

**D & S Realty Development, L.P. v Town of
Huntington**

2001 NY Slip Op 30012(U)

August 22, 2001

Supreme Court, Suffolk County

Docket Number: 0002897/2897

Judge: Arthur G. Pitts

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SHORT FORM ORDER

INDEX NO: 2897/99

SUPREME COURT - STATE OF NEW YORK
IAS PART 43 SUFFOLK COUNTY

P R E S E N T :

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

RETURN DATE 003-11/30/00
004&005-12/21/00

SUBMIT DATE 5/17/01

MOTION NO. 003-MG;004-MD
005-MG

DATE August 22, 2001

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D & S REALTY DEVELOPMENT, L.P.,

Plaintiff,

-against-

THE TOWN OF HUNTINGTON, TOWN BOARD
OF THE TOWN OF HUNTINGTON, FRANK
PETRONE, MARLENE L. BUDD, MARK
CUTHBERTSON, STEVEN J. ISRAEL,
SUSAN J. SCARPATI-REILLY,
Individually and as Members of
THE TOWN BOARD OF THE TOWN OF
HUNTINGTON, PLANNING BOARD OF THE
TOWN OF HUNTINGTON, H. JEFFREY
VIRAG, ELLEN PAGANO, W. GERARD
ASHER, ROBERT J. BONTEMPI, JR.,
ANDREW L. SISTERNINO, TRACEY A.
EDWARDS, and KIRK C. MACKEY, and
MITCHELL SOMER, Individually and
as Members of THE PLANNING BOARD
OF THE TOWN OF HUNTINGTON,

Defendants.

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Upon the following papers numbered 1 to 36 read on
these motions for summary judgment and cross motion to compel
disclosure Notice of Motion and supporting papers 1-9; 10-14 ;
Notice of Cross Motion and supporting papers 15-23; Answering
Affidavits and supporting papers 24-25; 26-30 ;Reply Affidavits
31-36 ; it is,

ORDERED, that the motions and cross motion interposed herein are consolidated for decision; and it is further

ORDERED, that the motion of the members of the Town Board of the Town of Huntington for judgment dismissing the action as asserted against them in their individual and official capacities (003) is granted upon the consent of the plaintiff, and the caption shall be amended accordingly; and it is further

ORDERED, that the motion of the defendants Planning Board of the Town of Huntington and the individual members of the Planning Board for judgment dismissing the action as time-barred (004) is denied; and it is further

ORDERED, that the cross motion of plaintiff to compel disclosure (005) is granted as follows.

The action involves a 20-acre parcel of real property located within the Town of Huntington, and owned by plaintiff D & S Realty Development, LP. It is alleged that the parcel is divided by a "zone district boundary," with 10.7 acres zoned R-40 (minimum lot size one acre, residential), and 9.8 acres previously zoned R-20 (minimum lot size 20,000 square feet, residential). It is alleged further that plaintiff sought the approval of the defendant Planning Board for the construction of seven homes in the R-40 zone and 17 additional homes in the R-20 zone. After SEQRA review of plaintiff's proposal, which occurred over the course of more than two years, and after apparent public outcry over the proposed development, it appears that the defendant Planning Board rejected plaintiff's original 24-home plan and a modified 17-home plan, resolving that plaintiff submit a 12-home plan. Thereafter, the defendant Town Board rezoned the 9.8 acre portion from R-20 to R-40, substantially reducing the number of homes which could be constructed on the parcel.

Plaintiff commenced this action pursuant to 42 USC §1983, seeking declaratory relief, as well as compensatory and punitive damages, for the alleged violation of its constitutional rights. Plaintiff alleges, inter alia, that the defendants acted in bad faith; that they "unduly and intentionally delayed" the SEQRA process in furtherance of their "ultimate intention" to rezone the parcel; that the rezoning was "illegal, arbitrary and capricious;" that the rezoning constituted an illegal taking without compensation, in violation of plaintiff's Fifth and Fourteenth Amendment rights; and that plaintiff was denied due process of law.

Defendants Frank Petrone, Marlene L. Budd, Mark Cuthbertson, Steven J. Israel, and Susan J. Scarpati-Reilly, who were individual members of the Town Board at the times relevant to this action, move for summary judgment dismissing the complaint as asserted against them individually, on the ground that they enjoyed legislative immunity for any actions taken in their official capacity. Plaintiff consents to dismissal as to these defendants, and accordingly, the motion (003) is granted.

The defendant Planning Board and the individual members thereof move for summary judgment dismissing the complaint in its entirety on the grounds that it is time-barred. The Planning Board defendants argue in support that the complaint is nothing more than an Article 78 proceeding which, pursuant to Town Law §282, must have been commenced no later than 30 days after the final decision of the Planning Board. Town Law §282 in fact provides:

Any person. . .aggrieved by any decision of the planning board concerning such plat or the changing of the zoning regulations of such land, or any officer, department, board or bureau of the town, may have the decision reviewed by a special term of the supreme court in the manner provided by article seventy-eight of the civil practice law and rules provided the proceeding is commenced within thirty days after the filing of the decision in the office of the board.

. . .

The Planning Board defendants argue that the Article 78 "remedy" for which this section provides is the exclusive manner by which the Planning Board's actions may be challenged.

However, it has been held that "[i]n the context of land use, [42 USC] section 1983 provides protection against municipal actions which violate a landowner's rights under the Just Compensation Clause of the Fifth Amendment or the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution," as well as a "substantive due process claim based on arbitrary and capricious conduct" (*Town of Orangetown v Magee*, 88 NY2d 41, 49, 643 NYS2d 21 [1996]). Hence, the complaint herein states a viable cause of action.

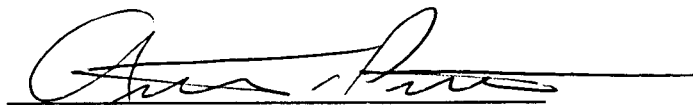
Furthermore, plaintiff correctly argues that the applicable statute of limitations herein is three years, pursuant to New York's CPLR 214(5) (cf. **423 South Salina Street, Inc. v City of Syracuse**, 68 NY2d 474, 501 NYS2d 507 [1986]). As this action was commenced well within the three-year period, the motion of the Planning Board defendants must be denied.

Finally, the cross motion to compel the individual Town Board members to appear for deposition is granted. Though they are no longer parties to this action, their testimony nevertheless remains crucially relevant to the claims alleged herein.

Accordingly, Frank Petrone, Marlene L. Budd, Mark Cuthbertson, Steven J. Israel, and Susan J. Scarpati-Reilly are directed to appear for deposition on the 19th day of November, 2001, at 9:30am, in the courthouse at 235 Griffing Avenue, Riverhead, and on each consecutive day thereafter on which court is in session, until depositions are completed. Depositions may, by agreement, be completed at an earlier date and time, and at another location.

The compliance conference, previously scheduled on September 13, 2001, is adjourned to November 29, 2001.

Plaintiff is directed to forthwith serve the above-listed individual Board Members with a copy of this order, with notice of entry thereon, by certified mail, return receipt requested. Plaintiff shall serve a further copy of this order upon the calendar clerk of this court.



J.S.C.