

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

**PRESENT:**

Hon. Gary J. Weber MOTION DATE January 30, 2007  
Acting Justice of the Supreme Court Motion Seq. # 001-MD  
# 002-MG

HUNTER SPORTS SHOOTING GROUNDS, INC.,

Plaintiff(s)

-against-

BRIAN X. FOLEY, STEVE FIORE-FORSENFELD,  
KEVIN T. MCCARRICK, KATHLEEN WALS, CONNIE  
KEPERT, CAROL BISSONETTE, and TIMOTHY P.  
MAZZEI, constituting the TOWN BOARD OF THE  
TOWN OF BROOKHAVEN,

Defendant(s)

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ATTORNEY FOR PLAINTIFF  
225 BROAD HOLLOW RD, STE 303  
MELVILLE, NY 11747

ROBERT F. QUINLAN, ESQ.  
BROOKHAVEN TOWN ATTORNEY  
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ONE INDEPENDENCE HILL  
FARMINGVILLE, NY 11738

The Plaintiff-Petitioner, by Order to Show Cause (Mot. #001) granted on January 17, 2007, has demanded that the Respondents Show Cause why the Respondents should not be enjoined from enforcing their Noise Ordinance. The Plaintiff has submitted a Memorandum of Law dated January 17, 2007. The Defendants, by Notice of Cross Motion dated March 2, 2007, have moved for summary judgment pursuant to CPLR 3212. The Plaintiff has submitted an Affirmation in Opposition to the Cross Motion which is dated March 25, 2007. The Defendant has submitted a Reply Affirmation in Support of its Cross Motion which is dated April 3, 2007. The Plaintiff has submitted a Reply Memorandum of Law dated March 25, 2007. The Defendants have submitted a Memorandum of Law in Support of its Cross Motion which is dated March 2, 2007. The Defendants have also submitted a Verified Answer dated March 2, 2007.

**DECISION**

The Plaintiff seeks to enjoin the Defendants' efforts to enforce their Noise Ordinance. This is in the nature of a writ of prohibition. Typically in New York State, a Court will grant such application if the Defendant is acting in excess of its authority or without jurisdiction. *See Haggerty v. Himelein 89 NY2d 4321.*

Here, the legal and factual situation is far from clear.

Plaintiff-Petitioner maintains that its use of the disputed premises as a shooting range is a prior existing non-conforming use and, as such, is protected from the Town of Brookhaven's lately intensified efforts to enforce the Noise Control Ordinance against it.

Plaintiff-Petitioner further asserts that, in as much as the leasehold by which it operates the premises was granted by the County of Suffolk, that the Town of Brookhaven, as a lesser governmental entity, may not regulate Suffolk County property so as to prevent the operation of the shooting range, which Plaintiff-Petitioner contends that, at least under the present circumstances, would be the effective result of Defendant's enforcement of its noise ordinance. The rationale being that an outdoor shooting range cannot exist without making noise - the gunshots.

For its part, the Defendant-Respondent Town of Brookhaven maintains that the Plaintiff-Petitioner's arguments are unavailing and that, in any event, the use of the premises as a shooting range was ended voluntarily for a period of six years or so prior to Plaintiff's arrival on the scene and that the said non-conforming use was thus abandoned before Plaintiff's lease ever took effect.

If it were not for the fact that the Town apparently has adopted a tactic whereby, at times, the Plaintiff-Petitioners are cited with a summons for each shot fired, the issues in this matter might have been, from the aspect of judicial economy, at least, better adjudicated elsewhere.

As it is, Plaintiff-Petitioner raises at least the specter of a realistic possibility that the sheer economic weight of the multiple summonses issued by the Town of Brookhaven will preclude the possibility of meaningful judicial review of the Town's actions, at least in any practical sense of the term.

In any event, the rights of the County of Suffolk seem to be clearly implicated in the matter and it is hard to see how complete relief could be granted if the County were not joined in this proceeding (*see C.P.L.R. 1001(a)*).

#### ORDER

**IT IS ORDERED** that the Plaintiff's motion for an injunction is denied with leave to renew it in the manner further described herein, and it is

**ORDERED** that Defendant's cross motion for dismissal is denied with leave to renew it in the manner further described herein, and it is further


**ORDERED** that the Plaintiff join and serve the County of Suffolk as a party to this action within 30 days after service of a copy of this order with Notice of Entry and, and it is further

**ORDERED** that upon the joinder of the County of Suffolk to these proceedings, the Court will conduct a hearing on a preliminary injunction at a time and place to be determined in consultation with counsel for all of the parties. At the conclusion of the hearing on the preliminary injunction all parties may renew their motions or, upon a schedule to be agreed upon, make new ones as well.

**ORDERED** that the Defendant is directed to serve a copy of this decision and order together with a notice of entry on the Plaintiff as soon as is practicable.

This shall constitute the decision and order of the court.

Dated: May 8, 2007



Gary J. Weber, Acting J.S.C.

Non-Final Disposition  
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