SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of,
SUZANNE MCCRORY,

DECISION & ORDER
INDEX NO. 2529/19

Petitioner,

-against-

VILLAGE OF MAMARONECK BOARD OF TRUSTEES and its attorney, ROBERT A. SPOLZINO, WESTCHESTER JOINT WATER WORKS NO. 1 and EDGEWATER POINT PROPERTY OWNERS ASSOCIATION, INC.,

Respondents.

For a Judgment Pursuant to Article 78 of the N.Y. Civil Practice Law and Rules

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FUFIDIO, J.

This is a proceeding commenced by the Petitioner, Suzanne McCrory, pursuant to CPLR Article 78 and CPLR Article 3001 which seeks a judicial declaration that, "(a) Respondent Edgewater Point Property Owners' Association Inc. owns the water lines beneath its privately owned Flagler Drive, (b) that Respondent association and its members are the beneficiaries of this water line that serves neither public land nor a public purpose; and (c) that municipal payment to install a new water line on Edgewater Point Association Property is an unconstitutional gift. Petitioner further asks this court to annul, reverse and vacate decisions by the Village of Mamaroneck and WJWW to make the Flagler water line a public works project paid for by the Village of Mamaroneck...," and finally, she asks the Court to order the Village of Mamaroneck (Village) to bill the Edgewater Point Association (Edgewater) in order to reimburse the village for the expense of the project. Each of the Respondents have submitted motions to dismiss, to which the Petitioner has responded and to which the Respondent, Westchester Joint Water Works (Water Works), has replied.

In addition, the Petitioner has filed a Notice of Pendency against Edgewater, which they have moved to vacate. The Petitioner has responded to that motion and Edgewater has replied thereto.

Finally, the Petitioner has moved for a preliminary injunction under CPLR Article 63 enjoining the Village of Mamaroneck, "from funding the Flagler water lines with any revenue source...other than payments by the Edgewater Point Property Owners' Association, Inc...." Each of the Respondents responded to the motion and the Petitioner has replied.

The Court has considered all of the filings described above, by each of the parties, along with all of the attached exhibits and affidavits.

The pertinent facts for this Court's consideration are that Flagler Drive in the Village of Mamaroneck is a private road that runs the length of Edgewater Point, a peninsula in the Long Island Sound.

The Edgewater Point subdivision was created in 1926 on land that was formerly owned by and purchased from the film director D.W. Griffith. In 1925, the land was sold to the Edgewater Point Company which began to develop the subdivision. At some point before the Edgewater Point Company became involved, a private water line was run onto the peninsula to provide water to the property. Today there are 28 large single family homes on the peninsula serviced by Flagler Drive and the owners of the homes on Edgewater Point are members of the Edgewater Point Property Owner's Association. It is unclear as to what happened to the Edgewater Point Company.

Water is supplied to the Village of Mamaroneck, including the homes on Edgewater Point by the Westchester Joint Water Works, a Water Works that was formed in 1927 to provide water to the Village of Mamaroneck, the Town of Mamaroneck and the Town/Village of Harrison. Each member municipality owns and is responsible for maintaining its own water distribution networks within their geographical boundaries, unless it decides to hire the Water Works to manage and maintain its local distribution systems. This is the arrangement that the Village of Mamaroneck opted into (*Soundview Woods, Inc. v. Town of Mamaroneck*, 14 Misc2d 866 [Supreme Court, Westchester County 1958]; NY Uncon Laws secs. 6135(4), 6136(1)). Should the municipality enter such an arrangement under Unconsolidated Laws section 6136(1), the Village is required to pay the Water Works for the service and can be compelled, by mandamus, to pay if they do not (NY Uncon Law sec. 6136(10)).

Because anyone who was personally involved in these past events is long since dead, the history has been reconstructed by the parties through various meeting minutes and contemporaneous correspondence. What has been presented is that on or about August 9, 1927, the Edgewater Point Company expressed an interest in turning over the piping system and necessary easements for maintenance of that system to the Village. In November of 1927 the Water Works received a communication from the Village Clerk along with a petition by the Edgewater Point Company asking that the Water Works assume responsibility for the water mains and for the installation of fire hydrants on Edgewater Point. On or about February 21, 1929, the Water Works was presented with communication by the Edgewater Point Company offering an easement to the pipelines in its subdivision. The Water Works Board accepted the easement and authorization was given for the Superintendent to rent fire hydrants to the Edgewater Point Company and for them to be connected. In April 1929, the Edgewater Point Company applied for fire hydrant service at the cost of $40/year per hydrant. Next, in December of 1929, while construction was being done on the peninsula and a utility trench had already been dug, the Edgewater Point Company's attorney wrote to the Water Works to inform them that they had exposed pipes that were installed by the previous owner and that they appeared to be inadequate and in poor condition and that, to save future expenses, the Water Works might want to look into replacing them while the trench was still open. He went on to say that in his estimation this was an internal matter between the Village and Water Works. Ultimately, on May 2, 1930, the Water Works resolved, "to install for the account of the Village of Mamaroneck, 1800 feet of 6 inch water main on Flagler Drive or Crossway, from Orienta Avenue, to a point where a water main has already been laid, all in accordance with the resolution of the Village Board requesting the same, and approval thereof of by its Mayor...," and the previously privately laid pipe that was taken over by the Water Works was assigned an

identifying number for future reference. In the intervening years, the Water Works continued to make repairs to the water lines servicing Flagler Drive and addressed customer concerns on behalf of the Village.

By 2016, the water lines under Flagler Drive had become inadequate for supplying the fire hydrants in Edgewater Point with sufficient water flow and pressure and the Village decided that they needed to be replaced, however, there was some concern over who was responsible for funding the project. On May 9, 2017 the Water Works approved the project for replacing the Flagler Drive lines on behalf of the Village and on August 14, 2017 the Village approved funding for the project subject to the Village Attorney's opinion on whether or not this was a lawful endeavor. On October 3, 2017, the Village Attorney and named Respondent in this case opined that based on his review of the historical relationship set forth above between each of the respondents *vis a vis* the Flagler Drive water line and the prevailing law, it was legitimate for the Village to bear the costs of this project. The work proceeded and by March 19, 2019 the project was deemed substantially complete by the Westchester County Department of Health.

This arrangement of the early 1900's regarding who was responsible for the water lines running under Flagler Drive seems to have been forgotten in the intervening years and seemingly never became an issue when other water line projects were completed on the lines running under other private roads within the Village of Mamaroneck, nevertheless, this project drew the attention of a number of Village residents including the *pro se* Petitioner who, in her petition, describes herself as a tax payer and someone, "who receives water from the municipal water system." Admittedly, the Petitioner states she has, "no formal legal training but formerly worked as a federal auditor identifying fraud, waste and abuse in governmental programs." In addition to this action, she has been the petitioner on several other challenges to various other perceived Village of Mamaroneck malfeasances.[1] Her allegation is that by the Village approving the Water Works to fix the water lines running under Flagler Drive, the Village bestowed an illegal gift on the Edgewater Point Property Owners Association in violation of the New York State Constitution Article 8, Section 1 and has asked the Court for a series of judicial declarations stating as much, as well as for one settling the issue of ownership of the water lines that run under Flagler Drive and an annulment of the Village's decision approving the funding for the project. In addition, the Petitioner has accused Village Attorney, Robert Spolzino, of violating rules of professional conduct and that the Village violated the open meetings law when the Board went into a private session that she believes was not done to seek, "'advice of counsel' but (was) rather a secret discussion of how the trustees would handle payment."

Each of the Respondents have filed motions to dismiss arguing, primarily, that the Petitioner lacks standing to bring this action and in any event it is untimely. The Court agrees with the Respondent's positions on timeliness and standing on all the issues except the alleged open meetings law violation and the allegation against Robert Spolzino, charges for which the Court finds that she has not set forth a *prima facie* case.

To begin, the Petitioner asserts standing as a taxpayer and recipient of the water services that Water Works and the Village supply to her. There are few recognized claims by which a citizen my assert a generalized taxpayer standing, one is a claim brought pursuant to General Municipal Law section 51 (*Mesivta of Forest Hills Inst. v. City of New York*, 58 NY2d 1014

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[1] *Henderson v Zoning Bd. of Appeals*, 72 AD3d 684 [2nd Dept. 2010]; *McCrory v Village of Mamaroneck Board of Trustees*, 181 AD3d 67 [2nd Dept. 2020][Reversing a dismissal for lack of standing in an alleged open meeting law violation]; *McCrory v Village of Mamaroneck*, 34 Misc3d 603 [Supreme Court, Westchester Co. 2011, Lefkowitz, J.] and *McCrory v Zoning Bd. Of Appeals of Village of Mamaroneck*, 40 AD3d 649 [2nd Dept. 2007].

[1983]) another is pursuant to State Finance Law article 7-A (*Wein v Comptroller*, 46 NY2d 394 [1979]). Neither of which is pled in this case. Similarly, simply alleging a violation of the gift and loans clause of the New York State Constitution does not establish a constitutional right to standing (*Schulz v. Cobleskill-Richmondville Cent. School Dist. Bd. Of Educ.*, 197 AD2d 247 [3rd Dept. 1994]). Because the Petitioner has not brought this action pursuant to either of those aforementioned statutes, she must instead rely upon common-law taxpayer standing, which requires a showing that the Petitioner is, "'personally aggrieved by those actions in a manner different in kind and degree from the community generally' and that 'the failure to accord [him or her] standing would be in effect to erect an impenetrable barrier to *any* judicial scrutiny of legislative action'" (*Fauvell v. Miglino*, 111 AD3d 596 [2nd Dept. 2013]; *quoting*, *Matter of Seidel v Prendergast*, 87 AD3d 545 [2nd Dept. 2011][emphasis added]). The Petitioner has not shown that she has been personally aggrieved by the decision to fund the Flagler Drive water main project any more than any other resident of the Village of Mamaroneck, including her neighbors who live on Flagler Drive who presumably also pay taxes and water bills at the same rate as does the Petitioner.

This finding of a lack of standing disposes of all of the claims in the Petition except that of the Open Meeting Law violation, where it has recently been held that, "the harm or injury of being excluded from municipal meetings that should be open to the public is sufficient to establish standing in cases based upon alleged violations of the Open Meetings Law...." (*McCrory v. Village of Mamaroneck Board of Trustees* 181 AD3d 67 [2nd Dept. 2020]). However, as to that allegation, the Court finds that the Petitioner has not set forth a cause of action, in this regard, against any of the Respondents, but especially against the Westchester Joint Water Works and Edgewater Point Property Owner's Association who the Court fails to see how, in any manner, could have violated the open meetings law.

With respect to this claim as it pertains to the Village of Mamaroneck and Robert Spolzino, the Petitioner alleges that during the August 26, 2019 Village of Mamaroneck Board of Trustees meeting the Board adjourned to an executive session and that these, "non-public discussions of the Flagler water line project and payments is anathema to Open Meetings Law and its mandate for transparency. Specifically, there was no legitimate reason to bar me and other members of the public from discussions of a multi-million dollar improvement on private property when a claim was being presented for payment on August 26, 2019 and when I had presented substantive information showing the water lines were private. That private session was not 'advice of counsel' but rather a secret discussion of how the trustees would handle payment...." This allegation of an improper private session is memorialized as such in the meeting minutes, "Ms. Sue McCrory appeared again and stated that the Flagler Drive water line is not the Village's responsibility. There is evidence that shows it is not public property. The Board is not applying laws uniformly. Must make sure that dollars are spent for public benefit. Trustee Lucas asked for an Advice of Counsel session. The Board agreed. Upon return from the Advice of Counsel session, Mayor Murphy asked that the Leventhal invoice on the bottom of page 5 in the amount of $16,425 be removed as the payment is premature." Open Meetings Law provides certain exemptions from the general requirement that the business of the Board of Trustees be conducted in public, included in which is an exception for "any matter made confidential by federal or state law" (Public Officers Law section 108(3)). This has been interpreted as meaning, among other things, discussions between the Board and the Village Attorney because such discussions are afforded attorney/client confidentiality (*Brown v Feehan*, 12 AD3d 1499 [4th Dept. 2015]). The Petitioner was not present during this closed-door session

and offers nothing but her own speculation as to what was discussed or what actions were taken as a result of those discussions. There is no further explanation by her or anyone else as to what the Leventhal invoice was or if it was even related in any way to the Advice of Counsel session or the Flagler Drive project. Nor is that information readily discernable from the meeting minutes. While the Petition, on a motion to dismiss pursuant to CPLR 3211, is presumed to be factually accurate and entitled to every favorable inference, the Petitioner's mere speculations and bare legal conclusions that are flatly contradicted by the record are insufficient to sustain a *prima facie* case against the Village of Mamaroneck and Robert Spolzino for violating the Open Meetings Law, especially when the stated purpose for going into the closed-door session is plain from the meeting minutes (*Silverman v Nicholson*, 110 AD3d 1054 [2nd Dept. 2013]). Lastly, the Petitioner has not set forth a cause of action against Robert Spolzino. In general, a third party, non-client, cannot sustain an action against an attorney absent a showing of specific injuries sustained as a result of that attorney's, "wrongful or improper exercise of authority," or that the attorney, "committed fraud or collusion or a malicious or tortious act" (*Singer v Whitman & Ransom*, 83 AD2d 862 [2nd Dept. 1981]). Although the Petitioner has framed her allegations against Mr. Spolzino as though he was the driving force behind a conspiracy to bestow the gift of better water flow to the fire hydrants on Edgewater Point, as far as this Court can tell, the sum total of the Petitioner's allegations against him are that as Village Attorney he advised the Village of Mamaroneck on the status of the Flagler Drive water lines and that the Petitioner disagrees with the legal opinion that was given to the Village. Critically, the Petitioner was not a client of Mr. Spolzino and has not demonstrated that he wrongfully or improperly exercised authority nor has she shown that Mr. Spolzino acted fraudulently, collusively, maliciously or tortiously. Consequently, she cannot show an injury as a result of such behavior. To the extent that she has alleged violations of the Rules of Professional Responsibility, that, without more, is insufficient to sustain a cause of action (*Long Island Medical Anesthesiology, P.C. v Rosenberg Fortuna & Laitman, LLP*, 191 AD3d 864 [2nd Dept. 2021]).

Next, regarding the timeliness of the claim, the Court is of the opinion that the final decision that the Petitioner wants annulled occurred, at the very latest, on October 10, 2017 when the Village of Mamaroneck Board of Trustees, after receiving an opinion from the Village Attorney that it had the legal authority to do so, confirmed their August 14, 2017 decision to accept the Flagler Drive project as a local capital project to which they were obligated to pay the Water Works for the work done (NY Uncon Laws 6136 (1), (5) and (10)). At the time the Village had voted to proceed with the Flagler Drive project, the Waters Works had already voted to undertake the project on May 9, 2017. CPLR 217 sets the limitations period for this type of Article 78 proceeding at four months from the date of the Board's final decision to proceed with the project and in such instances as in this case, where the declaratory judgments sought by the Petitioner are linked with the underlying Article 78 claim, the Petitioner should have brought those within the statute of limitations as well (*Imandt v New York State Unified Court Sys.*, 168 AD3d 1051 [2nd Dept. 2019]). Instead, she waited until October 8, 2019, nearly two years after the Board's decision to fund the project, in order to bring this action.

Turning now towards the Petitioner's Notice of Pendency against Flagler Drive. CPLR section 6501 provides that a notice of pendency may only be filed in an action, "in which the judgment demanded would affect title to, or the possession, use or enjoyment of real property" (CPLR 6501), by a party with interest in or title or rights to the property sought to be encumbered (*Braunston v Anchorage Woods, Inc.*, 10 NY2d 302 [1961]; *see also, NJ Global Inc., v Liu*, 2018 WL 6103216 [Sup. Ct. NY County, November 21, 2018]; *Richard J. Zitz, Inc. v*

Pereira, 965 FSupp 350 [EDNY 1997]). In this case, the Petitioner has not shown interest in or title or rights to Flagler Drive and has not even effectively demonstrated standing. Moreover, the ownership status of Flagler Drive is not at issue in this case. Rather, what the Petitioner has stated as an issue is the status of the water lines *under* Flagler Drive and even then, the action initiated by the Petitioner does not seek alteration of whomever owns the lines. Thus this notice of pendency is improper and vacated (*Doyle v Hafner*, 819 NYS2d 383 [Sup. Ct. Richmond Co. 2006]).[2]

Finally, the Petitioner has moved for a preliminary injunction, "to prevent the Village of Mamaroneck from funding the Flagler water lines with any revenue source (appropriations, bonding, or water fund appropriations) other than payments by the Edgewater Point Property Owners' Association Inc. until the rights of the parties are determined...." At the time of the motion for injunctive relief, all but approximately 5% of the project had already been paid. With respect to the motion as it applies to the Water Works and Edgewater, it is denied because it does not seek relief against either the Water Works or the Edgewater. With respect to the motion for injunctive relief against the Village, the motion is also denied for the following reasons.

A motion for preliminary injunctive relief is a drastic one which will not be granted unless the movant can establish a clear right to one under the law and upon the undisputed facts in the motion (*Nalitt v City of New York*, 138 AD2d 580 [2nd Dept. 1988]). The movant must establish, "(1) a likelihood of ultimate success on the merits, (2) that irreparable injury will occur absent a granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor" (*Saran v Chelsea GCA Realty P'ship, L.P.*, 148 Ad3d 1197 [2nd Dept. 2017]; CPLR 6301).

The purpose of an injunction is not to determine the respective rights of the parties, rather it is designed to maintain the status quo (*Wheaton/TMW Fourth Ave., LP v New York City Dep't of Bldgs.*, 65 AD3d 1051 [2009]). The motion is rendered academic if it requests, as it does in this case, an injunction for an event that has already occurred (*Bolling v Delta Funding Corp.*, 180 AD2d 1003 [3rd Dept. 1992]; *see also*, *Sergio v Elmhurst Gardens, Inc.*, 8 AD3d 489 [2nd Dept. 2004]). Here, by the time the Petitioner moved for injunctive relief, the $1.9 million project had already been completed and substantially paid off. The remaining balance on the project at the time of the motion was $85,000.[3] Regarding the approximately 5% remaining balance that the Petitioner seeks to stop from being disbursed, the Court does not find that the she has set forth the elements necessary to be granted a preliminary injunction. As the Court has found above, the Petitioner lacks standing for the aspect of her petition that challenges the decision authorizing the work and payment for the work; the actual work done to the lines and the cost associated with that work and that the petition was filed beyond the statute of limitations. In addition, even were the Court to reach the merits of this case, she has far from demonstrated that she would likely succeed on them. From what the Court has read based on all of the submissions in this case, it tends to agree with the Respondents that the water lines that run under Flagler Drive and that deliver water to the residents of Edgewater Point were given over to the Village in 1927 to be maintained by the Water Works, with an easement given from the Edgewater Point Company so that the Water Works could access the lines to maintain them, rather than the Petitioner's theory that despite there being contemporaneous evidence and nearly

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[2] Edgewater has on several occasions throughout its papers in this case stated definitively that they do not own the waterlines beneath Flagler Drive and both the Water Works and the Village have acknowledged their responsibility for them.

[3] While the Court recognizes that $85,000 is a significant amount of public money, it is not so large that it could not be easily recovered.

a century of usage to the contrary, the water main under Flagler Drive was never given over to the Village and the Edgewater Point Company never gave an easement to Village and Water Works because there is none recorded (*Cty. of Westchester v United Water New Rochelle*, 32 AD3d 979 [2nd Dept. 2006](Likelihood of success on the merits diminished when central facts of a case are in dispute)) .

Next, Petitioner has not demonstrated irreparable harm. In order for a harm to be considered, it must be, "immediate, specific, non-speculative, and non-conclusory" (*New York State Inspection, Security and Law Enforcement Employees v Cuomo*, 64 NY2d 719 [1984]). The harm must also be more than purely economic in nature (*In re Rice*, 105 AD3d 962 [2nd Dept. 2013]). Rather, she has asserted that irreparable harm may come to taxpayers, "when and if future Village taxes or water rates are affected by charges for new Flagler water lines that have no public benefit." Nor has Petitioner shown that the harm is anything more than strictly economic.

Lastly, she has not shown that the balance of equities favors her. The Petitioner's ultimate argument, it appears to the Court, is that the village residents at Edgewater Point were gifted the new line at the publics expense despite being able to restrict access to Edgewater Point by the road under which the water lines run and that because of their ability to restrict access on Flagler Drive that should also not get to enjoy the benefits of the public water system. In her somewhat quixotic quest to find inequity, the Petitioner might be missing the forest for the trees. Presumably the Village residents of Edgewater Point, separate and distinct from the Edgewater Point Property Owners Association, are not exempt from paying property taxes nor for paying for water usage at the same rates as all of the other village residents. Moreover, the Court is hard pressed to find many examples of how any end-use residential water consumption inures wholly to the public benefit. For example, the Petitioner cannot simply walk up to any house in the Village of Mamaroneck and demand a glass of water, a swim in a backyard pool or to take a bath there simply because she is a taxpayer. It is difficult for the Court to see what actual benefit was bestowed on Edgewater given that the stated purpose for the repairs was that the water lines as they existed provided insufficient waterflow to the fire hydrants on the peninsula and thus were insufficient for fighting fires, and therefore detrimental to the safety of Village residents on Edgewater Point and to the firefighters who might be called to Edgewater Point to fight fires. Even if Edgewater did derive a benefit, courts have held that such expenditures, grants or leases do not violate the Gift and Loan clause when they're in furtherance of a public purpose, even if it incidentally accrues to the benefit of a private entity such as Edgewater (*Lavin v Klein*, 12 AD3d 244 [1st Dept. 2004]; *Hamptons Resort & Tourism Assoc., v County of Suffolk*, 224 AD2d 536 [2nd Dept. 1996]) The Court would be more sympathetic to the Petitioner's plight if she showed that somehow the Village replaced the lines running from Flagler Drive to the individual houses, which would show a clear use of public money to benefit a clearly private entity, or if public money was used to maintain Flagler Drive or remove snow from Flagler Drive, however, that is not the case here nor is it the nature of the private end use of public water consumption.

Accordingly, the Respondent's motions to dismiss the petition under CPLR Article 78 and Article 30 are GRANTED for the reasons articulated above. The Respondent, Edgewater's motion to vacate the notice of pendency is GRANTED for the reasons articulated above and the Court awards attorney's fees for the cost of challenging the notice of pendency (CPLR 6514(c); *Lunney & Crocco v Wolfe*, 180 AD2d 472 [1st Dept. 1992]; *Delidimitropoulous v Krantinidis*, 142 AD3d 1038 [2nd Dept. 2016]). This was a frivolous notice of pendency that could have been

avoided by even a cursory consultation with an attorney. Edgewater tried to diplomatically resolve this matter, however the Petitioner insisted on litigating it. Next, the Petitioner's motion for a preliminary injunction under CPLR Article 63 is DENIED. Finally, because the use of taxpayer money is at the forefront of this case, the Court awards cost to each of the respondents. The burden should not fall on the Village of Mamaroneck tax payers, nor the Water Works customers to pay for defending this case.

The foregoing constitutes the opinion, decision and order of this court.

Dated: White Plains, New York
May 18, 2021

Honorable George E. Fufidio, A.J.S.C.

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