

**Tilcon N.Y. Inc. v Town of New Windsor**

2016 NY Slip Op 33098(U)

September 9, 2016

Supreme Court, Orange County

Docket Number: 2965/2016

Judge: Sandra B. Sciortino

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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----X  
TILCON NEW YORK INC.,

Plaintiff - Petitioner,

-against-

**DECISION AND ORDER**  
**INDEX NO.: 2965/2016**  
**Motion Date: 07/29/2016**  
Sequence No. 1 - 3

**TOWN OF NEW WINDSOR, TOWN BOARD OF THE  
TOWN OF NEW WINDSOR, TOWN OF NEW  
WINDSOR ZONING BOARD OF APPEALS, JENNIFER  
GALLAGHER IN HER OFFICIAL CAPACITY AS  
BUILDING INSPECTOR OF THE TOWN OF NEW  
WINDSOR BUILDING DEPARTMENT, JOINTA LIME  
COMPANY,**

Defendants - Respondents.

-----X  
SCIORTINO, J.

The following papers numbered 1 to 73 were read on the application (Seq. #1) by plaintiff-petitioner Tilcon New York Inc. ("Tilcon"), brought by Order to Show Cause, seeking a preliminary injunction; the cross-motion (Seq. #2) by defendants-respondents Town of New Windsor, Town Board of the Town of New Windsor, Town of New Windsor Zoning Board of Appeals, and Jennifer Gallagher in her official capacity as Building Inspector of the Town of New Windsor Building Department (collectively, the "Town") seeking dismissal of the complaint-petition; and the cross-motion (Seq. #3) by defendant-respondent Jointa Lime Company ("Jointa") also seeking dismissal of the complaint-petition:

PAPERS

NUMBERED

Order to Show Cause (Seq. #1) / Amended Verified Complaint-Petition  
Exhibits 1 - 24 / Attorney Affirmation (Schultz) / Supplemental  
Affirmation (Schultz) / Memorandum of Law / Supplemental  
Memorandum of Law

1 - 30

<u>PAPERS</u>	<u>NUMBERED</u>
Amended Notice of Motion (Seq. #2) / Attorney Affirmation (Puglielle) / Affidavit (Green) / Affidavit (Wiley) / Exhibits A - C / Memorandum of Law	31 - 38
Amended Notice of Cross-Motion (Seq. #3) / Affidavit (Fitzgerald) / Exhibits A - M / Memorandum of Law	39 - 54
Attorney Affirmation in Opposition and Reply (Seq. #1) (Schultz) / Exhibits A - F / Affidavit (Cooney) / Exhibit 1 / Memorandum of Law in Opposition / Memorandum of Law in Reply	55 - 65
Reply Affirmation (Seq. #2) (Puglielle)	66
Reply Affidavit (Seq. #3) (Fitzgerald) / Exhibits A - E / Memorandum of Law	67 - 73

### **Background and Procedural History<sup>1</sup>**

In this hybrid action-special proceeding, Tilcon, relying on General Municipal Law § 51 and Civil Practice Law & Rules Article 78, seeks an order and judgment, pursuant to Civil Practice Law & Rules § 3001, declaring “the rights and other relations” of the parties. Tilcon asks this Court to declare certain actions performed the defendants-respondents, both individually and collectively, to be unlawful, and order that certain activities performed by Jointa on a certain parcel of real property (the “Premises”) owned by Town cease, and that Jointa immediately vacate the Premises and remove its improvements therefrom.

In its Amended Complaint-Petition (the “Complaint”), Tilcon asserts nine causes of action: (1) procedural violations of Town Law §§ 64(2), 90, and 91; (2) violations of General Municipal Law § 103; (3) violations of Town Law § 29; (4) *ultra vires* actions; (5) substantive violations of Town Law § 64(2); (6) violations of General Municipal Law § 51; (7) arbitrary and capricious decision of the Town Zoning Board of Appeals (the “ZBA”), in violation of Town Law § 267-a(7) and (12) and Town of New Windsor Code § 300-85; (8) violations of Town of New Windsor Code

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<sup>1</sup>The facts as presented herein are taken from the respective parties’ Affidavits and Attorney Affirmations. Disputed facts will be identified when appropriate.

§§ 130-2, 300-77, and 300-86; and (9) violations of the State Environmental Quality Review Act (“SEQRA”), 6 NYCRR §§ 617.2(b) and 617.3(a).

By Order of this Court dated May 9, 2016, the Town was temporarily enjoined and restrained from entering into any lease, license or other occupancy agreement with Jointa with respect to the Premises. Jointa was temporarily enjoined and restrained from engaging in any further construction upon the Premises, pending resolution of this application and further order of the Court.

In its instant application, Tilcon seeks a preliminary injunction continuing the restraints imposed by the May 9, 2016 order, and further enjoining and restraining the Town from approving, issuing or otherwise authorizing any permits or approvals, including any building permits or authorizations allowing construction at the Premises, and enjoining and restraining Jointa from continuing its current operations at the Premises, or continuing any previously approved construction thereon.

In or about April, 2013, the Town entered into a lease agreement (the “Lease”) (Exh. 2 to Complaint-Petition) with Jointa, pursuant to which the Town leased the Premises to Jointa for the purpose of operating a temporary asphalt plant. Jointa had contracted to supply asphalt to the successful bidder on a project to repave certain runways at Stewart International Airport. Jointa approached the Town for advice as to where it might set up a mobile asphalt plant. The Town proposed that Jointa lease the Premises, a parcel of Town-owned land within the Town’s Airport (AP) Zoning District. The zoning district was consistent with Jointa’s intended use and the Premises was located in close proximity to the work site.

The initial term of the Lease was two years, with Jointa holding an option to extend the term for one year. Jointa thereafter exercised its option, extending the term of the Lease to April 14, 2016.

Though the term of the lease has expired, Jointa has remained on the premises and continues its operation of the asphalt plant. The parties dispute the current legal status of Jointa's continued occupation of the premises: Jointa and the Town contend that Jointa is a holdover tenant, operating under the terms of the expired Lease (*see* Green Aff. at ¶ 4); Tilcon contends that Jointa is operating under an unlawfully-created indefinite month-to-month lease (*see* Schultz Aff. at ¶ 44).

In connection with the Lease, the Town Board completed the necessary assessments pursuant to SEQRA and adopted a resolution authorizing the Town Supervisor to lease the Premises to Jointa. *See* Exh. C to Fitzgerald Aff. The terms of the Lease required that, upon the expiration of the Lease, Jointa must dismantle and remove its temporary asphalt plant and return the Premises to substantially the same condition as existed prior to Jointa's occupancy thereof, including repairing any Town roads that were damaged due to the operation of the plant. The Town determined that Jointa's use of the Premises to operate a temporary asphalt plant was a permitted use within the AP zoning district and that the plant was therefore exempt from the Town's Zoning Law. *See* Exh. 2 to Complaint; Exh. D to Fitzgerald Aff.

Jointa secured the necessary permits, including a building permit issued by the Town, on April 29, 2013 (Exh. E to Fitzgerald Aff.), and assembled its mobile asphalt plant on the premises, completing assembly by July, 2013. At that time, the New York State Department of Transportation ("DOT") evaluated and certified the plant to begin operations. Jointa was also awarded a contract to supply asphalt to DOT in connection with a project to repave Interstate 84.

At a Town Board meeting held on August 7, 2013, the Board adopted a resolution authorizing the Supervisor to enter into an Amended Lease with Jointa, pursuant to which Jointa leased certain additional land from the Town for the purpose of storing necessary materials. *See*

Exh. G to Fitzgerald Aff. As the additional land was also within the AP zoning district, the Board determined that this was also a permitted use and was exempt from the Zoning Law. *Id.* The Town and Jointa thereafter entered into an Amended Lease (Exh. 4 to Complaint), which included the additional land and provided for an increase in yearly rent. The terms of the Lease were otherwise substantially unchanged.

In 2015, Jointa exercised its option to extend the Lease term for one year, and the Town and Jointa executed an Option Lease Agreement (Exh. 6 to Complaint), pursuant to which Jointa's yearly rent for the Premises was again increased, and Jointa's term of occupancy was extended through April 14, 2016. As Jointa's prospects for future business in the area grew, Jointa began exploring possibilities for a long-term asphalt plant in the area. In the interim, Jointa sought approval to extend the Option Lease Agreement on a month-to-month basis, with rent paid monthly, prorated on the basis of the yearly rent agreed to in the Option Lease Agreement. The parties dispute whether such approval was properly obtained; Jointa and the Town contend that the approval properly came from the Town Supervisor (*see* Fitzgerald Aff. At ¶¶ 25-26), while Tilcon contends approval of the extension was unilaterally afforded by the Town Attorney, an act for which he has no authority. Tilcon further contends that the Town may not enter into such an agreement, in any event (*see* Schultz Aff. at ¶¶ 43-44).

Jointa has since proposed a long-term ten-year lease of the Premises, which would allow Jointa to continue to operate the mobile asphalt plant on a permanent and commercial basis. *See* Exh. 17 to Complaint. No agreement to such a long-term lease has been reached, and Tilcon seeks to enjoin any such agreement. In connection with the proposal, the Town has required that Jointa submit the necessary site plans and obtain the necessary approvals from the appropriate Town

agencies before any agreement may be reached.

In connection with its proposal for a long-term operation on the Premises, Jointa submitted its site plan application to the Planning Board in January, 2016. *See* Exh. K to Fitzgerald Aff. The Planning Board subsequently referred Jointa to the Zoning Board of Appeals (“ZBA”) for a determination as to whether certain height variances would be required for certain equipment and machines, as the formerly temporary mobile plant was now being proposed as a long-term operation. *See* Exh. L to Fitzgerald Aff.; Exh. 19 to Complaint.

At a meeting on April 25, 2016, the ZBA, by a four-to-one vote,<sup>2</sup> determined that none of Jointa’s machinery or equipment is subject to the zoning ordinance, and Jointa therefore need not apply for any variance. *See* Exh. 20-E to Complaint; Exh. M to Fitzgerald Aff. The Town Building Inspector issued a building permit to Jointa on March 17, 2016 (Exh. 22 to Complaint). This permit allows Jointa to pour a small foundation for a third silo (two having already been erected), but does not permit Jointa to erect the silo. The foundation has since been poured, which work Jointa acknowledges it performed at risk, as it may not erect the silo until it receives site plan approval from the Planning Board, and if Jointa’s proposal for a long-term lease is denied, the foundation must be removed.

#### **Tilcon’s Application for a Preliminary Injunction (Seq. #1)**

By Order to Show Cause filed on May 4, 2016, Tilcon seeks a preliminary injunction enjoining and restraining the Town from entering into any lease, license or other occupancy arrangement with Jointa with respect to the Premises, or approving, issuing or otherwise authorizing

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<sup>2</sup>The parties do not dispute that this vote was actually a second vote on this matter. The parties dispute only whether the procedure that led to the second vote was proper, and whether the resulting four-to-one vote was sufficient to make such a determination.

any permits or approvals, including any building permits or authorizations allowing construction on the Premises. Tilcon additionally seeks a preliminary injunction enjoining and restraining Jointa from continuing its current operations at the Premises; continuing any previously approved construction thereon, or engaging in any further construction thereon during the pendency of this action.

In support of its application, Tilcon submits its Amended Complaint-Petition, verified by counsel, along with the Affirmation and Supplemental Affirmation of its attorney, a Memorandum of Law, and a Supplemental Memorandum of Law. In essence, Tilcon asserts that each and every procedural step in the relationship between the Town and Jointa has been conducted in contravention of applicable laws, that the relationship thus “has the taint of fraud, corruption, and favoritism” (*see* Schultz Aff. at ¶ 9), and that Tilcon stands to be irreparably damaged if the relationship is permitted to continue.

Initially, Tilcon asserts that the resolutions authorizing the initial Lease, the Amended Lease, and the Option Lease Agreement all were adopted without the legally-required permissive referendum. Schultz Aff. at ¶¶ 11-13. Tilcon further contends that Jointa is operating its asphalt plant in, essentially, a *de facto* partnership with the Town, citing statements made by Town representatives in connection with prior litigation. Tilcon argues that, because the operation of the plant is essentially a public works project, it is subject to mandatory competitive bidding requirements, which have been circumvented to date. *Id.* at ¶¶ 17-22.

While Tilcon concedes that judicial review of the prior actions is time barred, it points to these actions as evidence of the generally tainted and unlawful nature of the relationship between the Town and Jointa. Tilcon thus concludes that injunctive relief is necessary to prevent further



benefit to Jointa at the expense of the Town's taxpayers. *Id.* at ¶ 23.

Tilcon contends that the Town has again violated the permissive referendum requirement found in Town Law § 64(2) by allowing Jointa's continued occupation of the Premises after the expiration of the Lease. The occupation is unlawful, not only because it was authorized by the Town Attorney, but also because a town may not enter into a month-to-month lease in any event. *Id.* at ¶¶ 41-44. In the alternative, Tilcon argues that the operation of the plant is a public project, and Jointa's continued operation after the expiration of the Lease is a further violation of the competitive bidding requirement set forth in General Municipal Law § 103. *Id.* at ¶ 42.

Tilcon further objects to Jointa's occupation of the premises on the ground that it constitutes a violation of the Town's fiduciary obligation to properly manage its property for the public benefit. Tilcon asserts that it would be willing to pay a higher rent for the Premises than that being paid by Jointa, and the Town has thus failed to make required findings in connection with its leasing of the premises and to ensure that it received adequate consideration. *Id.* at ¶ 45.

Tilcon further contends that the ZBA's April 25, 2016 determination that Jointa need not apply for any variances ignored statutory requirements that a public hearing be held; a motion to re-hear a particular matter be adopted by a unanimous vote, and such a re-hearing be decided by a unanimous vote. *Id.* at ¶ 46. In addition, Tilcon argues that the issuance of the March 17, 2016 building permit during the pendency of Jointa's site plan application violates several provisions of the Town's Code, as well as SEQRA. *Id.* at ¶¶ 47-48.

On the basis of the foregoing, Tilcon contends that it has demonstrated a likelihood of success on the merits of its claims. Tilcon argues that it has demonstrated the requisite irreparable harm in the event of further acts of the Town authorizing Jointa to occupy the Premises or to

perform further construction in the absence of the necessary SEQRA review. *Id.* at ¶ 49. Tilcon further concludes that the balance of the equities tips in its favor, as Tilcon is a concerned taxpayer seeking to enjoin illegal acts by Town officials in favor of “their preferred choice” to the detriment of the Town’s taxpayers. *Id.* at ¶¶ 50-51.

### **The Town’s Cross-Motion to Dismiss (Seq. #2) and Reply**

By Notice of Motion filed on June 21, 2016 (amended by Amended Notice of Motion dated July 1, 2016), the Town seeks an order pursuant to Civil Practice Law & Rules § 3211(a)(1), (3), (5), and (7) and § 7804(f) dismissing the Complaint. In support of its motion, the Town submits the affirmation of its attorney, as well as the affidavits of Town Supervisor George Green and Assessor J. Todd Wiley.

The Town contends that Tilcon’s claims must be dismissed on the ground that Tilcon lacks standing to bring its various procedural and technical challenges, as Tilcon makes no allegations demonstrating that it has suffered an injury-in-fact different in kind and degree from the public at large or that any such injury falls within the zone of interests sought to be protected by the statutes Tilcon invokes. *Puglielle Aff.* at ¶ 11. The Town further contends that Tilcon’s claim under General Municipal Law § 51 fails to state a cause of action, as such an action lies only when the acts complained of are fraudulent, or a waste of public property, and that, even assuming the contract between the Town and Jointa is illegal, mere illegality of a contract does not give rise to such a claim. *Id.* at ¶¶ 13-14.

With regard to Tilcon’s claim under General Municipal Law § 103, the Town contends that this claim must be dismissed, as there is no requirement in law that a lease of municipal property be subject to competitive bidding. *Id.* at ¶ 16. Further, the Town contends that Tilcon’s third and fourth

causes of action are time-barred. *Id.* Finally, the Town argues that Tilcon may not challenge the building permit, as it has failed to exhaust its administrative remedies, and the Town Building Inspector was improperly named as a party defendant-respondent. *Id.*

Alternatively, in the event that the Complaint is not dismissed, the Town argues that Jointa's application for a preliminary injunction should be denied, as Tilcon has failed to demonstrate a likelihood of success on the merits or an irreparable injury, and the balance of equities favors the Town. *See* Town Memorandum of Law at 20-23.

### **Jointa's Cross-Motion to Dismiss (Seq. #3) and Reply**

By Notice of Cross-Motion filed on June 17, 2016 (amended by Amended Notice of Cross-Motion dated June 24, 2016), Jointa seeks an order pursuant to Civil Practice Law & Rules § 3211(a)(1), (2), (3), and (7) and § 7804(f) dismissing the Complaint-Petition. In support of its motion, Jointa submits the affidavit of its Project Manager, Peter Fitzgerald, and a Memorandum of Law.

Jointa, like the Town, contends that Tilcon lacks standing to challenge the various actions and/or inactions by the Town, as Tilcon has not alleged any actual injury different from the general public that is within the zone of interest of the laws in issue. *See* Jointa Memorandum of Law at 17-25. Jointa additionally argues that Tilcon's claims must be dismissed as they are mere legal conclusions or factual allegations that are either inherently incredible or flatly refuted by documentary evidence. *Id.* at 16. Further, Jointa argues that the sixth cause of action fails to state a claim under General Municipal Law § 51, as it lacks the necessary allegations of collusion, fraud, or personal gain. In the alternative, Jointa submits that this claim is not ripe because no long-term lease has been signed. *Id.* at 26-33.

Alternatively, in the event that the Complaint is not dismissed, Jointa submits that Tilcon's application for a preliminary injunction must be denied, as Tilcon has failed to meet its burden of proof to justify such a drastic remedy. *Id.* at 34. Specifically, Jointa argues that Tilcon has failed to show the sort of extraordinary circumstances required for a mandatory injunction to issue. *Id.* at 35-39. Jointa contends that Tilcon has failed to establish a likelihood of success on the merits of its claims, and has demonstrated neither any irreparable harm nor that the equities weigh in its favor. *Id.* at 39-77.

In the further alternative, in the event that Tilcon's application for a preliminary injunction is granted, Jointa submits that the Court must require Tilcon to post a bond in the amount of \$7.5 million "as established possible damages to Jointa." *Id.* at 77.

#### **Tilcon's Opposition and Reply**

In opposition to the respective cross-motions, and in reply to the respective oppositions to its application for a preliminary injunction, Tilcon submits the affirmation of its attorney, and the affidavit of its President, John Cooney, Jr., who avers that Tilcon owns real property in the Town of New Windsor and pays taxes thereon in excess of \$1,000 per year. Tilcon additionally submits two Memoranda of Law: one in opposition to the cross-motions, and the other in reply and further support of Tilcon's application.

In opposition to the cross-motions to dismiss the Complaint, Tilcon argues that it has demonstrated taxpayer standing with respect to its first through fifth causes of action, as the law recognizes such standing for issues related to the transfer of publicly-owned property. Schultz Reply at ¶ 9. Further, Tilcon contends that it has standing as a potential bidder which was deprived of the opportunity to bid by the Town's illegal actions. *Id.* With respect to its sixth cause of action, Tilcon

submits that it has properly asserted its standing and that the issue is ripe for determination because this claim seeks judicial review of waste and illegality presently occurring, as of the expiration of the Lease, by Jointa's continued occupation of the Premises. *Id.* at ¶¶ 10-11.

Further, Tilcon submits that it has properly sought common-law taxpayer standing with respect to its final three causes of action, as the Premises are surrounded by government properties, and thus no plaintiff could meet the applicable standing requirements, such that denying Tilcon common-law taxpayer standing would effectively immunize the Town from judicial review of its illegal actions. *Id.* at ¶¶ 12-14. Tilcon additionally contends that it has stated a cause of action under General Municipal Law § 51, as it repeatedly alleges that the Town has engaged in acts that are either fraudulent or a waste of public property, and the Court should not consider any documentary evidence offered to refute such claims. *Id.* at ¶¶ 15-16.

In reply, and in further support of its application for a preliminary injunction, Tilcon asserts that the Town and Jointa do not dispute that Jointa's current occupation of the Premises, pursuant to an agreement referred to as the "Indefinite Lease" in Tilcon's papers, was not adopted by a resolution subject to permissive referendum. *Id.* at ¶ 18. Tilcon also submits that the Town and Jointa have failed to demonstrate that the required findings were made with regard to this agreement. *Id.* at ¶ 20.

Further, Tilcon asserts that there has been no dispute of their allegation that the relationship between the Town and Jointa is actually a partnership and that the resulting public works project, or perhaps a "purchase contract," should have been competitively bid. *Id.* at ¶ 19. Tilcon additionally contends that there has been no demonstration that the required SEQRA review was conducted with regard to the continuing occupation of the Premises. *Id.* at ¶ 21.

With regard to the statute of limitations issues raised in the respective cross-motions, Tilcon asserts that their action is timely, as it was filed within four months of Tilcon's receipt of notice of the agreement for Jointa's continued occupation of the Premises after the expiration of the Lease. *Id.* at ¶ 24. Jointa further contends that the defendants are not insulated by Real Property Law § 232-c, because there is no evidence that the Town Board approved or even knew of the continued occupation of the Premises. *Id.* at ¶ 25.

Tilcon also reiterates its arguments that the continued occupation violates the term limits rule, as it binds future Town Boards, and that Tilcon remains willing to pay a higher rent for the Premises than Jointa, illustrating that the required findings have not been made with respect to Jointa's continued occupation of the Premises. *Id.* at ¶¶ 28-30. Further, Tilcon contends that it need not exhaust its administrative remedies with respect to the building permit, as such action would be futile. *Id.* at ¶¶ 31-33. Tilcon additionally argues that the 30 day time limit found in Town Law § 267-c does not apply to the permit, and that the issue is not moot, as the foundation authorized by the permit is removable. *Id.* at ¶¶ 34-35.

Tilcon contends that the action should not be dismissed as against the Building Inspector, as she is a necessary party due to Tilcon's seeking to preclude the issuance of further permits. *Id.* at ¶ 37. Tilcon further contends that the procedural nature of the ZBA decisions of which it complains is not entitled to deference, and that, in any event, such decisions were substantively arbitrary and capricious. *Id.* at ¶¶ 38-39. Tilcon additionally argues that Jointa's proffered defense to Tilcon's SEQRA claim (that the "Indefinite Lease" is a Type II action) fails, as no such determination has been rendered, and the nature of the plant and the construction thereon render Type II exceptions inapplicable. *Id.* at ¶ 37.

Finally, Tilcon argues that Jointa's request for a bond in the amount of \$7.5 million is improper, as Jointa has submitted no evidence to establish that its damages are anything other than speculative, and Jointa has conceded that it is operating the plant at risk. *Id.* at ¶¶ 42-43. Tilcon thus concludes that the respective cross-motions to dismiss the Complaint should be denied, and Tilcon's application for injunctive relief should be granted.

The Court has fully considered the submissions of the parties.

### **Discussion**

Due to the nature of the relief sought, the Court must first consider the respective cross-motions to dismiss the Complaint, before considering the merits of Tilcon's application for injunctive relief.

### Legal Standards

#### Standing

"A party may move for judgment dismissing one or more causes of action asserted against him on the ground that... the party asserting the cause of action has no legal capacity to sue." Civ. Prac. Law & Rules § 3211(a)(3). Capacity to sue and standing to bring a particular action, while related, are distinct concepts. *Caprer v. Nussbaum*, 36 AD3d 176 (2<sup>nd</sup> Dep't 2006). "Capacity is a threshold question involving the authority of a litigant to present a grievance for judicial review." *Id.* at 181-82. "Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request." *Id.* at 182. Defendants-respondents in the instant action have challenged Tilcon's standing only.

"The... standing inquiry is designed to determine whether the party who is bringing suit is a proper party to request adjudication of the dispute." *Graziano v. County of Albany*, 3 NY3d 475,

479 (2004). “Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation.” *Caprer*, 36 AD3d at 182 (citation omitted). “Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed to access the courts to adjudicate the merits of a particular dispute.” *Id.* (citation omitted). “Where standing is put into issue by a defendant, a plaintiff must prove its standing in order to be entitled to relief.” *Deer Park Assocs. v. Town of Babylon*, 121 Ad3D 738, 740 (2<sup>nd</sup> Dep’t 2014).

#### Failure to State a Cause of Action

“A party may move for judgment dismissing one or more causes of action asserted against him on the ground that... the pleading fails to state a cause of action.” Civ. Prac. Law & Rules § 3211(a)(7). In evaluating a party’s papers, the court is to construe pleadings liberally and ignore all defects that do not prejudice a substantial right of a party. *Id.* § 3026.

In considering a section 3211(a)(7) motion, the court must “determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated.” *Campaign for Fiscal Equality v. State of New York*, 86 NY2d 307, 318 (1995). In determining a reasonable view of the facts, “[t]he pleading will be deemed to allege whatever may be implied from its statements by reasonable intendment and the court must give the pleader the benefit of all favorable inferences that may be drawn from the complaint.” *Dunn v. Gelardi*, 59 AD3d 385, 386 (2<sup>nd</sup> Dep’t 2009).

In essence, a section 3211(a)(7) motion “must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law.” *511 W. 32<sup>nd</sup> Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 152 (2002). When considering



such a motion, “The court may consider factual affidavits submitted by petitioners to remedy defects in the pleading but should not consider documents submitted by respondents in support of dismissal.” *Matter of Albany Law School v. New York State Off. of Mental Retardation and Dev. Disabilities*, 81 AD3d 145, 148 (3<sup>rd</sup> Dep’t 2011).

*Defense Founded Upon Documentary Evidence*

Civil Practice Law & Rules § 3211(a)(1) permits a party to move to dismiss a cause of action against it on the ground that a defense is founded upon documentary evidence. “In order to prevail on a CPLR 3211(a)(1) motion, the moving party must show that the documentary evidence conclusively refutes plaintiff’s... allegations.” *AG Capital Funding Partners, L.P. v. State Street Bank & Trust Co.*, 5 NY3d 582 (2005). “Dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Mr. San, LLC v. Zucker & Kwestel, LP*, 112 AD3d 796 (2<sup>nd</sup> Dep’t 2013) (quoting *Leon v. Martinez*, 84 NY2d 83 (1994)).

*Tilcon’s Amended Complaint - Petition*

*Tilcon’s Standing*

As outlined above, the Town and Jointa contend primarily that Tilcon lacks standing to sue. Tilcon submits that it has demonstrated necessary taxpayer standing to bring its first five causes of action. Further, Tilcon argues that it has standing to bring the sixth cause of action, pursuant to General Municipal Law § 51, as it alleges that it pays real estate taxes in the Town in excess of \$1,000. Finally, Tilcon contends that it should be found to have common-law taxpayer standing to bring its final three causes of action.

Ordinarily, a plaintiff seeking to challenge an administrative action regarding land use must

allege to have suffered an injury in fact, different from any injury of the public at large, that falls within the zone of interests sought to be protected by the statute under which the agency has acted. *Society of Plastics Indus., Inc. v. County of Suffolk*, 77 NY2d 761 (1991). However, such a rigid requirement is inappropriate in the context of conveyances of public lands, and the public interest would suffer if a tax-paying resident of the Town were found to lack standing to challenge the conveyance on the ground that no proper allegation of harm different from that of the public at large was made. *See, e.g., Oyster Bay Assocs. L.P. v. Town of Oyster Bay*, 42 Misc3d 1223(A) (Sup. Ct. Suffolk Cty. 2013) (citing *Committee to Preserve Brighton Beach v. Planning Comm'n of the City of New York*, 259 AD2d 26 (1<sup>st</sup> Dep't 1999)).

Furthermore, with regard to Tilcon's second cause of action, which alternatively asserts that the Lease should have been subject to competitive bidding requirements, a willing bidder for a municipal project who has been deprived of the opportunity to bid by an alleged violation of the bidding requirements has standing to challenge such an action. *See Lancaster Development, Inc. v. McDonald*, 112 AD3d 1260 (3<sup>rd</sup> Dep't 2013); *Kick v. Regan*, 110 AD2d 934 (3<sup>rd</sup> Dep't 1985); *Albert Elia Bldg. Co. v. New York State Urban Development Corp.*, 54 AD2d 462 (4<sup>th</sup> Dep't 1976).

Because the acts challenged by Tilcon in its first five causes of action relate to the Town's conveyance of an interest in Town-owned property, or, in the alternative, alleged violations of competitive bidding requirements, Tilcon need not claim a direct injury different from that of the public at large within the zone of interests sought to be protected by the statutes invoked. Tilcon's first five causes of action thus may not be dismissed for lack of standing.

Only the Town has challenged Tilcon's standing to bring its sixth cause of action pursuant to General Municipal Law § 51, on the ground that Tilcon's petition did not specifically plead and

prove that it pays real estate taxes in the Town in excess of \$1,000 and Tilcon has not filed a bond. Insofar as Tilcon's petition plainly pleads that Tilcon owns property in the Town with an assessment exceeding the statutory threshold, and any failure to have initially filed a bond may be cured *nunc pro tunc*, Tilcon has established its standing, and the Town's objections are without merit. See *Schultz v. DeSantis*, 218 AD2d 256 (3<sup>rd</sup> Dep't 1996).

With regard to its final three causes of action, however, Tilcon has failed to set forth a basis upon which this Court should decline to apply the general standing requirements as set forth in *Society of Plastics*. Tilcon's asserted basis for its standing, essentially that denying Tilcon standing in this instance would effectively preclude any judicial review of any Town action of the kind of which Tilcon complains, is without merit. Tilcon cites as authority for its position a number of cases in which courts have found, for pragmatic reasons, that denying standing in a particular circumstance would effectively foreclose judicial scrutiny of the acts in question. Each is readily distinguishable from the case at bar.

For example, in *Sierra Club v. Village of Painted Post*, 26 NY3d 301 (2015), in which the harm alleged was increased train noise in violation of SEQRA, the Court of Appeals held that standing would not be denied simply because other persons may suffer the same harm (i.e., the injury in fact was sufficiently "particularized" but need not be entirely "unique"). Holding otherwise would deny standing to all affected persons in any case in which more than one person was harmed. 26 NY3d at 311. Here, rather than asserting a particular injury that is common among neighboring landowners, Tilcon has asserted no injury at all.

In *Boryszewski v. Brydges*, 37 NY2d 361 (1975), the Court of Appeals declined to impose rigid standing requirements because the only persons who could satisfy such requirements, State

government officials, were unlikely to “vigorously attack legislation under which each is or may be a personal beneficiary.” 37 NY2d at 364. In the instant matter, Tilcon concedes that the Premises are surrounded by parcels of land which are not all Town-owned, but which are impacted by the Town’s action. Tilcon, implying the adjacent property owners are analogous to the government employees in *Boryszewski*, alleges no facts upon which this Court may infer that the non-Town landowners risk the loss of some benefit if an action were brought addressing the violations of law. In the event that further illegal acts upon the Premises cause a particular injury to any of the neighboring non-Town landowners, this Court perceives no reason that an injured party would not seek to enforce its rights.

In *Ricket v. Mahan*, 97 AD3d 1062 (3<sup>rd</sup> Dep’t 2012), the Appellate Division found common-law taxpayer standing for a petitioner who sought to annul a local law creating a government position with “appreciable public significance beyond the immediately affected parties.” The Court found that failure to confer such standing would “effectively insulate this provision from meaningful judicial scrutiny.” 97 AD3d at 1064. In contrast, in this matter, no government position of far-reaching importance has been created, and, as outlined in the previous paragraph, the absence of common-law taxpayer standing does not foreclose judicial review of the actions taken with regard to the Premises. The remaining cases cited are no more persuasive.

In fact, in *Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of Town of North Hempstead*, 69 NY2d 406 (1987), cited by Tilcon, the Court of Appeals instructed that, while a property owner “in nearby proximity to premises that are the subject of a zoning determination may have standing to seek judicial review without pleading and proving special damage,” even such a “close neighbor” lacks standing when the “only substantiated objection is the threat of increased

business competition.” 69 NY2d at 409-410. Here, Tilcon does not allege that it owns land in close proximity to the Premises, and the only injury that can be gleaned from Tilcon’s papers, if any, is precisely that threat of competition that would not confer standing even if Tilcon and Jointa occupied adjacent parcels.

Because Tilcon has failed to demonstrate that judicial review of the acts of which it complains will be foreclosed if Tilcon is not granted common-law taxpayer standing, and has likewise failed to establish its standing by any other means, the seventh, eighth, and ninth causes of action must be dismissed.

The remaining causes of action, for which Tilcon has established its standing to bring suit, must still be evaluated.

*First Cause of Action: Procedural Violations of Town Law §§ 64(2), 90, and 91*

Tilcon contends that Jointa’s continued occupation of the Premises after the expiration of the Lease violates the named sections, in that the continued occupation was not approved by a resolution of the Town Board subject to a permissive referendum. However, as a matter of law, the Town was not required to follow the procedures Tilcon cites, as no lease agreement for the Premises has been entered into with regard to the continued occupation.

Real Property Law § 232-c clearly establishes that, upon the expiration of a lease of more than one year in duration, a tenant who holds over may be removed from the premises by the landlord in any manner permitted by law. In the alternative, if the landlord continues to accept rent, as is the case here, in the absence of an agreement to the contrary, a month-to-month tenancy is created.

By the plain letter of the law, Jointa is a holdover tenant operating pursuant to the terms of

the expired Lease. The time in which Tilcon may have been permitted to bring any objection to the procedures employed to execute the Lease has long since passed. The Town cannot be held to the procedural directives in the named statutory sections until such time as it seeks to enter into a new lease. Tilcon thus has failed to state a viable cause of action.

*Second Cause of Action: Violation of GML § 103*

Tilcon's second cause of action seeks to subject the Town's lease of the Premises to the competitive bidding requirements of General Municipal Law § 103(1). By the plain wording of the statute, such requirements apply only to "all contracts for public work involving an expenditure of more than thirty-five thousand dollars and all purchase contracts involving an expenditure of more than twenty thousand dollars." No such contract exists in the instant matter, and it is settled law that no competitive bidding requirement applies to a lease of public property. *See, e.g., Citiwide News, Inc. v. New York City Transit Auth.*, 62 NY2d 464 (1984). The second cause of action is thus dismissed.

*Third Cause of Action: Violation of Town Law § 29*

Tilcon alleges that Jointa's continued occupation of the Premises after the expiration of the Lease violates this section because the occupation was approved by the Town Attorney, who has no authority to lease land in the name of the Town, and only the Town Supervisor may lease land, and must do so with the authorization of the Town Board. Tilcon's assertions regarding the respective powers of the Town Attorney and the Town Supervisor are correct.

However, the documentary evidence submitted with Tilcon's Complaint-Petition, in the form of e-mails between Jointa's representative and the Town Attorney's office (Exh. 15 to Complaint), flatly contradicts Tilcon's assertion that a lease has been consummated. These messages clearly

convey that Jointa is holding over under the terms of the expired Lease, and the Town reserves the right to eject Jointa from the Premises upon 30 days notice. Thus, neither the Town Attorney nor the Supervisor has leased any property. The third cause of action therefore must be dismissed.

*Fourth Cause of Action: Ultra Vires Action*

Tilcon asserts that a municipality may not enter into a contract that is perpetual in duration (the “term limit rule”). Again, Tilcon is correct. Again, however, Tilcon’s own documentary evidence flatly refutes its assertion that the Town has entered into such a contract. Assuming that the Town elects not to exercise its right to eject Jointa from the Premises, and further assuming that the e-mail exchange discussed above constitutes a contract to lease property between Jointa and the Town, the term of the extension requested in that exchange ends on December 31, 2016. The fourth cause of action is thus dismissed.

*Fifth Cause of Action: Substantive Violation of Town Law § 64(2)*

Tilcon asserts, again correctly, that section 64(2) requires that the Town make certain factual findings before it conveys Town property. Again, however, Tilcon’s assertion that such a conveyance has occurred is flatly contradicted by its own documentary evidence. The fifth cause of action thus is dismissed.

*Sixth Cause of Action: Violation of General Municipal Law § 51*

Tilcon asserts that the Town has engaged in certain acts that cause waste or injury, imperil the public interest, or are calculated to work public injury or to produce mischief, in violation of General Municipal Law § 51. However, the alleged violations of this section (violations of Town Law and/or competitive bidding requirements, and *ultra vires* actions) all are predicated upon assertions that, for the reasons set forth with regard to the first five causes of action, are legally

insufficient to support Tilcon's claims. The sixth cause of action therefore must be dismissed.

On the basis of the foregoing, each of the nine causes of action asserted in the Complaint are hereby dismissed. The Court therefore need not and does not address the remaining arguments of the parties. Further, Tilcon's application for a preliminary injunction is denied as moot.

The Court questions Tilcon's presentation in its prosecution of this action. While it attempts to portray itself as a genuinely concerned citizen, it is clear that its motives were not purely altruistic. Tilcon's ultimate goal was clearly to protect its own interests and could easily have been presented as such.

The Court is more concerned, however, with the Town's repeated corner-cutting and defiance of statutory mandates in its haste to move forward in its relationship with Jointa. While Tilcon's assertion that the whole relationship has the taint of fraud, corruption, and favoritism perhaps is hyperbolic, the Town certainly has displayed a general attitude of impunity and an alarming lack of respect for legal requirements enacted for the protection of the public.

The Town clearly violated numerous statutory requirements when it entered into the initial Lease with Jointa in 2013. The Town committed further violations when the Lease was extended in 2015. The Town has made no meaningful attempt to defend its actions, choosing instead, as is its right, to rest comfortably on the fact that its present adversary lacks standing to bring certain claims, and that its illegal actions are time barred from suit on others. The Town has, in essence, thumbed its nose at its taxpayers and the Legislature.

The Town's disregard for the law cannot continue. It is clear from the submissions before the Court that the Town and Jointa are in the process of cementing a long-term relationship involving Jointa's long-term occupation of the Premises. Such a relationship, and in fact any lease of Town-



owned land, must be achieved via full compliance with applicable law. In the absence of such compliance, future litigation is probable. It is only on the narrow grounds set forth herein that the Town's prior illegal conduct has escaped the reach of the courts in this instance.

On the basis of the foregoing, it is hereby ORDERED that the respective motions of the Town (Seq. #2) and Jointa (Seq. #3) are granted, and the Amended Complaint-Petition is dismissed; and it is further

ORDERED that Tilcon's application (Seq. #1) for a preliminary injunction is denied as moot.

The foregoing constitutes the decision and order of the court.

Dated: September 9, 2016  
Goshen, New York

~~ENTER:~~  
  
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