SHORT FORM ORDER

INDEX No. 01-2730
CAL. No. 14-00625NT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 9-30-14
ADJ. DATE 1-13-15
Mot. Seq. # 004 - MotD

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GREENPORT GROUP, LLC and ADRIENNE SOLOF,

Plaintiff,

- against -

THE TOWN BOARD OF THE TOWN OF SOUTHOLD,

Defendant.

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Upon the following papers numbered 1 to 48 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 21 - 45; Replying Affidavits and supporting papers 46 - 48; Other memoranda of law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted to the extent that (1) the claims of Adrienne Solof are dismissed in their entirety; and (2) the first, third, fourth and sixth causes of action asserted by the Greenport Group, LLC are dismissed, and the motion is otherwise denied.

In this proceeding commenced as a hybrid Article 78 proceeding and declaratory judgment action, plaintiffs seek, *inter alia*, to annul and further challenge the constitutionality of the adoption of a local law by defendant Town Board of the Town of Southold ("Town Board") which changed the zoning classifications of two adjacent parcels of real property owned by plaintiff Greenport Group, LLC ("Greenport Group") consisting of approximately 31 acres. Pursuant to an order dated December 2, 2002 (Jones, J.), and upon the consent of the parties, the claims interposed herein are considered exclusively as applications for declaratory relief.

The parcels of real property at issue are located on the east side of Chapel Lane and the north side of the Main Road (Route 25) in Greenport, Town of Southold, County of Suffolk, New York, and are depicted on the Suffolk County Tax Map as 1000-045.00-02.00-010.005. In or about 1976, the Planning Board and Town Zoning Board of Appeals of the Town of Southold granted a conditional site plan and special exception for construction of a multiple residence complex for Senior Citizen housing at the site. In or about 1984, certificates of occupancy were issued for the four (4) detached two-family residential dwelling units which remain on the property. At the time of construction, the southerly portion of the property was designated Limited Business (LB) and the northerly portion was designated Hamlet Density (HD).

On or about September 12, 2000, the Town Board adopted its own resolution, Local Law 20-2000, changing the designation of the entire property to Residential Low Density (R-80). The local law was filed with the Secretary of State on October 2, 2000. The purported rationale for the change in zoning, as set forth in the adopted legislation, was to achieve consistency with the Town of Southold's comprehensive land use plan and existing zoning patterns, and further to adhere to the recommendation in the findings of the Town Board's consultant, the Cramer Consulting Group, Inc. ("CCG"), which in 1999 prepared a report titled "County Road 48 Corridor Land Use Study Recommendation Discussion".

Plaintiff Adrienne Solof ("Solof") acquired ownership of the subject property by deed recorded on December 23, 1998 and thereafter conveyed interest in the property to the Greenport Group, of which Solof and her husband non-party Matthew Solof are purportedly the sole members, by deed recorded September 25, 2000. Approximately one year prior to the transfer, in or about September 1999, the Town Board published a notice of a public hearing to consider a change in zoning designations of certain properties along the Route 48 corridor, including the parcels at issue here. Solof filed a notice of protest pursuant to Town Law § 265, and the Town Board failed to pass the resolution at a Town Board hearing held October 19, 1999. Thereafter, another public hearing was noticed to again consider changing the zoning designation of the Greenport Group's property. On September 12, 2000, the Town Board adopted the resolution changing the zoning classification to R-80, and the local law was implemented the following month.

The complaint in this action, filed on February 2, 2001, asserts six causes of action. The first cause of action seeks a declaration that the local law changing the zoning designation of plaintiff's property is null and void because the Town Board adopted the resolution in violation of Town notice requirements and further in contravention of the Due Process clauses of the United States and New York State Constitutions. The second cause of action seeks a declaration that the Town Board's decision to re-zone plaintiff's property was arbitrary and capricious and an unconstitutional abuse of the Town Board's zoning authority. The third cause of action seeks a declaration that the re-zoning was unfairly discriminatory in nature against plaintiff's property and constitutes illegal spot zoning. The fourth cause of action alleges that the re-zoning violated plaintiff's vested rights to the HD and LB zoning classifications. The fifth cause of action alleges that the re-zoning was unjustified and fails to achieve the purported goals of the local law and land use plan. The sixth cause of action alleges the re-zoning amounts to a taking of plaintiff's property without just compensation, or, alternatively, seeks damages in an amount not less than $1.5 million.

Following the completion of discovery and certification of readiness for trial, the Town Board moves for summary judgment dismissing the complaint. Specifically, the Town Board argues that plaintiffs failed to overcome the presumption of Constitutionality afforded the zoning acts of a local municipality; the Court previously determined by prior order that the Town Board satisfactorily complied with the notice provisions pursuant to Town Law § 264 and § 265 thereby requiring dismissal of the first cause of action; the Town Board's decision to change the zoning classification was in accordance with the Town's comprehensive land use study; plaintiff's property was not singled out and re-zoned for the benefit of the landowner, and thus illegal spot zoning does not apply; plaintiffs did not acquire a vested right in the prior zoning that prevented the Town Board from effectuating a change in classification; the Town Board's adoption of the local law did not constitute a regulatory taking; and with respect to any monetary damages sought, such claims are barred due to plaintiffs' failure to serve a notice of claim. With respect to Solof, the Town Board further asserts that since she transferred ownership in the property to the Greenport Group prior to the enactment of the zoning change at issue, to the extent any of the causes of action survive summary judgment, they must be dismissed as to her.

In support of the motion, the Town Board submits, among other things, the pleadings, the County Route 48 Corridor Land Use Study ("CR 48 Land Use Study"), County Road 48 Land Use Study-Recommendation Discussion ("CR 48 Recommendation Discussion"), the bill of particulars, portions of the deposition testimony of Matthew Solof, managing partner of the Greenport Group, and Heather Lanza, current Town of Southold Director of Planning, two real estate appraisals, various invoices submitted by plaintiffs and the affirmation of counsel. In opposition, plaintiffs submit the affidavits of Mr. Solof and Kevin Barrasso, principal of the zoning consulting firm Owner's Advocate, zoning maps, the CR 48 Land Use Study, the CR 48 Recommendation Discussion, Southold Planning Board's resolutions, building permits and certificates of occupancy, the aforementioned real estate appraisals, the deposition transcripts of the Hon. Louisa Parkinson Evans, Fishers Island Town Justice and Southold Town Board Member, and Ms. Lanza, and an affirmation of counsel.

Initially, the motion for summary judgment dismissing the complaint as pertaining to plaintiff Solof is granted. It is well-established that in land use matters, an individual has standing where he or she demonstrates that they would suffer a direct harm or injury that is different from that of the public at large (***Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency***, 76 NY2d 428, 559 NYS2d 947 [1990]). Here, it is undisputed that Solof conveyed her individual interests in the property to the Greenport Group on September 25, 2000, prior to the implementation of the local law changing the zoning. Although Solof is apparently a member of the Greenport Group, the record fails to provide any evidence suggesting that Solof, in her individual capacity, has been aggrieved in any way by the alleged unlawful actions of the Town of Southold. Absent ownership of the subject property or a recognized right in an affected property within close proximity of the subject property, standing is not established (*see* ***Town of Bedford v Village of Mt. Kisco***, 33 NY2d 178, 351 NYS2d 129 [1973]; ***Lee v The New York City Dept of Hous. Preserv. and Dev.***, 212 AD2d 453, 622 NYS2d 944 [1st Dept 1995]). Under these circumstances, defendant's motion for summary judgment dismissing the complaint in its entirety with respect to Solof is granted.

With respect to the first cause of action, defendant is similarly entitled to summary judgment. Plaintiffs previously sought and were denied summary judgment on their claim that the Town Board's

decision to change the zoning classification was null and void on the grounds that the Town Board failed to comply with the Town's notice requirements. By order dated December 10, 2002 (Jones, J.), the Court held that although the Town Board failed to comply with the notice provisions of § 58-1 of the Local Law, the notice was sufficient pursuant to §§ 264 and 265 of Town Law. Further, since plaintiffs acknowledged they participated in the hearing regarding the zoning change and further failed to demonstrate that they were aggrieved or prejudiced in any manner as a result of the procedural violation of § 58-1, the Court denied plaintiffs' motion for summary judgment.

The Appellate Division, Second Department has since reached the same conclusion, and further affirmed summary judgment in favor of the Town Board in another action involving the sufficiency of the Town's notice of public hearing. In *John P. Krupski & Bros., Inc. v Town Board of Town of Southold*, the Appellate Division held that the Town of Southold's interpretation of its own local notice provisions as requiring compliance with Town Law § 264 and § 265 was neither arbitrary, capricious nor contrary to law (***John P. Krupski & Bros., Inc. v Town Bd of Southold***, 54 AD3d 899, 864 NYS2d 149 [2d Dept 2008]). In *John P. Krupski & Bros., Inc.*, similar to the instant matter, plaintiffs received notice of the hearing, and both attended and participated in the proceeding. Moreover, there is no allegation here that the notice provided by the Town Board was in contravention of either Town Law § 264 and § 265 or that the Town Board changed its interpretation of the local laws pertaining to zoning. Accordingly, plaintiffs' receipt of notice and its participation in the zoning hearing "constituted a waiver of the requirement that notice be given in strict compliance with the Southold Town Code" (*id.*). Under these circumstances, the Town Board is entitled to summary judgment dismissing the first cause of action. In view of the foregoing, it is declared that the Town Board's compliance with the notice requirements of §§ 264 and 265 of the Town Law along with the fact that plaintiff participated in the zoning hearings establishes that plaintiff received adequate notice.

The remaining causes of action interpose constitutional challenges and other substantive objections as to the validity of the Town Board's adoption of the local law changing the zoning classification of plaintiff's property. Generally, land use regulations must be in compliance with the town's overall comprehensive plan (Town Law § 263; ***Rocky Point Drive-In v Town of Brookhaven***, 21 NY3d 729, 977 NYS2d 719 [2013]; ***Nicholson v Incorporated Vil. of Garden City***, 112 AD3d 893, 978 NYS2d 288 [2d Dept 2013]). In addition to consideration for the general welfare of the community, a town in exercising its zoning authority "[m]ust act for the benefit of the community as a whole following a calm and deliberate consideration of the alternatives, and not because of the whims of either an articulate minority or even majority of the community" (***Udell v Haas***, 21 NY2d 463, 288 NYS2d 888 [1968]).

It is well-established that local zoning laws are entitled to a "strong presumption of constitutionality" (***Matter of G & C Transp., Inc. v McGrane***, 97 AD3d 817, 949 NYS2d 113 [2d Dept 2012]; ***Bonnie Briar Syndicate v Town of Mamaroneck***, 242 AD2d 356, 661 NYS2d 1005 [2d Dept 1997]). The presumption is rebuttable, but to be defeated, plaintiffs must establish the unconstitutionality of the local zoning law beyond a reasonable doubt (*see* ***Robert E. Kurzius, Inc. v Upper Brookville***, 51 NY2d 338, 434 NYS2d 180 [1980]). In other words, plaintiffs bear the burden of demonstrating that the zoning change "is not justified under the police power of the state by any reasonable interpretation of the facts" (***Matter of Seth Hart v Town Board of Huntington***, 114 AD3d

680, 980 NYS2d 128 [2d Dept 2014] [*quoting* ***Town of Bedford***, *supra*, 33 NY2d at 178]). Where the validity of the zoning law is "debatable" or its implementation is reasonable under an ordinary interpretation of the facts, the zoning law will be upheld (*id.*).

With regard to the second and fifth causes of action, the Town Board demonstrated prima facie entitlement to summary judgment. The record evinces evidentiary proof that the decision to re-zone plaintiff's property from Limited Business and Hamlet Density Residential to R-80 Residential Low-Density was based upon the advice and recommendations of CCG, the Town's consultant, which prepared both the CR 48 Land Use Study and CR 48 Recommendation Discussion at the request of the Town. A review of those documents, in addition to the Town of Southold Long Environmental Assessment Form ("LEAF"), details the Town's comprehensive goals and objectives. The Local Law itself provides, in pertinent part, the overall legislative intent of the Town Board in its implementation of a comprehensive use plan is to (1) preserve farmland and agriculture; (2) preserve open and recreational space; (3) preserve the rural, cultural, commercial and historical character of the hamlets and surrounding areas; and (4) preserve the natural environment, including the "Town's natural environment from wetlands to woodlands".

The documentary and testimonial evidence suggests the re-zoning was reasonable and further implemented in a manner consistent with these goals. The LEAF provides at page 5 that the re-zoning is "consistent with the recommended uses in adopted local land use plans". The document further reflects that under the prior zoning, the maximum potential development of plaintiff's property was 87,120 square feet of commercial buildings and 91.201 multi-family units. Under the new zoning, the maximum development is 17 single family units (Defendant's Motion; Exh. 5). In addition, Heather Lanza, Southold's current Director of Planning, testified that plaintiff's property is partially considered "wetlands", the parcels directly to the east of the subject property are designated as "parkland", and the subject parcels are part of the Town's protected open space lands (Defendant's Motion; Exh. 11).

In opposition, however, plaintiffs raise triable issues of fact as to whether the stated intent of the re-zoning was in fact the actual purpose for re-zoning plaintiff's property. Parenthetically, since the re-zoning was enacted approximately 14 years ago, the witnesses' recollection as to the zoning re-classification was legitimately less than ideal. Although the Town Board's decision appears to be supported by the CR 48 Land Use Study and CR 48 Recommendation Discussion, and tremendous deference is given to the local municipality's decision-making process and its authority, the Court will not simply rubberstamp a local municipality's assertion that it was following the advice of its own consultant. Instead, the Court must examine the record, including the adopted legislation, to determine whether the legislation was reasonable and enacted in accordance with the municipality's land use plan.

Here, notwithstanding the documentary evidence supporting the Town Board's claim, plaintiffs raise questions of fact concerning similarly situated properties included within the CCG studies but treated differently by the Town Board. For example, plaintiffs refer to two parcels in particular, the Cliffside Resort Time Share, a HD project on the Long Island Sound, and the nearby Kontokosta property, approximately 17 acres of undeveloped land without any existing infrastructure zoned as HD, that were not re-zoned by the Town Board. In addition, apparently hearings were held in 1999 and 2000 to re-zone 18 parcels included in the CCG studies but the Town Board failed to adopt the corresponding

resolutions authorizing the recommended zoning changes. These parcels include: 45-2-1 (Resolution #76, 2000); 113-12-11 (Resolution #80, 2000); 113-12-12 (Resolution #81, 2000); 113-12-13 (Resolution #82, 2000); 113-14-10 (Resolution #83, 2000); 121-6-1 (Resolution #84, 2000); 141-3-38.1 (Resolution #87, 2000); 141-3-29.1 (Resolution #90, 2000); 59-10-4 (Resolution #96, 2000); 59-10-5 (Resolution #97, 2000); 59-7-31.4 (Resolution #98, 2000); 59-7-32 (Resolution #99, 2000); 59-10- 3.1 (Resolution #100, 2000); 59-7-30 (Resolution #101, 2000); and 59-7-30.4 (Resolution #102, 2000); 55-5-2.2 (Resolution #111, 2000); 55-5-6 (Resolution #113, 2000, tabled); and 55-5-4 (Resolution #114, 2000, tabled). Further, plaintiffs identified more than two dozen parcels in which a second hearing was not conducted after the proposed zoning change had been denied in 1999.

The Town Board's opposition and efforts to refute the claim that plaintiff's property was unlawfully singled out for re-zoning compared to other properties contained within the CCG studies are unavailing. Where there are legitimate factual issues concerning the Town Board's intent and motivation in re-zoning a particular piece of property, summary judgment is unwarranted. Under these circumstances, defendant's motion for summary judgment dismissing the second and fifth causes of action asserted by the Greenport Group is denied.

With regard to the third cause of action, plaintiff alleges that the Town Board's adoption of the local law changing the zoning of its property, but not nearby similarly situated properties, constituted impermissible spot zoning. Spot zoning is the process of singling out a small parcel of land, for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners (*see* ***Rodgers v Village of Tarrytown***, 302 NY 115, 96 NE2d 731 [1951]). A municipality may not engage in spot zoning since to do so would be to defy the municipality's comprehensive land use plan (*see* ***Collard v Incorporated Vil. of Flower Hill,*** 52 NY2d 594, 439 NYS2d 326 [1981]; ***Conifer Dev. v City of Syracuse***,100 AD2d 730, 473 NYS2d 662 [2d Dept 1984]). Defendant has established that since there is no allegation or any evidence that the zoning change was either for "the benefit of the owner" or to the "detriment of other owners", the claim of spot zoning is unsustainable. Plaintiff failed to raise an issue of fact in opposition. Accordingly, the Town Board's motion for summary judgment dismissing the third cause of action is granted. In view of the foregoing, it is thus declared that the Town Board's adoption of the local law changing the zoning of plaintiff's property did not constitute impermissible spot zoning.

With regard to the fourth cause of action, defendant similarly established prima facie entitlement to judgment as a matter of law that plaintiffs did not have a vested property interest in the prior zoning. As a general matter, a landowner does not have vested rights in a zoning change (*see* ***Rodgers v Village of Tarrytown***, 302 NY 115 [1951]). Substantial improvements and expenditures standing alone are insufficient to give vested rights. Instead, the landowner must establish that the expenditures were so substantial that the "municipal action results in serious loss rendering the improvements essentially valueless" (***Town of Orangetown v Magee***, 88 NY2d 41, 643 NYS2d 21 [1996]). Plaintiffs submitted the affidavit of Kevin Barrasso, the owner of Owner's Advocate, who testified that in 2000, prior to the zoning change, Mr. Solof paid in excess of $10,000 to his company, in addition to alleged separate expenditures to other contractors, regarding development of the subject property. However, according to Mr. Barrasso, the expenditures were limited to meetings, retention of counsel and the retention of a contractor to "submit an application to wetlands". It is undisputed that no construction was performed in

connection with the development prior to the zoning change. "[W]here substantial expenditures have been made but substantial construction has not been completed, no vested rights will accrue" (***Berman v Warshavsky***, 256 AD2d 334, 681 NYS2d 303 [2d Dept 1998]; *see also* ***Matter of RC Enters. v Town of Patterson***, 42 AD3d 542, 840 NYS2d 116 [2d Dept 2007]; ***Putnam Armonk, Inc. v Town of Southeast***, 52 AD2d 10, 382 NYS2d 582 [2d Dept 1976]). Under these circumstances, the motion for summary judgment dismissing the fourth cause of action is granted. It is further declared that the Greenport Group did not possess vested rights in the prior zoning of its property.

With regard to the sixth cause of action alleging that the re-zoning constitutes a taking without just compensation, defendant has demonstrated prima facie entitlement to summary judgment dismissing that claim as well. It is well-established that to prevail on the claim, the Greenport Group must establish "by 'dollars and cents evidence' . . . that under no permissible use would the parcel as a whole be capable of producing a reasonable return'" (***Adrian v Town of Yorktown***, 83 AD3d 746, 920 NYS2d 411 [2d Dept 2011]). Thus, the Greenport Group must demonstrate that the economic value of the subject property was "destroyed by the regulations at issue" and that the loss was "one step short of complete" (***Noghrey v Town of Brookhaven***, 48 AD3d 529, 852 NYS2d 220 [2d Dept 2008]). It has been held that an 82% financial diminution in property value, without more, is insufficient to sustain an unlawful takings claim (*see* ***Matter of New Creek Bluebelt, Phase 4 v City of New York***, 122 AD3d 859, 2014 NY Slip Op 8029 [2d Dept 2014]; ***Euclid v Ambler Realty Co.***, 272 US 365, 47 S.Ct. 114 [1926] [75% diminution]; ***Adrian***, *supra* [64% diminution]).

Here, according to the appraisal reports submitted by plaintiff, which were prepared in 2007 and purport to assess the value of the subject property immediately before and after the implementation of the change in zoning, the property was worth $4,350,000 and $800,000, respectively (Defendant's Motion; Exhs. P and Q). This translates into a diminution of 80.7% which, in and of itself, does not constitute a sufficient diminution to establish an unlawful taking (***Adrian***, *supra*). Moreover, the appraisal immediately following the zoning change provides that the property in its current condition, despite collecting below market rents, is profitable (Defendant's Motion; Exh. Q, at 59). Accordingly, the Greenport Group cannot sustain a cause of action for an unlawful taking and the sixth cause of action is dismissed. In view of the foregoing, it is declared that the re-zoning of plaintiff's property did not amount to a taking without just compensation.

With respect to plaintiff's alternative claim for money damages, the Court finds that plaintiff's failure to serve a notice of claim pursuant to General Municipal Law 50-e is fatal because the money damages are not merely incidental to the declaratory relief sought adjudging the re-zoning null and void. Rather, the complaint alleges in effect a separate cause of action for money damages, in the alternative, should the unlawful taking claim be dismissed. Under these circumstances, a notice of claim was required (*cf.* ***Johnson v City of Peekskill***, 91 AD3d 825, 936 NYS2d 701 [2d Dept 2012]).

Dated: JUN 17 2015

HON. JOSEPH A. SANTORELLI
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**