Short Form Order

COPY

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Edward Johann, Third House Nature Center, Concerned Citizens of the Montauk, Inc. and Roger Feit,

Petitioners,

-against-

The Town of East Hampton, William Wilkinson, Theresa Quigley, Julia Prince, Dominick Stanzione and Peter Hammerle, in their official capacities as members of the East Hampton Town Board and East Hampton Town Department of Parks and Recreation as an interested party,

Respondents.

Clerk of the Court

Motion Sequence No.: 002; MOT.D
Motion Date: 12/14/10
Submitted: 12/22/10

Index No.: 36910/2010

Attorney for Plaintiff:

James S. Henry, Esq.
P.O. Box 2668
Sag Harbor, NY 11963

Attorney for Defendants:

Daniel L. Adams, Esq.
159 Pantigo Road
East Hampton, NY 11937

Attorney for Respondents Town of East Hampton, William Wilkinson, Theresa Quigley, Julia Prince, Dominick Stanzione and Peter Hammerle the East Hampton Town Board and the East Hampton Town Department of Parks and Recreation:

MacLachlan & Eagan LLP
241 Pantigo Road
East Hampton, NY 11937

Upon the following papers numbered 1 to 55 read upon this motion to dismiss: Notice of Motion and supporting papers, 1 - 14; Answering Affidavits and supporting papers, 15 - 21; Replying Affidavits and supporting papers, 22 - 23; Other, Sur-Reply 24 - 25, Notice of Petition and Petition 26 - 55.

In this hybrid CPLR Article 78 proceeding and action for declaratory relief the petitioners seek judgment pursuant to CPLR Article 78 reversing, annulling and setting aside and declaring void the resolution of the Town Board of the Town of East Hampton (Town)[1] adopted June 3, 2010, which deemed certain property owned by the Town to be surplus and authorized "all reasonable action to offer the property for sale." The petition sets forth four causes of action. In their first cause of action, the petitioners seek judgment declaring the attempt to sell the property without approval of the New York State Legislature a violation of the "public trust doctrine," and an order enjoining the sale, requiring the Town to reopen the property as a park, and for other relief. The petitioners further allege in their second, third and fourth causes of action respectively, that the subject resolution was adopted in violation of the New York State Environmental Quality Control Act ("SEQRA") and its implementing regulations at 6 NYCRR 617; the New York State Public Officers Law ("Open Meetings Law"); and the Town's Local Waterfront Revitalization Program ("LWRP").

The Town is the owner of approximately 3.99 acres of property located in a residential zoning district at 128 Second House Road, Montauk, East Hampton, New York (premises), and improved with a single family dwelling and accessory structures. The premises includes approximately 1200 feet of waterfront along a body of fresh water known as Fort Pond. The Town acquired the premises on January 27, 2003, pursuant to Resolution 2002-1138 adopted on September 10, 2002, which indicated that the purchase was for the purpose of "[providing] public access to the pond and could be used for a variety of municipal purposes," and "general municipal use which may include park use such as a beach or picnic area on Fort Pond." In addition, the resolution deemed the purchase an unlisted action pursuant to SEQRA.

Thereafter, the Town obtained financing through the issuance of two municipal bonds to improve the premises. On or about September 16, 2005, petitioner Third House Nature Center (THNC) took possession of the structures on the premises pursuant to a written license agreement (license) with the Town. Pursuant to the license, THNC enjoyed a non-exclusive right to operate the premises for the benefit of the residents of Montauk and the Town of East Hampton and to establish on-site programs for the public.

On June 3, 2010, the Town Board, consisting of the individual respondents named herein, adopted Resolution 2010-527 which states that the premises "is hereby deemed surplus by the Board and not needed for municipal purposes, and the Town is considering the sale of such surplus property," and authorizes the Supervisor "to take all reasonable action to offer the property for sale." The Board further resolved that all proposals would be subject to its approval and that of a permissive referendum. At a Town Board meeting held on June 17, 2010, petitioner Edward Johann, president of THNC, along with other members of the community objected to the proposed sale of the premises. On July 1, 2010, the Town's deputy attorney wrote to THNC purportedly terminating the license effective 90 days thereafter. On or about July 7, 2010, the Town locked the premises

---

[1] For the purposes of this motion, the Court shall use the term "Town" to represent the respondents collectively.

preventing the public from entering and prohibiting THNC, petitioner Concerned Citizens of Montauk (CCOM) and petitioner Roger Feit (FEIT) from removing their personal property from the site.

The petitioners commenced this action alleging that the premises has been either expressly or impliedly dedicated as a park, which cannot be alienated without approval of the New York State Legislature, and seeking, *inter alia*, to reverse the Town's decision to close the premises to the public. The Town now moves to dismiss the petition on the grounds that the petitioners lack standing, that the petition fails to state a cause of action, and that the challenged resolution is not a final determination under SEQRA and LWRP.

Initially, the respondents raise an objection regarding the standing of the petitioners to bring this proceeding. "The standing of a party to seek judicial review of a particular claim or controversy is a threshold matter which, once questioned, should ordinarily be resolved by the Court before the merits are reached" (Hoston v. New York State Department of Health, 203 AD2d 826 [3rd Dept., 1994], *citing* Society of Plastics Indus. v. County of Suffolk, 77 NY2d 761 [1991]; New York State Nurses Assn. v. Axelrod, 152 AD2d 888 [3rd Dept., 1989]). In determining standing, "[t]he 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 the action which casts the dispute 'in a form traditionally capable of judicial resolution.' " (Society of Plastic Indus. v. County of Suffolk, 77 NY2d 761 [1991]).

A review of the petition reveals that the petitioners have standing regarding their cause of action for declaratory judgment and a violation of the Open Meetings Law. Johann and Feit have set forth sufficient factual allegations that their use of the premises goes well beyond that of the general public and that, in the event the premises is found to be parkland, that they would "suffer direct harm, injury that is in some way different from that of the public at large" (Society of Plastic Indus. v. County of Suffolk, *id.*). Likewise, THNC and CCOM have met the requisites to establish organizational standing articulated by the Court of Appeals in Society of Plastics Industry, Inc., v. County of Suffolk, that is: (1) one or more of is members would have standing to sue; (2) the interests asserted are germane to its purposes so as to satisfy the Court that it is an appropriate representative of those interests; and (3) neither the asserted claim nor the appropriate relief requires the participation of the individual members.

In addition, this Court finds that the interests of justice require recognition of petitioners' standing. It is clear that the public interest would be subverted if no one were found to have standing to challenge the possible alienation of parkland (see, Roosevelt Island Residents Assn. v. Roosevelt Island Operating Corp., 7 Misc3d 1029[A] [Sup. Ct., New York County, 2005]; Committee to Preserve Brighton Beach v. Planning Commission of the City of New York, 259 AD2d 26 [1st Dept., 1999]). Under the totality of the circumstances, even if the petitioners had not established special injury they have properly plead standing herein (see, Tuck v. Heckscher, 65 Misc2d 1059 [Sup. Ct., New York County, 1971]).

Accordingly, the respondents' motion for an order dismissing the petition pursuant to CPLR §3211 (a) (3) is denied.

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 (see, Bloodgood v. Town of Huntington, 58 AD3d 619 [2nd Dept., 2009]; *see*, 1300 Franklin Ave. Members, LLC v. Board of Trustees of Inc. Vil. of Garden City, 62 AD3d 1004 [2nd Dept., 2009]). In addition, while a Court is required to assume the truth of the allegations set forth in the petition it must afford no consideration to the facts alleged in support of the motion (see, Matter of Federation of Mental Health Ctrs. v. DeBuono, 275 AD2d 557 [3rd Dept., 2000]; Matter of Ostrowski v. County of Erie, 245 AD2d 1091 [4th Dept., 1997]; Hondzinski v. County of Erie, 64 AD2d 864 [4th Dept., 1978]). 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 [3rd Dept., 1997], *quoting* Sysco Corp. v. Town of Hempstead, 133 AD2d 751 [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., 18 AD3d 650 [2nd Dept., 2005]).

Here, the petitioners have properly plead a cause of action for judgment declaring the premises parkland which may not be alienated without the approval of the New York State Legislature. "Dedicated park areas in New York State are impressed with a public trust, and their use for other than park purposes requires direct and specific approval by the State Legislature" (Matter of Jones v. Amicone, 27 AD3d 465 [2nd Dept., 2006]; *see*, Friends of Van Cortlandt Park v. City of New York, 95 NY2d 623 [2001]). Despite the lack of an express dedication, continuous use of a parcel as a public park or recreational area may impress that parcel with a public trust by implication, triggering the public trust doctrine and restricting a municipality's ability to sell or lease the parcel (see, 10 East Realty, LLC v. Incorporated Vil. of Valley Stream, 49 AD3d 764 [2nd Dept., 2008] *revd on other grounds* 12 NY3d 212 [2009]; Angiolillo v. Town of Greenburgh, 290 AD2d 1 [2nd Dept., 2001]). The petitioners set forth sufficient allegations in their petition, supported by sworn statements, that the premises may have been dedicated as parkland by implication.

The Open Meetings Law, Public Officers Law 103 (a), provides that "[e]very meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat." Public Officers Law 105 (1) states in part that "[u]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for ... the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof." Therefore, before a public meeting may be closed pursuant to the exception relied upon by respondents "it must first be shown that publicity

would substantially affect the value of the property" (Matter of Oneonta Star Div. of Ottaway Newspapers v. Board of Trustees of Oneonta School Dist., 66 AD2d 51 [3rd Dept., 1979]; *see*, Glens Falls Newspapers Inc. v. Solid Waste and Recycling Committee of Warren County Bd. of Supervisors, 195 AD2d 898 [3rd Dept., 1993]).

Here, there is no dispute that the Town voted to place the premises on the market pursuant to a vote taken in executive session. The petitioners have properly plead a failure by the Town Board to conduct said executive session pursuant to a majority vote taken in an open meeting and to show that publicity would substantially affect the value of the property. The petitioners have plead a proper cause of action (see, Matter of Oneonta Star Div. of Ottaway Newspapers v. Board of Trustees of Oneonta School Dist., 66 AD2d 51 [3rd Dept., 1979]) seeking CPLR article 78 review of the Town's decision to take action regarding the premises in executive session (see, Gordon v. Village of Monticello, 87 NY2d 124 [1995]; Csorny v. Shoreham-Wading River Cent. School Dist., 305 AD2d 83 [2nd Dept., 2003]).

Accordingly, the respondents' motion for an order dismissing the petition pursuant to CPLR §§3211 (a) (7) and CPLR 7804 (f) is denied.

The third and final branch of the respondents' motion seeks to dismiss the complaint on the ground that the challenged resolution is not a final determination under SEQRA, LWRP and the Open Meetings Law. A review of the East Hampton Town Code, Chapter 150, entitled the "Town of East Hampton Local Waterfront Revitalization Program Consistency Review Law" (LWRP) reveals that it mirrors SEQRA in regards to the issues discussed herein. Pursuant to SEQRA, "An agency action is final when the decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury" which could not have been "prevented, significantly ameliorated, or rendered moot by further administrative action or by steps available to the complaining party" (Matter of Jones v. Amicone, 27 AD3d 465 [2nd Dept., 2006] [internal quotation marks omitted]; see, Stop-The-Barge v. Cahill, 1 NY3d 218 [2003]; Matter of Essex County . Zagata , 91 NY2d 447 [1998].

It is clear that SEQRA requires an environmental review prior to the execution of contracts for specific proposals including the sale of municipal lands (see, Devitt v. Heimbach, 58 NY2d 925 [1983]). However, "[w]hether the agency action is ripe for review depends upon several considerations. First, the action must impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process. In other words, a pragmatic evaluation must be made of whether the decision has arrived at a definitive position on the issue that inflicts an actual, concrete injury. 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" (Gordon v. Rush, 100 NY2d 236 [2003], *quoting* Matter of Essex County v. Zagata , 91 NY2d 447 [1998]). Thus, if further agency proceedings might render the disputed issue moot or academic, then the agency position cannot be considered "definitive" or the injury "actual" or "concrete" (Matter of Essex County v. Zagata, *id.*). Where, as here, the Town has merely announced the solicitation of contract proposals prior to an environmental review, it has not

made a final determination under SEQRA (see, Nassau/Suffolk Neighborhood v. Town of Oyster Bay, 134 Misc2d 979 [Sup. Ct., Nassau County, 1987]). The respondents' contention that the Open Meetings Law requires a final determination in the vein of SEQRA and LWRP is without merit.

Accordingly, that branch of the respondents' motion which seeks to dismiss the complaint on the ground that the challenged resolution is not a final determination is granted to the extent that the second and fourth causes of action in the petition are dismissed. Given the circumstances, the Court dismisses the second and fourth causes of action without prejudice and without comment on the competing positions taken by the parties regarding the petitioners' standing to commence an Article 78 proceeding upon a final determination regarding the premises.

Based on the foregoing, it is

ORDERED that this motion by the respondents for an order pursuant to CPLR §3211 (a) (3), (7) and CPLR §7804 (f) dismissing the petition on the ground that the petitioners' claim for declaratory relief is improper, that the petitioners' claim for article 78 relief is not ripe, that the petitioners lack standing, and that the petition fails to state a cause of action, is granted to the extent that the second and fourth causes of action are dismissed without prejudice, and is otherwise denied; and it is further

ORDERED that the Town is directed to serve its answer to the petition within five days after service upon it of a copy of this order with notice of its entry, after which time any party may re-notice the matter for hearing pursuant to CPLR §7804 (f).

Dated: March 9, 2011

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**