

STATE OF NEW YORK  
SUPREME COURT  
WALTER OLSEN, et al.,

COUNTY OF ALBANY

-against-

Plaintiffs,

DECISION AND ORDER  
INDEX NO. 3600-01

NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION,  
et al.,

Defendants.

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(Supreme Court, Albany Co. Motion Term, March 15, 2002)  
(RJI No. 01-01-068179)  
(Justice Bernard J. Malone, Jr., Presiding)

APPEARANCES:

Galvin & Morgan, Esqs.  
(Madeline Sheila Galvin, Esq. Of Counsel)  
Attorneys for plaintiffs  
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Delmar, New York 12054

Hon. Eliot Spitzer, Attorney General  
(Lisa M. Burianek, Esq., AAG, of counsel)  
Attorney for State defendants  
NYS Department of Law - The Capitol  
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Timothy Hopkins, Esq.  
Attorney for defendants Suffolk County  
Water Authority, Raymond Corwin and  
Michael LoGrande  
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**MALONE, J:**

Plaintiffs having deliberately charted a summary judgment course by cross-moving for partial summary judgment upon the liability issue (Valentino v County of Tompkins, 284 AD2d 898; Henbest & Morrisey Inc. v W.H. Ins. Agency., 259 AD2d 829), the

Court is treating the motions of the defendants as summary judgment motions and those motions are granted upon the ground that the amended complaint lacks merit. The cross-motion of the plaintiffs for partial summary judgment upon the liability issue and to disqualify the Attorney General from representing certain defendants is denied. The motion of the State Defendants for an order sanctioning the attorneys for plaintiffs for making the cross-motion is denied.

This an action by 95 plaintiffs asserting standing as taxpayers and as present or former owners of real property located within the "core area" of the Long Island Central Pine Barrens, as defined by the 1993 "Pine Barrens Act"<sup>1</sup> (Act), attacking the Act and its implementation upon various legal theories. The history, purposes and operation of the Act were set forth by Federal District Court Judge Platt in the case of Dittmer v County of Suffolk, 975 F.Supp 440,441,442, as follows:

"Prior to the Act's passage, the New York State Court of Appeals recognized both the importance of the Area and the need for comprehensive planning to ensure its protection. See Long Isl. Pine Barrens Soc'y, Inc. v. Planning Bd. of the Town of Brookhaven, 80 N.Y.2d 500, 591 N.Y.S.2d 982, 988-89, 606 N.E.2d 1373, 1379-80 (1992) (noting that "an exhaustive and thorough approach to evaluating projects affecting [the Area] is unquestionably desirable and, indeed, may well be essential to its preservation"). Prior efforts to protect the Area have been extensive, but the Act represents the first comprehensive culmination of such efforts. The Act has two central goals: (1) to preserve the ecosystem for future generations; and (2) to protect the aquifer underlying the Area that is the sole drinking water supply for Long Island's 2.5 million inhabitants. The Act

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<sup>1</sup>Article 57 of the Environmental Conservation Law (ECL).

divides the Area into a Core Preservation Area ("Core Area") and a Compatible Growth Area. Plaintiffs are landowners in the Core Area. The Act provides for establishment of a Planning Commission charged with preparation of a plan designed to attain the Act's purposes. The Commission prepared such a plan ("the Plan"), which was signed by Governor Pataki on 28 June 1995 and ratified by the affected towns and county. The Commission is further charged with reviewing permit applications for development within the Area, granting variances by majority vote, and establishing a "Development Rights Bank" to determine values and set standards for purchase, sale, ownership, and transfer of development rights. The Act specifically provides for State court review of any final determination made pursuant to the Act."

ECL section 57-0111 establishes the Long Island Pine Barrens Maritime Reserve Council (Council) within the Department of Environmental Services (DEC) with the duties set forth in ECL section 57-0113. ECL section 57-0119 establishes the Central Pine Barrens Joint Planning and Policy Commission (Commission) with the functions described above by Judge Platt. Based upon the defense and indemnity rights accorded Commission officers and employees by Public Officers Law section 17 (1) (i) this Court concludes that the Legislature intended that the Commission was a State agency for the purposes of suit.

The 201 page amended complaint contains 22 purported causes of action against various State elected officials, officers, employees, agencies and departments in their official and individual capacities, as well numerous local governments, elected officials, officers and employees in the same manner. ECL section 57-0123 requires the State to defend and indemnify Suffolk County and participating towns, and their agents, servants, officials and employees, in any litigation arising out

of the Act. ECL section 57-0119 (6)(k-1) gives the Commission the power to purchase insurance coverage against any liability subject to indemnity pursuant to ECL section 57-0123 (6). The Attorney General has appeared for all of the defendants save those represented by Mr. Hopkins.

The 1<sup>st</sup> cause of action alleges that the legislature illegally delegated its law making power to the Council and Committee in violation of the Home Rule provision of the State Constitution causing the plaintiffs to sustain money damages. The 2<sup>nd</sup> cause of action asserts that the plaintiffs sustained money damages because the Commission failed to purchase sufficient liability insurance. The 3<sup>rd</sup> cause of action alleges that the plaintiff sustained money damages because the Legislature enacted ECL section 57-0123 which conflicts with Public Officers Law sections 17 and 18. The 4<sup>th</sup> cause of action avers that the plaintiffs suffered money damages because the Legislature created the Council and the Commission, which are "extra-legal and extra Constitutional entities operating without the Authority of the State Constitution" (amended complaint, par. 1103), which entities received an illegal delegation of legislative authority which makes them "void *ab initio*" (amended complaint, par. 1104).

The 5<sup>th</sup> cause of action asserts that the plaintiffs suffered money damages because the failure of the Commission to obtain insurance cost the State money, which plaintiffs allege was an unconstitutional gift of State funds to the persons

represented by the Attorney General in prior litigation. The 6<sup>th</sup> cause of action asserts that the plaintiffs suffered money damages because the Attorney General improperly represented the Council and Commission, and its members and employees, in prior litigation. The 7<sup>th</sup> cause of action asserts that the plaintiffs suffered money damages because the representation of the Commission and Suffolk County Water Authority, and their employees, by the Attorney General in the prior Federal litigation was a theft of services from the plaintiffs in their status as taxpayers.

The 8<sup>th</sup> cause of action asserts that the Attorney General committed a conversion causing money damages to the plaintiffs when he represented the Council and Commission in the prior Federal action. The 9<sup>th</sup> cause of action alleges that the plaintiffs suffered money damages when the Attorney General acted illegally in usurping legislative power by defending the Commission and Council, and their members and employees, in the Federal litigation. The 10<sup>th</sup> cause of action asserts that the plaintiffs suffered money damages when DEC failed to enact regulations concerning conservation easements and that the creation of those conservation easements by the Legislature was in violation of the Home Rule law. The 11<sup>th</sup> cause of action alleges that the plaintiffs suffered money damages because the Commission and the Council allegedly failed to comply with article 55 of the ECL.

The 12<sup>th</sup> cause of action alleges that the plaintiffs sustained money damages because the Commission failed to comply with ECL article 49. The 13<sup>th</sup> cause of action asserts that the plaintiffs incurred money damage because the Commission's failure to comply with ECL article violated plaintiffs' constitutional rights to due process and equal protection of the law. The 14<sup>th</sup> cause of action avers that the plaintiffs sustained money damages when the defendants, while acting in their official capacities, tortiously interfered with the contractual rights of the plaintiffs. The 15<sup>th</sup> cause of action alleges that the plaintiffs incurred money damages when the Legislature allegedly improperly delegated its legislative power. The 16<sup>th</sup> cause of action alleges that the plaintiffs sustained money damages in their capacities as taxpayers because they allege that the Attorney General improperly provided a defense to the Commission and certain individuals.

The 17<sup>th</sup> cause of action avers that the plaintiffs sustained money damages because the Legislature improperly enacted ECL section 49-0303(4). The 18<sup>th</sup> cause of action alleges that the plaintiffs sustained money damages when the DEC Commissioner failed to certify boundaries under ECL section 55-0117. The 19<sup>th</sup> cause of action alleges that the plaintiffs sustained money damages because they claim that ECL articles 49 and 57 violate the State Constitution. The 20<sup>th</sup> cause of action contends that the plaintiffs sustained money damages because the

Town of Riverhead failed to designate receiving areas for the TDR program in other than commercial zones. The 21<sup>st</sup> cause of action alleges that the plaintiffs sustained money damages because the defendants offered more money to plaintiffs' neighbors for their property than they offered to the plaintiffs. The 22<sup>nd</sup> cause of action avers that the plaintiffs sustained money damages because the contract between the Commission and the Water Authority concerning reimbursement is an unauthorized expenditure of State funds.

Supreme Court lacks the subject matter jurisdiction to adjudicate claims for money damages against the State arising from the alleged wrongful conduct of its agents, as those claims must be pursued in the Court of Claims (State of New York v Dewey, 260 AD2d 924). All of the causes of action set forth in the amended complaint, except the 20<sup>th</sup> cause of action, seek to recover money damages for the alleged wrongful conduct of agents of the State in violating various statutes and constitutional provisions. This Court does not have subject matter jurisdiction of those causes of action and they must be dismissed. Plaintiffs should have pursued these claims in the Court of Claims where it could have been determined whether the purported constitutional violations rose to the level of constitutional torts sufficient to support a money damage recovery (Brown v State of New York, 89 NY2d 172), and whether the 3 year Statute of Limitations applicable to such causes of action had expired (Brown v State of

New York, 250 AD2d 314). Likewise, it was for the Court of Claims to determine if the alleged statutory violations cited by plaintiffs gave rise to private causes of action for money damages (Warburton v State of New York, 173 Misc2d 879), and if the causes of action premised upon statutory violations were commenced within the 3 year Statute of Limitations (CPLR 214[2]).

The 20<sup>th</sup> cause of action lacks merit for a number of reasons. First of all, the record before the Court establishes that the Town of Riverhead does have designated receiving areas for the TDR program in other than commercial zones. Secondly, the plaintiffs lack the standing to maintain the 20<sup>th</sup> cause of action since they have not demonstrated injury in fact (Clempner v Town of Southold, 154 AD2d 421). Thirdly, the plaintiffs have not overcome the immunity that attaches to the actions of municipalities in performing government functions (see generally, Cardona v County of Albany, 188 Misc2d 440).

With respect to the requests for declaratory relief contained in the "wherefore clause" of the amended complaint, declaratory relief "is unnecessary where an action at law for damages will suffice" (Bartley v Walentas, 78 AD2d 310,312). By the way the amended complaint is pleaded it is clear to this Court that the primary relief sought by the plaintiffs is money damages, not for declaratory relief. The plaintiffs had available to them the bringing of actions at law in the Court of Claims for money damages based upon tort theories, constitutional

torts, and private causes of action for various statutory breaches. That being the case, declaratory relief is not available (Elkort v 490 West End Ave. Co., 38 AD2d 1). In any event, applying the appropriate Statutes of Limitations to the various declaratory relief requests set forth in the "wherefore clause" (see, Marsh v New York State and Local Employees' Retirement System, AD2d, 783 NYS2d 438) would result in almost all of those claims being time barred.

Had it been necessary to reach the other legal issues raised by the movants, the Court would have ruled that: the plaintiffs lack common law standing as no injury in fact is demonstrated (Society of Plastic Indus. V County of Suffolk, 77 NY2d 761); the plaintiffs lack taxpayer standing (Matter of Public Utility Law of New York, Inc. v New York State Public Service Comm., 263 AD2d 879; Mylod v Pataki, 171 Misc2d 556) and, in any event, almost all of the wrongs complained occurred more than a year before this action was commenced and are barred by the applicable 1 year Statute of Limitations (New York State Ass'n. Of Plumbing-Heating-Cooling Contractors, Inc. v Egan, 65 NY2d 793); the amended complaint fails to state a cause of action against the defendants named in their individual capacities; the plaintiffs have no private cause of action against the Attorney General with respect to which persons and entities he determines to provide a defense to under the governing statutes because they are not within the class of persons for whose particular benefit

the statutes were enacted (Carrier v Salvation Army, 88 NY2d 298) and plaintiffs lack standing to challenge such decisions because they have not demonstrated injuries different in kind than the public at large (Matter of Schulz v Warren Co. Bd. Of Supervisors, 206 AD2d 672); the Act addresses a matter of statewide concern so there are no Home Rule violations (Matter of Town of Islip v Cuomo, 64 NY2d 50); the authority of the Commission to purchase liability is discretionary, not mandatory; the plaintiffs do not have a private cause of action upon the insurance purchase issue because they are not among the class the statute was designed to benefit; the plaintiffs lack standing upon the insurance purchase issue because they have not demonstrated damages different than those sustained by the public at large; and, the amended complaint does not state a cause of action for a violation of section 4 of article IX of the State Constitution.

As to the cross-motion, in view of the granting of summary judgment to the defendants, clearly the plaintiffs are not entitled to partial summary judgment upon the liability issue. Moreover, this Court finds that the Attorney General's representation of the State defendants in this action was, and is, appropriate.

Turning to the motion for sanctions, the action of the plaintiffs in cross-moving for summary judgment prior to joinder of issue was not frivolous as is demonstrated by the two Third

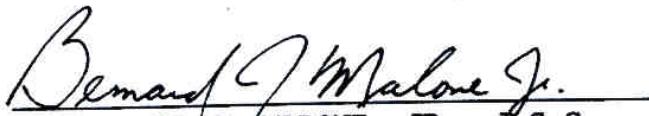
Department cases cited in the first sentence of this decision and order which recognize that at times the procedure is warranted. Furthermore, the defendants benefitted from the tactic by having their dismissal motions be accorded summary judgment treatment. Likewise, the cross-motion to disqualify the Attorney General from representing certain defendants was not frivolous as the issue was not in this Court's opinion free from doubt.

All papers, including this decision and order, are being returned to the Attorney General. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

This memorandum shall constitute both the decision and the order of the Court.

IT IS SO ORDERED.

DATED: ALBANY, NEW YORK  
MAY 7, 2002

  
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BERNARD J. MALONE, JR., J.S.C.

PAPERS CONSIDERED:

- the notice of motion dated November 15, 2001;
- the affirmation of Lisa M. Burianek dated November 15, 2001, with exhibits;
- the affidavit of Raymond P. Corwin sworn to November 14, 2001, with exhibits;
- the notice of motion dated November 14, 2001;
- the affidavit of Timothy J. Hopkins sworn to November 14, 2001, with exhibits;
- the notice of cross-motion dated January 22, 2002;
- the affidavit of James E. Morgan sworn to January 22, 2002, with exhibits;
- the affidavit of Madeline Sheila Galvin sworn to January 22, 2002, with exhibits;
- the affidavit of Madeline Sheila Galvin sworn to January 21, 2002,

with exhibits;  
✓ the reply affidavit of Timothy J. Hopkins sworn to February  
8, 2002, with exhibits;  
✓ the reply affirmation of Lisa M. Burianek dated February 7, 2002,  
✓ with exhibits;  
✓ the reply affidavit of Madeline Sheila Galvin sworn to February  
13, 2002, with exhibits;  
✓ the affidavit of James E. Morgan sworn to March 8, 2002;  
✓ the notice of motion for sanctions dated March 1, 2002, with  
exhibits;  
✓ the affirmation of Lisa M. Burianek dated March 1, 2002, with  
exhibits.