Supreme Court
State of New York

Richard E. Sise
Acting Justice

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November 18, 2015

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City of Saratoga
677 Broadway, 10th Floor
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RE: McTygue v City of Saratoga
Index No.: 2014-3552
RJI No. 45-1-2014-1771

Dear Counselor:

Enclosed please find original Decision and Order in the above-entitled matter. A copy of the Decision and Order together with the original papers has been delivered to the Chief Clerk. Kindly file the original with the Saratoga County Clerk.

Very truly yours,

Mary J. Burch-Macherone

Mary J. Burch-Macherone
Principal Secretary to the
Hon. Richard E. Sise

Enclosure
cc:
Carianne Brimhall, Chief Clerk
Saratoga County Supreme Court
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PRESENT: HON. RICHARD E. SISE
Acting Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

THOMAS G. McTYGUE, REMIGIA FOY and RAYMOND WATKIN,

Petitioners-Plaintiffs,

DECISION AND ORDER
Index No.: 2014-3552
RJI No.: 45-1-2014- 1771

-against-

CITY OF SARATOGA SPRINGS, CITY OF SARATOGA SPRINGS CITY COUNCIL, JOANNE YEPSEN, MAYOR, JOHN FRANCK, COMMISSIONER OF ACCOUNTS, MICHELE MADIGAN, COMMISSIONER OF FINANCE, ANTHONY SCIROCCO, COMMISSIONER OF PUBLIC SAFETY, THE ALGONQUIN BUILDING, LLC, and CONGREGATION & YESHIVA PARDES YOUSEF D'CHASIDEI BELZ, a New York Religious Corporation,

Respondents-Defendants.

(Supreme Court, Saratoga County, Motion Term)

APPEARANCES: Nixon Peabody LLP
(By: Daniel J. Hurteau, Esq. and Jena R. Rotheim, Esq.)
Attorneys for City of Saratoga Springs, City of Saratoga Springs City Council, Joanne D. Yepsen, Mayor, John Franck, Commissioner of Accounts, Michele Madigan, Commissioner of Finance, Anthony Scirocco, Commissioner of Public Works, Christian Mathiesen, Commissioner of Public Safety
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Matter of McTygue, et al v. City of Saratoga Springs, et al
Index No. : 2014-3552

Albany, New York 12207

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(By: Michael J. Toohey, Esq.)
Attorneys for Congregation & Yeshiva Pardes Yosef D'Chasidei Belz and Algonquin Building, LLC
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Sise, J.

This action arises out of the sale of a parcel of real property, commonly referred to as the Collamer lot, located at 500 Broadway in the City of Saratoga Springs. The parcel was sold by the City of Saratoga Springs (City) to The Algonquin Building, LLC. The petition-complaint asserts three cause of action under CPLR article 78 seeking to set aside the transaction, two causes of action alleging violation of the State Environmental Quality Review Act (SEQRA) and one cause of action pursuant to General Municipal Law §51. The pleading also requests a declaratory judgment that the City lacked the legal authority to engage in the transaction. The City of Saratoga Springs respondents-defendants[1] (respondents) have moved to dismiss the action on the bases that the petitioners-plaintiffs (petitioners) lack standing to raise the article 78 questions and SEQRA challenges and that the causes of action under article 78 and SEQRA, as well as the declaratory judgment action, are barred by the applicable statute of limitations.

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[1] City of Saratoga Springs, City of Saratoga Springs City Council, Joanne D. Yepsen, Mayor, John Franck, Commissioner of Accounts, Michele Madigan, Commissioner of Finance, Anthony Scirocco, Commissioner of Public Works, Christian Mathiesen, Commissioner of Public Safety.

Respondents-defendants also contend that the claims asserted under article 78, General Municipal Law §51 and for a declaratory judgment all fail to state a cause of action upon which relief may be granted. Respondents-defendants Congregation & Yeshiva Pardes Yosef D'Chasidei Belz and Algonquin Building, LLC have also moved for an order dismissing the petition-complaint.

STANDING

"Standing is a threshold issue requiring an actual legal stake in the outcome of the action, namely an injury in fact worthy and capable of judicial resolution" (*Aiardo v Town of E. Greenbush*, 64 AD3d 849, 851[3d Dept 2009] [internal quotation marks and citations omitted]). Moreover, the injury must fall within the zone of interests sought to be protected by the statutory provision or other authority under which the action was taken (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). Standing is not automatic and must be alleged and, when disputed, proven (*Matter of O'Brien v New York State Commissioner of Educ.*, 112 AD3d 188, 193 [3d Dept 2013]).

With respect to the causes of action under article 78, petitioners have not demonstrated that any of them are personally aggrieved by the sale of the Collamer lot. Instead they argue that they have standing under General Municipal Law § 51 which respondents have waived by failing to raise on this motion. According to petitioners, inasmuch as the article 78 causes of action are premised on many of the same factual underpinnings, they, by extension, have standing to raise the questions posed under article 78.

Respondents' waiver of the standing issue under General Municipal Law § 51 is not the equivalent of a judicial determination that petitioners have such standing. Absent such a determination, petitioners cannot argue for standing in an article 78 context based on standing under the General Municipal Law. Moreover, "[a] taxpayer suit under General Municipal Law § 51 lies only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009][citations and internal quotation marks omitted). That analysis presents different questions than are raised in determining standing in a proceeding under article 78.

Petitioners also contend that they should be permitted to pursue the article 78 challenges based on the doctrine of common-law taxpayer standing. The doctrine allows a party to challenge important governmental actions despite a lack of personal aggrievement where the party can show that the failure to accord such standing would in effect erect an impenetrable barrier to any judicial scrutiny (*Matter of Ricket v Mahan*, 97 AD3d 1062, 1063-1064 [3d Dept 2012]). The first cause of action is based on a claim that the City failed to secure fair market value for the property in violation of the City Charter and that the failure to do so constitutes a gift of City property in violation of the New York Constitution. In the second cause of action petitioners allege that the sale was accomplished through a process involving a Request for Proposals (RFP) rather than by public auction as required by General City Law § 23. In the third claim raised under article 78 petitioners contend that the Collamer lot has been dedicated to public use as a free parking lot and thus dedicated to the public trust. As such, petitioners claim, the City was

required to obtain State legislative authority for the sale to a private entity.

Here, the City issued a RFP in which it requested bids for the Collamer Lot with a minimum bid of $775,000. The RFP also sought, in conjunction with the proposal for the sale of the Collamar Lot, the acquisition of land on the eastern ridge of Saratoga Springs suitable for the construction of a Fire/Emergency Services Facility. The land was required to be at least 3 acres and within ½ mile radius of the intersection of Route 9P, Meadowbrook and Gilbert Roads with a maximum purchase price of $200,000. According to petitioners, Algonquin was the only entity to submit a proposal; offering to pay $775,000 for the Collamar Lot and tendering a 14.48 acre parcel, located within .3 miles of the intersection of Union Avenue, Meadowbrook and Gilbert Roads, for $200,000. Petitioners contend, and respondents do not dispute that the RFP was designed to accommodate only one offer: the one from Algonquin with whom the City had previously discussed the very transaction outlined in Algonquin's proposal. Inasmuch as the terms of the RFP foreclosed other interested parties from bidding on the Collamer Lot, it had the effect of raising an impenetrable barrier to judicial review. Consequently, petitioners have standing to challenge these issues.

Respondents have also attacked petitioners' standing to raise the fifth and sixth causes of action which present challenges under the State Environmental Quality Review Act (SEQRA). When a challenge to governmental action is based on a SEQRA violation, standing requires a showing that petitioners would suffer direct harm, injury that is in some way different from that of the public at large (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 774 [1991]). "Injury-in-fact may arise from the existence of a presumption established by the allegations

demonstrating close proximity to the subject property or, in the absence of such a presumption, the existence of an actual and specific injury" (*Matter of Powers v De Groodt*, 43 AD3d 509, 513 [3d Dept 2007], citations omitted). However, in instances such as this where the SEQRA challenge does not involve a zoning-related issue the presumption of standing based on proximity does not apply *(Matter of Save Our Main St. Bldgs. v Greene County Legislature*, 293 AD2d 907, 908 [3d Dept 2002], lv denied 98 NY2d 609 [2002]). Moreover, even if the presumption were to apply, the only allegation offered by petitioners in this regard is insufficient. Petitioner Thomas McTygue maintains that he owns property within 750 feet of the Collamer lot but that distance is measured along a straight line that cuts through two developed city blocks. However, in other matters involving challenges based on proximity owners whose property is closer than 750 feet to the proposed challenged project have been found not close enough to give rise to the presumption that the owner is or will be adversely affected by the proposed project (see *Matter of Finger Lakes Zero Waste Coalition, Inc. v. Martens*, 95 AD3d 1420, 1422 [3d Dept 2012], citing *Matter of Gallahan v Planning Bd. of City of Ithaca*, 307 AD2d 684, 685 [3d Dept 2003], lv denied 1 NY3d 501[2003] [no presumption at 700 feet]; *Matter of Oates v Village of Watkins Glen*, 290 AD2d 758, 760-761 [3d Dept 2002] [no presumption at 530 feet]; *Matter of Buerger v Town of Grafton*, 235 AD2d 984, 985 [3d Dept 1997], lv denied 89 NY2d 816 [1997] [no presumption at 600 feet]).

The injury-in-fact alleged by McTygue is also insufficient to confer standing to assert the SEQRA claims. McTygue maintains that if the sale of the Collamer lot is allowed to proceed the result will be the construction of a mixed use, multi-story building on the site and the loss of 42

parking spaces along Broadway. According to McTygue, development of that building will have to await the construction of a parking garage, proposed by the Saratoga Springs City Center Authority, approximately 300 feet from his property. Construction of the parking garage will, according to McTygue, impose an environmental harm on him that is greater in degree than that experienced by the general pubic. Even putting aside that the scenario envisioned by McTygue, with the exception of the sale of the Collamer lot, is irrelevant to an examination of the action taken by the City Council, the claimed harm is not articulated. And, because "[t]he injury in fact element must be based on more than conjecture or speculation" (*Matter of Animal Legal Defense Fund, Inc. v. Aubertine*, 119 A.D.3d 1202, 1203 [3d Dept 2014]), petitioners are without standing to pursue the SEQRA causes of action.

STATUTE OF LIMITATIONS

In addition to the issue of standing respondents have raised the statute of limitations as an objection in point of law to the article 78 claims. Respondents argue that the action which petitioners seek to annul is the approval by the City Council of the December 17, 2013 resolution authorizing the purchase of the Union Avenue parcel and the sale of the Collamer Lot. Petitioners contend that as that action occurred well more than four months before this action was commenced on December 5, 2014, the causes of action based on CPLR article 78 would be time barred under CPLR 217. Petitioners offer two arguments in opposing dismissal based on the statute of limitations. First, they contend that the article 78 causes of action assert, in substance, claims of waste cognizable under GML § 51 and that a one-year statute of limitations applies to

such actions (see *Clowes v Pulver*, 258 AD2d 50 [3d Dept 1999], lv dismissed 94 NY2d 858 [1999]). Applying a one-year statute of limitations to the article 78 based claims, such claims would be timely even using respondents accrual date of December 17, 2013. Petitioners also assert that even if the four-month period of limitation in CPLR 217 is applied the claims are timely as accrual did not occur until August 5, 2014.

Respondents attempt to affix a one-year statute of limitations to the claims under article 78 is misplaced. The statute of limitations for an action under CPLR article 78 is four months measured from the time the determination became final and binding (CPLR 217 [1]). Thus, insofar as petitioners have pled any claim under that statute, the claim is governed by the four-month period of limitation and there is no need to ascertain, as petitioners suggest, whether another form of proceeding is available for resolution of the dispute (see *Koerner v State of New York*, 62 NY2d 442, 447 [1984]). When governmental activity is challenged in a form of action for which no specific statute of limitations is prescribed, then, analysis of the applicable limitations period begins with an examination of the claims and the nature of the relief sought (*New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194, 200-201 [1994]; *Matter of Federation of Mental Health Ctrs. v DeBuono*, 275 AD2d 557, 559 [3d Dept 2000]) and the initial inquiry is whether the challenge could have been advanced in a CPLR article 78 proceeding (*Matter of Frontier Ins. Co. v Town Bd. of Town of Thompson*, 252 AD2d 928 [3d Dept 1998]). The distinction between an action under article 78 and one for a declaratory judgment depends on whether the challenged action is administrative or a legislative. Legislative action must be challenged in a declaratory judgment action while administrative actions are

tested under article 78 standards (*Matter of Federation of Mental Health Ctrs. v DeBuono*, 275 AD2d 557, 559 [3d Dept 2000]).

The decision to sell the lot was made when the City Council adopted either the December 17, 2013 resolution, as respondents contend, or the August 5, 2014 resolution, as argued by petitioners. However, "[the] circumstance that the action sought to be reviewed is that of a legislative body ... does not stamp that action as 'legislative' for the purpose of determining whether" that action may be challenged in an article 78 proceeding (*Press v County of Monroe*, 50 NY2d 695, 701-702 [1980]). Legislative action is characterized by action having general applicability, indefinite duration, and accomplished by formal adoption, i.e., the enactment of legislation, while administrative action is characterized by its individualized application, limited duration, and informal adoption, e.g., resolution by the governing body (*International Paper Co. v Sterling Forest Pollution Control Co.*, 105 AD2d 278, 282 [2d Dept 1984]). Here, both actions by the City Council applied only to a single purchase and sale agreement and was accomplished by resolution. As such, it was administrative in nature and the four-month statute of limitations in CPLR 217 applies to the request for a declaratory judgment.

Having determined that a four-month statute of limitations applies to the three claims under CPLR article 78 and the request for a declaratory judgment, the question then arises as to when the claims accrued. Respondents argue that the claims accrued when the City Council adopted the December 17, 2013 resolution accepting the Algonquin proposal. Petitioners argue that the August 5, 2014 resolution authorizing the Mayor to execute the contract commenced the running of the statute. The four month period of limitation applicable to actions brought under

article 78 is measured from the time the determination became final and binding (CPLR 217 [1]). Two requirements have been identified for fixing the time when agency action is final and binding. "First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" (*Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]).

Here, petitioners' injuries are based on claims that the City Council failed to secure fair market value for the Collamer lot, did not sell the property at public auction and failed to obtain authorization from the State legislature to sell the lot to a private entity. The City Council's position on these issues was fixed when it adopted the December 17, 2013 resolution accepting the Algonquin proposal and was the culmination of the allegedly illegal procedures that petitioners seek to review (see *Douglaston & Little Neck Coalition v Sexton*, 145 AD2d 480 [2d Dept 1988]; see also *Riverview Dev. LLC v City of Oswego*, 125 AD3d 1417 [4th Dept 2015], date on which the Common Council adopted the resolution authorizing the sale of City owned garage; *Matter of Long Is. Pine Barrens Soc'y v County of Suffolk*, 55 AD3d 610 [2d Dept 2008], date the County Legislature adopted the resolution authorizing the Parks Department to enter into a license agreement; *Gach v. City of Long Beach*, 218 AD2d 801 [2d Dept 1995], date on which the City Council adopted the resolution which awarded the beach concession rental). Moreover, the December 2013 date of accrual is consistent with the strong public policy underlying the short statute of limitations: freeing government operations of any unnecessary cloud created by

potential litigation (*Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d at 34). Measured for an accrual date of December 17, 2013, the claims under article 78 and the request for a declaratory judgment are untimely.

An action brought under General Municipal Law § 51, like a declaratory judgment action, does not have a prescribed statute of limitations and an examination of the substance of the action and the relief sought is necessary to fix that period (*Clowes v Pulver*, 258 AD2d at 53). Though periods of limitation ranging from four months to one year to three years have been applied to such actions (*Riverview Dev. LLC v City of Oswego*, 125 AD3d 1417 [4th Dept 2015], four months; *Matter of Resnick v Town of Canaan*, 38 AD3d 949 [3d Dept 2007], four months; *Clowes at* 53, one year; *Espie v Murphy*, 35 AD3d 348 [2d Dept 2006], three years), respondents have not challenged the timeliness of this claim.

FAILURE TO STATE A CAUSE OF ACTION

General Municipal Law §51 authorizes an action "against a municipality or public officers under that statute 'only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes'" (*Aiardo v Town of E. Greenbush*, 64 AD3d 849, 852 [3d Dept 2009], quoting *Kaskel v Impellitteri*, 306 NY 73, 79 [1953], cert denied 347 US 934 [1954]). "[M]ere failure to observe statutory provisions does not constitute the fraud or illegality necessary to support a taxpayer action under this section, but rather a taxpayer action lies only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property

or funds for entirely illegal purposes" (*Matter of Resnick v Town of Canaan,* 38 AD3d 949, 951-952 [3d Dept 2007], citations and quotations omitted). There must be specific allegations of waste tied to official corruption and allegations of illegality alone are insufficient and any expenditure of funds must be for entirely illegal purposes (*Matter of Town of Coeymans v City of Albany*, 284 AD2d 830, 836 [3d Dept 2001], citation omitted). While an allegation that respondents are making an impermissible gift of public property may satisfy the need to plead waste (cf. *Matter of La Barbera v Town of Woodstock*, 29 AD3d 1054 [3d Dept 2006]), the complaint fails to allege facts which might support a finding of official corruption. In the absence of allegations of corrupt motive and illegal purpose, the complaint is facially insufficient (*Matter of Town of Coeymans v City of Albany*, at 836).

Accordingly, it is

ORDERED, that the fifth and sixth causes of action, plead as violations of SEQRA, are dismissed for lack of standing and it is further

ORDERED, that the first, second, third causes of action, brought pursuant to CPLR article 78, and the fourth causes of action, for a declaratory judgment, are dismissed as untimely under the applicable statute of limitations and it is further

ORDERED, that the seventh cause of action, under General Municipal Law § 51, is dismissed for failure to state a cause of action.

This constitutes the decision and order of the Court. The original decision and order are returned to the attorney for respondents. A copy of the decision and order and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this

decision and order, and delivery of a copy of the decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED.
ENTER.

Dated: Albany, New York
November 7, 2015

Richard E. Sise
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion dated February 6, 2015;
2. Affidavit of David Fontana dated February 3, 2015 with Exhibits A-B annexed ;
3. Affidavit of Christian Mathiesen dated February 3, 2015 with Exhibits A-K annexed;
4. Affidavit of Eileen Finneran dated February 3, 2015;
5. Affidavit of Michele Madigan dated February 4, 2015;
6. Affidavit of Joanne D. Yepsen dated February 4, 2015;
7. Affidavit of John Frank dated February 4, 2015 with Exhibit A annexed;
8. Affidavit of Anthony Scirocco dated February 4, 2015;
9. Affirmation of Jena r. Rotheim dated February 5, 2015 with Exhibits 1-5 annexed;
10. Memorandum of Law dated February 6, 2015;
11. Affidavit of Joseph W. Zappone dated March 5, 2015 with Exhibit A annexed;
12. Affidavit of Scott L. Bellcourt dated March 5, 2015 with Exhibits A-B annexed ;
13. Affidavit of Thomas G. McTygue dated March 6, 2015 with Exhibits A-C annexed;
14. Affidavit of Daniel J. Tuczinski dated March 6, 2015 with Exhibits A-C annexed;
15. Affidavit of Remigia Foy dated March 6, 2015 with Exhibit A annexed;
16. Affidavit of Scott Johnson dated March 6, 2015 with Exhibit A annexed;
17. Memorandum of Law dated March 6, 2015;
18. Affirmation of Daniel J. Hurteau dated March 12, 2015 with Exhibit A annexed;
19. Memorandum of Law dated March 12, 2015;
20. Summons and Complaint with Exhibits A-K annexed;
21. Notice of Motion, Algonquin Building LLC, dated April 7, 2015;
22. Affirmation of Michael J. Toohey dated April 7, 2015 with Exhibits A-C annexed;
23. Memorandum of Law undated;

24. Affirmation of Daniel J. Tuczinski dated April 22, 2015 with Exhibits A-B annexed;
25. Memorandum of Law dated April 22, 2015;
26. Notice of Motion, Congregation & Yeshiva Pardes Yosef D'Chasidei Belz, dated April 7, 2015;
27. Affirmation of Michael J. Toohey dated April 7, 2015 with Exhibits A-C annexed;
28. Memorandum of Law undated;
29. Affirmation of Daniel J. Tuczinski dated April 22, 2015 with Exhibits A-B annexed;
30. Memorandum of Law dated April 22, 2015.