NO. CV 10 6005915S	:	SUPERIOR COURT
FREDERICK C. MACHHOLZ, JR. TRUSTEE	:	JUDICIAL DISTRICT OF
v.	:	NEW BRITAIN
TOWN OF BLOOMFIELD	:	DECEMBER 2, 2011

MEMORANDUM OF DECISION

The plaintiff, Frederick C. Machholz, Jr., Trustee (Machholz), is the owner of property located at Lot #2021 on Southwood Drive in the town of Bloomfield (town).

The Bloomfield Town Plan and Zoning Commission (TPZ commission) adopted open space regulations in 1978. At that time, the town's assessor, Peter Marsele, classified the subject property[1] as open space at a reduced assessment value. This open space classification continued for thirty years, until the Grand List of October 1, 2008.

More specifically, on October 1, 2008, the assessor classified the subject property as open space land, setting a fair market value of $2,910 (assessed value of $2,040). However, on the Grand List of October 1, 2009, the assessor terminated the open space classification and reclassified the subject land as "industrial." Pursuant to this new classification, the assessor determined that the fair market value of the subject property,

---

[1] The subject property was originally part of a larger parcel that was re-subdivided in 1981 into two lots – #2021 and #2022. See defendant's Exhibit F and trial transcript (Tr.), pp. 66-67 (testimony of Thomas Hooper, town planner).

as of October 1, 2009, was $135,800 (assessed value of $95,060).

The change in the subject property's classification from open space to "industrial" occurred because it was the understanding of the current assessor, Walter Topliff (Topliff), that the TPZ commission adopted new zoning regulations that eliminated the town's open space classification, effective August 15, 2009.

Lot #2021 contains 2.41 acres of land. No structures or other improvements have been made there since its classification as open space land in 1978. Assessor Topliff acknowledges that he did not inspect the subject lot prior to its declassification and was not aware of any change in the physical condition of the property. Topliff has been the town's assessor since 2005, and after an exhaustive search of the assessor's records, he could find no record of an application for open space classification for the subject property and none of his records or maps indicate that the subject property was classified as open space land.[2]

According to Assessor Topliff, the town plan of conservation and development in 1973 did not classify the subject as open space land. Topliff could not explain why Assessor Marsele in 1978 classified the subject as open space land. The town planner, Thomas Hooper, testified that the subject property, which is located in an industrial zone, was never classified as open space. Hooper came to this determination after reviewing the

---

[2] See footnote four.

town plan.

According to Hooper, the only two parcels of land classified as open space, as of October 1, 2009, was Barber's Pond and the town landfill, which is being used as the police firing range. Both of these parcels are located in an industrial zone. See Tr., p. 59.

There are two issues in this case:

1) whether the town can change its regulations so as to eliminate the existing open space classification of property within the town; and

2) whether a classification of open space designation by the town, in existence for over 30 years, may continue, even if the original designation of open space failed to comply with the conditions set forth in General Statutes § 12-107e.

"[T]hree elements are essential to a successful application seeking to classify land as open space. First, the land must be included in an area designated as eligible for open space classification in the municipality's plan of conservation or development. General Statutes § 12-107e (a). Second, the owner of the land must file an application for open space classification within the statutorily mandated period. General Statutes § 12-107e (b) and (c). Third, there must not have been a change in the use of the land between the date of the plan's adoption and the date of the classification, which adversely affects its condition as open space. General Statutes § 12-107e (a) and (b)." Goodspeed Airport, LLC v. East Haddam, 302 Conn. 70, 77, 24 A.3d 1205 (2011).[3]

---

[3] A fourth element, not noted in Goodspeed, is contained in General Statutes § 12-107e (a):

Defendant's Exhibit E is a copy of a subdivision map dated September 1974 and approved November 14, 1974 on file in the town clerk's office. The map, identified as "Subdivision Block 9," shows a tract of land running from the west side of Blue Hills Avenue to and across Southwood Drive. This map shows, as part of the subdivision, a lot owned by Frederick C. Machholz containing 5.45 acres of land on the west side of Southwood Drive.

Defendant's Exhibit F, dated March 1981 and approved by the TPZ commission on March 25, 1981, is a copy of a re-subdivision map on file in the town clerk's office. The 5.45-acre Machholz lot was re-subdivided into the subject property, Lot #2021 containing 2.41 acres, and Lot #2022 containing 3.02 acres.

Plaintiff's Exhibit 4, p. 2, sets out the TPZ commission's minutes, dated September 14, 1978, and recites the proposed open space regulations for tax purposes. The minutes provide as follows:

> "Pursuant to [§] 12-107e of the General Statutes of the State of Connecticut, The Plan & Zoning Commission of the Town of Bloomfield

---

"The planning commission of any municipality in preparing a plan of conservation and development for such municipality may designate upon such plan areas which it recommends for preservation as areas of open space land, provided such designation is approved by a majority vote of the legislative body of such municipality." See also Aspetuck Valley Country Club, Inc. v. Weston, 292 Conn. 817, 828-29, 975 A.2d 1241 (2009) ("legislative history of § 12-107e is clear that the legislature intended that property designated as open space land in a municipality's plan of development be approved by a majority of the municipality's legislative body before it may be classified as open space land for tax assessment purposes").

designates as open space land, all land within the Town of Bloomfield except the following lands:

* * * *

"4. All lots of record in the office of the Town Clerk which have been approved as a subdivision by the Town Plan & Zoning Commission which are not eligible for resubdivision.

"5. All lots of record in the office of the Town Clerk, which were part of a subdivision, predating the Town Plan & Zoning Commission."

There is considerable question whether the subject lot was ever eligible to be classified as open space land given the fact that no application for open space designation could be found by the current assessor and the fact that none of the town documents examined by the current assessor or the current town planner place the subject lot within an open space designated area.[4]

---

[4] The only witnesses called to testify in this case were the town's assessor Topliff and town planner Hooper. Assessor Topliff testified as follows:

"Q. Okay. And how -- could you describe for us the search you undertook to determine whether or not there was an application?

"A. We have a file in the office that contains all PA490 property: farm, forest, and the open space applications in each folder within that file. I reviewed each and every application within all three classifications of the PA490 statute looking for an application. We looked in other areas of the office to see if there were any misplaced files. There were none.

"Q. And based upon that search, you're [taking] the position that an application had never been filed. Is that correct?

However, it is not necessary for the court to determine whether Assessor Marsele, in 1978, could have properly granted to the plaintiff the open space designation for the subject property. The issue raised by the plaintiff is not the validity of Marsele's grant of the open space designation. The issue is whether it was improper for Assessor Topliff, as of October 1, 2009, to declassify the subject property as open space and reclassify it as industrial land.

As the plaintiff notes in his 9/15/11 brief, pp. 1-3,"[i]n 1978, the [town's TPZ commission] adopted open space regulations. In 1978, the Assessor . . . classified the subject property as open space. . . . Mr. Topliff testified that his termination of open space classification on the subject property was based entirely on his belief that new zoning regulations eliminated the open space classification in the [town] effective August 15, 2009. He testified that he considered these zoning regulations provided a sufficient basis to terminate the subject property's open space classification."

Assessor Topliff testified that, effective August 15, 2009, the town's zoning regulations eliminated the open space classification. See plaintiff's Exhibit 7. A thorough review of the 2009 zoning regulations shows that "open space" is defined as follows: "Land preserved in perpetuity for protection of natural resources, natural features, scenic

---

"A. That's correct."

(Tr., pp. 44-45.)

resources, or community character." (Plaintiff's Exhibit 7, p. 27.)

The plaintiff further raises the question of whether the town, once permitting the use of open space classification to property owners, can revoke or terminate such a classification.

It is the plaintiff's position that an open space classification can only be terminated pursuant to § 12-504h, which states in relevant part, as follows: "Any such land which has been classified by a record owner shall remain so classified without the filing of any new application subsequent to such classification . . . until either of the following shall occur: (1) The use of such land is changed to a use other than that described in the application for the existing classification by said record owner, or (2) such land is sold or transferred by said record owner."

Section § 12-504h addresses the record owner, not the town. In other words, the record owner whose land has been classified as open space may retain that designation so long as the use remains open space. Once the owner changes the use or transfers title to the open space land, the open space classification is lost. Nothing in § 12-504h addresses the issue of whether the town may or may not revoke the open space classification.

As discussed above, the TPZ commission adopted new zoning regulations, effective August 15, 2009. See plaintiff's Exhibit 7. The regulations were adopted under the authority of Chapter 124 [Zoning] of the General Statutes, as amended, for the

purpose of "guiding the future growth and development of Bloomfield in accordance with the Plan of Conservation and Development[.]" Id.

"The power of municipal legislative bodies or other zoning authorities to classify, prohibit, regulate, restrict and permit uses within districts, under comprehensive or valid partial zoning, is a power of legislative discretion, the exercise of which cannot be interfered with by courts except for abuse . . . . [A]ll questions concerning the wisdom or desirability of particular uses or restrictions in zoning may be addressed to the legislative bodies specifically created to determine them, and these questions are not for the courts." 8 E. McQuillin, The Law of Municipal Corporations (3d Ed., Rev. 2010) § 25:145, pp. 612-13.

The initial right of a property owner to apply for open space classification comes from § 12-107e (a), which provides, in relevant part, as follows: "The planning commission of any municipality in preparing a plan of conservation and development for such municipality may designate upon such plan areas which it recommends for preservation as area of open space land . . . ."

Section 12-107e further provides that land qualifying for open space designation also qualifies for the purposes of taxation. The valuation of land designated as open space is set forth in General Statutes § 12-63 (a): "The present true and actual value of land classified as . . . open space land pursuant to section 12-107e . . . shall be based upon its

current use without regard to neighborhood land use of a more intensive nature, provided in no event shall the present true and actual value of open space land be less than it would be if such open space land comprised a part of a tract or tracts of land classified as farm land pursuant to section 12-107c."

Recognizing that the open space designation for the subject property was created legislatively with the enactment of the zoning regulations, the plaintiff's argument, that it has a vested irrevocable right to retain the open space designation which was granted over 30 years ago, has no merit.

The plaintiff cites Aspetuck Valley Country Club, Inc. v. Weston, supra, for the proposition that a vested right equates to legal or equitable title to future enjoyment of property. See plaintiff's 9/15/11 brief, p. 6. Even though the plaintiff was granted open space designation to the subject property for 30 years, this fact, in itself, does not cause the plaintiff's classification to become vested. The plaintiff's argument, if accepted, would prevent municipalities from amending their zoning laws merely because the zoning restrictions or benefits were in existence for an extended period of time.

Mitigating against the vesting of the plaintiff's open space classification is General Statutes § 8-23 entitled "Preparation, amendment or adoption of plan of conservation and development," that requires the TPZ commission to review its plan at least once every ten years. Consistent with this statutory section, the town prefaces its

2009 zoning regulations with the following philosophy: "These Regulations are intended to be a dynamic document, not a static document. It is anticipated that these Regulations will be regularly reviewed and updated, as necessary, to anticipate and reflect the ever changing needs of the community and to guide land use activities in Bloomfield in ways that will continue to maintain and enhance community character and protect the public health, safety, and welfare." (Plaintiff's Exhibit 7.)

Assessor Topliff exercised his authority to eliminate the town's classification of open space designation because the definition of open space was changed in the town's 2009 zoning regulations. Open Space is defined therein as "[l]and preserved in perpetuity for protection of natural resources, natural feature, scenic resources, or community character." (Plaintiff's Exhibit 7, p. 27.) The subject lot has none of the features that come within this new definition of open space. There is nothing in the 2009 zoning regulations that grants to the assessor the authority to maintain the open space designation on the subject subdivided lot. Furthermore, there is no "grandfather clause" contained within the zoning regulations that preserves existing open space designations.

Because it is apparent that the town's 2009 zoning regulations have eliminated the open space designation of private property for the purpose of tax relief, it was appropriate for Assessor Topliff to declassify the subject property accordingly for the assessment year of October 1, 2009 and subsequent years.

The plaintiff brought this appeal pursuant to § 12-117a and § 12-119 from the decision of the board of assessment appeals denying him relief from the action of the assessor increasing his assessment, as of October 1, 2009 and subsequent years, due to the change in open space classification. However, no evidence has been introduced in the trial of this case that addressed the issue of the subject property's fair market value, as of the revaluation date of October 1, 2009 and subsequent years, pursuant to § 12-117a, other than to challenge the assessor's authority to make the change in the subject property's open space designation, pursuant to § 12-119.

Accordingly, since the court finds that the assessor had the authority, pursuant to the town's 2009 zoning regulations, to terminate the open space designation on the plaintiff's Lot #2021, judgment may enter in favor of the defendant, without costs to either party.

_____

Arnold W. Aronson
Judge Trial Referee