COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

PLYMOUTH, ss. No. 21 MISC 000637 (KTS)

BRIAN CARROLL, *et al*.,	)
Plaintiffs,	)
v.	)
SELECT BOARD of the TOWN OF NORWELL, *et al*.,	)
Defendants.	)

DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This case tests the power of the town meeting to compel the select board to dispose of town property in a manner that is contrary to the select board's plans for the property. Here, the property in question was vacant land that the town meeting of 2004 voted to "make available" for the development of affordable housing. Seventeen years later, when such a development began to shift from a mere possibility to a probability, a group of enterprising neighbors prepared a citizens' petition article for town meeting that "directed" the select board to convey the land to the conservation commission for "conservation, passive recreation and historic preservation purposes in perpetuity." The neighbors obtained the requisite signatures to get the article on the 2021 annual town meeting warrant and the article passed. When the select board refused to carry out the vote, the neighbors, plaintiffs here, brought this action in the nature of mandamus under G. L. c. 249, § 5 and now seek an order that compels the select board to prepare and execute the necessary instruments to complete the transfer of the land to the conservation commission.

The parties have not conducted any discovery as they agree that this dispute is a question of law for the court. The parties filed cross motions for summary judgment and the court heard oral argument on March 21, 2022.

For the reasons set forth in this decision, the motion for summary judgment of the Select Board of the Town of Norwell is ALLOWED, and the Plaintiffs' motion for summary judgment is DENIED.[1]

Summary Judgment Standard

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Hakim v. Massachusetts Insurers' Insolvency Fund*, 424 Mass. 275, 283 (1997); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 711 (1991). In viewing the factual record presented by the parties, the court must draw "all logically permissible inferences" from the facts in favor of the non-moving party. *Willits v. Roman Catholic Archbishop of Boston*, 411 Mass. 202, 203 (1991); *White v. Univ. of Mass. at Boston*, 410 Mass. 553, 556-557 (1991).

Undisputed Facts

In this case, there is no dispute concerning the material facts.

1. On September 14, 1989, the Town of Norwell made tax takings of two contiguous parcels of land located off of Wildcat Lane totaling approximately 6.3 acres (the "Wildcat Land"), and, in the ordinary course, foreclosed all rights of redemption for each.

2. On May 11, 2004, the Norwell town meeting voted to authorize the Select Board to make the Wildcat Land available for affordable housing as follows:

[1] The Select Board has challenged the Plaintiffs' standing to maintain this action in its motion for summary judgment. I have assumed for the purposes of this decision that the Plaintiffs have standing under the public right doctrine and will address the merits of the dispute concerning whether the Plaintiffs are entitled to relief under G. L. c. 249, § 5.

"Article No. 7:

> UNANIMOUSLY VOTED to authorize the Board of Selectmen to make available certain parcels of Town-owned land on WILDCAT LANE, identified on the Town of Norwell Assessors Maps as parcel 65-24-24A, consisting of three (3) acres, more or less, and parcel 65-25-24A, consisting of 2.93 acres, more or less, for affordable housing."

3. On May 15, 2007, the Norwell town meeting voted to establish the Affordable Housing Trust Bylaw which authorized the creation of the Norwell Community Housing Trust ("CHT"), whose trustees were to be appointed by the Select Board. The general purpose of the bylaw was to support the development of affordable housing in Norwell.

4. At some point after its creation in 2007, CHT engaged Ivas Environmental to delineate the wetlands on the Wildcat Land and engaged Green Environmental to perform a "site assessment" for development of the property.

5. During the 2009 timeframe, a private developer who owned vacant land that abutted the Wildcat Land obtained approval for and constructed a high-end residential subdivision known as the Wildcat Hill Development.

6. In 2013, CHT engaged Merrill Engineers and Land Surveyors to conduct a feasibility analysis of the Wildcat Land for a multi-unit residential 40B development. According to Merrill, the Wildcat Land was capable of supporting multiple housing units which would be compliant with local regulations.

7. In September 2019, CHT published an update to the "Norwell Housing Production Plan" which identified the Wildcat Land as a "housing development" in the planning or predevelopment phase.

8. In early 2021, CHT met with the Select Board to discuss development of the Wildcat Land with affordable housing. Shortly thereafter, plaintiff, Brian Carroll, who owns a home in the abutting Wildcat Hill Development, drafted a citizens' petition article purporting to

authorize and direct the Select Board to transfer the Wildcat Land to the conservation commission. Carroll obtained the required number of signatures under G. L. c. 39, § 10 to obligate the Select Board to place the article on the 2021 annual town meeting warrant. It was identified on the warrant as Article 26.

9. At the annual town meeting held on May 17, 2021, Article 26 received more than the required two-thirds majority vote

> "to authorize and direct the Board of Selectmen to transfer care, custody, maintenance and control of [the Wildcat Land] totaling 5.93 acres to the Conservation Commission, to be held for conservation, passive recreation and historic preservation purposes in perpetuity, and to authorize and direct the Board of Selectmen to request Town Counsel to prepare the appropriate documents for recording to transfer care to the Commission, in the deed."

10. On October 10, 2021, at a regular Select Board meeting, its members discussed the transfer of the Wildcat Land to the conservation commission as authorized by the town meeting vote on Article 26. A member of the Select Board then made a motion to direct town counsel to prepare a deed for the transfer of the Wildcat Land to the conservation commission. Before the Select Board voted on the motion, another member objected to the motion on the grounds that the motion could not be voted on until the Select Board passed a motion to declare that the Wildcat Land was no longer needed for affordable housing. As a result, a motion to declare that the Wildcat Land was no longer needed for affordable housing was voted on and did not pass.

11. The Select Board did not vote to authorize town counsel to prepare a deed for the transfer of the Wildcat Land to the conservation commission.

12. On November 17, 2021, plaintiff, Brian Carroll, recorded the town meeting vote on Article 26 at the Plymouth County Registry Deeds.

13. On November 29, 2021, the Select Board recorded in the Plymouth County Registry of Deeds an affidavit of its counsel that indicated, among other things, that the town meeting vote on Article 26 had been recorded without the approval of any Norwell town official.

14. The Plaintiffs, all neighbors of the Wildcat Land, commenced this suit on December 22, 2021.

Discussion

The legal question in this case exposes the interplay between the sections of General Laws Chapter 40 that authorize a municipality to own real property. Under G. L. c. 40, § 3, a municipality may own real property for the general use of its inhabitants. Such property, "not by law or vote of the town placed in the charge of any particular board, officer or department, shall be under the control of the selectmen." G. L. c. 40, § 3. Alternatively, under G. L. c. 40, § 15A, a municipality may own real property for a particular public purpose. In this circumstance, the municipality may place the real property under the control of the select board or another town board or committee, after which the real property may not be used for a different municipal purpose until the board or committee having charge of it detemines that it is no longer needed for the designated purpose. Whether public land is held as part of the municipality's general corporate property and available for any public use or is held for a particular municipal purpose depends on the circumstances of the property's acquisition and any votes of the town meeting intended to restrict the use of the property to a particular public purpose. The distinction, explained by the Supreme Judicial Court in *Harris v. Town of Wayland*, 392 Mass. 237 (1984), is critical to the outcome of this case.

In *Harris*, a dispute arose when a group of townspeople opposed the transfer of a parcel of town-owned land to the local housing authority for the purpose of developing elderly and low

income housing. The town had acquired the land 25 years earlier after a town meeting vote authorized the purchase "on behalf of the Town for school purposes." However, the town had never used the land for any school purpose and it remained vacant. When the town proposed to use the land for elderly and low income housing, the townspeople argued that the land had been acquired specifically for school purposes and, as a result, a transfer to the housing authority was prohibited unless and until the school committee notified the select board that it no longer needed the land for school purposes. The town, on the other hand, argued that it held the land for general corporate purposes and could transfer it to another board or committee for any other public purpose at the discretion of the select board, duly authorized, in accordance with G. L. c. 40, § 3.

The court ruled that the select board could not transfer the land to the housing authority because the town meeting vote that authorized its purchase had designated the land "for school purposes." The court reasoned that the wording of the town meeting article, coupled with subsequent actions taken by the town and the school committee, revealed the town's intent to place the land in the charge of the school committee for school purposes only. In reaching this conclusion, the court noted that G. L. c. 40, § 3 "does not require a separate town vote concerning the custody of property acquired, when the town's intention is indicated in some other way." *Id*. at 241. Thus, the court ruled that any transfer of the land from the control of the school committee was governed by G. L. c. 40, § 15A and required the school committee to vote to release the property to the select board before it could be transferred to the housing authority. The court explained its decision and the relationship between sections 3 and 15A as follows:

> "A word is needed here to clarify the relationship between G. L. c. 40, § 15A, and G. L. c. 40, § 3. The two statutes do not usually present alternative ways for the selectmen to convey town land. A sale of town land is a specific municipal purpose. Therefore, whenever town land that is held for any other specific purpose is to be sold, there must be

> a two-thirds vote pursuant to G. L. c. 40, § 15A, to authorize the transfer of the land from one purpose to the other. Once the transfer for the purpose of sale has been authorized pursuant to G. L. c. 40, § 15A, the selectmen, duly authorized, may consummate the sale by a deed, pursuant to G. L. c. 40, § 3. The language of G. L. c. 40, § 15A, makes it clear that this two-step procedure applies even if the land was in the charge of the selectmen rather than another board or officer. The section refers to the transfer of the custody of the land "*to the same* or another board or officer of the city or town *for another specific municipal purpose*" (emphasis in original). It is clear, therefore, that the provisions of G. L. c. 40, § 3, do not become operative until a transfer has been approved pursuant to G. L. c. 40, § 15A."

Id. at 243.

The instant case involves a fact pattern similar to *Harris*. Norwell acquired the Wildcat Land as the result of separate tax takings in 1989. Once the rights of redemption were foreclosed in 1992 and 1998, respectively, the town held the land for general municipal purposes and was under the control of the Select Board in accordance with G. L. c. 40, § 3. In 2004, the town meeting voted to make the Wildcat Land available for affordable housing. While the words "make available" in the town meeting article are not further defined, the unambiguous intent of the town meeting vote was to designate this land as a potential site for a publicly owned affordable housing project while it remained under the control of the Select Board.

From that point forward, the town and the Select Board explored development of the Wildcat Land for affordable housing in several distinct ways. In 2007, the town meeting voted to adopt an Affordable Housing Trust Bylaw which established CHT for the purpose of supporting the development of affordable housing. CHT then engaged several outside consultants to study the feasibility of constructing affordable housing on the Wildcat Land. In September 2019, CHT updated the town's Housing Production Plan and identified the Wildcat Land as a public property rental development "in the planning or predevelopment phase[]." Finally, in early 2021, CHT met with the Select Board to discuss plans for development of the

Wildcat Land. Like *Harris*, the language of the article that passed the 2004 town meeting that made the Wildcat Land "available" for affordable housing, coupled with the steps taken by the Select Board and CHT to explore use of the property for affordable housing, including the expenditure of public monies to engage outside consultants, make clear that the town intended to restrict the Select Board's use of the land to affordable housing purposes. If the town meeting vote was not intended to so restrict the use of the Wildcat Land, town meeting authorization to make the land available for affordable housing would have been unnecessary as the Select Board already had the authority to hold the property for general corporate purposes under G. L. c. 40, § 3, which could have included affordable housing. Significantly, under *Harris*, the restriction on use of the Wildcat Land for affordable housing did not require that the Select Board convey it to CHT to be effective.[2] See *Harris*, 392 Mass. at 241.

The Plaintiffs dismiss the significance of the 2004 town meeting, ostensibly because that vote did not authorize the Select Board to transfer control of the property to another town board or commission, like CHT, or to restrict the use of the property through the imposition of an affordable housing restriction under G. L. c. 184, §§ 31-32. They claim that *Bd. of Selectmen of Hanson v. Lindsay*, 444 Mass. 502 (2005) presents an "identical" fact pattern and supports a ruling that the Select Board must transfer the Wildcat Land to the conservation commission as a result of the 2021 town meeting vote on their Article 26. *Lindsay* does not support such a ruling.

Lindsay involved a parcel of land which the town acquired through a tax taking. Years later, the town meeting voted to "accept for conservation purposes, a deed, or deeds, to" the property. The town took no further action with respect to the land, and it remained on the town's list of tax possessions. Twenty-seven years later, without knowledge of the town meeting vote to

[2] It is important to note that the 2007 town meeting vote that created CHT did not authorize it to hold or control public property of the town for the purpose of affordable housing.

hold the property for conservation purposes, the town's tax custodian sold the property to a private party, having observed the requisite notice and other requirements for the sale of public land acquired through a tax taking. Subsequently, the town sought to void the transaction on the ground that, by virtue of the town meeting vote alone, the land was under the custody and control of the conservation commission and could not be sold to a third-party. In ruling against the town, the SJC concluded that the town meeting vote "evidenced an intent by the town to impose a conservation restriction on the locus, and that an instrument creating such a property restriction had to be filed with the registry of deeds in order for the town's interest to prevail over that of any subsequent bona fide purchaser for value." *Id*. at 505. The failure of the select board to follow through and execute a deed designating the land for conservation purposes was fatal as compared to the rights of a bona fide purchaser who had no notice of the town meeting vote to impose the restriction.

The Plaintiffs assert that *Lindsay* stands for the proposition that a town must either transfer public land from the control of the select board to another board or impose a deed restriction on the land in order for it to be restricted to a particular purpose or use. *Lindsay* makes no such sweeping statement. The focus of the court in *Lindsay*, like *Harris*, was on the intent of the town meeting vote that authorized the acquisition or use of the public property as gleaned from the language of the article and the subsequent circumstances as they illustrate the intent of the vote. If the town meeting vote and the attendant circumstances evince an intent by the town to restrict the use of the public land in question, G. L. c. 40, § 15A requires that the board having control of the land vote that the land is no longer needed for that restricted purpose before it can be transferred from one purpose to another.

In the case of the Wildcat Land, since 2004, with the authorization of the town meeting, the Select Board has controlled the Wildcat Land for the specific municipal purpose of affordable housing. It has taken steps, primarily through CHT, to explore development of the Wildcat Land for affordable housing. I find that it was the intent of the town meeting vote in 2004 to designate that land for affordable housing purposes to the exclusion of other general public uses that may be otherwise available. As such, it may not be transferred to another public use unless and until the Select Board determines that the land is no longer needed for affordable housing. To date, the Select Board has made no such determination and certainly did not make that determination prior to the 2021 town meeting.[3] The Select Board may not be compelled to convey the Wildcat Land to the conservation commission or to any other board for a particular purpose, until it determines that the land is no longer needed for affordable housing. Only then, after a two-thirds majority vote of the town meeting, will the Select Board be properly authorized to transfer the land to the conservation commission for conservation, passive recreation, or historic preservation purposes. Thus, the vote of the 2021 town meeting to transfer the Wildcat Land to the conservation commission was ineffective.

The Plaintiffs have also alleged in Count II of their verified complaint an alternative legal theory under G. L. c. 214, § 3(10) to compel the Select Board to transfer the Wildcat Land to the conservation commission. That statutory provision confers special jurisdiction to the supreme judicial and superior courts, and, through G. L. c.185, § 1(m), the land court, for actions by ten taxpayers "to enforce the purpose or purposes of any gift or conveyance which has been or shall have been made to and accepted by any . . . town . . . for a specific purpose or purposes in trust

[3] In fact, at its October 10, 2021 meeting, the Select Board voted on a motion to declare that the Wildcat Land was no longer needed for affordable housing and the motion failed.

or otherwise, . . ." Because I have found that the vote of the 2021 town meeting on Article 26 was not effective, I need not reach the merits of Count II as it is moot.

Conclusion

For the foregoing reasons, I hereby find and rule that the Defendants' motion for summary judgment on Count I is ALLOWED and the Plaintiffs' cross motion for summary judgment on Count I is DENIED. A judgment shall issue in favor of the Defendants and Count I of the Plaintiffs' complaint shall be dismissed with prejudice. Concerning Count II, judgment shall issue dismissing that claim without prejudice as it is moot.

So Ordered.

By the Court. (Smith, J.)

/s/ Kevin T. Smith

Attest: *___/s/ Deborah J. Patterson*_____
Deborah J. Patterson
Recorder

Dated: June 22, 2022