

**1630 N. Highway Southampton Corp. v Town of  
Southampton**

2013 NY Slip Op 30936(U)

April 26, 2013

Supreme Court, Suffolk County

Docket Number: 06-27444

Judge: Jerry Garguilo

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SHORT FORM ORDER

INDEX No. 06-27444  
CAL No. 09-00498EQ

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 47 - SUFFOLK COUNTY

**PRESENT:**

Hon. JERRY GARGUILO  
Justice of the Supreme Court

MOTION DATE 3-26-09  
ADJ. DATE 4-17-13  
Mot. Seq. # 003 - MD  
# 004 - XMG; CASEDISP

-----X

1630 NORTH HIGHWAY SOUTHAMPTON  
CORP.,  
  
Plaintiff,

- against -

TOWN OF SOUTHAMPTON, THE TOWN OF  
SOUTHAMPTON PLANNING BOARD, AND  
THE TOWN OF SOUTHAMPTON BUILDING  
AND ZONING DIVISION,  
  
Defendants.

-----X

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Upon the following papers numbered 1 to 42 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers 20 - 42; Answering Affidavits and supporting papers   ; Replying Affidavits and supporting papers   ; Other Memorandum of Law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by plaintiff for an order granting summary judgment in its favor is denied; and it is

**ORDERED** that the cross motion by defendants for an order granting summary judgment in their favor is granted.

Plaintiff 1630 North Highway Southampton Corp. is the owner of a parcel of commercial real property situated on the southeast corner of North Highway (also known as County Road 39) and Greenfield Road in defendant Town of Southampton. The property, known as 1630 North Highway, is used as a gasoline service station, repair shop and convenience store. It is bounded on the east by a parcel of commercial property owned by Angelo Toscano and Anthony Toscano, and on the south by a parcel of commercial property owned by Dave Bofill Marine, Inc. In June 2001, 1630 North Highway

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Southampton Corp. (hereinafter North Highway Corp.), seeking to make alterations and renovations to the subject property, filed an application with defendant Town of Southampton Planning Board for site plan and special exception approval. More specifically, North Highway Corp. sought permission from the Town to remove the existing fuel-dispensing islands and gasoline storage tanks, and to install new fuel-dispensing islands with an overhead canopy, new gasoline storage tanks, an above-ground fuel oil tank, and an above-ground waste oil tank. It also sought to legalize the existing convenience store and to renovate the exterior of the building on the premises.

On July 26, 2001, the Planning Board conducted a public hearing on North Highway Corp.'s application for site plan and special exception approval. A staff report concerning the application was prepared in September 2001, and revised plans addressing the issues raised in the staff report were submitted by North Highway Corp. in April 2002. At a meeting conducted on April 4, 2002 at which Cary Wolf, owner of North Highway Corp., and Richard Mathew, its attorney on the application, were present, the Planning Board adopted a resolution conditionally approving North Highway Corp.'s revised application. Mr. Mathew, by correspondence dated June 21, 2002, then sent eight copies of the final site plan for the subject property to the Planning Board. The Planning Board, by correspondence to Mr. Mathew dated July 29, 2002, advised North Highway Corp. in writing that its application had been conditionally approved. As relevant to the instant controversy, the Planning Board's resolution provides that the site plan and special exception approval was subject to North Highway Corp.'s submission of a "cross access easement as for vehicular and pedestrian cross and/or shared access between the parcels to the south and east . . . for review and approval of the Town Attorney, and filed with the Court Clerk, prior to the issuance of a certificate of occupancy." The resolution approving the site plan was signed by Mr. Wolf on June 21, 2002.

Subsequently, North Highway Corp. was issued a building permit by defendant Town of Southampton Department of Land Management, Building and Zoning Division, and the renovation and alteration project at the subject property was completed. Thereafter, on April 29, 2004, Mr. Wolf executed a Declaration of Covenants and Restrictions on behalf of North Highway Corp. agreeing that "[f]uture coordination of access and/or parking facilities with the adjoining parcels to the east as may be required by the Planning Board at some time in the future, shall be planned for, provided by and allowed by the declarant," and that "[i]n the event that . . . as the result of the submission of a site plan and/or special exception application to be reviewed and approved by the Planning Board . . . where such coordination of access and/or parking facilities with any of the adjoining parcels is involved, the Planning Board . . . shall provide the then-owner of the subject property with a written notification that various site improvements may be required as a result of a determination by the Planning Board . . . that such coordination of access and/or parking is deemed necessary as a result of its review of plans for the development or redevelopment of an adjoining parcel." The declaration further states that the declarant "agrees and irrevocable offers to exchange with the adjoining owners to the east, a non-exclusive, right, privilege and easement for the purpose of implementing" the provision related to future coordination of access and parking with the adjoining property owner. The Planning Board, however, rejected such declaration on the ground that it failed to address the cross easement for the adjoining parcel of property located south of the subject property. North Highway Corp. refused to execute a new declaration of covenants and restrictions, and the Town refused to grant it a certificate of occupancy for the subject property. In April 2005, the attorney for North Highway Corp. sent a letter to the Town attorney arguing

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that the condition requiring access easements for the parcels of land to the east and south amounted to an unconstitutional “taking” of private property. By correspondence dated October 11, 2005, the Town notified North Highway Corp. that its building permit expired on October 25, 2003, and requested that it contact the Building and Zoning Division to discuss the status of the permit.

Negotiations between the parties’ attorneys having failed to resolve the dispute over the cross access easements, North Highway Corp. commenced the instant action against defendants Town of Southampton, the Town of Southampton Planning Board, and the Town of Southampton Building and Zoning Division (hereinafter collectively referred to as the Town) in October 2006. The first cause of action alleges the Town’s requirement that North Highway Corp. grant cross access easements to the property owners to the east and south of its property is granting a benefit to private property owners that is not for public use in violation of the Takings Clause of the Fifth Amendment. The second cause of action alleges that the Town is committing a de facto taking by requiring it to grant the cross access easements and, therefore, it should be compensated for the loss of its property interest. The third cause of action alleges that requiring North Highway Corp. to grant such the easements to the neighboring properties is not a legitimate use of the Town’s police powers and constitutes a taking, and the fourth cause of action alleges that conditioning the certificate of occupancy for the subject premises on the easements is not a legitimate use of the Town’s police power. The wherefore clause of the complaint seeks the following relief: (1) “a declaratory judgment that the Town of Southampton’s actions are illegal and invalid, in that they constitute taking for a private purpose; or, alternatively, that such actions constitute a “taking” of plaintiff’s property . . . and that just compensation should be paid accordingly”; (2) an injunction preventing the Town from requiring North Highway Corp. to grant easements across its property; (3) an order directing the Town to issue a certificate of occupancy “without easement conditions”; and (4) an award of attorneys fees pursuant to 42 USC § 1988.

North Highway Corp. now moves for an order awarding summary judgment in its favor on the complaint, arguing, in part, that the cross access easements demanded by the Town constitute a per se taking, as such easements give the adjoining property owners the right to use its property while destroying its rights to control and occupy the subject property, and that requiring such easements serves no public interest. In support of the motion, North Highway Corp. submits, among other things, copies of the pleadings, the Planning Board’s July 29, 2002 letter advising that a resolution was adopted in favor of its application for site plan and special exception approval on the condition that cross access easements be granted, the declaration of covenants and restrictions executed by Mr. Wolf in April 2009, and an appraisal report prepared by Rogers & Taylor Appraisers, Inc. It also submits transcripts of the parties’ deposition testimony and an affidavit of Mr. Wolf. According to Mr. Wolf’s deposition testimony, the alteration and renovation project at the subject premises was completed in 2002, and the Town has refused to grant a certificate of occupancy for the property due to North Highway Corp.’s failure to file the declaration of cross access easements with the County Clerk.

The Town opposes the motion and cross-moves for summary judgment dismissing the complaint on the ground the action is time-barred, as it was not commenced within the 30-day period set forth in Town Law § 274-a (11). The Town also argues the controversy between the parties is not ripe for judicial review, since no declaration of cross access easements has been filed by New Highway Corp. with the County Clerk, and that requested easements do not constitute a taking of property within the

meaning of the Fifth Amendment. The Town's submissions in opposition to the motion and in support of the cross motion include copies of North Highway Corp.'s application for site plan and special exception approval, transcripts of the minutes of various Planning Board meetings at which the application was discussed, correspondence exchanged by the parties regarding the cross access easements, and an affidavit of Dennis Finnerty, the current chairman of the Planning Board. According to Dennis Finnerty's affidavit, the decision to condition approval of North Highway's Corp.'s site plan on the granting of easements to adjoining parcels of land was based on the Town's comprehensive plan for improving traffic safety and reducing congestion on County Road 39 by "access management strategies," like cross-use driveways. Also submitted in support of the cross motion are copies of comprehensive transportation plans drafted by the Town to address, among other things, "choke points" where severe traffic congestion occurs on County Road 39. No papers were submitted in opposition to the Town's cross motion.

A local planning board has broad discretion in determining applications for site-plan approval, and judicial review of such determinations is limited to whether the board's action was illegal, arbitrary or an abuse of discretion (*see Matter of Bagga v Stanco*, 90 AD3d 919, 934 NYS2d 493 [2d Dept 2011]; *Matter of Fairway Manor, Inc. v Bertinelli*, 81 AD3d 821, 916 NYS2d 630 [2d Dept 2011]; *Matter of In-Towne Shopping Ctrs., Co. v Planning Bd. of the Town of Brookhaven*, 73 AD3d 925, 901 NYS2d 331 [2d Dept 2010]; *Matter of Kearney v Kita*, 62 AD3d 1000, 879 NYS2d 584 [2d Dept 2009], *lv denied* 13 NY3d 716, 895 NYS2d 315 [2010]). Further, pursuant to Town Law § 274-a (4), "[t]he authorized board shall have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to a proposed site plan." However, such conditions must be reasonable and relate only to the real estate involved (*Matter of Dexter v Town Bd. of Town of Gates*, 36 NY2d 102, 105, 365 NYS2d 506 [1975]; *see Matter of St. Onge v Donovan*, 71 NY2d 507, 527 NYS2d 721 [1988]), and must be "designed to mitigate some demonstrable defect" (*Matter of Richter v Delmond*, 33 AD3d 1008, 1010, 824 NYS2d [2d Dept 2006]; *see Matter of Clinton v Summers*, 144 AD2d 145, 534 NYS2d 473 [3d Dept 1988]).

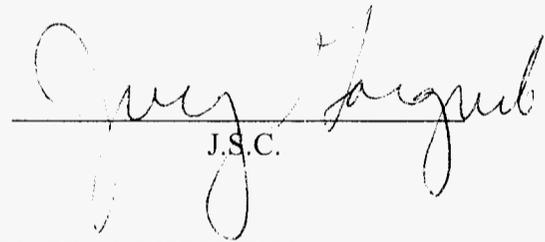
"A primary difference between CPLR article 78 proceedings and declaratory judgment actions is the presence or absence of a judicially imposed remedial order" (*Matter of Dandomar Co., LLC v Town of Pleasant Val. Planning Bd.*, 86 AD3d 83, 89, 924 NYS2d 499 [2d Dept 2011]). The purpose of a declaratory judgment is to determine the rights of the parties "before a 'wrong' actually occurs in the hope that later litigation will be unnecessary" (*Klostermann v Cuomo*, 61 NY2d 525, 475 NYS2d 247 [1984]; *see James v Alderton Dock Yards*, 256 NY 298, 176 NE 401 [1931]). In contrast, an Article 78 proceeding is designed to challenge the actions of state and local governments and corporations, and may result in a judgment affirmatively directing the unsuccessful party to perform an act or refrain from doing so (*see* CPLR 7801, 7803; *Matter of Dandomar Co., LLC v Town of Pleasant Val. Planning Bd.*, 86 AD3d 83, 924 NYS2d 499; *Matter of Levine v Board of Educ. of City of N.Y.*, 186 AD2d 743, 589 NYS2d 181 [2d Dept 1992]). Further, regardless of whether a pleading is styled as an article 78 or a declaratory judgment action, courts have the obligation in the first instance to determine the true nature of an action so as to ascertain the applicable statute of limitations (*Matter of Dandomar Co., LLC v Town of Pleasant Val. Planning Bd.*, 86 AD3d 83, 90, 924 NYS2d 499; *see Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 518 NYS2d 943 [1987]). If a claim could have been made in a form other than a declaratory judgment action and the limitations period for that action has expired, the

time period for asserting that claim cannot be extended simply by denominating it as an action for declaratory relief (*New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194, 616 NYS2d 1 [1994]).

Although characterized by North Highway Corp. as an action for declaratory and injunctive relief, the instant matter, in fact, seeks to annul that portion of the Planning Board's April 2002 determination requiring that North Highway Corp. grant cross access easements to the owners of the parcels of property adjoining the subject property to the east and south. To obtain judicial review of the Planning Board's conditional approval of the site plan and special use exception, North Highway Corp. was required to commence an article 78 proceeding within thirty days after the filing of such decision by the Planning Board (*see* Town Law § 274-a [11]; *Matter of Gilmore v Planning Bd. of Town of Ogden*, 16 AD3d 1074, 791 NYS2d 804 [4th Dept 2005]; *Matter of Elliot v Boycott*, 293 AD2d 676, 740 NYS2d 632 [2d Dept 2002]; *Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven*, 247 AD2d 395, 667 NYS2d 912 [2d Dept 1998]). The evidence in the record, however, shows that North Highway Corp. was granted a building permit in October 2002 after the Planning Board's determination approving the site plan and special use exception, that the project was largely completed by the end of 2002, and that the building permit expired one year later without any requests being made to the Building and Zoning Division to extend its duration (*see* Code of the Town of Southampton §§ 123-11, 330-175). Moreover, it is undisputed that the instant action was brought more than 30 days after the determination and filing of the Planning Board's decision on North Highway Corp.'s application for special use exception and site plan approval. Thus, even though its claim against the Town is couched in the complaint as constitutional objections based on the right of just compensation for the taking of property and the exercise of police powers, the appropriate procedural vehicle for North Highway Corp.'s challenge to the Planning Board's determination was an article 78 proceeding (*see Solnick v Whalen*, 49 NY2d 224, 425 NYS2d 68 [1980]).

Accordingly, the Town's cross motion for summary judgment dismissing this action on the ground it is time-barred is granted, and North Highway Corp.'s motion for summary judgment in its favor is denied as moot.

Dated: 4/26/13

  
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J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION