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Index No: 35162/07

SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY

PRESENT:
HON. JOSEPH C. PASTORESSA

Motion R/D: 12/17/07
Adj. Date: 5/14/08
Mot Seq: #002-**MD**
#003-**MG**
#004-**Mot-d**

THE TOWN BOARD OF THE TOWN OF BABYLON, and THE TOWN OF BABYLON,

Petitioner(s)-Plaintiff(s),

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and §3001 of the Civil Practice Law and Rules

-against-

THE NEW YORK STATE DEPARTMENT OF TRANSPORTATION,

Respondent(s)-Defendant(s).

ATTYS FOR PLAINTIFF(S):
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LAUREL R. KRETZING, ESQ.
JOHN C. FARREL, ESQ.
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GARDEN CITY, NY 11530

ATTYS FOR DEFENDANT(S):
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NEW YORK, NEW YORK 10271

This is a hybrid proceeding pursuant to CPLR Article 78, whereby the petitioner/plaintiff, Town of Babylon, (hereinafter "Town"), challenges the respondent/defendant, New York State Department of Transportation's (hereinafter "DOT") determination that its plan to relocate Taxiway Bravo (hereinafter "Taxiway Project") at Republic Airport, Farmingdale, New York from its current location 200 feet west of Runway 1-19 to a location 300 feet off the runway would have no significant impact on the environment. The Town seeks a judgment vacating and annulling the DOT's issuance of a negative declaration on July 16, 2007 for the Taxiway Project, pursuant to the State Environmental Quality Review Act (hereinafter "SEQRA"). The Town alleges that DOT failed to comply with SEQRA's prohibition against segmentation and failed to take a "hard look" and make a reasoned evaluation of the Taxiway Project's impact on the environment together with the cumulative impacts of the unified development plan set forth in the DOT's Master Plan Update and Airport Layout Plan (hereinafter "ALP"). In addition, the Town seeks a declaratory judgment declaring the DOT to be in breach of a stipulation of discontinuance between the parties dated November 1990 regarding the DOT's environmental review of future construction projects and/or improvements at Republic Airport. Moreover, the Town seeks a preliminary and permanent injunction enjoining the DOT from proceeding with the Taxiway Project pending compliance with SEQRA. The DOT cross-moves to dismiss the petition on the grounds that: (1) the court lacks subject matter jurisdiction; (2) the claims are barred by the statute of limitations; (3) the claims are barred by the doctrines of collateral estoppel and res judicata; and (4) the petition and complaint fail to state a cause of action upon which relief can be granted.

Republic Airport is located in East Farmingdale in the Town of Babylon, Suffolk County, New York and is owned and operated by the DOT as a public air transportation facility pursuant to

New York State's Transportation Law (Article 15, §400 et seq.) and is certified by the Federal Aviation Administration (hereinafter "FAA"). Republic Airport contains 535 acres, has two runways, Runway 14/32 and Runway 1/19 and accommodates approximately 500 based aircrafts of varying types and sizes. Republic Airport holds a "limited" or "general aviation" operating certification, which is different than an "air carrier in airports", such as Kennedy, LaGuardia and MacArthur airports, which serve commercial aircraft with more than 30 seats on fixed schedules. Republic Airport is required to operate the airport in compliance with all applicable federal laws, rules and regulations in order to obtain federal funding and has been identified by federal, state and local governments as an asset in the event of a disaster. The DOT in November 1989 submitted and received approval for an ALP from the FAA, which is required in order to receive federal funds. The ALP is a map of existing airport facilities and proposed land uses. Many airport projects, including the proposed project presently before the court, require FAA approval, which has established standards for airport design to insure the safety of an airport. The proposed Taxiway Project has, in fact, already been recommended, approved, and funded by the FAA.

By way of background, in or about 1985 the DOT undertook a study upon which to base a master plan update for Republic Airport, which, in November 1989, resulted in a document called the "Republic Airport Master Plan Update-Final Report" (hereinafter "MPU"). The MPU consisted of a 20 year plan regarding projects to be implemented for Republic Airport. The DOT concluded that the adoption and implementation of the MPU would have no significant adverse effect on the environment and issued a negative declaration pursuant to SEQRA. The Town filed a lawsuit in 1990 challenging that determination, but the action was settled with the parties entering a stipulation of discontinuance in November 1990 (hereinafter "1990 stipulation"). The 1990 stipulation stated, inter alia, that "the State has withdrawn its Negative Declaration and intends to issue a revised Master Plan Update which will be subject to environmental review in accordance with ECL Article 8 and the applicable regulations". Thereafter, on May 14, 2001, the DOT issued a positive declaration that the "Finalization and Implementation of the Master Plan Update" may have a significant effect on the environment and that a draft generic environmental impact statement will be prepared. The DOT drafted environmental impact statements in connection with the MPU and sought public comments, however, no draft environmental impact statement was ever completed and the DOT subsequently abandoned the MPU.

Turning back now to the instant proposed project to relocate a taxiway, the negative declaration pursuant to SEQRA was issued on behalf of the DOT, as lead agency, by Michael Geiger, who was, at the time, the Airport Director for the DOT, and a New York State professional engineer. Attached to the negative declaration notice was a Full Environmental Assessment form (hereinafter "EAF") which contained a description of the project as follows:

> "The proposed project includes relocating the existing Taxiway Bravo 300 feet from the centerline of Runway 1-19. Currently the separation distance between Taxiway Bravo and Runway 1-19 is 200 feet. The relocated taxiway will run parallel to Runway 1-19 the distance from threshold of Runway 1 to the threshold of Runway 19. Existing connector Taxiway B-3 and B-4 will be removed as part of this project. All other existing connector taxiways will be reconstructed. The type of work in this project includes, but is not limited to, excavation and embankment, construction of bituminous concrete pavement, taxiway lighting and guidance signs, installation of drainage, pavement demolition and removal, pavement markings and marking removal."

Mr. Geiger's affidavit states that the "purpose of the relocation is to extend the distance

between the center lines of one of the Airport's two runways, Runway 1/19, and Taxiway Bravo, to meet FAA safety standards. The FAA has long considered the project a first priority because Taxiway Bravo's current configuration does not meet FAA minimum safety standards for minimizing the potential for ground collisions between aircraft of any type and size".

On a motion pursuant to CPLR §7804 (f) to dismiss a petition, only the petition is to be considered and all of its allegations are deemed to be true (Albi v Cmty. Bd. No. 2, 17 AD3d 459, 459). When considering a motion to dismiss pursuant to CPLR §3211(7), the court must accept as true the facts as alleged in the complaint and afford the plaintiff the benefit of every possible inference in determining whether the complaint states any legally cognizable cause of action (see, Town of Riverhead v County of Suffolk, 39 AD3d 537). However, "it is well settled that bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action" (Hartman v Morganstern, 28 AD3d 423, 424).

The Town's first cause of action avers that the DOT's approval of individual projects contained in the MPU and the ALP before completion of an environmental review of the MPU constitutes impermissible segmentation in violation of SEQRA and a breach of the 1990 stipulation. The Town argues that the 1990 stipulation obligates the DOT to complete an environmental review of the MPU before approving individual construction projects contained in the MPU and the ALP. The Town argues that the DOT's issuance of a positive declaration under SEQRA for the MPU demonstrates that the parties intended that the DOT was to prepare a draft environmental impact statement (hereinafter "DEIS") for the MPU and that despite the Town's repeated request to do so, the DOT has failed to adopt a DEIS. The DOT argues that these alleged claims that the proposed project violates SEQRA and constitutes a breach of the 1990 stipulation are barred by the doctrines of res judicata or collateral estoppel. The DOT claims that over the past 18 years the Town has advanced the very same argument in numerous unsuccessful legal challenges wherein the courts rejected the Town's proposition that the DOT may not review other projects for environmental impacts until it develops and adopts a single long range plan for Republic Airport. Additionally, the DOT avers that the Town's claim of a breach of the 1990 stipulation is without merit based on a plain reading of the stipulation. Namely, that the 1990 stipulation does not require the DOT to implement a MPU and, thus, the DOT's subsequent issuance of a positive declaration under SEQRA when the DOT proposed drafting the MPU is moot in light of a change in circumstances causing the DOT to abandon the MPU. Critically, the DOT argues that such abandonment was entirely within the DOT's legal rights, and nowhere proscribed or prohibited in the prior stipulation.

The court will address first the Town's argument that the proposed project is in breach of the 1990 stipulation. A stipulation is no different than any other contract and is necessarily governed by the standard rules of contract law. "Where, as here, the contract is clear and unambiguous on its face, the intent of the parties must be gleaned from within the four corners of the instrument, and not from extrinsic evidence" (Rainbow v Swisher, 72 NY2d 106, 110). When determining the true intent of the parties, the court must look to the plain meaning of the words used by the parties (see, Pukilman v 31st Ave, Realty Corp., 39 AD3d 812). Here, a plain reading of the 1990 stipulation does not state that the DOT is required to adopt or implement a master plan update . The 1990 stipulation states, inter alia, that "the State has withdrawn its Negative Declaration and intends to issue a revised Master Plan Update which will be subject to environmental review in accordance with ECL Article 8 and the applicable regulations". Critically, the stipulation provides only precatory language such as "it *intends* to issue a revised Master Plan" rather than such mandatory language as shall or must(emphasis supplied). In this regard, the court notes that this was a stipulation crafted by counsel on both sides in the context of a commercial litigation. To read into a stipulation entered into nearly 20 years ago, an obligation on the part of the DOT to mandatorily adhere to a MPU ad infinitum,

precluding projects such as the one before the court, proposed nearly 20 years later, without regard for any potential change in circumstances, would be a draconian interpretation. If the Town wanted to bind the DOT to a MPU in futuro, leaving the DOT without recourse, regardless of changed circumstances, than it should have included strong mandatory language to that effect. In the absence of such mandatory language requiring the DOT to implement or adopt the MPU, the Town's claims that the DOT breached the 1990 stipulation is without merit. Parenthetically, the court notes, and the Town concedes, that the adoption of a MPU is not mandated by any state or federal law. While the Town has questioned the circumstances surrounding the DOT's decision to abandon the MPU, and raised the question of a possible nefarious motivation on the part of the DOT to circumvent any comprehensive environmental review, the Town has not presented any support for this contention, other than mere speculation and conjecture, and, again, the Town concedes that there is no federal or state law mandate against discretionary abandonment of a MPU (cf., 1 Salkin, New York Zoning Law and Practice §4:04 [4th ed 2001]).

The court will now address the Town's arguments regarding SEQRA violations of alleged "segmentation" raised in the first and third causes of action, and the alleged failure of the DOT to take a "hard look" at the Taxiway project, raised in the Town's second cause of action . Specifically, the Town's petition avers that the DOT failed to consider the environmental impact from an alleged putative increase in flights facilitated by the proposed Taxiway Project. The Town's petition further avers that Taxiway project would be "inconsistent with the Town's Master Plan and Zoning Code, which is to develop the 110 corridor for commercial, retail and office uses, the full implementation of which is inconsistent with further expansion or intensification of Republic Airport for commercial airport uses based upon height restrictions imposed by the DOT". The Town submits in support the affidavit of Brian Zitani, the Waterways Management Supervisor for the Town of Babylon's Department of Environmental Control who claims that "[a]lthough the form EA prepared by the DOT asserts that the Taxiway Project is consistent with the Town's comprehensive planning any intensification of airport use restricts the Town's efforts to develop this area in a coherent manner. In particular, the building height limits in the Commercial Overlay District are at odds with the Airport's plans which limit the height of buildings which in turn make it difficult for the Town to evaluate office building proposals submitted to it under Commercial Overlay District." The Town further avers via attorney affirmation that the DOT in the EAF failed to consider the potential environmental impact of water runoff and drainage flow from the Taxiway Project, and argues that the DOT's failure to determine the impact of the surface water of the Taxiway Project is evidence of the DOT's failure to take a hard look at the environmental impact of the entire project. The DOT indicated in the EAF that the surface water from the Taxiway project would have no significant environmental impact, and counters that neither the petition nor the petitioner's affidavits in support identify any specific infirmities in the DOT's environmental review of the project. The DOT contends that the petition and the affidavit of Mr. Zitani fail to establish a nexus between the proposed project and the height of buildings near the airport. The DOT avers that runways and not taxiways dictate the direction and altitude of incoming and outgoing traffic. The DOT takes issue with Mr. Zitani's averment in his affidavit that once the capability of Republic Airport is increased to handle more flights in the case of a disaster, it could be used for any purpose. The DOT counters that the taxiway project is designed to meet current runway safety area standards and the operation of aircraft will not change. In addition, that there will be no increase in the capacity of the airport or the ability of larger aircraft to operate at the airport. Furthermore, the affidavit of Mr. Geiger of the DOT avers that there will be no change in surface water flow or drainage other than it will occur 100 feet further from the runway.

"The law is well settled that judicial review of a SEQRA determination is limited to determining whether the challenged determination was affected by an error of law or was arbitrary

and capricious, an abuse of discretion, or was the product of a violation of lawful procedure. In reviewing the lead agency's determination, the court must determine whether the lead agency 'identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination'. In this regard, 'it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively'" (Matter of Village of Tarrytown v Planning Bd. of Vil. Sleepy Hollow, 292 AD2d 617, 619). Here, the DOT in preparing the EAF identified the relevant areas of environmental concern and took the "hard look" at them and made a reasoned elaboration of the basis for its determination (Matter of Village of Tarrytown v Planning Bd. of Vil. of Sleepy Hollow, supra; Matter of Town of Babylon v New York State Department of Transportation, 47 AD3d 721; Matter of Town of Babylon v New York State Department of Transportation, 33 AD3d 617). Specifically, the DOT in the EAF looked at the impact of the following categories: land, water, air, plants and animals, agricultural land, aesthetic resources, historic and archaeological resources, open space and recreation, critical environmental areas, transportation, energy, noise and odor, public health, and the growth and character of the community or neighborhood. The petition and supporting affidavits fail to allege any infirmities to substantiate that the DOT failed to take a hard look at the project. The Town's averments that the proposed project is inconsistent with the Town's Master Plan and Zoning Code and that the building height restrictions impede their ability to evaluate proposed buildings is unfounded in light of the DOT's uncontroverted affidavit of Mr. Geiger that the project will not increase the number or size of the aircraft at the airport, and that runways and not taxiways dictate the direction and altitude of incoming and outgoing traffic. Moreover, the Town failed to rebut Mr. Geiger's uncontroverted affidavit that the purpose of the Taxiway Project is to meet current runway safety area standards and that the operation of aircraft will not change. Furthermore, the Town's averments by counsel regarding the DOT's alleged failure to consider the impact of the surface water of the project on the environment were speculative and were not supported by an expert.

Finally, the court finds without merit the Town's argument that the DOT's failure to consider the cumulative impacts of the Taxiway Project and other projects contained in the MPU and the ALP before completion of the environmental review under SEQRA constituted impermissible segmentation in violation of SEQRA. The DOT contends that the issue of segmentation is barred by the doctrine of res judicata based on two prior Appellate Division cases involving the DOT and the Town, namely in the Matter of the Town of Babylon et al. v New York State of Department of Transportation and Northeastern Aviation, et al, supra and the Matter of the Town of Babylon, et al. v New York State of Department of Transportation, Talon Air, Inc., supra, wherein the Appellate Division rejected the Town's claims of segmentation for those particular projects. The Town argues that while the Appellate Division held that there was no segmentation in those cases (Northeast and Talon) it does not necessarily mean that there was no segmentation in this case which challenges a different DOT determination and constitutes a separate "action" as that term is defined by the SEQRA regulations.

"[P]rinciples of res judicata require that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" (Xiao Yang Chen v Fischer, 6 NY3d 94, 100). "The party seeking to invoke the doctrine of res judicata must demonstrate that the critical issue in the instant action was decided in the prior action and that the party against whom estoppel is sought was afforded a full and fair opportunity to contest such issue" (Luscher v Arrura, 21 AD3d 1005, 1008). Whether or not the instant controversy meets the strictures of a res judicata bar, there clearly have been several prior appellate level cases wherein the identical argument advanced by the Town was rejected, and the projects in those cases approved over the identical ground for objection

raised by the Town herein, namely, that a comprehensive environmental study pursuant to an implemented plan was a sine qua non for discrete unrelated projects at the airport. Even if the issue of segmentation was not subject to collateral estoppel or not barred by the doctrine of res judicata, the prior appellate cases would be persuasive, if not controlling, stare decisis. The court finds that the DOT has established that they did not violate SEQRA in allegedly segmenting its review of the challenged project from the MPU and the ALP (see, Matter of Town of Babylon v New York State Department of Transportation, supra; Matter of Town of Babylon v New York State Department of Transportation, supra; Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven, 80 NY2d 500; Matter of Village of Tarrytown v Planning Bd. of Vil. of Sleepy Hollow, supra). The challenged project is a discrete endeavor, involving in essence the movement of a taxiway only 100 feet and remaining within the existing footprint of the airport. Under no reasonable view of the record can it be said that this project should require, as the petitioner's argue, a wholesale review of the Master Plan Update before going forward, and the DOT has clearly established that it took the requisite "hard look" necessary before proceeding. Accordingly, it is

ORDERED, that the court grants the entry of judgment in favor of the respondent/defendant dismissing the petition/complaint; and it is further

ORDERED, that the petitioner/plaintiff's relief for a preliminary injunction and permanent injunction are denied as moot; and it is further

ORDERED, that the temporary restraining order is vacated.

DATED: September 16, 2008

HON. JOSEPH C. PASTORESSA, J.S.C.

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