

Seiter v Shea
2017 NY Slip Op 31140(U)
May 25, 2017
Supreme Court, Suffolk County
Docket Number: 15-14024
Judge: Daniel Martin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

COPY

-----X
THEODORE SEITER,

Petitioner,

For a Judgment under Article 78 of the Civil
Practice Law and Rules and a Declaratory
Judgment,

- against -

MARTIN SHEA, as Chief Environmental
Analyst of the Town of Southampton Land
Management Environmental Division;
SOUTHAMPTON TOWN CONSERVATION
BOARD, HARRY S. LUDLOW, as Chairman of
the Southampton Town Conservation Board,
GEORGE J. HEINE, JEREMIAH COLLINS,
TERRENCE FLANAGAN, JOHN BOUVIER,
THOMAS RICKENBACH, and ANNE
ALGIERI, as Members of the Southampton Town
Conservation Board; TOWN BOARD OF THE
TOWN OF SOUTHAMPTON,

Respondents.
-----X

DECISION AND ORDER

By: Daniel Martin, A.J.S.C.
I.A.S. Part 9

Index No. 15-14024

Mot. Seq. #001 - MotD

Mot. Seq. #002 - MD

Return Date: September 23, 2015 (#001)

Return Date: December 22, 2015 (#002)

Adjourned: January 12, 2016

Oral Argument Held: January 4, 2017

MICHAEL WALSH, ESQ.
Attorney for Petitioner
860 Montauk Highway, Unit 4
Water Mill, New York 11976

TIFFANY S. SCARLATO, Town Attorney
By: Kathleen Murray, Esq.
116 Hampton Road
Southampton, New York 11968

In this article 78 proceeding, the petitioner challenges, *inter alia*, the respondents' July 17, 2015 determination denying his application for a letter of non-jurisdiction relative to the Town of Southampton's regulatory authority over freshwater wetlands within its boundaries.

The petitioner is the owner of a vacant lot in the Town of Southampton, located at 108 Harbor Watch Court, Noyac, New York, on which he proposes to construct a single-family residence with accessory structures. On December 29, 2014, he obtained a freshwater wetlands letter of non-jurisdiction from the New York State Department of Environmental Conservation ("DEC"). In its letter, the DEC noted that the property, being "more than 100 feet from DEC regulated freshwater wetlands

Seiter v. Shea
Index No. 15-14024
Page 2

*** is, therefore, beyond Article 24 (Freshwater Wetlands) jurisdiction,” so that “no permit is required under the Freshwater Wetlands Acts.” However, when the petitioner subsequently applied to the Town for a similar letter of non-jurisdiction, his request was denied in a letter dated July 17, 2015, the text of which follows:

Dear Mr. Seiter:

In response to the June 29, 2015 receipt of a lot inspection application/application for letter of non-jurisdiction, pursuant to Chapter 325 (WETLANDS), the above-referenced project plans have been reviewed. The proposed activities require a town wetlands (325) permit, as they are located within 200 feet of town regulated wetlands. As such, a town wetlands permit will need to be obtained, prior to filing for a building permit.

Chapter 325-A (WETLANDS, FRESHWATER) does not apply, as such section is intended to allow for local government implementation of New York State Environmental Law (NYS ECL) Article 24 (State Freshwater Wetlands Act), in the event that the NYS Department of Environmental Conservation elects to delegate such responsibility to the Town to administer such law. Furthermore, pursuant to Section 325A-3 (Effect of provisions on local laws):

“Nothing herein shall be construed to repeal, modify or limit the authority of the Town to regulate wetlands under Chapter 325 of the Town Code nor to limit the authority of the Town to enact future ordinances or local laws regulating wetlands in accordance with state law.”

Please contact my office or the office of the Town Attorney, if you have further questions. Thank you for your cooperation.

Sincerely,

Martin E. Shea
Chief Environmental Analyst

By way of this proceeding, the petitioner seeks the entry of judgment annulling the July 17, 2015 determination and compelling the respondents to issue the requested letter of non-jurisdiction, as well as declaring chapter 325 of the Town Code to be void and unconstitutional as applied to his application. In challenging the administrative determination, the petitioner contends, in essence, that chapter 325 was inapplicable to deny his request for a letter of non-jurisdiction.¹ More particularly, the petitioner contends that the Freshwater Wetlands Act (ECL art 24) preempts chapter 325, that the Town could

¹ The petitioner does not claim that chapter 325 was improperly applied but only that it was, in fact, applied; he does not dispute, for example, that the proposed construction is located within 200 feet of a wetlands boundary.

enforce its own local law only if it complied with ECL 24-0501 and its implementing regulations, and that the Town did not do so with respect to chapter 325. The petitioner further contends that when the Town enacted chapter 325A of the Town Code, it adopted the Freshwater Wetlands Act (ECL art 24) in its entirety and, consequently, that it was bound to apply the same procedures as those applied by the DEC in considering his request for a letter of non-jurisdiction and that it was prohibited from regulating any activities exempted from permit under chapter 325A and the Freshwater Wetlands Act. In attacking the validity of the local law, the petitioner contends that chapter 325 was not adopted pursuant to ECL 24-0501 and 6 NYCRR 665.4; additionally, he contends that the Town Code is unconstitutionally vague in that it has conflicting provisions (Chapters 325 and 325A) containing different regulatory schemes with respect to the issuance of freshwater wetlands permits.

In their answer, the respondents raise as affirmative defenses and objections in point of law, *inter alia*, that the petitioner's claim is barred for failure to exhaust administrative remedies under Town Code § 325-7 (C) and by applicable statutes of limitation.

.....

At the heart of the parties' dispute is the legislation, both state and local, governing this matter—including, most prominently, chapters 325 and 325A of the Town Code.

On or about June 9, 1993, the Town adopted Local Law No. 16 of 1993, which amended the Town Code by adding a new chapter 325, entitled "Wetlands," for the purpose of "establishing local land-use controls which place a priority on the protection of natural vegetation and the preservation of wetland buffer zones" (Town Code § 325-1 [B]). Recognizing that existing regulatory programs initiated at both the Town and State level "have not provided adequate protection for those resources," and containing no reference to the Freshwater Wetlands Act or its implementing regulations, chapter 325 represents an attempt by the Town "to assert new leadership in wetland protection activities" by establishing a procedure for the issuance of wetlands permits in the Town of Southampton (Town Code § 325-2 [C]). It defines "wetlands" to include "tidal, freshwater, and brackish" wetlands (Town Code § 325-3) and provides that it is unlawful in a wetland area or within 200 feet of a wetlands boundary to engage in certain activities—including erecting, constructing, reconstructing or enlarging a structure—without a permit (Town Code § 325-6 [A]). With particular relevance to this proceeding, it defines "letter of nonjurisdiction" as "[a] written notification from the approving authority or its designee, issued in response to a written request for a determination, stating that the proposed activity is exempt from the provisions of this chapter" (Town Code § 325-3); identifies the approving authority as the Conservation Board (Town Code § 325-5); and provides that if the designee of the approving authority denies the request, a request for review by the applicant "shall be made in writing to the approving authority within 30 days" (Town Code § 325-7 [C]).

On or about August 20, 1994, the Town adopted Local Law No. 36 of 1994, which amended the Town Code by adding a new chapter 325A, entitled "'Wetlands, Freshwater,'" and provides as follows:

§ 325A-1 Purpose.

- A. The State of New York, in its Freshwater Wetlands Act (§ 24-0101 et seq. of the Environmental Conservation Law), declared it to be a public policy of the state to preserve, protect and conserve freshwater wetlands and their benefits and established procedures designed to implement that policy. Among them is the authority of the New York State Department of Environmental Conservation to delegate responsibility to qualified local governments for carrying out the law within their borders, upon the filing of the State Freshwater Wetlands Maps. That filing occurred on May 26, 1993.
- B. The Town Board of the Town of Southampton finds that it is in the public interest to request such delegation from the Department of Environmental Conservation. If authority to implement the State Freshwater Wetlands Act were transferred to the Town, property owners wanting to engage in regulated activities near state-regulated freshwater wetlands in the Town need apply for only one freshwater wetlands permit and consequently would avoid the time and expense required to obtain a separate permit from the state.

§ 325A-2 Adoption of state provisions.

Pursuant to Article 24, Title 5, of the New York State Environmental Conservation Law, the Town of Southampton hereby adopts those provisions of the State Freshwater Wetlands Act (§ 24-0101 et seq. of the Environmental Conservation Law) that are applicable to the issuance of freshwater wetlands permits thereunder, as the same may be amended from time to time.

§ 325A-3 Effect of provisions on local laws.

Nothing herein shall be construed to repeal, modify or limit the authority of the Town to regulate wetlands under Chapter 325 of the Town Code nor to limit the authority of the Town to enact future ordinances or local laws regulating wetlands, in accordance with state law.

.....

Having thus set out the relevant local legislation, the court proceeds with its analysis.

As a threshold matter, and relative to the petitioner's challenge to the July 17, 2015 determination, the court finds no need for him to have exhausted the administrative remedy provided under Town Code § 325-7 (C). The rule that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law is "subject to important qualifications. It need not be followed, for example, when an agency's action is

challenged as either unconstitutional or wholly beyond its grant of power, or when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury” (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57, 412 NYS2d 821, 824 [1978] [citations omitted]). Here, the crux of the petitioner’s challenge is not that the procedures of chapter 325 were followed incorrectly but that they were followed at all (*see* n 1, *supra*). Since the Conservation Board presumably lacks the power and competence to pass on the validity of those procedures, it is evident that a request to the Conservation Board for review of the denial of petitioner’s application would be futile.

Nevertheless, the court finds that challenge to be without merit. Under the statutory and regulatory scheme applicable to the protection of freshwater wetlands (ECL art 24; 6 NYCRR part 665), a local government may assume *exclusive* jurisdiction over such wetlands by adopting and implementing a local freshwater wetlands protection law or ordinance consistent with the provisions of article 24. It may adopt the procedures and concepts contained in article 24 or it may prescribe its own such procedures, provided that they are no less protective than the procedures set forth in article 24 and that they do not affect the activities exempted from permit by ECL 24-0701 (ECL 24-0501 [1], [2]; *see also* ECL 24-0501 [6]). But nothing in ECL article 24 prevents a local government from instead enacting its own local law designed specifically to regulate development in freshwater wetlands and to exercise *concurrent* jurisdiction with the DEC—again, provided that the local law is at least as protective of wetlands as ECL article 24 (ECL 24-0509). ECL 24-0509 effectively negates any intent on the part of the State to preempt local regulation of freshwater wetlands.

No provision of this article shall be deemed to remove from any local government any authority pertaining to the regulation of freshwater wetlands, whether such wetlands are under the jurisdiction of the department or a county pursuant to subdivision 4 of section 24-0501 of this title, under the county, general city, general municipal, municipal home rule, town, village, or any other law, provided, however, that any such regulation by a local government shall be at least as protective of freshwater wetlands as the regulations in effect pursuant to the provisions of this chapter or any rule or regulation promulgated pursuant to the provisions of this article or pursuant to a local freshwater wetlands protection law or ordinance adopted by a county pursuant to the provisions of section 24-0501 of this title.

Here, Local Law No. 16 of 1993 provides the law was adopted, in part, pursuant to the Town’s authority “to concurrently regulate wetlands under [ECL] 24-0509.”

SECTION 2. Concurrent Jurisdiction. This Local Law is adopted by the Town of Southampton pursuant to Municipal Home Rule Law § 10 and pursuant to its authority to concurrently regulate wetlands under § 24-0509, Environmental Conservation Law and the Municipal Home Rule Law. Nothing herein shall be deemed to remove or supersede the authority of the New York State Department of Environmental Conservation (NYSDEC) to regulate wetlands within the Town of Southampton pursuant to Articles 24 and 25 of the Environmental Conservation Law, unless and until the NYSDEC has duly delegated said authority to the Town pursuant to said statutes.

(compare *Matter of Gabrielli v Town of New Paltz*, 116 AD3d 1315, 984 NYS2d 468 [2014]). And since the local law makes unlawful certain activities in a wetland area or within 200 feet of a wetland boundary—it would, therefore, seem to be at least as protective of wetlands as the State law (*cf.* ECL 24-0701 [2])—it does not supersede the DEC’s authority. Even assuming, then, that the Town failed to satisfy the requirements of ECL 24-0501 and 6 NYCRR 665.4 in adopting Local Law No. 16 of 1993, such failure is without legal consequence.

While the petitioner further argues that the Town’s adoption of chapter 325A compelled it to apply the same standards and procedures relative to the issuance of freshwater wetlands permits as those applied by the DEC, the court disagrees. Based on the affidavit of Martin Shea, submitted in opposition to the petition, it appears that regulatory authority was never transferred to the Town to implement the provisions of the Freshwater Wetlands Act. Specifically, he attests that despite the “hereby adopts” language of section 325A-2, the Town was required to obtain certification from the DEC in order to implement the provisions of chapter 325A; that the option to assume regulatory authority of the provisions of the Freshwater Wetlands Act is voluntary (6 NYCRR 665.1 [b]); that pursuant to 6 NYCRR 665.4, there is a two-step process for obtaining certification; that the first step is to file a copy of the local law with the DEC (6 NYCRR 665.4 [e]), which step was completed; that the second step is to submit a report to the DEC demonstrating that the Town has the technical and administrative capability to administer the Freshwater Wetlands Act (6 NYCRR 665.4 [h]); that the second step was never completed; and, as a result, that the Town has never enforced, exercised or implemented the provisions of chapter 325A, notwithstanding the adoption of Local Law No. 36 of 1994. The court also notes that pursuant to section 325A-3, nothing in chapter 325A “shall be construed to repeal, modify or limit the authority of the Town to regulate wetlands under Chapter 325 of the Town Code.” The petitioner, in reply, has offered no evidence to the contrary. Accordingly, the court finds no basis in the record to bar the application of chapter 325 to the petitioner’s request for a letter of non-jurisdiction.

Nor does it avail the petitioner—assuming that the foregoing analysis is not dispositive of the matter—to frame his challenge to the administrative determination as one to the procedures followed in the enactment of Local Law No. 16 of 1993. Such a challenge, though properly raised in the context of an article 78 proceeding, would appear to be time-barred. When a challenge to a local law is directed not to its substance but to the procedures followed in its enactment, an article 78 proceeding is appropriate (*Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 518 NYS2d 943 [1987]; *P & N Tiffany Props. v Village of Tuckahoe*, 33 AD3d 61, 817 NYS2d 345 [2006], *appeals dismissed* 8 NY3d 943, 834 NYS2d 720 [2007]), and the applicable four-month statute of limitations begins to run upon the effective date of the presumptively valid enactment (CPLR 217; *Matter of McCarthy v Zoning Bd. of Appeals of Town of Niskayuna*, 283 AD2d 857, 724 NYS2d 798 [2001]).

As to the petitioner’s challenge to the substantive validity of the law, *i.e.*, that it is unconstitutionally vague, such a claim is not maintainable in an article 78 proceeding and, therefore, is not properly before the court at this juncture; rather, a declaratory judgment action is appropriate (*see Matter of Save the Pine Bush v City of Albany, supra; P & N Tiffany Props. v Village of Tuckahoe, supra*). CPLR 103 (b) requires that all civil judicial proceedings be prosecuted in the form of an action

“except where prosecution in the form of a special proceeding is authorized.” Since it appears that jurisdiction has been obtained over the parties, the matter may be continued in an appropriate form (*see* CPLR 103 [c]). Before engaging in discovery or making any dispositive motions, however, the parties are directed to appear for a preliminary conference at which they shall be prepared to discuss, *inter alia*, whether the petitioner’s claim is barred by the six-year statute of limitations set forth in CPLR 213 (1).

Accordingly, the petition is denied to the extent that it is for article 78 relief, those portions of the proceeding are dismissed, and the petitioner’s remaining claim for declaratory relief shall be converted and continued in the form of a plenary action.

.....

To the extent that the petitioner seeks, by way of a separate motion, to strike certain portions of the respondents’ certified return and memorandum of law on the grounds that they improperly refer to matters outside the record and raise issues that are not before the court in this proceeding, it suffices to note that those portions of the return and memorandum of law have not been considered by the court and that the petitioner’s request is, therefore, academic.

.....

NOW, in light of the foregoing, and upon the reading and filing of the following papers in this matter: (1) Notice of Petition and Verified Petition dated August 10, 2015, and supporting papers (including Memorandum of Law); (2) Verified Answer and Return dated September 17, 2015 (except for item numbers 5 through 40 of the Return); (3) Memorandum of Law dated November 17, 2015 (except for subsection B of the “Facts” section); (4) Notice of Motion dated December 4, 2015 and supporting papers; (5) Reply Memorandum of Law dated December 4, 2015; (6) Affirmation in Opposition dated December 15, 2015, and supporting papers; and (7) Reply Affirmation dated December 18, 2015, and supporting papers; it is

ORDERED that the motion by the petitioner for an order striking item numbers 5 through 40 from the respondents’ certified return, and striking subsection B from the “Facts” section of the respondents’ memorandum of law, is denied; and it is further

ORDERED that the petitioner’s remaining claim for declaratory relief is hereby converted to a plenary action, with the notice of petition deemed the summons and the petition deemed the complaint; and it is further

ORDERED that the parties be designated as plaintiff and defendants and that the caption of the action be amended accordingly; and it is further

ORDERED that entry of judgment on the petitioner’s claims for CPLR article 78 relief be held in abeyance pending the disposition of his remaining claim for declaratory relief or further order of this court; and it is further

Seiter v. Shea
Index No. 15-14024
Page 8

ORDERED that the parties appear for a preliminary conference to take place at **9:30 a.m. on July 11, 2017** at IAS Part 9 of the courthouse located at One Court Street, Riverhead, New York.

Dated: May 25, 2017
Riverhead, NY



HON. DANIEL MARTIN, A.J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION