

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XIII SUFFOLK COUNTY

PRESENT:  
HON. MELVYN TANENBAUM  
Justice

MOTION #001 & 002 **Case Disp**  
R/D: 02108/10  
S/D: 04/27/10

Application of FIREPLACE HISTORY  
CLUB and MARTIN VAN LITH. Chairman.

PLTF'S/PET'S ATTY:  
REGINA SELTZER. ESQ.  
30 Brewster Lane Bellport.  
NY 11713

Petitioners.  
For a Judgment Pursuant to CPLR Article 78

-against

TOWN BOARD OF THE TOWN OF BROOKHAVEN.

DEFT'S/RESP'S ATTY:  
ROBERT F. QUINLAN. ESQ.  
BROOKHAVEN TOWN ATTORNEY  
1 Independence Hill  
Farmingville. NY 11738

Respondent.

Upon the following papers numbered 1 to 26 read on this motion for an order pursuant to CPLR See 3212 & 7804 Notice of Motion/Order to Show Cause and supporting papers 1-3.4-13; Notice of Cross Motion and supporting papers Answering Affidavits and supporting papers 14-15.16-17.18 19.20-24 Replying Affidavits and supporting papers 25-26 Other \_\_\_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this CPLR Article 78 petition and summary judgment motion of FIREPLACE HISTORY CLUB ("FHC") and MARTIN V AN LITH ("V AN LITH"), seeking a judgment in the nature of mandamus compelling respondent TOWN BOARD OF THE TOWN OF BROOKHAVEN ("TOWN") to maintain and preserve ten historic cemeteries are determined as follows:

Petitioner "VAN LITH" is the chairman of "FHC", a not-for-profit cultural heritage and historical association involved in restoring and maintaining cemeteries. This petition seeks a writ of mandamus to compel respondent "TOWN OF BROOKHAVEN" to remove grass, brush and weeds from 10 cemeteries petitioners claim are "public cemeteries". In support petitioners submit a verified petition together with affidavits from petitioner "V A,N LITH" and petitioner's counsel and claim that the evidence submitted shows that each cemetery is either publicly owned by governmental entities (5 cemeteries are owned by the Town, Suffolk County or the United States) or has been abandoned and title to each has escheated to the people pursuant to Section 200, Article 2 of the Abandoned Property Law. Petitioners contend that Town Law Section 291 obligates respondent to preserve, care for, maintain and fence each cemetery and that since 1937 newspaper articles indicate the "TOWN" maintained and preserved these burial grounds. It is petitioner's contention that under the circumstances the "TOWN" has legal and moral obligations to preserve and care for historical grounds.

In opposition respondent submits a verified answer together with affidavits from the "TOWN's" deputy parks commissioner and environmental planning aide. Respondent claims that its only obligation under law is to provide maintenance services for Town owned property and that only 1 cemetery (Rose Family Cemetery) is Town owned. Respondent claims that substantial issues of fact exist concerning whether the remaining cemeteries are "public" or "private" cemeteries sufficient to defeat petitioner's motion for summary judgment. Respondent also claims that petitioners do not have standing to maintain this proceeding.

Standing is a threshold determination resting in part on policy considerations that a person should be allowed access to the courts to adjudicate the merits of a particular dispute (Society of Plastics v. County of Suffolk, 79 NY2d 761, 570 NYS2d 778 (1991)). An aggrieved party must sustain an injury in fact- an actual legal stake in the matter being adjudicated- and the injury asserted must fall within the zone of interest sought to be promoted or protected by the statutory provision under which the agency has acted (Society of Plastics v. County of Suffolk, *supra.*; Sun Brite v. North Hempstead Zoning Board, 69 NY2d 406, 515 NYS2d 418 (1987)). Moreover the petitioners must show for standing purposes that the harm or injury suffered is in some way different from that of the public at large (Schultz v. NYSDEC, 186 AD2d 941, 589 NYS2d 370 (3'd Dept., 1992); appeal denied 81 NY2d 704, 595 NYS2d 398 (1993)).

Petitioner "FHC" is an organization formed to educate the public about the cultural heritage and history of cemeteries. Petitioners have standing to maintain this proceeding since the claimed injury clearly falls within the zone of interest sought to be protected by the statute and since the organization was formed to protect and preserve public cemeteries.

Mandamus may be granted only to enforce a clear legal right (Klosterman v. Cuomo, 61 NY2d 525, 475 NYS2d 247 (1984); Matter of Legal Aid Society v. Sheinman, 53 NY2d 12, 16,439 NYS2d 882 (1981)). It issues to compel the performance of official duty clearly imposed by law where there is no other adequate remedy (Hamptons Hospital & Medical Center v. Moore, 52 NY2d 88, 436 NYS2d 239 (1980)). The duty must be positive and not discretionary, since mandamus does not lie to review the determination of public officers in matters involving the exercise of discretion or judgment (New York State Inspection, Security & Law Enforcement Employees v. Cuomo, 103 AD2d 312, 480 NYS2d 1 (2"d Dept., 1984)).

As the Court of Appeals explained in Klosterman v. Cuomo, *supra.*:

"What must be distinguished are those acts the exercise of which is discretionary from those acts which are mandatory but are executed through means that are discretionary. For example, the decision to prosecute a suit is a matter left to the

public officer's judgment and therefore cannot be compelled. In contrast, when a town council is directed by statute to designate up to four newspapers having the largest circulation for the purpose of receiving city advertising, the court can compel the council to execute its statutory duty, but it may not direct the particular papers to be named" (id. at 539).

Town Law Section 291 provides:

**Burial grounds**

1. The title to every lot or piece of land which shall have been used by the inhabitants of any town in this state as a cemetery or burial ground for the space of fourteen years shall be deemed to be vested in such town, and shall be subject in the same manner as other corporate property of towns, to the government and direction of the town board. In any town the town board may adopt regulations for the proper care of any such cemetery and burial ground and regulating the burial of the dead therein. It shall be the duty of the town board to remove the grass and weeds from any such cemetery or burial ground in any such town at least three times in each year, and to erect and maintain suitable fences around such cemetery or burial ground. The town board of any town must also provide for the removal of grass and weeds at least twice in each year from any cemetery or burial ground, by whomsoever owned, in such town, where such control is not vested by other provisions of law in the town or in trustees or other corporate body, and provide for the preservation, care and fencing of any such cemetery and the town board of any town must also provide for the removal of grass and weeds from all cemeteries, other than private burial grounds, which are abandoned or not controlled by any existing board or body and for the care of which there exists no special fund or endowment and such duties shall be performed under the supervision of the town board or a person whom the town board may designate; provided, however, that such duties shall not be exercised in respect to any private ground or particular lot or lots therein after the true owner or owners file written objections thereto with the town clerk.

The statute imposes a duty of care upon the town board for all public cemeteries located in the town. The statute does not impose a duty of care for a cemetery which is either a private cemetery or a cemetery control of which is vested in trustees or another corporate body. Moreover a town is obligated to provide care and maintenance for a cemetery which has been neglected over a long period of time, if such cemetery is public in nature, but has no such duty if the burial ground is private in nature (Conn v. Boylan, 224 NYS2d 823 (1962)).

The documentary evidence submitted by the parties shows that five of the ten cemeteries ("Rose Family Cemetery", "David Hawkins Cemetery", "Nathaniel Hawkins Cemetery", "South Haven Presbyterian Church Cemetery" and "Carman Family Cemetery") are publicly owned. Records also indicate that of the remaining five cemeteries, four have no known owners ("Hulse Cemetery", "Corwin Family Cemetery", "Azal Hawkins Cemetery" and "Bartreau Cemetery") and one is "privately" owned ("Miller Cemetery"). Petitioner has also submitted proof in the form of newspaper articles and a March/April Town of Brookhaven "purchase order" showing that the Town has in the past cared for each of the privately owned cemeteries

In a proceeding seeking judicial review of administrative action, the court must determine whether there is a rational basis for the decision or whether it is arbitrary and capricious (Matter of Warden v. Board of Regents, 53 NY2d 186, 194, 440NYS2d875 (1981)). Based upon the evidence presented petitioner has established that except for the Miller Cemetery the remaining nine cemeteries in issue are either publicly owned or burial grounds public in nature. Pursuant to the requirements of Town Law Section 291 respondent "TOWN" therefore has an affirmative duty to maintain and preserve such nine cemeteries. Petitioner's application for a writ of mandamus must therefore be granted. Accordingly it is

**ORDERED, ADJUDGED and DECREED** that the petition seeking a writ of mandamus is granted. Respondent is directed to provide the assets necessary to comply with the requirements of Town Law Section 291 for such nine cemeteries within 90 days of service of a copy of this Judgment with notice of entry.

Dated: August 20, 2010

MELVYN TANENBAUM

J.S.C.