EXHIBIT B
TO
AMENDED AFFIRMATION OF KATE FLETCHER
IN SUPPORT OF AMENDED VERIFIED PETITION

18 Misc.3d 1109(A)
Unreported Disposition
(The decision of the Court is referenced in a table in the New York Supplement.)
Supreme Court, Schuyler County, New York.

Kenneth F. DILLON and Jan I. Dillon, Petitioners,
v.
The TOWN OF MONTOUR, The Town Board For the Town of Montour, David Scott, Bart Besley, Robert Brown, Melvin Switzer and Roy Craver, individually and collectively as members of the Town Board, and Does 1 through 50, Respondents.

No. 06–313.
|
Oct. 23, 2007.

Attorneys and Law Firms

Robert L. Halpin, Esq., Montour Falls.

Opinion

ELIZABETH A. GARRY, J.

*1 Petitioners Kenneth Dillon and Jan Dillon filed this proceeding under CPLR Article 78 to challenge actions taken by Respondents, the Town of Montour (Town), its Town Board (Board), and the Board's members, in connection with an amendment to the Town's Zoning Ordinance (Amendment) which was adopted as Local Law 2006–002 on November 29, 2006. On October 6, 2006, Petitioners filed a Petition objecting to the Town's issuance on August 15, 2006, of a Resolution that declared pursuant to the State Environmental Quality Review Act (SEQRA), Environmental Conservation Law art. 8, and its enabling regulations in 6 NYCRR Part 617 (SEQRA Regulations), that the Amendment would not have a significant impact on the environment and did not require preparation of an Environmental Impact Statement (Negative Declaration). On November 17, 2006, Petitioners filed an "Amendment to Petition" (Amended Petition) which, among other things, seeks to add the Town's Superintendent of Building and Zoning and its Zoning Board of Appeals as additional respondents. On December 29, 2006, Petitioners filed a Supplemental Petition objecting to the adoption of Local Law 2006–002. The Town filed Answers to all three of these submissions opposing Petitioners' requests for relief, raising various affirmative defenses, and seeking dismissal of the proceeding. Petitioners filed a Verified Reply on May 31, 2007. On June 1, 2007, Respondents appeared by Counsel and Petitioners appeared pro se for oral argument.

Factual and Procedural History

Petitioners are residents of an R–1 zoning district within the Town that is also part of a state-certified agricultural district. (Petition para. 1). In approximately July, 2000, non-parties Frank Gugliotta and Deborah Cox–Gugliotta (Gugliottas) began operating a business consisting of a game hunting and shooting preserve on land in the R–1 district located across the road from Petitioners' property. (Petition paras. 19, 23, 24, 97.)

Petitioners immediately began objecting to the Gugliottas' business as a violation of the Town's Zoning Ordinance (Ordinance.) Initially, the Town also treated the Gugliottas' business as a violation of the Ordinance. At Board meetings held on October 10, 2000, and November 9, 2000, the Gugliottas were advised that shooting preserves were not acceptable agricultural uses in the R–1 district. At both of these meetings, the Board directed the Gugliottas to apply for a "PUD" for their business. They apparently never did so. (Petition Exhibits A, B.) On March 26, 2001, the Gugliottas were served with a "Notice of Violation—Order to Remedy" asserting that they had violated the Town's Zoning Law art. 1, §§ 5[a], 7[a], through a use of property not permitted in the R–1 district. (Petition Exhibit O.) On October 10, 2001, the Town Board voted to refuse a request from the Gugliottas' attorney to amend the Ordinance to allow hunting preserves as an agricultural operation. (Petition Exhibit C.) On March 9, 2004, the Town filed an action in Schuyler County Court under Town Law § 268 seeking to enjoin the Gugliottas from continuing to operate the business on the ground that it was not an allowable use under the Ordinance.

*2 At some time after the enforcement action was filed, however, the Town reversed its course. The minutes of a Board meeting held on October 12, 2004, indicate that the Board directed the Town Attorney to send a certified letter to the Gugliottas "regarding the release of liability if the Town does not pursue legal action." (Amendment to Petition Exh. QQQ.) Frank Gugliotta signed a "General Release" on November 3, 2004, that purported to release

the Town from "any and all claims regarding ultra vires actions of the Town of Montour regarding land use and zoning from 2002 to November 1, 2004" in consideration of a "declaration from the Town of Montour of conforming use of an agricultural operation, i.e., the raising and hunting of game birds at 2918 and 2998 Mills Road." (Amendment Exh. SSS.) On November 8, 2004, the Town's attorney wrote to the Gugliottas' attorney to advise him that the General Release was not acceptable because the Town had not made such a declaration. (Amendment Exh. TTT.)

The Board held an executive session on January 24, 2005, with the stated purpose "to discuss pending litigation." Present at the meeting, according to Petitioners, were all of the members of the Town Board except for Petitioner Kenneth Dillon, who was then Town Supervisor but was necessarily absent from a series of meetings at this time; the Chairman of the Town Planning Board; the Gugliottas' attorney; and the Town's attorney. The minutes of the meeting reflect that immediately after the executive session ended, there was discussion of "amendments to make or propose to [the Town] Zoning Board" and that the Town's attorney asked "to draft a proposal to amend the Town of Montour Zoning Ordinance, section 7, R–1 to A, No.2, to allow a game farm as a permitted use." (Amendment to Petition Exh. AAAA.)

The Board's minutes indicate that at a meeting on February 8, 2005, Board Member Robert Brown proposed an amendment to the Zoning Ordinance that would add Christmas tree farms, game preserves, and plant nurseries to the list of specifically-permitted agricultural uses within the Town's R–1 district. (Amendment to Petition, Exh. BBBB.) After a public hearing on the proposal on April 12, 2005, the Board adopted a resolution that formally proposed the Amendment on August 9, 2005. A public hearing on the proposed amendment took place on September 13, 2005. (Exh. A, Minutes of Board Meetings, attached to Aff. of Deborah Riley sworn to on 11/16/06.)

At the Board's meeting on September 29, 2005, the Board began the process of completing a long-form Environmental Assessment Form (Long EAF) under 6 NYCRR part 617. At a meeting held on November 10, 2005, the Board discussed using the short-form Environmental Assessment Form instead (Short EAF), and a Short EAF was completed at a meeting of the Board on December 13, 2005. Thereafter, on February 14, 2006, the Town's representative to the Schuyler County Planning Commission (Planning Commission) advised the Board that the Long EAF was preferable. The Long EAF was subsequently completed and submitted to the Planning Commission. (Riley Affidavit Exh. C.) The Planning Commission suggested a modification in the Long EAF and approved it as modified on March 21, 2006. (Riley Affidavit Exh. D.) On April 11, 2006, the Board held another hearing and resolved to approve the recommended change.

***3** On April 11, 2006, the Town's attorney signed a Stipulation Discontinuing Action in the Town's lawsuit against the Gugliottas. (Amended Petition Exh. BBBBB.) On May 9, 2006, the Board directed its attorney to file the Stipulation of Discontinuance in the County Clerk's office. (Amended Petition Exhibit KKKKK.)

On August 15, 2006, after completing Parts 2 and 3 of the Long EAF, the Board adopted the challenged Negative Declaration. (Riley Affidavit Exh. A.) On October 6, 2006, Petitioner Kenneth Dillon delivered a letter denominated "Request for Appeal" to Al Buckland, then the Town's Superintendent of Building and Zoning, and to Georgie Taylor, the Chairperson of the Zoning Board of Appeals (ZBA). In the letter, he asked the ZBA to review "decisions made and actions either taken or not taken" by Buckland, the Board, and the Board's members related to interpretation of the zoning ordinance and to cause the enforcement of the zoning ordinance as outlined in a letter headed "Demand for Enforcement Action" which he had previously sent to Buckland on September 21, 2006. (Amended Petition Exh. QQQQQ.) On October 24, 2006, Petitioner received an e-mail from Taylor advising him, "The town attorney does not feel that there is any reason for the ZBA to address this." (Amended Petition Exh. SSSSS.) The ZBA did not undertake the requested appeal.

A public hearing on Local Law 2006–002, which comprised the proposed Amendment, was originally scheduled for October 10, 2006. (Riley Affidavit.) The hearing was postponed to November 9, 2006, allegedly because of a typographical error in the text of the proposed Local Law. (Riley Affidavit.) On the adjourned date a full quorum of Board members did not appear. On that date, the Town Supervisor called a special meeting for November 13, 2006, by advising the Town Clerk and one councilman in person and contacting two other councilmen by telephone. Another councilman, who was allegedly in Florida, was not notified. (Riley Affidavit; Scott Affidavit.) The asserted purpose for calling the special meeting was to permit the Town to meet deadlines imposed by the Town Law for adoption of a budget. (Scott Affidavit.) Notice of the special meeting was posted in the Town Clerk's office and in eight public locations in the Town, but was not submitted to the

media, allegedly because it was too late to meet the deadline of the Town's newspaper of record, a weekly publication. (Scott Affidavit.)

At the November 13, 2006, meeting, all Board members except for the individual allegedly in Florida were present, and the Board voted to reschedule the public hearing on Local Law 2006–002 to November 29, 2006. Notice of a public hearing was published in the Town newspaper of record on November 22, 2006. (Riley Affidavit Exh. A.) All Board members were present at the November 29, 2006, meeting, and the Local Law was passed unanimously. On February 13, 2007, at a regularly-scheduled meeting, the Board re-adopted Local Law 2006–002. (Riley Affidavit Exh. C.)

***4** Petitioners raise numerous procedural and substantive objections to the Town's alleged failure to enforce its pre-Amendment Zoning Ordinance against the Gugliottas, the issuance of the Negative Declaration, the passage of Local Law 2006–002, and the refusal of the Zoning Board of Appeals to act on their request for enforcement. They assert that there were violations of the New York and federal Constitutions, of SEQRA and its implementing regulations, the Open Meeting Law, the Town Law, the Municipal Home Rule Law, the Agriculture and Markets Law, and other provisions.

Legal Analysis

1. Standing

Respondents allege that Petitioners have failed to establish standing to challenge the Negative Declaration. "Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation." *Society of Plastics Indus. v. County of Suffolk,* 77 N.Y.2d 761, 769 [1991]. Standing to challenge an administrative action is based, generally, on "a showing that the action will have a harmful effect on the challenger and that the interest to be asserted is within the zone of interest to be protected by the statute." *Gernatt Asphalt Prods. v. Town of Sardinia,* 87 N.Y.2d 668, 687 [1996]. Thus, a challenger asserting that SEQRA has been violated must "demonstrate that it will suffer an injury that is environmental and not solely economic in nature." *Matter of Mobil Oil Corp. v. Syracuse Indus. Dev. Agency,* 76 N.Y.2d 428, 433 [1990].

A SEQRA challenger must also demonstrate that it will suffer an injury that is different in kind or degree from that suffered by the public at large. *Society of Plastics* at 778. An exception to this special injury requirement exists, however, for residents and property owners within the area affected by a challenged regulation, who are "presumptively adversely affected" by alleged SEQRA violations. *Schulz v. Lake George Park Com.,* 180 A.D.2d 852, 855 [3d Dep't 1992]. In such circumstances, the property owner has a legally cognizable interest in being assured that SEQRA has been satisfied before action is taken to rezone the owner's land. *Matter of Har Enterprises v. Town of Brookhaven,* 74 N.Y.2d 524, 529 [1989]. This exception is not, as Respondents contend, limited to "project-specific" zoning regulations. In *Schulz,* for example, a resident of the Lake George Park in Washington, Warren, and Essex Counties was found to have standing to challenge a wastewater-discharge moratorium that was applicable to the Park as a whole without a showing of special injury, based solely on the presumptive adverse effect that resulted from his status as a Park resident and property owner.

"[I]n zoning litigation in particular, it is desirable that land use disputes be resolved on their own merits rather than by preclusive, restrictive standing rules." *Sun–Brite Car Wash, Inc. v. Board of Zoning & Appeals,* 69 N.Y.2d 406, 413 (1987). To that end, in determining a petitioner's standing, the allegations contained in the petition are deemed to be true and are construed in the light most favorable to the petitioner. *Town of Coeymans v. City of Albany,* 284 A.D.2d 830 [3d Dep't 2001]. Petitioners have alleged that they will be negatively affected by environmental effects of the challenged Amendment, such as noise and increased vehicle traffic. As Petitioners are residents and property owners within the R–1 district, which is the district to which the challenged legislation is applicable, no showing of special injury is required under the principles discussed above. Even if it were, however, the Petitioners' submissions make the required showing. They claim that the challenged Amendment, though applicable by its terms to the R–1 district as a whole, is in reality an impermissible form of spot zoning or zoning by contract that was intended specifically to benefit the Gugliottas' shooting preserve, which is located directly across the road from Petitioners' property. They further claim that their property has lost value as a result of the Gugliottas' business activities. A nearby property owner's standing to challenge a proposed zoning change may be based on proximity, which alone "permits an inference that the challenger possesses an interest different from other members of the community." *Gernatt, supra* at 687.

When Petitioners' allegations are construed as true and in the light most favorable to them, they have met their burden, as the parties seeking judicial review, to establish their standing to challenge the Negative Declaration. *Society of Plastics, supra.* at 769.

2. The Negative Declaration

***5** Environmental Conservation Law § 8–0109 of SEQRA requires an agency to prepare an environmental impact statement (EIS) if it determines that a proposed action may have a significant effect on the environment. Weinberg, Practice Commentaries, McKinney's Cons Laws of NY, Book 17 1/2, ECL C8–0109:1.) If the agency determines that the environmental impact of a proposed action is not significant, it issues a negative declaration pursuant to the SEQRA Regulations, as did the Board in this case. Petitioners assert that numerous procedural and substantive violations of the SEQRA Regulations took place in the process of the issuance of the Negative Declaration, including improper delays and use of the wrong forms as well as failures to involve all involved agencies, to coordinate review, to take the required "hard look" at adverse environmental impacts of the proposed Amendment, and to publish the Negative Declaration.

Petitioners allege that the Town Board, as the "lead agency" for the project (6 NYCRR § 617.2[u]), violated SEQRA and the SEQRA Regulations by failing to coordinate its review of the action with other "involved agencies" as required by 6 NYCRR § 617.6[b][3]. The only agency that the Board identified as an involved agency was the Town's Planning Commission. (Petition para. 66; Riley Affidavit Exhs. C, D.) As to the Planning Commission, Petitioners do not contend that the designation was improper or that the required coordinated review did not occur. Instead, Petitioners claim that the Department of Environmental Conservation, the Department of Agriculture and Markets, local boards of health, the Department of Taxation and Finance, and other unnamed agencies should also have been identified as involved agencies.

An "involved agency" is defined in the SEQRA regulations as "an agency that has jurisdiction by law to fund, approve or directly undertake an action." 6 NYCRR § 617.2[s]. The "action" under challenge in this proceeding is the Amendment of the Ordinance. See 6 NYCRR § 617.2[b]. Although the state and local agencies listed by Petitioners may arguably exert regulatory authority over certain aspects of the operation of hunting preserves, no showing has been made or could have been made that any of them had jurisdiction to fund, approve, or directly undertake the Amendment in question. Failure to identify the agencies proposed by Petitioners as "involved agencies" or to coordinate review of the Amendment with these agencies did not, therefore, violate SEQRA.

Petitioners also contend that the Board violated SEQRA by failing to begin the review process until seven months after the proposed Amendment was introduced and then allegedly delaying the process for another five months by initially completing a Short EAF instead of a Long EAF. The SEQRA Regulations require agencies to complete SEQRA proceedings with minimal delay, to expedite the process of review, and to carry out initial review "as early as possible" (6 NYCRR §§ 617.3[h], .6[a][1]). The lead agency is to complete its determination of significance within 20 days of its receipt of all information it reasonably needs for this purpose. (6 NYCRR § 617.6[b][3][ii]). However, no penalties for failure to meet these time limits are included in the SEQRA Regulations, and courts have consistently held that "time limits for SEQRA review are directory, not mandatory." *Omabuild USA No. 1 v. State,* 207 A.D.2d 335 [3d Dep't 1994]. In *Nicklin–McKay v. Town of Marlborough Planning Board,* 14 AD3d 858 (3d Dep't 2005), for example, an 853–day delay was held to be an insufficient reason to invalidate a negative declaration. Petitioners have not shown that the delays which occurred here were unreasonable or that they caused any prejudice. No reason appears to invalidate the Negative Declaration based on untimeliness.

***6** Petitioners' final procedural objection to the Board's SEQRA process is its alleged failure to publish the Negative Declaration in the Environmental Notice Bulletin (ENB) as required by 6 NYCRR § 617.12[c][1]. An Affidavit of Deborah Riley, the Town of Montour Town Clerk, sworn to on November 16, 2006, indicates that she provided notice of the Negative Declaration to the ENB by mailing it to "Business Environmental Publications, 6 Seville Drive, Clifton Park, New York 12065–5013." The text of § 617.12[c][1], however, requires such notice to be sent "directly to Environmental Notice Bulletin, Room 538, 625 Broadway, Albany, N.Y. 12233–1750." Respondents have not explained why the notice was not sent to the address specified in the regulation, nor have they produced evidence that the Negative Declaration was, in fact, ever published. It appears that this requirement was not met. If this procedural defect did occur, however, Petitioners have not shown that it resulted in any failure of actual notice, caused prejudice, or prevented a thorough discussion of

the issues which might have changed either the decision to issue the Negative Declaration or the ultimate approval of the Amendment. See *Village of Skaneateles v. Board of Educ.*, 180 Misc.2d 591, 594 (Supreme Court, Albany County 1999) (decided on other grounds). This Court has found no case law precedent discussing the effect of a failure to comply with the ENB publication requirement. Like the previously-discussed regulations regarding the timing of SEQRA review, however, § 617.12[c][1] sets out no penalty for failure to comply with the publication requirement. With respect to time limitations, New York courts have consistently held that if the language used in a provision does not indicate that the provision was intended as a limitation on the power of the body or officer, the provision is to be interpreted as directory rather than mandatory. *Grossman v. Rankin,* 43 N.Y.2d 493, 501 (1977); *Seaboard Contracting & Material, Inc. v. Department of Environmental Conservation,* 132 A.D.2d 105, 108 (3d Dep't 1987). Under these circumstances, where no penalty is set out in the applicable regulation and no prejudice or failure of actual notice has occurred, the alleged failure to publish the notice in the ENB does not appear to be a sufficient ground to invalidate the Negative Declaration.

Petitioners' remaining challenges to the Negative Declaration are essentially substantive rather than procedural in nature. As to such challenges, "[a]lthough the threshold triggering an EIS is relatively low, a negative declaration is properly issued when the agency has made a thorough investigation of the problems involved and reasonably exercised its discretion. Thus, a court's review of that determination is limited to whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination." *Spitzer v. Farrell,* 100 N.Y.2d 186, 190 [2003].

*7 During the SEQRA process, the lead agency is required to identify all impacts "reasonably expected to result from the proposed action ." 6 NYCRR § 617.7[c][1]. It is not necessary for the lead agency to identify all impacts that could conceivably occur. See *Niagara Recycling, Inc., v. Town Board of Town of Niagara,* 83 A.D.2d 335 (4th Dep't 1981). In both the Long EAF and Negative Declaration, the Board first noted that because the project at hand was the amendment of an ordinance, no impacts on the environment would result directly from the action; instead, any potential impacts would result from actions that might be taken by property owners pursuant to the Amendment. In the interest of giving full consideration to impacts that conceivably could occur, however, the Board went on to identify seven potential areas of environmental impact: bodies of water, ground water and surface water, agricultural land resources, transportation systems, objectionable odors and noise, public safety, and the character of the community.

As to each of these potential impacts, the Board explained specifically how the impact might reasonably result from the Amendment, evaluated the probability of the impact and its likely extent, and reached a conclusion as to its importance. For example, as to the potential impact on bodies of water, the Board noted that degradation of water quality could result from animal waste or lead shot from hunting operations and that raising fish for harvest might affect bodies of water, but that in view of the number of properties likely to be converted to game preserve or fishery operations and the intensity of use on such properties, the potential negative impacts could not be considered important. Such analysis certainly constitutes a "reasoned elaboration" in stark contrast with the "bald conclusory statement" found to be inadequate in *Niagara Mohawk Power Corp. v. Green Island Power Authority,* 265 A.D.2d 711 (3d Dep't 1999). In that case, the negative declaration at issue evidently stated, without detail or analysis, that no positive or negative impacts on the environment whatsoever would occur as the result of the action under consideration. See also *Board of Cooperative Educational Services v. Town of Colonie,* 268 A.D.2d 838 [3d Dep't 2000].

After completing the above-described analysis in the Long EAF, the Board held three public hearings on the Amendment at which Petitioners and other residents of the Town offered their views. The Negative Declaration indicates that in addition to these hearings, the Board reviewed and considered the criteria set forth in 6 NYCRR § 617.7[c] as well as supplemental materials that, along with others, included a report on the "Unique Natural Assets of Schuyler County" as well as a "SEQRA Issues Statement" prepared by one of the Petitioners. The Board therefore took the required "hard look" at the potential adverse environmental impacts of the Amendment. *Spitzer, supra.*

***8** "It is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively." *Chinese Staff & Workers Ass'n v. New York,* 68 N.Y.2d 359, 363 [1986]. The Board met its obligations under SEQRA to identify relevant areas of environmental concern, take a hard look at them, and make a reasoned elaboration of the basis for its determination. *Spitzer, supra.* The issuance of the Negative Declaration was not affected by an error of law, arbitrary and capricious, or an abuse of discretion.

Anderson v. Lenz, 27 AD3d 942 [3d Dep't 2006]. Petitioners' disagreement with the conclusions reached in the Negative Declaration does not offer a basis for its rejection.

3.Addition of parties

In the Amended Petition, Petitioners sought to add as additional Respondents the Town of Montour Zoning Board of Appeals (ZBA) as well as "Al Buckland in his capacity as the Town of Montour Superintendent of Building and Zoning a/k/a Code Enforcement Officer a/k/a Zoning Insptector a/k/a Building Inspector III" (Buckland). Petitioners did not initially seek leave to add these additional respondents as required by CPLR § 401. An amendment to a petition is properly treated as a nullity to the extent that it seeks to add a party or parties without complying with CPLR § 401. *Board of Education v. DePace,* 301 A.D.2d 521, 522 (2d Dep't 2003). However, as Petitioners did make a request in their reply papers for leave to join the additional respondents after Respondents' Counsel pointed out the failure, the merits of the request are addressed.

Leave of court is required to join additional parties in a special proceeding because such proceedings are intended to bring the dispute before the court immediately. Thus, the court is given "the degree of control over parties necessary to preserve the summary nature of the proceeding, but it is still able to utilize joinder devices to prevent an undesirable multiplicity of suits. If the circumstances militate in favor of joinder of additional parties, the court can, of course, extend the time of the hearing as necessary." Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C401:2. In considering a request for joinder, a court may look to the merits of the claim against the respondents and may consider whether adding additional parties will cause undue delay or unnecessarily embroil new parties in the dispute. See *People v. Apple Health and Sports Clubs, Ltd., Inc.,* 206 A.D.2d 266 [1st Dep't 1994].

The Amended Petition demands relief in the nature of mandamus in the form of orders directing Buckland, as the Town's Superintendent of Building and Zoning, to take various actions to enforce the Town's zoning ordinance as it existed prior to the challenged Amendment. Mandamus under CPLR art. 78 lies only when the right to relief is clear and the act to be compelled involves no exercise of discretion. *Hamptons Hospital & Medical Center, Inc., v. Moore,* 52 N.Y.2d 88 [1980]. Petitioners allege that Buckland's duty to enforce the Ordinance is not discretionary. They base this claim on the use of mandatory language in various provisions in the Ordinance, such as § 16 which provides in part, "This ordinance shall be enforced by the Superintendent of Building and Zoning," and § 3, which provides, "The term shall' is always mandatory." Petitioners also rely on Town Law § 138, which provides that a town's building inspector "shall" have charge of the enforcement of the Ordinance. The mandatory language in these provisions, they claim, makes the duty to enforce the ordinance ministerial and entitles them to mandamus relief.

*9 This argument misconstrues the law. The provisions in question use mandatory language to assign the task of enforcement to the specified officer. They do not and cannot mandate *how* the task of enforcement is to be carried out. New York law is absolutely clear that decisions by municipal officers as to whether to enforce zoning codes are discretionary and therefore not subject to mandamus relief. *Dyno v. Village of Johnson City,* 261 A.D.2d 783 [3d Dep't 1999]; *Church of the Chosen v. City of Elmira,* 18 AD3d 978 [3d Dep't 2005]; *Mayes v. Cooper,* 283 A.D.2d 760 [3d Dep't 2001]. When a proposed amendment to the pleadings in a proceeding under CPLR article 78 is "plainly lacking in merit" in that it seeks relief not available in such a proceeding, the amendment is properly denied. *Dyno, supra* at 783–784. As the mandamus relief that Petitioners seek against Buckland is not available in this proceeding, their request for leave to add him as a respondent is denied.

Petitioners also seek to add the ZBA as a respondent based on the claim that it wrongfully failed to act on their letter asking the ZBA to review determinations allegedly made by Buckland relating to the operation of a shooting preserve, a hatchery, and a dog kennel. Town Law § 267–a [4] provides that "unless otherwise provided by local law or ordinance, the jurisdiction of a board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation or determination made by the administrative official charged with the enforcement of any ordinance or local law." Petitioners contend, in effect, that Buckland's alleged failure to enforce the ordinance constituted an "order, requirement, decision, interpretation or determination" within the meaning of this provision and that in refusing to entertain their request for an appeal from his failure to act, the ZBA failed to perform a duty enjoined upon it by law.

As § 267–a [4] makes clear, a zoning board of appeals is a body of limited jurisdiction. Where, as here, a zoning ordinance confers no additional authority on a zoning

board of appeals, its power is limited to the appellate jurisdiction specifically given to it by Town Law § 267[2]. *Gaylord Disposal Service, Inc. v. Zoning Bd. of Appeals,* 175 A.D.2d 543, 544 [3d Dep't 1991]. When the officer charged with enforcing a zoning ordinance has made no determination, a zoning board of appeals has no appellate jurisdiction. *Barron v. Getnick,* 107 A.D.2d 1017, 1018 [4th Dep't 1985]; see also *Brenner v. Sniado,* 156 A.D.2d 559 [2d Dep't 1989]. No determinations were made in this case, so the ZBA had no jurisdiction and no duty to undertake the actions requested by Petitioners. The relief Petitioners seek against the ZBA is not available in this proceeding, and their request to add the ZBA as additional respondents is denied.

4. Statute of Limitations.

***10** The Amended Petition alleges that on June 13, 2006, the Board improperly passed a Resolution to distribute certain funds to the Town's Deputy Supervisor. CPLR 217[1] requires a proceeding under CPLR art. 78 to be commenced within 4 months after the challenged action becomes final or binding. The Amended Petition was filed on November 17, 2006, more than four months after the challenged Resolution was passed. Thus, the claim is timely only if it relates back to the claims raised in the original Petition, which was filed on October 6, 2006, less than four months after the Resolution was passed.

CPLR 203[f] provides: "A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." In this case, the original Petition is focused almost exclusively on the validity of the Negative Declaration. It makes no reference to the challenged distribution of funds. Nothing in the Amended Petition demonstrates that the challenged distribution shares a "common factual foundation" with the allegations of the original Petition. See *Brown v. Vail–Ballou Press, Inc.,* 188 A.D.2d 972, 973 [3d Dep't 1992]. The claim is therefore time-barred.

The Amended Petition also includes two causes of action directed against the Stipulation of Discontinuance filed by the Town in its enforcement action against the Gugliottas under Town Law § 268. Petitioners allege that by discontinuing the action, Respondents effectively and improperly issued a variance permitting the Gugliottas to continue their allegedly illegal business. They also claim that the Stipulation of Discontinuance improperly denied the existence of "interested non-parties" to the action. The Stipulation of Discontinuance, however, was filed on May 17, 2006, more than four months before the original Petition was filed. Thus, without regard to whether the assertions regarding the Stipulation of Discontinuance relate back to any of the allegations of the original Petition, these claims are time-barred and must be dismissed.

Even if this claim were not time-barred, it would not succeed on the merits. Town Law § 268[2] provides that town authorities "may" institute injunctive proceedings. Nothing in the statute indicates that they must institute such proceedings or that, once such proceedings have been begun, they cannot be discontinued. "A town is not subject to a mandamus proceeding to enforce its zoning laws since the determination to [commence] an enforcement action is within the discretion of the town." Rice, Practice Commentaries, McKinney's Cons Laws of NY, Book 61 at 390. See *Mayes v. Cooper,* 283 A.D.2d 760 [3d Dep't 2001]. As previously discussed, to the extent that the Amended Petition seeks to compel Respondents to take any action to enforce the zoning ordinance, it seeks relief that is not available in a CPLR art. 78 proceeding. Petitioners' claims regarding the Stipulation of Discontinuance, as well as their claims seeking relief in the nature of mandamus compelling the Town to enforce the Ordinance, must be dismissed.

5. Constitutional Violations.

***11** In the remaining cause of action in the Amended Petition, Petitioners assert that their due process rights under the New York and United States Constitutions have been violated. Constitutional due process claims are not included in CPLR § 7803, which lists the questions that may be raised in a proceeding under CPLR art. 78. However, in zoning disputes, due process claims that are "administrative" in nature are properly considered in Article 78 proceedings, while due process claims that are "legislative" in nature may be reached through conversion of the action under CPLR 103[c], which permits the review of a challenged zoning determinations even though the improper procedural form has been employed. *Todd Mart, Inc. v. Town Board of Webster,* 49 A.D.2d 12, 17 [4th Dep't 1975]. Without regard to procedural form, Petitioners' constitutional claims lack merit.

Petitioners allege that they were deprived of due process by Respondents' alleged failure to enforce the zoning ordinance. A party's interest in a land-use regulation is protected by the 14th Amendment only when the party

has a legitimate claim of entitlement to the relief being sought, and such an entitlement arises in zoning matters only when the discretion of the zoning agency is so narrowly circumscribed as to virtually assure its conferral. *Twin Town Little League, Inc. v. Town of Poestenkill,* 249 A.D.2d 811 [3d Dep't 1998]. As previously discussed in the context of mandamus relief, Respondents have broad discretion in determining whether and how to enforce their zoning ordinance. The federal constitution, therefore, does not afford Petitioners a protected property interest in the ordinance's enforcement. See *Gagliardi v. Village of Pawling,* 18 F3d 188, 192 [2d Cir.1994]. Further, Petitioners have not shown that the New York Constitution offers greater due process protection in the context of land use regulation than does the federal constitution. NY Const. art. I, § 6; *Masi Mgmt., Inc. v. Town of Ogden,* 180 Misc.2d 881, 897 [Supreme Court, Monroe County 1999], aff'd 273 A.D.2d 837 [4th Dep't 2000]. Petitioners' constitutional claims are therefore denied.

6. The Adoption of Local Law 2006–002

The Supplemental Petition raises substantive and procedural objections to the passage of Local Law 2006–002, which was adopted by the Board on November 29, 2006, and re-adopted on February 13, 2007. Petitioners allege that violations of the Municipal Home Rule Law, the Town Law, the General Municipal Law, the Open Meetings Law, SEQRA, and the Agriculture and Markets Law took place, that Local Law 2006–002 fails to comport with the Town's comprehensive plan, that its passage was an arbitrary and capricious exercise of the Board's power, and that certain Board members had potential conflicts of interest but failed to make the requisite disclosures or to recuse themselves. Petitioners therefore ask the court to declare Local Law 2006–002 to be null and void.

***12** First, Petitioners contend that Respondents failed to give the required notice of the special meeting conducted on November 13, 2006, at which the November 29, 2006 public hearing on Local Law 2006–002 was scheduled. Municipal Home Rule Law § 20[5] requires five days' notice for a public hearing on a local law prior to its adoption. Town Law § 62 permits a town supervisor to call a special meeting of the town board by giving at least two days' written notice to board members. Public Officers Law § 104 requires that when a meeting is scheduled less than a week in advance, notice must be posted and provided to the news media "to the extent practicable ."

Respondents assert that on November 9, 2006, the Supervisor gave verbal notice of the rescheduled November 13, 2006, special meeting to all members of the Board except for one member who was in Florida. Notice was posted in the Town Clerk's Office and in eight other public locations. No written notice was given to any Board member, and notice was not given to the news media. Neither of these circumstances, however, renders the business conducted at the November 13, 2006, meeting null and void. Notice to the news media was not "practicable" (Public Officers Law § 104) because the Town's newspaper of record publishes on a weekly schedule. As to written notice, actions taken at a special meeting held without two days' written notice are not invalid if all board members have actual notice of the meeting, attend it, and participate therein. 1980 Op. Atty. Gen. (Inf.) 129. In this case, all Board members except for one who was in Florida and, according to Respondents, would not have attended the November 13, 2006 meeting in any event, received actual notice of the November 13, 2006, meeting, attended the meeting, and voted unanimously to reschedule the hearing on Local Law 2006–002 to November 29, 2006. All Board members attended and voted at the latter meeting, which was properly noticed according to the requirements of the Municipal Home Rule Law. Thus, no failure of actual notice occurred and no prejudice resulted. Even if irregularities in the scheduling of the November 13, 2006, meeting did raise any questions about the validity of Local Law 2006–002, any such irregularity was corrected by the re-adoption of the Local Law at the Board's regularly-scheduled meeting on February 13, 2006.

Petitioners' remaining procedural claims may be briefly addressed. No procedural violations of the Town Law took place because Local Law 2006–002 was adopted under the alternate procedures of the Municipal Home Rule Law. *Pete Drown, Inc., v. Town of Ellensburg,* 229 A.D.2d 877, 878 [3d Dep't 1996]. Local Law 2006–002 does not, as Petitioners contend, violate Municipal Home Rule Law § 22 by failing to specify the state statutes, local laws, or ordinances that it changes or supercedes. The text of the Local Law provides that it amends "Article 1, § 7 R–1, A[2] of the Zoning Ordinance of the Town of Montour, revised May 1, 1981, and amended July 11, 2000," and Petitioners have not shown that any other legislative provision was changed or superceded. No "agricultural data statement" was required because the Amendment was not an "application for a special use permit, site plan approval, use variance, or subdivision approval." Agriculture & Markets Law § 305–a [2]; Town Law § 283–a [2]. No showing has been made that the adoption of Local Law 2006–002 violated the conflict of

interest provisions of General Municipal Law art. 18.

***13** Petitioners' final objections to Local Law 2006–002 are substantive rather than procedural in nature. Petitioners assert, first, that the Local Law was not enacted in accordance with a "comprehensive plan" as required by Town Law § 263. "The purpose of this statute's requirement that zoning regulations conform to a comprehensive plan is to guard against ad hoc zoning legislation affecting the land of a few without proper regard to the needs or design of the community as a whole." *Daniels v. Van Voris,* 241 A.D.2d 796, 797 [3d Dep't 1997]. Where, as here, a municipality has no formal comprehensive plan, the plan is found by examining all relevant evidence, such as the municipality's existing zoning ordinance or zoning maps. *Randolph v. Town of Brookhaven,* 37 N.Y.2d 544, 547 [1975]; *Udall v. Haas,* 21 N.Y.2d 463, 472 [1968].

Petitioners base their claim that Local Law 2006–002 is inconsistent with the Town's comprehensive plan on the assertion that until sometime in 2006, the Town interpreted its existing Ordinance to exclude such activities as shooting preserves from its definition of agricultural uses, so that the adoption of Local Law 2006–002 amounted to a change in direction. The requirement that zoning must be consonant with comprehensive planning is not, however, a prohibition against change. "What is mandated is that there be comprehensiveness of planning, rather than special interest, irrational ad hocery. The obligation is support of comprehensive planning, not slavish servitude to any particular comprehensive plan. Indeed sound planning inherently calls for recognition of the dynamics of change." *Bedford v. Mt. Kisco,* 33 N.Y.2d 178, 188 [1973].

The legislative findings made by the Board in support of its adoption of Local Law 2006–002 include determinations that the existing Ordinance no longer accurately reflected the Town's current and proposed development, that neither the "traditional notions of agriculture" set forth in the Ordinance nor its definition of a "farm" adequately reflected the realities of agricultural land use in the Town, that agricultural operations such as Christmas tree farming and raising and harvesting game birds on game preserves had increased since the Ordinance was enacted, and that the Town's orderly development required a more accurate and realistic definition of permissible agricultural operations. Local Law 2006–002, art. I. As these findings make clear, the required forethought was given to the community's land use problems, and the change in the Town's zoning did not conflict with the community's basic scheme for land use. *Randolph, supra* at 547. Local Law 2006–002 is properly consistent with the Town's comprehensive plan.

Finally, Petitioners contend that the true motive behind the adoption of Local Law 2006–002 was not the good of the Town as a whole, but was arbitrary and capricious "spot zoning" for the benefit of a single property owner. Spot zoning is defined as "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area for the benefit of the owner of said property to the detriment of other owners." *Daniels, supra* at 799. Local Law 2006–002 does not single out any small parcel of land. It applies to the Town's entire R–1 district, which Petitioners themselves assert encompasses about 10,500 of the Town's total 12,000 acres. (Petition para. 37.) Even if the Local Law did single out a smaller parcel, the ultimate test for spot zoning is whether the change is "other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community." *Id.; Boyles v. Town Board,* 278 A.D.2d 688 [3d Dep't 2000]; *Yellow Lantern Kampground v. Town of Cortlandville,* 279 A.D.2d 6, 9 [3d Dep't 2000]. Local Law 2006–002 is fully consistent with the Town's comprehensive planning strategy. No improper spot zoning occurred.

***14** Nor have Petitioners established that Local Law 2006–002 was passed as the result of improper "zoning by contract" between the Town and the Gugliottas. "All legislation by contract is invalid in the sense that a Legislature cannot bargain away or sell its powers." *Citizens to Save Minnewaska v. New Paltz Central School District,* 95 A.D.2d 532, 534 [3d Dep't 1983], quoting *Church v. Town of Islip,* 8 N.Y.2d 254 [1960]. A petitioner who asserts that such an illegal bargain has been struck in the zoning context must prove that the municipality either "legislated pursuant to the terms of a contract ... or agreed in exchange for a predetermined consideration to provide an expedited and favorable determination." *De Paolo v. Town of Ithaca,* 258 A.D.2d 68, 71 [3d Dep't 1999]. No such showing has been made here. Although Petitioners' submissions intimate that the Town discontinued its enforcement action against the Gugliottas as the result of some improper, clandestine agreement, no evidence of such an agreement has been presented other than the Town's amendment of its Ordinance. The exercise of legislative discretion to rezone property, alone, is not proof that the change resulted from an illegal agreement. *Brechner v. Incorporated Village of Lake Success,* 25 Misc.2d 920 [Supreme Court, Nassau County 1960], *aff'd* 14 A.D.2d 567 [2d Dep't 1961]. Here, as in *DePaolo, supra* at 71, the Town expressly rejected language which could have arguably been

interpreted as an improper agreement when its attorney refused to accept Frank Gugliotta's General Release of certain claims against the Town dated November 3, 2004, because of its reference to a "declaration from the Town of Montour of conforming use of an agricultural operation, i.e., the raising and hunting of game birds at 2918 and 2998 Mills Road."

Zoning legislation is "entitled to the strongest possible presumption of validity and must stand if there was any factual basis therefor." *Church, supra* at 258. Petitioners have not met their "heavy burden" of showing that Local Law 2006–002 is not justified "by any reasonable interpretation of the facts." *Bedford, supra* at 186. Petitioners' passionate disagreement with the Town's decision to amend its Ordinance and their deep frustration with the consequences of that decision are unmistakable. Sympathy for their circumstances does not and cannot provide this court with any basis for judicial interference with the Town's legislative processes. No legal grounds have been shown for the invalidation of Local Law 2006–002.

Conclusion

Petitioners have not established that any violation of the laws of the State of New York, its Constitution, or the United States Constitution requires the invalidation of the Negative Declaration or of Local Law 2006–002, the joinder of additional parties, injunctive relief against Respondents, or any of the other relief sought. For the reasons and based upon the law set forth above, the Petition, Amended Petition, and Supplemental Petition are dismissed in their entirety.

***15** This constitutes the Decision and Order of the Court.

All Citations

18 Misc.3d 1109(A), 856 N.Y.S.2d 23 (Table), 2007 WL 4592978, 2007 N.Y. Slip Op. 52477(U)

End of Document