

**Suffolk Asphalt Supply, Inc. v Board of Trustees of  
Vil. of Westhampton Beach**

2007 NY Slip Op 31650(U)

June 11, 2007

Supreme Court, Suffolk County

Docket Number: 0015115/2000

Judge: Elizabeth H. Emerson

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SUPREME COURT - STATE OF NEW YORK  
**TRIAL TERM, PART 8 SUFFOLK COUNTY**

COPY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 9-27-06  
SUBMITTED: 11-29-06  
MOTION NO: 004-MD  
005-XMD

\_\_\_\_\_  
SUFFOLK ASPHALT SUPPLY, INC., X

Plaintiff,

-against-

**BRACKEN & MARGOLIN, LLP**  
Attorney for Plaintiff  
One Suffolk Square, Suite 300  
Islandia, New York 11749

BOARD OF TRUSTEES OF THE VILLAGE OF  
WESTHAMPTON BEACH and FRED SHOWERS,  
BUILDING INSPECTOR OF THE VILLAGE OF  
WESTHAMPTON BEACH,

**RICHARD T. HAEFELI, ESQ.**  
Attorney for Defendants  
48F Main Street  
Westhampton Beach, New York 11978

Defendants.

\_\_\_\_\_  
X

Upon the following papers numbered 1 to 19 read on this motion and cross-motion for summary judgment ;  
Notice of Motion and supporting papers 1-14 ; Notice of Cross Motion and supporting papers 15-19 ; Answering Affidavits  
and supporting papers \_\_\_\_ ; Replying Affidavits and supporting papers \_\_\_\_ ; it is,

**ORDERED** that this motion by plaintiff for summary judgment declaring Village of  
Westhampton Beach Local Law No. 10 of 2000 invalid and unconstitutional is denied; and it is  
further

**ORDERED** that the cross motion by defendants for summary judgment declaring  
Village of Westhampton Beach Local Law No. 10 of 2000 constitutional, is denied.

This is an action for judgment, *inter alia*, declaring that Village of Westhampton  
Beach Local Law No. 10 of 2000 is invalid and unconstitutional.

The plaintiff is the owner of real property in the Village of Westhampton Beach that  
has been used for the production of asphalt since 1946. Since the plaintiff acquired the property in  
1994, it has operated an asphalt plant thereon. The plant, which is the only such plant in operation  
in the Village, is a nonconforming use. When this action was commenced in 2000, the plaintiff's  
property was located in the Village's Industrial 1 Zoning District, in which an asphalt plant is not a  
permitted use. In 2003, the property was rezoned to Multifamily Residence 20.

In June of 2000, the Board of Trustees of the Village of Westhampton Beach adopted Local Law No. 10 amending, *inter alia*, section 197-29 (J) (3) of the Village Code to provide for the amortization of nonconforming asphalt plants as set forth below (“the amortization law”):

(a) Legislative intent.

- [1] The Board of Trustees finds that asphalt plants have been nonconforming uses in the Village of Westhampton Beach since 1985 when such uses were eliminated as permitted uses in the Industrial District. This Board further finds:
  - [a] There is only one asphalt plant in operation in the Village of Westhampton Beach.
  - [b] The existing asphalt plant is adjacent to and abuts residential property located in a resident zoning district.
  - [c] The operation adversely impacts upon the quality of the air, producing odors that cannot be eliminated.
  - [d] Other emissions are produced as a result of the operation of the asphalt plant including diesel emissions from the truck traffic generated by the asphalt plant and from the equipment operated at the asphalt plant.
  - [e] Other materials are produced that cause a residue on neighboring properties which adversely impact these properties.
  - [f] The operation of the asphalt plant also results in a substantial increase in heavy track traffic on residential streets from the early morning to the evening.
  - [g] The operation of the asphalt plant also results in a substantial increase in the noise in the neighborhood from the early morning to the evening hours.
- [2] The Board of Trustees further finds that the continued operation of the asphalt plant will adversely affect the health, safety and welfare of the residents of the Village in general and the neighboring residences in particular and that the continued operation of the asphalt plant will adversely affect neighboring property values.

[3] Based upon the foregoing findings, the Board of Trustees has determined that in order to preserve and protect the health safety and welfare of the residents of the Village, and to preserve and protect the property values in the Village the continued use of the asphalt plant should be discontinued and that said operation should be terminated upon the following provisions.

(b) Termination.

[1] The right to operate and maintain a nonconforming asphalt plant shall terminate one year from the date this subsection is adopted unless, within the time specified, the owner or mortgagee or both appeal to the Zoning Board of Appeals to extend the termination date for an additional period of time not to exceed five years from the date this subsection is adopted.

[2] In the event that an appeal is taken to a court of competent jurisdiction from any of the provisions of this amortization section or from any decision of the Zoning Board of Appeals, the period of termination set forth above shall continue to run during said appeal.

(c) Notice of termination.

[1] Upon the adoption of this subsection, the Building Inspector shall serve a notice of termination upon the owner of the real property and the mortgagee, if any, of any mortgage on real property, notifying them that the operation of the asphalt plant shall terminate on the date specified in the notice. The notice shall further state that the owner or mortgagee, or both, may, within 60 days of the date the notice is served, file an application with the Zoning Board of Appeals for an extension of the termination date.

[2] If no such application is filed within the time set forth herein, it shall be presumptive proof that the termination date set forth in said notice is reasonable and that the nonconforming asphalt plant has been fully amortized, and the use shall terminate on the date specified in the notice.

[3] The notice of termination shall be sent by certified mail, return receipt requested, to the owner of the real property at the address set forth on the most recent tax rolls of the Village and to any mortgagee at the address set forth on any recorded

mortgage.

- [4] In the event that the certified letter is not accepted by the owner, the posting of a copy of the notice on the property and the mailing of a copy by regular mail to the owner's address shall be deemed sufficient notice.

(d) Hearing.

- [1] Upon the filing of an application, the Zoning Board of Appeals shall schedule a public hearing to determine the termination date.
- [2] The Zoning Board of Appeals shall be entitled to retain such experts and others it deems necessary to assist it in its review.
- [3] The applicant shall have the burden of establishing the right to continue the operation of the asphalt plant beyond the date set forth in the termination notice.
- [4] The Zoning Board of Appeals shall consider the following factors, among others, in making its determination:
  - [a] The value of the land without the buildings, fixed equipment, fixed structures and other fixed capital improvements existing on the property and used in the production of asphalt as of the date it was acquired by the present owner.
  - [b] The value of all the buildings, fixed equipment, fixed structures and other fixed capital improvements existing on the property and used in the production of asphalt as of the date the asphalt plant became a nonconforming use.
  - [c] The value of all the buildings, fixed equipment, fixed structures and other fixed capital improvements used in the production of asphalt as of the date the present owner acquired the property.
  - [d] The value of all buildings, fixed equipment, fixed structures and other fixed capital improvements used in the production of asphalt that were added pursuant to a valid building permit subsequent to the date the present owner acquired the property.

- [e] The value of all additions, modifications and alterations made to buildings, fixed equipment, fixed structures and other fixed capital improvements used in the production of asphalt that were added pursuant to a valid building permit subsequent to the date the present owner acquired the property.
  - [f] The depreciation of buildings, fixed equipment, fixed structures and other fixed capital improvements used in the production of asphalt taken for income tax purposes by the present owner.
  - [g] The effect the operation of the asphalt plant has upon property values in the area.
  - [h] The character of the neighborhood.
  - [I] The environmental effects the asphalt plant has upon the neighborhood.
- (c) Standing. Any resident of the Village and the Board of Trustees shall have the standing and the right to intervene in any hearing before the Zoning Board of Appeals.
- (f) Invalidity. If any section, subsection or other portion of this section is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not effect the validity of the remaining portions thereof.

The amortization law provides that the right to operate and maintain a nonconforming asphalt plant shall terminate after one year unless the owner obtains an extension from the Zoning Board of Appeals ("the ZBA") for a period not to exceed five years from the date of adoption of the law. On or about June 26, 2000, the plaintiff received a notice of termination requiring that it cease operations by July 2, 2001. This action followed. On August 21, 2000, the plaintiff filed a timely application with the ZBA to extend the one-year amortization period. While that application was pending, the plaintiff moved for a preliminary injunction enjoining the ZBA from holding a hearing on its application for an extension. The plaintiff argued in support thereof that the amortization law was unconstitutional on its face because it did not provide adequate standards to guide the ZBA's determination, that the amortization period was unreasonable, and that the ZBA lacked jurisdiction to conduct the hearing. By order dated December 3, 2001, this Court (Emerson, J.) denied the plaintiff's motion. While noting that "the jurisdiction of the ZBA is appellate 'unless otherwise provided by local law' (Village Law § 7-712-a [4])," the court found that the local law had "specifically delegate[d] authority to the ZBA to conduct a hearing with respect to the plaintiff's application for an extension of time." Hearings commenced on May 16,

2002, and continued through March 17, 2005, as negotiations took place to have the asphalt plant relocated to nearby property. Finally, on May 19, 2005, the ZBA issued a determination that the plaintiff had received a complete return on its investment and that it was required to terminate its asphalt operation by July 2, 2005. The May 19, 2005, determination is the subject of a separate article 78 proceeding (*Suffolk Asphalt Supply v Zoning Bd. of Appeals of Vil. of Westhampton Beach*, Suffolk County Clerk's Index No. 05-13020 [decided herewith]).

The plaintiff moves for summary judgment declaring the amortization law invalid and unconstitutional, and the defendants cross-move for summary judgment declaring the amortization law constitutional.

It is axiomatic that a court should avoid dealing with a constitutional question if it can make a dispositive determination on another appropriate ground (*see, Matter of Beach v Shanley*, 62 NY2d 241, 476 NYS2d 765 [1984]). Thus, the Court will first address the plaintiff's argument that the law is invalid because the ZBA was without jurisdiction to hear and determine its application to extend the one-year amortization period. The plaintiff contends, in relevant part, that Village Law § 7-712-a (4) gives a zoning board of appeals appellate jurisdiction that is limited to hearing and deciding appeals from, and reviewing determinations of, administrative officials charged with the enforcement of local laws "[u]nless otherwise provided by local law." When the amortization law was adopted, section 197-74 of the Village Code, entitled "Power of review of orders and decisions," provided only that the ZBA "shall have the power to review any order or decision of the officer designated to enforce this chapter made in connection with this chapter." Consequently, plaintiff argues that the ZBA did not have jurisdiction to hear and determine an application to extend the amortization period. The defendants counter that, because this argument was previously rejected by the Court (Emerson, J.) in its December 3, 2001, order denying the plaintiff's motion for a preliminary injunction, the plaintiff is precluded from raising it again by the doctrine of law of the case. In any event, Municipal Home Rule Law § 10 and Village Law § 7-712-a clearly authorize the Board of Trustees to adopt a local law granting jurisdiction to the ZBA to hear and consider any application for an extension of the amortization period.

As a preliminary matter, the Court notes that the defendants may not properly invoke the doctrine of law of the case, which does not apply to the denial of a motion for a preliminary injunction (*e.g., Town of Concord v Duwe*, 4 NY3d 870, 799 NYS2d 167 [2005]). Nevertheless, the Court is constrained to reject the plaintiff's argument. Although Village Law § 7-712-a grants local zoning boards appellate review power only, its prefatory language, *i.e.*, "[u]nless otherwise provided by local law or ordinance," allows local governments to delegate original jurisdiction over certain designated matters through local legislation. Here, section 197-29 (J) (3) (d) of the Village Code specifically delegates authority to the ZBA to hear, consider, and determine an application to extend the one-year amortization period. Contrary to the plaintiff's contention, the fact that section 197-74 did not enumerate this power at the time the amortization law was adopted is of no moment. The Court is aware of no authority requiring that a power be so enumerated before it is delegated by local law or ordinance. Accordingly, the plaintiff cannot successfully challenge the ZBA's exercise of jurisdiction.

Turning to the constitutional question, the plaintiff contends that the amortization

law is unconstitutional both on its face and as applied. The Court is doubtful that any meaningful distinction exists between a facial and an as-applied challenge under the facts of this case since it does not appear that there are any circumstances under which the Village may enforce the ordinance against someone other than the plaintiff. In any event, given the general rule that “a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court” (*Broadrick v Oklahoma*, 413 US 601, 610, 93 S Ct 2908, 2915 [1973]; *accord*, *People v Parker*, 41 NY2d 21, 390 NYS2d 837 [1976]; *Matter of Daniel C.*, 99 AD2d 35, 472 NYS2d 666, *affd* 63 NY2d 927, 483 NYS2d 679 [1984]), the Court will first consider whether the law can be constitutionally applied to the plaintiff under the facts of this case (*see*, *People v Stuart*, 100 NY2d 412, 765 NYS2d 1 [2003]).

A municipality may enact a local law or ordinance reasonably limiting the duration of a nonconforming use by means of an amortization period at the conclusion of which the nonconforming use must end (*e.g.*, *Village of Valatie v Smith*, 83 NY2d 396, 610 NYS2d 941 [1994]). The validity of an amortization period depends on its reasonableness, *i.e.*, whether it is sufficient to give the property owner a fair opportunity to recoup his investment in the use (*id.*; *Matter of Town of Islip v Caviglia*, 73 NY2d 544, 542 NYS2d 139 [1989]). An amortization period is presumptively valid. However, a court will declare an amortization law unconstitutional as applied to a property owner if the owner is able to overcome the presumption by establishing that the loss he suffers as a result of the removal of the nonconforming use is so substantial that it outweighs the public benefit gained by the legislation (*id.*; *Modjeska Sign Studios v Berle*, 43 NY2d 468, 402 NYS2d 359 [1977], *appeal dismissed* 439 US 809, 99 S Ct 66 [1978]; *Matter of Harbison v City of Buffalo*, 4 NY2d 553, 176 NYS2d 598 [1958]). In determining what constitutes a substantial loss, a court will consider the nature of the surrounding neighborhood, the value and condition of the improvements on the premises, the nearest area to which the owner may relocate the business, the cost of such relocation, as well as any other reasonable costs that bear on the kind and amount of damages the owner may sustain (*id.*). Conversely, if the enforcement of an amortization law or ordinance causes relatively slight and insubstantial loss to the property owner, the law will be deemed constitutional (*id.*, at 563, 176 NYS2d at 605; *People v Miller*, 304 NY 105, 108 [1952]). An owner need not be given the time necessary to recoup his investment entirely (*Suffolk Outdoor Adv. Co. v Hulse*, 43 NY2d 483, 402 NYS2d 368 [1977], *appeal dismissed* 439 US 808, 99 S Ct 66 [1978]; *Modjeska Sign Studios v Berle*, *supra*).

The Court finds that the plaintiff has failed to make a prima facie showing warranting the entry of a judgment in its favor. Although there was testimony and other evidence before the ZBA that the plaintiff made a substantial investment in equipment and other improvements prior to the enactment of the amortization law, the record is devoid of certain proof, including the amount of such investment and the useful life of the improvements, necessary to determine the existence or dimension of the claimed loss (*see generally*, Collins, *Methods of Determining Amortization Periods for Nonconforming Uses*, 3 Wash U J L & Pol’y 215 [2000]). Moreover, the plaintiff has not met its burden of establishing, prima facie, that the standards set forth in section 197-29 (J) (3) (d) (4) are impermissibly vague. While the law allows for the consideration of both listed and unlisted factors and for the exercise of discretion on the part of the ZBA in weighing those factors, it is not so imprecisely worded as to permit unfettered discretion or

encourage arbitrary enforcement (*see, People v Stuart, supra; Morgan v Town of W. Bloomfield*, 295 AD2d 902, 744 NYS2d 274 [2002]). Absent a conclusive finding that the law is unconstitutional in its application to the plaintiff, the Court will not proceed at this juncture to consider the plaintiff's facial challenge to the law.

The defendants' showing is likewise deficient. Notwithstanding the plaintiff's failure to overcome the presumption of constitutionality on its motion, such failure does not relieve the defendants of the burden on their motion to affirmatively prove the reasonableness of the amortization period (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *see generally, Village of Valatie v Smith, supra; Modjeska Sign Studios v Berle, supra*). "Zoning ordinances, [though] presumed constitutional," must be "*reasonably* related to the achievement of \* \* legitimate [governmental] purposes" (*McMinn v Town of Oyster Bay*, 66 NY2d 544, 548-549, 498 NYS2d 128, 130-131 [1985] [emphasis added]). The defendants have not met their burden. Instead, they rely on evidence that the plaintiff paid \$980,000 for the property in 1994, that the amount of depreciation taken by the plaintiff with respect to the plant from 1994 through the first half of 2000 was \$608,802, that the various improvements to the plant were made without obtaining permits or approvals from the Village, and that the defendants' 2004 appraisal valued the property at \$5.6 million (following the rezoning of the property for multifamily use). Based on this evidence, the defendants assert that the business was fully depreciated as of the date of the ZBA's determination and that the property is currently worth substantially more than the plaintiff's own estimates of the value of its business. Accordingly, the defendants contend that the plaintiff cannot claim that the value of its property was destroyed. However, without proof of the amount of the plaintiff's investment in equipment and other improvements and the useful life of such equipment and improvements, proof of the amount depreciated is insufficient to determine whether enforcement of the amortization law would cause only slight and insubstantial loss. Moreover, the defendants have not established whether any of the improvements required the issuance of permits or approvals and, if so, whether the failure to obtain a permit or approval would constitute a legitimate basis for excluding the value of such improvement from a computation of the plaintiff's investment. Finally, regarding the current value of the property, it does not appear to this Court why the value of the property, as distinguished from its use, is relevant to the question of reasonableness or why the plaintiff should not be permitted to recoup its investment in the use of the property without regard to any profit it might realize from the sale of the property. Consequently, the Court finds that there is an issue of fact as to the reasonableness of the amortization period, requiring that the matter proceed to trial.

**HON. ELIZABETH HAZLITT EMERSON**

DATED: June 11, 2007

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J. S.C.