

**Harriman Estates at Aquebogue Loc v Town of  
Riverhead**

2012 NY Slip Op 31932(U)

June 27, 2012

Supreme Court, Suffolk County

Docket Number: 10-44846

Judge: John J.J. Jones Jr

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

**PRESENT:**

Hon. JOHN J.J. JONES, JR.  
Justice of the Supreme Court

MOTION DATE 1-26-11  
MOTION DATE 3-23-11  
ADJ. DATE 2-29-12  
Mot. Seq. # 001 - continued  
          # 002 - MD  
          # 003 - MD

HARRIMAN ESTATES AT AQUEBOGUE  
LOC, and HARRIMAN ESTATES  
DEVELOPMENT CORP.,

Petitioners/Plaintiffs,

- against -

TOWN OF RIVERHEAD, TOWN BOARD OF  
THE TOWN OF RIVERHEAD, and PLANNING  
BOARD OF THE TOWN OF RIVERHEAD,

Respondents/Defendants.

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Upon the following papers numbered 1 to 115 read on this hybrid article 78 petition and complaint for declaratory judgment and motions to dismiss; Notice of Petition/Complaint and supporting papers 1 - 23, 55 - 75; Notice of Motion/ Order to Show Cause and supporting papers 24 - 26, 27 - 54; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 76 - 97, 98 - 107; Replying Affidavits and supporting papers 110 - 113, 114 - 115; Other, memorandum of law, 108 - 109; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by the respondent Planning Board of the Town of Riverhead for an order pursuant to CPLR 3211 (a) (1), (a) (7), and CPLR 7804 (f) dismissing the petition/complaint on the grounds that the claim is barred by Town Law § 282, that the claim violates the rule against perpetuities, and that Real Property Law § 335 (3) does not create a cause of action for refund, is denied; and it is further

**ORDERED** that this motion by the respondents Town of Riverhead and Town Board of the Town of Riverhead for an order pursuant to CPLR 3211 (a) (1), (a) (5), (a) (7), and CPLR 217 (1)

dismissing the petition/complaint, is denied; and it is further

**ORDERED** that the respondents are directed to serve and file their answers to the petition/complaint, and to file a certified return, within 10 days of service of a copy of this order with notice of entry; and it is further

**ORDERED** that pursuant to CPLR 7804 (f), any party may re-notice this matter for hearing upon appropriate notice.

In this hybrid CPLR article 78 proceeding and action for declaratory relief, the petitioners/plaintiffs (petitioners) seek, *inter alia*, a judgment 1) vacating and setting aside the determination of defendant/respondent, Town Board of the Town of Riverhead (the Board), set forth in Resolution # 675, adopted October 5, 2010, which denied petitioners' request for a refund of fees paid to the defendant/respondent, Town of Riverhead (Town), pursuant to an approved subdivision of the petitioner's property; 2) compelling the Town to refund said fees; and 3) declaring that any provisions of the Town Code of the Town of Riverhead (Code) which would permit the Town to retain those fees to be unconstitutional.

The petitioners were the owners of certain real property, consisting of approximately 57 acres of unimproved land, located on the north side of Hubbard Avenue in the Town of Riverhead. On or about September 2004, the petitioners submitted a sketch plan for a residential subdivision for approximately 50 acres of the property. On January 9, 2006, the respondent Planning Board of the Town of Riverhead (Planning Board) approved the petitioners' preliminary plot plan. On July 24, 2006, the Planning Board, pursuant to its Resolution #71, granted final plat approval to the petitioners, subject to the payment of park and recreation fees in the amount of \$261,000, engineering fees in the amount of \$271,400, and water extension/improvement fees (water hookup fees) in the amount of \$217,500. By letter dated June 26, 2007, counsel for the petitioners forwarded payment of the park and recreation fees, and the engineering fees. On or about July 5, 2007, the petitioners paid the water hookup fees. The petitioners allegedly paid a separate fee of \$28,500 with its application for subdivision approval to reimburse the Town for the cost of having an engineer review its submission. The final subdivision map, entitled "Map of Harriman Estates," was filed by the petitioners on July 10, 2007.

On or about November 2008, the petitioners made inquiry to the Town regarding a possible sale of the development rights for the subject property. After the requisite review by the County of Suffolk (County), on or about March 2010, the County and petitioners entered into a contract of sale for the development rights for the property which required the petitioners to abandon the filed subdivision map before the closing thereunder. On March 18, 2010, the petitioners filed the necessary Certificate of Abandonment with the Clerk of Suffolk County. On or about May 4, 2010, the County purchased the development rights to the subject subdivision. On April 27, 2010, the petitioners filed a notice of claim with the Town demanding a refund of the fees paid pursuant to the subdivision application process. On October 5, 2010, the Town Board adopted Resolution #775, which denied the petitioners' claim on the

grounds that the fees were paid by the petitioners voluntarily, and that the petitioners had failed to file a petition for review of the required fees within 30 days of the Planning Board final plat resolution.

On December 13, 2010, the petitioner commenced this action by filing the notice of petition and summons together with the petition/complaint (petition) with the County Clerk. Thereafter, the respondents filed their respective pre-answer motions to dismiss pursuant to CPLR 3211. On July 26, 2011, the petitioners served an amended petition as of right. The respondents do not oppose the service of the amended petition, and they have elected to have the instant motion applied to the amended pleading (*D'Addario v McNab*, 73 Misc 2d 59, 342 NYS2d 342 [Sup Ct, Suffolk County 1973]). Accordingly, all references herein are to the amended petition dated July 25, 2011.

The petition essentially sets forth three claims/causes of action. The first seeks judgment pursuant to CPLR article 78, annulling and reversing Town Board Resolution #775, which denied the petitioners' claim for refunds. The second seeks monetary damages equal to the fees paid, alleging as grounds money had and received, unjust enrichment and restitution. The third seeks judgment declaring that any provisions of the Code which the respondents argue would permit the Town to retain the subject fees to be unconstitutional.

Planning Board now moves to dismiss the petition pursuant to CPLR 3211 (a) (1), (a) (7), and CPLR 7804 (f) on the grounds that the claim is barred by Town Law § 282, that the claim violates the rule against perpetuities, and that Real Property Law § 335 (3) does not create a cause of action for refund. On a motion to dismiss pursuant to CPLR 3211 and 7804 (f) in a hybrid proceeding and action, the petition/complaint alone must be considered, and all of its allegations are deemed true and afforded the benefit of every favorable inference (*Bloodgood v Town of Huntington*, 58 AD3d 619, 871 NYS2d 644 [2d Dept 2009]; see *1300 Franklin Ave. Members, LLC v Board of Trustees of Inc. Vil. of Garden City*, 62 AD3d 1004, 880 NYS2d 133 [2d Dept 2009]). Moreover, on a motion to dismiss a declaratory judgment action for legal insufficiency, "the test is not whether a party will succeed in getting a declaration of rights in accordance with a theory or contention advanced, but whether '[t]he allegations of the complaint ... when considered as true, demonstrate the existence of a bona fide justiciable controversy which should be settled'" (*Schulz v New York State Legislature*, 230 AD2d 578, 582, 660 NYS2d 155 [3d Dept 1997], *lv denied* 95 NY2d 769, 722 NYS2d 473 [2000], quoting *Sysco Corp. v Town of Hempstead*, 133 AD2d 751, 751, 520 NYS2d 40 [2d Dept 1987]). The court must also accept as true all factual submissions made in opposition to the dismissal motion (see *Wohlgemuth v Lang Const., LLC*, 18 AD3d 650, 795 NYS2d 634 [2d Dept 2005]).

The first branch of the Planning Board's motion reflects its contention that, pursuant to Town Law § 282, the petitioners were required to bring a petition to review its decision regarding the subject fees within 30 days of its adoption of Resolution #71 on July 24, 2006. This respondent contends that, because the subject proceeding/action was commenced on December 13, 2010, more than 30 days after the adoption of Resolution #71, said claims should be dismissed as time barred. A review of the petition reveals that the petitioners have not challenged the ability of the Planning Board to condition the approval of their subdivision application on the payment of those fees, or the reasonableness of said fees. Rather, the petitioners clearly plead a claim/cause of action regarding the Town Board's determination of its notice of claim and request for an audit of the fees paid after the subdivision was abandoned and the reason for the imposition of the fees allegedly no longer existed. A party has the right to seek a refund of fees paid to a municipality by service of a notice of claim and voucher (Town Law § 118, 119). Here, the question raised in this proceeding/action is not whether the Planning Board's determination to condition

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approval of the petitioners' subdivision application on the payment of the subject fees was proper, or whether said fees were reasonable and necessary. The question raised is whether the Town Board's denial of the petitioners' request for a refund of the subject fees was arbitrary and capricious. Thus, the applicable statute of limitations runs from the time that the Town Board's decided to deny a refund of the subject fees, as discussed below.

The contentions in the second and third branches of Planning Board's motion are without merit. The Planning Board does not explain how, nor can the Court discern any indication that, the petitioners' claim for a refund of the subject fees is a restraint on alienation of the property, or that the rule against perpetuities is implicated in any manner under the facts herein. Neither has Planning Board established that the absence of an express cause of action for a refund in CPLR 335 (3) is an indication that the legislature intended to prohibit an action to enforce the petitioners' rights to seek a refund under the relevant sections of the Town Law.

Accordingly, Planning Board's motion for an order pursuant to CPLR 3211 and CPLR 7804 (f) dismissing the petition/complaint is denied.

The Town and Town Board (collectively, Town) now move to dismiss the petition pursuant to CPLR 3211 (a) (1), (a) (5), (a) (7), and CPLR 217 (1). CPLR 3211 (a) (1) permits the court to dismiss an action based upon documentary evidence. A cause of action will be dismissed when documentary evidence submitted in support of the motion conclusively resolves all factual issues and establishes a defense as a matter of law (*Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; *Vitarelle v Vitarelle*, 65 AD3d 1034, 885 NYS2d 320 [2d Dept 2009]; *Mazur Bros. Realty, LLC v State of New York*, 59 AD3d 401, 873 NYS2d 326 [2d Dept 2009]). The documents submitted in support of this branch of the Town's motion include various relevant resolutions, correspondence, and miscellaneous documents. Putting aside for the moment the Town's contention that the petition fails to state a cause of action, the Town essentially asserts two defenses herein. The first is that the proceeding/action is barred by the statute of limitations, which is treated below. The second is that the petitioners paid the subject fees voluntarily, which forecloses their ability to receive a refund herein. It has been held that whether payment of a fee is considered voluntary or involuntary in an action for reimbursement of fees paid to a governmental entity is a question of intention, to be resolved upon consideration of the totality of the circumstances (*Video Aid Corp. v. Town of Wallkill*, 85 NY2d 663, 628 NYS2d 18 [1995]).

The Town makes an additional argument in its reply papers herein.<sup>1</sup> To wit, that the purchase of the development rights by the County, in effect, reimbursed the petitioners for the subject fees as those development rights were appraised at a higher value due to the subdivision approval. The petitioners object to the introduction of this additional argument in a reply. Regardless of the propriety of the inclusion of the argument and the submission of the relevant appraisals in a reply, the appraisals do not establish the Town's right to a dismissal of the petition. The Court finds that the documents submitted, including the subject appraisals, do not conclusively resolve all factual issues, nor do they establish the

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<sup>1</sup> Planning Board's reply herein fails to include an affidavit of service. However, the Court has considered the reply as it essentially tracks the arguments in the Town's reply, it fails to raise an issue which would alter the Court's findings herein, and there is no prejudice to the petitioners.

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enumerated defenses as a matter of law.

The second branch of the respondents' motion seeks an order pursuant to CPLR 3211 (a) (5) dismissing the petition on the ground that the claims made are barred by the statute of limitations. A movant seeking to dismiss a petition/complaint insofar as asserted against it as time-barred pursuant to CPLR 3211 (a) (5) has the initial burden of proving through documentary evidence that the action was untimely commenced after its accrual date (*see Morris v Gianelli*, 71 AD3d 965, 897 NYS2d 210 [2d Dept 2010]; *Lessoff v 26 Ct. St. Assoc., LLC*, 58 AD3d 610, 872 NYS2d 144 [2nd Dept 2009]; *Sabadie v Burke*, 47 AD3d 913, 849 NYS2d 913 [2d Dept 2008]). Thereafter, the burden shifts to the plaintiff to aver evidentiary facts establishing that the action was timely or to raise an issue of fact as to whether the action was timely (*Lessoff v 26 Ct. St. Assoc., LLC, supra*).

Here, the respondents have failed to establish their prima facie entitlement to dismissal pursuant to CPLR 3211 (a) (5). It has been held that claims for reimbursement or refund of monies paid to a municipality accrue from the date the determination under review becomes final and has an actual impact on the claimant (*Dominick Dan Alonzo, Inc. v Levitt*, 73 AD2d 741, 423 NYS2d 275 [3d Dept 1979]; that is, until he possesses the legal right to be paid and to enforce his right to payment in court (*City of White Plains v City of New York*, 63 AD2d 396, 407 NYS2d 517 [2d Dept 1978]; *Acme Bldrs., Inc. v Nassau County*, 36 AD2d 317, 320 NYS2d 289 [2d Dept 1971]). Here, the question raised in this proceeding/action is whether the Town Board's denial of the petitioners' request for a refund of the subject fees after the abandonment of the subdivision was arbitrary and capricious. Thus, Town's contention that this action is barred by CPLR 282 is without merit. In addition, it is undisputed that the petitioner commenced this action within four months of the Town Board's denial of the application for a refund (CPLR 217 [1]).

The third branch of the Town's motion contends that the petition should be dismissed on the ground that it fails to state a cause of action. A review of the petition herein reveals that the petitioners have plead cognizable causes of action for certiorari, money had and received, unjust enrichment, restitution, and declaratory judgment. A fee charged by a municipality must be "reasonably necessary to the accomplishment of the statutory command" (*Jewish Reconstructionist Synagogue of North Shore v Village of Roslyn Harbor*, 40 NY2d 158, 163, 386 NYS2d 198 [1976]). Moreover, municipal fees, cannot be designed or utilized as a revenue generating mechanism for a municipality (*Cimato Bros. v. Town of Pendleton*, 237 AD2d 883, 654 NYS2d 888 (4th Dept 1997), and a party seeking a refund of fees has a claim for money had and received (*City of White Plains v City of New York, supra*).

Accordingly, the Town's motion for an order pursuant to CPLR 3211 and CPLR 217 (1) dismissing the petition/complaint is denied.

Dated: 27 June 2012

  
 \_\_\_\_\_  
 J.S.C.

\_\_\_\_ FINAL DISPOSITION     NON-FINAL DISPOSITION