

<b>Johann v Town of E. Hampton</b>
2013 NY Slip Op 30742(U)
April 4, 2013
Supreme Court, Suffolk County
Docket Number: 36910/2010
Judge: William B. Rebolini
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## MEMORANDUM

## SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTYSUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

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

Motion Sequence No.: 001; MOT.D  
Motion Date: 5/13/11  
Submitted: 12/11/12

Petitioners,

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-against-

Attorney for Petitioner:

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,

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

Attorney for Respondents:

Respondents.

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

Clerk of the Court

In this hybrid Article 78 proceeding and action for declaratory and injunctive relief, petitioners seek a judgment (1) annulling Resolution 2010-527 adopted by respondent Town Board of the Town of East Hampton, (2) declaring that a certain parcel of land owned by the Town of East Hampton is parkland and that the Town of East Hampton's plan to sell such property violates the public trust doctrine, and (3) enjoining the Town from soliciting bids for the purchase of the property and from blocking access to the property. For the reasons set forth herein, the Article 78 proceeding is dismissed, and the cause of action seeking a declaratory judgment and injunctive relief is severed and converted into a plenary action.

On June 3, 2010, respondent Town Board of the Town of East Hampton adopted Resolution 2010-527, which deemed a certain parcel of Town property to be surplus property and authorized the Town Supervisor and any persons he may designate "to take any and all reasonable action to offer the property for sale." Fronting a large freshwater pond, the property at issue, known as 128 Second House Road, Montauk, consists of approximately four acres of land

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and is improved with a single family residence and accessory structures. It was purchased by the Town of East Hampton in 2003 pursuant to Resolution 2002-1138, which states that ownership of the property would provide public access to the pond, and that the purpose of the acquisition was “general municipal use, which may include park use such as a beach or picnic area on Fort Pond.” Thereafter, the Town financed improvements to the property, allegedly to make it suitable for public use, by issuing municipal bonds, and entered into a license agreement with petitioner Third House Nature Center (hereinafter referred to as THNC) for the operation of the property. Under the terms of the license agreement, THNC was given the non-exclusive right to operate the property for the benefit of the residents of the Town of East Hampton and to establish on-site programs for the public.

Subsequently, the Town sent a notice to THNC, dated July 1, 2010, advising that the Fire Marshall had determined “the structure” on the subject property was “in disrepair and unsafe for public use and occupancy,” and that the license agreement was terminated as of 90 days from the date of such notice. Approximately two weeks prior to such notice, petitioner Edward Johann, who is the president of THNC, and others appeared at a Town Board meeting and voiced their objections to the plan to sell the parcel at 128 Second House Road as surplus property. On July 7, 2010, the Town allegedly locked the gate to the entrance of the subject property, prohibiting the removal of personal property stored on the site by THNC, petitioner Concerned Citizens of Montauk, and petitioner Roger Feit.

Thereafter, on October 4, 2010, petitioners brought this hybrid Article 78 proceeding and action for declaratory and injunctive relief. The petition alleges, in relevant part, that the subject property constitutes a municipal park, and that the Town closed such property and listed it for sale without first obtaining permission from the New York State Legislature in violation of the public trust doctrine. It further alleges that the Town Board violated the Open Meetings Law in making its determination that such property sold be sold as surplus by discussing the merits of such a sale in an executive session, rather than in a public session. The first cause of action seeks a judgment declaring that the Town’s closure and listing of the subject property for sale without legislative approval constitutes an unlawful alienation of parkland. It also seeks an injunction enjoining the Town from listing the property for sale until such sale is approved by the State Legislature and from blocking public access to the property, and permitting petitioners to recover their personal property from the site. The second, third and fourth causes of action, which each seek a judgment pursuant to CPLR Article 78, allege that Resolution 2010-527 was adopted unlawfully in violation of the New York State Environmental Quality Control Act and its implementing regulations, the New York State Public Officers Law, and the Town’s Local Waterfront Revitalization Program. By order dated March 9, 2011, this Court granted a motion by respondents made pursuant to CPLR 3211 to the extent that the second and fourth causes of action were dismissed. Then, by order issued July 20, 2011, the Court granted respondents leave to reargue their prior dismissal motion, but adhered to its March 2011 determination. The arguments raised by the parties in support and in opposition to the motions for dismissal and reargument, and the bases for the Court’s determinations thereof, were set forth in detail in the March 2011 and July 2011 orders and will not be repeated herein, as the parties’ familiarity with the same is assumed.

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On December 1, 2011, the Town Board adopted Resolution 2011-1042, which, like Resolution 2010-527, deems the subject property surplus and authorized the Town Supervisor and any persons he may designate to offer the property for sale. As with the resolution that is the subject of this proceeding, the 2011 resolution also provides that the offer to sell is subject to the Town Board's right to reject any and all proposals, and that all proposals shall be subject to acceptance by the Town Board by further resolution. The Court, having conferenced this matter with the parties' attorneys, agreed to permit the submission of memoranda of law on the issue of whether the Town violated article 7 of the Public Officers Law, known as the Open Meetings Law, in its adoption of Resolution 2010-527.

Memoranda on the claim that Resolution 2010-527 was adopted in violation of the Open Meetings Law have now been submitted to the Court. Petitioners assert in their memorandum, in part, that the Town Board violated Public Officers Law § 103 by discussing the proposal to sell the subject property as surplus in an executive session, and that such discussion was held in an executive session in an effort to conceal the planned sale and to frustrate efforts to challenge adoption of Resolution 2010-527. Petitioners also argue that the 2011 resolution does not "cure" the alleged prior violations of the Open Meetings Law that are the subject of this proceeding or affect their request for relief. Respondents argue in their memorandum that the Town Board complied with the requirements of the Open Meetings Law, and that any discussions regarding Resolution 2010-527 conducted during an executive session were permitted under Public Officers Law § 105 (h). Further, respondents assert that petitioners' remaining Article 78 claim was rendered moot by the adoption of Resolution 2011-1042, and that any violations of the Open Meetings Law that may have occurred were technical and do not warrant the imposition of enforcement sanctions.

"It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case before the tribunal" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713, 431 NYS2d 400 [1980]). The mootness doctrine, a facet of this principle, ordinarily precludes the courts from resolving disputes which, due to the passage of time or a change in circumstances, would not affect any substantial rights of the parties and would not have an immediate consequence for them (*see Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 746 NYS2d 429 [2002]; *Matter of Johnson v Pataki*, 91 NY2d 214, 668 NYS2d 978 [1997]; *Matter of Gold-Greenberger v Human Resources Admin. of City of N.Y.*, 77 NY2d 973, 571 NYS2d 897 [1991]; *Matter of Hearst Corp. v Clyne*; 50 NY2d 707, 431 NYS2d 400). As a court's jurisdiction extends only to live controversies, it is prohibited from giving advisory opinions or ruling on "academic, hypothetical, moot or otherwise abstract questions" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 810, 766 NYS2d 654 [2003], *citing Matter of Hearst Corp. v Clyne*; 50 NY2d 707, 713, 431 NYS2d 400). An Article 78 proceeding, therefore, should be dismissed as moot if the issue raised therein has become abstract because of a change in circumstances (*see e.g. Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 2 NY3d 727, 778 NYS2d 740 [2004]; *Matter of Morrison v New York State Div. of Hous. & Community Renewal*, 93 NY2d 834, 687 NYS2d 621 [1999]; *Matter of Papert v Zoning Bd. of*

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*Appeals of the Inc. Vil. of Quogue*, 98 AD3d 581, 949 NYS2d 466 [2d Dept 2012]; *Matter of DIP Pharmacy v Perales*, 211 AD2d 790, 621 NYS2d 905 [2d Dept 1995]).

The determination of mootness may be fact-driven, and chief among the factors to be considered by a court is the failure to seek preliminary injunctive relief or to otherwise preserve the status quo during the pendency of the litigation (*Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 173, 746 NYS2d 429; see *Matter of Papert v Zoning Bd. of Appeals of the Inc. Vil. of Quogue*, 98 AD3d 581, 949 NYS2d 466; *Matter of Sherman v Planning Bd. of Vil. of Scarsdale*, 82 AD3d 899, 918 NYS2d 878 [2d Dept 2011]; *Asher v Gigante*, 21 AD3d 916, 800 NYS2d 642 [2d Dept 2005]). Moreover, the issue of mootness may be raised at any time, since when a matter becomes moot a court is deprived of an actual controversy, “an essential wherewithal of a court’s jurisdiction” (*Matter of Cerniglia v Ambach*, 145 AD2d 893, 894, 536 NYS2d 227 [3d Dept 1988], *lv denied* 74 NY2d 603, 543 NYS2d 396 [1989]; see *Gabriel v Prime*, 30 AD3d 955, 818 NYS2d 322 [3d Dept 2006]; *Dunham v Wing*, 295 AD2d 309, 743 NYS2d 877 [2d Dept 2002]).

A case that is moot, however, may be considered by a court if it falls within the exception to the mootness doctrine, which permits judicial review of “important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable” (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714, 431 NYS2d 400; see e.g. *City of New York v Maul*, 14 NY3d 499, 903 NYS2d 304 [2010]; *Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 615 NYS2d 644 [1994]; *Matter of Seltzer v New York State Democratic Comm.*, 293 AD2d 172, 743 NYS2d 565 [2d Dept 2002]). This exception applies only if the controversy or issue involved (1) is likely to recur, either between the parties or other members of the public, (2) typically evades review in the courts, and (3) presents an issue that is substantial and novel (*Coleman v Daines*, 19 NY3d 1087, 1090, 955 NYS2d 831 [2012]; see *City of New York v Maul*, 14 NY3d 499, 903 NYS2d 304; *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 431 NYS2d 400; *Matter of Shellfish, Inc. v New York State Dept. Envtl. Conservation*, 76 AD3d 975, 908 NYS2d 53 [2d Dept 2010]; *Cellular Tel. Co. v Village of Tarrytown*, 209 AD2d 57, 63, 624 NYS2d 170 [2d Dept], *lv denied* 86 NY2d 701, 631 NYS2d 605 [1995]).

Here, it is undisputed that Resolution 2011-1042, adopted by the Town during the pendency of this action, supersedes Resolution 2010-527. Thus, the question of whether the Town Board’s designation of the subject property as surplus and its authorization to sell such property via Resolution 2010-527 was in violation of the Open Meetings Law is moot (see *Matter of Orsi v Board of Appeals of Town of Bethlehem*, 3 AD3d 698, 770 NYS2d 774 [3d Dept 2004]; *Matter of Group for S. Fork v Town of Southampton*, 285 AD2d 506, 729 NYS2d 148 [2001]; see also *Colonial Arms Apts. v Village of Mount Kisco*, 64 NY2d 948, 488 NYS2d 639 [1985]). Further, petitioners failed to establish that the proceeding falls within the exception to the mootness doctrine. Significantly, no showing has been made that this proceeding raises substantial and novel issues that are likely to recur, and that the Town’s process for deeming real property surplus typically evades review (see *Matter of DeCintio v Village of Tuckahoe*, 100 AD3d 887, 954 NYS2d 563 [2d Dept 2012]; *Matter of Jablonski v Steinhaus*, 48 AD3d 465,

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851 NYS2d 634 [2d Dept 2008]; *Matter of Peconic Baykeeper, Inc. v Suffolk County*, 17 AD3d 371, 793 NYS2d 78 [2d Dept 2005]; *Matter of Many v Village of Sharon Springs Bd. of Trustees*, 234 AD2d 643, 650 NYS2d 486 [3d Dept 1996], *lv denied* 89 NY2d 811, 657 NYS2d 403 [1997]; *cf. City of New York v Maul*, 14 NY3d 499, 903 NYS2d 304; *Mental Hygiene Legal Servs. v Ford*, 92 NY2d 500, 683 NYS2d 150 [1998]). Accordingly, the Article 78 proceeding, set forth in the petition as the first cause of action, is dismissed.

Finally, as the remaining cause of action is properly brought in the context of a plenary action, it hereby is

**ORDERED** that the fourth cause of action in the petition is severed and converted into an action for declaratory and injunctive relief, with the notice of petition deemed the summons and the petition deemed the complaint (*see* CPLR 103 [c]); and it is further

**ORDERED** that the parties' attorneys shall appear before the undersigned at **9:30 a.m. on Wednesday, April 17, 2013** for a compliance conference.

Dated: 4/4/2013

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

\_\_\_\_\_ FINAL DISPOSITION \_\_\_X\_\_\_ NON-FINAL DISPOSITION