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SHORT FORM ORDER

INDEX No. 99-02897

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 6-30-10
ADJ. DATE 11-17-10
Mot. Seq.#014 - MG; CASEDISP
#015 - XMG

D & S REALTY DEVELOPMENT, L.P.,

Plaintiff,

- against -

THE TOWN OF HUNTINGTON, PLANNING BOARD OF THE TOWN OF HUNTINGTON, H. JEFFREY VIRAG, ELLEN PAGANO, N. GERARD ASHER, ROBERT J. BONTEMPI, JR., ANDREW L. SISTERNINO, TRACEY A EDWARDS and KIRK C. MACKEY, and MITCHELL SOMMER, Individually, and as MEMBERS OF THE PLANNING BOARD OF THE TOWN OF HUNTINGTON,

Defendant.

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Upon the following papers numbered 1 to 92 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 50 ; Notice of Cross Motion and supporting papers 51 - 53 ; Answering Affidavits and supporting papers 54 - 79 ; Replying Affidavits and supporting papers 80 - 81, 82 - 87 ; Other 88 - 89, 90, 91 - 92 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (014) by defendant Town of Huntington for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the cross-motion (015) by defendant Town of Huntington Planning Board for summary judgment dismissing the complaint is granted.

The plaintiff commenced this action pursuant to 42 USC § 1983, seeking declaratory relief, as well as compensatory and punitive damages, and attorney fees for the alleged violation of its constitutional rights. Plaintiff alleges, *inter alia*, that the defendants acted in bad faith; that they "unduly and intentionally delayed" the State Environmental Quality Review Act

(hereinafter SEQRA) process in furtherance of their "ultimate intention" to upzone the parcel; that the upzoning was "illegal, arbitrary and capricious;" that the upzoning constituted an illegal taking without compensation in violation of the plaintiff's rights pursuant to the Fifth and Fourteenth Amendment to the United States Constitution; and that plaintiff was denied due process of law. Plaintiff also claims that the upzoning substantially reduced the number of homes which could be constructed on the parcel, and reduced the land's value.

D & S Realty Development, LP (hereinafter plaintiff) owns a 20-acre parcel of real property located within the Town of Huntington, New York (hereinafter Town). The parcel is divided by a "zone district boundary," with 10.7 acres zoned R-40 (minimum lot size one acre, residential), and 9.8 acres previously zoned R-20 (minimum lot size 20,000 square feet, residential). The property was formerly owned by the State to be used as a right-of-way and part of the Babylon-Northport Expressway (hereinafter Expressway), which was never built. David Marom, a partner in D & S purchased the property through another company, Britt Realty, at a State auction in 1995 for $450,000.00, and later sold the property to the plaintiff. In the spring of 1995, the plaintiff sought the approval of the defendant Town Planning Board (hereinafter Planning Board) for the construction of 7 homes in the R-40 zone and 17 additional homes in the R-20 zone.

The record reveals that the Planning Board was established as the lead agency for SEQRA. The Planning Board designated the application as a SEQRA Type I action and a positive declaration was issued requiring that an environmental impact statement be prepared. After the Planning Department performed a SEQRA review of the plaintiff's draft environmental impact statement (hereinafter DEIS), which occurred over the course of more than two years, and after hearing apparent public outcry over the proposed development, the Planning Board rejected plaintiff's original 24-home plan and a subsequent plan for 17 modified lots. A Final Environmental Impact Statement (hereinafter FEIS) was prepared by the Planning Department, which provided 10 alternatives, ranging from "do nothing," to rezoning the southern portion of the property from R-20 to R-40 which would produce a 5-lot yield plan, not the plaintiff's 17-lot yield plan, with modified lots. The rezoning alternative was presented in the FEIS to mitigate the environmental and safety impacts of the density permitted under the former Town code provisions. The FEIS revealed that the lots would be shallow, and wider than deep, and that there were access problems from the Expressway. In addition, there were recharge and drainage impacts which required reduced density. On January 7, 1998, the Planning Board resolved to adopt the FEIS, concluding that a 12-lot alternative would mitigate approximately 24 adverse environmental impacts. The Planning Board directed the plaintiff to submit a 12-lot subdivision plan for further review and approval, which plaintiff concedes it did not submit.

On January 9, 1998, an Environmental Assessment Form (hereinafter EAF) was prepared by the Planning Department staff to explore the possibility of rezoning the property. The Planning Department duly circulated SEQRA notices to declare the Town Board as the lead agency for the rezoning, which was classified as an Unlisted action. On January 20, 1998, the Town Board in Resolution 1998-63, after analyzing the FEIS, which resulted from

the applicant's submissions, the Planning Board and staff study and public comments, found that the alternative to rezone the property to the 5-lot alternative which would be "less intensive, and consequently the most protective" alternative, had sufficient merit to schedule a public hearing on its own motion. The resolution also revealed that the Town Board, upon examining the EAF, Parts II and III, issued a negative declaration and stated that all requirements for a SEQRA review were met. The hearing was conducted on March 24, 1998, at which time plaintiff's counsel presented its plan to the Town Board. On April 7, 1998, the Town Board voted unanimously to upzone the 9.8 acre portion from R-20 to R-40, relying in large part upon the Planning Board's SEQRA findings and alternatives contained in the FEIS. Plaintiff did not seek review of the determination in a CPLR Article 78 proceeding. Instead, plaintiff filed this 42 USC §1983 action alleging a deprivation of its constitutional rights.

The Town now moves for summary judgment dismissing the complaint because the rezoning was consistent with the Town's Comprehensive Plan and was presented as an alternative in the FEIS prepared by the Planning Department, filed on December 4, 1997. In addition, the Town contends that the plaintiff's due process rights were not violated. The Planning Board cross-moves for summary judgment dismissing the complaint and incorporates by reference all exhibits and arguments presented by the Town. In support, the Town and the Planning Board submit, *inter alia*, the pleadings, the deposition testimonies (hereinafter EBT) of David Marom (hereinafter Marom), Jeffrey Hartman (hereinafter Hartman), Frank Petrone, Richard Machtay (hereinafter Machtay), and W. Gerard Asher sued herein as "N. Gerard Asher" (hereinafter Asher), a copy of Town Board Resolution 1998-63, and a copy of a letter to the plaintiff from an official of Suffolk County, New York. The letter, dated May 27, 2008, reveals that Suffolk County and the Town offered to purchase the subject property for a sum of $1,600,000.00.

In opposition to the motion and cross-motion, plaintiff argues that numerous issues of fact exist as to whether the Planning Board timely adhered to SEQRA regulations, and whether the plaintiff's due process rights were violated pursuant to 42 USC §1983. Plaintiff also claims that issues of fact exist regarding whether the Planning Board delayed the adoption of the FEIS so that lower density rezoning could be studied. Plaintiff indicates that it has withdrawn the second cause of action alleging a constitutional taking. Plaintiff submits, *inter alia*, copies of the minutes of the Planning Board meetings on October, 8, 1997, November 19, 1997 and January 7, 1998 as well as the EBTs of Machtay, Asher and Jeffrey Virag.

At his EBT, Marom, a partner in the plaintiff's firm, testified that Britt Realty purchased the property for $450,000.00 at a State auction on March 10, 1995. Marom stated that Britt Realty was one of his companies, and was the managing construction company for the plaintiff, the land owner. He stated that the land was sold to the plaintiff for $850,000.00. When the initial subdivision application was submitted, the plaintiff requested a total of 24 lots, with 16 lots on the half-acre zone and 8 lots on the acre zone. After receiving feedback from the Town, the plaintiff decided to reduce the number of lots to 17, clustered in the south end of the property, shorten the cul de sac to 1200 feet, and dedicate 10 acres as a park in the north end of the property. He further stated that the plaintiff relied on a statement by Machtay, the

Planning Department Director, who stated that a 17-lot yield plan would be more acceptable. Marom was also aware, however, that Machtay qualified that statement by also saying that he could not speak for the Planning Board. The Planning Board accepted the plaintiff's DEIS. Marom became aware of public opposition to the project and tried to meet with the property's neighbors, but they refused to speak with him. On March 12, 1997, the preparation of the FEIS was begun by the Planning Department.

Marom recalled receiving several requests from the Planning Department for extensions of time to complete the FEIS statement and he agreed. He stated that there were several delays in completing it. The Planning Department requested a traffic study, which was performed on June 2, 1997, and an amended lot-yield study. He stated that he received the FEIS from the Town on September 9, 1997. He reviewed the statement with Hartman, his engineer, and filed a letter requesting another 90-day extension. Marom recalled telling Hartman to object to all the alternatives in the FEIS except the preferred alternative of a 17-lot yield because he thought the other alternatives would not be profitable enough. He stated that in October, 1997, he received another FEIS which included rezoning as an alternative. He learned, on January 7, 1998, that the Planning Board approved a 12-lot yield plan and directed him to submit a map to confirm the 12-lot modified plan. He stated that the plaintiff did not submit the plan and did not receive a subdivision permit. He recalled feeling that Machtay misled him into believing that the 17-lot yield plan would be approved. He also felt that the Town acted to take the property away from the plaintiff for park land without paying for it.

At his EBT, Hartman testified that he was a licensed professional engineer in New York and was retained by Marom to submit the plaintiff's subdivision plan to the Town. After discussions with a Suffolk County Department of Public Works employee, he informed Marom that this could be a difficult application. Hartman stated that he drafted the 17-lot plan after putting in a recharge basin, avoiding through lots, shortening the cul de sac road, and dedicating green space to the Town. He conceded that the lots, however, were 20% smaller than the R-20 requirements. He prepared the DEIS and included 5 alternatives. He stated that after learning of the Planning Board's acceptance of a 12-lot subdivision, he did not ultimately submit a plan because Marom did not want to develop only 12 lots. He never obtained conditional file approval and later learned that the property was rezoned. He encouraged Marom to consent to each of the Planning Department's requests for extensions of time to complete the FEIS inasmuch as he felt it was necessary to keep the application on the Planning Board agenda, and avoid the need to refile and pay additional fees.

At his EBT, Frank Petrone testified that, as the Town Supervisor at the time of the subject subdivision application and subsequent rezoning, he recalled the rezoning of the subject property. He did not discuss the property with the Planning Department staff and could not comment on the analysis prepared by the Planning Department. He did remember writing a letter to the Planning Board requesting a lower lot density in the plaintiff's subdivision application.

At his EBT, Machtay testified that he was the Director of the Department of Planning and Development at the time of the subject application and he reviewed the application and

made recommendations to the Planning Board. He acknowledged that the Town Board had no jurisdiction over this process. He stated that he was approached to consider rezoning the property and did not recall by whom. He was aware that his staff wrote an alternative in the FEIS to rezone the southerly end of the property. He was aware of his department's requests made to the plaintiff for extensions for more time. He stated that although plaintiff's 17-lot modified plan had single family detached housing, the Town's 5-lot plan was consistent with the greater community without modifications. He was aware of 3 other instances where the Town Board rezoned property while a subdivision application was in process.

At his EBT, Asher testified that he was a member of the Planning Board at the time the plaintiff's application was considered and he was its chairman from January, 1994 through December 31, 1995. He remembered the subject application. When he initially saw the plaintiff's application, he felt the cul de sac road was too long and that the project was too ambitious. He also knew of several environmental problems. He further stated that it was not common for the Planning Board to approve a subdivision map where some of the lots were wider than they were deep. He did not speak with the Town Board members about this property and he read the Town Supervisor's letter to the Planning Board. However, the letter did not affect his decision. Asher also stated that the Town Board had the authority to rezone property without asking for the Planning Board's advice.

At his EBT, Jeffrey Virag testified that he was a member of the Planning Board during the time that the plaintiff's subdivision application was considered but any actions as to the subject property occurred after he departed from the Planning Board.

The Planning Board minutes, dated October 8, 1997, reveal that Machtay discussed the extension of accepting the FEIS and the timeliness pursuant to SEQRA. The possibility of rezoning the property was discussed, and the Planning Board agreed on consensus to ask its staff to review the possibility of lower density rezoning. At the Planning Board meeting on November 19, 1997, Machtay reviewed the alternatives presented in the plainitff's DEIS and the issues that the Planning Board should consider. At its meeting on January 7, 1998, the Planning Board, *inter alia*, took a hard look at the environmental aspects of the action pursuant to SEQRA and after considering the FEIS found that the necessary requirements pursuant to SEQRA had been met, adopted the FEIS, and resolved that the plaintiff's subdivision application did not conform to the requirements of Town Law and Town subdivision regulations and site plan specifications. The Planning Board concluded that the alternative that would be most protective of the environment while insuring the adjoining community no loss in valuation was the 12-lot modified plan.

A party moving for summary judgment must make a prima facie showing of entitlement, as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (***Stewart Title Insurance Co. v Equitable Land Servs.,*** 207 AD2d

880, 616 NYS2d 650 [2d Dept 1994]), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

42 USC §1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ***, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ..." "In the land-use context, 42 USC §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 to the United States Constitution" (***Bower Assocs. v Town of Pleasant Valley***, 2 NY3d 617, 626, 781 NYS2d 240 [2004], *citing* ***Town of Orangetown v Magee***, 88 NY2d 41, 49, 643 NYS2d 21 [1996]). However, "42 USC § 1983 is not simply an additional vehicle for judicial review of land-use determinations" (***Bower Assocs. v Town of Pleasant Valley***, *supra*).

Procedural due process is designed to insure that there will be no deprivation of rights otherwise created without notice and opportunity to be heard (***Lai Chun Chan Jin v Board of Estimate,*** 92 AD2d 218, 460 NYS2d 28 [1st Dept 1983]). The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. Whether a party's interest in a land-use regulation is protected by the Fourteenth Amendment depends upon whether it has a legitimate claim of entitlement to the relief being sought (***Twin Town Little League, Inc. v Town of Poestenkill***, 249 AD2d 811, 671 NYS2d 831 [3d Dept 1998]). The mere existence of procedures for obtaining a permit or certificate do not, in and of themselves, create constitutional property interests (***Zahra v Town of Southold***, 48 F3d 674, 1995 U.S. App. LEXIS 3415 [2d Cir 1995]).

"In order to establish a deprivation of a property right in violation of substantive due process, the claimant must establish (1) a cognizable or vested property interest, not the mere hope of one and (2) that the municipality acted without legal justification and motivated entirely by political concerns. In order for a right in a particular zoning status to vest, a property owner must have undertaken substantial construction and must have made substantial expenditures prior to the enactment of the more restrictive zoning ordinance (***Ellington Constr. Corp. v Zoning Board of Appeals***, 77 NY2d 114, 122, 564 NYS2d 1001 [1990]). As for the second element of the test, only the most egregious official conduct can be said to be arbitrary in the constitutional sense [citations omitted]" (***Sonne v Board of Trustees of Vill. of Suffern,*** 67 AD3d 192, 887 NYS2d 145 [2d Dept 2009]). Here defendants have established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff had no vested property interest in a subdivision. Plaintiff does not claim that it began construction and expended substantial sums in connection therewith (*see*, ***Genser v Board of Zoning and Appeals of the Town of North Hempstead***, 65 AD3d 1144, 885 NYS2d 327 [2d Dept 2009];

Town of Orangetown v Magee, 88 NY2d 41, 643 NYS2d 21 [1996]). Nor does it contend that defendants gave it an approval or a permit upon which it could establish a property interest. Indeed, plaintiff failed to submit the 12-lot yield plan for preliminary approval as directed by the Planning Board on January 7, 1998. In addition, the Planning Board's alleged departure from usual practice by completing the FEIS (*see*, 6 NYCRR §617.9 [a] [5]), and the Town Supervisor's submission of a letter to the Planning Board do not rise to the level of egregious conduct that is required to be arbitrary in the constitutional sense (*see* ***Bower Assocs. v Town of Pleasant Valley***, *supra*).

In opposition, plaintiff has failed to raise a triable issue of fact. Although plaintiff alleges violations of various SEQRA time frames, the statute itself provides that the time periods in the regulations may be extended by mutual agreement between the sponsor and the lead agency upon notice to all other involved agencies. "In practice, strict adherence to the time frames . . . is a rare occurrence" (Gerrard Ruzow Weinberg, Environmental Impact Review in New York, § 3.01 [2] at 3-13). At his EBT, Marom conceded that he consented to all requests for extensions of time and was advised by his engineer to do so.

Accordingly, the complaint is dismissed and the Court declares that the Town Board resolution, dated April 7, 1998, and the rezoning of the 9.8 acres of the property in this case is legally valid and constitutional.

Dated: AUG 31 2011

J.S.C.

_X_ FINAL DISPOSITION _____ NON-FINAL DISPOSITION