To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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HAMPSHIRE RECREATION, LLC,

Plaintiff,

Index No. 56207/2021

– against –

Motion Seq. 1

THE VILLAGE OF MAMARONECK and THE VILLAGE OF MAMARONECK PLANNING BOARD,

DECISION & ORDER

Defendant.

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In an action to recover damages for alleged regulatory taking, the defendants THE VILLAGE OF MAMARONECK and THE VILLAGE OF MAMARONECK PLANNING BOARD (hereinafter "defendants", "Village of Mamaroneck" and/or "Planning Board") moves to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (a)(7):

Papers Considered **NYSCEF DOC NO. 1-10; 23-27; 36-39; 41**

1. Summons & Complaint/Exhibits A-I
2. Notice of Motion/Affirmation of Robert A. Spolzino, Esq./Exhibits A-B/ Memorandum of law
3. Memorandum of law in opposition/Exhibit A/Affirmation of David J. Cooper, Esq. in opposition/Exhibit A
4. Reply memorandum of law

Factual and Procedural Background

On May 6, 2021, plaintiff commenced the instant action by filing a summons and complaint. The only cause of action alleged in the complaint is regulatory taking of plaintiff's property without compensation pursuant to Article 1, Section 7 of the New York State Constitution. Plaintiff purchased 1107 Cove Road, a/k/a 1025 Cove Road, Mamaroneck, New York 10543, a 106-acre site ("property") in 2010 for $12 million with the intent of developing it in accordance with the R-20, single-family zoning that applied to the property when the plaintiff bought it. The same zoning applies today. In 2012, the Village of Mamaroneck issued a Comprehensive Plan which included future planning goals for plaintiff's property including consideration for future zoning changed from residential to recreation/open space zone and/or reducing the allowable residential density from R-20 to R-30.

In June 2015, plaintiff submitted an application to defendants to construct a 105-unit residential development in a tidal flood plain along the Long Island sound within a designated Critical Environmental Area for approval of a "planned residential development" (PRD) under section 342-52 of the Village zoning code. There was a 5 year SEQRA review process which led to the Planning Board's Findings Statement and Denial Resolutions prohibiting any residential development on the property due to unmitigated impacts and what the Planning Board views as environmental constraints on the property. The complaint asserts that the Planning Board's refusal to permit development on the property is arbitrary, capricious, and contradicted by or not supported by substantial evidence, will erase nearly all of the property's economic value, and will interfere with plaintiff's distinct investment-backed expectation of significant profits from developing a residential project on the property consistent with the permitted uses under the Village Code.

Defendants move, pre answer, pursuant to CPLR 3211(a)(1) & (7), to dismiss the complaint based upon the documentary evidence and for failure to state a cause of action.

Defendants claim that plaintiff purchased the property subject to numerous regulatory restrictions and cannot now base a regulatory takings claim on the ground that it has the unrestricted right to develop the property for residential use. Defendants claim that developing the property required five separate discretionary approvals from the Planning Board, (1) a special permit pursuant to the planned residential development ("PRD") regulations, (2) site development plan approval, (3) subdivision approval, (4) a floodplain development permit, and (5) a freshwater wetlands permit, after successful completion of the environmental impact review required by the New York State Environmental Quality Review Act (SEQRA). Defendants argue that plaintiff chose to add a sixth discretionary approval when it applied for approval to develop the property as a "planned residential development ("PRD").

Defendants argue that the Planning Board did not deny approval for all uses that would enable the plaintiff to derive economic benefit from the property as required for a takings claim. Defendants claim that plaintiff may build on its property, but the Planning Board determined that it may not build this project on its property. Defendants argue that the plaintiff still has the same rights to develop on its property today as it did when it purchased it, but that plaintiff has no right to the approvals required by the instant project and therefore the Planning Board's denial of the approvals is not a "taking". Defendants argue that the Planning Board's action in disapproving the project advanced legitimate state interests, and its determination did not deny plaintiff economically viable use of its land. Defendants claim that the Planning Board required the plaintiff to study 25-unit, 50-unit and 75-unit alternatives, but plaintiff took the position that none of these alternatives were economically feasible, without presenting any financial information necessary for evaluation of that position.

In opposition, plaintiff argues that its complaint sets forth sufficient verifiable details to establish the elements of a regulatory taking claim. Plaintiff argues that the Planning Board's findings have stripped plaintiff of its ability to use the property for residential purposes in accordance with the R-20 zoning and as such effectuated a *de facto* rezoning of the property to a conservation zone, precluding any residential use and reducing the value of the property by tens of millions of dollars.

Discussion

A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint, "conclusively establishing a defense as a matter of law" (*Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo*, 113 AD3d 587, 588 [2d Dept 2014]).

Upon a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail'" (*Esposito v Noto*, 90 A.D.3d 825, 825 [2d Dept 2011]). The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.*). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss (*Endless Ocean, LLC*, 113 AD3d at 589).

The Second Department instructs that an alleged unconstitutional taking based upon denial of development, the test to apply is set forth by the United States Supreme Court in *Agins v City of Tiburon* (447 US 255 [1980]) (*Blue Is. Dev., LLC v Town of Hempstead,* 131 A.D.3d 497, 502 [2d Dept 2015]). Pursuant to this test, 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.*). However, a reasonable land use restriction imposed by the government in the exercise of its police power characteristically diminishes the value of private property, but is not rendered unconstitutional merely because it causes the property's value to be substantially reduced, or because it deprives the property of its most beneficial use (*id.)*. Thus, a court must examine (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action (*id.*)

Here, the complaint sufficiently states a cause of action against the Planning Board for a regulatory taking (CPLR [a] [7]). Defendants fail to submit documentary evidence which utterly refutes the factual allegations of the complaint, conclusively establishing a defense as a matter of law (*Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo*, 113 AD3d 587, 588 [2d Dept 2014]). Defendants claim that the plaintiff cannot establish a takings claim because only one option for development was denied by the Planning Board, and that other options are available. In its complaint, plaintiff alleges that no less than sixteen alternative densities, layouts and housing types were evaluated by the Planning Board. Further, in its opposition, plaintiff claims that the Planning Board has stripped it of its ability to use the property for residential purposes in accordance with R-20 zoning, which it is undisputed that the property is zoned for, which results in a de facto rezoning of the property precluding any residential use.

Accordingly, it is hereby

ORDERED that the defendants' motion to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (a)(7) is DENIED; and it is further

ORDERED that the defendants shall serve their answer within ten days of service of this order with notice of entry (*see* CPLR 3211[f]).

The parties are directed to file to NYSCEF a proposed preliminary conference stipulation on or before June 10, 2022.

Dated: White Plains, New York
May 3, 2022

HON. WILLIAM J. GIACOMO, J.S.C.