

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

2003 NY Slip Op 30030(U)

July 7, 2003

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 12/23/02

SUBMIT DATE 4/3/03

MOTION NO. 007&008-MotD

DATE July 7, 2003

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D & S REALTY DEVELOPMENT, L.P.,

Plaintiff,

-against-

THE TOWN OF HUNTINGTON, 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 30 read on this
motion to quash and cross motion to compel Notice of Motion and
supporting papers 1-7 ; Notice of Cross Motion and supporting
papers 8-22 ; Answering Affidavits and supporting papers 23-30 ;
Reply Affidavits _____ ; it is,

ORDERED, that the motion of defendant Town of Huntington to
quash subpoenas and the cross motion of plaintiff D & S Realty
Development, LP, to compel depositions are determined 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 upzoned the 9.8 acre portion from R-20 to R-40, substantially reducing the number of homes which could be constructed on the parcel, and purportedly reducing the land's value.

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 upzone the parcel; that the upzoning was "illegal, arbitrary and capricious;" that the upzoning 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.

By order dated August 21, 2001, this court, inter alia, granted plaintiff's cross motion to compel the depositions of Frank Petrone, Marlene L. Budd, Mark Cuthbertson, Steven J. Israel, and Susan J. Scarpati-Reilly, who were members of the Town Board when the upzoning was accomplished (hereafter "Board members").¹ By order dated June 3, 2002, the Appellate Division, Second Department, held that this court should have denied the cross motion as "premature." The Appellate Division held

A municipality, in the first instance, has the right to determine which of its officers or employees with knowledge of the facts underlying the litigation may appear for examination before trial [cites omitted]. The plaintiff may demand the production of additional witnesses "when it becomes

¹ This direction was based, perhaps mistakenly, upon the preliminary conference order, wherein it was agreed that individual defendants were to be produced for deposition. Earlier in this litigation, the Board members were named as individual defendants.

apparent that the knowledge of the proffered official or officials is inadequate to produce testimonial and documentary evidence material and necessary to the prosecution of the action" [cites omitted]. *Upon such application, the court can determine the Town's arguments, inter alia, that the demanded examinations impermissibly seek to discover the motivation behind the challenged actions. . .or are inquiries precluded by legislative immunity* [cites omitted][emphasis added](*D&S Realty, L.P. v Tom of Huntington*, 295 AD2d 306, 307-308, 743 NYS2d 147 [2002]).

Now, on this motion to quash subpoenas served upon the Board members in question and on this cross motion to compel their testimony, this issue is before the court.

42 USC 51983 provides

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State. . ., subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

"Municipalities are 'persons' subject to suit under section 1983 for the deprivation of constitutionally protected rights caused by actions which 'implement[] or execute[] a policy statement, ordinance, regulation or decision officially adopted and promulgated by [its] officers' [*Monell v New York City Dept of Social Servs.*, 436 US 658 (remaining cites omitted)] (*Town of Orangetown v Magee*, 88 NY2d 41, 48, 643 NYS2d 21 [1996]). In the context of land use, this section protects a landowner's rights to equal protection of the laws guaranteed by the Fourteenth Amendment, or just compensation for the taking of property protected by the Fifth Amendment, and due process of law as guaranteed by both the Fifth and Fourteenth Amendments (see, *Bower Associates v Town of Pleasant Valley*, 2003 WL 21060866 [2d Dept]).

Not every incorrect decision or good-faith mistake by a local official provides a valid claim for constitutional deprivation. Rather, liability under §1983 for constitutional deprivation attaches "where-and only where-a *deliberate choice* to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question" (***Pembaur v Cincinnati***, 475 US 469, 474, 106 Sct 2018[]) [emphasis added]).

It is logical to infer, therefore, that the thinking, intention and motive behind such official or officials' choice of action is relevant in a §1983 action. As relevance is the touchstone of the law of disclosure in the State of New York, and as the examination before trial is an effective and popular disclosure device, it is reasonable to conclude that deposing such official would be an efficient manner to get to the bottom of the controversy.

Nevertheless, defendants argue that they enjoy a privilege against disclosure aimed at delving into their thought processes, motivations and deliberations surrounding plaintiff's efforts to build on his property. In fact, such "federal common law privilege" has been recognized as a corollary to a Town Board member's absolute immunity from suit under §1983 (see, ***Orange v County of Suffolk***, 855 FSupp 620 [EDNY 1994]; ***Searingtown Corp. V Inc. Village of North Hills***, 575 FSupp 1295 [EDNY 1981]). "[T]he purpose in preventing inquiry into the motivation for legislative acts is to shield legislators from civil proceedings which disrupt and question their performance of legislative duties to enable them to devote their best effort and full attention to the 'public good' [cite omitted]" (***Searingtown Corp. V Inc. Village of North Hills***, *supra* at 1298-1299). It is only where "the public need for the full development of relevant facts [is sufficient] to warrant threatening the interest in protecting the legislative process" that motive becomes discoverable (***Searingtom Corp. V Inc. Village of North Hills***, *supra* at 1299).

It is also the settled law of the State of New York that "[a]n examination before trial as to motives inducing legislative action is improper [cites omitted]. However, while there may not be an examination into the motives which move a legislative body in the exercise of its legislative discretion, there may be an inquiry into the purpose of the legislation" (***Burack v Town of Poughkeepsie***, 32 AD2d 806, 806, 302 NYS2d 314 [2d Dept 1980], quoting ***Reformed Church of Mile Square v City of Yonkers***, 8 AD2d 639, 640). At least one state court has found that a legislative privilege applies in a §1983 action commenced

in New York Supreme Court (**Humane Society of NY v City of NY**, 188 Misc2d 735, 729 NYS2d 360 [Supreme Ct, NY Co 2001]).

The Town argues that the disclosure sought by plaintiff, namely the EBTs of the Board members, falls squarely within the ambit of legislative privilege. The Town argues further that plaintiff cannot get past the first issue posed herein, that being an absence of relevant knowledge of those witnesses already produced by the Town. The Town argues that because the only relevant material about which the Board members can testify is privileged, they may not be compelled to do so.

This court is not entirely in agreement. Firstly, it is not an understatement that the witnesses produced by the Town and the Planning Board have a collective memory of events surrounding the rezoning that would scarcely fill a thimble.

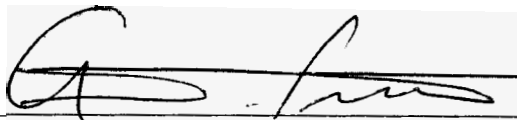
Secondly, this court is not convinced that the privilege urged by the Town is complete. While testimony as to motive is prevented, testimony as to the purpose behind the subject legislation is not (**Burack v Town of Poughkeepsie**, *supra* at 806). In addition, legislative privilege attaches only to "legislative acts," such as votes and speeches during Board meetings, as well as to motives and thought-processes, and to "committee meetings and hearings," to the extent applicable to a Town Board (see, **People v Ohrenstein**, 77 NY2d 38, 563 NYS2d 744 [1990]). "However, it does not extend to acts which a legislator performs to secure support in the community or to insure reelection, such as giving speeches in the community, issuing newsletters and press releases, [etc.]" (**People v Ohrenstein**, *supra* at 54).

Plaintiff argues, on the other hand, that the Second Department's decision in **Rattner v Planning Commission of Village of Pleasantville** (110 AD2d 840, 487 NYS2d 873 [1985]), is directly in point and warrants the limitless examination of the Board members. However, the court in **Rattner** permitted depositions of the Village officials involved upon a clear showing of "particularly egregious circumstances," including the testimony of an enforcement officer which revealed improper motives, and board actions which "resulted in the [futile] delay and prolongation of litigation" (**Rattner v Planning Commission of Village of Pleasantville**, *supra* at 841-842). There has been no similar showing in the case at bar.

Neither has it been shown that a public need to reveal any underlying motive outweighs the public interest in protecting the legislative process (see, **Searingtown Corp. v Inc. Village of**

North Hills, supra at 1299).

In accord with the forgoing, the five Board members' shall be produced for depositions on the 15th day of August, 2003, at 9:30am, in the courthouse at 210 Center Drive, Riverhead, before the Honorable Harry Seidell, Judicial Hearing Officer (see, CPLR 3104[b]). There shall be no questions as to the Board members' motives, thought-processes or deliberations concerning the subject rezoning. Questions regarding the purpose of the rezoning are proper. The issue of privilege may be visited on a question-by-question basis, as may any issue as to what activity constitutes or does not constitute a "legislative act."



J.S.C.

Clerk only: Non-Final Disposition

² The parties have taken the position that either all or none of the Board members may be deposed. The court therefore finds no issue as to how many or which Board member shall be produced.