SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. PAUL I. MARX, J.S.C.

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SAMI MUHAMETAJ and SAMI CONSTRUCTION,

Plaintiffs,

-against-

TOWN OF ORANGETOWN,

Defendant.

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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.

DECISION AND ORDER

Index No. 033000/2018

Motion Seq. No. 3
Motion Date: Oct. 24, 2018

The following papers numbered 1 to 5 were read on Defendant's motion to dismiss Plaintiff's petition/complaint pursuant to CPLR § 3211(a)(7), CPLR § 7804(f) and CPLR § 3212:

Notice of Motion/Affirmation of William J. McPartland, Esq./Memorandum of Law in Support.....1-3
Affirmation of Dwight D. Joyce, Esq. in Opposition/Exhibits A-B.....4
Affirmation of William J. McPartland, Esq. in Reply.....5

Upon reading the foregoing papers, it is ORDERED that Defendant's motion is granted in part and denied in part for the reasons which follow.

BACKGROUND:

In or about Spring and Summer of 2016, Plaintiff Sami Muhametaj ("Plaintiff") was introduced to a property located at 70 Hickory Hill Road, Tappan NY (Section 77.09, Block 1, Lot 25) (the "Property") for his personal home (Compl., ¶ 3). Prior to purchasing the Property, Plaintiff had his agents research the Property (Compl., ¶ 5). The agents met with representatives of the Town's Building Department and the Town's Zoning Office, who stated that the Property is zoned R-15 according to the Official Map of the Town and the Town's Code, and that it could be subdivided (Compl., ¶ 6-8).

The Town Map dated September 27, 2011 is the Official Zoning Map of the Town of Orangetown approved by the Town Board by Resolution number 526 and adopted on September 27, 2011 (the "2011 Official Zoning Map") (Compl., ¶ 10). The 2011 Official Zoning Map is a restatement of the August 11, 2008 Official Zoning Map approved by the Town Board by Resolution number 582 (Compl., ¶ 11). Both Official Zoning Maps state that the Property is entirely within the R-15 zone (Compl., ¶ 13). Plaintiffs assert that both Official Zoning Maps have been incorporated into and made part of the Town Code by Local Law No. 1-2002 (Compl., ¶ 14).

Plaintiff thereafter engaged the services of a "building professional" who confirmed that the Property was in the R-15 zone and could be subdivided (Compl., ¶ 16).

Plaintiff alleges that he increased his offer on the Property by almost $100,000.00 based on the Town Officials' representations regarding the Property (Compl., ¶ 17). He also alleges that based on the Town Officials' representations, as well as the investigations conducted by his agents, he purchased the Property on October 25, 2016 (Compl., ¶ 18).

Plaintiff alleges that he then hired professionals "at substantial expense" to engineer the Property for subdivision (Compl., ¶ 19). He alleges that he intends to build another house in the rear of the Property (Compl., ¶ 19).

In or around December 2016, Plaintiff Sami Construction filed an application with the Town to subdivide the Property into two conforming Lots. The Town refused to proceed with the application, claiming that they had been advised by a Town resident that the Property was zoned R-40, not R-15, pursuant to a local law enacted in or around 1991, and was thus not subdividable (Compl., ¶ 20-22). By letter dated February 8, 2017, the Town stated that it could not proceed with the application because the Town's Zoning Map does not accurately reflect the 1991 zone change, which rezoned the Property from R-15 to R-40 (Compl., ¶ 23).

Plaintiff alleges that a representative of the Town Attorney's Office and the Director of the Town's Building/Zoning Office advised his agents that he should file a zone change petition to change the portion of the Property which is claimed to be R-40 to R-15 (Compl., ¶ 25). Plaintiff alleges that the Town Board members stated that it was a "Town created problem" and that his petition would be granted (Compl., ¶ 26).

In July 2017, Plaintiff filed a zone change petition with the Town (Compl., ¶ 28). In April 2018, the Town Board denied the petition (Compl., ¶ 32). Plaintiff alleges that during the public hearing on the petition, the Town Attorney disseminated "erroneous" information to the Town Board. Plaintiff also alleges that one of the Board members stated that he had a conflict, but the Town Attorney nevertheless encouraged him to vote. Plaintiff alleges that the Board member cast a vote against the petition even after recusing himself (Compl., ¶ 32-36).

Plaintiffs allege that the Town has treated at least 50 building permit applications, variance applications, zoning violations and other contacts with neighboring property in this claimed R-40 zone as R-15 since the 1991 law was enacted (Compl., ¶ 30).

Plaintiffs also allege that since the rezoning application was denied, the Town has sought ways to provide permanent R-15 status to at least 26 of Plaintiff's neighbors, but not to him (Compl., ¶ 37).

Plaintiffs filed their summons, complaint/petition and notice of petition on May 24, 2018. Plaintiffs seek a declaratory judgment establishing that the Property is zoned entirely within R-15; an order equitably estopping the Town from treating his Property as R-40 and denying the Property a designation in the R-15 zone; an order vacating the Town's denial of Plaintiff's rezoning application because it has no basis in fact and is arbitrary and capricious; an order pursuant to 42 USC § 1983 determining the damages suffered by Plaintiff from Defendant's discriminatory treatment by denying him R-15 treatment of the Property, while affording it to all other neighboring lots; and legal fees pursuant to 42 USC § 1988 (Compl., ¶ 39-95).

DISCUSSION:

Plaintiff Sami Construction's Standing:

Defendant argues that Plaintiff Sami Construction ("Sami Construction") does not have standing to bring claims against it and must be dismissed from this matter. Defendant argues that Sami Construction does not have ownership of the Property, any special particularized property interest in the Property or a property interest in the zoning dispute.

Plaintiffs argue that Sami Construction is properly named as a party as it is the applicant of the subdivision application. Plaintiffs assert that the application is currently pending before the Town Planning Board. Plaintiffs argue that until the Town Board corrects the zoning designation of the Property, Sami Construction cannot proceed with the subdivision application or the subdivision and building plans. Plaintiffs also argue that Sami Construction has been personally and adversely affected by the "non-approval" of the subdivision application. Plaintiffs argue that Sami Construction may seek relief in its own right because it has been aggrieved by the Town's arbitrary and capricious act of denying the subdivision application.

In reply, Defendant argues that a subdivision application is brought on behalf of the property owner, and thus no property interest extends to Sami Construction. Defendant argues that the complaint does not state that Sami Construction is an adjacent landowner, resident taxpayer or owner of the Property. Defendant also argues that Sami Construction is not identified as an entity or a corporation and is only named in the caption of the complaint. Defendant argues that, at most, Sami Construction's interest is no more specialized than any other member of the public.

"Whether in the form of an article 78 proceeding for review of an administrative determination or an action for an injunction, challenges to zoning determinations may only be made by 'aggrieved' persons". *Matter of Sun-Brite Car Wash v Board of Zoning and Appeals of the Town of North Hempstead*, 69 NY2d 406, 412 [1987].

Here, the complaint does not allege any facts about Sami Construction. The complaint does not allege how Sami Construction is related to the Property or to Plaintiff, the owner of the Property. The complaint does not identify any interest that Sami Construction has in the Property. The complaint does not allege how Sami Construction is aggrieved by the Town's refusal to grant the rezoning application or the subdivision application. As such, the complaint fails to establish that Sami Construction has standing to pursue this action.

Plaintiffs did not proffer any additional facts regarding Sami Construction's interest in the Property in their opposition. Although they argue that Sami Construction has standing because its subdivision application was not granted, the relief that Plaintiffs seek in this action does not arise out of the denial of the subdivision application. Rather, the causes of action asserted by Plaintiffs arise out of the denial of the rezoning application.

Additionally, the case law upon which Plaintiffs rely does not support the argument that an entity which has no stated interest in the Property or in a neighboring property has standing to pursue an action such as the one at issue merely because it filed a subdivision application related to the Property. In *Matter of Douglaston Civic Association, Inc. v Galvin*, 36 NY2d 1 [1974], the Court of Appeals found that representative associations of property owners and/or residents in the immediate vicinity of the area involved whose property may be affected have standing to bring actions such as the one at issue. Plaintiffs have not alleged that Sami Construction is a representative association of property owners and/or residents in the immediate vicinity of the Property whose property may be affected. In *Matter of Sun-Brite Car Wash*, the Court held that while a property owner in close proximity to property that is the subject of a zoning determination may have standing to seek judicial review without pleading and proving special damages, such property owner lacks standing to contest a zoning determination if the only objection he/she has is the threat of increased business competition, an interest not within the "zone of interest" protected by the zoning laws. Plaintiffs have not alleged that Sami Construction is a nearby property owner.

Accordingly, Defendant's motion to dismiss Plaintiff Sami Construction from this action is granted.

Plaintiff's Article 78 Cause of Action:

Plaintiff alleges in his complaint that the Town Board arbitrarily denied his rezoning application. Plaintiff alleges that although Defendant stated that the 1991 law changed the zoning designation of the Property from R-15 to R-40, it has allowed adjoining properties to enjoy an R-15 zoning classification (Compl., ¶ 68). Plaintiff also alleges that the 1991 law was superseded by Local Law 1-2002 and 43-2.2 of the Orangetown Zoning Code incorporating the Official Zoning Map, which identified the Property as being in the R-15 zone.

Defendant argues that Plaintiff cannot bring an Article 78 action to challenge the validity of a zoning ordinance or to challenge a decision on a rezoning application. Defendant also argues that a town board is not required to state its reason for denying a rezoning application. Defendant further argues that a denial of an application to change zoning must be upheld if it is nondiscriminatory or bears a substantial relationship to the public health, safety, welfare or morals.

Plaintiff argues that it is not challenging the validity of the zoning ordinance, but rather Defendant's refusal to abide by the official maps incorporated into the Town Code by Local Law No. 1-2002 as to him, and the procedure Defendant followed in refusing to do so. Plaintiff argues that a challenge directed to the procedures followed in the enactment of an ordinance is maintainable in an Article 78 proceeding.

Plaintiff also argues that it is proper for the Court to review the Board's decision on his application to determine whether it was rational and not arbitrary and capricious.

Plaintiff further argues that Courts have disapproved of zoning ordinances that result in exclusionary zoning, and that exclusionary zoning has occurred in this case because he has not been treated in the same manner as all of his neighbors. Plaintiff argues that he is the only property owner in the surrounding area that applied for and was denied R-15 treatment of his property. Plaintiff argues that there is no basis for the Town Board to deny his use of the Property as R-15 other than for a discriminatory purpose, and as such, the Board's denial should not be upheld.

Denial of an application to rezone property constitutes legislative action, which is not reviewable in an Article 78 proceeding. The appropriate vehicle for such review is an action for declaratory judgment. *In the Matter of Joseph P. Rodriques v McCluskey*, 156 AD2d 369 [2nd Dept 1989]; *Kasper v Town of Brookhaven*, 122 AD2d 200 [2nd Dept 1986].

"The general rule is that an article 78 proceeding is unavailable to challenge the validity of a legislative act such as a zoning ordinance. However, when the challenge is directed not at the

substance of the ordinance but at the procedures followed in its enactment, it is maintainable in an article 78 proceeding." *Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 202 [1987].

Plaintiff's request for review of the Board's denial of his rezoning application is not based on a procedural irregularity followed in the enactment of either law. By arguing that the Board based its decision on outdated law, Plaintiff is attacking the substance of the Board's decision.

Plaintiff's argument that the Court may consider whether the Board's denial of a rezoning application was discriminatory and/or arbitrary and capricious in an Article 78 proceeding is not supported by the case law he cites in his opposition papers. *Tri-Serendipity, LLC v City of Kingston*, 145 AD3d 1264 [3rd Dept 2016] concerns the denial of a permit application, *Asian Americans for Equality v Koch*, 72 NY2d 121 [1988] concerns a declaratory judgment action and *Litz v Town Board of Guilderland*, 197 AD2d 825 [3rd Dept 1993] concerns a combined article 78 and declaratory judgment action. Rather, the Second Department has held that claims of discrimination arising out of a denial of a rezoning application should be brought in a declaratory judgment action, not in an article 78 proceeding. *See Matter of Wolfe v Town Board of Town of Islip*, 133 AD2d 636 [2nd Dept 1987].

Accordingly, Defendant's motion to dismiss the Article 78 petition is granted.

Plaintiff's Equitable Estoppel Cause of Action:

Plaintiff alleges in his complaint that Defendant should be estopped from claiming that the Property is zoned R-40. Plaintiff alleges that he purchased the Property for more money than he was willing to spend because of the representations made by Town Officials, the Official Zoning Maps, research of Town records and other Town material that the Property was zoned R-15, upon which he justifiably and detrimentally relied. He alleges that it would be unfair and unjust if the Defendant were not so estopped. He cites *Town of Copake v 13 Lackawanna Properties, LLC*, 99 AD3d 1061 [3rd Dept 2012] for the proposition that equitable estoppel may be actionable against a municipality upon a showing of misrepresentation, deception or similar affirmative misconduct, along with reasonable reliance thereon.

Defendant argues that the doctrine of equitable estoppel is not applicable to a municipality enforcing the provisions of its zoning laws, and that a municipality cannot be estopped from correcting errors, even if there are harsh results for the Plaintiff. Defendant argues that it was carrying out its statutory duty to enforce the existing zoning ordinance. Defendant argues that the Property was zoned R-40 through the 1991 law and the maps that Plaintiff relied on are incorrect.

Plaintiff argues that equitable estoppel is applicable here because Plaintiff is challenging Defendant's refusal to follow Local Law 1-2002. Plaintiff argues that it is seeking to estop the Town from not treating the Property as R-15 as it is currently designated. Plaintiff argues that any ambiguity arising out of the superseded 1991 law must be resolved in Plaintiff's favor. Plaintiff argues that the 1991 law does not appear to have been enforced in twenty-seven years.

"'[E]stoppel is not available against a local government unit for the purpose of ratifying an administrative error'. In particular, '[a] municipality, it is settled, is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches'." *Matter of Parkview Assoc. v City of New York*, 71 NY2d 274 [1988].

"[E]stoppel cannot be invoked against a municipality to either (1) prevent it from discharging its statutory duties, (2) ratify administrative errors, or (3) preclude it from enforcing its zoning laws . . . an estoppel defense may lie where the municipality engages in 'fraud, misrepresentation, deception or similar affirmative conduct' upon which there is 'reasonable reliance'." *Oakwood Property Management, LLC v Town of Brunswick*, 103 AD3d 1067, 1069 [3rd Dept 2013].

Although it is true that generally, equitable estoppel cannot be invoked against a municipality seeking to enforce its zoning laws, Plaintiff has stated an exception to the general rule in his complaint. Plaintiff has stated that the Town has represented that the Property is zoned R-15 according to its Official Zoning Maps, 2002 Local Law and the Town Code. Plaintiff has stated that Town Officials represented to him and/or his agents that the Property is zoned R-15. Plaintiff has stated that he has justifiably relied on these representations. Plaintiff has also stated that it would be unfair and unjust if the Defendant were not so estopped. On a motion to dismiss a complaint for failure to state a cause of action, the Court need only consider whether Plaintiff has stated a viable cause of action. Based on the foregoing, Plaintiff has stated an estoppel claim.

Accordingly, Defendant's motion to dismiss this cause of action is denied.

Plaintiff's Declaratory Judgment Cause of Action:

Plaintiff seeks a declaratory judgment clarifying the issue of the zoning classification of the Property. Specifically, he seeks a declaratory judgment that the Property is zoned entirely within R-15 pursuant to the Official Zoning Maps, 2002 Local Law and Town Code 43-2.2.

Defendant argues that Plaintiff is asking the Court to interfere with the legislative body and change the zoning of the Property. Defendant argues that Plaintiff does not allege that the zoning

of the Property as R-40 is discriminatory or that the property was reduced or the marketability destroyed. Defendant argues that Plaintiff cannot attack the Town's legislative power to zone properties and enforce the zoning laws through a declaratory judgment.

Plaintiff argues that a declaratory judgment is appropriate because it is seeking a determination that the zoning maps and local law of 2002 that classify the Property as being zoned R-15 are correct and that Defendant is compelled to abide by it. Plaintiff argues that there is no need to change the zoning classification.

Defendant argues that Plaintiff is seeking a new R-15 designation. Defendant argues that if the Court were to decide that the zoning must be changed to R-15, the Court would be inappropriately declaring a finding of fact, not declaring the rights of the parties based on a given set of facts.

CPLR § 3001 states in relevant part that: "The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds."

"A declaratory judgment should not be rendered unless it will serve some useful purpose to the parties. 'The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations. Where there is no necessity for resorting to the declaratory judgment it should not be employed.'" *Walsh v Andorn*, 33 NY2d 503, 507 [1974].

A court may "in its discretion, render a declaratory judgment as to the rights and other legal relations of the parties to a justiciable controversy that involves substantial legal interests, when, as here, the judgment will have some practical effect". *Goodman v Reisch*, 220 AD2d 383, 384 [2nd Dept 1995].

Defendant's motion to dismiss the declaratory judgment cause of action is denied. Defendant suggests that the Court cannot review a Town Board's action on an application for rezoning. The case law establishes otherwise. As stated above, declaratory judgment is the proper vehicle for reviewing denial of a rezoning application. *In the Matter of Joseph P. Rodriques*, supra; *Kasper*, supra.

In addition, contrary to Defendant's argument, Plaintiff is not seeking to "interfere" with the legislative body by requesting that the Court change the zoning of the Property, nor is it

challenging the legislative body's power to zone properties. Plaintiff is arguing that the legislative body has already zoned the Property to be R-15, and seeks a declaration to that effect.

There is a clear dispute between the parties as to which is the proper law to follow. As such, a declaratory judgment on this issue will serve a useful and practical purpose to the parties.

Plaintiff's 42 USC § 1983 Causes of Action:

"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 Associates v Town of Pleasant Valley*, 2 NY3d 617, 626 [2004].

Substantive Due Process:

Courts have set out a two-part test for substantive due process violations. "First, claimants must establish a cognizable property interest, meaning a vested property interest, or 'more than a mere expectation or hope to retain the permit and continue their improvements; they must show that pursuant to State or local law, they had a legitimate claim of entitlement to continue construction'. Second, claimants must show that the governmental action was wholly without legal justification." *Bower*, 2 NY3d at 627.

As for the first element of the test, "[b]eyond a vested property right arising from substantial expenditures pursuant to a lawful permit, a legitimate claim of entitlement to a permit can exist only where there is either a 'certainty or a very strong likelihood' that an application for approval would have been granted. Where an issuing authority has discretion in approving or denying a permit, a clear entitlement can exist only when that discretion 'is so narrowly circumscribed that approval of a proper application is virtually assured". *Bower*, 2 NY3d at 628. "The issue of whether an individual has such a property interest is a question of law '[s]ince the entitlement analysis focuses on the degree of official discretion and not on the probability of its favorable exercise.'" *Gagliardi v Village of Pawling*, 18 F3d 188, 192 [2nd Cir. 1994].

As for the second element of the test, "'only the most egregious official conduct can be said to be arbitrary in the constitutional sense'." *Bower*, 2 NY3d at 628.

Defendant argues that Plaintiff's § 1983 cause of action must be dismissed because Plaintiff has not proven that he was deprived of a property interest. Defendant argues that a landowner has no constitutionally protected interest in a particular zoning classification. Thus, Plaintiff cannot

state a substantive due process claim for Defendant's failure to grant the rezoning application, even if the Town employees mishandled it.

Defendant also argues that Plaintiff cannot obtain equitable relief under § 1983 because his alleged injuries can be compensated by a monetary award.

Plaintiff argues that he has met the two-part test for substantive due process violations. Plaintiff argues that the first prong is met because the 2002 local law and the official maps establish that he has a legitimate claim of entitlement to subdivide the Property pursuant to the R-15 zoning. Plaintiff argues that his property interests are created by the 2002 local law and the zoning maps. Plaintiff argues that the second prong is met because Defendant's reliance on a 1991 statute, which has not been previously enforced since it was enacted, to avoid compliance with local law 2002, is wholly without legal justification. Plaintiff argues that the 2002 local law supersedes the 1991 law. Plaintiff argues that Defendant has not even set forth a reason for refusing to follow the 2002 local law.

Plaintiff argues that he can seek both equitable and compensatory relief under § 1983 and does not have to choose between them.

Although Defendant appears to be arguing that one cannot have a property interest in a rezoning application as a matter of law, the case law cited by Defendants establish that that is not so. Rather, the Court must consider a number of factors to determine whether one has such a property interest.

In any case, Plaintiff has stated a property interest by stating a claim of entitlement to the rezoning classification pursuant to the 2002 Local Law and the Official Zoning Maps of the Town. *See Town of Orangetown v Magee*, 88 NY2d 41, 52 [1996] ("In order to establish a protectable property interest in the building permit, defendants must show more than a mere expectation or hope to retain the permit and continue their improvements; they must show that pursuant to ***State or local law***, they had a 'legitimate claim of entitlement' to continue . . ." (emphasis added)).

Accordingly, Defendant's motion to dismiss this cause of action is denied.[1]

Additionally, Defendant has not established that Plaintiff cannot plead both equitable and monetary relief in his complaint pursuant to 42 USC § 1983. As such, Defendant's motion to dismiss Plaintiff's request for equitable relief pursuant to 42 USC § 1983 is denied.

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1 Defendant does not argue that Plaintiff has not met the second element of the test.

Equal Protection:

"The essence of a violation of the constitutional guarantee of equal protection is, of course, that all persons similarly situated must be treated alike" *Bower*, 2 NY3d at 630.

"[A] violation of equal protection arises where first, a person (compared with others similarly situated) is selectively treated and second, 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*, 2 NY3d at 631.

"The 'similarly situated' element of the test asks 'whether a prudent person, looking objectively at the incidents, would think them roughly equivalent'. But even different treatment of persons similarly situated, without more, does not establish a claim. What matters is impermissible motive: proof of action with intent to injure-that is, proof that the applicant was singled out with an 'evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances'." *Bower*, 2 NY3d at 631.

Defendant argues that Plaintiff has not pleaded sufficient facts to state a cause of action under the Equal Protection Clause of the Fourteenth Amendment. Defendant argues that Plaintiff has not pled any facts to show that other applications seeking subdivision in the same zoning as Plaintiff were approved where Plaintiff's was denied. Defendant argues that Plaintiff did not plead any facts in support of his allegation that applicants of western European descent in the same zoned region were treated differently, that the Board was aware of his Albanian heritage or that there were any similarly situated individuals attempting to subdivide their properties in the same zone as Plaintiff's property location. Defendant also argues that Plaintiff has not pled any evidence of impermissible considerations or unequal treatment because the claim is based solely on Plaintiff being referred to by his name.

Plaintiff argues that he has established in his complaint that his property has been treated by the Town Board as R-40 zoned, while those of his neighbors have not. Plaintiff also argues that Defendant met in secret to discuss how to continue treating the other property holders as R-15 while denying Plaintiff the same treatment. Plaintiff argues that he has not been treated in the same manner as his neighbors. He argues that he, a Muslim Albanian immigrant, is the only property owner in the surrounding area who applied for and was denied R-15 treatment of his property. Plaintiff argues that the Town Board is selectively treating him differently than his neighbors who are similarly situated. Plaintiff argues that the Town residents repeated his last name multiple times during the Town Board public meeting, which successfully prejudiced the Town Board into

denying Plaintiff's application based upon a Muslim last name, Islamic fears and ethnicity that is different from the rest of the prevailing neighborhood. As a result, the Town's discriminatory conduct deprived Plaintiff of his property interest and resulted in disparaged treatment.

Plaintiff sufficiently stated a claim for equal protection pursuant to 42 USC § 1983. The complaint states that Plaintiff was selectively treated differently from others similarly situated because his property was treated as R-40 zoned, while those of his neighbors were treated as R-15 zoned. Plaintiff has also stated that the denial of the rezoning application and the selective treatment of his property was motivated by racial and ethnic animus.

Accordingly, Defendant's motion to dismiss this cause of action is denied.

SUMMARY:

Accordingly, Defendant's motion to dismiss is granted in part and denied in part. Defendant's motion to dismiss Plaintiff Sami Construction from this action is granted. Defendant's motion to dismiss the Article 78 petition is granted. Defendant's motion to dismiss is denied in all other respects.

This matter is scheduled for a preliminary conference on **January 29, 2019 at 9:15 a.m.**

The foregoing constitutes the Decision and Order of this Court.

Dated: December 17, 2018
New City, New York

ENTER

HON. PAUL I. MARX, J.S.C.