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May 26, 2017

VIA ECF & FACSIMILE (914) 390-4179
Hon. Nelson S. Román
United States District Court
Southern District of New York
300 Quarropas Street
White Plains, New York 10601

Re: Butterfield Realty, LLC v. Village of Cold Spring, et al.
Case No.: 17-cv-1901 (NSR)
Response to Defendants' Request for Pre-Motion Conference

Dear Judge Román,

This firm represents Plaintiff Butterfield Realty, LLC in the above referenced case. Please accept the following as Plaintiff's position regarding Defendants' request for a pre-motion conference. Dkt. No. 18.

Defendants' proposed motion is fundamentally flawed in that it misstates and mischaracterizes the relief sough by Plaintiff and the basis therefor. To begin with, Defendants selectively address only a sliver of the numerous irrational and unconstitutional actions that comprise Plaintiff's claim. Defendants claim that Plaintiff cannot establish a vested property interest in the Butterfield Project ("Project") because once Plaintiff made changes to its approved site plan it was required to seek additional approval, and therefore Plaintiff could have no vested property interests of any kind in the Project. In support of their argument, Defendant cites to *Donovan Realty, LLC v. Davis*, 2009 WL 1473479, at *5 (N.D.N.Y. May 27, 2009), for the proposition that: "one cannot have a protected property right where the Planning Board has discretionary approval power" over a revised site plan. Dkt. No. 18 at p. 2.

In *Donovan* the Court applied the "clear entitlement" test in deciding whether the plaintiff had a protected property right in its requested amendment to a portion of its previously approved site plan. Specifically, plaintiff sought permission to amend its approved site plan to allow it to use an area of its property previously approved solely for use as a location for "RV camping sites" as an overflow lot to store purchased vehicles in the off-season. *Donovan,* 2009 WL 1473479 at *1 (N.D.N.Y. May 27, 2009). Applying the "clear entitlement test", the court found that plaintiff lacked a protected property interest in the desired change "[b]ecause

defendants are vested with such vast discretion in approving site plans and modifications, plaintiffs cannot establish that *approval of their modification* was virtually assured." *Donovan Realty, LLC v. Davis*, at *5 (emphasis added). Crucially, the *Donovan* Court did not hold that the plaintiff lost any and all interest in the approved and un-amended portions of the site plan merely by applying for a modification.

Here Plaintiff does not allege that it had a vested property interest in the proposed minor amendments sought in the revised site plan. Rather, Plaintiff has alleged and seeks to prove that it had a constitutionally protected property interest in the overall Project approved by the Defendants in its initial site plan, and that the Defendants – through a malicious campaign designed specifically to harm Plaintiff – unconstitutionally deprived it of any and all interests in every portion of the Project, including those uses which were not affected by the proposed amendments and were at all times in full compliance with the approved site plan, solely to delay progress of the development and make the Project economically unviable.

It is clear that Plaintiff had a vested property interest in the initial approved site plan and the development project it contemplated. *See Soundview Associates v. Town of Riverhead*, 725 F. Supp. 2d 320, 334 (E.D.N.Y. 2010) ("The special permit, once issued, unquestionably [is] the property of [the recipient]" (citing and quoting *Villager Pond, Inc. v. Town of Darien,* 56 F.3d 375, 379 (2d Cir.1995) and *T.S. Haulers, Inc. v. Town of Riverhead,* 190 F.Supp.2d 455, 461 (E.D.N.Y. 2002), alterations in original). Indeed, as alleged, not only did Plaintiff possess an approved site plan, but the Town had previously passed a special zoning law specifically for the purposes of allowing Plaintiff to build this project. After the creation of the special zoning district, approval of the initial site plan and meeting a host of other siting and permitting requirements, Plaintiff's invested more than a million dollars in developing the Project.

The proposed amendment sought by Plaintiff affected only two of the buildings in a Project that included the building or redevelopment of two retail/office buildings, a medical arts building, 55 senior condominiums, a three-building senior center, and three single family homes. At the time of the proposed amendments Plaintiff had already demolished buildings, installed utility lines and infrastructure, paved roads, poured foundations, and begun the remodeling of part of the existing structures on the property in furtherance of developing that portion of the property which was unaffected by the proposed amendment.

Importantly, "[w]hen a permit has already been granted, 'the 'clear entitlement' test no longer [is] applicable to the special permit because the test applies only to permits being sought.'" *Soundview Associates v. Town of Riverhead*, 725 F. Supp. 2d at 334 (internal citations omitted). In *Donovan*, the defendants sought to preclude the plaintiff from using a single parking lot on a larger commercial property for non-conforming uses. They did not seek to stop the entire development and the case does not address plaintiff's property rights in the remaining portion of the property. Here, Defendants sought to prevent Plaintiff from using any part of its property, including those portions of the Project which it had already attained vested rights in

based on its substantial efforts to develop those aspects pursuant to the initial approved site plan, and which had nothing to do with the proposed amendments.

Likewise, even assuming that Plaintiff did not have a vested property interest in the initial approved site plan, Defendants' numerous abuses of power and intentionally harmful actions continued after the revised site plan itself was approved. Plaintiff has alleged and will prove that Defendant continued its dilatory tactics with respect to the building permits the town issued for buildings # 2 and # 3 even after the revised site plan was approved and these permits were issued.

Finally, Plaintiff was not obligated to make an application to the Village's Zoning Board of Appeals prior to filing suit because it is clear that such an application would have been futile. Indeed, as alleged in the Complaint, Defendant Mayor Merandy, who had improperly inserted himself at every level of the Village's governance including the Zoning Board of Appeals, had publically stated that he intended to kill the project. *See, e.g., Murphy v. New Milford Zoning Commn.*, 402 F.3d 342, 349 (2d Cir. 2005) ("A property owner, for example, will be excused from obtaining a final decision if pursuing an appeal to a zoning board of appeals or seeking a variance would be futile.").

Very best regards,

GIRVIN & FERLAZZO, P.C.

By:

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DSLR/SDF
Cc: Catania, Mahon, Milligram & Rider, PLLC (via ECF only)