

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
In the Matter of the Application of

FELIX PROCACCI,

Petitioner,

- against -

TOWN OF HEMPSTEAD,

Respondent.
-----X

AFFIRMATION

Index No.:
615888/2018

Justice Assigned:
Hon. Sharon M.J.
Gianelli

Return: 1/09/19

CHARLES S. KOVIT, an attorney duly admitted to practice law in the Courts of the State of New York, affirms under penalty of perjury that:

1. I am the Chief Deputy Town Attorney in the Office of the Town Attorney of the Town of Hempstead, attorney for respondents in the above-captioned matter.

2. I am familiar with the facts and circumstances involved in this matter insofar as they are depicted in the files and records of the Town Attorney's office.

3. I submit this affirmation in support of the Town's motion to dismiss the petition.

4. A reading of the petition indicates that petitioner is seeking an order of mandamus to compel the Town of Hempstead to repeal ("rescind") the section of its

Gasoline Service Station (GSS) zoning ordinance which requires gas station operators to provide availability of an air compressor for the inflation of tires, free of charge to the user.

5. The proceeding should be dismissed because petitioner lacks standing to assert that claim.

6. Petitioner candidly admits that he is not specially aggrieved by the ordinance provision he seeks to have repealed by order of the Court.

7. As such, petitioner lacks standing as a matter of law to bring this proceeding, and it should be dismissed.

8. Moreover, this claim is improperly brought as an article 78 proceeding seeking an order of mandamus to compel. Mandamus to compel does not lie in the absence of a clear legal right to the relief sought, and there is no such right, petitioner's claims notwithstanding.

9. Rather, aside from the issue of standing, with the enactment of the ordinance constituting a legislative act, this case would be ripe for conversion to a declaratory judgment action, to adjudicate it's legality on the merits.

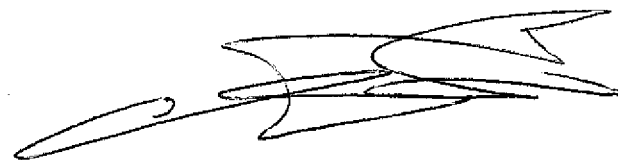
10. The problem for petitioner is that it is well settled in the Second Department that a declaratory

judgment action brought by an unaggrieved party should be dismissed, where, as here, to do so would not create an "impenetrable barrier" to judicial review (see, Clark v. Town Bd. of Clarkstown, 28 A.D.3rd 642, 812 N.Y.S.2d 643, 645 (2nd Dep't, 2010)).

11. Indeed, to the extent that there is a cognizable claim that the subject ordinance is susceptible to attack as *ultra vires* or preempted by State law, that claim could be brought by a host of existing gas station operators in the Town who are subject to the free-air requirement and may credibly assert standing to plead such a claim.

12. The petition should therefore be dismissed, together with such further or different relief which the Court may deem appropriate.

Dated: Hempstead, New York
December 11, 2018



Charles S. Kovit

Case: In the Matter of the Application of
Felix Procacci v. Town of Hempstead

STATE OF NEW YORK)

) ss.:

Index No. 615888/18

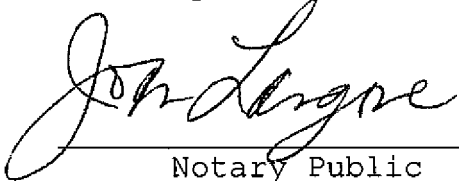
COUNTY OF NASSAU)

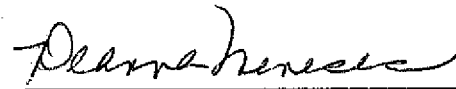
DEANNA MENESES, being duly sworn, deposes and says that she is a secretary in the Office of the Town Attorney, the attorney for the Defendant, Town of Hempstead, herein; that on the 11th day of December, 2018, she served the within Notice of Motion to Dismiss and Affirmation upon the below listed attorneys by mailing a true copy of the same in a postpaid wrapper in a Post Office Box regularly maintained by the United States Government at 1 Washington Street, Hempstead, New York 11550, in said County of Nassau, directed to them at the address shown below:

TO: Felix Procacci
Petitioner
1165 Barnes Street
Franklin Square, NY 11010

Deponent is over the age of 21 years.

Sworn to before me this
11th day of December, 2018


Notary Public



JOAN LANGONE
Notary Public, State of New York
No. 4994464
Qualified in Nassau County
Commission Expires April 6, 2022