

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-15-480

FRIENDS OF THE MOTHERHOUSE,
et al.,

Plaintiffs

v.

ORDER

CITY OF PORTLAND,

Defendant

and

SEA COAST AT BAXTER WOODS
ASSOCIATES, LLC, et al.,

Intervenors.

STATE OF MAINE
Cumberland, ss, Clerk's Office

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Before the court are two motions: a motion for summary judgment brought by Intervenors Motherhouse Associates LP and Sea Coast at Baxter Woods Associates, LLC, as well as a Rule 56(f) motion filed by Plaintiffs Friends of the Motherhouse, Raymond Foote, and Barbara Weed seeking a continuance to take further discovery. For the reasons set forth below, plaintiffs' Rule 56(f) motion is denied and the intervenors' motion for summary judgment will remain under advisement.

Plaintiffs brought this case alleging that recent amendments to the City of Portland's zoning ordinance are inconsistent with the City's comprehensive plan and failed to comply with applicable procedural requirements for re-zoning. Plaintiffs thus seek a declaratory judgment that the amendments are unlawful. The intervenors are developers whose proposed project depends

upon approvals granted by the City under the zoning amendments. Intervenors have moved for summary judgment arguing that the amendments are not inconsistent with the comprehensive plan and are otherwise lawful.

Whether zoning is consistent with a comprehensive plan is an issue of law. *City of Old Town v. Dimoulas*, 2002 ME 133 ¶ 18, 803 A.2d 1018. The challenger has the burden to prove that the challenged zoning or zoning amendment is inconsistent with the comprehensive plan. *Id.*

Plaintiffs first opposed the intervenors' motion for summary judgment, acknowledging that there were no material disputes of fact. Plaintiffs' Opposition to Intervenors' Motion for Summary Judgment dated December 28, 2015 at 1. In their opposition plaintiffs argued not only that the intervenors' motion should be denied but also that summary judgment should be entered against intervenors and in favor of plaintiffs. *Id.* at 18. However, plaintiffs also suggested in two footnotes that they expected to file a Rule 56(f) motion in order to determine whether the rezoning which they challenge in this action was not an isolated instance. In the footnotes they suggest that if they find other alleged departures from the comprehensive plan, they will seek to amend their complaint. *Id.* at 3 n.1, 4 n.3.

After filing their opposition to the intervenors' motion for summary judgment, plaintiffs filed a Rule 56(f) motion requesting an opportunity to depose city officials. Rule 56(f) allows the court to continue a ruling on a pending motion to allow a party to conduct further discovery where the party "cannot for reasons stated present by affidavit facts essential to justify the party's opposition." M.R. Civ. P. 56(f).

Plaintiffs believe there has been a change in philosophy in the City's Planning Department and the City Council regarding contract zoning and growth management that

fundamentally differs from the philosophy in place when the existing comprehensive plan was adopted. In their Rule 56(f) motion plaintiffs state that they wish to conduct further discovery to establish the supposed change in philosophy that they say has led to departures from the comprehensive plan.

First, plaintiffs are not entitled to take discovery in order to determine if they are going to seek to amend their complaint. The sole purpose of a Rule 56(f) motion is to allow a party to take discovery necessary to oppose a motion for summary judgment.

Second, regardless of whether there has been a change in philosophy by the City, the issue before the court is not whether the City's philosophy has changed but whether specific zoning amendments are inconsistent with the comprehensive plan. The question of whether the amendments are consistent with the comprehensive plan will be determined by reference to the amendments and to the comprehensive plan. The summary judgment record already contains the evidence necessary to make this determination, and the court cannot see any reason why the discovery now requested by plaintiffs is needed.

Third, plaintiffs have already opposed the motion for summary judgment and stated that there are no material factual disputes. Plaintiffs have thereby acknowledged that their additional proposed discovery is not necessary to obtain facts that are "essential" to justify their opposition as required by Rule 56(f).

Under the Law Court's decision in *Bay View Bank N.A. v. The Highland Golf Mortgagees Realty Trust*, 2002 ME 178 ¶ 22, 814 A.2d 449, plaintiffs have not demonstrated that they have been diligent in conducting discovery to date and have not adequately indicated how the discovery requested will influence the outcome of the pending summary judgment motion.

The entry shall be:

Plaintiffs' motion under M.R. Civ. P. 56(f) is denied. The clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: March 8, 2016



Thomas D. Warren
Justice, Superior Court