North Fork Knolls I, L.P. v Town of Riverhead
2007 NY Slip Op 31083(U)
May 2, 2007
Supreme Court, Suffolk County
Docket Number: 0023322/2006
Judge: Peter Fox Cohalan
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INDEX NO.23322-2006

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 003 Mot D

004 Mot D

Present:
Hon. SANDRA L. SGROI

Adj'd Date: 3-15-07
Return Date: 11-6-06

NORTH FORK KNOLLS I, L.P.,

Plaintiff,

-against-

TOWN OF RIVERHEAD and TOWN BOARD OF THE TOWN OF RIVERHEAD,

Defendants.

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Upon the following papers numbered 1 to 52 read on these Motions: Notice of Motion and supporting papers 1-17; Affirmation in opposition and supporting papers 37-42; Reply Affirmation and supporting papers 45-52; Exhibits 18-36; 43-44; it is,

ORDERED that the motion of the Defendants numbered 003 is withdrawn upon stipulation of the parties; and it is further

ORDERED that the Clerk of this Court has entered the notice of motion attached as Exhibit "C" to Plaintiff's affirmation in opposition as motion sequence number 004; and it is further

ORDERED that motion sequence number 004 is decided as follows:

1. the motion of the Defendants to dismiss the Plaintiff's amended complaint is granted only to the extent that (a) the Town's requirement that a second special permit be filed is challenged or (b) the Plaintiff claims a vested property right under the lapsed special permit obtained by Hubbard before the Plaintiff took title to the property;

2. the motion pursuant to ***CPLR*** § 3211 to dismiss the claims in the amended Complaint alleging a violation of 42 United States Code § 1983 is denied;

3. the motion pursuant to ***CPLR*** § 3211 to dismiss the amended Complaint for failure to state a cause of action on the issue of unconstitutional taking is denied at this time with leave to move for summary judgment at the appropriate time after further discovery has been conducted;

4. the motion to dismiss upon the ground that this Court does not have jurisdiction of this matter is denied; and

5. all other requested relief in the motion of the Defendants is denied.

The Defendants herein moved for an order dismissing the action of the Plaintiff on the grounds that the Plaintiff lacks jurisdiction of the Defendants, the complaint fails to state a cause of action, a defense is founded upon documentary evidence and the time within which to commence this action has expired. The Defendants have not moved for summary judgment and the Defendants' motion to dismiss is limited by the issues raised in its motion.

In ***Leon v. Martinez*** (84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511), the Court of Appeals stated that on a motion to dismiss pursuant to CPLR 3211 "the pleading is to be afforded a liberal construction (*see* CPLR 3026)." Additionally, on a motion to dismiss pursuant to CPLR § 3211(a) (7), the court must accept the facts as alleged in the complaint as true (see, ***Greene v. Doral Conference Center Associates***, 18 A.D.3d 429, 795 N.Y.S.2d 252), accord the Plaintiffs the benefit of every possible favorable inference with regard to those facts (see, ***Kevin Spence & Sons, Inc. v. Boar's Head Provisions Co., Inc.,*** 5 A.D.3d 352, 774 N.Y.S.2d 56), and determine only whether the facts as alleged fit within any cognizable legal theory (see, ***Collins v. Telcoa Intern. Corp.,*** 283 A.D.2d 128, 726 N.Y.S.2d 679). A Court should freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (see, ***Rovello v. Orofino Realty Co., Inc.***, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970).

A motion to dismiss pursuant to CPLR § 3211 (a)(7) should be granted only when, even after viewing the allegations in the Complaint as true, the Plaintiff still cannot establish a cause of action. The standard is not whether the Plaintiff has stated a cause of action, but whether the Plaintiff has a cause of action (see ***Guggenheimer v. Ginzburg***, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17).

The property owned by the Plaintiff consists of approximately 78.4 acres of unimproved land located near or contiguous to Saw Mill Brook and Peconic River and the tract of land is commonly known as Hubbard Farm. On November 16, 2004, the Town of Riverhead adopted a local law to amend chapter 108 of the Riverhead Town Zoning Code and under that new enactment the property owned by the Plaintiff was re-zoned to be subject to more restrictive requirements. Prior to these zoning changes in the Riverhead Town Code, the Town conducted an environmental review pursuant to the Environmental Conservation Law and prepared an

Environmental Impact Statement. During the process of addressing the issues raised by the re-zoning, the Town issued a moratorium on residential construction in the Town. That moratorium is not challenged in this action.[1]

When the new zoning regulations were adopted, the Town re-zoned the Plaintiff's property from "Business A District - Resort Business" to "Tourism/Resort Campus (TRC) Zoning District". The present zoning permits the Plaintiff to use its property for the development of country clubs, country inns, bed & breakfast establishments and recreational sporting clubs. In addition some other uses are allowed by special permit including art galleries, retail stores and catering halls accessory to hotel uses.

Apparently, the Plaintiff now seeks to construct a senior citizen rental community with some sale units on the property and this proposed use is not permitted under the new, amended Riverhead Zoning Code.[2]

The Plaintiff's first Complaint and amended Complaint both seek a declaration that the change of zoning of the property of the Plaintiff was unconstitutional and that the change of zoning was a violation of 42 USC § 1983.

After the Defendants moved to dismiss the Complaint under motion sequence # 003, the attorney for the Plaintiff served an amended complaint dated October 25, 2006. The parties apparently stipulated that the Defendants' motion to dismiss was deemed to apply to the Plaintiff's amended complaint and, according to the Plaintiff's attorney, the Defendants, as part of that stipulation served an amended notice of motion. A written stipulation has not been submitted to the Court. It is unclear whether this stipulation procedure was permitted by one of the former Justices assigned to this matter, but in the interests of facilitating a resolution of this matter, this Court will permit the procedure utilized by the attorneys with a proviso that future stipulations concerning motion procedure should be "so-ordered" by this Court or otherwise approved in advance. In furtherance of the agreement between the parties, they allege that another amended Notice of Motion has been served and that alleged notice of motion is attached as Exhibit C to Plaintiff's affirmation in opposition. This notice of motion has apparently not been entered as a motion in the Court's computer by the Special Term Clerk and the Court will direct the Clerk to enter that Notice of Motion at this time. The first motion is ordered marked withdrawn.

This Court has jurisdiction to consider the claims of the Plaintiff. The Court is not acting as a "super

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[1]If a moratorium is not imposed in bad faith, it will be enforced as a valid exercise of police power and a legitimate response to environmental concerns (see, ***Home Depot U.S.A., Inc. v. Village of Rockville Centre***, 295 A.D.2d 426, 743 N.Y.S.2d 541).

[2]This Court must apply the Riverhead Zoning Code as it exists at the time of judicial review, unless there is proof of special facts which indicate that Riverhead acted in bad faith in delaying Plaintiff's application for a building permit while the zoning law was in the process of being changed (see, ***Matter of Pokoik v. Silsdorf***, 40 N.Y.2d 769, 772-773, 390 N.Y.S.2d 49, 358 N.E.2d 874; ***Matter of Wiehe v. Town of Babylon***, 169 A.D.2d 728, 564 N.Y.S.2d 193).

legislature" when it addresses whether the ordinance enacted by the legislature was constitutional as it is applied to the Plaintiff's property (see, ***McCallin v. Walsh***, 64 A.D.2d 46, 407 N.Y.S.2d 852 *aff'd* 46 N.Y.2d 808, 413 N.Y.S.2d 922, 386 N.E.2d 833). In determining this issue, it will not, however, substitute its judgment for that of the elected Town officials and review all the material upon which the local decision was based to determine whether the Town was correct in reaching a particular conclusion (see, ***Day-Brite Lighting, Inc. v. Missouri***, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469).

The Plaintiff also alleges that the challenge to the re-zoning of the subject property is barred by the Statute of Limitations. At this point a history of the attempts by the Plaintiff and the other property owner of the parcel to obtain a permit is relevant. In or about 1987, the former owner of the property, William Hubbard, made an application to the Town of Riverhead for a special permit to build clustered residential units on the land. At that time, the property was zoned "Business A District-Resort Business". On April 18, 1989, the Town granted conditional approval for a special permit to be issued to William Hubbard for the proposed construction of the clustered residential units with accessory recreational buildings and other amenities on the property. At that time, the proposed use was "designed for and to be marketed to second home owners". The owner was also required to submit a detailed site plan; apply for inclusion in the Riverhead Sewer District and connection to the Riverhead Water Department; obtain the approval of the Suffolk County Health Department; and prepare a condominium map or homeowners association plan acceptable to the Town.

Since the above special permit process was not completed by 1991, the Town ratified the special permit two separate times to provide Hubbard additional time to obtain the approvals required by the process. On December 16, 1997, the Town Board extended the special permit issued to the owner of the property, at that time still Hubbard, for a period of one year subject to all other terms and conditions of the prior resolutions.

In or about 1998, William Hubbard entered into a contact to sell the property to the Plaintiff in this action, North Fork Knolls I, L.P. Approximately one year later, the Plaintiff submitted site plans to include construction of senior citizen cooperatives, rental development, a community center and associated site improvements for the property to the Planning Board. The Defendants found that the Plaintiff's proposed use, senior housing with rental units for sale housing, was drastically different from the original application submitted for approval by Hubbard.

As a result of the Town of Riverhead's finding that there was a significant difference between the two applications submitted for the development of the property, the Town required the Plaintiff to file another application for a special permit for this new proposed use. The Plaintiff did not challenge this determination by the Town, and it instead filed a new application for a special permit and a new Environmental Assessment Form for review by the Town of Riverhead Planning Department.

On January 15, 1999, the Planning Department, by letter, advised the Plaintiff that the plans for a senior citizen development was a Type I action and therefore those plans were required to undergo review by the New York State Department of Environmental Conservation, the Suffolk County Department of Health Services, Suffolk County Department of Public Works and other agencies. The Town also requested further

clarification of the site plan because two different plans had been submitted. On February 1, 1999, the Plaintiff filed a proposed site plan and long form Environmental Assessment Form. After this was reviewed, on April 20, 1999, the Town Board determined that the proposal had a significant effect on the environment, declared itself the lead agency and recommended that a supplemental Environmental Impact Statement be prepared. On May 18, 1999, a scoping hearing was held to consider the relevant environmental issues and a public hearing was scheduled. The public hearing was held approximately one month later. The Plaintiff purchased the property on August 22, 2000, and the deed was recorded in the office of the Suffolk County Clerk on or about September 13, 2000.

According to the Town, the applicant did not complete the application process involved in the issuance of the second permit and it did not submit a Final Environmental Impact Statement. The first special permit that was issued to Hubbard, the former property owner, was extended by the Town for one year on December 16, 1997, but it lapsed, with no request for an extension of that special permit, in 1998.

The Complaint of the Plaintiff alleges other actions that were taken in 2001 by the parties including a public hearing in connection with the supplemental Draft Environmental Impact Statement submitted in support of the proposed project. However, it appears that this was done without the Plaintiff actually obtaining a new special permit or applying for an extension of the first, lapsed special permit.

On or about December 20, 2001, the Riverhead Town Board adopted a six month moratorium on residential subdivisions within the Town and on or about June 12, 2002, the Town Board adopted a twelve month extension of that moratorium on new, residential subdivisions. During the year of 2002, the County of Suffolk took some steps to purchase the land of the Plaintiff. Sometime prior to 2002, the Nature Conservancy expressed an interest in purchasing the land. In 2003, the County offered 2.1 million dollars for the land but the Plaintiff rejected the offer as being inadequate. On or about October 20, 2003, the Town Board extended the moratorium on residential subdivisions to February of 2004. Prior to the expiration of the moratorium on the development of subdivisions, the Town changed the zoning designation of the subject property when a new ordinance was enacted covering Town lands. It has not been alleged that the moratoriums were illegal.

This action was commenced by the Plaintiff in August or September of 2006, and the statute of limitations to challenge the Town's requirement that the Plaintiff file a second special permit had passed whether either a four month or thirty day statute of limitations is applied (see, ***CPLR*** § 217; ***Town Law*** § 267-c). The Plaintiff has never sought to request an extension of the lapsed special permit obtained by Hubbard when he was the owner of the property.

To the extent that the Plaintiff in this action seeks to challenge the decision of the Town to require a new special permit, the statute of limitations has run on that claim. The first permit lapsed at the end of 1998, prior to the issuance of a moratorium on residential developments and prior to the Plaintiff obtaining title to the property. The Plaintiff herein has no vested rights under that first special permit.

Zoning enactments have a strong presumption of constitutionality, and while such presumption of constitutionality may be rebutted, unconstitutionality must be demonstrated beyond a reasonable doubt (see, ***Clearwater Holding v. Town of Hempstead***, 237 A.D.2d 768, 655 N.Y.S.2d 768; ***Farahzad v. Town Bd. of***

Town of Riverhead, 220 A.D.2d 379, 631 N.Y.S.2d 895; ***Curtiss-Wright Corp. v. Town of East Hampton***, 82 A.D.2d 551, 442 N.Y.S.2d 125; see also ***Town of Islip v. Caviglia***, 73 N.Y.2d 544, 540 N.E.2d 215, 542 N.Y.S.2d 139).

The allegations in the amended Complaint and the causes of action interposed have been expounded to overcome the dismissal required by the running of the four-month Statute of Limitations contained in ***CPLR*** § 217,(which governs ***CPLR*** Article 78 proceedings brought against a governmental body) and the Plaintiff does not appear to seek a review of either the Town's action in requiring a second permit to be filed or the SEQRA determinations made by the Town as the lead agency (see, ***Asian Americans for Equality v. Koch***, 128 A.D.2d 99, 514 N.Y.S.2d 939 order affirmed by 72 N.Y.2d 121, 527 N.E.2d 265, 531 N.Y.S.2d 782).

In ***Vecce v. Town of Babylon***, (32 A.D.3d 1038, 822 N.Y.S.2d 94), the Appellate Division, Second Department citing the Court of Appeals held that:

> "[T]o determine the [s]tatute of [l]imitations applicable to a particular declaratory judgment action, the court must 'examine the substance of that action to identify the relationship out of which the claim arises and the relief sought.' If the court determines that the underlying dispute can be or could have been resolved through a form of action or proceeding for which a specific limitation period is statutorily provided, that limitation period governs the declaratory judgment action" (citing ***Matter of Save the Pine Bush v. City of Albany***, 70 N.Y.2d 193, 202, 518 N.Y.S.2d 943, 512 N.E.2d 526, quoting ***Solnick v. Whalen***, 49 N.Y.2d 224, 229, 425 N.Y.S.2d 68, 401 N.E.2d 190).

Therefore, to the extent that the Plaintiff seeks any relief for failure to either issue a special permit or extend the time period for the special permit, the motion to dismiss is granted.

The Plaintiff has interposed four causes of action involving alleged violations of 42 ***USC*** § 1983, a civil rights claim. In the land-use context, § 1983 protects against municipal actions that violate a property owner's rights to due process, equal protection of the laws and just compensation for the taking of property under the Fifth and Fourteenth Amendments.[3]

The Defendants have moved to dismiss stating that the statute of limitations has run on these claims and that they fail to state a cause of action. The Appellate Division, Second Department has specifically held that a three year statute of limitations applies to a challenge to a zoning change under 42 USC § 1983, and that the claim runs from the time that the land is re-zoned, and the Court is constrained to follow that precedent in deciding this action (see, ***D & S Realty Development, L.P. v. Town of Huntington***, 295 A.D.2d 306, 743 N.Y.S.2d 147). Therefore, since the statute of limitations on the §1983 causes of action in the Complaint began to run upon the re-zoning of the property, the plaintiff's action with regard to the §1983 claims was

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[3]An instructive history of the application of the Fifth Amendment's language, "nor shall private property be taken for public use, without just compensation," and it relationship to zoning is contained in ***Smith v. Town of Mendon***, (4 N.Y.3d 1, 822 N.E.2d 1214, 789 N.Y.S.2d 696).

commenced timely.

The Defendants' motion to dismiss these claims on CPLR § 3211 grounds for failure to state a cause of action must also be denied with the exception of the sixth cause of action (see, ***Bower Associates v. Town of Pleasant Valley***, 304 A.D.2d 259, 761 N.Y.S.2d 64 order affirmed 2 N.Y.3d 617, 814 N.E.2d 410, 781 N.Y.S.2d 240; ***Town of Orangetown v. Magee***, 88 N.Y.2d 41, 49, 643 N.Y.S.2d 21, 665 N.E.2d 1061). On motions to dismiss for failure to state a cause of action (***CPLR*** 3211§ [a][7]), this Court must assume the truth of the allegations in the pleading, "resolve all inferences which reasonably flow therefrom in favor of the pleader" (***Sanders v. Winship***, 57 N.Y.2d 391, 394, 456 N.Y.S.2d 720, 442 N.E.2d 1231) and "determine*** whether the facts alleged fit within any cognizable legal theory" (***Morone v. Morone***, 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592, 413 N.E.2d 1154).

The sixth cause of action alleges a claim based upon the special facts exception. It has been held that 'when a zoning law has been amended after the submission of an application seeking * * * [a project's] approval, but before a decision is rendered thereon by the reviewing agency, the courts are bound to apply the law as amended unless 'special facts' indicated that the [Town] Board 'acted in bad faith and unduly delayed acting upon [the] application while the zoning law was changed' " (***Matter of Cleary v. Bibbo***, 241 A.D.2d 887, 888, 660 N.Y.S.2d 230, quoting ***Matter of Bibeau v. Village Clerk of Vil. of Tuxedo Park***, 145 A.D.2d 478, 479, 535 N.Y.S.2d 106). The amended complaint herein alleges that the Defendants acted in bad faith and without just cause by delaying Plaintiff's application. Where it is alleged, as it is herein that the Town "deliberately delayed rendering a determination as to [petitioner's] application and that such delay was the product of malice, oppression, manipulation or corruption," a cause of action is stated (***Matter of Magee v. Rocco***, 158 A.D.2d 53, 60, 557 N.Y.S.2d 759; see also ***Matter of Greene v. Zoning Bd. of Appeals of Town of Islip***, 25 A.D.3d 612, 612-613, 806 N.Y.S.2d 880, ***Matter of Cleary v. Bibbo***, supra at 888, 660 N.Y.S.2d 230). At the present time and upon the record before this Court, there is an allegation of special facts that raise an issue concerning an intentional delay in processing the two special permits (see, ***Denton v. Town of Brookhaven***, 32 A.D.3d 395, 819 N.Y.S.2d 547; ***Matter of Greene v. Zoning Bd. of Appeals of Town of Islip*** supra). The amended complaint does allege that the Plaintiff

> was entitled to the permit as a matter of right by full compliance with the requirements at the time of the application and that proper action upon the permit would have given him time to acquire a vested right (***Matter of Pokoik v Silsdorf***, 40 N.Y.2d 769, 358 N.E.2d 874, 390 N.Y.S.2d 49).

More recently, the Court of Appeals in ***Ellington Constr. Corp. v. Zoning Bd. of Appeals***, (77 N.Y.2d 114, 564 N.Y.S.2d 1001, 566 N.E.2d 128)has stated

> The New York rule, both before and after the exemption statutes, has been that where a more restrictive zoning ordinance is enacted, an owner will be permitted to complete a structure or a development which an amendment has rendered nonconforming only where the owner has undertaken substantial construction and made substantial expenditures prior to the effective date of the amendment (cites omitted). The doctrine of vested rights has generally been described as an application of the constitutionally based common-law rule protecting nonconforming uses (cites omitted). But the doctrine is also said to have been grounded on

> principles of equitable estoppel (cites omitted). Whether rooted in equity or the common law, the operation and effect of the vested rights doctrine is the same and it has been applied alike to a single building or a subdivision (cites omitted).

This Court is cognizant that this claim may eventually be dismissed, but for the limited purposes of this ***CPLR*** 3211 motion to dismiss, the motion to dismiss the sixth cause of action in its entirety is denied.

In order to state an equal protection claim against the Defendants under §1983 because the change of zoning resulted in the Plaintiff's inability to obtain approval of a subdivision, there must be an allegation that the subject property was treated differently from other similarly-situated properties (see, ***Ardmar Realty Co. v. Building Inspector of Village of Tuckahoe***, 5 A.D.3d 517, 773 N.Y.S.2d 129; ***Bower Associates v. Town of Pleasant Valley,*** *supra*). The Complaint alleges that the "Defendants singled out the Subject Property and one other parcel for unlawful selective and discriminatory treatment by imposing the "TRC - Tourism/Resort Campus" zoning designation upon such parcels of real property." The Court cannot say on the basis of the papers submitted on this motion to dismiss that the Plaintiff has failed to state a claim in the fifth cause of action in the amended Complaint.

In ***Nicolakis v. Rotella,*** (24 A.D.3d 739, 806 N.Y.S.2d 700) the Appellate Division, Second Department succinctly stated two elements that must be alleged in the complaint for a 42 USC § 1983 action when it held that

> In order to succeed on a claim for damages pursuant to 42 USC § 1983, a plaintiff must establish (1) deprivation of a "cognizable property interest, meaning a vested property interest" (2) as a result of governmental action taken "wholly without legal justification" (***Bower Assoc. v. Town of Pleasant Val.***, *supra* at 627, 781 N.Y.S.2d 240, 814 N.E.2d 410; see ***Town of Orangetown v. Magee***, supra at 52-53, 643 N.Y.S.2d 21, 665 N.E.2d 1061).

The Plaintiff did not timely seek to extend the first special permit and it did not challenge the Town's requirement that it was required to file a request for a new permit because the development that the Plaintiff proposed was significantly different from the development that Hubbard had sought. These acts all occurred more than three years prior to the commencement of this action. Therefore, the Plaintiff did not preserve for review the Town's actions in requiring another permit to be filed. By failing to continue to proceed under a valid permit, the Plaintiff had no legally vested interest to develop the land pursuant to those permits when the moratorium was imposed by the Riverhead Town Board. Therefore, since the Plaintiff had no vested property interest as a result of the prior application for a permit, it cannot state a claim under 42 USC § 1983 for failure to act upon the special permit that was issued to Hubbard and the fourth cause of action is dismissed (see, ***Huntington Yacht Club v. Incorporated Village of Huntington Bay,*** 1 A.D.3d 480, 767 N.Y.S.2d 132). The claims based upon 42 USC § 1983 only to the extent that they rely on rights flowing from the permits are dismissed (see also, ***Masi Management, Inc. v. Town of Ogden,*** 273 A.D.2d 837, 709 N.Y.S.2d 734).

Since it appears that the constitutional claims in the complaint concern the recovery for damages for inverse condemnation (see, ***U.S. v. Clarke***, 445 U.S. 253, 100 S. Ct. 1127, 63 L. Ed. 2d 373), the three-year statute of limitations set forth in ***CPLR*** 214(4) applies to that cause of action for an unconstitutional taking of

property (see, ***Linzenberg v. Town of Ramapo***, 1 A.D.3d 321, 766 N.Y.S.2d 217; ***CPLR*** 214[4]; ***Gache v. Town of Harrison, N.Y.***, 813 F.Supp. 1037, 1047; *cf.* ***Sarnelli v. City of New York***, 256 A.D.2d 399, 401, 681 N.Y.S.2d 578; ***Sassone v. Town of Queensbury***, 157 A.D.2d 891, 893, 550 N.Y.S.2d 161). This claim, which is governed by a three year statute of limitation, accrued when the zoning ordinance was changed and it was timely interposed by the Plaintiff by service of the Summons and Complaint on the Defendants.

While the Court has found that the claim for an improper taking of the property of the Plaintiff was timely commenced, it must still decide if the allegations in the Complaint state a cause of action. A zoning regulation is not unconstitutional simply because it reduces the value of a particular parcel of land (see, ***Adamo v. Town of Babylon,*** 28 N.Y.2d 982, 984, 323 N.Y.S.2d 839, 272 N.E.2d 338). Even a showing that a zoning restriction reduces the value of the property significantly or substantially is not sufficient to establish unconstitutionality(see, ***Kennedy v. Zoning Bd. of Appeals of Village of Dobbs Ferry***, 145 A.D.2d 487, 535 N.Y.S.2d 636).

Further, the invalidity of the ordinance is not established by showing that the property would yield a greater or more profit, or a greater return, if different uses were permitted under the zoning statute(see, ***McGowan v. Cohalan***, 41 N.Y.2d 434, 393 N.Y.S.2d 376, 361 N.E.2d 1025). The Plaintiff must show not only that the property will not yield a reasonable return under the amended Code provisions for the existing use, but also that it will not yield a reasonable return under any of the other uses permitted by the zoning regulation for the land (see, ***Northern Westchester Professional Park Associates v. Town of Bedford***, 60 N.Y.2d 492, 458 N.E.2d 809, 470 N.Y.S.2d 350; ***Walton v. Incorporated Town of Smithtown***, 378 N.Y.S.2d 387, 387, 340 N.E.2d 747, 748, 37 N.Y.2d 915).

In determining whether or not a zoning ordinance is reasonable in its application to a given parcel of land and the economic return is unreasonable, the Court will take into consideration the character of the surrounding neighborhood, the existing uses and zoning of nearby property, the amount by which property values are decreased by the re-zoning, the extent to which the diminution of values promotes the public health, safety, morals or welfare (see, ***Toussie v. Central Pine Barrens Joint Planning and Policy Com'n***, 182 Misc.2d 582, 700 N.Y.S.2d 358), the relative gain to the public as compared with the hardship imposed upon the individual owner, the suitability of the subject property for the purpose for which it is zoned (see, ***Dodge Mill Land Corp. v. Town of Amherst***, 61 A.D.2d 216, 402 N.Y.S.2d 670), the length of time the property has remained unimproved, considered in the context of the land development in the area and any other factor that may be relevant to the determination (see, ***C/S 12th Ave. LLC v. City of New York***, 32 A.D.3d 1, 815 N.Y.S.2d 516; see also ***Linzenberg v. Town of Ramapo***, 1 A.D.3d 321, 766 N.Y.S.2d 217[4]).

In 1999, the New York Court of Appeals in ***Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck***, (94 N.Y.2d 96, 721 N.E.2d 971, 699 N.Y.S.2d 721certiorari den'd 529 U.S. 1094, 120 S.Ct. 1735, 146 L.Ed.2d 654, 68 USLW 3552, 68 USLW 3669) stated:

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[4]The Defendants have not moved for summary judgment in the present case and therefore this Court is not deciding whether the allegations in the Complaint that the property could not yield an economically reasonable return as it is presently zoned are insufficient to establish an unconstitutional taking.

> In ***Agins v. City of Tiburon***, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106, the United States Supreme Court articulated the general test for determining whether "[t]he application of a general zoning law to particular property effects a taking" (*id.*, at 260, 100 S.Ct. 2138, 65 L.Ed.2d 106). ***Agins*** held that a zoning law effects a regulatory taking if either: (1) "the ordinance does not substantially advance legitimate state interests" *or* (2) the ordinance "denies an owner economically viable use of his land" (*id.*).

In reaching a determination as to whether there has been a taking, no single factor is controlling and each must receive due consideration. In order to sustain its attack upon the validity of a zoning ordinance, the Plaintiff must show that if the ordinance is enforced the restrictions on the property would essentially preclude its use for any purpose to which it is reasonably adapted (see, ***Northern Westchester Professional Park Associates v. Town of Bedford***, 60 N.Y.2d 492, 458 N.E.2d 809, 470 N.Y.S.2d 350. The Plaintiff is required to show that there is no possibility for profitable use under the restrictions of the zoning ordinance, or alternatively that the greater part of the value of the property is destroyed by it, although there may be some slight use remaining (see, ***Dauernheim, Inc. v. Town Bd. of Town of Hempstead,*** 33 N.Y.2d 468, 310 N.E.2d 516, 354 N.Y.S.2d 909). It is obvious that this is a heavy burden.

The complaint herein alleges that the zoning classification applied to the property of the Plaintiff is the most restrictive in the Town of Riverhead. It further alleges that only one other lot under the amended Code in the Town of Riverhead is zoned "TRC-Tourism/Resort Campus". According to the Plaintiff's amended complaint, the restrictions placed upon the property by this zoning classification are "facially untenable" and the "property has diminished in value in an amount not less than $50,000,000." (Amended Complaint, Plaintiff's Exhibit "B"). At this time, those factual allegations are not challenged. Therefore, the amended complaint states a claim as to the confiscatory nature of the amended zoning ordinance as it applies to the property of the Plaintiff and the Court will deny the motion of the Defendants to dismiss the Amended Complaint (see generally, ***Noghrey v. Town of Brookhaven***, 21 A.D.3d 1016, 801 N.Y.S.2d 620).

Dated: 5/2/07

SANDRA L. SGROI, J. S. C.