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March 14, 2008

Mr. Richard A. Reed
Deputy Clerk
Court of Appeals, State of New York
Albany, NY 12207-1095

Re: Town of Montauk, Inc. v. Pataki, et al.
Motion No. 08/101

Dear Mr. Reed:

On behalf of the Town of East Hampton, erroneously designated in the above matter as "The Town Board Gov't of the Town of East Hampton," we respond to your March 10, 2008 letter, in an effort to assist the Court in its *sua sponte* consideration of its subject matter jurisdiction with respect to whether the Appellate Division order appealed from finally determines the matter within the meaning of the Constitution (CPLR § 5601[b]).

As noted in my March 5, 2008 letter to you, the order appealed from was "the July 13, 2007 Appellate Division Order denying leave to appeal the May 8, 2007 Decision and Order [of the same Court]."

The order appealed from is not a final order. The determination of the Appellate Division dated May 8, 2007 was the final order in this case, in that it affirmed the dismissal of the Petition by Supreme Court, Suffolk County. As cogently stated in Karger, Powers of the New York Court of Appeals, Revised Third Edition, at §4:15, p. 94,

> [T]here can hardly be two final determinations reaching the same identical result in a single action or proceeding; one or the other must be the final determination. As the Court of Appeals has emphasized, a decision [denying a motion to vacate or affirming such a denial] does not "add to nor detract from the rights of the parties as already determined," but instead "merely adheres to the already final determination".

The order appealed from in this case, by denying leave to appeal, also had the effect of "adhering to the already final determination."

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The conclusion that the order does not meet the constitutional test of finality so as to be independently appealable is buttressed by the explicit provision in CPLR § 5602(a) which provides the exclusive remedy after a denial of leave to appeal by the appellate division:

> An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application.

An application to the Court of Appeals for leave, after refusal by the appellate division, must be made within 30 days of the latter court's denial. CPLR § 5513 (b). For the reasons expressed in my March 5, 2008 letter, the filing on October 5, 2007 of the Notice of Appeal in this case, even if it were to be treated as an application to this Court for leave, was untimely.

Conclusion

For these reasons, as well as the reasons stated in my March 5, 2008 letter and the letter of the Attorney General's office to the same effect, the appeal purportedly taken as of right to this Court was properly dismissed.

Respectfully,

Richard C. Cahn

cc: All Counsel