NYS2d 281[1998], *quoting* ***Chicago & S. Air Lines v Waterman S.S. Corp.***, 333 US 103, 113, 68 S Ct 431[1948]; *see*, ***Gordon v Rush***, 100 NY2d at 242). In other words, " 'a pragmatic evaluation [must be made] of whether the "decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete

injury" ' " (***Essex County v Zagata***, 91 NY2d at 453 [citations omitted];*see*, ***Gordon v Rush***, 100 NY2d at 242). Further, there must be a finding that the apparent harm inflicted by the action "may not be 'prevented or significantly ameliorated by further administrative action or by steps available to the complaining party' " (*Id.*).

The fifteenth cause of action is not premature inasmuch as the petitioners allegedly suffered actual and concrete harm, and thus became aggrieved, when the 2009 Local Laws were enacted, at which point the Town Board and Planning Board committed themselves to a definite course of future action (*see*, ***Village of Chestnut Ridge v Town of Ramapo***, 45 AD3d 74, 95, 841 NYS2d 321 [2nd Dept 2007], *lv to appeal dismissed* 12 NY3d 793, 879 NYS2d 38 [2009]; ***County of Orange v Village of Kiryas Joel***, 44 AD3d 765, 767, 844 NYS2d 57 [2nd Dept 2007]; *see also*, ***Eadie v Town Bd. of Town of North Greenbush***, 7 NY3d 306, 821 NYS2d 142 [2006]; ***Save Pine Bush, Inc. v City of Albany***, 70 NY2d 193, 518 NYS2d 943 [1987]). Also, this proceeding is not barred by laches (*see*, ***Szurnicki v Janisch***, 202 AD2d 1071, 612 NYS2d 983 [4th Dept 1994]). Moreover, to the extent that the respondents are arguing that the petitioners failed to exhaust their administrative remedies, "[t]he exhaustion rule ... is not inflexible" and "need not be followed ... when an agency's action is challenged as either unconstitutional wholly beyond its grant of power ... or when resort to an administrative remedy would be futile" (see, ***Sonne v Board of Trustees of Vil. of Suffern***, 67 AD3d at 202, *citing* ***Watergate II Apartments v Buffalo Sewer Auth.***, 46 NY2d 52, 57, 412 NYS2d 821 [1978]).

Accordingly, the motion to dismiss is granted solely with respect to dismissal of the petition as against the individual respondents in their individual and official capacities and dismissal of the fourteenth cause of action.

Dated: June 15, 2010

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**