

<b>Matter of Blue Is. Dev., LLC v Town of Hempstead</b>
2014 NY Slip Op 33824(U)
November 24, 2014
Supreme Court, Nassau County
Docket Number: 3533/14
Judge: Jeffrey S. Brown
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN  
JUSTICE

-----X TRIAL/IAS PART 16  
In the Matter of the Application of BLUE ISLAND  
DEVELOPMENT, LLC and POSILICO DEVELOPMENT INDEX # 3533/14  
COMPANY AT HARBOR ISLAND INC.,

Petitioner(s), Mot. Seq. 4  
Mot. Date 10.21.14  
Submit Date 10.21.14

For a Judgment Pursuant to Article 78 of the Civil Practice  
Law and Rules, and for additional relief,

-against-

THE TOWN OF HEMPSTEAD and THE TOWN BOARD  
OF THE TOWN OF HEMPSTEAD,

Respondent(s).

-----X

The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit .....	2
Reply Affidavit.....	3

Motion (Mot. Seq. 4) by the respondents/defendants, the Town of Hempstead and the Town Board of the Town of Hempstead (Town defendants), for an order pursuant to CPLR 2221(d) granting the Town defendants leave to reargue their motion to dismiss the second amended verified petition/complaint and, upon such reargument, granting judgment dismissing the second amended verified petition/complaint, pursuant to CPLR 7804(f) and 3211(a)(1), (5) and (7), is decided as set forth herein.

[\* 2]

By order dated August 8, 2014 and entered August 11, 2014, this court denied petitioners/plaintiffs' motion (Mot. Seq. 1) for summary judgment vacating and annulling the November 12, 2013 decision of the Town defendants, which denied the petitioners/plaintiffs' application to modify a restrictive covenant; declaring such restrictive covenant be invalidated and extinguished; and approving petitioners/plaintiffs' modified site plan. By that same order, this court also denied the Long Island Builders Institute's motion (Mot. Seq. 2) for leave to appear as amicus curiae. In that same order, this court also denied the Town defendants' motion (Mot. Seq. 3) to dismiss the second amended verified petition/complaint. The Town defendants now seek leave to reargue so much of the court's August 8, 2014 order as denied their motion to dismiss.

On August 18, 2014, counsel for petitioners/plaintiffs served a copy of the court's August 8, 2014 order, with notice of entry, upon counsel for the Town defendants by Federal Express overnight mail, as well as by first class mail. CPLR 2221(d)(3) provides, in relevant part, that a motion for leave to reargue shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. CPLR 2103(6) provides, in relevant part, that when a period of time prescribed by law is measured from the service of a paper and service is by overnight delivery, one business day shall be added to the prescribed period.

The Town defendants did not serve their motion for leave to reargue until September 19, 2014 and concede that the motion was therefore one day late. However, even where a motion for reargument is technically untimely, a court has discretion to reconsider its prior ruling (*HSBC Bank USA, N.A. v Halls*, 98 AD3d 718 [2d Dept 2012]; *Terio v Spodek*, 63 AD3d 719 [2d Dept 2009]; *Izkowitz v King Kullen Grocery Co., Inc.*, 22 AD3d 636 [2d Dept 2005]). Given the brevity of the delay by the Town defendants in making their motion to reargue, this court, in the exercise of its discretion, shall consider the motion despite its admitted untimeliness.

CPLR 2221(d)(2) provides that "[a] motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion. "A motion to reargue 'is not designed to provide the movant with successive opportunities to reargue issues previously decided or to present arguments different from those originally presented'" (*Haque v Daddazio*, 84 AD3d 940 [2d Dept 2011] quoting *Mazinov v Rella*, 79 AD3d 979 [2d Dept 2010]; *McGill v Goldman*, 261 AD2d 593 [2d Dept 1999]).

In moving for leave to reargue their motion to dismiss, the Town defendants take issue with only certain aspects of this court's prior decision. The Town defendants maintain that the Town Board's determination denying the petitioners/plaintiffs' second request for modification of the restrictive covenants imposed on their property should be upheld because the denial was non-discriminatory and bears a substantial relationship to public health, safety and welfare. In making this argument, the Town defendants rely upon the language in the original declaration of

restrictive covenants, which recites that the restrictions are meant "to ensure that the use and enjoyment of the Premises and the surrounding properties may be enhanced and protected thereby and, further, that the residents of the County of Nassau will be benefitted."

However, the second amended verified petition/complaint raises allegations that because of the change in circumstances since the initial imposition of the original restrictive covenants, the Town Board's refusal to further modify the restrictive covenants bears no relationship to the public health or safety, and, in fact, could conceivably be seen as thwarting same. Given the standard on a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must accept all of petitioners/plaintiffs' allegations as true and accord them every favorable inference, and in the absence of any explanation for the denial of the petitioners/plaintiffs' second request to modify the restrictive covenants, this court still cannot determine, based on the pleadings before it, whether the Town defendants' denial was in fact proper.

The Town defendants also maintain that the petitioners/plaintiffs waived any challenge to the restrictive covenants by agreeing to such restrictions as a condition for the rezoning. However, as this court noted in its prior order, the Town defendants failed to meet their burden of establishing waiver. Unlike the cases relied upon by the Town defendants, while the petitioners/plaintiffs did initially consent to the restrictions imposed, they made a previous request to modify the restrictive covenant in 2010, which the Town defendants granted. These circumstances are inconsistent with waiver.

Respondents/defendants additionally argue that the petitioners/plaintiffs' second cause of action for a declaratory judgment that the restrictive covenant is unenforceable and extinguished pursuant to RPAPL § 1951 must be dismissed because RPAPL § 1951 is inapplicable. However, RPAPL § 1951 may be utilized to review a restrictive covenant imposed by a municipality (*Ehrlich v Incorporated Vil. of Sea Cliff*, 95 AD3d 1068 [2d Dept 2012]).

"In order to state a cause of action pursuant to RPAPL § 1951, [for a] declaration that a restrictive covenant is unenforceable, [the pleading] must allege that, upon a balancing of the equities, the restrictive covenant is of no actual and substantial benefit to the party seeking to enforce it" (*Neri's Land Improvement, LLC v J.J. Cassone Bakery, Inc.*, 65 AD3d 1312 [2d Dept 2009]).

As noted by this court in its prior decision, petitioners/plaintiffs have alleged that the restrictive covenant limiting the number of rental units on the site is of no actual benefit to the Town defendants since the restrictive covenant does not limit the future owners of the proposed condominium units at the site from renting their units, thus there is no benefit to be had from prohibiting the petitioners/plaintiffs from leasing the units themselves. Given the standard on a

[\* 4]  
motion to dismiss for failure to state a cause of action, and accepting the petitioners/plaintiffs' allegations as true, it cannot be said that the petitioners/plaintiffs' second cause of action fails to state a claim under RPAPL§ 1951.

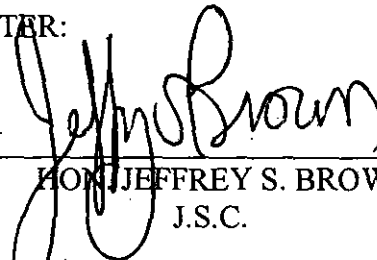
The Town defendants also seek to dismiss the petitioners/plaintiffs' third cause of action that the restrictive covenants constitute an unlawful taking. Upon reviewing the arguments of the parties and the allegations contained in the second amended verified petition/complaint, the court concludes that petitioners/plaintiffs have failed to state a claim for a regulatory taking in that they lacked a vested property interest in using the premises for rental properties (*Jones v Town of Carroll*, \_\_AD3d\_\_, \_\_NYS2d\_\_, 2014 WL 5900295, 2014 NY Slip Op 07780 [4th Dept 2014]).

Accordingly, the Town defendants' motion (Mot. Seq. 4) for leave to reargue is **GRANTED**, and upon reargument, the court adheres to its original determination, except to the extent of granting dismissal of the third cause of action in the second amended verified petition/complaint.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York  
November 24, 2014

ENTER:



HON. JEFFREY S. BROWN  
J.S.C.

**ENTERED**

NOV 25 2014

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

Attorney for Petitioner  
Weber Law Group, LLP  
290 Broadhollow Road, Ste. 200E  
Melville, NY 11747  
[6315492015@fax.nycourts.gov](mailto:6315492015@fax.nycourts.gov)  
[jstern@weberlawgroup.com](mailto:jstern@weberlawgroup.com)

Attorney for Respondent Town of Hempstead and Town Board  
Berkman Henoeh Peterson  
Peddy & Fenchel, PC  
100 Garden City Plaza  
Garden City, NY 11530  
[5162226209@fax.nycourts.gov](mailto:5162226209@fax.nycourts.gov)