SUPREME COURT: STATE OF NEW YORK
COUNTY OF MONROE

SUSAN FERRARI ROWLEY, GREGORY STOKOE and WILLIAM MCGUIRE,

INDEX NO.
2010-3999

Plaintiffs,

vs.

TOWN OF WHEATLAND and MONROE COUNTY

MEMORANDUM OF LAW
ON BEHALF OF
THE TOWN OF WHEATLAND
SUPPORTING MOTION TO DISMISS
OR IN THE ALTERNATIVE
SUMMARY JUDGMENT

Respectfully submitted
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PRELIMINARY STATEMENT

The County of Monroe maintains a county park, known as Oatka Creek Park, within the physical boundaries of the Town of Wheatland, Monroe County, New York. The Plaintiff, Susan Ferrari Rowley, a resident of the Town of Wheatland, wrote a letter (Exhibit C to Complaint) to the Town of Wheatland Building Inspector, Terry W. Rech, dated March 4, 2010, in which she alleged that the Oatka Creek Park is in violation of the Town of Wheatland Code, and requesting the Building Inspector to "…restrain, correct or abate…" the claimed violation. On March 11, 2010, Terry W. Rech, the Building Inspector, responded by letter (Exhibit D to Complaint), in which he determined that there is no violation.

Susan Ferrari Rowley did not appeal the determination of Terry W. Rech to the Zoning Board of Appeals. Instead, Susan Ferrari Rowley, along with two other Plaintiffs, commenced this action under Town Law §268(2), alleging a failure to restrain, correct or abate the "violations," and under the theory of public nuisance.

This Memorandum of Law is submitted in support of the motion of the Town of Wheatland to dismiss the complaint, or, in the alternative for summary judgment in favor of the Town of Wheatland and against the Plaintiffs.

ARGUMENT

POINT I

The Action Against the Town of Wheatland Is outside the Jurisdiction of the Court and Beyond the Scope of Town Law §268(2)

Town Law §268(2) provides that three aggrieved taxpayers can commence an action or proceeding *"...in like manner as..."* town officials are authorized to commence,

if town officials fail or refuse to comply, within ten days, with a written request by a resident taxpayer that a zoning violation be restrained, corrected or abated by an appropriate action of the town officials.

Assuming *arguendo* that town officials in the instant case had failed or refused to institute an appropriate action or proceeding for ten days after being requested to do so (which this moving Defendant disputes), an action under Town Law §268(2) may be brought *"in like manner as such local officer, board or body of the town is authorized to do."* The right of action conferred upon resident taxpayers is no greater than the right of action possessed by the Town if it chose to institute a proceeding. *Phair v. Sand Lake Corp.,* 56 A.D.3rd 449 (2nd Dep't 2008); *Marlowe v. Elmwood, Inc.,* 12 A.D.3d 742 (3rd Dep't 2004) *leave dismissed,* 4 N.Y.3rd 881 (2005); *Forget v. Raymer,* 65 A.D.2d 953 (4th Dep't 1978).

In *Manuli v. Hildenbrandt,* 144 A.D.2d 789 (3rd Dep't 1988), the court, after holding that a proceeding in the nature of mandamus does not lie against a municipal official to compel enforcement of a zoning provision, stated it would not be a bar to an action under Town Law §268(2) under the proper circumstances. In other words, inclusion of the Town of Wheatland as a party defendant in a §268(2) action is inappropriate because the purpose of the section is to provide a vehicle for taxpayers, under certain circumstances, to proceed against the alleged violator directly.

POINT II
The Plaintiffs Have Failed to Demonstrate Standing

a. The Plaintiffs Have Not Shown That They Are "Aggrieved"

Town Law § 268(2) requires that a so-called "taxpayer action" be brought by three resident taxpayers who are jointly or severally aggrieved by the alleged violation. An examination of the Complaint demonstrates that each of the three Plaintiffs are "concerned" about certain possible consequences of having a soccer field in a park, such as the possibility that there will be traffic. It is respectfully submitted that having "concern" for a possible consequence does not constitute being "aggrieved." In *Shepardson v. Kenville,* 167 Misc.2d 247 (Sup. Yates Cnty - 1995), the court, discussing the issue of standing under Town Law §268(2), said that support for the position that standing requires special damages is found:

> "…in the general rule that individuals cannot maintain a suit in equity to restrain the violation of a statute or ordinance enacted for the public's protection absent a showing of special damages. (Citing *Mobil Oil Corp. v. Syracuse Industrial Development Agency,* 76 N.Y.2d 428 (1990); *Marcus v. Village of Mamaroneck,* 283 N.Y. 325 (1940).

After discussing the concept of standing being premised on proximity alone, the court continued, citing the leading case of *Sun-Brite Car Wash v. Board of Zoning & Appeals,* 69 N.Y.2d 406 at 414:

> "*The status of neighbor does not…automatically provide the entitlement, or admission ticket, to judicial review in every instance.*

In the case at bar, in sum, the Plaintiffs have neither alleged nor shown that they have been or will be damaged in any way by reason of the claimed zoning violation. Instead, they have alleged only they each are "concerned" about certain issues. This case is clearly different from those in which the plaintiff has suffered damages clearly different and greater than that suffered by the public in general (See *Little Joseph Realty, Inc. v. Town of Babylon,* 41 N.Y.2d 738 [1977])

b. The Plaintiffs Have Failed to Exhaust Administrative Remedies

Town of Wheatland building Inspector, Terry W. Rech, determined that the violation alleged by Susan Ferrari Rowley in her letter (Exhibit C to the Complaint), had not occurred. His decision is that there is no violation. The instant action was brought not on the premise of a failure or refusal of town officials to take action against a zoning violation. Rather it is based on the interpretation of the Plaintiffs that a violation exists, which disregards the decision of the person in the Town of Wheatland authorized to interpret the Town's laws. Town Law §267-a, dealing with the appellate jurisdiction of zoning boards of appeal, provides that unless otherwise provided by local law, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing appeals from and reviewing interpretations and determinations of the public official charged with enforcement of the laws of the municipality. Anyone aggrieved by the determination of a public official may appeal to the Zoning Board of Appeals ("ZBA"). Until such an appeal is taken and a decision made on the appeal, the determination of the town official is not final. (See *Marlowe v. Elmwood, Inc.,* 12 A.D.3rd 742 [3rd Dep't – 2004]).

The Appellate Division, in holding that Town Law 268(2) was not available to plaintiffs in *Marlowe, supra,* said:

> *"...plaintiffs-dissatisfied with repeated conclusions of Town officials that defendants current operation of summer programs at the school does not violate the applicable zoning ordinances- attempt to utilize Town Law §268(2) to challenge those conclusions of Town officials and to obtain a determination that defendants are in violation of the Town zoning ordinance. On the first aspect of plaintiffs' challenge ...should have been raised in an appeal to the Town's Zoning Board of Appeals (see Town Law §267-a) and, thereafter, in a timely CPLR article 78 proceeding (see e.g. Matter of Mayes v. Cooper, 283 A.D.2d 760, 761-762...)."*

Very similarly to the case at bar, the plaintiffs in *Marlowe, supra,* preferred to rely upon their own determination as to whether a zoning violation had occurred, rather than get a final determination from the town. *Marlowe, supra,* and the case at bar are virtually identical on the issue of exhaustion of administrative remedies as a prerequisite for commencement of a taxpayer action under Town Law §268(2).

POINT III

The Plaintiffs Have Failed to Show That Town of Wheatland Officials Failed or Refused to Enforce the Town's Zoning Code

Courts have held that the rendering of a decision or determination which is contrary to that which the plaintiff seeks does not constitute a "failure or refusal" to enforce the town zoning code, within the meaning of §268(2) of the Town Law. (See *Marlowe v. Elmwood, Inc., supra,*

The Appellate Division, Fourth Department, in *Forget v. Raymer,* 65 A.D.2d 953 (4th Dep't 1978) held:

> "*In a taxpayer's action to enforce compliance with the zoning law upon failure of the town officers to do so, the taxpayer plaintiff have no greater right to demand compliance than do the town officials. In this case the town could not question the validity of the defendants' use of the subject property because the Town Building Inspector and the Town Zoning Board of Appeals had declared formally that the use was a legal and nonconforming use* (internal citations omitted). *Inasmuch as the Town Officials could not institute legal action to enjoin the use, the plaintiffs may not do so…"* 65 A.D.2d 953 at 954

POINT IV

The Enforcement of Local Laws is Discretionary and May not be Compelled

The decision to enforce a municipal code rests in the discretion of the public officials charged with its enforcement and relief in the nature of mandamus is

unavailable. *Church of the Chosen v. City of Elmira,* 18 A.D.3d 978 (3rd Dep't 2005), citing *Matter of Dyno v. Village of Johnson City,* 261 A.D.2d 783, 784 (3rd Dep't 1999), appeal dismissed 93 N.Y.2d 2033 (1999), lave denied 94 N.Y.2d 818 (1999); *Manuli v. Hildenbrandt,* 144 A.D.2d 789, 790 (3rd Dep't 1988); *Matter of Young v. Town of Huntington,* 121 A.D.2d 641 (2nd Dep't 1986).

The instant action, although not brought under article 78 in the nature of mandamus, has the same effect. It seeks to compel the Town of Wheatland to correct, abate or limit activity which the plaintiffs believe amounts to a violation, even though the Town Building Inspector has determined otherwise. It seeks to reach a result contrary to the determination of the Building Inspector without having appealed his determination by using the "taxpayer action" as their vehicle.

However, as shown elsewhere in this memorandum, the taxpayer action under Town Law §268(2) must fail by reason of the plaintiffs' inability to show that there has been a "failure or refusal" by the Building Inspector to act as requested.

POINT VI

The Action Against the Town of Wheatland Based On Theory of Public Nuisance Does Not Lie

a. Plaintiffs have not complied with General Municipal Law §§50-e and 50-i.

The allegations in the complaint regarding public nuisance are clear neither as to their target nor as to the underlying facts. To the extent that all or any part of the purported cause of action based on the theory of public nuisance is directed against the Town of Wheatland and constitutes an alleged tort or torts to which GML §§50-e and 50-I apply, the plaintiffs have failed to file the required notice(s) and have failed to allege compliance therewith in the complaint.

b. Plaintiffs, having failed to plead special damages, lack standing to bring public nuisance action

Citing *Copart Indus. v. Consolidated Edison Co. of New York,* 41 N.Y.2d 564 (1977) and *Queens County Business Alliance v. New York Racing Ass'n,* 98 A.D.2d 743 (2nd Dep't 1983), the court in *Saks v. Petosa,* 184 A.D.2d 512 (2nd Dep't 1992) held that the *"...petitioners do not have standing to maintain the cause of action alleging public nuisance. A claim for damages arising from a public nuisance which interferes with or causes damage to the public in the exercise of rights common to all, cannot be maintained by a private individual absent special damages.....The petitioners have failed to allege an injury different from that suffered by other residents in their community."*184 A.D.2d 512 at 513

In the instant case, the plaintiffs make no allegations which even remotely could be construed as alleging special damages greater or different from that which might have been suffered by the community as a whole. The plaintiffs merely allege "concern" over possible traffic problems, which by their very nature apply only to the general community at large.

CONCLUSION

For the reasons and upon the grounds above stated, this court should grant the motion of the Town of Wheatland to dismiss the within action as to it, in its entirety, or in the alternative, grant summary judgment in favor of the Town of Wheatland and against the Plaintiffs herein, together with all the relief requested in the Notice of Motion.

Respectfully submitted,

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