| **Infinity Consulting Group, Inc. v Town of Hungtington** |
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| 2006 NY Slip Op 30695(U) |
| July 24, 2006 |
| Supreme Court, Suffolk County |
| Docket Number: 03-6956 |
| Judge: James C. Hudson |
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# Memorandum Decision
# Supreme Court of the State of New York
## IAS Part XL - Suffolk County

PRESENT:
**HON. JAMES HUDSON**

INFINITY CONSULTING GROUP, INC.,

Plaintiff,

-against-

THE TOWN OF HUNTINGTON,

Defendant.

**DATED: July 24, 2006**
**INDEX NO.: 03-6956**
**CDISPSJ**

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The case at bar requires the Court to reconcile two dynamic impulses namely, the individual right of property and the collective right of society to regulate the use of land for the public good. The former sentiment is best contained in the immortal declaration of Sir William Blackstone, "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominium which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." (Commentaries On The Laws of England, Book 2, Chpt. 1, p. 2). The latter principle finds voice in environmental and zoning laws, from the sweeping "forever wild" clause of Article 14 of the State Constitution of over a century ago, to the more prosaic, yet still essential, town ordinances which attempt to maintain quality of life in the face of what would otherwise be unbridled development.

Plaintiff is the owner of a certain parcel of realty in the Town of Huntington. The *locus in quo* is presently zoned R-40 which limits its use to one-acre residential. Plaintiff, however, desires to use the realty as a business and sought a rezoning of same from the Town. This was ultimately refused. Plaintiff claimed that this was violative of its equal protection rights under our State and Federal Constitutions (NYS Const. Art. 1, Sec. 11 and the 14th Amendment, respectively). Additionally, plaintiff asserts that the present zoning of its property is in violation of Town Law Secs. 263 and 272-a. The instant lawsuit for declaratory judgment was filed, which includes claims pursuant to 42 USC Secs. 1983 and 1988.

A nonjury trial (on November 14th and December 16th of 2005) was held before the Court and both sides presented evidence. Mr. Richard Machtay, the Director of Planning of the Town of Huntington, was called by the plaintiff. After listening to Mr. Machtay and observing his demeanor, the Court found him to be a forthright and credible witness. He described the history of the Town's master plans over the past forty years. These plans, in addition to their stated purpose of regulating development, chronicle the evolution of a rural community into a suburban one. Route 110, once the site of homes and farms, has become, in Mr. Machtay's words, "...one of the most trafficked roads in the town of Huntington." Its principal uses are now "mostly retail" to the north of the *locus in quo*, and "principally...office buildings" to the south. Set in the midst of this area, the plaintiff's property is zoned one-acre residential. The witness effectively conceded that this treatment was an anomaly and it was shown on a map depicting the comprehensive plan (plaintiff's Exhibit 1) that the subject parcel had been designated for a zoning change to a mixture of commercial use (the front portion along Route 110) and moderate density residential use (to the rear). This rezoning was admittedly not done and Mr. Machtay stated, "I don't think there are any other one-acre-zoned properties along Route 110" (tran-

script p. 10). The witness also described that the easterly side of Route 110, across from the *locus in quo*, is (with one exception) zoned for office buildings and shopping. To provide for uniform development pursuant to its comprehensive plan, the Planning Board offered resolutions (in 1997 and 2001) for the Town Board's review (plaintiff's Exhibits 2 and 3). One of these documents states in pertinent part "...rezoning is consistent with the comprehensive plan" (plaintiff's 2). Although there is some difference between these resolutions, they have a common theme. Both recommend a commercial rezoning of the subject parcel to C-1 (Office Residence District).

Ms. Stewart-Suchow then cross-examined the witness. She established that there were residentially-zoned properties abutting the *locus in quo*. All her skill, however, could not change the salient fact which was established on direct examination (i.e., the Planning Board's dispassionate opinion that a zone change was in accordance with the comprehensive master plan).

Plaintiff having rested, the defendant called Ms. Marion Siess, a New York State Certified Residential Appraiser. Ms. Siess conducted an appraisal of the premises in question (defendant's Exhibit "C") and gave her opinion that it is worth $575,000.00.

The parties subsequently submitted post trial memorandum of law. The Court wishes to offer it's praise both to Mr. Goldstein and Ms. Stewart-Suchow for the thorough and insightful arguments they have presented. Counsel do credit both to their clients and to the profession of law. The transcript in this proceeding was finally received by the Court in July of 2006 for its review. Based upon the forgoing, the Court finds as follows:

Initially, the Court notes how loathe it is to intervene in matters concerning other branches of government. We are not an alternative legislature, nor a "super" zoning board of appeals.

The Court's succor is warranted only when it is manifest that a governmental entity has acted in derogation of the law, or our constitution. Accordingly, "[Z]oning determinations enjoy a strong presumption of validity, which can only be overcome by a showing that the decision to rezone was unreasonable and arbitrary" (*Rayle v. Town of Cato Bd.* 295 A.D.2d 978, 743 N.Y.S.2d 784 [4th Dept., 2002]; *Matter of Save Our Forest Action Coalition v. City of Kingston*, 246 A.D.2d 217, 221, 675 N.Y.S.2d 451 [3rd Dept., 1998]; see *Matter of Boyles v. Town Bd. of Town of Bethlehem*, 278 A.D.2d 688, 690, 718 N.Y.S.2d 430 [3rd Dept., 2000]; see also *Pyne v. Knaisch*, 159 A.D.2d 999, 1000, 552 N.Y.S.2d 477 [4th Dept., 1990]). An additional burden for those challenging the *auctoritas* of the municipality is the standard of proof. It is not a mere preponderance of the evidence but the most rigorous standard of beyond a reasonable doubt (*Asian Ams for Equality v. Koch*, 72 N.Y.2d 121, 531 N.Y.S.2d 782 [1988]).

Defendant's reliance on the holding in *LoScalzo v. Town of Huntington* (137 A.D.2d 660, 524 N.Y.S.2d 753 [2nd Dept., 1988]) is most telling. Although the Court upheld the dismissal of a declaratory judgment action in that instance, the decision contains the following passage:

> "The plaintiff did adduce expert testimony to the effect that the zoning of his property was not in accordance with a comprehensive plan (see, Town Law 263), and the town failed to come forward with its own evidence in order to rebut this expert testimony. However, this failure merely exposed the town to the risk of an adverse factual determination; it did not warrant judgment for the plaintiff as a matter of law" (*Id.* at 661).

Unfortunately for the defendant, the risk alluded to in *LoScalzo* has been realized in the case before us.

The Court in *LoScalzo* also confined most of it's discussion to whether the subject parcel could produce a reasonable return as zoned, thus limiting it's constitutional analysis to the question of

confiscation (*Id.* at 661 citing *Northern Westchester Professional Park Associates v. Town of Bedford*, 60 N.Y.2d 492, 470 N.Y.S.2d 350 [1983]).

By contrast, the instant case involves an allegation of disparate treatment in violation of the equal protection clause as well as deviation from a comprehensive plan. As the Court stated in *Jurgens v. Town of Huntington* (53 A.D.2d 661, 662, 384 N.Y.S.2d 870[2nd Dept., 1976]), "Allegations of confiscation are separate and distinct from allegations of discrimination or allegations that the zoning ordinance is not in accordance with a comprehensive plan." Once a zoning ordinance has been found to be discriminatory, the economic consequences of the regulation are of no moment (*Udall v. Haas*, 21 N.Y.2d 463, 477, 288 N.Y.S.2d 888, 900 [1968]). The Court will analyze the plaintiff's various claims *ad seriatim*.

We first address the plaintiff's constitutional claim sounding in discriminatory treatment in violation of the equal protection clause. In the case of *Bower Associates v. Town of Pleasant Valley* (2 N.Y.3d 617, 781 N.Y.S.2d 240, [2004]), the Court addressed an equal protection clause argument in a land-use case for the first time (*Id.* at 630). *Bower* imposed a two-part test for the viability of claims invoking this constitutional protection. First, the plaintiff must show selective treatment "compared with others similarly situated" (*Id.* at 631). This test is satisfied by asking "whether a prudent person, looking objectively at the incidents, would think them roughly equivalent" (*Id.* at 631 citing *Penlyn Dev. Corp. v. Incorporated Vil. of Lloyd Harbor*, 51 F.Supp.2d 255, 264 [EDNY, 1999]). After reviewing the evidence in the case before us, it has been overwhelmingly proven that its property is being treated differently than the parcels of other feeholders. Indeed, the comprehensive plan map (Exhibit 1) shows that the Planning Board anticipated the inclusion of the subject parcel within a business district.

If our analysis were to end here, plaintiff would prevail upon its equal protection claim. Indeed, the cases relied upon by Mr. Goldstein (*Reuschenberg v. Town of Huntington*, 143 A.D.2d 265, 532 N.Y.S.2d 148 [2nd Dept., 1988]; *Walton v. Gozo and the Town of Huntington*, 128 A.D.2d 609, 512 N.Y.S.2d 779 [2nd Dept., 1987]; and *DeSena v. Gulde*, 24 A.D.2d 165, 265 N.Y.S.2d 239 [2nd Dept., 1965]) are more than analogous to the controversy before us. As counsel asserts, they're "on all fours" (Mr. Goldstein's memorandum of law, p. 19).

The Court in *Bower*, however, imposed an additional burden upon a plaintiff in a case of this sort and has, *sub silencio*, abrogated these prior decisions on the question of equal protection claims.

The *Bower* Court relied upon the holding in *Frooks v. Town of Cortlandt* (997 F.Supp. 438, 453 [SDNY, 1998], *affirmed* 182 F.3d 899 [2nd Cir., 1999]), which determined that developers or commercial landowners were not suspect classifications for equal protection purposes. The Court, in *Frooks*, further opined that land-use rights were not fundamental rights for the purposes of equal protection. Based on this principle, the Court of Appeals held that in addition to selective application of a zoning ordinance, the plaintiff must show that "such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person" (*Bower* at 631). There has been no evidence of *scienter* on the part of the defendant Town. Accordingly, the claim based on equal protection must be dismissed.

We now turn to the question of whether the defendant's actions are in violation of Town Law Secs. 263 and 272-a. These statutes require, respectively, a town to create a comprehensive zoning plan and authorizes a planning board to prepare a master plan for the development of the town.

"A comprehensive plan has as its underlying purpose the control of land uses for the benefit of the whole community based upon consideration of its problems and applying the enactment or a general policy to obtain a uniform result" (*Kravetz v. Plenge*, 84 A.D.2d 422, 429, 446 N.Y.S.2d 807 [1982]).

In support of its decision not to rezone the plaintiff's property, defendant refers, *inter alia*, to the holdings in *Shepard v. Village of Skaneateles* (300 N.Y. 115 [1949]); *Curtis Wright Corp. v. East Hampton* (82 A.D.2d 551, 442 N.Y.S.2d 125 [2nd Dept., 1981]); *Stevens v. Town of Huntington* (20 N.Y.2d 352 [1967]); *Town of Islip v. F.E. Summers Coal and Lumber Co.* (257 N.Y. 167 [1930]); *Matter of Loulfsohn v. Burden* (241 N.Y. 288 [1925]) and the seminal *Village of Euclid Ohio v. Ambler Realty Co.* (272 U.S. 365, 47 S.Ct. 114). This authority, though well settled and well argued, is not applicable to the matter before us.

In the case of *Osiecki v. Town of Huntington* (170 A.D.2d 490, 565 N.Y.S.2d 564 [2nd Dept., 1991], *app denied* 78 N.Y.2d 863, 578 N.Y.S.2d 877 [1991]) the Court was presented with a fact pattern similar to the one before us. As in *Osiecki*, we also find that as regards similar parcels along the commercial roadway, "Town actions have been consistent with the master plan" (*Id.* at 491 citing *Tilles v. Town of Huntington*, 74 N.Y.2d 885, 547 N.Y.S.2d 835 [1989] *affirming* 137 A.D.2d 118, 528 N.Y.S.2d 386 [2nd Dept., 1988]). A glance at the Town's zoning map is sufficient to show that almost all other landowners along Route 110 have had their property zoned to some type of commercial use with the passage of time from the earliest zoning.

It has been conclusively established that the present zoning status of plaintiff's property deviates from the comprehensive land use plan of the Town. The determining factor for this case is whether this deviation can be justified. Defendant seeks to distinguish the holding in *Osiecki*, *supra*, on

the basis of the Town's reasoning being displayed in the minutes of the 2002 public hearing where the plaintiff's application was discussed (defendant's Exhibit "D"). This document, however, falls woefully short of the justification necessary to support such an extreme departure from the plan. To accept it "would invite the kind of *ad hoc* and arbitrary application of zoning power that the comprehensive planning requirement was designed to avoid" (*Osiecki*, *supra* at 490-491 citing *Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 187, 188, 351 N.Y.S.2d 129 [1973]).

Defendant contends that its decision was permissible because it was made on the basis of a desire to protect the residential community immediately to the west of the subject parcel. In this light, the plaintiff's feehold can be viewed as a buffer to prevent a commercial incursion into the residential neighborhood. The Town's plan, and consistent prior practice (as seen from viewing the zoning map of the Town), however, clearly demonstrates that Huntington Town Code Sec. 198-22 has been used to provide this buffer. This Code section describes the C-1 Office Residence District, sought by the plaintiff as being

> "[I]ntended to encourage office development of a high character, compatibly mixed with residence uses, principally for areas in which a similar pattern has occurred or for areas in which an office-residence pattern is appropriate between high-intensity commercial districts and residential neighborhoods."

The Court is sympathetic to the concerns of the homeowners who live in the area behind the commercial establishments of Route 110. By the same token, the plaintiff owns a piece of land with a house on Route 110, a thoroughfare that the Town has long conceded (by its actions) is no longer suitable for residences. We go back to a simple exchange that took place on Mr. Machtay's direct examination:

"Q. ...[I]s it accurate to state that as the property is now zoned, the comprehensive plan is being violated and not observed, is that correct?

"A. That's right."

The proof adduced by the defendant does not overcome this statement.

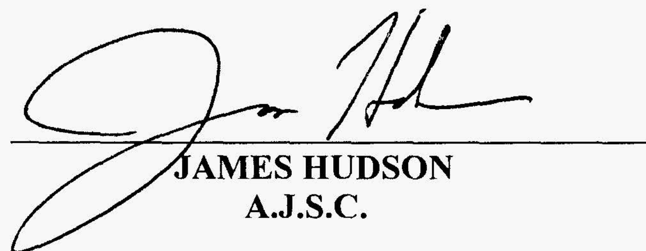
In his unpublished (yet eloquent) decision in *Walton v. Gozo and Town of Huntington* (*affirmed* 128 A.D.2d 609), Mr. Justice Cannavo wrote at page 8, "Although zoning boundaries must be drawn somewhere in the town, they cannot be arbitrarily drawn. There exists no rational reason to continue one acre zoning along the east side of a heavily traveled street when the entire west side of the street is developed by large office buildings." The factors that the Town offers in an attempt to distinguish controlling case law (i.e., size of parcels, presence of side roads, etc.) are as relevant as the fact that the property in *Walton v. Gozo* is on the east side of a roadway while the *locus in quo* is on the west. They are differences without a distinction.

In short, a municipality cannot have it both ways. The Court would not encroach upon the Town's prerogative to discuss, draft and implement a master plan and various zoning ordinances for its citizens. This would be the antithesis of democracy. By the same token, however, the enactment of such a plan is presumed to be for the health, safety and welfare of the Town's inhabitants. The Town cannot now disregard its own plan and claim such a deviation is for the very purpose of the plan itself. Town Law Secs. 263 and 272-a, cloak comprehensive plans with the dignity of the law. To ignore their provisions (which a Town is free to change by adopting subsequent or modified plans or entrusting to its planning board) brings to mind Lord Coke's admonition, *Si a jure discedas, vagus eris et erunt omnia omnibus incerta* (Co. Litt. 227).*

To once again rely on Mr. Justice Cannavo's wisdom, we find in favor of the feeholder "with great hesitancy." The concerns of the homeowners referred to by the Town are not chimerical. It is the methods used by the Town, which have been determined to be *ultra vires*, and not its motivation, which is altruistic. The case law, which guides the Court's hand is clear, however, and the duty of a trial court is to follow the precepts of our senior colleagues on the appellate benches. As it has been observed for hundreds of years, *A verbis legis non est recedendum* (Broom's Max. 268).**

Therefore, the Court finds that the plaintiff has proven, beyond a reasonable doubt, that the Town's zoning classification of its property is in violation of Town Law Secs. 263 and 272-a. In light of this determination, the matter will be remitted to the Town Board of the Town of Huntington to rezone the plaintiff's property in an appropriate manner (*Reuschenberg v. Town of Huntington*, *supra* at 266).

Settle judgment.



**JAMES HUDSON**
**A.J.S.C.**

*If you depart from the law, you will wander without a guide, and everything will be in a state of uncertainty to every one.

**From the words of the law there must be no departure.

CHECK ONE: __X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION _____ DO NOT SCAN