

**Matter of County of Suffolk v Kennedy**

2019 NY Slip Op 33043(U)

October 15, 2019

Supreme Court, Suffolk County

Docket Number: 00408-2019

Judge: David T. Reilly

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**SUPREME COURT OF THE STATE OF NEW YORK  
I.A.S. PART 30 SUFFOLK COUNTY**

**PRESENT:  
HON. DAVID T. REILLY, JSC**

**INDEX NO.: 00408-2019**

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In the Matter of the Application of

**The COUNTY OF SUFFOLK and THERESA WARD,  
Individually and as Commissioner of the Department of  
Economic Development and Planning,**

**Petitioners,**

**For an Order and Judgment Pursuant to Article 78 and  
Section 2304 of the Civil Practice Law and Rules,**

**-against-**

**JOHN M. KENNEDY, JR., County Comptroller of the  
County of Suffolk,**

**Respondent.**

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In this proceeding commenced pursuant to CPLR Article 78, petitioners seek a judgment in the nature of prohibition declaring that respondent John M. Kennedy, County Comptroller of the County of Suffolk (Kennedy), is acting in excess of his jurisdiction and should be enjoined and restrained, pursuant to CPLR 6301, from conducting any investigation and audit into the Suffolk County Department of Economic Development and Planning's evaluation of the qualifications of a potential Master Planner pursuant to a Request For Qualifications (No. 17046) as authorized by the Suffolk County Legislature by Resolution No. 438-2018. In addition, petitioner Theresa Ward, Deputy County Executive and Commissioner of Economic Development and Planning seeks an order pursuant to CPLR 2304 quashing a subpoena issued by Kennedy, acting in a quasi-judicial capacity as a public officer, on December 17, 2018.

In sum and substance, this proceeding relates to the County of Suffolk's request for qualifications (RFQ) with respect to the development of Suffolk County owned land located in Ronkonkoma, NY. On August 17, 2017 Ward requested and received the approval of the Office of the Suffolk County Executive to issue a RFQ for a master development team and concepts for the re-development of the thirty-three acres of county land. On October 19, 2017 the Department of Economic Development and Planning issued and advertised the RFQ, referred to herein as RFQ No. 17046.

Immediately prior to the advertisement, Kennedy, on October 17, 2017, delivered a letter to Ward indicating that the Office of the Suffolk County Comptroller intended to conduct an audit of RFQ No. 17046 and requested that certain documents be provided to his office including, but not

limited to, the County Executive's approval to initiate and advertise the RFQ, proof of the RFQ advertisement, all proposals submitted, individual evaluation score sheets, evaluation summary sheets and all contractual agreements entered into as a result of the RFQ. While Ward complied with a number of these requests, treating the demands as a petition pursuant to the Freedom of Information Law, several of Kennedy's demands met with no meaningful response. In a responsive letter Ward stated to Frank Bayer, CPA (Bayer) the Suffolk County Executive Director of Auditing Services, Department of Audit and Control, that "[S]ince no action other than due diligence has been authorized by the Legislature and there is no fiscal impact at this time, the point of your letter is unclear to us."

On December 7, 2018 Bayer issued a letter to Ward indicating that the Office of the Comptroller "plans on conducting a performance audit of the Department's Request For Qualifications" pursuant to the auditing powers of the Suffolk County Comptroller outlined in the Suffolk County Charter at §C5-2B. Bayer further indicated in the letter, "[I]t is within the purview of the Comptroller to audit all functions that directly or indirectly involve County funds. Department personnel were used to develop and evaluate the RFQ so the uses of County funds were involved and the Comptroller's Office should have access to all records necessary to conduct our audit."

On December 17, 2018 Kennedy, acting in a quasi-judicial capacity through his position as a public officer and through the grant of authority embodied in Suffolk County Charter §C23-6, issued a subpoena to Ward requesting un-redacted copies of the materials requested in the October 17, 2018 letter to Ward. Counsel for Ward responded on December 26, 2018 requesting that Kennedy withdraw the subpoena indicating that the "jurisdictional authority of the Office of the Comptroller is limited to those set forth in County Law §577 and Article V of the Suffolk County Charter. These provisions of law restrict the role of the Comptroller to overseeing the financial condition of the County and its political subdivisions. They afford the Office of the Comptroller with no authority to conduct what you describe as 'performance audits' and more pertinently, no role in evaluation of requests for qualifications. It is significant to note that RFQ No. 17046 relates to the qualifications for a potential developer of Ronkonkoma Properties and involves the expenditure of no County monies."

Petitioners now move for an Order in the nature of a writ of prohibition declaring that Kennedy is acting in excess of his jurisdiction, enjoining and restraining him from taking any further action with respect to RFQ No. 17046 and quashing the subpoena issued by Kennedy to Ward on December 17, 2018. In support of their application the petitioners submit, *inter alia*, submissions in support of an appeal to the Appellate Division, Second Department in a matter entitled Kennedy v. Suffolk County, et al. (Docket No. 2018-11299), copies of communications between Ward and Kennedy, various documents associated with RFQ No. 17046 and a Memorandum of Agreement between Suffolk County and Jones Lang Lasalle Americas, Inc., the company awarded the contract resulting from RFQ No. 17046.

Kennedy has submitted an answer and counterclaim to the petition wherein he maintains that an audit of RFQ No. 17046 is "crucial to ensure compliance with Suffolk County Code §§ 1065-16(B), 1065-18(A), and to make any necessary 'best practices' recommendations." Kennedy contends that the information requested of Ward is crucial to his ability to exercise his statutory powers and conduct a thorough audit and verify compliance with the laws and regulations are being observed. He indicates that the Office of the Comptroller does not partake in the evaluation

processes of the County government and is not seeking to do so, but is seeking to review the procedural actions conducted by the County to ensure compliance with the law and ensure governmental accountability and efficiency. In addition, Kennedy asserts that he received a joint letter from the Supervisors of the Towns of Brookhaven and Islip requesting that he conduct an audit of the Suffolk County Department of Economic Development and Planning's RFQ No. 17046 because they had been excluded from any planning process involving the "Ronkonkoma Properties." Kennedy indicates that he notified Ward of his intention to conduct an audit of the RFQ process to determine if her department complied with Chapter 1065, Article IV, of the Suffolk County Code entitled "Implementation of Suffolk County Master Plan 2035 and Projects of Regional Significance."

Kennedy has also asserted a counterclaim wherein he seeks an Order directing compliance with the subpoena issued on December 17, 2018, as it was properly authorized pursuant to County Charter §C23-6. In opposition to the petition and in support of the counter claim, Kennedy submits, among other things, a copy of a joint letter from Edward P. Romaine and Angie Carpenter, the Supervisors of the Towns of Brookhaven and Islip, respectively, copies of previously issued audit reports from the Office of the Comptroller, as well as copies of materials supplied in support of the petition.

Prior to its analysis of the instant petition the Court must note its relation to another action before the undersigned entitled Kennedy v Suffolk County, et al under Suffolk County Supreme Court Index No. 604808-2018.<sup>1</sup> In Kennedy v Suffolk, an action for a declaratory judgment, this Court denied the Suffolk County defendants' application which sought an Order preliminarily enjoining Kennedy from conducting any further activity in connection with a pending Request For Proposal (RFP) wherein the Suffolk County Department of Parks and Recreation sought proposals from potential vendors to manage the food service concessions at certain Suffolk County beaches. In granting Kennedy's request for a preliminary injunction this Court stated,

Turning then to the merits of the instant application, the Court finds the relevant inquiry to be first and foremost one of statutory interpretation and that endeavor must start with the statutes at issue. The powers and duties of the county comptroller are set forth in the New York State County Law §577. Among the powers and duties delegated to the county comptroller are to "have general superintendence over the fiscal affairs of the county" (*see* County Law §577(a)). The Suffolk County Charter further defines the role of the Suffolk County Comptroller under Chapter C, Article V, entitled "Department of Audit and Control." That local legislation defines the County Comptroller as the chief fiscal officer of the County and expressly provides that the Suffolk County Comptroller shall "have all the powers and perform all the duties conferred or imposed upon a county comptroller or the chief fiscal officer of a county under the County Law, and have charge of the administration of all the financial affairs of the County" (*see* Suffolk County Charter, §C5-2(A)). In addition,

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<sup>1</sup>By Order of this Court [Hinrichs, J.] dated March 5, 2019 and by Administrative Order of even date (Order No. 15-19), it was determined that the instant petition was "related" to the matter of Kennedy v Suffolk County, et al, under Index No. 604808/2018 and transferred from the Hon. Martha Luft, JSC to the undersigned.

the Suffolk County Comptroller shall “be the auditing authority of the County” (*see Id.*, at §C5-2(G)).

The Court later continued,

Upon examination of this Chapter of the Suffolk County Charter it is clear to the Court that the Suffolk County Legislature specifically considered the potential evils presented by the RFP process and took measures to protect the taxpayers of Suffolk County by installing a review mechanism of the RFP process. However, there is nothing in this legislative enactment which limits or curtails the existing authority of the Comptroller under the Suffolk County Charter to examine, audit and verify all accounts through the use of a performance audit (*see Suffolk County Charter, Article V*). The Legislature has highlighted the problems inherent in the RFP process and the need for additional review and oversight by itself and the County Executive and created this statute to combat these perceived ills. This statute does not, however, appear to limit the duties and responsibilities of the Comptroller who was seemingly already empowered to review the RFP process under its auditing and examining authority (*see Suffolk County Charter, Article V, §C5-2*). Should the Comptroller be stripped of this authority, the possibility of perversion within the RFP process rises.

While recognizing the inherent logistical concerns in having the Office of the Comptroller take part in “real time” auditing of the RFP process, the Court left it to the parties to develop a mechanism whereby the Comptroller could perform his auditory powers without impeding the function of the County Executive, or other offices involved in the RFP process. That being said, this Court finds that the RFP process and the RFQ process differ little in their implementation and review, specifically with reference to RFQ No. 17046, based on the following.

The enabling legislation giving rise to RFQ No. 17046 can be found in Chapter 1065, Article IV of the Suffolk County Code, entitled “Implementation of Suffolk County Comprehensive Master Plan 2035 and projects of Regional Significance.” In the legislative intent portion of the statute it is stated,

This legislature finds and determines that the procurement of the highly specialized planning and design professionals capable of assisting the County and Regional Planning Alliances with the planning and design of projects of regional significance and to implement the Plan involves a class of services not subject to competitive bidding required by law. This warrants that a new policy and procedure of prequalification of consultants be adopted by this legislature pursuant to New York General Municipal Law §104-b to efficiently engage these professionals so as to ensure the prudent and economical use of public moneys in the best interests of the taxpayers of the political subdivision or district, to facilitate the acquisition of goods and services of maximum quality at the lowest cost under the circumstances, and to guard against favoritism, improvidence, extravagance, fraud and corruption.”

Where, as here, prohibition is sought, the first issue is whether it may be available in the situation presented (*see B.T. Productions, Inc. v Barr*, 44 NY2d 226, 405 NYS2d 9 [1978]). The

extraordinary remedy of prohibition is only available to prevent a judicial or quasi-judicial body or officer from proceeding or threatening to proceed without or in excess of its jurisdiction, and then only if a clear legal right to that relief has been established (*Haggerty v Himelein*, 89 NY2d 431, 654 NYS2d 705 [1997]). Because the remedy is discretionary a court that is asked to impose prohibition, “must weigh a number of factors: the gravity of the harm caused by the act sought to be performed by the official; whether the harm can be adequately corrected on appeal or by recourse to ordinary proceedings at law or in equity; and whether prohibition would furnish a more complete and efficacious remedy even though other methods of redress are technically available” (see *Matter of Sedore v Epstein*, 56 AD3d 60, 864 NYS2d 543 [2d Dept 2008], quoting *Matter of Rush v Mordue*, 68 NY2d 348, 509 NYS2d 493 [1986]).

Here, petitioners maintain that Kennedy is acting in a quasi-judicial capacity as a public officer when demanding, through the subpoena process, documents and records and is by that very act, “proceeding or threatening to proceed without or in excess of his jurisdiction” thereby raising the issue of prohibition. However, Kennedy, by his own admission, seeks only to review the documents submitted in response to RFQ No. 17046 and to review the procedural actions conducted by the County in order to ensure compliance with the law, and to promote “best practices” and ensure government accountability and efficiency. He does not seek to partake in the evaluation process, nor does he wish to encourage or discourage the selection of any particular consulting professional. Further, the language of the Suffolk County Code, Section 1065, Article IV states that the County Legislature seeks a policy and procedure of prequalification of consultants, “so as to ensure the prudent and economical use of public moneys in the best interest of the taxpayers...,” an endeavor much suited to the expertise of the Office of the Comptroller.

Inasmuch as the Suffolk County Charter provides that the Suffolk County Comptroller shall “be the auditing authority of the County” (see Suffolk County Charter §C5-2(G)), the Court finds it without basis to conclude that the enabling legislation giving rise to RFQ No. 17046 should be read in a way that limits the powers of the Suffolk County Comptroller to conduct the performance audit contemplated herein, much like the preliminary determination made in *Kennedy v Suffolk*. Indeed, the Suffolk County Charter defines the role of the Suffolk County Comptroller under Chapter C, Article V (“Department of Audit and Control”). That local legislation describes the County Comptroller as the chief fiscal officer of the County and expressly provides that the Suffolk County Comptroller shall “have all the powers and perform all the duties conferred or imposed upon a county comptroller or the chief fiscal officer of a county under the County Law, and have charge of the administration of all the financial affairs of the County” (see Suffolk County Charter, §C5-2(A)). When read in these terms, the Court finds that the role of the Comptroller shall not be so limited when the enabling statute of RFQ No. 17046 states explicitly that the purpose of the legislation is to ensure the most prudent and economical use of public moneys. To reach a different determination would render the statutes at issue here inapposite.


In addition, when reminded of the limited purpose for which Kennedy seeks the records at issue, to wit: a limited review of the procedural processes employed by Ward to ensure compliance with law, it is clear that the proposed harm advanced by petitioner weighs against prohibition (see generally *Matter of Rush v Mordue*, supra). Finally, this Court cannot find, as a matter of law, that prohibition would supply the most efficacious and complete remedy when the proposed harm is amorphous, at best (*Id.*).

Based on the sum of the foregoing, it is hereby,

**ORDERED** that the petition is denied and this proceeding is dismissed; and it is

**ORDERED** that, with respect to the counterclaim, Ward is directed to comply with the properly issued subpoena dated December 17, 2018 within twenty (20) days of the date hereof.

Dated: October 15, 2019  
Riverhead, New York

  
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DAVID T. REILLY  
JUSTICE OF THE SUPREME COURT

X  FINAL DISPOSITION      \_\_\_\_\_ NON-FINAL DISPOSITION