Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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TOWN OF HUNTINGTON,

Plaintiff,

-against-

COUNTY OF SUFFOLK,

Defendant.

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INDEX NO.: 21265/2005
MOTION DATE: 1/4/2007
MOTION NO.: 001 MD
002 MOT D

PLAINTIFF'S ATTORNEY:
BARTLETT, McDONOUGH, BASTONE & MONAGHAN, LLP
81 Main Street, Fourth Floor
White Plains, New York 10601

DEFENDANT'S ATTORNEY:
CHRISTINE MALAFI
Suffolk County Attorney
100 Veterans Memorial Highway
Hauppauge, New York 11788

Upon the following papers numbered 1 to 78 read on this motion for preliminary injunction and cross-motion to dismiss complaint : Notice of Motion/ Order to Show Cause and supporting papers 1-21 ; Notice of Cross Motion and supporting papers 26-48 ; Answering Affidavits and supporting papers 22-25; 51-68 ; Replying Affidavits and supporting papers 49-50; 69-78 ; ~~Other~~ ___ ; and after hearing counsel in support of and opposed to the motion; it is,

ORDERED that the motion (motion sequence no. 001) of plaintiff Town of Huntington, brought on by order to show cause (COSTELLO, J.) dated September 9, 2005, for an order granting the Town a preliminary injunction pursuant to CPLR §6301 enjoining the County of Suffolk to assume responsibility for repairing and maintaining certain roads within the Town of Huntington and staying the litigation of an assertedly related action, *Hastings v County of Suffolk, et al.*, Index No. 29367/03, is denied in accordance with the oral decision of the undersigned from the Bench; and it is further

ORDERED that the pre-answer cross-motion (motion sequence no. 002) of defendant County of Suffolk for an order dismissing plaintiff's complaint and denying the plaintiff's motion is determined as follows.

Plaintiff Town of Huntington (the "Town") commenced this action against the County of Suffolk (the "County") for a judgment declaring, *inter alia*, that certain enumerated roads within the Town[1] are "county roads" within the meaning of Highway Law §3(4), and that the County of Suffolk has the sole and exclusive responsibility, duty and obligation to improve, maintain and repair such roads as part of the "county road system" of the County of Suffolk pursuant to Highway Law §3 and Article 6. The Town's order to show cause for a preliminary injunction requiring the County to immediately assume responsibility for the improvement, maintenance and repair of the subject roads, and permitting the Town to cease and desist from issuing work permits with respect to the subject roads, was denied on the record upon the oral argument held before the

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[1] County Road ("CR") 2 – Dixon Avenue/Straight Path/Lower Half Hollow Road; CR 4 -- Commack Road/Town Line Road/Bread & Cheese Hollow Road; CR 5 -- Ruland Road/Colonial Springs Road; CR 9 -- Cuba Hill Road/Greenlawn-Huntington Road; CR 28 -- New Highway; CR 35 – Deer Park Avenue/Park Avenue/Mill Dam Road/West Shore Road.

undersigned, the Court having reserved decision with respect to the County's pre-answer cross-motion to dismiss plaintiff's complaint pursuant to CPLR R. 3211(a)(4), (5) and (7).

As a preliminary matter, the Court determines to treat defendant's cross-motion as a motion for summary judgment pursuant to CPLR R. 3211(c), without prior notice, it being apparent from the submissions that there are no disputed issues of material fact, and that the sole issue to be determined herein is the meaning and interpretation of the relevant provisions of the Highway Law, which can be determined by the Court as a matter of law (*O'Hara v Del Bello*, 47 NY2d 363 [1979]). Moreover, it is apparent from the voluminous and detailed submissions in support of and in opposition to the motions that the parties have "laid bare their proof" in their respective submissions and essentially "charted a summary judgment course" (*id.; O'Dette v Guzzardi*, 204 AD2d 291 [2d Dept 1994; *Four Seasons Hotels, Ltd. v Vinnik*, 127 AD2d 310 [1st Dept 1987]). In moving to dismiss plaintiff's complaint defendant obviously intended that its motion would be dispositive of this matter, and plaintiff's attorney has conceded that this action is "one on the law, and...could probably be determined on the papers before the Court" (Tr. of oral argument, p. 8). Upon careful review and consideration of the parties' submissions, the voluminous record and the applicable statutes, case law and other authorities, the Court denies defendant's cross-motion to dismiss the complaint and, upon searching the record, grants summary judgment to plaintiff.

The Town of Huntington's Action for a Declaratory Judgment

This action arises out of the statutory scheme of Highway Law Article 6,which provides for the construction, reconstruction and maintenance of a "county road system" with the use of state and county moneys comprising the "county road fund"[2] (Highway Law §114).[3] The statute provides for the creation of an official map of the county road system, and further provides that upon approval and filing of the map, only those roads set forth on the map are eligible to receive county road fund moneys (Highway Law §115). The submissions reflect, and the parties acknowledge, that under this scheme, County Roads 2, 4, 5, and 9 were "pledged" into the county road system in 1930 and County Roads 28 and 35 were "pledged" into the county road system in or around 1936 and 1978, respectively. It is undisputed that all of the subject roads appear on the official map of the county road system as "county roads" and are prominently identified to the public as such by signage.[4]

The submissions reflect that the County of Suffolk has, from time to time, expended funds from the county road fund for the construction, reconstruction, repair and maintenance of various

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[2] The fund also includes moneys collected from towns for the construction of town highways pursuant to Highway Law Article 8 (§§194 and 195).

[3] The Highway Law was repealed in its entirety and wholly reenacted in 1929. The Highway Law was thereafter amended and the reenacted law, as amended, was first published in 1936 in McKinney's Consolidated Laws of New York. With the reenactment, the statutory scheme with respect to "county road systems" and the funding and maintenance responsibility therefor was significantly changed from the prior version of the law.

[4] The most recent map of the county road system for Suffolk County is dated July 1988.

roads pledged into the county road system, including roads located within the Town of Huntington. It is undisputed, however, that for a period in excess of 70 years, the Town of Huntington has continued to maintain and repair those county roads within its borders, citing public safety concerns and the failure or refusal of the County to undertake such repairs or maintenance.

In recent decades, and most recently in October 2003, the Town has formally requested that the County undertake such repair/maintenance responsibility as to particular county roads within the Town, but the County, citing fiscal restraints, has refused. In the face of its own fiscal concerns (as well as concerns about liability), the Town of Huntington has now commenced this action, seeking an interpretation of the provisions of the Highway Law that govern the county road system and a judgment declaring that the responsibility and obligation for repairing and maintaining all of the roads within the county road system belongs exclusively with the County, and that the Town be relieved of its self-imposed responsibility for the repairs and maintenance that it has undertaken in the face of the County's historical abdication of its statutory duties.

The Town's argument is substantially grounded in Highway Law §3, entitled "Classification of Highways," and Article 6, entitled "County Roads." Highway Law §3(4) states: "County roads are those roads constructed, improved, maintained and repaired under article six of this chapter and roads constructed or improved under a general or special law, *which are maintained by the county*" [emphasis added]. "Town highways," on the other hand, "are those constructed, improved or *maintained by the town* with the aid of the state or county, under the provisions of this chapter, including all highways in towns, outside of incorporated villages constituting separate road districts *which do not belong to either of the two preceding classes* [the two preceding classes being "county roads" and "state thruways"[5]; emphasis added] (Highway Law §3(5)).

The Town argues that because County Roads 2, 4, 5, 9, 28 and 35 are indisputably part of the county road system pursuant to Highway Law §115, they are "county roads" within the meaning of Highway Law §3. As county roads, they are expressly excluded from the definition of "town highways," and the County is charged with the statutory duty of maintaining and repairing them. The Town also argues that the subject roads were never abandoned to the Town pursuant to Highway Law §115-a or removed from the county road system pursuant to Highway Law §115-b, so that the responsibility for maintaining the roads never reverted to the Town as provided therein. Moreover, the Town notes, no notice of any such abandonment or removal of County Roads 2, 4, 5, 9, 28 and 35 has ever been provided to the Town as required by Highway Law §115-c.

The foregoing provisions of the Highway Law, argues the Town, unequivocally establish the County's statutory obligation to maintain the subject roads. Moreover, the Town argues, that statutory obligation cannot be waived notwithstanding the Town's having voluntarily undertaken the task for many decades.

The County's Motion to Dismiss Plaintiff's Complaint

The County seeks to dismiss plaintiff's complaint on various grounds. First, it argues,

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[5] "State thruways are those highways specified and described in section three hundred forty-nine-a of this chapter, constructed, improved or reconstructed as provided in such section" (Highway Law §3(3)).

plaintiff's action, although "inartfully" framed as an action for a declaratory judgment, actually seeks mandamus relief, because it seeks to "compel the County of Suffolk to perform an action which includes assumption of the responsibility, duty, obligation and expense of improving several roadways located within the Town of Huntington" (Def's Memo. of Law, p. 4). Plaintiff's action is therefore untimely because the Town's demands that the County repair the subject roadways were made in the 1980s and 1990s, with the most recent request having been made in October 2003. Such demands, the County argues, are well outside the four-month statute of limitations for an action in the nature of mandamus, and accordingly are time-barred. Moreover, the County argues, plaintiff has not demonstrated the "ministerial nature" of the requested action or a "clear legal right to the requested relief." Accordingly, it argues, "mandamus will not lie" and the action must be dismissed.

As to the substance of plaintiff's claims, the County argues that the Highway Law provisions of Article 6 are nothing more than an "appropriations vehicle" that enables towns to receive county and state funds for the repair and maintenance of town highways, which retain their essential character as town highways, notwithstanding that they have been pledged into the county road system. The County relies on Highway Law §111, which provides that the county "*may* appropriate and contribute to the county road fund," and §114(5), which provides that "where and to the extent that moneys are available in the county road fund to pay for the cost of any expenditure which may be charged to and paid from the county road fund, such expenditures shall be charged to the county road fund." Thus, argues the County, any contribution by the County to the county road fund is purely discretionary, and where no moneys are available in the county road fund, the County is not mandated by the statute to undertake the cost of maintaining town roads that are part of the county road system.

In addition, the County relies on an assortment of vintage cases and more recent opinions of the State Attorney General which assertedly confirm that the statute is merely a funding mechanism and the County merely a conduit for those funds. Chief among these is *Macrum v Hawkins* (261 NY193 [1933]), a Court of Appeals case cited for its observation that "the chief, if not the only purpose of section 320-b [the predecessor to §115 of Highway Law Article 6] is to empower the board of supervisors to build county roads and receive State aid therefor. Properly to achieve this end power is given to establish a joint road fund, containing State and county moneys; to impose limitations and duties in respect to the use of such funds; and otherwise to govern the methods and manner of county road construction." Defendant also cites *Matter of Herman L. More* (207 AD 79 [3d Dept 1923]) and *Wilson v Board of Supervisors* (152 Misc 645 [Sup Ct Oneida Cty 1934]), which conclude, under the then-existing version of the Highway Law, that the towns maintain the obligation to maintain roadways and bridges constructed or repaired with aid from the county road fund.

In particular, the County cites Attorney General Opinion 91-2 for the proposition that the Town continues to hold title to town highways even after they have been transferred into the county road system pursuant to Highway Law §115 (1991 NY Op Atty Gen (Inf) 1003). (The Court notes that the Town does not expressly refute this contention regarding "ownership" of the roads, but argues that it is "inapposite to the issue of whether the County has thereby assumed control and responsibility for maintaining the roads which were made part of the County Road System by placing them on the map" [Aff. of Edward J. Guardaro, Jr. dated 2/15/06, ¶36]). The County also cites Attorney General Opinion 86-69 as stating the principle that the county road

system involves the appropriation of funds from the county road fund for the construction, reconstruction or maintenance of the county road system (1986 NY Op Atty Gen (Inf) 132). Finally, the County quotes Highway Law §219(1) as ostensibly "foreclosing the argument" that any of the Highway Law sections relied on by the Town require the County to independently maintain roadways in the county road system: "'Town highway' shall mean highways constructed, improved or *maintained by the town* with the aid of the state or county, under the provisions of the highway law [emphasis added]." The County argues that the roads did not lose their essential character as "town highways" notwithstanding their inclusion on the map of the county road system, and that the burden of maintaining and repairing these "town highways" remains with the Towns, which continue to own the roads.

In addition, the County argues that inasmuch as no unexpended funds for maintenance of roadways within the Town of Huntington have been appropriated by the Suffolk County Legislature, the Town is precluded from the recovery it seeks.

As a final argument, the County urges that the complaint should be dismissed as there is a prior action pending between the parties involving the same issues involved in this action. The County is referring to *Katie Hastings v The County of Suffolk, Town of Smithtown and Town of Huntington* (Index No. 29367/2003), a personal injury action arising out of a motor vehicle accident on Town Line Road (County Road 4), in which the ownership, maintenance and repair of the road is a contested issue among the defendants. (The submissions reflect that the road is the subject of a 1988 agreement between the Town of Huntington and the Town of Smithtown allocating maintenance responsibilities for the road between the two municipalities.[6])

Analysis and Determination

The Court declines the County's somewhat contrived and circuitous invitation to construe plaintiff's action as in the nature of mandamus and then to determine that mandamus "will not lie." The Town has plainly and properly labeled its action as one for a declaratory judgment (Ver. Complaint, ¶1), which is indisputably a proper vehicle for determining the legality or meaning of a statute where no question of fact is involved (*Dun & Bradstreet, Inc. v City of New York*, 276 NY 198 [1937]). Such an action has as its purpose the "quieting or stabilizing [of] a uncertain or disputed jural relation" as to either present or prospective obligations (*New York Foreign Trade Zone Operators, Inc. v State Liquor Authority*, 285 NY 272 [1941], and accordingly, no statutory limitation on the bringing of such actions is imposed (*Kirn v Noyes*, 262 AD 581 [3d Dept 1941]). Moreover, plaintiff has not waived its declaratory judgment remedy by waiting until 2005 to commence its action, as the mere lapse of time in asserting a right or claim is insufficient to support a defense of laches in the absence of prejudice to the defendant (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801 [2003]), which has not been demonstrated herein. Accordingly, plaintiff's action for a declaratory judgment is both timely and substantively and procedurally proper, and the Court may properly determine the parties' respective obligations and responsibilities for the maintenance of "county roads" within the Town of Huntington pursuant to Highway Law §3 and Article 6.

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[6] The Court notes that contrary to the characterization of the agreement provided by defendant, the agreement annexed to defendant's cross-motion as Exhibit O is not a "sworn agreement."

In interpreting a statute, which has at its root the discernment of the intent of the legislature, the Court looks first to the plain meaning of the statute *(Majewski v Broadalbin-Perth Cent. Sch. Dist.*, 91 NY2d 577 [1998]). If a statute is unambiguous and clear on its face, the Court must give effect to its plain meaning (*Pultz v. Economakis*, 10 NY3d 542 [2008]). All parts of a statute are required to be construed together to determine its fair meaning, notwithstanding the division of the statute into sections, chapters or titles (McKinney's Cons Laws of NY, Book 1, Statutes, §130).

In reviewing the provisions of Highway Law §3 and Article 6, in the context of the entirety of the Highway Law, the Court is constrained to agree with plaintiff that the Highway Law plainly and unequivocally places the burden of maintenance of roadways that are part of the county road system on the County.

Highway Law §3 delineates the five classes of highways existing in New York State after the repeal and reenactment of the Highway Law in the early 1930s. These classes comprise "state highways," "controlled access highways," "state thruways," "county roads," and "town highways."[7] The statute expressly excludes from the class of "town highways," which are maintained by the towns, those highways within towns that are classed as "county roads," and plainly states that such "county roads" are maintained by the County.

The legislative intent to exclude town roadways that are county roads from the definition of "town highways" is buttressed by Highway Law §219, which, quoted in its entirety, provides as follows: "'Town highway' shall mean highways constructed, improved or maintained by the town with the aid of the state or county, under the provisions of the highway law, including all highways in towns, outside of incorporated villages constituting separate road districts, *except* state highways, *county roads*, parkways, thruways and controlled access highways as defined by the highway law" [emphasis added]. The Court notes that the County conveniently excised the latter part of the provision – and its significant import – in purporting to quote the statute in its memorandum of law (Def's Memo. of Law, p. 22). Further evidence of the legislative intent to distinguish "town highways" from "county roads" is found in Highway Law §187, which addresses the construction of a highway on the line between two towns or wholly in one town but adjacent to another town. That statute provides that where the highway is partly within a city and "is on the county road system of town highways proposed to be constructed pursuant to the provisions of article six of this chapter," the county and city may agree to share the responsibility for such improvement, "*and the county shall improve and maintain the portion of such highway allotted to it as a part of the county road system of the county*" [emphasis added].

Although the County argues that the Town's responsibility for maintaining its town highways did not change merely because certain such highways were pledged into the county road system, the County's argument is not supported by the statute. The County has not identified a single provision of the Highway Law that differentiates between "county roads" that were formerly town highways and "county roads" that were not. The Court's own research has not identified a statutory basis for imposing different maintenance responsibilities on the municipalities predicated on that distinction. Certainly, if the legislature had wanted towns to

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[7] The former class of "county highways" was eliminated and folded into the class of "state highways" (Highway Law §3(1); *People v Wolf*, 153 Misc 230 [Nassau Cty Ct 1934]).

continue to maintain town highways pledged or transferred into the county road system, it could have expressly so provided. The fact that it did not suggests that the County's perceived distinction is in fact a distinction without a difference.

Moreover, even the authorities cited by defendant do not support its arguments (if they are quoted accurately and completely). The early cases cited by the County predated the repeal and reenactment of the Highway Law, which eliminated the distinction between "county highways" (which were abolished and reclassified as "state highways") and "county roads," and substantially changed the funding and maintenance scheme for the former town highways that became part of the county road system (*Hemmingway v Town of Dannemora*, 269 AD 221 [3d Dept 1945]). With respect to town highways improved under former Highway Law §§320 and 320-a (which became §§194 and 195), the responsibility for maintenance remained with the towns. Where, however, the highways had been incorporated into the county road system pursuant to former Highway Law §320-b (which was reenacted as Article 6 of the present Highway Law), responsibility for the maintenance of the highways was "cast upon the county" (*Hemmingway, supra*, 269 AD at 223; see also *People v Wolf*, 153 Misc 230 [Nassau Cty Ct 1934]). Under the present statutory scheme, construction and reconstruction of county roads is required to be carried out under the immediate direct supervision of the county superintendent (Highway Law §117), who has "supervision of all roads and bridges comprising the county highway system" (Highway Law §102(1)). Responsibility for "town highways," as defined in Highway Law §3 and §219, remains with the towns, and funding by the county for the improvement of such town highways is discretionary (Highway Law §§111, 194 and 195).

Many of the statutory provisions that were the subject of those early cases cited by defendant are substantively different from the current version and accordingly are not applicable to the instant action, other than for the historic overview they provide. In any event, they do not change the fact that the present statute, on its face, reflects that it is far more than the mere "funding conduit" that the County attempts to characterize it as, and in fact, is a comprehensive mechanism for centralizing highway construction, reconstruction and maintenance under the exclusive jurisdiction and supervision of the County.

The various opinions of the Attorney General that were selectively quoted by the County do not support – and when read in their entirety in fact flatly contradict – the County's position regarding the County's maintenance obligations for town highways that were transferred into the county road system pursuant to Highway Law §115. Attorney General Opinion 91-2, in a portion not quoted by the County, unequivocally states that "the county is responsible for the upkeep and maintenance of the highways which are part of the county road system." Attorney General Opinion 86-69, in a provision also not quoted by the County, states that "Section 102 of the Highway Law charges the county superintendent of highways [in Suffolk County, the Commissioner of Public Works] with the duty to construct, improve, repair and maintain all county roads within the county." The opinion further states that: "The fact that a portion of a county road may lie within an incorporated village...has no bearing on whether it must be maintained by the county superintendent of highways. The determinative factor is whether the highway is part of the county road system, or whether the county is otherwise obligated or authorized to maintain it" (1986 NY Op Atty Gen (Inf) 132).

The County also cited Attorney General Opinion 2003-2, which it described as "somewhat

confused" because of its conclusion that "Highway Law §115 sets forth the proper procedure for transfer of supervision and control of roads and that after such transfer, *the county is responsible for maintaining the roads*" (2003 NY Op Atty Gen (Inf) 1004). In light of the clear and unequivocal language of the authorities cited and relied on by the County, the County's assertion that the County does not have the obligation to maintain county roads that are part of the county road system is itself either "somewhat confused" or merely an exercise of lawyerly legerdemain.

In addition, the Court takes judicial notice of the County's official website (http://www.co.suffolk.ny.us/Home/departments/publicworks/roads.aspx), which identifies all but two of the roads that are the subject of this action as "Suffolk County Maintained Roads" (*i.e.*, CR#4, Commack Road; CR#35 Deer Park Road/Park Avenue; CR#2, Dixon Avenue/Straight Path; CR#28, New Highway), thus undermining the County's arguments. Moreover, the home page of the Department of Public Works states that: "The Department of Public Works constructs, maintains and operates county properties and *designs, constructs and maintains county roads*" and goes on to note that "Suffolk County is responsible for snow removal *on county roads only*." Nothing in the County's website differentiates between "county roads" that were pledged into the county road system by the towns and "county roads" that were not.

Perhaps most significant, the County utterly fails to address plaintiff's arguments regarding the statutory "opting-out" mechanism provided by Highway Law §§115-a and 115-b. The former statute provides that where a county road constructed as part of the county road system deviates from the line of an existing town highway or former town highway within an incorporated village, the County may abandon the unused portion of the town highway to the town or village, and that any such excluded portions "*shall be maintained by the town or village in which it is located*" [emphasis added]. The latter statute provides that the county can remove a road or part of a road from the county road system, which thereupon reverts to the town in which it is situated "*and thereafter shall be maintained by said town or towns...in the same manner as other town highways...are maintained*" [emphasis added]. The necessary implication of the "reversion" of maintenance responsibility to the town or village after the roadway's abandonment or removal from the county road system is that prior to such abandonment or removal from the county road system, the road is not required to be maintained by the town or village. That is manifestly because, as expressly provided by Highway Law §3, the maintenance of county roads that are part of the county road system is solely and exclusively that of the County.

As to the County's argument that the *Hastings* case bars plaintiff's claim, the Court finds that there is not such an identity of issues between the two cases as to preclude plaintiff from maintaining the instant action (CPLR R. 3211(a)(4); *Diaz v Philip Morris Cos., Inc.*, 28 AD3d 703 [2d Dept 2006]). In any event, the records of this Court reflect that the *Hastings* matter was settled before the Hon. Arthur G. Pitts on August 9, 2007; accordingly, defendant's demand for dismissal pursuant to CPLR R. 3211(a)(4) is academic (*id.; Nakazawa v Horowitz*, 50 AD3d 985 [2d Dept 2008]).

In light of the foregoing, and upon searching the record, the Court finds that the plaintiff is entitled to summary judgment as a matter of law; and it is declared that, as set forth in Highway Law §3 and Article 6, the County is responsible for repairing, maintaining and reconstructing County Roads 2, 3, 5, 9, 28 and 35; and that no such statutory burden is imposed upon the Town of Huntington for the repair and maintenance of the afore-cited roadways. (The Court notes that, although plaintiff's motion for a preliminary injunction purported to seek restitution for amounts paid by the Town to maintain the subject roads in the past, no such relief was sought in plaintiff's

complaint. Accordingly, plaintiff's request for such relief is denied.)

Settle judgment.

Dated: July 2, 2009

PAUL J. BAISLEY JR.

J.S.C.