STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-08-041

The Friends of Great Diamond Island, LLC, et al.,

Plaintiffs

v. **DECISION AND JUDGMENT**

The Inn at Diamond Cove, LLC, et al.,

Defendants

This matter was heard on August 17 & 18, 2010, on Counts VI and VII of Plaintiffs' Third Amended Complaint seeking a declaratory judgment pursuant to 14 M.R.S. §§ 5951-63 (2009).[1] Following the trial, the parties submitted written argument. The Court received the final submission on September 10, 2010. After a telephonic conference with counsel for the parties, the Court, on November 15, 2010, heard further oral argument from the parties.

After consideration of the evidence and the parties' arguments, the Court makes the following findings:

Findings of Fact

1. Great Diamond Island is located in Casco Bay, and is part of and governed by the City of Portland.

2. The City's Comprehensive Plan designates areas of the City as either growth or rural areas. Great Diamond Island is designated as a rural area.

[1] Because the issues generated by Counts VI and VII involve directly only Defendant City of Portland, the Court, in the interest of judicial economy and with the agreement of the parties, conducted a separate trial on Counts VI and VII.

3. During the 1980s, the City of Portland commissioned a study of the land uses and growth issues for the islands located in Casco Bay.

4. In 1985, following the release of the study, the City of Portland rezoned the Diamond Cove section of Great Diamond Island as an Island-Residential 3 (IR-3) Zone, which included some conditions and restrictions (the 1985 Zoning Agreement).

5. An IR-3 zone permits uses such as inns, lodging houses, single family attached and detached dwellings, restaurants, recreational facilities, municipal uses, private clubs, fraternal organizations, nursery schools, kindergartens and day cares, schools, churches or other places of worship, and retail businesses or services.

6. After the area was rezoned, a developer transformed the Fort McKinley site in the Diamond Cove area into a planned living community. The community included residential units, a parade ground, open space, and some commercial space. The commercial uses were limited to the waterfront area of Diamond Cove. According to the 1985 Zoning Amendment, the areas designated as open space were to remain so "in perpetuity."

7. The developer completed and sold some, but not all, of the planned units. The developer became insolvent, and the developer's lender foreclosed on the remaining properties.

8. Included within the IR-3 zone are two buildings, the Double Barracks and the Hospital, which are in disrepair. The City of Portland became the owner of both properties when the owner failed to pay the required property taxes for the property.

9. In 2008, Defendant The Inn at Diamond Cove, LLC, a development company formed in part by the principal developer of the Fort McKinley project in the 1980's, proposed to renovate and develop the Double Barracks, the Hospital and some of the abutting land. Under the proposal, the developer would convert the Double Barracks and the Hospital into individual living units described as hotelminiums. The Double Barracks would be developed with a total of 36 units (16 of which are lock-out units) and the Hospital would be developed into 24 units (12 of which are lock-out units).

Each unit would be equipped with kitchen facilities. The project also included a pool and service area on land designated as open space in the 1985 Zoning Amendment.

10. The developer's intent was to attract people to invest in, but not reside in the units. Rather, the owners of the units would agree to rent them to visitors to Great Diamond Island. In this way, the units provided short-term occupancy similar to rooms that are available at hotels, motels, or inns.

11. The City of Portland and Defendant The Inn at Diamond Cove, LLC entered into a purchase and sale agreement for the property on which the project would be developed.

12. In April 2008, the developer applied for an amendment to the 1985 Zoning Agreement to permit the proposed development. The City's Planning Board recommended the approval of the proposed amendment.

13. The City Council first considered the amendment at its meeting on September 3, 2008, at which time the council entertained public comment. During the meeting, some City Council members raised questions about the amendment and the proposed development. Following the meeting, City staff members prepared a written response to some of the questions that were posed.

14. On October 6, 2008, the City Council approved the amendment.

15. Before approval of the amendment, the developer filed with the City a letter from a lender in which the lender represented that it "would welcome the opportunity to discuss the possibility of financing the project with the project owners at some point in the future." A principal of the developer also represented to the City Council that he had financing subject to the City Council's vote. In addition, the developer provided the City Council with a list of more than 20 multi-million dollar development projects in which he was involved.

16. Section 14-60 of the Portland Code of Ordinances provides that "[c]onditional or contract zoning shall be limited to where a rezoning is requested by the owner of the property to be rezoned." Portland, Me., Code § 14-60 (July 23, 2010).

Discussion

Plaintiffs argue that the City's adoption of the amendment to the 1985 Zoning Amendment, by which action the City approved the "hotelminium" development project on Great Diamond Island, was impermissible because the developer (Defendant The Inn at Diamond Cove, LLC) lacked standing to file the application for the amendment, the development project was not consistent with the existing or permitted uses in the zone, and the development project was inconsistent with the City's Comprehensive Plan.

A. Standing of The Inn at Diamond Cove, LLC.

According to section 14-60 of the Portland Code of Ordinances, "conditional or contract zoning shall be limited to where a rezoning is requested by the owner of the property to be rezoned." Portland, Me., Code § 14-60. Citing this provision, Plaintiffs maintain that Defendant The Inn at Diamond Cove, LLC did not have standing to request the amendment because it was not at the time of the application, and is not now, the owner of the subject property. The City contends that the developer was authorized to seek the amendment because it had sufficient interest in the property by virtue of its agreement to purchase the property from the City.

An entity or person who has a "right, title or interest" in a certain property, has the ownership interest necessary to apply for a zoning amendment. *See Bailey v. Coffin*, 115 Me. 495, 498-99, 99 A. 447, 448 (1916) (explaining that in equity, the vendee of an agreement for the sale of land is treated "as the equitable owner of the land and the vendor as owning the consideration"). Because the purchaser is ordinarily the party most familiar with the proposed use of the property and, therefore, best able to provide the municipality with the information necessary to evaluate the proposal, such a rule is sound and logical. Here, the valid purchase and sale agreement between the City and Defendant The Inn at Diamond Cove, LLC, conferred upon the developer the interest necessary to apply for the amendment. *Cf. Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40 (Me. 1983) (holding that a signed purchase and sale agreement is sufficient to confer

standing on a developer to apply to create a subdivision because the developer had an interest in land that was not subject to a condition that was revocable at the whim of the seller). Accordingly, Plaintiffs' standing argument fails.

B. Development of Open Space.

In Count VI of the Amended Complaint, Plaintiffs argue that the City impermissibly modified the 1985 Zoning Agreement when it authorized the use of a portion of the "open space" abutting the Double Barracks for a swimming pool and service area. In support of this argument, Plaintiffs cite the 1985 Zoning Agreement, which provides that the areas designated as "open space" in the IR-3 zone shall remain open space "in perpetuity."

Plaintiffs' argument must be considered in the context of the entire 1985 Zoning Agreement, which also makes clear that the condition and restrictions of the agreement are subject to modification. Specifically, the 1985 Zoning Agreement states, "[n]othing in these conditions or restrictions shall constitute any representation or commitment by the City to retain the zoning classification of the Premises, or shall entitle the Owner to rely thereon for any purposes, or shall estop the City from any future rezoning or exercise of other authority with respect to the Premises." Thus, in the 1985 Zoning Agreement, the City confirmed a basic concept of zoning – that subject to the substantive and procedural safeguards of state law and local zoning ordinances, a municipality can amend, modify or change a property's zone designation, or the conditions and restrictions to which certain property is subject. Provided, therefore, that the City complied with and satisfied the requirements of state law and its zoning ordinance, the City had the authority to permit the use of "open space" in the Diamond Cove area for a swimming pool and service area.

C. Existing and Permitted Uses.

In Count VII of the Amended Complaint, Plaintiffs argue that the proposal is not consistent with the existing and permitted uses of the area. To be valid, conditional zoning must "[e]stablish rezoned areas that are consistent with the existing and permitted uses within the original zones."

30-A M.R.S. § 4352(8) (2009). Plaintiffs have the burden of showing that the amendment allowing the "hotelminiums" is not consistent with the existing and permitted uses within the original zone. *See Adelman v. Town of Baldwin*, 2000 ME 91, ¶ 22, 750 A.2d 577, 585.

At the time of the amendment, the 1985 Zoning Agreement and the Declaration of Restrictions and Covenants of the Diamond Cove Homeowners' Association principally governed and defined the existing and permitted uses for the Diamond Cove area. As mentioned above, lodging houses and inns are permitted in the zone. In addition, commercial uses are permitted and exist in the Diamond Cove area. The test is not whether the specific use contemplated by the applicant exists or is otherwise permitted in the IR-3 zone. If the use were permitted, the rezoning process would not be necessary. Instead, the issue is whether the proposed use is *consistent* with the existing and permitted uses. To the extent that a hotelminium differs from an inn, the difference is of little consequence. Simply stated, the proposal is to establish an overnight lodging business, a use that is already permitted in the area. The Court cannot, therefore, determine that the City improperly concluded that the proposal was consistent with the existing and permitted uses.

D. The Comprehensive Plan.

Plaintiffs also contend in Count VII of the Amended Complaint that the amendment is not consistent with the City's comprehensive plan. Every zoning ordinance "must be pursuant to and consistent with a comprehensive plan adopted by the municipal legislative body." 30-A M.R.S. § 4352(2). "The test for the court's review of the city council's rezoning action is whether from the evidence before it the city council could have determined that the rezoning was in basic harmony with the comprehensive plan." *LaBonta v. City of Waterville*, 528 A.2d 1262, 1265 (Me. 1987) (quotation marks and emphasis omitted). In this case, Plaintiffs must establish that the City did not "strike a reasonable balance among the City's various zoning goals." *Nestle Waters North America, Inc. v. Town of Fryeburg*, 2009 ME 30, ¶ 23, 967 A.2d 702, 709; *LaBonta*, 528 A.2d at 1265. In

other words, the Court must determine whether the zoning amendment and the comprehensive plan are in "basic harmony." *City of Old Town v. Dimoulas*, 2002 ME 133, ¶ 18, 803 A.2d 1018, 1023.

The City's comprehensive plan is comprised of several documents including the Portland Islands Land Use and Zoning Study, and the City of Portland Comprehensive Plan, Portland's Goals and Policies for the Future. A review of the various documents reveals that as part of its comprehensive plan, the City recognized the unique nature of the islands of Casco Bay, and the need to balance development on the islands with the qualities that contribute to the uniqueness of the islands. Importantly, neither the comprehensive plan, nor Maine law prohibits development on Great Diamond Island. Indeed, through the Ft. McKinley project, Great Diamond Island experienced significant development during the 1980s. Furthermore, the City Code and the comprehensive plan contemplate the possibility that once established, the permitted uses in a particular IR-3 zone can be modified. In fact, the City Code proscribes a process by which the permissible uses can be modified or supplemented. *See* Portland, Me., Code §§ 14-145.13, 14-145.16 (July 23, 2010).

In this case, Plaintiffs first contend that the proposed use is inconsistent with a general plan for limited development on and the preservation of the uniqueness of the island. Although the development might result in more visitors to the island, the comprehensive plan does not include a specific limit on the number of residents per unit on the island, nor does it contain a requirement that each unit in the Diamond Cove area be owner-occupied. To the contrary, the IR-3 zone specifically authorizes lodging houses and the use of property as "inns" with as many as 50 rooms.

The Court's inquiry is not, however, limited to this more general assessment of compatibility with the comprehensive plan. Plaintiffs contend, and the City does not dispute, that the City's comprehensive plan requires that any zoning to or rezoning within an IR-3 zone must meet the development standards laid out in section 14-145.13 of the Portland City Code. That section of the City's Code provides, in part, that an IR-3 "development plan should have the capability of meeting

the development review standards of section 14-145.16." Portland, Me., Code §§ 14-145.13(e). Section 14-145.16 states that "no development shall occur *nor shall any new use be established* unless the Planning Board finds that the final development plan for the site is in compliance with the following development standards: [transportation, solid waste, sanitary waste, water, shoreland areas, environmentally sensitive areas, recreation and open space, financial and technical capability]." (emphasis added). Plaintiffs maintain that the proposal failed to satisfy these specific guidelines that the City established to assure that a development is consistent with the comprehensive plan.

While Plaintiffs challenge the City's determination as to several of the guidelines, most of Plaintiffs' arguments focus on aspects of the project that at least in part clearly include some subjective analysis, which would impermissibly require the Court to substitute its judgment for that of the City. *See Adelman*, 2000 ME 91, ¶ 22, 750 A.2d at 585. With one possible exception, the Court is satisfied that there is evidence to support the City's conclusion that the applicant satisfied the performance standards and does not perceive the need to discuss those standards any further. The one exception is the requirement that the applicant "shall demonstrate sufficient financial ... capability for undertaking the proposed project." Portland, Me., Code § 14-145.16(h).[2] One issue in the case is whether the City could approve the amendment if the applicant did not demonstrate that it had the financial capability to complete the project.

In many ways, the performance standards are the best means of determining whether a proposed development or zoning amendment is consistent with a municipality's comprehensive plan. *See Nestle*, 2009 ME 30, ¶ 24, 967 A.2d at 710 ("The ordinance is the translation of the comprehensive plan's goals into measurable requirements"). In the instant case, the City's comprehensive plan requires applicants to meet these standards. On the topic of rezoning, the plan, which includes the Portland Islands Land Use and Zoning Study, reads in pertinent part, "[t]his

[2] The Court heard further oral argument from the parties on November 15, 2010 on whether an applicant's failure to satisfy one of the Code's performance standards invalidates the process by which the City approved the amendment, and whether the record contained sufficient evidence of the developer's financial capability to conclude the project.

zoning tool can insure that the representations and assertions of a particular zone change application and development plan that served as the basis for granting the rezoning, are formally carried out in the context in which it was approved." Comprehensive Plan, Defendant's Exhibit 9 at p. 12 (emphasis added). Accordingly, the rezoning process is the only stage at which the City Council, in its legislative capacity, has the opportunity to evaluate the financial feasibility of the development for which a zoning change is requested. The City's plan further states: "Given the sensitive environmental issues and development constraints on the islands, it is not in the interest of the City to approve on IR-3 without appropriate assurances that the ultimate development for the site appropriately addresses such development constraints." *Id.*

The prudence of the City's inclusion of an applicant's capability of "undertaking the proposed project" as a performance standard is evident in this case. First, particularly at a time of limited governmental resources, a municipality should not have to devote time to and incur the expense of an exhaustive review of a proposal that has no realistic possibility of completion. In other words, the City should not be required to engage in an academic exercise. Perhaps more importantly, the financial capability requirement provides greater assurance that if the City approves a particular project, the City will not be burdened with an unfinished project that most assuredly would be inconsistent with the comprehensive plan. The Court cannot, therefore, simply dismiss this one performance standard as inconsequential. The Court will, therefore, consider whether the City was justified in its conclusion that the applicant satisfied this requirement.

Plaintiffs maintain that the applicant, Defendant The Inn at Diamond Cove, LLC, did not demonstrate the financial capability to undertake the project. In support of this argument, Plaintiffs cite the trial testimony of Richard Knowland of the City's Planning Division, in which he said that the evidence of the applicant's financial capability consisted of a letter to him from a TD Banknorth representative, which letter reads as follows:

> TD Banknorth, N.A. has reviewed preliminary financial and project information on the development to be known as The Inn at Diamond Cove.
>
> TD Banknorth, N.A. has not issued a commitment to provide construction financing for this project. The bank would welcome the opportunity to discuss the possibility of financing the project with the project owners at some point in the future.
>
> If you need any additional information, please call.[3]

Defendants argue that the evidence regarding the applicant's financial capability was not limited to the letter, but also included testimony from one of the applicant's principals, and relevant information regarding the principal's other successful development projects. In particular, Defendants point to the principal's direct representation to the City Council that he had commitments for financing pending the vote of the City Council,[4] and to a list of over 20 multimillion dollar development projects in which the principal was involved.

Insofar as a financial institution might have difficulty issuing a formal commitment letter at an early stage of a project, an applicant cannot reasonably be required to produce a firm, binding financial commitment at this stage of the proceedings before the City. Even acknowledging this practicality, the letter to Mr. Knowland, in which a bank representative expresses a willingness to discuss the possibility of financing the project, without more, would fail to satisfy the financial capability requirement of the Code. Indeed, if the letter submitted the City is sufficient to satisfy the financial capability requirement, the requirement would be essentially meaningless.

The letter was not, however, the sole evidence of the applicant's financial capability before the City Council. As explained above, the record also included the principal's (David Bateman's) representation that the he had secured financing. Although the City Council could have reasonably required more information regarding the developer's financial capability, given Mr. Bateman's past development experience, which was documented for the City Council, and Mr. Bateman's direct

[3] April 29, 2008, letter from David Bronson to Richard Knowland.
[4] At the October 6, 2008, City Council meeting, councilor Daniel Skolnik, when questioning the applicant's principal, David Bateman, asked, "So are you saying that you have secured commitments but for the vote of the council?" Mr. Bateman replied, "That's correct."

representation to the City Council during a discussion about the applicant's financial capability, the Court cannot conclude that the applicant failed to satisfy the financial capability requirement such that the proposed development is inconsistent with the comprehensive plan. A contrary conclusion would constitute an impermissible substitution of the Court's judgment for the judgment of the City Council. *See Adelman*, 2000 ME 91, ¶ 22, 750 A.2d at 585.

Conclusion

Based on the foregoing analysis, the Court finds and declares:

1. That Defendant The Inn at Diamond Cove, LLC, had standing to file with the City the application for an amendment to the 1985 Zoning Agreement;

2. On Count VI of the Amended Complaint, that the 1985 Zoning Agreement does not prohibit the area designated as "open space" adjacent to the Double Barracks to be used for a swimming pool and service area;

3. On Count VII of the Amended Complaint, that the proposed use of the property is not inconsistent with the existing and permitted uses for the IR-3 established in the Diamond Cove area; and

4. On Count VII of the Amended Complaint, that the Amendment to the Conditional Zone approved by the City on October 6, 2008, is not inconsistent with the City's Comprehensive Plan.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Judgment into the docket by reference.

Date: 11/29/10

Justice, Maine Business & Consumer Docket