

**Town of Brookhaven v Durao**

2003 NY Slip Op 30176(U)

March 3, 2003

Supreme Court, Suffolk County

Docket Number: 01-8713

Judge: Daniel J. Loughlin

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**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 12 - SUFFOLK COUNTY**

***P R E S E N T :***

Hon. DANIEL J. LOUGHLIN  
Justice of the Supreme Court

MOTION DATE- 7-25-02 (#003)  
9-17-02 (#004)  
ADJ. DATE 11-21-02  
Mot. Seq. # 003 - MD  
# 004 - XMG; CASEDISP

-----X  
TOWN OF BROOKHAVEN,

Plaintiff,

- against -

CELIA DURAO, a//k/a CELIA R. DURAO and :  
RICARDO DURAO,

Defendant. :

-----X

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Upon the following papers numbered 1 to 59 read on this motion to compel disclosure; cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers 11 - 24; Answering Midavits and supporting papers 25 - 57; Replying Midavits and supporting papers 58 - 59; Other \_\_\_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is.

**ORDERED** that the motion by plaintiff Town of Brookhaven for an order compelling defendants to permit plaintiff to “inspect, measure, survey, photograph and record by videotape the exterior and interior” of certain premises owned by defendants is denied; and it is further

**ORDERED** that the cross motion by defendants for, *inter alia*, summary judgment dismissing the action on the ground that plaintiff Town of Brookhaven lacks the capacity to sue is granted.

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Defendants Celia Durao and Ricardo Durao are the title holders, either individually or as tenants by the entirety, of six residential rental properties located in plaintiff Town of Brookhaven. Each of the properties is improved with a house and is located in a use district zoned for one-family residential dwellings. This action for injunctive relief and damages seeks to enforce various building, zoning and general welfare ordinances allegedly violated by defendants.

The complaint initially filed and served by plaintiff Town alleged, among other things, that defendants rent the subject properties to people who are not family members in violation of section 82-4(A)(1) of the Code of the Town of Brookhaven. This ordinance, adopted in 1999 and entitled the Neighborhood Preservation Law, made it unlawful for any person or entity that owns a “non-owner occupied dwelling unit” in the Town, excluding property on Fire Island, “to use, establish, maintain, operate, let, lease, rent or suffer or permit the occupancy and use thereof by someone other than the owner or his immediate family without having first registered with the Chief Building Inspector by filing a rental registration form and obtain [sic] a rental occupancy permit.” It also permitted the Town’s Chief Building Inspector, “upon consent of the owner if the unit is unoccupied, or upon consent of the occupant of the unit is (occupied,” to make or cause to be made an inspection of “any rental dwelling and the premises in which same is located” at any reasonable time during daylight hours or at such other times as may be necessary in an emergency. Significantly, renting a dwelling unit to an individual who is not an immediate family member within the definition set forth in §82-2 of the Brookhaven Town Code is classified as a violation punishable by fine or imprisonment (Code of the Town of Brookhaven §§82-10, 82-15). The complaint also alleged that defendant Celia Durao, the title holder of the premises located known as 140 Wendy Drive, Holtsville, New York, was failing to keep the property free of litter in violation of the Town’s Sanitation Code (*see*, Code of the Town of Brookhaven §45-4).

Simultaneous with the filing of the pleadings, plaintiff Town moved for a preliminary injunction restraining defendants from “causing, allowing and/or permitting the use, occupancy and/or maintenance” of the properties at issue until rental occupancy permits are obtained from the Town Building Inspector, and directing defendant Celia Durao to remove any litter and debris from the premises at 140 Wendy Drive within a specified time period. Defendants cross-moved for an order dismissing the complaint on the ground that the ordinances allegedly violated by defendants are unconstitutional. Subsequently, plaintiff Town served an amended complaint, which alleges defendants are violating various zoning and building ordinances, as well as Town Code §§ 82-4 and 45-4.

By order dated March 28, 2002, this Court (Kitson, J.) denied plaintiff Town’s motion for a preliminary injunction, finding that such relief would amount to granting the ultimate relief sought in the action *pendente lite* without any proof of urgency or grave necessity, and that serious questions exist regarding the constitutionality of section 82-4 and section 45-4 of the Town Code. It further denied defendant’s cross motion to dismiss the action, finding that the amended complaint alleged sufficient facts to state an action for injunctive relief pursuant to Town Law §§ 135 and 268. The

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legal arguments raised by the parties in these motions and the bases for the Court's determinations are detailed in the March 28, 2002 order and will not be repeated herein, as the parties' familiarity with that decision is assumed.

Plaintiff Town now moves for an order compelling defendants to permit an inspection of three properties located in Farmingville, New York, namely, 691 Horseblock Road, 1345 Waverly Avenue, and 106 Granny Road. More particularly, plaintiff Town seeks an order, *inter alia*, directing defendants to permit Town employees "to inspect, measure, survey, photograph, and record by video tape the exterior and interior of the structures situated on the premises," on the basis that "the condition of the structures situated upon said properties cannot be ascertained without a physical inspection" by plaintiff Town. These properties, which are the subject of the three causes of action added to the amended complaint, allegedly were altered to create two-family residences without obtaining a building permit in violation of Brookhaven Town Code §85-17(A). In addition, the amended complaint alleges that the premises, located in areas zoned for single-family dwellings, are being used as two-family dwellings without a special permit or a certificate of occupancy in violation of Brookhaven Town Code §85-58 and §85-20(A), and that the fire damage to the interior of the house at 1345 Waverly Avenue was repaired without a building permit in violation of Brookhaven Town Code §85-17(A).

Defendants oppose plaintiff Town's application to compel disclosure and cross moves for, *inter alia*, for an order granting summary judgment dismissing the action on the ground that the action was instituted without authorization from the Town Board as required by Town Law §65. Defendants also seek leave to amend their answer to include counterclaims for declaratory judgments as to the constitutionality of plaintiff Town's Neighborhood Preservation Law and Sanitation Code (Code of the Town of Brookhaven §§82 and 45), and of Town Law §138.

**An** affirmation submitted by plaintiff Town in opposition to the cross motion asserts, among other things, that this action was authorized by a resolution passed by the Town Board in 2001 and that the constitutional challenge to the Neighborhood Preservation Law was rendered moot by a recent amendment to that ordinance. Exhibits annexed to the affirmation include a certified copy of a resolution by the Town Board, adopted on January 4, 2001, authorizing the Town Attorney to initiate and settle any action, proceeding and claim by or against the Town of Brookhaven. The resolution reads, in relevant part, as follows:

WHEREAS, Chapter 20 of the Code of the Town of Brookhaven empowers the Town Attorney to perform such other duties and functions as the Town Board shall specify; and

WHEREAS, the Town Attorney conducts and is responsible for litigation, proceedings and claims involving the Town of Brookhaven; and

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WHEREAS, in order to efficiently commence, conduct and conclude such litigation the Town Attorney should have authority to initiate and settle actions, proceedings and claims involving the Town,

NOW, THEREFORE, BE IT RESOLVED that during the 2001 calendar year the Town Attorney is hereby authorized to initiate all actions, proceedings and claims by the Town of Brookhaven.

Also submitted by plaintiff Town was a certified copy of Local Law No. 22, which purportedly amends chapter 82 of the Brookhaven Town Code to make it applicable to “all dwelling units within the Town of Brookhaven,” except those located on Fire Island, and to provide that warrantless inspections may be conducted only upon consent of the owner, except in the case of an emergency (Code of the Town of Brookhaven §82, L 2002, ch 22, §1, as amended). This local law was adopted by the Town Board on October 15, 2002, and states that it is effective immediately upon filing with the Secretary of State of New York (see, Code of the Town of Brookhaven §82, L 2002, ch 22, 92, as amended). Absent from plaintiff Town’s submissions, however, is evidence or even an allegation that Local Law No. 22 was filed with the Secretary of State (see, Municipal Home Rule §27; *Matter of Sterling Concerned Citizens v Pell*, 204 AD2d 730, 612 NYS2d 425 [2d Dept 1994]).

Contrary to the conclusory allegations by counsel to plaintiff Town, the instant action was not “duly authorized” by the Town Board. Rather, the Court finds that the blanket resolution authorizing the Town Attorney to initiate all actions, proceedings and claims by the Town constituted an improper delegation of power by the Town Board to the Town Attorney. Municipalities are creatures of the Legislature and possess only the powers that are expressly conferred upon them by statute, together with the powers necessarily incident thereto (see, *People v Scott*, 26 NY2d 286, 289, 309 NYS2d 919 [1970]; *Perry v Town of Cherry Valley*, 307 NY 427, 121 NE2d 402 [1954]; *Whittaker v Village of Franklinville*, 265 NY 11, 191 NE 716 [1934], *rearg denied* 266 NY 505, 195 NE 174 [1935]; *Torsoe Bros. Constr. Corp. v Board of Trustees of Vil. of Monroe*, 49 AD2d 461, 375 NYS2d 612 [2d Dept 1975], *see also, New York Trap Rock Corp. v Town of Clarkstown*, 299 NY 77, 85 NE2d 873 [1949]). Thus, a town’s right to sue must be derived from the relevant enabling legislation or some other statutory predicate (*Town of Claverack v Brew*, 277 AD2d 807, 808, 716 NYS2d 748 [3d Dept 2000], *see, Community Bd 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 615 NYS2d 644 [1994]).

Town Law §65(1) provides that

[a]ny action or special proceeding for or against a town \* \* \* shall be in the name of the town. The town board of any town may authorize and direct any town officer or officers to institute, defend or appear, in any action or legal proceeding, in the name of the town, as in its

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judgment may be necessary for the benefit or protection of the town, in any of its rights or property. It shall be the duty of any officer or officers so authorized and directed to institute said action or proceeding or to defend or appear therein, and the reasonable and necessary expense of such action or proceeding, or defense or appearance shall be a town charge.

A town board also is authorized to maintain an action or proceeding in the name of the town “to compel compliance with or to restrain by injunction” the violation of town ordinances, rules and regulations, notwithstanding that the ordinance, rule or regulation may provide a penalty or other punishment for such violation (Town Law §1.35; *see, Town of Thompson v Alleva*, 76 NY2d 1022, 429 NYS2d 481 [3d Dept 1980], *appeal dismissed* 53 NY2d 839 [1981]) Similarly, Town Law §268(2) provides that if any building or structure “is erected, constructed, reconstructed, altered, converted or maintained \* \* \* in violation of this article or of any local law, ordinance or other regulation \* \* \* the proper local authorities of the town, in addition to other remedies, may institute any appropriate action or proceeding” to enforce its zoning ordinances (*see, Town of East Hampton v Buffa*, 157 AD2d 714, 549 NYS2d 813 [2d Dept 1990], *Town of Southampton v Sendlewski*, 156 AD2d 669, 549 NYS2d 434 [2d Dept 1989]) The authority to initiate an action or proceeding in the name of the town to enforce local ordinances, therefore, lies with the town board (*see, Town of Claverack v Brew, supra, Town of Thompson v Alleva, supra; see also, County of Sullivan v Town of Thompson*, 99 AD2d 574, 471 NYS2d 399 [3d Dept 1984])

It is undisputed that the Town Board did not pass a resolution authorizing the Brookhaven Town Attorney to institute an action in the name of the town against defendants for injunctive relief and damages. However, it did pass a blanket resolution authorizing the Town Attorney “to initiate all actions, proceedings and claims by the Town.” The question raised by this action, then, is whether the Town Board had the authority to delegate to the Town Attorney the power conferred upon it by Town Law §§65 and 135 to determine whether to commence an action in the name of the Town to enforce its ordinances.

Pursuant to Town Law §60, in every town the supervisor and town councilmen shall constitute the town board, and “shall be vested with all the powers of such town and shall possess and exercise all the powers and be subject to all the duties now and hereinafter imposed by law upon town boards.” The supervisor, town councilmen, town clerk, town justices, town superintendent of highways and receiver of taxes of every town are elected officers; all other officers and employees of the town are appointed by the town board, except as otherwise provided by law (Town Law §20[1][a]). Every town board is authorized to establish the office of town attorney, to appoint a town attorney and deputies for the office, and to fix the salary of such officers (Town Law §20[2][a]). If such office is created, the town attorney and deputies hold office for an indefinite term and are removable at the pleasure of the town board (Town Law §20[2][a]).

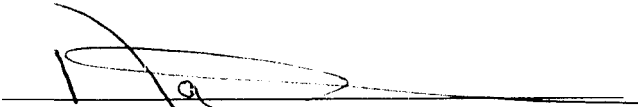
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It is fundamental that a court should attempt to effectuate the legislative intent when interpreting a statute and that, when a statute is clear and unambiguous, it should be construed “so as to give effect to the plain meaning of the words used” (*Patrolmen’s Benevolent Assn. of City & New York v City of New York*, 41 NY2d 205, 208, 391 NYS2d 544 [1976]; see, *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 673 NYS2d 966 [1998]; McKinney’s Consol Laws of NY, Book 1, Statutes, 994) The language of Town Law §§65, 135 and 268 clearly expresses the Legislature’s intention to place the responsibility of determining whether to commence an action to enforce a town’s ordinances, particularly its building and zoning ordinances, upon the town boards, the members of which are elected by and directly responsible to the citizens whose rights are affected by such ordinances (see generally, *Thompson v Schermerhorn*, 6 NY 92, 55 Am Dec 385 [1851]) Another fundamental rule of statutory construction is that a statute must be construed as a whole, and all parts of an act must be read and considered together to determine the legislative intent (see, *Sanders v Winship*, 57 NY2d 391, 456 NYS2d 720 [1982]; *People v Mobil Oil Corp.*, 48 NY2d 192, 422 NYS2d 33 [1979], McKinney’s Consol Laws of NY, Book 1, Statutes, §§97, 98) “Every part of a statute must be given meaning and effect“ (*Heard v Cuomo*, 80 NY2d 684, 689, 594 NYS2d 675 [1993])

Having conferred upon the town board of every town a discretionary power to authorize any action or legal proceeding in the name of the town “as in its judgment may be necessary, for the benefit or protection of the town, in any of its rights,” the Legislature then created a separate duty for any officer or officers “so authorized and directed[,] to institute said action or legal proceeding” (Town Law §65). To read Town Law §65 as permitting a blanket resolution that authorizes a town attorney to commence any action in the name of the town as in the exercise of his or her discretion and judgment is warranted is to ignore the clear duty imposed upon a town board by the Legislature. Further, while a town board is authorized to create the office of town attorney (see, Town Law §20[2]), nothing in the statute indicates that the governmental or discretionary power to determine whether to commence an action or proceeding on behalf of the town delegated by the Legislature to the town board can be further delegated to a town attorney (see, *Town of Babylon v N. Racanelli Assocs.*, 171 AD2d 741, 567 NYS2d 297 [2d Dept], *appeal denied* 78 NY2d 853, 573 NYS2d 467 [1991]; see generally, *Nemeroff Realty Corp. v Kerr*, 38 AD2d 437, 330 NYS2d 632 [1972], *aff’d* 32 NY2d 873, 346 NYS2d 532 [1973]). Therefore, the Court concludes that the Town Board lacked the authority to delegate to the Town Attorney the power to institute actions in the name of plaintiff Town to enforce the local ordinances.

Accordingly, summary judgment dismissing this action for lack of capacity to sue based upon plaintiff Town’s failure to comply with the requirement of Town Law §65 is granted. Plaintiff Town’s motion for an order compelling disclosure is denied as moot.

Dated: March 3 2003

  
\_\_\_\_\_  
J.S.C.

X  FINAL DISPOSITION          NON-FINAL DISPOSITION