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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

MICHAEL NICHOLSON, ESQ. and
DIANA NICHOLSON, ESQ.,
Residing at 35 Hilton Avenue, Garden City, NY 11530,

Plaintiffs/Petitioners,

-against-

THE INCORPORATED VILLAGE OF GARDEN CITY, BOARD OF TRUSTEES OF THE INCORPORATED VILLAGE OF GARDEN CITY, in the County of Nassau, Sate of New York, ROBERT J. ROTHCHILD, Mayor and Trustee, DONALD T. BRUDIE, ANDREW W. CAVANAUGH, DENNIS C. DONNELLY, NICHOLAS P. EPISCOPIA, JOHN L. MAUK, LAWRENCE J. QUINN and JOHN J. WATRAS, Trustees,

Defendants/Respondents.

ORIGINAL RETURN DATE:01/18/12
SUBMISSION DATE:01/18/12
INDEX No.:025360/09

MOTION SEQUENCE #2,3,4.

The following papers read on this motion:

Notice of Motion	1
Notice of Cross Motion	2
Notice of motion to strike	3
Reply	4,5,6
Memorandum of Law	7,8

Motion by defendants pursuant to CLR 3212 for judgment dismissing the complaint is granted to the limited extent that plaintiffs' request for attorneys' fees is dismissed; in all other respects the motion is denied.

Motion by defendants pursuant to CLR 4102 striking plaintiffs' demand for a jury

is denied as moot.

Cross-motion by plaintiffs pursuant to CLR 3212 for summary judgment is granted as follows: this court declares that Local Law 4-2009 is unconstitutional in its entirety. Plaintiffs' additional request for attorneys' fees is denied.

Plaintiffs commenced this action in December 2009 seeking a declaration that Local Law 4-2009, amending the Code of the Village of Garden City to establish Residence R-20C Corner Overlay Districts, is unconstitutional.

Plaintiffs are the owners of 35 Hilton Avenue in Garden City. They purchased this property, with an area of 62,500 square feet, in 1974.

Defendants include the Village, the Board of Trustees (" the Board"), and the Trustees, individually.

Local Law 4-2009 prohibits the subdivision as of right of large corner lots on four avenues in the Central Section of the Village. Defendants allege that the purpose of Local Law 4-2009 is to create an overlay district along the larger avenues serving as a gateway to the Central Section of the Village "in order to preserve the character of that area." The avenues subject to the new ordinance are Rockaway, Cathedral, Hilton and Cherry Valley. Prior to the enactment of Local Law 4-2009, plaintiffs could have subdivided their oversized corner property on Hilton Avenue as of right. According to defendants, Local Law 4-2009 affects approximately 20 properties on the subject avenues.

The Incorporated Village of Garden City (the "Village") is a planned community of approximately 5 miles in area. It has four geographic sections: East, Central, West and Estates. In 1869, a multi-millionaire businessman named Alexander Stewart purchased over 7,000 acres of the Hempstead Plains and proceeded to create a private estate in what is now the Central Section of the Village. This private estate included homes, a hotel, stores and a railroad station. Properties were available only for rental to the upper middle class and the wealthy.

In 1893 the Garden City Company was incorporated by Stewart's heirs to further

develop the estate and to sell parcels to private parties. In 1919 the Village was incorporated and the Garden City Company relinquished control over the village government.

The Village's first comprehensive zoning code was adopted in 1924. The code was amended at various times over the years. In 1970 the Village Master Plan was adopted (Movant's Ex. F). The Master Plan provides:

> To maintain the present high standard of single-family housing, in instances that warrant it, (where subdivision of a lot into two or more parcels is contemplated and is accompanied by a demolition of the existing structure) a ten percent reduction in both the minimum front footage and lot square footage might well be allowed.

(Master Plan at p.18). Up until 1989, the highest residential zoning district was R-12, requiring a minimum lot size of 12,000 square feet for both corner and interior lots.

In 1989, based upon a Master Plan Update, two new zoning districts were created. In the new R-20 district, the minimum lot size became 20,000 square feet, and the frontage requirement was 125 feet. In the new R-40 district, the minimum area was 40,000 square feet; the R-40 district applied only to the Village's golf courses.

According to defendants, in the twenty-year period preceding 2009, a trend towards reduction in size of the corner lots developed, primarily as a result of the drastic increase in the market price of vacant land in the Village. Plaintiffs acknowledge that numerous large corner lots were subdivided, and they claim that the new residences harmonize with and enhance the character of the Central Section and the Village as a whole.

In 2007 and 2008, the owners of corner properties at 31 Rockaway Avenue and 115 Hilton Avenue filed applications to subdivide their properties into a corner lot and an interior lot as of right in compliance with the R-20 requirements. At the hearings on those applications, neighbors who resided at smaller interior lots objected to the requested subdivisions. As to 31 Rockaway Avenue, two deeds were recorded in February 2009 to subdivide the property, but a variance of approximately 2.64 inches from the 125-foot width requirement was denied by the

Board of Zoning Appeals ("ZBA"). Local Law 4-2009 was passed thereby rezoning 31 Rockaway Avenue as an R-20C property, and thereafter the denial of the variance by the ZBA was upheld for 31 Rockaway Avenue (Order of Winslow J. dated September 30, 2010, Movant's Ex.R). Subdivision of 115 Hilton Avenue was denied and litigation ensued. The Article 78 proceeding commenced concerning 115 Hilton Avenue was then withdrawn after a sale in 2009 (Movant's Ex. S).

In late 2008, the Board of Trustees engaged BFJ Planning ("BFJ") to propose a plan to prevent further subdivisions of large corner lots in the Village. BFJ issued its report (Movant's Ex. C) in May 2009. According to BFJ, it focused on the gateway avenues in the Central Section of the Village "because that section is where there is the greatest concentration of large corner lots" (Fish Aff., ¶ 10). BFJ noted that "the open space of the larger boulevard streets," together with such non-residential sites as the Cathedral and St. Paul's School, "give the impression that the Village is somewhat more green and open than it is"(Ex. C at second page of Memorandum). Although many of the large corner lots there had already been subdivided, BFJ identified twenty corner lots on the subject four avenues, with plots in excess of 40,000 square feet (Fish Aff., ¶ 13). Local Law 4-2009 is the enactment of one of the recommendations in the BFJ Report.

Plaintiffs commenced this action in late 2009 seeking judgment vacating Local Law 4-2009 as unconstitutional on various grounds, including that it constitutes spot zoning and, as such, violates equal protection under the New York State and United States Constitutions (New York Constitution, Art. 1, §11; US Constitution, 14th Amendment). Defendants moved for judgment dismissing the complaint. By Order dated November 4, 2010 (Movant's Ex. W), this Court directed that the matter shall be deemed an action for a declaratory judgment only and denied the motion.

Summary judgment is the procedural equivalent of a trial (*SJ Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist (*Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182 [1994]). The evidence must be viewed in the light most favorable to the non-moving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 [2007]; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]), and the

court should refrain from resolving issues of credibility (*Forrest* at 315; *SJ Capelin Assoc., Inc.*, at 341).

At the outset, the Court must address defendants' argument that plaintiffs' claims are not ripe because they have failed to establish they actually suffered any harm. Defendants argue that plaintiffs may request the ZBA for an area variance that could vary or modify the application of Local Law 4-2009 and, if that variance is denied, plaintiffs could always commence litigation seeking to overturn any unfavorable determination by the ZBA.

Where a plaintiff directly attacks an ordinance as unconstitutional, there is no prerequisite that plaintiff must first seek a variance (*Scarsdale Supply Co v Village of Scarsdale*, 8 NY2d 325, 329 [1960]). The ZBA does not have the power to review the discretion of the Board of Trustees (*Id.* at 330), nor does it have the power to "remake the zoning map under the guise of granting a variance" (*Levitt v Incorporated Village of Sands Point*, 6 NY2d 269, 273 [1959]).

Moreover, it is appropriate to entertain a pre-enforcement challenge to the action of an administrative agency if the action is final and the controversy may be termed a "purely legal" question (*Community Housing Imp. Program, Inc. v. New York State Div. of Housing & Community Renewal*, 175 AD2d 905, 907 [1991], citing *Church of St. Paul & St. Andrew v. Barwick*, 67 NY2d 510, 519, cert den 479 US 985 [1986]). Such is the case here. Based on the foregoing, defendants' argument that this action is not ripe for judicial review is rejected.

For the record, the denials of variances of 2.64 inches from the 125-foot front width requirement for 31 Rockaway Avenue and 1.3 feet from the 20-foot side-yard set-back requirement for 115 Hilton Avenue fully support plaintiffs' claim that, in their case, an application for a variance of 35 feet from the 125 foot front-width requirement was not a viable option.

Spot zoning is the antithesis of planned zoning; it is defined as the singling out of a small parcel of land for a classification totally different from that of the surrounding area for the benefit of one landowner and the detriment of another (*Rodgers v Village of Tarrytown*, 302 NY 115, 123 [1951]; *In re Realen Valley Forge Greenes Associates*, 576 Pa 115 [2003]; *Pennings v Owens*, 340 Mich 355 [1954]). "What is mandated is that there be comprehensiveness of planning, rather

than special interest, irrational *ad hocery*" (*see Matter of Town of Bedford v Village of Mount Kisco*, 33 NY2d 178, 188 [1973] and *Infinity Consulting Group, Inc v Town of Huntington*, 49 AD3d 813, 814 [2d Dept], lv app den 11 NY3d 712 [2008]). The relevant inquiry is whether the challenged zoning ordinance was accomplished for the benefit of individual owners rather than pursuant to a comprehensive plan for the general welfare of the community (*Id.* at 123). Local authorities must act for the benefit of the community as a whole and not because of the whims of an articulate minority or even majority (*Udell v Haas*, 21 NY2d 463, 469 [1968]).

A claim of spot zoning requires proof both that the zoning is site-specific and that it is inconsistent with the well-considered land-use plan for the area (*Peck Slip Assoc. LLC v City Council of the City of NY*, 26 AD3d 209, 210 [1st Dept], lv app den 7 NY3d 703 [2006]). Furthermore, whether zoning legislation withstands scrutiny under the equal protection clause is a question of whether there is a rational relationship between the disparate treatment of property owners and a legitimate government purpose (*Matter of C/S 12th Ave LLC v City of New York*, 32 AD3d 1, 9 [1st Dept 2006]). Unless shown to be arbitrary, a local law is beyond judicial interference (*Mahoney v O'Shea Funeral Homes, Inc.*, 45 NY2d 719 [1978]).

Rezoning in accordance with a comprehensive plan guards against *ad hoc* zoning legislation affecting the land of a few, without proper regard for the needs or design of the community as a whole (see *Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 685 [1996]). Defendants insist that Local Law 4-2009 is consistent with the Village's ever-evolving comprehensive plan.

There is no question that an ordinance that affects at most 20 corner properties, on four avenues in a Village the size of Garden City, is site-specific. The issue before this Court is whether Local Law 4-2009 is inconsistent with the Village's comprehensive zoning plan and whether it is arbitrary.

It is undisputed that Alexander Stewart's original planner, John Kellum, established corner lots of 250 feet X 250 feet, and interior lots of 200 feet X 250 feet in the Central section of the Village ("the original layout") (see Movant's Ex. C). In 1970 the Master Plan refers to the possibility of a reduction in square footage to accommodate subdivisions, while the Master Plan Update, in 1989,

mentions that the pressure for subdivisions of older, larger properties will probably increase. Following two unsuccessful attempts by Village residents to subdivide corner lots, Local Law 4-2009 was enacted in 2009 "to preserve the character of that area," specifically the four identified avenues in the Central Section (Movant's Ex. A).

That summary does not give the whole picture. According to plaintiffs, the original layout was abandoned first by the Garden City Company it its efforts to develop and populate the Village after 1893 and then by the Village when it adopted a comprehensive zoning plan in 1924. All of the zoning maps of Garden City from 1924 to 1989 provided for much smaller lots for both interior and corner lots and treated both interior and corner lots the same. Plaintiffs' property was zoned R-12, with a minimum square footage of 12,000 square feet, when they purchased it in 1974.

Plaintiffs point out that many corner lots in the Central Section of the Village have already been subdivided. Nevertheless, they argue that there is much open space in the Central Section due to the location of two of the Village's three golf courses, the Adelphi University campus, various schools and their playgrounds, the Garden City Hotel, Wyndham Condominiums and parks.

Plaintiffs insist that the prohibition against subdivision of the few selectively targeted corner lots on only four of the avenues in only the Central Section of the Village is intended to create a park-like atmosphere for the benefit of neighbors on the adjoining smaller interior properties. They submit that Local Law 4-2009 was enacted for the purpose of appeasing a few objectors and not to accord with any comprehensive zoning plan for the Village.

Plaintiffs have the better argument. There is no question that the 250 foot X 250 foot corner lots in the Central Section of the Village were established in the late nineteen hundreds for one private property owner and that in the intervening century the original layout has been significantly modified. When plaintiffs purchased their corner property in 1974, the largest minimum size for both corner and interior residential lots was 12,000 square feet. Numerous corner lots have been subdivided and the Central Section retains its character through its golf courses, the Cathedral, the Hotel, public properties and parks, the deep front-yard setbacks and the wide tree-lined streets and sidewalks.

While a municipality may change its zoning to promote the general welfare and respond to changed conditions in the community, it may not change its zoning to conflict with fundamental land use policies. Zoning restraints are constitutional only if the restrictions are necessary to protect the public health, safety or welfare of the community [see *Asian Americans for Equality v Koch*, 72 NY2d 121, 131 [1988]). The requirement of a comprehensive or well-considered plan not only insures that local authorities act for the benefit of the community as a whole but protects individuals from arbitrary restrictions on the use of their land (*Id.*).

That a turning point toward more restrictive zoning occurred in 1989, when the R-20 and R-40 zones were first enacted, is a fair characterization of the new zoning districts implemented at that time. However, there is no precedent for making a distinction between interior and corner properties in the entire history of the Village. Here, after the upzoning of R-12 properties to R-20, the doubling in size of the minimum footage for only corner lots on only four avenues in only one section of the Village, admittedly affecting merely twenty properties at most, is simply not consistent with any prior zoning in the Village's history nor any comprehensive zoning plan presented by defendants herein. Is Local Law 4-2009 calculated to benefit the community as a whole? Overall, on this record, that question must be answered in the negative. The Board's enactment of Local Law 4-2009 was arbitrary and hence unreasonable. Under these circumstances this Court is compelled to declare that Local Law 4-2009 is unconstitutional as spot zoning. It smacks of special interest *ad hocery*.

For the record, defendants' fall-back argument is plaintiffs' deed is subject to covenants of record and the original deed to 35 Hilton Avenue allowed for development "only by one dwelling house" (Movant's Exs. X and Y). Defendants argue that this precludes subdivision of 35 Hilton Avenue. However, as plaintiffs point out, numerous deeds to subdivided properties in the Central Section of the Village contain such restrictions. The covenants and restrictions have simply never been enforced, and even BFJ, in its Memo to the Board, dated May 6, 2009 (Movant's Ex. C) states that the restrictions "probably no longer apply." Consequently, defendants' reliance upon covenants and restrictions of record to preclude any request for subdivision of plaintiffs' property must be summarily rejected.

Based on the foregoing, there is no need to consider plaintiffs' additional

arguments.

Plaintiffs have failed to submit an agreement or identify a statute or court rule pursuant to which they are entitled to attorneys' fees. Consequently, their request for attorneys' fees must be denied (US Underwriters Ins Co v City Club Hotel, LLC, 3 NY3d 592, 597 [2004]; Hooper Assoc. v AGS Computers. 74 NY2d 487 [2004]; Matter of McCrudden v Putnam Valley Cent School Dist, 88 AD3d 721 [2nd Dept 2011]).
March 20, 2012

This decision constitutes the order of the court.

Dated: March 26, 2012

HON THOMAS P. PHELAN
J.S.C.

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ENTERED
MAR 27 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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