

**MEMO ENDORSED**

**CATANIA, MAHON, MILLIGRAM & RIDER, PLLC**  
ATTORNEYS AND COUNSELLORS AT LAW

JOSEPH A. CATANIA, JR.  
RICHARD M. MAHON, II (DC, AZ)  
STEVEN I. MILLIGRAM (NJ)  
MICHELLE F. RIDER, CPA (FL)  
PAUL S. ERNENWEIN  
JOSEPH G. MCKAY  
MICHAEL E. CATANIA (NJ)  
ARI I. BAUER  
SEAMUS P. WEIR

ONE CORWIN COURT  
POST OFFICE BOX 1479  
NEWBURGH, NEW YORK 12550  
TEL (845) 565-1100 FAX (845) 565-1999  
TOLL FREE 1-800-344-5655

703 ROUTE 9, SUITE 5  
FISHKILL, NEW YORK 12524  
TEL (845) 231-1403 FAX (845) 565-1999  
(MAIL AND FAX SERVICE NOT ACCEPTED)

100 REP SCHOOLHOUSE ROAD, SUITE C-12  
CHESTNUT RIDGE, NEW YORK 10977  
TEL (845) 426-7799 FAX (845) 426-5541  
(MAIL AND FAX SERVICE NOT ACCEPTED)

E-MAIL: [cmmr@cmmrlegal.com](mailto:cmmr@cmmrlegal.com)  
(FAX AND E-MAIL SERVICE NOT ACCEPTED)

[www.cmmrlegal.com](http://www.cmmrlegal.com)

SPECIAL COUNSEL

JAY F. JASON (MA)  
ROBERT E. DINARDO  
SHAY A. HUMPHREY

MARK L. SCILUH  
LIA E. FIERRO  
ERIC D. OSSENTJUK (NJ)  
DAVID A. ROSENBERG (NJ)  
MICHAEL R. FRASCARELLI (NJ)  
JOHN W. FURST  
EDWARD F. KEALY (NJ)  
ERIC SANTOS  
AIMEE M. NIENSTADT  
LANI E. MEDINA (NJ)

(ALSO ADMITTED IN)

RICHARD F. LIBERTH, *RETIRED*  
HODART J. SIMPSON (1975-2016)

(ALSO ADMITTED IN)

Writer's Direct No.  
(845) 569-4322

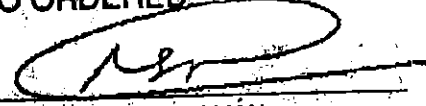
Writer's E-Mail  
[sweir@cmmrlegal.com](mailto:sweir@cmmrlegal.com)

Via ECF Filing and Fax to (914) 390-4179

Hon. Nelson S. Román  
United States District Court  
Southern District of New York  
300 Quarropas Street  
White Plains, New York 10601

May 19, 2017 Initial Pre-trial Conf.  
Scheduled for June 2, 2017  
at 10:30 am is converted to  
a Pre-Motion Conf. Opposing  
party to state position in  
writing (not to exceed 3 pages)  
by May 26, 2017. Clerk of  
the Court requested to terminate  
the motion (doc. 18).  
Dated: May 22, 2017

RE: Butterfield Realty, LLC v. Village of Cold Spring, et al.  
Case No.: 17-cv-1901 (NSR)  
Our File No.: 08977-64029  
Request for Pre-Motion Conference

**SO ORDERED:**  
  
HON. NELSON S. ROMAN  
UNITED STATES DISTRICT JUDGE

Dear Judge Román:

This firm represents Defendants, Village of Cold Spring and David Merandy, in the above-referenced case. Per the Court's Order dated April 5, 2017, the deadline for Defendants to answer or move is currently May 22, 2017. I write to respectfully advise the Court that Defendants propose to make a motion to dismiss under FRCP Rule 12(b)(6) and to request a pre-motion conference pursuant to § 3(A)(ii) of Your Honor's Individual Practices.

The complaint in this case alleges that Defendants denied Plaintiff its right to Substantive Due Process in violation of the Fourteenth Amendment and 42 U.S.C. §1983. The gravamen of the complaint is that Defendants took steps to undermine and "kill" a large property redevelopment project managed by Plaintiff by causing intentional delays, increasing costs, and denying building permits. Plaintiff's constitutional causes of action are based upon the allegation that Plaintiff had a vested property interest in an approved site plan and in related building permits.

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: 5/22/2017

Hon. Nelson S. Román  
United States District Court  
Southern District of New York  
Page 2

Defendants will demonstrate in their motion that Plaintiff made changes to its site plan subsequent to approval by the Village's Planning Board. In other words, Plaintiff no longer had an "approved" site plan. As a result, Plaintiff was required to have its revised site plan re-approved before any building permits could be issued. The Village's Zoning Code specifically mandates that "[n]o building permit may be issued for any building or structure within the purview of this Article *until a site plan or amendment of any such plan has been finally approved by the Planning Board...*" (Village Code §134-27[C][3] [emphasis added]). While Plaintiff may have been unhappy about the additional time and expenses required, such is the nature of any large-scale redevelopment project.

Plaintiff's factual allegations, even if accepted as true, fail to state a claim upon which relief can be granted. To assert a Substantive Due Process claim, Plaintiff must sufficiently allege (1) that it has a constitutionally protected property interest and (2) that Defendants arbitrarily denied it of that interest (see Honess 52 Corp. v. Town of Fishkill, 1 F.Supp.2d 294, 300 [S.D.N.Y. 1998]). The first prong – a constitutionally protected property interest – is of paramount importance. Even where it can be shown that a denial was arbitrary, a Substantive Due Process claim nevertheless does not lie in the absence of a protected property right in the first instance (see Gagliardi v. Village of Pawling, 18 F.3d 188, 193 [2d Cir 1994]; RRI Realty Corp. v. Inc. Village of Southampton, 870 F.2d 911, 918 [2d Cir 1989]).

As a matter of law, one cannot have a protected property right where the Planning Board has discretionary approval power (see Orange Lake Assoc., Inc. v. Kirkpatrick, 825 F.Supp. 1169, 1178 [S.D.N.Y. 1993], aff'd 21 F.3d 1214 [2d Cir 1994]; RRI Realty Corp. v. Inc. Village of Southampton, 870 F.2d at 919; RR Village Assn. v. Denver Sewer Corp., 826 F.2d 1197, 1201-02 [2d Cir 1987]).

Here, the Village's Building Inspector and Planning Board had complete discretion to determine whether Plaintiff's revised site plan required re-approval and whether to grant such approval (see Donovan Realty, LLC v. Davis, 2009 WL 1473479, \*5 [N.D.N.Y. 2009] [holding there is no protected property interest where the defendants have authority to approve or disapprove a site plan modification]). Thus, as a matter of law, Plaintiff could not have had a protected property interest in approval of its revised site plan or in related building permits which were not yet issued.

Plaintiff, in effect, wants this Court to transform itself into a zoning board of appeals, which is patently improper (see Zahra v. Town of Southold, 48 F.3d 674, 679-80 [2d Cir 1995]; Penlyn Development Corp. v. Inc. Village of Lloyd Harbor, 51 F.Supp.2d 255, 263 [E.D.N.Y. 1999] ["Occasionally, this discretion may yield inequitable and irregular results. Nevertheless, federal courts must be careful not to become zoning boards of appeal"]).

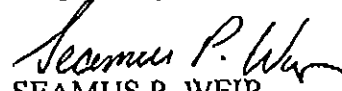
Hon. Nelson S. Román  
United States District Court  
Southern District of New York  
Page 3

Application to the *Village's* Zoning Board of Appeals would have been Plaintiff's sole proper remedy (*Village Code* §134-24 *et seq.*). However, Plaintiff failed to pursue that remedy and is now time-barred from doing so, as such appeals must be taken within sixty (60) days (*N.Y. Village Law* § 7-712-a[5][b]).

In sum, Plaintiff could not have had a protected property interest in its site plan once it made modifications subjecting the plan to a new approval. Similarly, Plaintiff could not have had a property interest in any building permits associated with the revised site plan which had not been issued. The lack of a constitutionally protected property interest defeats Plaintiff's Substantive Due Process claims as a matter of law.

Based upon the foregoing, Defendants respectfully request the Court to schedule a pre-motion conference and to grant leave to move to dismiss, pursuant to FRCP 12(b)(6), on the ground of failure to state a claim upon which relief can be granted.

Respectfully submitted,

  
SEAMUS P. WEIR

SPW/dar/lf/1354095

cc: Girvin & Ferlazzo, P.C. (via ECF filing)

*Pursuant to IRS Regulations, any tax advice contained in this communication or attachments is not intended to be used and cannot be used for purposes of avoiding penalties imposed by the Internal Revenue Code or promoting, marketing or recommending to another person any tax related matter.*