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SHORT FORM ORDER

INDEX No. 11-29066

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

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 12-19-11 (#001)
MOTION DATE 3-15-12 (#002)
ADJ. DATE 3-15-12
Mot. Seq. # 001 - MD
002 - XMG; CASEDISP

In the Matter of the LONG ISLAND PINE BARRENS SOCIETY, INC., RICHARD AMPER, as Executive Director and as an individual, LONG ISLAND ENVIRONMENTAL VOTERS FORUM, INC., THOMAS CASEY and ROBERT MCGRATH, residents, taxpayers, property owners and voters, Plaintiffs, - against - COUNTY OF SUFFOLK, the SUFFOLK COUNTY LEGISLATURE, and STEVE LEVY, Defendants.	REGINA SELTZER, ESQ. Attorney for Plaintiffs 30 Brewster Lane Bellport, New York 11713 DENNIS M. COHEN, ESQ. Suffolk County Attorney By: Leonard G. Kapsalis, Esq. Attorney for Defendants 100 Veterans Memorial Highway P.O. Box 6100 Hauppauge, New York 11788-0099

Upon the following papers numbered 1 to 38 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers 16 - 36; Answering Affidavits and supporting papers 37 - 38; Replying Affidavits and supporting papers ___; Other ___; it is,

ORDERED that this motion by plaintiffs for an Order granting summary judgment in their favor is denied; and it is

ORDERED that this cross-motion by defendants for an Order granting summary judgment dismissing the complaint is granted.

Beginning in the 1970s, a series of laws and policies were adopted by New York State to protect approximately100,000 acres of undeveloped land in central Suffolk County that is part of a unique ecosystem known as the Long Island Pine Barrens, which is situated above the major zone of recharge

for Long Island's aquifer. The Long Island aquifer is the principal source of freshwater for residents in Suffolk and Nassau counties, and the highly porous soils of the Pine Barrens are crucial to the infiltration of precipitation from the surface to the groundwater system. As the permeability of the surface soil also means the area is vulnerable to contamination through pollution, the New York Legislature in 1987 adopted Environmental Conservation Law article 55, which designates the Pine Barrens area and other ecologically-sensitive areas on Long Island as special groundwater protection areas and mandates the creation of a comprehensive management plan to govern development in such areas (***Matter of Long Is. Pine Barrens Socy., Inc. v Planning Bd. of Town of Brookhaven***, 80 NY2d 500, 508-509, 591 NYS2d 892 [1992]). In 1987, as part of a coordinated effort to protect such area from development and contamination, the Suffolk County Legislature added Article XII, entitled Suffolk County Drinking Water Protection Program, to the Suffolk County Charter (*see* ***Matter of Long Is. Pine Barrens Socy., Inc. v Planning Bd. of Town of Brookhaven***, 80 NY2d 500, 591 NYS2d 892, *supra*). As relevant to the instant controversy, the program, repeatedly approved by voters through referenda measures placed on Suffolk County ballots during the period between 1987 and 2003, established a funding mechanism for certain specified environmental protection and tax mitigation efforts (Suffolk County Code § C 12-2). Briefly stated, under the Drinking Water Protection Program, an additional sales and use tax of ¼ of 1% is imposed by Suffolk County. The total revenues collected each calendar year on such tax are allocated in specific percentages for the acquisition of properties and development rights, water quality protection and land stewardship, county property tax reduction, and sewer tax rate stabilization, with the allocated revenues deposited into trust funds created for such purposes (Suffolk County Code § C 12-2).

In August of 2011, Suffolk County adopted Local Law 44-2011, which amended the Drinking Water Protection Program by permitting 62.5% of any monies in excess of a balance of $140 million held in the Suffolk County Sewer Assessment Fund during the fiscal years 2011, 2012 and 2013 to be used for sewer infrastructure and sewer treatment plants, and for the installation of residential and commercial enhanced nitrogen removal septic systems. The law further provides that "[t]hirty-seven and one-half percent (37.5%) of the 2011, 2012, and 2013 excess fund balance [in the Suffolk County Sewer Assessment Fund] shall be appropriated via duly approved resolutions to a reserve fund for bonded indebtedness established pursuant to § 6-h of the General Municipal Law or to a retirement contribution reserve fund established pursuant to § 6-r of the General Municipal Law (County Fund 420 and any successor fund)." Significantly, unlike past amendments to the Drinking Water Protection Program, which were submitted to County voters for approval by way of mandatory public referenda, Local Law 44-2011 was signed into law by the County Executive after the County Legislature adopted Resolution 625-2011, permitting the use of so-called "reserve-surpluses" in the Suffolk County Sewer Assessment Fund "to enhance sewer capacity and provide tax relief." Resolution 625-2011 provides, in relevant part, that a permissive referendum may be held on the law if, within sixty (60) days after its adoption, a petition protesting the law was filed with the Clerk of the County Legislature.

Subsequently, plaintiffs Long Island Pine Barrens Society, Inc., Long Island Environmental Voters Forum, Inc., Richard Amper, Thomas Casey and Robert McGrath commenced this action for judgments declaring Suffolk County Local Law 44-2011 is illegal and invalid, and that any allocation of funds in the Suffolk County Operating Budgets of 2011 and 2012, and in any future County operating

budgets, arising from the formula set forth in Local Law 44-2011 is illegal and invalid. The complaint also seeks judgment directing the Suffolk County Executive and the Suffolk County Legislature "to take all actions and to make all such budgetary adjustments as shall be necessary to conform the adopted 2011 Suffolk County Operating Budget, the 2012 Suffolk County Operating Budget and all future Suffolk County operating budgets . . . to Article XII of the Suffolk County Charter as adopted via mandatory public referendum." Plaintiffs assert that the 2011 local law amending the Drinking Water Protection Program was improperly adopted by the County in violation of voters' "vested rights to amendment only by mandatory [public] referendum," with such right to mandatory referendum allegedly set forth explicitly in Article XII of the Suffolk County Charter. Defendants County of Suffolk, Suffolk County Legislature, and the Suffolk County Executive (hereinafter collectively referred to as "the County") served an answer denying most of the allegations in the complaint and asserting various affirmative defenses, including lack of standing and failure to state a cause of action. Plaintiffs now move for an Order granting summary judgment in their favor on the complaint. The County opposes the motion, arguing, in part, that it must be denied, as the moving papers do not include a copy of the pleadings. The County also cross-moves for an Order dismissing the complaint on the grounds that Local Law 44-2011 was properly enacted without a public referendum, and that plaintiffs lack standing to maintain the instant action.

Plaintiffs' motion for summary judgment is denied. CPLR 3212 (b) requires that a motion for summary judgment be supported by copies of all of the pleadings filed in the action (*see* ***Sendor v Chervin***, 51 AD3d 1003, 857 NYS2d 500 [2d Dept 2008]; ***Matsyuk v Konkalipos***, 35 AD3d 675, 824 NYS2d 918 [2d Dept 2006]). Here, plaintiffs failed to submit copies of the pleadings with their moving papers.

The County's cross-motion for summary judgment is granted. Whether a party seeking relief "is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the onset of any litigation" (***Society of Plastics Indus. v County of Suffolk***, 77 NY2d 761, 769, 570 NYS2d 778 [1991]; *see* ***Dairylea Coop. v Walkley***, 38 NY2d 6, 377 NYS2d 451 [1975]). Pursuant to General Municipal Law § 51, a taxpayer may maintain an action against "[a]ll officers . . . and other persons acting, or who have acted for and on behalf of any county . . . to prevent any illegal official act on the part of any such officers . . . or other persons, or to prevent waste or injury to, or to restore and make good, any property, funds or estates or such county." A taxpayer action pursuant to General Municipal Law § 51, however, "lies only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes" (***Mesivta of Forest Hills Inst. v City of New York***, 58 NY2d 1014, 1016, 462 NYS2d 433 [1983], *quoting* ***Kaskel v Impellitteri***, 306 NY 73, 79, 115 NE2d 659 [1953]; *see* ***Godfrey v Spano***, 13 NY3d 358, 892 NYS2d 272 [2009]; *see also* ***Matter of Sanitation Garage Brooklyn Dists. 3 & 3A***, 32 AD3d 1031, 822 NYS2d 97 [2d Dept 2006]). Significantly, the mere failure to observe statutory provisions does not constitute the fraud or illegality necessary to maintain a taxpayer action under General Municipal Law § 51, as the law is intended to combat fraud and corruption committed by public officers or bodies (*see* ***Mesivta of Forest Hills Inst. v City of New York***, 58 NY2d 1014, 462 NYS2d 433; ***Kaskel v Impellitteri***, 306 NY 73, 115 NE2d 659; ***Matter of Resnick v Town of Canaan***, 38 AD3d 949, 832 NYS2d 102 [2d Dept 2007]; ***Beresford Apts. v City of New York***, 238 AD2d 218, 656 NYS2d

607 [1st Dept 1997]). "Any other construction would subject the discretionary action of all local officers and municipal bodies to review by the courts at the suit of taxpayers, a result which would burden the courts with litigation, without increasing the efficiency of local government" (***Talcott v City of Buffalo***, 125 NY 280, 288, 26 NE 263 [1891]).

Further, as relevant to the instant controversy, Article IX, section 1, subdivision h of the New York State Constitution provides that any amendment which abolishes or curtails "any power of an elective county officer" shall be subject to a permissive referendum. Likewise, Municipal Home Rule Law § 34 provides that no law adopted by a county legislature which "abolishes, curtails or transfers to another county officer or agency any power of an elective county officer . . . shall become effective in such county until at least sixty (60) days after its final enactment," so as to permit such a referendum.

Plaintiffs in this action do not allege waste, fraudulent acts or the use of public funds by County officials for an illegal purpose. Rather, they allege that in adopting Resolution 625-2011, which enacted Local Law 44-2011, "Suffolk County officials violated a solemn, moral and contractually-binding agreement with Suffolk voters" by amending the Drinking Water Protection Program without a public referendum. More particularly, plaintiffs assert, in part, that through prefaces to Local Law 17-1998 and Local Law 38-1989, which amended Suffolk County Charter § 4-6, the provision governing the submission of a proposed budget by the County Executive to the County Legislature, and "Section 7 of the preface to Article XII " (Local Law 35-1999), the County Legislature curtailed the power of subsequent County legislatures by requiring mandatory referenda to amend, repeal, modify or alter the Drinking Water Protection Program.

Here, it is undisputed that Resolution 625-2011 provided for a permissive referendum if a petition was properly filed with the Clerk of the County Legislature. Thus, Municipal Law § 51 does not authorize the individual plaintiffs, by virtue of their status as taxpayers, to compel judicial review of the County Legislature's alleged adoption of a local law in a manner consistent with Municipal Home Rule Law § 34, rather than by the mandatory referendum procedure approved by preceding legislatures in connection with prior amendments to the Drinking Water Protection Act (*see* ***Mesivta of Forest Hills Inst. v City of New York***, 58 NY2d 1014, 462 NYS2d 433; *cf.* ***Matter of Korn v Gulotta***, 72 NY2d 363, 534 NYS2d 108 [1988]).

Similarly, the organization plaintiffs lack standing to maintain this action challenging the 2011 amendment to the Drinking Water Protection Program. Initially, it is noted that plaintiffs do not claim standing on behalf of the Long Island Pine Barrens Society or the Long Island Voters Forum under Municipal Law § 51. Rather, they allege that the reputation and credibility of each organization will be harmed if the County Legislature is permitted to modify the Drinking Water Protection Program without a mandatory referendum.

To establish standing to maintain an action on behalf of its members, an organization must demonstrate that at least one of its members would have standing to sue, that the interests it asserts in the action are germane to its organizational purposes, and that the case would not require the participation of individual members (*see* ***New York State Assn. of Nurse Anesthetists v Novello***, 2 NY3d 207, 778

NYS2d 123 [2004]; ***Rudder v Pataki***, 93 NY2d 273, 689 NYS2d 701 [1999]; ***Matter of Dental Socy. of State of N.Y. v Carey***, 61 NY2d 330, 474 NYS2d 262 [1984]). The Long Island Pine Barrens Society and the Long Island Environmental Voters Forum have failed to show that one or more of their members have been or will be harmed by the failure to submit to a mandatory referendum the County Legislature's proposal to amend the Drinking Water Protection Act to permit the use of so-called excess monies in the Suffolk County Sewer Assessment Fund for other purposes (*see* ***Rudder v Pataki***, 93 NY2d 273, 689 NYS2d 701; ***Matter of Dental Socy. of State of N.Y. v Carey***, 61 NY2d 330, 474 NYS2d 262). It is noted that the conclusory affidavits of Richard Amper, Thomas Casey, and Robert McGrath, which allege simply that their reputations as environmentalists and their ability "to enjoy the natural resources of Long Island" have been harmed by the County's failure to hold a public referendum on the change to the Drinking Water Protection Program at issue, are insufficient to show actual injury warranting judicial intervention in the legislative process (*see* ***New York State Assn. of Nurse Anesthetists v Novello***, 2 NY3d 207, 778 NYS2d 123; ***Rudder v Pataki***, 93 NY2d 273, 689 NYS2d 701; *cf.* ***Matter of New York Propane Gas Assn. v New York State Dept. of State***, 17 AD3d 915, 793 NYS2d 601 [3d Dept 2005]). Moreover, they have failed to show how the interest advanced in this action, namely requiring the County to submit the amendment to a mandatory public referendum, as opposed to a permissive referendum, is germane to the Pine Barrens Society's purposes as a not-for-profit environmental education and advocacy organization and the Long Island Environmental Voter's Forum's purposes as a political action committee (*see* ***Society of Plastics Indus. v County of Suffolk***, 77 NY2d 761, 570 NYS2d 778). Finally, the affidavit of Amper, Executive Director of the Long Island Pine Barrens Society, is insufficient to establish organizational standing, as it does not demonstrate concrete harm to the organization if a mandatory referendum on the modification to the Drinking Water Protection Program is not held by the County (*see* ***Matter of Save the Pine Bush, Inc. v Planning Bd. of Town of Clifton Park***, 50 AD3d 1296, 856 NYS2d 687 [3d Dept 2008]; ***Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven***, 213 AD2d 484, 623 NYS2d 613 2d Dept 1995]; *cf.* ***New York Civil Liberties Union v New York City Tr. Auth.***, 2012 WL 10972 [2d Cir 2012]; ***Irish Lesbian & Gay Org. v Giuliani***, 143 F3d 638 [2d Cir 1998]).

Accordingly, the County's motion for summary judgment dismissing the complaint based on plaintiffs' lack of standing is granted.

Dated: July 19, 2012

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION