SHORT FORM ORDER

INDEX # 20446-06
RETURN DATE: **11-15-06**
MOT. SEQ. # **001 & 002**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. **PETER FOX COHALAN**

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GREENS AT HALF HOLLOW LLC.

Plaintiff,

-against-

TOWN OF HUNTINGTON and TOWN BOARD OF THE TOWN OF HUNTINGTON,

Defendants.

----------x

CALENDAR DATE: April 4, 2007
MNEMONIC: Mot D.; XMot D.

PLTF'S/PET'S ATTORNEY:

Harras, Bloom & Archer
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Melville, NY 11747

DEFT'S/RESP ATTORNEY:

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Huntington Town Attorney
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Huntington, NY 11743

Upon the following papers numbered 1 to 35 read on this motion and cross motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1-15; Notice of Cross-Motion and supporting papers 16-35; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other _____; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the Town of Huntington, for summary judgment and/or dismissal of the plaintiff's action pursuant to CPLR §3212 and CPLR §3211 (a)(4) and (a)(5) and the cross-motion by the plaintiff for summary judgment on its complaint seeking a declaration of its rights with regard to a price adjustment mechanism in connection with a development project know as the "Greens at Half Hollow" (hereinafter "Greens") is hereby decided as follows.

The Greens is a planned unit development ("PUD") and constitutes the largest residential development project in the Town of Huntington (hereinafter "Town"). The Greens consists of a 1,144 unit residential development for occupancy by persons 55 years and older located in Melville, Suffolk County on Long Island, New York. The Greens comprises 383 acres of land on the former site of the Long Island Development Center and was re-zoned from R-80 (2 acre residential) to a PUD for this project. The proposed development was to be a senior residential community with part of the development to constitute "affordable" housing. This action under Index #20446-06 is one of a number of related actions presently pending before this Court under Index #14517-06, 17515-06 and Index #27910-05 which all involve issues surrounding the planned development of the Greens housing complex. The origin and historical background of the numerous lawsuits and motions on this case and the related matters arise because the plaintiff's project has encountered a significant number of problems and complaints centering on drainage, grading, construction of a community center and other site plan improvements not successfully completed in accordance with the approved site plan.

In the present case before this Court, the Greens proposed development included 400 units which were to be considered "affordable", of which 100 of those units were to be offered to the public, as alleged by the Town, at a sale price of $125,000 with federal and town subsidies. The language used within the Greens Environmental Impact Statement ("GEIS") provided in paragraph 6:

> "The proposed development includes 400 condominium units which are considered to be affordable. 300 of these units will have a sale price of $175,000.00. In addition, the Applicant proposes an innovative affordable housing program which includes 100 condominium units, the majority of which will be two-bedroom units, placed in an affordable program. Eligibility of buyers relative to the program's 100 units will be subject to income levels and other means testing. Contemporaneously with the sale of each of the program's 100 affordable units, the Applicant [Greens] will pay the sum of $25,000 (totaling a maximum of 2.5 million) into a dedicated housing trust fund. ... Both the program and the fund will be administered by the Town of Huntington, the Long Island Housing Partnership, and/or their designees " [Town's motion, Exhibit H].

These units would be subject to income levels and means testing. The Town Resolution 2000-661, dated September 12, 2000, adopted the findings of the Final Greens Environmental Impact Statement ("FGEIS") and contained within the document at subdivision C, subparagraph a under "affordable housing" provided in part for "400 condominium units offered at a price of $175,000 and under. One hundred of those condominium units reduced in price from $175,000 to $125,000." The offering as set forth within the plan was stated:

> "100 of these condominium units will be reduced in price from $175,000 to $150,000-$145,000, which with subsidies can be offered to the buyer at $125,000. Those subsidies will either be obtained from available state and federal sources or underwritten by the developer." [Movant's papers, Exhibit C].

The present action and dispute arose from the Town's claim that the Greens did not conform to the plan and failed to build the affordable housing in a timely manner and now proposes to adjust the price upward from the proposed $125,000 to a range of $145,000 - $165,000. The Greens states the affordable housing price of $125,000 was a base line pricing in 1999 dollars as set forth in their FGEIS and that a price adjustment is necessary and it was the Town's actions in objecting to the proposed pricing plan that resulted in the delay in building the 100 "affordable" units. The Town contends that the Greens delayed the "affordable" units project to increase the profit margin and raise the cost.

The plaintiff instituted the present lawsuit with the service of a summons and complaint on the Town alleging three (3) causes of action. The first cause of action seeks declaratory judgement relief in the nature of a judicial declaration of the respective rights of the parties with regard to the 100 "affordable" condominium units and a judicial determination of the adjustment pricing mechanism setting forth the pricing of the 100 "affordable" units to be built. The second cause of action alleges "tortuous interference" with the affordable housing program by the defendant, Town, and the third cause of action requests a permanent injunction requiring compliance by the Town with the affordable housing program. The Town's answer denies the substance of the Greens allegations.

The Town now moves for summary judgment and dismissal of the plaintiff's action pursuant to CPLR §3212 (seq. #001) on the grounds that the plaintiff was obligated to construct the 100 on-site affordable housing units and offer them at a price of $125,000, and that the plaintiff's failure to construct the affordable units should not be rewarded with a cost adjusted price increase. The Town also seeks to dismiss the complaint pursuant to CPLR §3211 (a)(5) arguing that the plaintiff's action is barred by the statute of limitations and must fail because it falls within the four month limitation period for bringing an action against the Town's administrative determination on the affordable housing and further under CPLR §3211 (a)(4) that there is another action pending *i.e.* Town of Huntington v. S.B.J. Associates, LLC., The Greens et al. under Index #14517-05, the main action before this Court dealing with the site plan requirements and various development issues involving the Greens development project, including the failure to build the affordable housing.

The plaintiff cross-moves for summary judgment pursuant to CPLR §3212 (seq. #002) on its first (1st) cause of action seeking a judicial declaration that the "affordable" units are subject to a price adjusting mechanism and a Court determination after a hearing setting forth the proper pricing mechanism. The plaintiff also denies the substance of the Town's allegations in support of the Town's motion to dismiss the plaintiff's action.

For the following reasons, the Town's motion for summary judgement and dismissal of the plaintiff's action pursuant to CPLR §3212 is granted in part as to the second and third causes of action alleging tortuous interference and permanent injunctive relief and is denied as to the first cause of action seeking a judicial declaration. The plaintiff's cross-motion for summary judgment pursuant to CPLR §3212 is granted to the extent that the Court makes a judicial declaration that the pricing adjustment mechanism is valid and the development plan submitted to the Town on the "affordable" units contained a price adjusting mechanism and the plaintiff was not dilatory in its failure to construct the "affordable" units in 2003 because of the Town's prior objections to the pricing plan. This matter will be placed on the Court's calendar on April 29, 2008 for a hearing to determine the proper pricing mechanism and price of the "affordable" units with the presentation of evidence from both sides on the price adjustment mechanism and formula to calculate price and the setting of a time line for construction of the "affordable" units not yet completed. The Court will also hear evidence by the Town on delay

in construction, if any, by the Greens resulting in the price adjustment mechanism penalty for the delay.

The present controversy concerns the pricing of the "affordable" housing set aside of 100 units as called for within the plans of the Greens and ratified by the Town in Resolution 2000-661, dated September 12, 2000. The Town argues that the plan encompassed the 100 units being offered for $140,000 and with Federal and Town subsidies set forth in the housing trust, the price of these 100 "affordable" units would be sold for $125,000 per unit. The Greens does not deny the pricing scheme but claims that because of a time lag between the proposal and the project actually being built, there was a pricing adjustment mechanism contained within the proposal based upon 1999 dollars.

The Town and the Greens both move for summary judgment pursuant to CPLR §3212 both arguing that the Town resolution and accompanying documentation support their respective positions that there was or was not a price adjustment mechanism contained within the structure of the "affordable" housing units. The Court, upon review of the Town Resolution 2000-661, the accompanying documentation as well as the draft GEIS, the final GEIS attached to the Town Resolution and the supporting documents, finds that the price structure for the Greens contained a price adjustment mechanism based upon the language within the documentation presented wherein the pricing structure of the project is projected in 1999 dollars.

The Draft Generic Environmental Impact Statement in paragraph six (6) sets forth the following:

> "In order to insure a mix of seniors with varied interests, backgrounds and economic resources, the project's various housing types will be offered at different price levels. Housing prices will range from $145,000-$175,000 for condominiums to $275,000 for townhouses and $375,000 for golf course villas (***in 1999 dollars)***. [emphasis added] ...
>
> The proposed development includes 400 condominium units which are considered affordable. 300 of these units will have a sale price of $175,000. In addition the Applicant proposes an innovative affordable housing program which includes 100 condominium units, the majority of which will be two-bedroom units placed in the affordable program."

The Town's argument and analysis of the proposed price structure is a too narrow reading of the price structure suggesting that the reference to the 1999 dollars figure upon which computation should occur refers only to the sale structure of the units not comprising the affordable housing program. The Court disagrees. Even in the final resolution of the Town (2000-661) with the State Environmental Quality Review Act (SEQRA) findings incorporating the GEIS, it is noted that

> "Although the term 'affordable' was not subject to uniform definition by the various speakers, the term generally included a spectrum of affordability ranging from 'starter homes' to non age restricted housing for individuals with 'very low incomes' and 'low incomes' as defined by HUD." [Town's motion Exhibit D, p.4]

While the final GEIS attached to the Town Resolution 200-661 provides under paragraph C. (1)(a) denoted as affordable housing "100 of those condominium units reduced in price from $175,000 to $125,000" with available subsidies, this provision does not retract from the pricing structure of calculations based upon a 1999 dollar cost analysis. In fact, the final GEIS carries the price structure in 1999 dollars forward wherein it states:

> "Housing prices will range from $125,000-$175,000 for condominiums to $275,000 for townhouses and $375,000 for golf course villas (in 1999 dollars)." Greens cross motion, Exhibit B, paragraph 6, p.10.

To suggest otherwise contradicts good business sense and would require this Court to ignore the language in the documentation submitted that refers to pricing in 1999 dollars. The question is not the price adjustment mechanism built in to the affordable unit scheme but the Greens delay in construction of the proposed units to such an extent that a penalty built into the pricing structure should apply for its failure to build the units in a timely fashion as required. The Greens argues, however, that this intervention and objection by the Town to the State Attorney General in its offering as to the pricing structure impeded the Greens' ability to construct the affordable housing in a timely manner.

The Town's objection notes that had the affordable units been constructed first as contemplated under the pricing structure as set forth within the 2000 resolution, the selling price would have been greatly reduced from what the plaintiff now seeks to charge. However, some of this delay may be attributable to the Town's intervention when it was informed that the pricing structure was based upon 1999 dollars and its subsequent objection and intervention with the State Attorney General on the Offering Plan of the Greens. In this regard and undercutting the Town's argument is the statement from of the Long Island Housing Partnership, which was charged with assisting in the administering of the affordable housing plan wherein it noted:

> "Using the formulation and the CPI increase from 1999 to 2004, the Housing Partnership agrees that the adjusted price of $140,000 for the affordable units at the Greens at Half Hollow is reasonable and affordable to low/moderate-income households. In arriving at this conclusion, the Housing Partnership considered only the CPI increase since 1999 and affordability criteria." [Greens, cross motion, exhibit H].

Clearly, the consensus and documentation provided establish that the GEIS and Town Resolution 2000-661 contained the understanding that a price adjustment mechanism was in place to ensure not only affordable housing but a price structure which would change dependent upon when the units would be constructed and made available for sale. However, the Court in determining the price structure to be levied on the 100 "affordable" units at the hearing scheduled must be concerned also with the need presented in the documentation in the SEQRA findings and the Town Board submission that

> "To meet the identified need for affordable senior housing, the Town Board finds that (the) affordable housing units must be constructed during the first start-up stage of the proposed development project." (Town's motion, Exhibit D, paragraph C(1)(a) pp4-5.

Thus, the Court will look at the delay and determine which party should be charged with any delay in establishing any pricing mechanism and determining the selling price of the 100 affordable units now to be constructed. CPLR §3212 (c) provides a mechanism for the Court to order an immediate trial on the issue of the proper pricing mechanism to use and set forth the price of the "affordable" housing units consistent with the Greens plan in its declaration and whether or not some or all of the delay in the construction of the affordable units should have an impact on the pricing structure for or against either party to this action.

As to the Town's ancillary arguments under its alternative requested relief in the motion that the action is barred by CPLR §3211(a)(5) because the plaintiff failed to bring this action within four months of the Town's administrative action or CPLR §3211 (a)(4) that another action is pending before this Court, these aspects of the motion are denied in their entirety. The four month statute of limitations in CPLR §217(1) is only applicable to an Article 78 proceeding challenging a final administrative action. The action before the Court is a declaratory judgment action seeking a declaration of the validity of a price adjustment mechanism allegedly built into the Greens project and is not time barred under CPLR §217 (1). See, ***Janiak v. Town of Greenville***, 203 AD2d 329, 610 NYS2d 286 (2nd Dept. 1994). The claim that there is another action pending is also unavailing. While the main action in this case

under Index # 14517-06 deals with the Greens project and seeks compliance with the Greens master plan, site plan requirements and the zoning change, there being eight motions now *sub judice*, those issues involve site plan deficiencies separate and distinct from the issue presently before the Court. At issue here is a judicial declaration on the legitimacy of a price adjustment mechanism in determining the market value and selling price of the 100 "affordable" units. While the Town's action in that case raises the issue of the Greens promptly constructing the 100 "affordable" units as part and parcel of its failure to comply with the master plan, it is an ancillary matter not involving the price adjustment mechanism involved in the judicial declaration brought forth in this action by the Greens.

Finally, the Town runs afoul of CPLR §3211 (e) which provides in part that:

> "Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) [of CPLR §3211] is waived unless raised either by such motion or in the responsive pleading."

As to the Town's motion for summary judgment pursuant to CPLR §3212 on the plaintiff's second (2nd) and third (3rd) causes of action which allege, respectively, tortious interference and injunctive relief based upon the alleged tortious interference, the Court grants that aspect of the Town's motion for summary judgment and dismisses the plaintiff's second (2nd) and third (3rd) causes of action.

The Court finds that the Greens has not made out a case for tortious interference under the second (2nd) cause of action and that cause of action is dismissed. It is well settled that to sustain a tortious interference claim the plaintiff is required to demonstrate that there was an "***unlawful***" interference by improper means or a lawful interference with intentional harm done without justification or excuse. See, ***Bogdan v. Peerskill Community Hospital***, 211 AD2d 692, 622 NYS2d 292 (2nd Dept. 1995). The premise behind a claim of tortious interference is that the Town engaged in a "wrongful means" in interfering with the affordable housing program. ***McNaughton v. City of New York***, 234 AD2d 83, 650 NYS2d 688 (1st Dept. 1996). This conduct by the Town must be more than "merely negligent" or incidental to some other lawful purpose. ***Harris v. Town of Fort Ann***, 35 AD3d 928, 825 NYS2d 804 (3rd Dept. 2006). Here, in the case at bar, the Town questioned the pricing mechanism of the plaintiff to the State Attorney General based upon an understanding that the price of the affordable housing program and the 100 units would be $140,000 reduced to $125,000 per unit with the Federal and Town subsidies. The fact that the parties disputed the contract language and questioned the "good faith" of the developer in his pricing and the fact that the Town resolution noted that the affordable senior housing would be constructed during the first start up phase and it was not, all support the Town's right to question the developer's pricing mechanism.

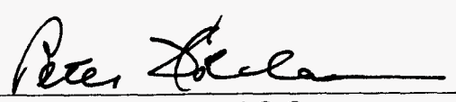
Thus the Town's actions in objecting to the plaintiff's pricing mechanism and calling for a return to the $125,000 price per affordable unit and requiring a start up of the affordable housing in the first phase as opposed to the last phase does not constitute unlawful

interference or intentional harm without justification such as to warrant a claim of tortious interference. For those reasons, the second (2nd) cause of action is dismissed. By the same token, the plaintiff's third (3rd) cause of action which seeks permanent injunctive relief based upon this allegation of tortious interference also fails and that cause of action is also dismissed.

Accordingly, the Court grants the plaintiff's motion in part. The Court states that there is present within the project known as the Greens a pricing mechanism applicable not only to the market value of the residential units but also to the sale of the "affordable" units as set forth within the plans, the Town resolution and related documents. However, the pricing mechanism for the affordable units and the delay in the project require the presentation of additional proof to the Court to assist in arriving at a final price to be determined on the "affordable" units. In this respect, the Court will hear testimony from the Town, the Greens and the Long Island Housing Partnership. The Court will also take into account during the hearing whether the price adjustment for the "affordable" units should reflect any delay in construction by the plaintiff and whether that delay should be offset as against the final sale price of each of these units. The Town's cross-motion for summary judgment and dismissal of the plaintiff's action is granted in part and denied in part. The Town's motion directed at the second (2nd) and third (3rd) causes of action alleging tortious interference and injunctive relief is granted and those causes of action are dismissed. That aspect of the Town's motion for summary judgment directed to the first (1st) cause of action in which plaintiff seeks a declaratory judgment is denied as stated in the body of this opinion and order.

The foregoing constitutes the decision of the Court.

Dated: March 5, 2008



J.S.C.