

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

D32684
N/ct

_____AD3d_____

Argued - October 3, 2011

PETER B. SKELOS, J.P.
CHERYL E. CHAMBERS
SANDRA L. SGROI
ROBERT J. MILLER, JJ.

2010-06560

DECISION & ORDER

Town of Southampton, respondent, v County of
Suffolk, et al., appellants, et al., defendants.

(Index No. 19533/09)

Christine Malafi, County Attorney, Hauppauge, N.Y. (John R. Petrowski of counsel),
for appellants.

Tiffany Scarlato, Town Attorney, Southampton, N.Y. (Michael Sendlenski of
counsel), for respondent.

In an action to permanently enjoin the defendants from continuing and/or expanding their use of certain trailers within the Town of Southampton as temporary housing for registered sex offenders, the defendants County of Suffolk and Janet DeMarzo, as Commissioner of Social Services for the County of Suffolk, appeal, as limited by their brief, from so much of an order of the Supreme Court, Suffolk County (Whelan, J.), dated June 8, 2010, as granted that branch of the plaintiff's motion which was for a preliminary injunction.

ORDERED that the order is reversed insofar as appealed from, on the facts and in the exercise of discretion, with costs, and that branch of the plaintiff's motion which was for a preliminary injunction is denied.

In February 2007 the County of Suffolk and the Commissioner of Social Services for the County of Suffolk (hereinafter together the County) placed a trailer on a County-owned parcel of real property located in Westhampton to provide temporary emergency housing for homeless registered sex offenders. This trailer (hereinafter the Westhampton trailer) provided housing for up to eight sex offenders. In May 2007 the County set up a second trailer to serve the same purpose on another County-owned parcel located in Riverside (hereinafter the Riverside trailer). In 2008 the

October 25, 2011

Page 1.

TOWN OF SOUTHAMPTON v COUNTY OF SUFFOLK

Riverside trailer was expanded to house additional sex offenders.

In May 2009 the Town of Southampton commenced this action to permanently enjoin the County from continuing and/or expanding its use of the Riverside trailer. The Town alleged, among other things, that the County's installation of the Riverside trailer and its use as housing violated certain state, county, and local laws, including certain zoning provisions. In May 2010 the Town served a proposed amended complaint upon the County seeking such permanent injunctive relief with respect to both the Westhampton trailer and the Riverside trailer. Simultaneously, the Town moved, inter alia, for a preliminary injunction enjoining the County from altering, expanding, replacing, or changing the physical structure of the Riverside and Westhampton trailers. In an order dated June 8, 2010, the Supreme Court, among other things, granted that branch of the Town's motion which was for a preliminary injunction.

To obtain a preliminary injunction based on a violation of its zoning ordinances, a town need not satisfy the traditional three-part test for injunctive relief, but is required "only [to] show that it has a likelihood of ultimate success on the merits and that the equities are balanced in its favor" (*Town of Islip v Modica Assoc. of NY 122, LLC*, 45 AD3d 574, 575, quoting *First Franklin Sq. Assoc., LLC v Franklin Sq. Prop. Account*, 15 AD3d 529, 533; see Town Law § 268[2]). Here, the Town failed to establish a likelihood of ultimate success on the merits (see *Town of Riverhead v County of Suffolk*, 78 AD3d 1165; *Town of Islip v Modica Assoc. of NY 122, LLC*, 45 AD3d at 575; *Town of Oyster Bay v Sodomsky*, 154 AD2d 455, 455). The Town further failed to demonstrate that the equities were balanced in its favor (see *Town of Riverhead v County of Suffolk*, 39 AD3d 537, 539; *Town of Esopus v Fausto Simoes & Assoc.*, 145 AD2d 840, 842). Consequently, the Supreme Court improvidently exercised its discretion in granting that branch of the Town's motion which was for a preliminary injunction (see *Town of Huntington v Pierce Arrow Realty Corp.*, 216 AD2d 287, 289).

To the extent that the County seeks relief regarding its separate motion to dismiss the complaint, we note that the Supreme Court did not decide that motion in the order appealed from. Thus, the County's contentions regarding that separate motion are not properly before this Court.

SKELOS, J.P., CHAMBERS, SGROI and MILLER, JJ., concur.

ENTER: 
Matthew G. Kiernan
Clerk of the Court