

**Town Board of Town of Smithtown v New York State  
Urban Development Corp.**

2005 NY Slip Op 30367(U)

June 3, 2005

Supreme Court, Suffolk County

Docket Number: 10379/05

Judge: Donald R. Blydenburgh

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**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 11 SUFFOLK COUNTY**

**PRESENT:**

Honorable Donald R. Blydenburgh

**Motion Date: 6/9/05  
Submitted: 6/22/05  
Motion No. 001, 002, 003**

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TOWN BOARD OF THE TOWN OF  
SMITHTOWN, AND THE SMITHTOWN,

Petitioners-Plaintiff,

- against -

NEW YORK STATE URBAN DEVELOPMENT  
CORP. D/B/A EMPIRE STATE DEVELOPMENT  
CORP., STATE OF NEW YORK OFFICE OF  
MENTAL HEALTH, THE NEW YORK STATE  
DORMITORY AUTHORITY, THE NEW YORK  
STATE OFFICE OF GENERAL SERVICES, THE  
STATE OF NEW YORK DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION, THE  
ARKER COMPANIES, THE ARKER  
DIVERSIFIED COMPANIES, CHEROKEE  
NORTHEAST LLC AND CHEROKEE ARKER  
KINGS PARK LLC.

Respondents-Defendant

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**PROCEDURAL BACKGROUND**

On May 27, 2005, Plaintiff-Petitioners, hereinafter referred to as "Town", appeared before this Court as the assigned special Term Part with the Defendants-Respondents, seeking to have an Order to Show Cause signed which contained a request for a Temporary Restraining Order enjoining and restraining the Defendants-Respondents from conveying title or conveying or transferring any easements over the property formerly known as the Kings Park Psychiatric Center.

Before beginning, the Court met with the attorney for the Town, both the Town Attorney and outside Counsel, the Assistant Attorney General in Charge representing Defendant-Respondents New York State Urban Development Corp. D/B/A Empire State Development Corp., hereinafter referred to as "ESD", State of New York Office of Mental Health, hereinafter referred to as "OMH", The New York State Dormitory Authority, hereinafter referred to as "NYSDA", The New York State Office of General services, hereinafter referred to as "OGS", and The State of New York Department of Environmental Conservation, hereinafter referred to as "DEC" and all of the New York State Defendant-Respondents shall hereinafter be referred to as "State", and the attorney for the Defendant-Respondent Arker Companies, and Defendant-Respondent

Arker Diversified Companies, hereinafter referred to as "Arker", the attorney for the Cherokee Northeast LLC, hereinafter referred to as "Cherokee" and the attorney for the Cherokee Arker Kings Park LLC, hereinafter referred to as "Cherokee Arker". At that conference, the Court disclosed to all present that it had served as the Smithtown Town Attorney (1983-1986) and had worked at the Kings Park Psychiatric Center (1970-1979) and did not feel that it had any problem with being fair and impartial, but would, nonetheless, recuse itself if any party so desired. Each party waived any request to recuse and expressed confidence that the Court should proceed on the issue of the Temporary Restraining Order.

Thereafter, the Court went on the record in the Courtroom and after once again disclosing the above information, all counsel waived any claim for recusal, but further stated that the Defendants-Respondents would stipulate to not transfer title to the Kings Park Psychiatric Center Property, hereinafter referred to as "KPPC", until the Court could hear the underlying motion and any cross-motions, obviating the necessity to rule on the Temporary Restraining Order.

The Court then contacted the Hon. Ralph Costello, J.S.C., the assigned Justice, to schedule when the parties could appear before him, and after some problems expeditiously hearing the parties, the parties requested that this Court retain the motion and schedule a hearing for June 9, 2005, because time was of the essence. The parties then requested an adjournment until June 20, 2005. On June 20, 2005, the parties appeared and the Court conferenced with attorneys to determine how the hearing and/or oral argument should proceed, but the parties indicated that the pleadings before the Court set forth the relevant facts which were agreed to and rendered a fact-finding hearing unnecessary. Further, the parties felt that the issues of law were clearly set forth in their respective pleadings and/or Memoranda of Law and therefore, oral argument was likewise unnecessary. There was some clarification of issues discussed but again, all parties agreed to rely on the facts and issues presented in written form. The final issue, the continuation of the Temporary Restraining Order, was agreed to between the Town and Arker and Cherokee until at least Thursday, June 23, 2005 and possibly later if the Court did not issue a decision by that time. The State, because of the logistical problem of contacting its various parties, could not consent, but did not object.

The Court in this Conference clarified the issues that parties needed decided.

## THE PLEADINGS

As referred to above, the Town sought to obtain a preliminary injunction by Order to Show Case and further sought, by Summons and Verified Petition and Complaint, a declaratory judgment and injunction pursuant to Article 78, based upon collective Defendants-Respondents for failure to comply with the provisions of The New York State Environmental Quality Review Act ("SEQRA") with respect to the sale to Defendants-Respondents Arker, Cherokee and Cherokee-Arker, property formerly known as KPPC which is currently owned by the State. The Town further seeks to (a) compel the State Respondents to undertake the required coordinated review to determine Lead Agency and "hard look" at the specific project proposed by Arker for the Kings Park Psychiatric Center as set forth in the Brownfield Clean-up Application and the adequacy of certain restrictive covenants or easements which are purportedly to be a condition of the transfer of the property enjoined upon them by law; (b) to permanently enjoin the contemplated closing of title and any transfer or conveyance of conservation easements until such time as a coordinated determination of Lead Agency and the environmental quality review mandated by SEQRA is performed; and (c) a declaration that the purported contract of sale with respect to the Kings Park Psychiatric Center is null and void and of no force and effect based on the failure to engage in the SEQRA review process and fulfill the condition precedent set forth in the contract of sale to engage in the review process mandated by SEQRA.

The various Defendants-Respondents cross-moved to dismiss the Town case Verified Petition and Complaint as time barred, and opposed the Town's request for an injunction.

#### THE FACTS

As stated above, there is little if any dispute as to the facts. The one area of dispute concerned whether or not the Defendants-Respondents Arker, Cherokee and/or Cherokee-Arker ever proposed a specific project in the Brownfield Clean-Up Application which would require a further SEQRA Process. The Defendants-Respondents unanimously deny that any specific project has yet been prepared.

The relevant facts are as follows:

The KPPC was an institution for psychiatric treatment which operated in the Hamlet of Kings Park, in the Town of Smithtown, New York until 1996. Subsequent to ceasing operations at KPPC, the State dedicated a portion of the property as a State Park, known as Nissegogue River State Park. The remaining property, approximately 380 acres, is the subject of this Action.

This property is located within an existing R-43 residential zoning district (i.e. one acre lots). The town has also adopted the Local Waterfront Revitalization Program ("LWRP") which set forth the Town's requirements for land use of property on the waterfront, a portion of which is relevant to the KPPC property.

After 1996 and prior to November of 1999, the ESD developed a program to privatize 7 properties owned by the state consisting of former State Psychiatric Treatment Center, including KPPC, by offering these properties for sale.

In or about November 1999, the ESD issued an Invitation to Bid offering KPPC as well as other properties for sale. The Town contends this is akin to an RFP and can be negotiated as to the terms and conditions by the successful bidder but the State disputed same claiming the Invitation to Bid is a device that ESD uses which is tantamount to a contract bid which terms are cast in stone and are non-negotiable.

After the Invitation to Bid was publically advertised but prior to being received, the State determined that this proposed action, the mere transfer of title from the State to a successful bidder, will have no significant adverse impact on the environment and determined that this action will result in a Negative Declaration. The State referenced that "... No specific Project Plan or Proposal for Development or a change in the type or intensity of use of the properties is currently proposed or is being considered for funding, authorization or approval by ESD. Clearly it was anticipated that if any future Specific Project Plan is proposed, same will be subject to further environmental and land use review.

No transfer or sale of the property occurred as a result of the 1999 Invitation to Bid. In February, 2003, there was a second Invitation to Bid. The Town contends that certain conservation easements and restrictions with respect to development of the KPPC property were included in the 2003 Bid that were not in the 1999 report. The State disputes this indicating that back in 1999 the property was offered with the identical easements and restrictions and the Town was well aware of this since all of these items were sent to the Supervisor of the Town each time the Invitation to Bid was sent out.

It is undisputed that there was no other SEQRA review with respect to the 2003 Invitation to Bid. The Town contends that the terms and conditions of the transfer were modified and that this required a subsequent SEQRA review. Further, that the Purchase and Sale Agreement attached to the Invitation to Bid

set as a condition precedent, SEQRA review. The State disputes same, stating that the terms and conditions of the 2003 Invitation to Bid are identical to the 1999 Invitation to Bid, (although the conservation easement may have been better described, it did not change) and the Invitation to Bid in 1999 with the Purchase and Sale Agreement was sent out prior to the SEQRA determination of a negative declaration, so of course the Purchase and Sale Agreement would be subject to said requirement, but that the 2-23, 2000 Negative Declaration resolved that issue. The reference to any further environmental review that would be required for a specific project, is appropriate subsequent to the sale and contingent upon the purchaser submitting an appropriate application to the Town for development of that property. Clearly, the State contends, at that stage, the Town would be the lead agency to determine the use of this property. There are no guarantees to the purchaser what, if any uses will be permitted by the Town and/or how much of the transferred property will be permitted to be developed by the Town. All defendants acknowledged this.

The Town contends that the State is aware of a Specific Project Plan by Arker, based upon a Brownfield Clean-Up Program Application ("BCP") which was filed with DEC. That Application seeks assistance with the cost of corrective action and remediation of the property in which reference is made to a construction project for residential and commercial purposes including 1,800 residential units. As mentioned SUPRA, all of the Defendants-Respondents deny any such specific project has been proposed and the one-sentence in the BCP application was requested but the ultimate project has yet to be proposed and will be prepared for the first time when, and if an application is prepared and submitted to the Town.

#### THE ISSUES

1. Has the Statute of Limitations on the issuance of the Negative Declaration issued on February 23, 2000 run or does the 2003 Invitation to Bid with the Purchase and Sale Agreement require a second SEQRA Action?
2. Does the 2003 Invitation to Bid change the Application by the State such that a second SEQRA Action is required?
3. Has Cherokee Arker proposed a Specific Project for the KPPC property which would require the State to do a second SEQRA Action?

In conference with the attorneys for the parties, there was general agreement that these are the sole issues for the Court to consider. There is no question that if there has been no triggering event to require a second SEQRA review, then the Statute of Limitation to review the February 23, 2000 Negative Declaration expired 4 months later, without action by Plaintiffs/Petitioners.

The Town's contention that the Arker BCP constitutes a specific project for development that would require a subsequent SEQRA review is based upon a February 11, 2004 letter to DEC which States in relevant part that "...Arker's development proposal would include a residential development of approximately 1,800 units and ancillary uses", and a reference in the application on page 6, paragraph numbered "2. Development" which reiterates the proposal for approximately 1,800 units of residential housing and ancillary uses. In paragraph numbered "3", the estimated Project Schedule states "... Construction will commence immediately upon completion of the necessary land use approval processes and environmental review." This is in line with the States contention that the Defendants-Respondents Cherokee-Arker have no specific proposal and any such proposal will be subject to the Town's zoning and land use requirements and approvals. The property is presently zoned R-43 and there is no attempt by the state to change that zoning classification and Cherokee-Arker are taking title with that understanding.

The mere reference in this application to Arker's future proposal to the Town is not sufficient to require the State to rescind its earlier Negative Declaration to the transfer of title of this property "as is where is" and to contemplate any ambiguous possible future development before the Town, who will then be in a position to better assess the impact both on the environment and the community.

It is worth noting, again, that the State's action which was determined to be a Negative Declaration referred to the transfer of title to a third party bidder. Any successful bidder would, most likely, then seek some sort of development application before the Town. The impact of the naked transfer of title has not changed by virtue of the time element.

The Town's contention that the 2003 Invitation to Bid is different than the 1999 Invitation to Bid because the 1999 Invitation did not set forth the conservation easements and the location of the 92 acres which would not be subject to conservation easements and which would be earmarked for development is incorrect. First the issue of the conservation easements, their description and location and the ultimate yield of approximately 95 acres was referenced in a November 11, 1999 press release as well as the 1999 Invitation to Bid. If anything, the final transfer has reduced the number of acres available from 95 to 92 acres.

Next, the State did not limit what the Town in its wisdom could require to remain untouched in this 92 acre area and did not grant the right to develop any of the 92 acres since it made development of any of this property subject to local zoning and building requirements.

What the Town appears to be saying is that it might be better to consider the entire future of the property now rather than when the property is owned by Arker. That is very possible. But not the legal issue here. The State should not need to contemplate any and all possible future applications to transfer title "as is, where is". That is better left to the Town who have the wherewithal to address this application when the application is made, with specifics, by Arker.

The State has, for 6 years, attempted to sell these premises, realize income from the sale of this unneeded asset and relieve itself of the need to pay Pilots to the Town. This is not a segmented process, because the entire process by the State is to transfer title "as is, where is" and no specific project is or has been pending or proposed.

The needs of all the parties is best served by permitting the transfer of this property from Defendant State to Defendants Cherokee Arker for the following reasons:

1. The State accomplishes its original articulated plan to unload unnecessary assets while preserving the vast majority of this land.
2. The purchaser, Defendants Cherokee-Arker will endeavor to remediate problems on the KPPC site.
3. The Town will take the lead in deciding how this property should or can be developed, if at all.

## DECISION

The court denies Plaintiff Town's request for a Preliminary injunction on the transfer of title to the property. The Court further determines that the original Negative Declaration dated February 23, 2000 was the only SEQRA action necessary as there has been no modification to the State's action, and no subsequent specific proposal to develop the property has been proposed, and the 2003 Invitation to Bid by ESD contained the same conservation easements and restrictions that existed and that were referred to in the February 23, 2000 Negative Declaration.

The Town's request for the Mandamus is denied, as the State did act, notified the Town of said action and the Town did not timely file an Article 78 within the required 4 month Statute of Limitations to challenge the State's determination..

Accordingly, the Town's Action is dismissed as time barred, the applicable time period to bring the Verified Petition and Com0plaint having run in June or July of 2000. The request for a permanent injunction is denied as there has been no showing that the Town has been irreparably injured. In fact, the Town will be in the best position of determining the use of these premises after the property is transferred and the purchaser's development proposal is submitted to the Town departments and/or agencies.

The foregoing constitutes the Order of this Court.

Date: 6/23/05

**DONALD R. BLYDENBURGH**

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J.S.C.

Central Islip, N.Y.