

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUPREME

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JOSEPH MACARI and KIM STALLER,

Index No. 612543/2026

Petitioners,

Mot. Seq. #s 1 and 2

For a judgment pursuant to Article 78 of the  
Civil Practice Law and Rules,

Hon. Alison J. Napolitano

**NOTICE OF APPEAL**

-against-

TOWN OF EAST HAMPTON BUILDING  
DEPARTMENT,

Respondent.

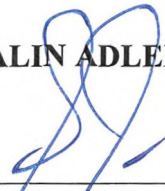
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**PLEASE TAKE NOTICE**, that Defendant, Town of East Hampton Building Department, hereby appeals to the Supreme Court of the State of New York, Appellate Division, Second Department, from each and every part of the Decision and Order of the Honorable Alison J. Napolitano, Justice of the Supreme Court of the State of New York, County of Suffolk, dated June 10, 2026 and filed with the Clerk of Suffolk County on June 10, 2026.

Dated: Hauppauge, New York  
June 17, 2026

**CERTILMAN BALIN ADLER & HYMAN, LLP**

By:

  
\_\_\_\_\_  
Glenn B. Gruder  
*Attorneys for Respondent*  
100 Motor Parkway, Suite 560  
Hauppauge, New York 11788

TO: Tarbet & Lester, PLLC  
132 N. Main Street  
East Hampton, NY 11937

SHORT FORM ORDER

**ORIGINAL**

INDEX No. 612543/2026  
CAL No. \_\_\_\_\_

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 74 - SUFFOLK COUNTY

**PRESENT:**

Hon. ALISON J. NAPOLITANO  
Justice of the Supreme Court

MOTION DATE 5-5-25, 5-21-25  
SUBMIT DATE 6-3-2026  
Mot. Seq. # 01 - Mot. D  
Mot. Seq. # 02 - MD

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In the Matter of

JOSEPH MACARI and KIM STALLER,

Petitioners,

For a judgment pursuant to Article 78 of the  
Civil Practice Law and Rules,

-against-

TOWN OF EAST HAMPTON BUILDING  
DEPARTMENT,

Respondent.  
-----X

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East Hampton, NY 11937

**EAST HAMPTON TOWN ATTORNEY**  
**JACOB TURNER, ESQ.**  
*Attorneys for Respondent*  
159 Pantigo Road  
East Hampton, NY 11937

Upon the following papers read on this Article 78 Petition and Motion to Dismiss; e-filed on the NYSCEF system as documents 1 - 8, 9 - 13, 14, 15, 16 - 20, 21 - 22: it is,

In this Article 78 action, the petitioners are seeking an order from the Court compelling the Town of East Hampton Building Department, ("EHBD"), to perform its non-discretionary, ministerial duty and immediately issue a building permit for the construction of a single-family residence on the property located at 20 Bendigo Road, Amagansett, New York. Additionally, the petitioners seek an order directing that the permit be issued within 15 days of the date of this Order and recovery of costs and reasonable attorneys' fees. The respondent opposes this petition in its entirety and moves to dismiss the petition pursuant to CPLR 3211(a)(7).

*Background*

The petitioners, Joseph Macari and Kim Staller, currently own a vacant 11-acre parcel of land located at 20 Bendigo Road, Amagansett, Town of East Hampton, State of New York (SCTM#300-152-1-11.3). The

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petitioners wish to build a single-family residential home upon the land. The subject property is located within an area distinguished as zoned for residential use. Prior to this current Article 78 proceeding, the petitioners were required to obtain a Natural Resource Special Permit, ("NRSP"), from the Zoning Board of Appeals before the issuance of a building permit due to the presence of certain protected beach vegetation growing on the property. In the process of obtaining the NRSP, a hearing was required to be held. At one point in the process due to the alleged improper delaying of the public hearing, the petitioners herein commenced a separate Article 78 proceeding against the Town of East Hampton Zoning Board of Appeals and the Town of East Hampton Planning Department under index number 609411/2025. In that prior proceeding, the petitioners sought to compel the scheduling of the necessary hearing in relation to the NRSP. In that action, the parties concluded the matter by a stipulation of settlement which required the public hearing to be held on or before July 29, 2025. Subsequent to the hearing, the petitioners were issued the NRSP for the construction of the single-family residence.

After the issuance of the NRSP, the petitioners submitted a formal building permit application to the East Hampton Building Department through the online portal system, which was accepted and assigned permit number BP-78528 on December 24, 2025. By letter dated January 9, 2026, the Planning Department indicated its approval and notified the Building Department that the NRSP was granted. Additionally in the letter, the Planning Department stated that it had reviewed and inspected the subject property and that it appeared to have met the Zoning Board's prerequisites for the issuance of a building permit. To date, the application for a building permit has not been approved or disapproved and no response of any kind has been provided to the petitioners in relation to the application. The petitioners cite to East Hampton Town Code 102-8(a) and argue that the EHBD has not adhered to the statutory deadline proscribed by law requiring the approval or disapproval of the application within 15 days of submission. The petitioners argue that they have a clear legal right to a permit as they have been granted the NRSP, the proposed construction meets all requirements and no variance is required. Additionally, they argue that because the Planning Department has indicated that a building permit should be issued, there is no discretionary determination remaining.

In opposition, the respondent's argument for dismissal is multifaceted. They argue that a clear legal right to compel the issuance of the permit has not been established. Additionally, they argue that the petitioners have not established that the Town has issued a final determination and thus cannot bring the instant Article 78 petition. The respondent also argues that the petitioners' interpretation of the Town Code is misread and misapplied. Pointedly, the respondent claims its interpretation of the applicable code should apply. EHBD argues that the Code does not indicate a specific deadline with regard to when the Inspector must commence the review of any application and that the Inspector's review is the triggering event for any specific time limitations. They argue that since the review has yet to take place, the time limit does not apply and the EHBD is therefore in compliance with the applicable code and need not be compelled to take action at this time. EHBD finally states that they are the wrong entity to be sued as the Building Department cannot be sued. The Court notes that in their moving papers, the respondent does not indicate who would be the proper party in its place and offers no further information as to this argument.

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*Motion to Dismiss*

To succeed on a motion to dismiss pursuant to CPLR §3211(a) for failure to state a cause of action, the court must determine whether, accepting as true the factual averments of the petition and granting petitioner every favorable inference which may be drawn from the pleading, petitioner can succeed upon any reasonable view of the facts stated (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 754 NE2d 184, 729 NYS2d 425 [2001]; see also *Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos LLP v Island Prop., LLC*, 307 AD2d 953, 763 NYS2d 481 [2d Dept 2003], *Bartlett v Konner*, 228 AD2d 532, 644 NYS2d 550 [2d Dept 1996]). If the pleading states a cause of action and if, from its four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion for dismissal will fail (see *Wayne S. v County of Nassau Dept. of Social Services*, 83 AD2d 628, 441 NYS2d 536 [2d Dept 1981]). The documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the petitioner's claim (see *Estate of Menon v Menon*, 303 AD2d 622, 756 NYS2d 639 [2d Dept 2003], citing *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511, *Roth v Goldman*, 254 AD2d 405, 406, 679 NYS2d 92).

In the context of a CPLR §3211 motion to dismiss, the Court must take the factual allegations of the petition as true, consider the affidavits submitted on the motion only for the limited purpose of determining whether the petitioner has stated a claim, and in the absence of proof that an alleged material fact is untrue or beyond significant dispute, the Court must not dismiss the petition (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 684 NYS2d 244 [1st Dept 1999], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634-636). In making a determination whether the petition sets forth a cognizable claim, evidentiary material may be considered to "remedy defects in the complaint" (see *Dana v Shopping Time Corp.*, 76 AD3d 992, 908 NYS2d 114 [2d Dept 2010], quoting *Rovello v Orofino Realty Co.*, *supra* at 40 NY2d at 636).

The Court concludes that, accepting as true the factual averments of the petition and granting petitioners every favorable inference which may be drawn from the pleading, the petitioners have pled causes of action cognizable at law as against the respondent seeking mandamus to compel. The Court notes that in a mandamus petition such as this, there would not be a final determination. The very nature of a mandamus petition is to compel an action. Accordingly, the respondent's motion to dismiss is denied in its entirety.

*Article 78*

In *Matter of Willows Condominium Assn. v Town of Greenburgh*, 153 AD3d 535, 536 [2d Dept 2017], the Court stated that

"Mandamus . . . is an extraordinary remedy that, by definition, is available only in limited circumstances" (*Klostermann v Cuomo*, 61 NY2d 525, 537, 463 N.E.2d 588, 475 N.Y.S.2d 247). "[T]he remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion"

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(*Matter of Brusco v Braun*, 84 NY2d 674, 679, 645 N.E.2d 724, 621 N.Y.S.2d 291).

A discretionary act "involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (*Tango v Tulevech*, 61 NY2d 34, 41, 459 N.E.2d 182, 471 N.Y.S.2d 73; see *New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184, 824 N.E.2d 947, 791 N.Y.S.2d 507). "For example, the decision to prosecute a suit is a matter left to the public officer's judgment and, therefore, cannot be compelled" (*Klostermann v Cuomo*, 61 NY2d at 539; see *People ex rel. Hammond v Leonard*, 74 NY 443, 446-447).

"The general principle [is] that mandamus will lie against an administrative officer only to compel him [or her] to perform a legal duty, and not to direct how he [or she] shall perform that duty" (*People ex rel. Schau v McWilliams*, 185 NY 92, 100, 77 N.E. 785; see *Klostermann v Cuomo*, 61 NY2d at 540). HN2 A party seeking mandamus must show a "clear legal right" to relief (*Matter of County of Fulton v State of New York*, 76 NY2d 675, 678, 564 N.E.2d 643, 563 N.Y.S.2d 33 [internal quotation marks omitted]; see *Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 16, 422 N.E.2d 542, 439 N.Y.S.2d 882).

In the proceeding before this Court, the petitioners seek to compel action by the EHBD based upon a specific portion of the Town Code. Section 102-8(a) states:

The Building Inspector shall examine or cause to be examined all applications for permits and the plans, specifications and documents filed therewith. He shall approve or disapprove the application within a reasonable time, and in all events within 15 days. (*emphasis added by the Court*)

The petitioners argue that the duty upon the respondent is fixed by the Town Code in that a complete application must be approved or disapproved within a 15 day time limit. They further argue that the issuance of a building permit to an applicant in compliance would be a ministerial act and not one of discretionary power. EHBD, in opposition, argue that the 15-day period in the subject section of the Town Code is "directory, not mandatory". Additionally, they rely on their interpretation that the Inspector's review of the application is the trigger for the 15-day time limitation and not the acceptance of the application itself.

Upon reviewing the applicable Town Code, as well as the supporting documentation submitted along with the motion papers, the Court is troubled by the fact that the EHBD repeatedly states that "Inconvenience and impatience are not sufficient to bypass application examination" but give no indication that any such examination has begun to take place. The EHBD vehemently argues that the 15-day time period is only triggered by such examination. The Court disagrees. Upon the Court's reading of the Code, the qualifying language is "and in all events". This particular drafting signifies to the Court that the intention of the Code

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was to provide those applying for permits a swift approval or disapproval within 15 days of the application. The "and in all events" fully encompasses the application and the examination of the application, thus, directing the Building Inspector to render a decision within that time frame. Accordingly, the petition is granted to the extent that the East Hampton Building Department is compelled to take action on permit application number BP-78528 associated with the property at 20 Bendigo Road, Amagansett, New York, and either issue an approval or disapproval as directed by the Town Code within 15 days of the date of this order.

Therefore, it is

**ORDERED**, that this Article 78 proceeding is granted to the extent stated herein; and it is further

**ORDERED**, that the petitioners' remaining requests for an order directing the permit to be issued immediately and for costs and attorney fees are denied.

The foregoing shall constitute the decision and Order of this Court.

Dated: June 10, 2026



HON. ALISON J. NAPOLITANO  
J.S.C.

X  FINAL DISPOSITION    \_\_\_ NON-FINAL DISPOSITION

# Supreme Court of the State of New York Appellate Division: Second Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

JOSEPH MACARI and KIM STALLER,  
  
For a judgment pursuant to Article 78 of the Civil Practice Law and Rules,  
  
- against -  
  
TOWN OF EAST HAMPTON BUILDING DEPARTMENT,

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type	Filing Type
<input type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration <input type="checkbox"/> Action Commenced under CPLR 214-g	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceedings <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Labor Law 220 or 220-b <input type="checkbox"/> Public Officers Law § 36 <input type="checkbox"/> Real Property Tax Law § 1278
<input checked="" type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Executive Law § 298 <input type="checkbox"/> CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

<input checked="" type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input type="checkbox"/> Commercial	<input type="checkbox"/> Contracts
<input type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input type="checkbox"/> Election Law	<input type="checkbox"/> Estate Matters
<input type="checkbox"/> Family Court	<input type="checkbox"/> Mortgage Foreclosure	<input type="checkbox"/> Miscellaneous	<input type="checkbox"/> Prisoner Discipline & Parole
<input checked="" type="checkbox"/> Real Property (other than foreclosure)	<input type="checkbox"/> Statutory	<input type="checkbox"/> Taxation	<input type="checkbox"/> Torts

Appeal	
Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.
<input type="checkbox"/> Amended Decree <input type="checkbox"/> Determination <input checked="" type="checkbox"/> Order <input type="checkbox"/> Resettled Order <input type="checkbox"/> Amended Judgement <input type="checkbox"/> Finding <input type="checkbox"/> Order & Judgment <input type="checkbox"/> Ruling <input type="checkbox"/> Amended Order <input type="checkbox"/> Interlocutory Decree <input type="checkbox"/> Partial Decree <input type="checkbox"/> Other (specify): <input type="checkbox"/> Decision <input type="checkbox"/> Interlocutory Judgment <input type="checkbox"/> Resettled Decree <input type="checkbox"/> Decree <input type="checkbox"/> Judgment <input type="checkbox"/> Resettled Judgment	
Court: <b>Supreme Court</b> ▼	County: <b>Suffolk</b> ▼
Dated: <b>06/17/2026</b>	Entered: <b>June 10, 2026</b>
Judge (name in full): <b>Alison J. Napolitano</b>	Index No.: <b>612543/2026</b>
Stage: <input type="checkbox"/> Interlocutory <input checked="" type="checkbox"/> Final <input type="checkbox"/> Post-Final	Trial: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No    If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury
Prior Unperfected Appeal and Related Case Information	
Are any appeals arising in the same action or proceeding currently pending in the court? <span style="float: right;"><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</span> If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.  Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case: <b>none</b>	
Original Proceeding	
Commenced by: <input type="checkbox"/> Order to Show Cause <input type="checkbox"/> Notice of Petition <input type="checkbox"/> Writ of Habeas Corpus	
Date Filed: <b>06/17/2026</b>	Statute authorizing commencement of proceeding in the Appellate Division:
Proceeding Transferred Pursuant to CPLR 7804(g)	
Court: <b>Choose Court</b>	County: <b>Choose County</b>
Judge (name in full):	Order of Transfer Date:
CPLR 5704 Review of Ex Parte Order:	
Court: <b>Choose Court</b>	County: <b>Choose County</b>
Judge (name in full):	Dated:
Description of Appeal, Proceeding or Application and Statement of Issues	
Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed. <b>Appeal of an Order denying a motion to dismiss an Article 78 Proceeding and granting the Petition.</b>	

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

The Court below misapplied and misinterpreted the Town Code of the Town of East Hampton and case law on administrative discretion. The Court below also erred by granting the Petition without first providing the Appellant with an opportunity to Answer the Petition.

**Party Information**

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Joseph Macari	Petitioner <input type="checkbox"/>	Respondent <input type="checkbox"/>
2	Kim Staller	Petitioner <input type="checkbox"/>	Respondent <input type="checkbox"/>
3	Town of East Hampton Building Department	Respondent <input type="checkbox"/>	Appellant <input type="checkbox"/>
4			
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7			
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Attorney Information			
Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.			
Attorney/Firm Name: Brian Jay Lester/Tarbet & Lester, PLLC			
Address: 132 N. Main St.			
City: East Hampton	State: NY	Zip: 11937	Telephone No: 631-907-3500
E-mail Address: brian@easthamptonlawyer.com			
Attorney Type: <input checked="" type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1			
Attorney/Firm Name: Brian Jay Lester/Tarbet & Lester, PLLC			
Address: 132 N. Main St.			
City: East Hampton	State: NY	Zip: 11937	Telephone No: 631-907-3500
E-mail Address: brian@easthamptonlawyer.com			
Attorney Type: <input checked="" type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 2			
Attorney/Firm Name: Glenn Brian Gruder/Certilman Balin Adler & Hyman, LLP			
Address: 100 Motor Parkway, Suite 560			
City: Hauppauge	State: NY	Zip: 11788	Telephone No: 632-979-3000
E-mail Address: ggruder@certilmanbalin.com			
Attorney Type: <input checked="" type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 3			
Attorney/Firm Name: Jacob Turner/East Hampton Town Attorney			
Address: 159 Pantigo Road			
City: East Hampton	State: NY	Zip: 11937	Telephone No: 631-324-8787
E-mail Address:			
Attorney Type: <input checked="" type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 3			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: <input type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: <input type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			

Informational Statement - Civil

**AFFIRMATION OF SERVICE**

**GLENN B. GRUDER** affirms the following:

On June 17, 2026, I served the within **NOTICE OF APPEAL with attached Decision and Informational Statement** upon all counsel in this action by electronic filing on the New York State Electronic Filing system.

I, **GLENN B. GRUDER**, affirm this 17th day of June, 2026 under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.



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GLENN B. GRUDER