Short Form Order

Index No. 621195/2016

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

P R E S E N T:
Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER

CASEDISP

Mot. Seq. No.:	001 - MG
Orig. Return Date:	05/24/2018
Mot. Submit Date:	09/04/2018
Mot. Seq. No.:	002 - MD
Orig. Return Date:	06/19/2018
Mot. Submit Date:	09/04/2018
Mot. Seq. No.:	003 - MG
Orig. Return Date:	08/07/2018
Mot. Submit Date:	09/04/2018
Mot. Seq. No.:	004 - MG
Orig. Return Date:	08/14/2018
Mot. Submit Date:	09/04/2018

WILLIAM C. BERG, GEORGE BUBARIS, JOAN BUBARIS and THERESA M. FEDERICO, et al.,

Plaintiffs,

-against-

MICHAEL J. CAHILL, AS TRUSTEE OF THE MAUDE D. ROBERG REVOCABLE LIVING TRUST, MAUDE D. ROBERG REVOCABLE LIVING TRUST, TOWN OF HUNTINGTON, TOWN OF PLANNING BOARD, FORT SLONGO LLC, THE PRESERVE AT INDIAN HILLS, LLC and THE INDIAN HILLS CC, LLC,

Defendants.

PLAINTIFFS' ATTORNEY
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DEFENDANTS' ATTORNEYS
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Upon the e-filed documents numbered 43 through 113, it is

ORDERED that the motions to dismiss the complaint are granted, and the plaintiffs' cross-motion for summary judgment is denied; and it is further

ORDERED that the notice of pendency filed in this matter is hereby cancelled; in connection therewith, the clerk is directed to do so, upon payment of proper fees.

Plaintiffs, William C. Berg, George Bubaris, Joan Bubaris and Theresa M. Federico, own, respectively, three parcels of real property located on Breeze Hill Road in Northport, New York, all of which are benefited by an easement providing for ingress and egress over a twenty-two-foot private right of way owned by defendant, the Maude D. Roberg Revocable Trust (together with defendant, Michael Cahill, as Trustee: "Roberg Trust"), which owns another parcel located on Breeze Hill Road in Northport. Plaintiffs filed this action seeking declaratory and injunctive relief with regard to a residential cluster subdivision application filed by defendants Fort Slongo, LLC, The Preserve at Indian Hills, LLC and Indian Hills CC, LLC (collectively, "Indian Hills") with the defendant, Town of Huntington Planning Board ("Planning Board"). Defendants Fort Slongo, LLC and The Preserve at Indian Hills, LLC are contract vendees for purchase of the Roberg Trust property.

There are four motions before the court addressing the Second Amended Verified Complaint of the plaintiffs, dated February 15, 2018, which contains five causes of action. The first three causes of action are against the Indian Hills and Trust defendants only, and the fourth and fifth cause of action are against all defendants. The first cause of action seeks a declaratory judgment, pursuant to RPAPL §1521, to the effect that plaintiffs possess an exclusive right to free and unfettered access across the aforementioned private right of way. The second cause of action alleges nuisance and trespass and seeks an injunction against the proposed use of the private right of way in conjunction with Indian Hills' application to the Planning Board. The third cause of action seeks a declaratory judgment to the effect that the proposed use of the private right of way violates the restrictive covenant prohibiting its use for trade or business and an injunction barring such use. The fourth cause of action seeks a declaratory judgment to the effect that the Indian Hills application is either *ultra vires* and/or illegal based on several theories and requests an injunction against the Planning Board approving the application. The fifth cause of action seeks a declaratory judgment to the effect that the proposed cluster development is *ultra vires* on its face.

The Indian Hills defendants' motion (Mot. Seq. 001) seeks dismissal of the complaint and cancellation of the notice of pendency filed by the plaintiffs or, in the alternative with regard to the first cause of action the issuance of a declaratory judgment to the effect that plaintiffs do not have an exclusive easement, and with regard to the third cause of action, the issuance of a declaratory judgment to the effect that the application does not violate the restrictive covenant.

The plaintiffs then cross-moved for summary judgment in their favor on the complaint (Mot. Seq. 002). The Town defendants thereafter filed a cross-motion to dismiss the complaint (Mot. Seq. 003), as did the Roberg Trust defendants (Mot. Seq. 004), joining in the arguments made by the Indian Hills defendants.

Notwithstanding the undue volume of papers filed on these various motions, the governing legal principles are quite simple. The vast majority of plaintiffs' claims are not justiciable in that they are prematurely raised. The very subject of this lawsuit is an application to the Planning Board which is not final. Whether the claims are characterized as a request for a declaratory judgment or, as would be more appropriate, an article 78 proceeding, they are not ripe for judicial review.

The Court of Appeals has long held that a court "should decline to apply the discretionary relief of declaratory judgment (*citations omitted*) to 'administrative determinations unless these arise in the context of a controversy "ripe" for judicial resolution' (*citation omitted*)." ***Church of St. Paul and St. Andrew v Barwick***, 67 NY2d 510, 518, 505 NYS2d 24, 29 (1986). The reasoning behind such a principle, according to the high court, is to conserve judicial resources for real problems, rather than squandering them on "abstract or hypothetical or remote" ones. ***Id.***

In regard to plaintiffs' request for injunctive relief, it is well established that such relief is a "drastic remedy" that will only be granted upon the movant's establishing a clear right to such remedy under the law and upon undisputed facts. ***Miller v Price,*** 267 AD2d 363, 364, 700 NYS2d 209 (2d Dept. 1999). The relevant facts in this matter have not even been established yet so it is impossible to say that they are undisputed. The final version of the plan has not been arrived at and the Planning Board has not reached a determination to approve or disapprove. Plaintiffs have shown no right to any relief, much less the clear right required to support the drastic remedy of an injunction.

The propriety of these principles is made abundantly clear by the evolution to date of Indian Hills' application to the Planning Board, which, at least in part, prompted plaintiffs to amend their complaint. By re-routing the proposed access to the subdivision, Indian Hills has rendered moot any claims based upon the conservation easement, as well as any arguments connected with plaintiff Federico's property. The modification of the proposal has narrowed the use of the right of way at issue considerably. The court certainly could not issue a declaratory judgment or enjoin the use of the right of way as unduly burdensome when it is not even clear what the proposed scope of such use is, much less whether the plan will be approved or not.

More specifically, with regard to the causes of action against the Town and its Planning Board, it is clear that plaintiffs seek relief pertaining to the function of the Planning Board. An article 78 proceeding is the vehicle prescribed for such challenges. Town Law §282. By its very nature, an article 78 proceeding can only be used to challenge a final determination. CPLR §7801 (1). To the extent the requested relief could be characterized as being in the nature of prohibition, such extraordinary relief is not available to prohibit a Planning Board from reviewing an application. ***Gasland Petroleum, Inc. v Planning Board of the Town of Beekman***, 50 AD3d 1039, 1040, 857 NYS2d 584, 586 (2d Dept. 2008). Just as the Second Department noted in its decision, so too in the present case, any grievance the plaintiffs may have to the determination of the Planning Board may be adequately addressed in a proceeding to review it after it is made. ***Id.***[1]

The plaintiffs neither requested summary judgment on their second cause of action nor meaningfully opposed the motions to dismiss this claim, which was based upon nuisance and trespass. The court, therefore, presumes that such claim has been abandoned. However, even if it were not abandoned, such claims lack any merit. They are obviously premature and speculative since no action has been taken of any sort, as of yet. Plaintiffs' argument appears to boil down to the fear of overburdening of the right of way, which they concede themselves is an issue of fact in their memorandum of law at p. 20.

The only potentially viable claims plaintiffs have are contained in the first and third causes of action as against the Indian Hills and Roberg Trust defendants. As noted above, the first cause of action seeks a declaration that plaintiffs have an exclusive right to free and unfettered access across the private right of way. Plaintiffs modified this request for relief in their summary judgment motion by requesting, in the alternative, a declaration that the proposed use will unreasonably burden their easement rights. The third cause of action seeks a declaratory judgment and injunctive relief with regard to the use of any portion of the right of way for "trade" or "business" as violative of the restrictive covenant prohibiting such use.

For reasons similar to those stated above, the court finds that both the alternative proposal for relief on the first cause of action and the relief sought in the third cause of action are not ripe for review. Without knowing the details of the final plan, no assessment of undue burdening of the plaintiffs' easement rights can be made. Similarly, without a final plan, the court cannot fully assess the question of whether the use of a portion of the private right of way for access is a use for trade or business. Certainly, it appears at this point that the use will only be for residential purposes and plaintiffs' arguments to the contrary are purely speculative. Given the fact that the plan may change, the court declines to rule upon this issue at this time.

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[1]The court cannot help but note that the statutory construction argument raised by plaintiffs to the effect that the very creation of the Residence-Open Space Cluster District in Town Code §198-21.3 over-rode the Town's authority to consider residential cluster development pursuant to Town Code §198-114 is utterly spurious. There is nothing in either the legislative intent nor the language of the Code provision itself that indicates any such limitation.

What remains is the question of whether plaintiffs' rights of access across the private right of way are exclusive. This claim may be easily disposed of in that plaintiffs have offered no legal support for this claim whatsoever. There is no dispute that the easements in question grant only rights of ingress and egress. The language creating the three easements contains no reference to exclusivity. Plaintiffs apparently concede this point because they made no attempt to refute the legal arguments raised by the Indian Hills defendants. Thus, there is no basis to find that their rights of way are exclusive. *See, e.g.,* ***DiDonato v Dyckman***, 76 AD3d 610, 905 NYS2d 909 (2d Dept. 2010); ***Taylor v Devendorf***, 140 AD2d 510, 528 NYS2d 409 (2d Dept. 1988).

Based upon the foregoing determination to dismiss the Second Amended Complaint, the court directs cancellation of the notice of pendency. CPLR §6514; ***RB Hempstead, LLC v Inc. Village of Hempstead***, 34 AD3d 552, 824 NYS2d 407 (2d Dept. 2006); ***Gallagher Removal Service, Inc. v Duchnowski***, 179 AD2d 622, 578 NYS2d 584 (2d Dept. 1992).

ENTER

Date: January 16, 2019
Riverhead, New York

Martha L. Luft
MARTHA L. LUFT, A.J.S.C.

✓ FINAL DISPOSITION ___NON-FINAL DISPOSITION