



## REALESTATE

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# Precedent setter

Court ruling against town's restrictive covenants helps developers

By DAVID WINZELBERG

A state appellate court decision has ended the long battle over an Island Park residential development and provided a future tool for developers to fight restrictive covenants imposed by municipalities.

The landmark ruling issued two months ago upheld earlier court decisions that struck down an attempt by the Town of Hempstead to keep rental apartments out of a planned development in Island Park. The court invalidated a restrictive covenant imposed by the town on the grounds that its restriction to only build for-sale condos on the site provided "no actual and substantial benefit" to the town.

In 2007, Blue Island Development and Posillico Development Company at Harbor Island applied to the Hempstead town board to develop a \$70 million, 172-unit residential waterfront project. The town approved the application a year later, but it was subject to a restrictive covenant that required all the homes be sold as condominiums only.

Posillico paid \$2.4 million for the 11.5-acre development site at Harbor Island, a former Cibro oil storage and distribution facility, at a bankruptcy auction in 1999. The company had originally planned to build 172 condominiums on the property and received approvals in the spring of 2008, but held off when housing prices collapsed a few months later.

The developer changed the plan and proposed to build 140 luxury rental units, 32 condominium units, and 31 boat slips on the site. Posillico applied to the town to modify the restrictive covenant in 2010 and again in 2013, to allow for rental units as well as condo units, but the town refused. Over the following three years, the Supreme Court and its Appellate Division both ruled against the town. And with this latest decision, the town has exhausted all its appeals.

Attorney Jason Stern, partner at Weber Law Group, who represented the developer in the case, called the ruling "a terrific victory" for his client.

"This case will serve as a check on municipalities that seek to overreach in imposing restrictions on real estate projects without justification, Stern told LIBN. "As a result of the precedent set by this case, restrictions imposed by municipalities on real estate projects must provide an "actual and substantial benefit," or they will be subject to judicial attack and struck down by the courts."

The Appellate Division applied a statute known as the Real Property Actions and Proceedings Law, something that's historically been applied to contracts between pri-



Photo by Judy Walker

**JASON STERN: This is the first time the Real Property Actions statute has been applied to a municipality.**

vate parties, to determine that Hempstead's restrictive covenant was "invalid and unenforceable."

Mitchell Pally, CEO of the Long Island Builders Institute, called the ruling "a big deal." LIBI had filed an amicus brief in support of the Posillico lawsuit.

"We were very pleased with the court's decision," Pally said. "It will present significant new opportunities for the building community to develop properties without unreasonable restrictions being placed on them. It will also provide new opportunity for rental projects because the court has determined that the distinction between rental and for-sale projects is no longer warranted."

Pally added that the precedent-setting ruling could also be used by developers to reject conditional requirements forced on them by municipalities, such as donations to community funds or school districts that are unrelated to their projects.

Before construction of the Harbor Island development can

proceed, the property must be remediated to the standard set forth in the project's Remedial Action Work Plan as approved by the State Department of Environmental Conservation's Brownfield Cleanup Program. The Dec. 31, 2017 deadline to meet the cleanup obligations, estimated to cost Posillico several million dollars, has been extended into 2019.

As for the future of the project, Posillico executives haven't responded to requests for comment. However, real estate industry sources say it's likely the development will be converted into all rentals when it finally moves forward.

Meanwhile, Stern said the court decision is the first time the Real Property Actions and Proceedings Law has been applied to keep a municipality in check.

"Ultimately, the case proves that contrary to conventional wisdom, you can fight town hall," Stern said. "And you can win."

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## Inked

### 574 Broadway Ave., Amityville

Powerhouse Mason Supply purchased a 2,900-square-foot industrial building with outdoor storage at 574 Broadway Ave. in Amityville for \$1 million. The property is a former lumber yard. Jose Torres of **Schacker Realty** represented the buyer, while Chris Nicholson of **Genesis Real Estate** represented seller Sibby Realty Corp. in the sales transaction.

### 66 Broadway, Greenlawn

ALVI Brothers purchased a 2,100-square-foot retail building at 66



Broadway in Greenlawn for \$420,000. The building was occupied by a drug-store for more than three decades, but has been vacant for the last several years. Gary Pezza of **NAI Long Island** represented the buyers and the sellers, Ed Gauss and Al Pekchi, in the sales transaction.

### 1626 Locust Ave., Bohemia

AMP Industries leased 5,000 square feet of industrial space at 1626 Locust Ave. in Bohemia. Andrew Gonzalez of **Industry One Realty** represented the tenant, while landlord Carpentier Properties was self-represented in the lease transaction.

### 180 Adams Ave., Hauppauge

J&D Brush Company leased 3,325 square feet of office space at 180 Adams Ave. in Hauppauge. Doug Donatelli of **Metro Realty Services** represented the tenant, while James Parnes of **Schacker Realty** represented landlord 180 Adams Realty LLC in the lease transaction.

### 187 E. Main St., Huntington

Home Energy Solutions purchased a 4,750-square-foot building at 187 E. Main St. in Huntington for \$1.35 million. The building was formerly occupied by the Stiene and Associates law firm. Gary Pezza of **NAI Long Island** represented the buyer and the sellers, Glenn and Deborah LeMay, in the sales transaction.

### 772 Marconi Ave., Ronkonkoma

OB Maintenance & Management Corp. leased 3,000 square feet of industrial space at 772 Marconi Ave. in Ronkonkoma. Michael Zere of **Zere Real Estate Services** represented the tenant and the landlord, LMAR Corp., in the lease transaction.