

**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XXXVI SUFFOLK COUNTY**

COPY

**PRESENT:****HON. PAUL J. BAISLEY, JR., J.S.C.**

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In the Matter of the Application of

PLURALIS, LLC,

Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

- against -

EDWARD P. ROMAINE, Supervisor of the Town Board of the Town of Brookhaven, Steve Fiore-Rosenfield, Jane Bonner, Kathleen Walsh, Constance Kepert, Timothy Mazzei, and Daniel Panico, constituting the Town Board of the Town of Brookhaven, and the TOWN BOARD, and VINCENT E. PASCALE, Chairman, TARA KAVANAGH, Deputy Chair, STEVEN J. WILUTIS, KAREN J. DUNNE, JOSEPH A. BETZ, PETER E. ZARCON, M. CECILE FORTE, constituting the PLANNING BOARD of the Town of Brookhaven, the PLANNING BOARD of the Town of Brookhaven, and the DEPARTMENT OF PLANNING, ENVIRONMENT AND LAND MANAGEMENT of the Town of Brookhaven, and DANIEL P. LOSQUADRO, Superintendent of Highways of the Town of Brookhaven, and the TOWN OF BROOKHAVEN, and Peter A. Scully, Edward Romaine, Steve Bellone, Sean M. Walter, and Anna E. Throne-Holst, as members of and constituting the CENTRAL PINE BARRENS JOINT PLANNING AND POLICY COMMISSION, created pursuant to the New York State Long Island Pine Barrens Protection Act of 1993 and codified in the New York Environmental Conservation Law Section 57,

Respondents.

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INDEX NO.: 15979/13  
MOTION DATE: 5/1/14  
MOT. SEQ. NO. 001WDN  
MOT. SEQ. NO. 002 MG  
MOT. SEQ. NO. 003 MG  
MOT. SEQ. NO. 004 CDISPSUBJ  
MOT. SEQ. NO. 005 MD

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Upon the following papers numbered 1 to 41 read on this motion to dismiss; motion to dismiss; motion for leave to submit amicus curiae brief; Notice of Motion/ Order to Show Cause and supporting papers 1-13; 14-35; 36-39; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 40-41; Replying Affidavits and supporting papers   ; Other notice of petition and verified petition, dated June 13, 2013, and supporting papers (#001); memorandum of law, dated October 15, 2013 (#002); memorandum of law, dated October 16, 2013 (#003); amended verified petition, dated December 30, 2013, and supporting papers (#004); reply memorandum of law, dated March 7, 2014 (#003); reply memorandum of law, dated March 10, 2014 (#002); (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that these motions are hereby consolidated for purposes of this determination; and it is further

**ORDERED** that the motion (motion sequence no. 002) of respondents Edward P. Romaine, Supervisor of the Town Board of the Town of Brookhaven, Steve Fiore-Rosenfield, Jane Bonner, Kathleen Walsh, Constance Kepert, Timothy Mazzei, and Daniel Panico, constituting the Town Board of the Town of Brookhaven, and the Town Board; Vincent E. Pascale, Chairman, Tara Kavanagh, Deputy Chair, Steven J. Wilutis, Karen J. Dunne, Joseph A. Betz, Peter E. Zarcone, M. Cecile Forte, constituting the Planning Board of the Town of Brookhaven, and the Planning Board of the Town of Brookhaven; the Department of Planning, Environment and Land Management of the Town of Brookhaven; Daniel P. Losquadro, Superintendent of Highways of the Town of Brookhaven; and the Town of Brookhaven (collectively, "the Town") for an order pursuant to CPLR §7804(f) dismissing the petition in all respects because of objections in point of law, is granted; and it is further

**ORDERED** that the motion (motion sequence no. 003) of respondent The Central Pine Barrens Joint Planning and Policy Commission for an order pursuant to CPLR R. 3211(a)(1), (2), (3), (5), and (7) and §7804(f) dismissing the petition with prejudice in its entirety, is granted; and it is further

**ORDERED** that the motion (motion sequence no. 004) of nonparty Long Island Builders Institute, Inc. for an order granting leave to submit an *amicus curiae* brief in connection with this proceeding, is denied as academic.

In this Article 78 proceeding, petitioner seeks, *inter alia*, to compel the Town to comply with certain provisions of the Long Island Pine Barrens Protection Act ("the Act") and the Central Pine Barrens Comprehensive Land Use Plan ("the Plan"), so as to support the value of development rights known as Pine Barrens Credits ("PBCs") received as compensation by owners of property located in the Central Pine Barrens whose lands were designated for preservation or protection under the applicable law.

The Act, which was designed to protect the Long Island Pine Barrens and the underlying aquifer, was enacted in 1993 and codified at ECL §57-0103, *et seq.* Under the Act, the Legislature established the Central Pine Barrens Joint Planning and Policy Commission ("the Commission"), to comprise the Suffolk County Executive, the supervisors of the towns of Brookhaven, Riverhead, and Southampton, and a fifth member appointed by the Governor (ECL §57-0103, §57-0119); designated a core preservation area (in which development is generally prohibited) and a compatible growth area within the Central Pine Barrens (ECL §57-0109 [2]); and directed the Commission to prepare and oversee the implementation of a comprehensive land use plan to preserve the core preservation area by prohibiting and redirecting new development through acquisition and transfer of development rights, as well as to accommodate orderly development in the compatible growth area consistent with protecting the existing resources (ECL §57-0121). On June 28, 1995, the Plan was adopted. Chapter 6 of the Plan creates the Pine Barrens Credit Program, the purpose of which is to maintain value in lands designated for preservation or protection under the Plan by providing for the allocation, sale, and transfer of PBCs and by designating receiving districts in the Towns of Brookhaven, Southampton, and Riverhead where PBCs are redeemable for increased use and development.

Petitioner is the owner of 95 PBCs. It is petitioner's general contention that the Town has not only failed to take the steps required under the terms of the Act and the Plan to insure a robust market for PBCs – as by refusing to designate sufficient receiving areas for PBCs and by denying applications for increased density as discretionary instead of approving them as a matter of right – but has also adopted a policy and practice that artificially and continually depresses their value, thereby stripping owners of PBCs of their property and civil rights. Apart from the application for Article 78 and declaratory relief sought against the Town, petitioner requests, alternatively, that the Commission be directed to bring suit against the Town to compel the Town's compliance with the Act and the Plan. It is not alleged, however, that petitioner ever applied to develop land in a designated receiving area on an as-of-right basis by redemption of its PBCs, nor that any such application was denied by the Town.

The Town and the Commission now separately move, pre-answer, to dismiss the petition on the ground, *inter alia*, that the petitioner has no private right of action to vindicate its claims.

CPLR §7804(f) provides that the respondent in an Article 78 proceeding may, within the time allowed for answer, move to dismiss the petition based on an "objection in point of law," which is akin to an affirmative defense (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7804:7). On a pre-answer motion to dismiss an Article 78 petition, only the petition is to be considered and all of its allegations are deemed to be true (*Matter of East End Resources v Town of Southold Planning Bd.*, 81 AD3d 947, 917 NYS2d 315 [2011]; *Matter of Long Is. Contractors' Assn. v Town of Riverhead*, 17 AD3d 590, 793 NYS2d 494 [2005]). No additional facts in support of the motion may be considered (*Matter of 1300 Franklin Ave. Members v Board of Trustees of Inc. Vil. of Garden City*, 62 AD3d 1004, 880 NYS2d 133 [2009]).

Following service of the motions to dismiss, petitioner filed an amended petition, seeking to broaden the scope of the relief requested by asserting claims on behalf of Robert Toussie and Joy Selter, LLC as additional petitioners.

Before addressing the substance of the motions, the Court notes that the amended petition is a nullity to the extent it is asserted on behalf of Robert Toussie and Joy Selter, LLC, as the petitioner failed to obtain leave to join them as parties (see CPLR 401; *Matter of Barrett v Dutchess County Legislature*, 38 AD3d 651, 831 NYS2d 540 [2007]; *Matter of Aries Striping v Hurley*, 202 AD2d 578, 610 NYS2d 821 [1994]). As to the remainder of the amended petition, the Court further notes that its filing does not automatically abate the motions to dismiss the original petition or render those motions academic; rather, a moving party has the option to decide whether its motion should be applied to the new pleading (*Livadiotakis v Tzitzikalakis*, 302 AD2d 369, 753 NYS2d 898 [2003]; *Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 675 NYS2d 14 [1998]). Since the respondents have not answered the amended petition, the Court recently conducted a conference call with the attorneys in this matter in which it was confirmed that the respondents' intention is to apply their respective motions to any portion of the amended petition which is not deemed a nullity. Finally, as a technical matter, since the amended petition supersedes the original petition (see e.g. *Matter of Schultz v Schultz*, 107 AD3d 1616, 966 NYS2d 737 [2013]), the original petition shall be marked "withdrawn" on the Court's computer records.

Turning, then, to the merits of the respective motions *sub judice*, the Court is constrained to find – despite the limited scope of judicial review on a motion to dismiss – that dismissal is warranted because the Act does not provide for a private cause of action to enforce its terms. Plainly, the Act does not provide explicitly for such a cause of action. Section 57-0135, entitled “Judicial Review,” provides for the availability of Article 78 relief, but only to those persons “aggrieved by a final determination by any governing body acting under this title.” Section 57-0136, entitled “Penalties and Enforcement,” contemplates the commencement of “any appropriate action or proceeding to prevent, restrain, enjoin, correct, or abate any violation of, or to enforce, any provision of this title [or] the land use plan adopted by the commission,” but only by the Commission or the Attorney General. Where, as here, a statute contains no language conferring an express private right of action, a Court will imply a private right of action only if certain factors are present, namely, (1) that the petitioner is a member of the class for whose particular benefit the statute was enacted, (2) that recognition of a private right of action would promote the legislative purpose, and, most importantly, (3) that creation of such a right would be consistent with the legislative scheme (*e.g. Sheehy v Big Flats Community Day*, 73 NY2d 629, 543 NYS2d 18 [1989]). “Avoiding unwarranted interference with the legislative scheme is the most critical factor in determining whether a private cause of action may be fairly implied from the enactment of a statute” (*Hudes v Vytra Health Plans Long Is.*, 295 AD2d 788, 789, 744 NYS2d 80, 82 [2002], *lv denied* 99 NY2d 505, 755 NYS2d 711 [2003] [internal quotation marks omitted]).

Even assuming, for purposes of this determination, that petitioner may be found to satisfy the first two prongs of the analysis, the fact that the Act specifically places authority for its enforcement on the Commission and the Attorney General compels the Court to conclude that recognition of a private right of action would be inconsistent with the legislative scheme (*see Uhr v East Greenbush Cent. School Dist.*, 94 NY2d 32, 698 NYS2d 609 [1999]; *Goldman v Simon Prop. Group*, 58 AD3d 208, 869 NYS2d 125 [2008]). “[R]egardless of its consistency with the basic legislative goal, a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme” (*Sheehy v Big Flats Community Day, supra* at 634-635, 543 NYS2d at 21). That the relief requested by the petitioner is framed in terms of mandamus to compel in the context of an Article 78 proceeding does not mandate a different result (*see Delgado v New York City Hous. Auth.*, 66 AD3d 607, 888 NYS2d 19 [2009]; *Women’s Voices for the Earth v Procter & Gamble Co.*, 29 Misc 3d 358, 906 NYS2d 721 [2010]). And even if this proceeding were an appropriate vehicle to seek relief against the respondents, it is evident that mandamus does not lie to compel a public body such as the Commission to take discretionary enforcement action (*see Matter of Kroll v Village of E. Hampton*, 293 AD2d 614, 741 NYS2d 98 [2002]).

Accordingly, the motions to dismiss are granted, the amended petition is denied, and the proceeding is dismissed.

Settle judgment.

Dated: November 6, 2014

HON. PAUL J. BAISLEY, JR.  
J.S.C.