

*To be argued by appellant, pro se
10 Minutes Requested*

New York State Supreme Court

APPELLATE DIVISION - SECOND DEPARTMENT

**Robert A. Ficalora, both *pro se* and as acting president of
Montauk Friends of Olmsted Parks, inc., a not-for-profit
corporation established under the laws of the State of New York**

Petitioner - Appellant

- against -

The Planning Board and Building Department

- of -

**The town board government of the Town of East Hampton, 159
Pantigo Road, East Hampton, 11937**

Respondents

Appellant's Brief

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Suffolk County Clerk's Index No. 97-23205

APPELLATE DIVISION OF THE SUPREME COURT
SECOND JUDICIAL DEPARTMENT

-----x
Robert A. Ficalora, both *pro se* and as acting president
of Montauk Friends of Olmsted Parks, inc., a
not-for-profit corporation established under the laws
of the State of New York

Petitioner-Appellant,

- against -

The Planning Board and Building Department

- of -

The town board government of the Town East
Hampton, 159 Pantigo Road, East Hampton, 11937

Defendants-Respondents
-----x

Case no.

97-10457

Statement Pursuant to
CPLR 5531

The index number of this special proceeding is 97-23205.

The full names of the original parties are as set forth above. There have been no changes.

The proceeding was commenced in the Supreme Court of the State of New York, County of Suffolk.

The proceeding was commenced by entry of an Order to Show cause by the Honorable John J. Jones, Jr., J.S.C., on September 12th, 1997. Personal service of same upon all parties was made on or about September 15th, 1997. A verified answer by respondents was served on or about October 3rd, 1997.

This action pursuant to CPLR Article 78 to vacate and annul permits issued by the Planning Board and Building Department which are illegal on their face under the zoning ordinance of the Town of East Hampton.

This is an appeal from the order and judgment of the Honorable William L. Underwood, Jr., J.S.C., dated October 31st, 1997, and entered November 7th, 1997.

This appeal is made upon the full record (reproduced) and an appendix of companion cause no. 97-17016.

The order and judgment appealed from was not after a trial or hearing.

Dated: Olympia, Washington
March 15th, 1997.

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Questions Presented

1. Did the Building Department fail to perform a duty enjoined upon it by law?
(§7803(1))
 - ☞ The court below answered this question “No”.
2. Did the Planning Board proceed without or in excess of its jurisdiction? (§7803(2))
 - ☞ The court below answered this question “No”.
3. Are the permits issued illegal, arbitrary, capricious or an abuse of discretion?
 - ☞ The court below answered this question “No”.
4. Did the Building Permit amount to a wholly unauthorized grant of a variance?
 - ☞ The court below implicitly answered this question “No”.
5. Was cause shown as ordered by Justice John J. Jones, Jr., J.S.C., why the permits issued should not be vacated/annulled?
 - ☞ The court below implicitly answered this question “Yes”.
6. What statute of limitations, if any, applies to the commencing of an action or proceeding at law to annul a permit which is illegal upon its face?
 - ☞ The court below answered that this action is time barred per “Town Law Sec. 274-b[9].”
7. Does the residential structure unreasonably crowd and therefore harm the common use and enjoyment of the adjoining Reservation property?
 - ☞ The court below answered this question “No”.
8. Is petitioner’s action frivolous and without merit and, therefore, sanctionable?
 - ☞ The court below answered this question “Yes”.

Preliminary Statement

This brief is submitted on behalf of the appellants.

This appeal is from an order of the Supreme Court, Suffolk County, entered November 7th, 1997, which:

- a. erroneously determined that there was “no reasonable argument” that the illegal Guarneri structure would injure the common use and the enjoyment of the adjoining historic landscape/park land (166, 177, 254, 430).
- b. erroneously construes petitioner’s argument that “respondent municipality was without authority to issue a setback variance” when this was never argued below and the issuing board (Zoning Board of Appeals) was not joined as a defendant. The petitioner has presented in his papers his belief that the setback variance was legal, but insufficient to “approve” other prohibited uses (p. 244, 15).
- c. erroneously found that permits issued allowing gross and wanton violation of the letter and intent of the local zoning ordinance were not arbitrary or capricious.
- d. erroneously found that the proceeding below was time barred by “Town Law Sec. 274-b[9].” (see p. 425-428)

This special proceeding was commenced pursuant to CPLR Article 78 against respondents Planning Board and Building Department of the town board government of the Town of East Hampton to annul permits issued in violation of local law for the “creation” of a single family residence upon a substandard, non-conforming over-density lot in a resort zone district in Montauk.

This proceeding was commenced upon entry of an Order to Show Cause by Justice John J. Jones, Jr., J.S.C., demanding a showing of why the subject permits should not be vacated/annulled for allowing an illegal “conversion” under the local

zoning ordinance. It also points to the legal defect in the building permit which purports to be issued for a "CI", or commercial industrial, zoning district instead of the resort zone district wherein the property is situated.

In effect, this proceeding seeks a permanent injunction against any further force or effect of the illegal permits issued. No hearing or trial was had by the court below.

This proceeding is a companion to action no. 97-10463 (Suffolk index 97-17016) for a declaratory judgment. The two causes have substantially identical facts and parties. As the CPLR requires that Article 78 proceedings must be disposed of first, this appeal will attempt to cover all the issues raised in the proceedings below appropriate for determination under Article 78. The brief appealing the second action for declaratory judgment is being prepared and will follow shortly.

Appellant seeks reversal of the judgment and order of the court below and does pray that this court will grant the relief requested upon the substance and merit of the facts and arguments of law presented.

Statement of Facts

1. On December 11th, 1996, the Zoning Board of Appeals of the Town of East Hampton did approve “construction of a 2,296 sq. ft. two story single family dwelling” (p. 55 (G)(2)) subsequent to the demolition of a “non-conforming, overdensity old motel building” (p. 55 (F)(4)) in a Resort zone district and did issue an “area variance” from front-yard setback requirements in order that the dwelling could be erected.
2. Subject property is 11,972 sq. ft or 0.275 acres in size (p. 55).
3. The property is a substandard lot. A minimum lot size of 20,000 sq. ft. is required for the “creation” a single family residence upon the smallest possible lot (“B Residence”, p. 528, see also “Affordable Housing Development”(1)(e) p. 522).
4. Subject property was in a Resort (RS) zone district when purchased in January 1996 by Joseph & Joanne Guarneri and remains in a Resort zoned district (p. 212, 213, 55).
5. Subject property had upon its premises three buildings containing at least four (4) dwelling units as defined in the Town Code (§151-1-20, p. 508; p. 55).
6. The Town Code specifies that there “shall be no less than ... 7,260 sq. ft. of lot area devoted exclusively to the resort use for each dwelling unit” a density of six (6) units per acre (§153-5-50, p. 525).
7. The subject 0.275 acre lot is, therefore, allowed only 1.65 dwelling units under the zoning ordinance, and was a preexisting nonconforming over density use. (p. 55, 284).
8. Overcrowding of dwelling units is prohibited under the zoning ordinance (p. 515, 523-525)
9. “Creation” of a dwelling unity (p. 508) upon subject non-conforming, overdensity property is prohibited under the zoning ordinance.

10. "Conversion" of any part of a building, structure or lot in a Resort zone district prohibits the "creation or continuation on any site of a number of dwelling units in excess of six (6) units per acre of lot area." (§153-5-50, p. 523)
11. The non-conforming, over density and "dilapidated" Umbrella Inn structure had been abandoned for at least five (5) years prior to the Guarneri purchase (p. 294 Guarneri note in margin at ¶12, p. 88 ¶10, p. 514)
12. On March 20, 1997, the Planning Board did publish a "Public Hearing Notice" in *The East Hampton Star* upon Site Plan/Special Permit approval to "demolish, reconstruct, and convert a dilapidated nine (9) unit motel into a two story single family residence..." (p. 360, emphasis added).
13. On June 5th, 1997, respondent Planning Board did file an approved "Special Permit" for "Creation of a single family residence in a Resort (RS) Zone." (emphasis added, p. 59, §153-11-10(A)(1)(a).)
14. No variances from the zoning ordinance were, or since have been, issued by the ZBA from lot size or dwelling unit density requirements necessary for either a "conversion" or for a new single family residence on the Guarneri lot.
15. No "Special Permit" has been issued for a "Conversion" in a resort zone district. (p. 59, 507, §153-5-50 "Conversion"(1),(6), p. 523-524).
16. On June 29th the Building Department did issue a Building Permit for the construction of a single family residence, reliant on the above approval, area variance and special permit, as if in a Commercial Industrial (CI) zone district (p. 67, p. 527 A(1)(a).)
17. Ground was broken on or about July 10th and the summons in companion action 97-17016 served on or about July 16th.
18. The town board government continues to zone the adjoining "Reservation" properties as "A3 Residential" and has assisted the nominal title-holder in

preventing the exercise of the rights upheld by this court's February 13th, 1996, decision and order in the case of Breakers Motel, Louise Nielsen, et al. v. Sunbeach Montauk II and Nicola Biase (Suffolk 85-5656). (p.221, 447-451)

19. The aesthetic and use impacts upon the adjoining historic landscape and park land granted for the common use of Montauk's proprietors cannot be overstated (photos at p. 490ff.)
20. A companion action for declaratory judgment has also been brought by petitioner in this matter. Among the two actions, three orders to show cause have been entered by four different Justices, including Justice Lawrence J. Bracken, of the Appellate Division. Plaintiff has entered a variety of motions, including motions for summary judgment and for consolidation, and a request for recusal by Justice Underwood.
21. The court will find in the record no attempt by defendants to answer the order to show cause entered by Justice John J. Jones, jr., J. S. C. upon the merits presented.
22. No hearing or trial has been had in this matter.

Point I

The court below erred in determining that Planning Board did not arbitrarily act without or in excess of its jurisdiction when it issued a “special permit” for the “creation” of a dwelling unit upon the subject non-conforming over-density lot.

The town zoning ordinance at § 153-1-70 “Overcrowding of Dwelling Units” sets forth that:

“... no person shall erect, construct, create or permit to come into being on any property in any district... dwelling units at a density of more than six units per acre of land.” (p. 515).

Section V. “Special Permits” § 153-5-50 “Specific Standards and Safeguards” under the subheading “Resort” states that:

“(1) There shall be no less than seven thousand two hundred sixty (7,260) square feet of lot area devoted exclusively to resort use for each dwelling unit.” (p. 525)

The subject resort zoned lot is 11,972 sq. ft. and is, therefore, allowed 1.65 units under the zoning ordinance. It is uncontested that the property is “nonconforming, over-density” (p. 55 F(4)). With the “Umbrella Inn” structure razed, there continued to exist three (3) dwelling units on the quarter acre lot (see photos p. 497; p. 55). The previous existence of a dilapidated and abandoned non-conforming motel is mere speciousness and moot as the permit was not for “conversion.” *The “creation” of a single family residence (dwelling unit) upon the cramped Guarneri lot is, therefore, prohibited under the zoning ordinance.*

The court below erred in determining that the decision of the respondents was not illegal, arbitrary, capricious or an abuse of discretion (p. 169). The Planning Board exceeded its statutory powers in granting a “special permit” for the “creation” of a

single family residence on a non-conforming over-density lot. Its decision was illegal, arbitrary, capricious in its injury to the adjoining Reservation property and an abuse of discretion. In effect, it granted an illegal variance from dwelling unit density and must be nullified. (Ronning v. Thompson, 1985, 126 Misc 2d 764, McEnroe v. Planning Bd of the Town of Clinton, 61 Misc 2d 937, S. Chas. Gherardi v. Glass, 32 AD2d 961, Reed v Bd of Standards and Appeals, 255 N.Y. 136, Chessin v. NY City Appeals Bd, 100 AD2d 302, Corliss v. Soloman, 75 AD 2d 838)

Point II

The court below erred in failing to find that respondent Building Department failed to perform an obligation enjoined upon it by law by failing to deny a building permit without a special permit for “conversion.”

The “Special Permit” issued by respondent Planning Board was for “Creation” of a single family residence in a Resort (RS) zone . The description of the work proposed, however, is “Demolition of existing ... transient motel building ... and its replacement with ... a single family residence.” (p. 59)

Under local law such an undertaking is a “conversion.” “Conversion” is defined at § 153-1-20 as:

“CONVERSION - The changing of the use of all or any part of a building, structure or lot which is being used as a resort, transient motel, or multiple residence to a different such use.” (p. 507)

Treating the Guarneri project as “Creation” instead of “Conversion” had a substantial effect upon the manner in which the approvals were made. The Town

zoning ordinance § 153-5-50 “Special Permit” “Specific Standards and Safeguards”

“Conversion” (6) specifically states that:

“The building permit and certificate of occupancy which this chapter requires for such conversions shall not be issued until a special permit... has been obtained.” (p. 524)

Recognizing that a conversion was to be effected, on March 20th, 1996, the Planning Board did post a “Notice of Public Hearing” which stated in part that:

“... a public hearing will be held... for a site plan/special permit approval... in order to demolish, reconstruct and convert a dilapidated nine (9) unit motel (Umbrella Inn) into a... single family residence...” (p. 92, emph added.)

The Town zoning ordinance § 153-5-50 “Special Permit” “Specific Standards and Safeguards” “Conversion” (4) specifies that:

“... conversion shall not result in the creation or continuation on any site of a number of dwelling units in excess of a density of six (6) units per acre of lot area...” (p. 523)

With three remaining dwelling units on a quarter-acre lot, the Guarneri property was already at twelve (12) units per acre, *twice the legally allowable density for a “conversion”*.

Furthermore, “conversion” is allowed by “structural changes” only. The razing and rebuilding of a building is “Expansion, Substantial” and violates both the letter and intent of the law. (p. 523-524, 508)

By arbitrarily treating the Guarneri project as “Creation” the specific statutory standards and safeguards for “conversion” were evaded.

The court below erred in determining that the decision of the respondent Building Department was not illegal, arbitrary, capricious or an abuse of discretion (p. 169). No “special permit” for a “conversion” has been issued. In failing to deny the Building Permit on this ground, the Building Department failed to perform a duty expressly enjoined upon it by law by East Hampton Town Code § 153-5-50 “Special Permit” “Specific Standards and Safeguards” “Conversion” (6). Building Permit should be nullified (People v. Apex Lumber, 13 Misc 2d 333, B & G Construction Corp. v. ZBA of Village of Amityville, et al., 309 N.Y. 732; Pete-lor, inc. v. Haber, 66 Misc2d 309, 320 N.Y.S.2d 352, see also Marcus vs. Mamaroneck, 283 N.Y. 330)

Point III

The court below erred in not finding building permit amounted to a wholly unauthorized grant of a variance.

The Guarneri property is in a Resort “RS” zone district (58, 59. 221)

Town Code § 153-5-31 “Special Permits” “Applications” (p. 518) sets forth that:

“An application for a special permit shall be on the form for same provided by the Building Inspector and shall be submitted in triplicate, together with the appropriate fee, to the Building Inspector, who shall review the application for completeness and conformity with this chapter. The Building Inspector shall reject the application if it is not complete or not in conformance and shall notify the applicant as to the reason for such rejection.”

The building permit issued by respondent Building Department approved the construction of the subject single family residence in a “CI” (Commercial Industrial) zone district (p. 67). It is interesting to speculate upon how the misrepresentation of

zoning district affected the Building Inspector's review of the Guarneri permit. At a minimum, this defect allowed the Building Inspector to evade the many prohibiting standards for approvals in a Resort zone district. The court should note, however, that the "creation" of a single family residence is a PROHIBITED USE in a "CI" zone district under the zoning ordinance § 153-11-10 A(1)(a). (p. 527)

The court below erred in not finding the building permit defective as a matter of law. The Building Inspectors grant of a building permit to either create or convert a non-conforming, over-density dwelling unit in a Resort zone district amounts to a wholly unauthorized grant of a variance. The building permit should be nullified by the court and a bond ordered to ensure the removal of the structure erected Reichenback et al. v. Windward Southampton, 80 Misc.2d 1031).

Point IV

The court below erred in determining that Planning Board did not arbitrarily act without or in excess of its jurisdiction when it issued a "special permit" for the "creation" of a single family residence on a substandard lot.

There is no minimum lot size for a single family residence in a Resort (RS) zone district. Generally, the minimum lot size required for a new single family residence under the zoning ordinance is 20,000 sq. ft. ("B" district, p. 528). *The subject lot, at only 11,972 sq. ft., is substandard by any standard within the zoning ordinance.* The Planning Board, however, arbitrarily determined that: "the lot area is sufficient, appropriate, and adequate for the use, as well as reasonably anticipated operation and expansion thereof." (p. 61).

With rare exceptions, municipalities have no inherent power to enact zoning ordinances (p. 517). Any power which they may have is derived from State enabling statutes, which delegate the power to the Town, in this case §§ 261, 274-a. (Rolf O. Ronning et al., Petitioners v. William Thompson, Chairman of the Planning Board of the Town of Bolton, et al., Respondents, 1985, 126 Misc 2d 762, 764); McEnroe v. Planning Bd of the Town of Clinton, 61 Misc 2d 937.

Under Town Law § 274-a the powers of the Planning Board are limited to approving “certain uses which are specified within [the zoning] ordinance”. § 153-5-35 of the Code of the Town of East Hampton “Administration of Special Permits” states that

“The Planning Board shall have exclusive jurisdiction over all special permits ... and shall have complete responsibility for the issuance of same in conformity with all applicable regulations herein.” (emphasis added, p. 519)

Under Section V. “Special Permits” § 153-5-50 “Specific Standards and Safeguards” it states that

No special permit shall be issued unless the issuing board shall specifically find and determine that, in addition to meeting all of the general standards for special permit uses contained in § 153-5-40 and § 153-5-45 hereof, the particular proposed special use can and will meet the specific standards set forth in this section. (p. 522)

The special permit for “creation” of a new single family residence in a Resort (RS) zone district the Planning Board was reliant upon a single notation found in the “Use Table” at § 153-11-10 A(1)(a) (p. 527). No further definition or specific standards or safeguards are given in the code of this notation.

In Ronning, the court held that the section of the zoning ordinance relied upon by the Planning Board in its determination was

“so lacking in specificity that virtually any application could be deemed objectionable... Accordingly, the Planning Board’s determination to deny applications for site plan approval... must be nullified as beyond the power of the Planning Board and arbitrary.” at 764.

The “creation” of a new single family residence in a resort zone district reliant only upon § 153-11-10 is similarly lacking in specificity. No minimum lot size or “Specific Standards and Safeguards” exist for a special permit for the “creation” of a single family residence in a Resort zone district. The previous existence of a dilapidated and abandoned non-conforming motel is mere speciousness and moot as the permit was not for “conversion.” As applied by the Planning Board in this case, a single family residence could be “created” in a Resort zone district on any size lot.

The court below erred in determining that the decision of respondent Planning Board was not illegal, arbitrary, capricious or an abuse of discretion. (p. 169) The Planning Board exceeded its statutory powers in arbitrarily granting a “special permit” for “creation” of a single family residence on what by any standard in the ordinance is a substandard lot. The order of the court below should be reversed and the special permit issued by the Planning Board should be nullified. (Ronning v. Thompson (supra) 764, McEnroe v. Planning Bd of the Town of Clinton, 61 Misc 2d 937, S. Chas. Gherardi v. Glass, 32 AD2d 961, Reed v Bd of Standards and Appeals, 255 N.Y. 136, Chessin v. NY City Appeals Bd, 100 AD2d 302, Corliss v. Soloman, 75 AD 2d 838)

Point V

The court below erred in determining that Guarneri structure would not interfere with the enjoyment of the grant of “common use” to the adjoining Reservation property

The covenanted grant of “common use” of the adjoining Benson Reservations property establishes it as spectacular natural public parkland for the feeholders of dominant estates, in this case all Montauk property owners (proprietors) (judgment, p. 166, MFOP claim, p. 179, jurisdiction, p. 517).

The construction of the Guarneri building has an overpoweringly negative effect upon the use and enjoyment of the property (see photos, 490-504). (Similarly capricious æsthetic damage in 1997 occurred at the perimeter of our Ocean View Reservation - see attached photos.) It also threatens our use of the property for festival and other commercial and recreational uses through noise and other complaints by a non-resort and/or antagonistic interest (p. 452).

The Town Code at § 153-1-11 “General Provisions” “Purposes” sets forth at (L):

“æsthetic attributes: to perpetuate and enhance areas of natural beauty, to retain outstanding water views and other open vistas available to residents and visitors and to perpetuate generally those æsthetic attributes which are not only please the eye, but which together are the essence of the nationally recognized character of the Town.” (p. 506)

The MFOP has rededicated the property and opened it to the public pursuant to its incorporated purposes (p. 256, 297). The property will now experience greatly increased use and will come to be recognized as yet another jewel among New York’s many Olmsted Parks.

Both the ZBA and respondent Planning Board were arbitrary and capricious in issuing a special permit for a structure which causes such dramatic injury to the æsthetics of our newly recovered historic landscape and park.

Point VI

The “approval” of the Zoning Board of Appeals was arbitrary and without legal effect without the necessary variances from the zoning ordinance.

“Approval” by Zoning Board of Appeals is ineffective for approval of special permit and building permit without the necessary variances from minimum lot size and dwelling unit density requirements. (Holy Spirit Association for Unification of World Christianity v. Rosenfeld, 91 A.D.2d 190, 458 N.Y.S.2D 920, appeal denied 63 N.Y.2d 603, 469 N.E.2d 103, Croissant v. Zoning Board of the Town of Woodstock, Ulster County, 198183 A.D.2d 673, 442 N.Y.S.2d 235, 1979 Op. Attny Gen. (Inf.) 162)

Point VII

Use Variance Required

As overcrowding of dwelling units is specifically prohibited in the law, a use variance from the zoning ordinance by the Zoning Board of Appeals was required for a special permit to be issued. (Croissant v. Zoning Bd. of Appeals of Town of Woodstock, Ulster County, 442 N.Y.S.2D 235, 83 A.D. 673.; Boyadjian v. Board of Appeals of Village of East Hills, 523 N.Y.S.2d 548, 136 A.D.2d 548)

Point VIII

The “Umbrella Inn” was an abandoned non-conforming use.

Town Code § 153-1-40 “Nonconforming uses” (p. 513-14) sets forth:

D. Abandonment. A nonconforming use which is abandoned shall be deemed to have ceased to exist for all purposes hereunder and shall not thereafter be carried on. Such abandonment of a nonconforming use shall occur:

(2) In the case where the use occupied a building or structure designed primarily to accommodate or facilitate such use, when the use is discontinued for any reason for a period of thirty-six (36) consecutive months or voluntarily for twelve (12) months.

The non-conforming, over density use of the Umbrella Inn structure as a “dwelling unit” in excess of the legally established maximum had been abandoned for at least five (5) years prior to the Guarneri purchase (p. 294 Guarneri note in margin at ¶12, p. 88 ¶10).

Point IX

As no “legal and valid” permits have been issued, court below erred in finding that proceeding against respondent Planning Board and Building Department are time-barred.

On July 13th, 1997, petitioner did deliver notice the Town of East Hampton of issues of law and of equity in allowing construction upon Guarneri property and request that “all work voluntarily be stopped pending an order of the court.” (p. 265)

CPLR § 217 “Proceeding against a body or officer - four months” governs the statute of limitations under CPLR Article 78. It states, in pertinent part:

“Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the

petitioner...or, after the respondent's refusal, upon demand of the petitioner... to perform his duty."

Town Law Article 16 § 274-a(3), "Planning Board approvals of site plans and certain uses" sets forth that:

"Any person aggrieved by any decision of the Planning Board... may apply to the Supreme Court for review by a proceeding under Article 78 of the CPLR. Such proceedings shall be instituted within thirty days after the decision is filed with the town clerk."

Article 78 is a consolidation of the common law writs of Prohibition, Mandamus and Certeriori (§7801). The writ of mandamus serves two purposes, *mandamus to compel* and *mandamus to review*. Of these writs, only the writs of certeriori and of mandamus to review are for review. This difference results in variation in the application of the statute of limitations under CPLR § 217 (See practice commentary by Judge Joseph M. Mclaughlin in Westlaw.)

CPLR § 217 applies to both time barring an application for review of a decision made (certeriori/mandamus) and to compelling a respondent to perform his duty (mandamus/prohibition).

The question raised of whether the Building Department failed to perform a duty as enjoined on it by law, §7803(1), is in the nature of a writ of mandamus to compel. The statute of limitations begins at the time that it refused the demand to enforce the law, which in this case would be to nullify the Building Permit issued (Williams v. Morton, 297 N.Y. 328).

The town board government of East Hampton was asked to desist on July 13th, 1997; this proceeding against the respondents of said government was commenced upon an order to show cause entered September 13th, 1997. The intervening time between the demand made to enforce the law and the start of this proceeding is, therefore, two months. Petitioner is clearly not outside of CPLR §217 in his proceeding against the respondents Planning Board and Building Department of the town board government of the Town of East Hampton in this matter.

The question raised of whether the Planning Department proceeded without or in excess of its jurisdiction, §7803 (2), in the nature of a writ of Prohibition. Prohibition was a writ employed to prevent bodies or officers which exercised judicial or quasi-judicial functions, from acting in excess of their jurisdiction. The question of the application of CPLR §217 to prohibition is uncertain.

Petitioner has shown that no "legal and valid" permits have been issued. The Planning Board and Building Department acted without or in excess of their jurisdiction in granting the permits at bar. "The four months' Statute of Limitations does not apply if the determination to be reviewed herein is illegal, unauthorized or in excess of statutory jurisdiction in the first instance." Myricks, petitioner, against Kennedy, Police Commissioner of the City of New York, et al., Respondents, 6 Misc2d 856.

Point X

The court below erred in finding Petitioner's action frivolous, without merit and therefore sanctionable

The court below would impose sanctions for frivolous conduct in litigation pursuant to 22 NYCRR Sec 130-1.1 for requiring defendants to appear in an action which is "without merit in the law." (p. 168)

The court should reflect on the fact that three orders to show cause were entered by four Justices of the Supreme Court, including Justice Lawrence J. Bracken of the Appellate Division. The court below never granted a hearing upon any one of these orders, even when hearings were set upon shortened time in lieu of a temporary restraining order.

The court also will find in the record that the respondents at no time attempted to answer the orders upon the merits presented. Instead they engaged in shrill *ad hominem* attacks, and attempts to find procedural faults.

Even a brief review of these papers will discover that Petitioner has presented strongly on the merits and the law, so the request for sanctions should be reversed upon the respondents.

Conclusion

Proceeding not time barred, Court should reverse the order below on the merits. Permits should be nullified and bond ordered to ensure demolition of structure erected.

No legal and valid permits have been issued for the construction of a single family residence on the substandard, non-conforming overdensity Resort zone Guarneri property. The permits issued were illegal, arbitrary, capricious, and an abuse of discretion.

Order to Show Cause entered 9/12/97 by Hon. John J. Jones, Jr, J.S.C. has not been answered by respondents Planning Board and Building Department upon the merits presented. Judgment and order of the court below should be reversed. Permits should be nullified and a bond ordered to ensure demolition and removal of structure erected.

Robert A. Ficalora
Petitioner, pro se

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