SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of
HEAL THE HARBOR.COM and RAYMOND J. TARTAGLIONE,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

THE CITY OF RYE, THE COMMON COUNCIL OF THE CITY OF RYE AND THE SANITATION COMMITTEE OF THE COMMON COUNCIL OF THE CITY OF RYE,

Respondent.

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DECISION, ORDER & JUDGMENT

Index No. 10/14742

ZAMBELLI, A.J.S.C.

The following papers numbered 1-10 read on this hybrid CPLR Article 78 proceeding and action for declaratory relief:

	PAPERS NUMBERED
Notice of Petition, Verified Petition & Exhibits A-B	1-3
Notice of Motion to Dismiss, Tamburro Affidavit with Exhibits A-B & Memorandum of Law in Support of Motion to Dismiss	4-7
Constantine Reply Affirmation & Memorandum of Law, Tartaglione Affidavit in Reply with Exhibits A-H	8-10

Upon the foregoing papers it is ordered and adjudged that this petition is disposed of as follows:

Petitioner Raymond J. Tartaglione ("Tartaglione") is one of 33 shareholders of Kuder Island Colony Inc. ("Kuder"). Kuder owns real property in the City of Rye which is commonly referred to as Hen Island, which is located in Milton Harbor, and Tartaglione occupies a seasonal cottage on that island which he uses for nine months of the year. Tartaglione is also the president of petitioner Heal the Harbor.com ("HTH", collectively with Tartaglione, "petitioners"). According to HTH's "mission statement" on their website (www.healtheharbor.com/home.asp), their goal is to "reduce pollution effluent from Hen Island"; "keep the shores of Hen Island clean from trash and floating debris"; "ensure that the Hen Island Board of Directors and individual cottage owners take responsibility for past actions and create a new environmentally friendly and safe atmosphere in Milton Harbor"; "require politicians, commissioners and municipal employees to hold Hen Island (Kuder Island Colony Inc.) and its cottage owners to the same, health, safety and building codes as every other community in Westchester County. **This is to be accomplished by education, cooperation, public exposure, and/or any other legal measures possible, until all issues are addressed in an acceptable manner.**" (Bold in original) (Petitioners' Reply Exhibit A).

Petitioners commenced this hybrid Article 78 petition and request for declaratory judgment seeking to compel the City of Rye, its Common Council and Sanitation Committee (collectively "respondents") to "forthwith" complete the inspections mandated by Rye City Code ("Code") §161-1, which provides, in relevant part, that "there shall be an

annual inspection of all private sewage disposal systems by a contractor duly approved by the Westchester County Commissioner of Health on all properties bordering on all watercourses, including Long Island Sound, Milton Harbor and all tributaries thereto, and wherever else directed by the Sanitation Committee of the Common Council. A written certificate of such inspection shall be submitted to said Committee for such action thereon as it may direct." Petitioners contend that Code §161 creates a non-discretionary duty which requires respondents to perform the inspections referred to therein. On April 19, 2010, petitioners wrote to the City Manager referencing Code §161 and requesting that petitioner Tartaglione be provided with a copy of the certificate of the required inspections for all private sewage disposal systems located on Hen Island for the past two years; if such written certificates of inspection were not submitted, petitioners requested that "appropriate action, as described in §161-3 A, be taken by the City, to ensure compliance with the Code." (Petitioners' Exhibit A). Petitioner Tartaglione avers that the sewage disposal system issue was also raised by him at the City Council meeting of May 5, 2010, and was addressed again in the May 19, 2010 letter sent to the City's Mayor (Petitioners' Exhibit B). As respondents never acted in regard to petitioners' letters, petitioners commenced this petition seeking to compel them to act.

Respondents oppose the petition and move to dismiss it. They argue that, as an initial matter, that petitioners lack standing to maintain this proceeding. They also argue that the Common Council of the City of Rye and the Sanitation Committee of the Common Council of the City of Rye are not proper parties to this proceeding because, they submit, these entities no longer exist and thus the Court is unable to provide any relief to petitioner

as it relates to those parties. Substantively, respondents argue that their motion to dismiss should be granted because the Westchester County Department of Health ("DOH"), as opposed to any City entities, has jurisdiction over the private sanitary sewer systems in the City; they further submit that Code Chapter 161 is no longer applicable or enforced in the city. In any event, even if Code Chapter 161 is applicable, respondents argue that petitioners have failed to state a cause of action because petitioners are seeking to compel the City to enforce its Code and the City has discretion over code enforcement.

In reply, petitioners argue that the petition must be granted because respondents failed to file an answer and a certified record in accordance with CPLR §7804(d) and (e). Petitioners also assert both individual standing on the part of Tartaglione and organizational standing on the part of HTH. Petitioners also dispute that the Common Council or Sanitation Committee of the City of Rye are not proper parties herein, as petitioners note that the current version of the City Code contains numerous references to the Common Council and respondents failed to offer any proof that these organizations are defunct. As to respondents contentions that the DOH and not the City has jurisdiction over private sewer systems, petitioners note that pursuant to the express language of the Westchester Sanitary Code, the DOH's jurisdiction over private sewers is not exclusive and as Code §161 has never been repealed or superceded, it is still in effect. Lastly, petitioners reiterate their arguments that Code §161 imposes a non-discretionary duty upon respondents to perform to inspections and issue the required certificates.

As an initial matter, as regards the petitioners' contention that the respondents have, in essence, defaulted by moving to dismiss instead of filing an answer and the certified

record, petitioners' contentions are without merit. CPLR §7804(f) provides, in relevant part, that a respondent "may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition . . . . If the motion is denied, the court shall permit the respondent to answer, upon such terms as may be just". As noted by petitioners, CPLR §7804(e) provides that the certified transcript of the record of proceedings is to be filed with the answer. Accordingly, respondents are not in default because they moved to dismiss the proceeding in lieu of answering, as that procedure is expressly sanctioned by the CPLR.

In determining a motion to dismiss pursuant to CPLR §7804(f), a court is limited to examining the petition and all of the allegations contained therein are to be deemed true (Matter of Brown v. Foster, 73 A.D3d 917, 918 (2d Dept. 2010), lv. denied 15 N.Y.3d 710 (2010); Matter of 10 East Realty LLC v. Incorporated Village of Valley Stream, 17 A.D.3d 472, 473 (2d Dept. 2005); Matter of Long Island Contractors Assoc. v. Town of Riverhead, 17 A.D.3d 590, 594 (2d Dept. 2005)). Moreover, in the determination of such a motion, the petitioners are to be accorded the benefit of every possible inference (Matter of Brown v. Foster, supra; Matter of 10 East Realty LLC v. Incorporated Village of Valley Stream, supra).

As to respondents' motion to dismiss the Common Council of the City of Rye and the Sanitation Committee as improper parties herein, the motion must be denied as respondents offer only the most conclusory allegations in support of their contentions. While respondents contend that the Rye City Council replaced the Common Council "decades ago", respondents fail to note any particulars or point to any legislation as to

when this occurred. As to the Sanitation Committee, respondents simply allege that such committee no longer exists because "essentially" the DOH is the City's health department and is the enforcement agency over the applicable County health regulations (Tamburro Affidavit, ¶12). It may be that these entities no longer actually exist; however, respondents' conclusory contentions herein are an insufficient basis upon which to grant a dismissal of the parties from this proceeding.

Respondents' motion to dismiss based upon their contention that Code §161 is no longer applicable or enforced in the city, and that the DOH has preempted the regulatory field in regard to private sewer systems, is also denied. As with respondents' allegations regarding the Common Council and the Sanitation Committee, only insufficient, conclusory statements are offered in support of their allegation that Code §161 is no longer applicable. Respondents fail to point to any evidence the Code §161 has been repealed or superceded; indeed, Code §161 still appears "on the books" today and its history, while reflecting that the ordinance was originally adopted on September 20, 1950 and that certain parts were amended in the 1980's, fails to reflect any such repeal (Respondents' Exhibit B). Moreover, while it is true that the County has enacted regulations regarding sewage systems, the County has clearly not usurped local municipalities rights to pass their own regulations regarding such systems, as the County Sanitary Code, of which the sewage regulations are a part, specifies that "[n]othing herein contained in this code shall be construed to restrict the power of any city, town or any village to adopt and enforce additional ordinances or enforce existing ordinances relating to health and sanitation, provided that such ordinances are not inconsistent with the provisions of the Public Health

Law, the Environmental Conservation Law or the State Sanitary Code." (Westchester County Sanitary Code, §873.102(4)). While respondents' claim that Code §161 has been pre-empted by County legislation, they do not argue that it is inconsistent with it, and indeed, this Court finds nothing inconsistent in the inspection required by Code §161 and the County's regulations. Accordingly, respondents' motion to dismiss on this basis must also be denied.

Addressing the issue of petitioners' standing, it appears to this Court that at least petitioner Tartaglione and possibly petitioner HTH would have standing under the analysis of the Court of Appeals in Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 N.Y.3d 297 (2009), as petitioner Tartaglione, the president of petitioner HTH, asserts that he uses and enjoys the affected natural resource of Milton Harbor in a way different from the public at large (Tartaglione Affidavit, ¶¶ 14-17) and alleges that the municipal action (or, in this case, inaction) directly harms his use and enjoyment of the harbor.

Nevertheless, even if petitioners have standing to maintain this proceeding, the motion to dismiss must still be granted because petitioners' have failed to state a cause of action. The relief which petitioners seek in this proceeding is that the respondents be compelled to enforce their own zoning code; however, the decision to enforce a municipal code rests in the discretion of the public officials charged with its enforcement and is not a proper subject for relief in the nature of mandamus to compel (Matter of Saks v. Petosa, 184 A.D.2d 512 (2d Dept. 1992); Matter of Young v. Town of Huntington, 121 A.D.2d 641, 642 (2d Dept. 1986); Matter of Church of the Chosen v. City of Elmira, 18 A.D.3d 978, 979 (3d Dept. 2005), lv. denied, 5 N.Y.3d 709 (2005), cert. denied, Stephenson v. City of

Elmira, 547 U.S. 115 (2006)).

While petitioners argue that Code §161-1 imposes a non-discretionary duty upon the respondents to perform the inspections, the statutory language does not support petitioner's interpretation. Nowhere within that statute does it expressly state that respondents have the duty to perform the inspection, and the statute itself expressly refers to the inspections being performed by an approved contractor, which indicates that the burden to perform the annual inspection falls on the property owner. Moreover, Code §161-3, entitled "Performance of work; costs; collection", at subsection (A) thereof, provides, in relevant part, that "[i]f the provisions of the foregoing sections are not complied with, the City Manager or the Building Inspector shall cause written notice to be served personally upon the owner. . . ." which also indicates that the burden of complying with Code §161-1 is on the property owner. Indeed, in petitioner Tartaglione's own letter of May 19, 2010 to the Rye City Mayor, he writes, under "Septic Issues" that he is "requesting that the City of Rye enforce Chapter 161 and require Hen Island to report annually to the City of Rye on each and every private sewage disposal system along the shoreline of Milton Harbor." (Petitioners' Exhibit B). Thus, in this letter, it is expressly conceded that the burden of compliance with Code §161-1 falls to the property owner and that petitioners are seeking to have the City enforce the Code. The petition must therefore be dismissed, as petitioners seek relief that this Court, as a matter of law, is not empowered to grant.

Accordingly, respondents' motion to dismiss the Article 78 petition is granted and the proceeding is dismissed in its entirety.

This Decision constitutes the Order and Judgment of the Court.

Dated: White Plains, New York
January 20, 2011

BARBARA G. ZAMBELLI
A.J.S.C.

Mark A. Constantine, Esq.
Attorney for Petitioners
65 South Broadway - Suite 101
Tarrytown, New York 10591

Kristin Kelley-Wilson, Esq.
Interim Corporation Counsel
1051 Boston Post Road
Rye, New York 10580

Nancy Barry, Esq.
Chief Clerk