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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 25**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**In the Matter of the Application of
HARVEY WEISMAN and
OTS ASSOCIATES, INC.,**

**Motion Sequence #001
Submitted December 12, 2004**

Petitioners,

**For Judgment under CPLR Article 78
directing that a building permit be issued
for certain building lots in the Town of
Oyster Bay,**

INDEX NO: 10853/04

-against-

**FRANK DeSTEFANO, Commissioner, THE TOWN
OF OYSTER BAY PLANNING DEVELOPMENT
DEPARTMENT,**

Respondents.

The following papers were read on this petition:

Notice of Petition and Verified Petition.....	1
Affirmation in Opposition to Petition.....	2
Affirmation in Reply.....	3

Petitioners, HARVEY WEISMAN (hereinafter referred to as "WEISMAN") and OTS ASSOCIATES, INC. (hereinafter referred to as "OTS"), petition the Court for a judgment under CPLR Article 78 directing that the respondent, FRANK DeSTEFANO, COMMISSIONER OF THE TOWN OF OYSTER BAY PLANNING and DEVELOPMENT

DEPARTMENT (hereinafter referred to as "PLANNING AND DEVELOPMENT"), grant petitioners applications for building permits for one-family dwellings on four (4) separate building lots located on real property which was formerly part of the MILL NECK BAY MARINA. The TOWN opposes the motion which is determined as follows:

Petitioners are the owners of certain lots of real property in the Town of Oyster Bay located on land formerly part of the MILL NECK BAY MARINA. Petitioners state that WEISMAN, in the year 2000, and OTS, in the year 2001, applied for building permits to construct new one-family dwellings on the subject lots, which they assert was a permitted and lawful use of the property under the Town of Oyster Bay Building Code. They relate that, over the years, the Town of Oyster Bay expressed an interest in acquiring the subject lots and, in the Spring 2003, made an offer for all four (4) lots for the sum of \$1,200,000, which the petitioners accepted as an advance payment under the Eminent Domain Procedure Law. However, petitioners assert that, thereafter, the Town refused to negotiate the purchase of the four (4) lots or to proceed under the Eminent Domain Procedure Law and have since refused to issue building permits to petitioners despite repeated requests to do so. They claim that they have been deprived of their property without due process of law, denied the equal protection of the laws and that their rights have been violated under the United States and New York State Constitutions. They seek an order of this Court directing PLANNING AND DEVELOPMENT to perform its lawful duties and issue building permits for the three (3) WEISMAN lots and the one (1) OTS lot in accordance with their applications.

In opposition to the motion, PLANNING AND DEVELOPMENT relates that the Town of Oyster Bay and petitioners were involved in ongoing negotiations for the property and

that the land, now vacant, was formerly occupied by a marina as far back as the 1950's which reportedly contained boat storage and maintenance areas as well as gasoline storage and dispensing facilities. PLANNING AND DEVELOPMENT states that, in furtherance of performing its due diligence in connection with any proposed purchase of the property, the Town of Oyster Bay sought to conduct environmental testing to determine if the marina had caused any environmental impact to the property. They retained CASHIN ASSOCIATES to perform the testing, who evaluated surface and sub-surface soil and water samples and prepared an environmental investigation report, issued on August 5, 2004, which determined that elevated levels of volatile organic compounds (VOC's), semi-volatile organic compounds (SVOC's) and metals, including arsenic, barium, cadmium, chromium, copper, iron, lead, magnesium, mercury, nickel, selenium and zinc, existed in the soil and groundwater at the sites which was the result of the prior marina related use of the property, probably from anti-fouling boat bottom paints and other marina related materials. The report recommended the following:

- The data presented in this report should be submitted to Nassau County Department of Health (DOH) for agency review and comment.
- Additional sampling could be needed to further define the extent of contamination by metals and SVOCs at the site, and to define the scope of needed remedial activities.
- Extensive remediation of on-site soils, including removal and disposal of the most contaminated soils, may be required following review and evaluation of the attached data by the Nassau County Department of Health.

It is PLANNING AND DEVELOPMENT's position that the environmental testing demonstrated that the soil and water posed significant environmental concerns and health hazards which exceeded the New York State cleanup guidelines and that PLANNING AND DEVELOPMENT had the discretion to not issue building permits until such time as proper

remediation had been effectuated. PLANNING AND DEVELOPMENT states that it had been awaiting the results of the environmental testing before recommencing purchase negotiations and that it certainly was entitled to know the nature and extent of the environmental contamination of the property it intended to use as a public park for its residents.

In reply, petitioners state that on November 23, 2004, a Deputy Town Attorney advised petitioners that the Town of Oyster Bay was no longer interested in acquiring the four (4) lots which will remain private property. It is the petitioners position that the CASHIN report made no finding that a health hazard existed at the sites and only suggested that the results be reviewed by the DOH, which has, to date, not declared there is any health hazard on the property. Petitioners urge that the results in the CASHIN report do not preclude the issuance of building permits on the four (4) lots and points out that many of the soil samples taken for the CASHIN report were not taken on the lots that are subject of this proceeding. Further, petitioners assert that PLANNING AND DEVELOPMENT breached an Inspection Agreement that required that the tests be conducted "at a date and time to be mutually agreed upon" and that petitioners had the right to obtain splits of the soil samples taken which did not occur. Petitioners claim that the Town entered upon the property in violation of the agreement and deprived them of the opportunity to confirm that the tests were conducted in an appropriate manner and at appropriate locations. They urge that the building permits may be issued with such conditions as may be imposed by the DOH.

The instant Article 78 proceeding is in the nature of mandamus to compel in that it requests an order directing the Commissioner of PLANNING AND DEVELOPMENT to

perform a specific act. The Court is well aware that mandamus is an extraordinary remedy that is available against an administrative officer only to compel the performance of a duty that is commanded to be performed by law. (See, *In the Matter of Kyer v. Restino*, 181 Misc. 2d 568, 693 NYS2d 913 [Sup. Rensselaer Co., 1999] citing *Klostermann v. Cuomo* 61 NY2d 525, 539,540).

A proceeding pursuant to CPLR article 78 is the proper vehicle by which to compel officials to perform a mandatory duty (CPLR 7803[1]). Mandamus may be used to compel the performance of an act required to be done by provision of law where "the act sought to be compelled is ministerial, nondiscretionary and nonjudgmental, and is premised upon specific statutory authority mandating performance in a specific manner" (*Matter of Peirez v. Caso* 72 AD2d 797) and where there is an inordinate delay in action (*Matter of Stuart & Stuart v. New York Liq. Auth.*, 29 AD2d 176). Mandamus is therefore appropriate to compel acts that officials are duty bound to perform, regardless of whether they may exercise their discretion in doing so. A body can be directed to act, but not how to act, in a manner as to which it has the right to exercise its judgment (*Klosterman v. Cuomo*, 61 NY2d 525, 540).

Bonanno v. Town Board of Babylon, 148 AD2d 532, 538 NYS2d 864 (2nd Dept. 1989); see also, *Knapp Street Restaurant Bar Inc. v. Department of Consumer Affairs of the City of New York*, 150 AD2d 464, 543 NYS2d 911 (2nd Dept. 1989).


In the case at bar, PLANNING AND DEVELOPMENT is the body responsible for considering applications for building permits, a duty which they are mandated to perform. Now that the Town of Oyster Bay has indicated that it is no longer interested in acquiring the subject lots, the petitioners are entitled to a decision on their applications for building permits with respect to the property within a reasonable time. Cf., *Bonanno v. Town Board of Babylon*, *supra*. While it would be irresponsible to issue building permits for family housing on lots that have been identified as having contaminated soil requiring remediation, the Court directs that, if it has not done so already, PLANNING AND DEVELOPMENT shall

submit the CASHIN report to the Nassau County Department of Health (DOH), within thirty (30) days from the date of this order, for agency review and comment and, thereafter, except for good cause shown, to make a determination on petitioners application within one hundred eighty (180) days of submission of the report to the DOH, with directions as to what remediation activities are required, if any, to bring the lots into compliance with New York State guidelines.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: January 10, 2005



WILLIAM R. LaMARCA, J.S.C.

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ENTERED

JAN 19 2005

NASSAU COUNTY
COUNTY CLERK'S OFFICE