

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of
SUZANNE McCRORY and STUART TIEKERT,

DECISION & ORDER

Petitioners,

Index No. 17-1772

For a Judgment Pursuant to Article 30 of the
Civil Practice Law and Rules

- against -

VILLAGE OF MAMARONECK
BOARD OF TRUSTEES

Respondent.

-----X
CACACE, J.

The following papers, numbered one (1) through four (4) were read on this
petition for relief pursuant to article 30 of the Civil Practice Law and Rules (CPLR), and on the
respondent's motion to dismiss.

Notice of Petition - Petition - Exhibits	1
Notice of Motion to Dismiss - Affirmation in Support - Affidavit in Support	
Affidavit in Support - Memorandum of Law - Exhibits	2
Affidavit in Opposition - Affidavit in Opposition - Exhibits	3
Reply Affirmation - Exhibits - Affidavit in Support - Affidavit in Support	
Memorandum of Law	4

Upon the foregoing papers, it is ordered and adjudged that the motion to dismiss the instant
petition for relief is disposed of as follows:

The petitioner brings this proceeding by a notice of petition seeking an order of this Court
(1) entering a judgment declaring that the action undertaken by the respondent Village of

Mamaroneck Board of Trustees (hereinafter, the Board) to enter into non-public meetings without legitimate basis constituted a violation of the Open Meetings Law, and (2) directing the members of the respondent Board to undergo Open Meetings Law training. Specifically, the petitioners allege that on March 30, 2017, the respondent Board violated article 7 of the Public Officers Law, commonly known as the Open Meetings Law (hereinafter, OML), by failing to provide the public with adequate notice of the respondent Board's scheduled meeting for that date (hereinafter, the subject meeting), by improperly entering into executive session during the subject meeting for the expressed purpose of contract negotiations and advice of counsel, and by failing to subsequently issue accurate minutes of the agenda items and motions addressed during the subject meeting.

In opposition to the instant petition for relief, the respondent filed a motion to dismiss this proceeding pursuant to CPLR 3211(a)(3) and (a)(7), and CPLR 7804(f), arguing that (1) the petitioners lack standing to bring the instant proceeding due to the failure of each of them to attend all of the meetings of the respondent Board which are referenced within the instant petition, including the subject meeting, and (2) the instant petition fails to state a cause of action against the respondent Board due to the failure of the instant petition to raise factual allegations in support of claims which fail based upon either indisputable factual evidence contained within the respondent Board's records or as a matter of law, or upon both grounds.

Legal Analysis

Upon consideration of a motion to dismiss brought pursuant to CPLR 7804(g) and/or CPLR 3211, the Court recognizes that the pleadings are to be liberally construed by the reviewing court, that the alleged facts are to be accepted as true, and every favorable inference possible shall be afforded to the petitioner (*see Nonnon v City of New York*, 9 NY3d 825; *see also Ray v Ray*, 108 AD3d 449, 451). Upon examination of the pleadings, the reviewing court must accept the factual allegations raised therein to be true, and view them in the light most favorable to the petitioner (*see Lawrence v Miller*, 11 NY3d 588; *see also Leon v Martinez*, 84 NY2d 83, 87), but the court's sole inquiry shall concern whether the facts alleged fit within any cognizable legal theory, irrespective of the level of evidentiary support proffered (*see People v Coventry First LLC*, 13 NY3d 758). However, the Court also recognizes that "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration" (*Silverman v Nicholson*, 110 AD3d 1054, 1055).

Turning first to consider that branch of the respondent's motion to dismiss the instant petition upon a duly raised challenge to the standing of each of the individual petitioners to bring the instant proceeding, the Court is mindful that the applicable standard for determining the standing of a party seeking judicial review of an alleged violation of the Open Meetings Law, as codified under article 7 of the Public Officers Law, is governed by § 107(1) thereof, which provides that "[a]ny aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article 78 of the civil practice law and rules, and/or an action for a declaratory judgment and injunctive relief".

Consequently, in order for a challenge to an alleged violation of the OML to proceed, the petitioner(s) must establish his or her/their standing to raise their particular challenge to governmental action under review before the reviewing court may reach the merits of the challenge raised (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769). In order for a petitioner alleging a violation of the OML to establish standing, such petitioner must show (1) that the proposed action will have or has had a harmful effect upon him or her/them which is different from that suffered by the public-at-large, and (2) that the alleged injury-in-fact falls within their zone of interest (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d at 772-774; *see also Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, 76 NY2d 428; *Skelos v Patterson*, 65 AD3d 339, 344; *Matter of Long Island Pine Barrens Society, Inc. v Town of Islip*, 261 AD2d 474, 475; *Matter of Parisella v Town of Fishkill*, 209 AD2d 850, 851; *Schiavoni v Village of Sag Harbor*, 201 AD2d 716).

Here, the petitioners specifically argue that their standing to bring this proceeding for a declaratory judgment is based upon their status as residents of the Village of Mamaroneck, as well as the alleged violation of their rights to “observe the performance of their elected officials and to witness the decision-making of the Board of Trustees” when the respondent entered into executive session on March 30, 2017 for the express purpose of obtaining the advice of counsel with regard to a personnel matter which had been under consideration earlier in the meeting during the public session segment. Notably, the petitioners have neglected, through the instant petition and the supportive papers, to raise any allegation of resultant harm which they have suffered, or may suffer at some point in the future as a direct or indirect consequence of the executive session discussions undertaken by the respondent Board on March 30, 2017.

Although those courts of this State which have had occasion to address the showing required of a petitioner to establish his or her/their standing to challenge an alleged violation of the OML have reached disparate conclusions, it appears that the status of a petitioner as a mere member of the general public, a taxpayer or resident of the municipality, in and of itself, is insufficient to confer standing to pursue a declaratory judgment action or an article 78 proceeding which seeks redress for an alleged OML violation. In this regard, the Court considered the decision reached by a learned Justice of this Court (Giacomo, J.), who granted a motion to dismiss an article 78 petition which challenged an alleged violation of the OML by the Mount Vernon Board of Estimate and Contract (MVBEC) upon finding that the petitioner's proffered status as a local business owner and taxpaying resident of the City of Mount Vernon was insufficient, standing alone, to establish that he possessed standing to raise an OML challenge to the administrative action undertaken by MVBEC through its passage of a proposed budget due to his failure to make the requisite showing that he was adversely affected by that action allegedly undertaken in violation of the OML (*see Matter of Rivers v Young*, 26 Misc.3d 946). Consistent therewith, the Appellate Division, Second Department had previously affirmed the dismissal of an article 78 petition for want of standing by the Supreme Court, Dutchess County (Dillon, J.), which found that the failure of the petitioner to demonstrate some personal damage or injury to his civil, personal or property rights as a consequence of the student redistricting determination reached by the respondent Board of Education, compelled the determination that he lacked standing to challenge any of the actions undertaken by the respondent which allegedly violated the OML (*see Matter of Goldin v Board of Education of Wappingers Central School District*, 306 AD2d 410, *lv. denied* 100 NY2d 514).

Indeed, this Court finds that the rationale applied in these cited decisions is more well-reasoned than that applied in the *Matter of Zehner v Board of Education of the Jordan-Elbridge Central School District* (29 Misc.3d 1206[A]), where the Supreme Court, Onondaga County (Greenwood, J.) held that the petitioner possessed standing to maintain an article 78 proceeding which challenged the respondent Board of Education's alleged violation of the OML when it appointed an interim superintendent, by virtue of his mere presence at the respondent's meeting when the challenged appointment was made - reasoning that since the petitioner was a lawful attendee at the meeting, he was an aggrieved party with standing to challenge the respondent's appointment action. Stated succinctly, this Court finds the *Zehner* Court's conclusion that the standing of a party to challenge an alleged violation of the OML hinges upon, and may otherwise be based solely upon the lawful presence of the petitioning party during the challenged meeting to be unsupported by legal precedent and too restrictive in a society where the meetings of many governmental bodies are made available for viewing by members of the public via a multitude of electronic media.

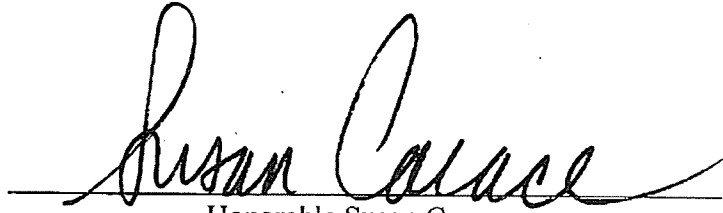
Accordingly, as this Court finds that the petitioners' pleadings fail to allege that either of them have suffered some personal damage or injury to their civil, personal or property rights as a direct or indirect consequence of the employment and contract actions undertaken by the respondent Board during executive session discussions had on March 30, 2017, this Court is compelled to find that neither of the petitioners have standing to challenge any of the actions undertaken by the respondent Board which allegedly violated the OML on March 30, 2017 (see *Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579; see also *Godfrey v Spano*, 57 AD3d 941, 943; *Matter of Goldin v Board of Education of Wappingers*

Central School District, 306 AD2d at 410; *Matter of Rivers v Young*, 26 Misc.3d at 949-950).

Based upon the foregoing, the respondent's motion to dismiss the instant proceeding pursuant to CPLR 3211(a)(3) is hereby granted, and this proceeding is hereby dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
September 22, 2017


Honorable Susan Cacace
Acting Justice of the Supreme Court

TO:

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From: Heather Lorenzen

Date: 9/27/2017 3:56 PM

Pages: 1 of 8 (including this page)

Subject: Suzanne McCrory and Stuart Tiekert v. Village of Mamaroneck Board of Trustees

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MATTER: Attached please find a decision recently signed by the Hon. Susan Cacace in the matter of Suzanne McCrory and Stuart Tiekert v. Village of Mamaroneck Board of Trustees. Thank you.

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