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ARTICLE 78—PROCEEDING AGAINST BODY OR OFFICER

Unaggrieved citizen-taxpayer has standing to constitutionally challenge a village law and injunctive relief is available in an Article 78 proceeding.

*Policemen's Benevolent Ass'n v. Board of Trustees*²⁸⁹ involved a proceeding brought by an individual taxpayer and a Patrolmen's Benevolent Association pursuant to Article 78 to obtain a declaration of invalidity of a local village law, and related injunctive relief. The respondents were the board of trustees of the village and the village chief of police. The supreme court granted respondents' motion²⁹⁰ made before answer, to dismiss the petition as being insufficient on its face on two grounds. First, petitioners failed to show that they were personally aggrieved, thus lacking standing to bring the proceeding. Second, injunctive relief is not available in an Article 78 proceeding.

The appellate division, second department, reversed, holding that the petitioners had standing, and that injunctive relief could be granted in such a proceeding. In holding that the petitioners had standing to challenge the local village law, the court expressly overruled its prior decision in *Ahern v. Board of Supervisors of Suffolk County*.²⁹¹ The court in *Ahern* had held that the mere fact that the petitioner was a taxpayer, resident and voter, did not give him the standing to challenge a local legislative act. In the instant case the court stated that "one who is a citizen, resident and taxpayer has standing to bring an Article 78 proceeding such as the one at bar, even though he does not show a personal grievance or a personal interest in the outcome. . . ."²⁹² The court distinguished the instant case from that of *St. Clair v. Yonkers Raceway, Inc.*,²⁹³ wherein it was held that an unaggrieved citizen-taxpayer lacked standing to challenge the constitutional validity of a state statute. Here, because a *village* law was involved, the court ruled that petitioner had standing.

With respect to the granting of injunctive relief in an Article 78 proceeding, the court saw no reason why it should not be obtainable²⁹⁴ in the instant case, despite some case law²⁹⁵ to the contrary.

²⁸⁹ 21 App. Div. 2d 693, 250 N.Y.S.2d 523 (2d Dep't 1964).

²⁹⁰ CPLR 7804(f); CPLR 3211.

²⁹¹ 7 App. Div. 2d 538, 185 N.Y.S.2d 669 (2d Dep't 1959).

²⁹² *Policemen's Benevolent Ass'n v. Board of Trustees*, 21 App. Div. 2d 693, 250 N.Y.S.2d 523, 526 (2d Dep't 1964).

²⁹³ 13 N.Y.2d 72, 192 N.E.2d 15, 242 N.Y.S.2d 43 (1963).

²⁹⁴ Cases holding that injunctive relief in an Article 78 proceeding is available are: *Matter of New York Post Corp. v. Leibowitz*, 2 N.Y.2d 677, 143 N.E.2d 256, 163 N.Y.S.2d 409 (1957); *Matter of O'Reilly v. Grumet*, 308 N.Y. 351, 126 N.E.2d 275 (1955).

²⁹⁵ *Gapinski v. Zoning Bd. of Appeals*, 3 App. Div. 2d 976, 162 N.Y.S.2d

As a result of *Policemen's Benevolent Ass'n*, the law is, at least in the second department, that an unaggrieved citizen-taxpayer has standing to challenge the validity of a local village law, as well as the action of a county board of supervisors, since the *Ahern* case involved such action by a county board, and was expressly overruled by the instant case insofar as the question of standing is concerned. As to an unaggrieved citizen-taxpayer attacking the validity of a *state* law, the court of appeals case of *St. Clair* is controlling, and the petitioner will be deemed to lack standing to challenge its validity.

Mandamus unavailable to prevent judge X from referring matter to Judge Y.

In *Kahn v. Backer*,²⁹⁶ the question presented was whether an Article 78 proceeding was properly brought against a justice of the supreme court. The proceeding was instituted in the appellate division,²⁹⁷ first department, in order to compel the respondent to render a decision on a motion to dismiss a cause of action.²⁹⁸ The case was on the general jury reserve calendar when the motion was made. Respondent disposed of the motion by referring it to the trial justice. The appellate division held that the respondent had in fact exercised his discretion and that the disposition of the motion in the above manner was the equivalent of a denial of the motion. Proper procedure was to enter an order thereon and to appeal the order.

The court pointed out that an Article 78 proceeding could not be used to challenge a determination made in a civil action, unless it was an order summarily punishing a contempt committed while in the court's presence.²⁹⁹ The court also held that the disposition of the petitioner's motion, even if erroneous, could not be indirectly reviewed in a proceeding in the nature of mandamus, since the only proper avenue by which one may challenge such a determination is by appeal.³⁰⁰

The proceeding in the *Kahn* case was one in the nature of mandamus, which has always been a discretionary remedy. The court points out, relying on well-established case law,³⁰¹ that it will

945 (4th Dep't 1957). The court made a blanket statement in this case that injunctive relief is not appropriate in a proceeding under Article 78, Civil Practice Act.

²⁹⁶ 21 App. Div. 2d 171, 249 N.Y.S.2d 572 (1st Dep't 1964).

²⁹⁷ CPLR 506(b)(1).

²⁹⁸ A motion to dismiss a cause of action is made pursuant to CPLR 3211.

²⁹⁹ CPLR 7801(2).

³⁰⁰ CPLR 7801(1).

³⁰¹ See, e.g., *Walker v. Reidy*, 31 Misc. 2d 915, 221 N.Y.S.2d 564 (Sup. Ct. 1961); *Lindner v. Frisina*, 194 N.Y.S. 2d 843 (Sup. Ct. 1959).