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March 5, 2008

Mr. Richard A. Reed
[redacted] 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 February 27, 2008 letter, in an effort to assist the Court in its *sua sponte* consideration of its subject matter jurisdiction with respect to the timeliness of the appeal, and whether a substantial constitutional question is directly involved to support the appeal taken as of right. Because the appeal is untimely, the Court lacks jurisdiction. Moreover, there is no jurisdictional predicate for a direct appeal pursuant to CPLR 5601(b)(1), as there is no substantial constitutional question involved. Appellant also lacks juridical existence and hence capacity to sue.

Subject Matter Jurisdiction

This appeal was taken by Notice of Appeal dated October 5, 2007. 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]."

This firm had served a copy of the July 13, 2007 Order upon Appellant's counsel by mail on July 17, 2007. Thus, the 35-day period during which an appeal could be timely taken, as against the Town of East Hampton, expired on August 21, 2007, 45 days before the Notice of Appeal was served. Page 3 of the Appellant's Preliminary Appeal statement states inconsistently that the Appellant was served with the Appellate Division Order on July 13, 2007 and August 30, 2007. The latter date presumably refers to service by the Attorney General's office. However, the Notice of Appeal was untimely as to that service as well, since the 35-day period following that date expired on October 4, 2007, one day before its filing.

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Thus, the appeal was untimely, and the Court lacks subject matter jurisdiction. CPLR 5513, 5514. The Court's dismissal of the appeal should stand.

No Substantial Constitutional Question

There is no substantial constitutional question. Indeed, under CPLR 5601(b)(1), for a direct appeal as of right to be available, the constitutional question "must not only be directly involved, but it must also be the only question involved on the appeal." Karger, The Powers of the New York Court of Appeals, Revised 3d Ed., § 7:2, at p. 222.

First, the order denying leave to appeal, sought to be appealed, was within the sound discretion of the Appellate Division, and did not involve a substantial constitutional question.

Second, the Appellant attempted in 2005 to take a direct appeal to this Court from the judgment of the Court of original instance, and took the position that this case fell within CPLR 5601(b)(2), in that the only question involved was the constitutional validity of a federal or state statute. This firm transmitted a letter on August 19, 2005 letter to Deputy Clerk Marjorie S. McCoy, in response to the Court's jurisdictional inquiry regarding the Appellant's purported direct appeal, and pointed out that this case does not involve any such statutory construction, but involved a host of other, non-constitutional issues. The only document cited by the Appellant at that time as supporting the Court's jurisdiction was Chapter 2 of the Laws of 1691, an act of the colonial legislature, and possibly not the equivalent of a statute of the State. *See, Beers v. Hotchkiss,* 256 N.Y. 41, 175 N.E. 506 (1931). In that connection we stated this appeal does not involve the constitutional validity of the 1691 enactment, but at most, its interpretation.

We further argued in our 2005 letter that an examination of the Appellant's papers (described as "nearly incomprehensible" by the IAS Justice in Supreme Court, Suffolk County), demonstrates that the 1691 colonial statute was adopted by the colonial legislature to quiet title to lands whose original title derived from a royal charter or patent given by a representative of the English sovereign, such as the 1686 Dongan Patent, which conveyed title to lands in Montauk to the Trustees of the Freeholders and Commonalty of the Town of East Hampton ("the Trustees"). A quiet title action does not involve the "construction of the constitution of the state or of the United States," within the meaning of CPLR 5601(b)(1), so as to warrant an appeal as of right.

Third, the Amended Petition in this case sought, with respect to the Town of East Hampton, an order or judgment which would "update, modify and re-enter an order of Hon. Nathan B. Morse, Justice of the Supreme Court granted June 26, 1851," in a case which resolved a dispute between

four individuals and the Trustees; the relief sought on that claim for relief also does not involve a constitutional question, much less a substantial one.

Whether the Appellant's request for judgment "compelling delivery into Court of all of Montauk's revenues, including taxes" is a viable, soundly-based prayer for relief, (or not, as we believe), it, too, attempts to raise questions other than the construction of a constitutional provision. The same can be said of the request for a declaration "that any and all claims of jurisdiction made by the State Legislature or the Town" were and are in violation of the Dongan Patent.

Finally, the Appellant's requests to deliver all real property in Montauk claimed by the Town of East Hampton to "MFOP/ Montauk Trustee Corporation," to identify property encumbered by the Indians proprietary rights and to prohibit all actions of the Town and other bodies politic that had some effect or apparent effect upon the territory claimed by the present "Town of Montauk, Inc." do not meet the test of constitutional construction embodied in Section 5601(b)(1).

Standing of the Plaintiff

We wish also to note that Appellant lacks standing to sue. The Appellant, terming itself "Town of Montauk, Inc.," claimed that it became incorporated on April 2, 1852 by Chapter 139 of the Laws of the State in that year. Chapter 139 purported to incorporate seven individuals as the "trustees of Montauk." A reading of Chapter 139 demonstrates that it conferred upon the newly designated trustees the power "to make such by-laws, rules and regulations for governing, using and improving" properties conveyed by the statute provided that "such by-laws and rules do not contravene those made by the [earlier] proprietors."

Although Chapter 139 conferred limited powers upon the "Trustees of Montauk" and in no way undercut the governmental powers, including police powers, conferred upon the Town of East Hampton by the Town's incorporating statute, enacted as Laws of 1788, Chapter 64, the interpretation of Chapter 139 is not only not a question of constitutional construction, but demonstrates Appellant's lack of standing as the successor of the 1852 trustees. At best, Chapter 139 conferred property rights upon a group of individuals, but did not confer upon those individuals the governing powers that the Legislature, 64 years before, had conferred in incorporating the Town of East Hampton. The Appellant, for its standing, relied exclusively upon a certificate of incorporation filed April 13, 1994 by the Montauk Friends of Olmstead Park/Montauk Trustee Corp., which organized itself as a not-for-profit organization on that date under Section 402 of the Not-For-Profit Corporation Law. The Not-For-Profit Corporation Law does not confer government powers upon a corporation formed thereunder and therefore that law does not provide a basis for standing. Moreover, there was submitted to the Appellate Division a

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certificate of the Secretary of State showing that there is no record in that office of the incorporation of any such entity as "Town of Montauk, Inc."

Although Appellant relies upon this Court's decision in *People v. Vorpahl,* 2 N.Y. 3, 781, 812 N.E.2d 1255, 780 N.Y.S.2d 306 (2004), in which the Court dismissed an application for intervention by a party designating itself as "Town of Montauk, Inc.," that determination, aside from the fact that it rejected the Appellant's participation, cannot substitute for legislative recognition of a municipality as required by the State statute, and did not in any effective way establish that "Town of Montauk, Inc" is a juridical entity, much less one that possesses standing to litigate this case.

Conclusion

For all of these reasons, the appeal purportedly taken as of right to this Court was properly dismissed.

Respectfully,

Richard C. Cahn

RCC/pdm
cc: All Counsel