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STATE OF VERMONT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 780-11-08 Wrcv

John & Megan Brendel, et al.
Plaintiffs

v.

Town of Norwich
Defendants

OPINION AND ORDER RE: SUMMARY JUDGMENT

This tax dispute is before the court on the plaintiffs' motion for summary judgment. They are represented by Scott McGee, Esq. The defendant, Town of Norwich, opposes summary judgment, and it is represented by Charles Merriman, Esq. For the reasons below, the plaintiffs' motion is DENIED.

FACTS

The plaintiffs¹ (Taxpayers) are owners of residential properties located on or near Bragg Hill Road in Norwich, Vermont. In 2008, the Town's listers reappraised all residential properties located on or near Bragg Hill Road, including Taxpayers' properties. Although it appears that the Town had generally discussed reappraising other residential areas in town during the previous year, there was no set plan or procedure to systematically reappraise other residential areas in town. In fact, Bragg Hill Road was the only residential area reappraised by the Town between 2008 and 2010.

It seems clear that the residences near Bragg Hill Road are not similar to each other. They vary in size, shape, age, style, and value. Although the residences near Bragg Hill Road vary from one another, it is less clear from the record how distinctive they are from residential properties in other parts of town. Taxpayers appear to argue that their properties make up a representative sample of all residential properties in town, but the Town disputes this. No evidence was submitted that indicates that Taxpayers' properties all fall into a particular classification different from other residential properties in town, e.g., vacation properties, rentals,

¹ The plaintiffs are John and Megan Brendel, Laura Emerson, Michael and Barbara Hall, Kimberly Holzberger, Susan McLaughry, Candace Nattie, Sandra Nowicki, Margaret and Ned Redpath, Mark and Paula Schleicher, Shiela Swett, Ashley and Peter Milliken, Colette Gaudin, Elaine Warshell, Richard Grossman, and Sean and Andrea Nolon. However, Colette Gaudin, Elaine Warshell, Richard Grossman, and Sean and Andrea had their cases against the Town dismissed by order dated June 9, 2009. The "Taxpayers" referred to in this opinion are only those plaintiffs whose case has not been dismissed.

FILED

JUL 15 2010

owner-occupied properties. The Bragg Hill Road properties comprise less than 5% of the town's residential properties.²

According to the Taxpayers' experts, the Bragg Hill Road neighborhood was not under-assessed in comparison to other residential properties in town as a whole. Taxpayers contend that their properties were assessed at 84.8% of the fair market value, while other residential properties in town were assessed at 80.2% of the fair market value.

Dennis Kaufman, one of the Town's listers, disputes these facts. He contends that during 2007 much of Bragg Hill Road was under-assessed when compared to the town as a whole because the other residential properties in town were assessed, on average, at 98.6% of the fair market value.

Taxpayers brought the instant suit claiming that (1) the Town acted unconstitutionally by reassessing only their properties and not other residential properties; (2) the Town failed to apply an accurate equalization ratio to the fair market value of their properties when those properties were listed; and (3) the Town arbitrarily manipulated appraisal software to create artificially high values for Taxpayers' properties. The instant summary judgment motion focuses only on Taxpayers' first argument that their properties were taxed at a disproportionately higher rate than other residential properties in the town in violation of Chapter I, Article 9 of the Vermont Constitution.

STANDARD OF REVIEW

Taxpayers move for summary judgment on the complaint. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment "has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists." *Price v. Leland*, 149 Vt. 518, 521 (1988). However, "[s]ummary judgment is mandated . . . where, after an adequate time for discovery, a party 'fails to make a showing sufficient to establish the existence of an element' essential to his case and on which he has the burden of proof at trial." *Poplaski v. Lamphere*, 152 Vt. 251, 254-55 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

The court derives the undisputed facts from the parties' statements of fact under V.R.C.P. 56(c)(2). Facts in the moving party's statement are deemed undisputed when supported by the record and not controverted by facts in the nonmoving party's statement which are also supported by evidence in the record. See *Boulton v. CLD Consulting Eng'rs, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413 (citing *Richart v. Jackson*, 171 Vt. 94, 97 (2000)).

² The parties dispute exactly how many residential properties near Bragg Hill Road were reappraised. The numbers put forth by the parties range from 52-58. Regardless of which number is used, it is undisputed that these properties constitute less than 5% of the town's residential properties.

FILED

DISCUSSION

Taxpayers claim that the Town's reassessment of their properties disproportionately raised their tax burdens when compared to other residential property owners in the town. The Constitution states "[t]hat every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute the member's proportion towards the expence of that protection" Vt. Const. ch. I, art. 9. "The Proportional Contribution Clause imposes no greater restriction on governmental action than the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Thus, the test of validity of governmental action under the clause is 'the rational basis test used for federal equal protection analysis.'" *USGen New England, Inc. v. Town of Rockingham*, 2003 VT 102, ¶ 15, 176 Vt. 104 (citations omitted) (quoting *Alexander v. Town of Barton*, 152 Vt. 148, 157 (1989)). "Under this test, governmental action is unconstitutional only if it treats similar persons differently for arbitrary and capricious reasons." *Williams v. Town of Lyndon*, 2005 VT 27, ¶ 7, 178 Vt. 507 (mem.).

In this case, it is clear that Taxpayers' properties were singled out for reappraisal in 2008, while no other residential properties were reappraised from 2008-10. This, in it and of itself, is not a problem. "[A]ssessors may properly change assessment values between full-town appraisals if a legitimate nondiscriminatory reason exists and if equitably done to all similarly-situated properties." *M.T. Associates v. Town of Randolph*, 2005 VT 112, ¶ 18, 179 Vt. 81 (citing *Regent Care Ctr., Inc. v. Hackensack City*, 828 A.2d 332, 340-41 (N.J. Super. Ct. App. Div. 2003)).

"Thus, the determinative issue is whether there is a rational basis for the distinctions the Town has drawn in assessing taxpayer's property." *Id.* ¶ 17. Given the current state of the record, the court cannot determine the Town's basis for distinguishing Taxpayers' properties from other residential properties. The evidence submitted by Taxpayers suggests that there is no reason.

According to Taxpayers' real estate experts, "[t]he houses and properties along Bragg Hill Road do not form a distinctive community. Rather, they mirror houses and properties along most other roads in Norwich." (McLaughry Aff. ¶ 5.) "Most of the hill roads that I reviewed shared characteristics similar to the characteristics of Bragg Hill Road and the properties served by that road." (Twombly Aff. ¶ 7.) "Each of the properties were [sic] different, and there was no greater comparability among and between properties on Bragg Hill Road than I found among and between properties on other roads in town." *Id.* ¶ 8.

In his deposition, Taxpayers asked the Town's assessor about the choice to reappraise Bragg Hill Road as opposed to other comparable areas of town.

Q. Where was the uniformity in all of that in terms of selecting Bragg Hill Road as opposed to Maple Street or Upper Pasture of one of these other roads?

A. The Listers felt that they needed to do an entire road and its tributaries or its feeders that come into that single vehicular access point.

FILED

JUL 15 2010

Q. [Why] did they feel they had to do an entire road and some of its feeders?

A. I guess it was an emotional decision.

Q. Okay.

A. There really was no explained logic for it.

Q. Was there any . . . other reason given, got to start somewhere or—

A. No. Not really.

(Wheelock Dep. at 68.)

“Our precedents establish two fundamental requirements for the valid imposition of taxes in Vermont: first, that any legislative classification of taxpayers bear a reasonable relation to the purpose for which it is established; and second, that the classification scheme be fairly and equitably applied among like classes of taxpayers.” *In re Property of One Church St.*, 152 Vt. 260, 266 (1989).

When the Town is given the benefit of all reasonable doubts and inferences, the evidence shows that a study conducted by the Town’s assessor concluded that high-end residential properties, i.e., residential properties valued over \$600,000, were under-appraised relative to the rest of the grand list. Distinguishing high-end residential properties from other residential properties bears a reasonable relation to the purpose of the classification because the Town’s study showed that high-end property owners were paying a disproportionately lower share of taxes.

In order to pass the rational basis test, the Town would then have to reappraise all high-end properties so that its classification scheme would be fairly and equitably applied among like classes of taxpayers. That did not happen here. Instead, the Town chose to reappraise only Bragg Hill Road because it claims that that area has a high concentration of high-end properties. This fact is disputed.

If Bragg Hill Road is just one of many high-end neighborhoods in town, then the Town could reappraise Bragg Hill Road alone if there were plans to systematically reappraise all the high-end neighborhoods in town over time. Reappraising only one neighborhood per year, because of budget constraints, on a rolling basis until all the neighborhoods in the “high-end” classification are reappraised is constitutionally acceptable. See *Alexander v. Town of Barton*, 152 Vt. 148 (1989). However, there appears to be no evidence in this case that the Town has a systematic rolling or cyclical reappraisal plan for all high-end residential properties. Indeed, no other residential properties have been reappraised since 2008.

Of course, reappraising only those areas of town with the lowest ratio of listed value to fair market value is constitutionally acceptable. See *Williams*, 2005 VT 27, ¶ 9. However, the evidence in this case does not indisputably show that Bragg Hill Road is a distinct geographic

FILED

JUL 15 2010

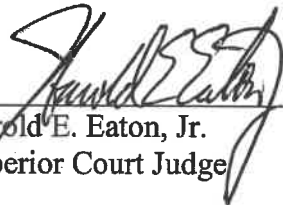
and residential area experiencing a disproportionate appreciation in property value. See *id.* (upholding trial court's finding that downtown commercial district is "discrete and isolated" from other areas of the town, with a ratio of grand list to fair market value of only 13% as compared to the town's overall ratio of 89%). Here, the parties dispute whether Taxpayers' properties are similar to other residential properties. One of the Town's listers stated in his affidavit that he believed "the Bragg Hill Road properties form a distinctive group in comparison to other areas in town." (Kaufman Aff. ¶ 7.) Taxpayers presented evidence to the contrary. The parties also dispute whether this allegedly distinct neighborhood is even under-assessed at all. Compare *id.* ¶ 11 with Twombly Aff. ¶ 5.

Because disputed issues of material fact remain about the Town's classification scheme and the relative appraisal levels in the town, the court cannot determine whether the Town's selective reappraisal of Taxpayers' properties was arbitrary and capricious. Therefore, summary judgment is DENIED.

ORDER

For the reasons given above, Plaintiffs' motion for summary judgment is DENIED.

Dated at Woodstock, Vermont this 15 day of July, 2010.



Harold E. Eaton, Jr.
Superior Court Judge

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JUL 15 2010

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