

To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS**

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In the Matter of

EVERETT KORET, NAZARETH FLORY, JAMES  
MACKIN, JOHN WALKER, DANIEL NAPIER,  
PETER MAHER and FLORY'S CORP,

Petitioner-Plaintiffs,

-against-

TOWN BOARD OF THE TOWN OF EAST  
FISHKILL and TOWN OF EAST FISHKILL,

Respondent-Defendants.  
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**DECISION AND ORDER**

Index No.: 2017-52698

Motion Seq. 1, 2 and 3

The following documents, numbered 1 to 45, were read on the following motions:

- (1) Petitioner-Plaintiffs' Notice of Petition-Verified Petition/Complaint seeking an Order pursuant to Article 78 and 3001 of the CPLR (a) reversing, annulling and setting aside Local Law 2-2017, (b) reversing, annulling and setting aside Local Law No. 4-2012 adopted by Respondent Town Board of the Town of East Fishkill on July 26, 2012 on the grounds that it was adopted in violation of New York State Municipal Home Rule Law and constitutes spot zoning; and
- (2) Defendant-Respondents' motion for an Order dismissing the Complaint and judgment on the Petition, pursuant to CPLR 3212; and
- (3) Motion of proposed intervenor Gas Land Petroleum Inc., for an Order pursuant to CPLR 1012, 1013 and 7802(d) permitting said party to intervene and participate in this action both as of right and by permission of this Court, as the movant is the owner of the property identified as the subject of this action:

Notice of Verified Petition-Summons and Verified Petition/Complaint-  
Exhibits A-J ..... 1-13  
Verified Answer ..... 14  
Certified Administrative Record ..... 15

Memorandum of Law in Support of Verified Petition/Complaint.....16  
 Memorandum of Law in Opposition to Petition and Complaint .....17  
 Notice of Motion-Affirmation of Thomas F. Wood, Esq. in Opposition to  
 Complaint/Petition-Affidavit of Michelle Robbins, with Exhibits A-D..... 18-24  
 Reply Affidavit of Craig T. Bumgarner, Esq.-Reply Memorandum of Law  
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 Reply Memorandum of Law in Support of Summary Judgment Motion  
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Notice of Motion-Affirmation in Support of Robert O. Cusumano, Esq. with  
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 Affidavit of Craig T. Bumgarner, Esq. in Opposition with Exhibits A-E-  
 Memorandum of Law in Opposition..... 37-43  
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Petitioner-Plaintiffs Everett Koret, Nazareth Flory, James Mackin, John Walker, Daniel Napier and Peter Maher all own property with addresses in Hopewell Junction, New York. Petitioner-Plaintiff Flory’s Corp owns property located at 1563 Route 82 in the Town of East Fishkill on which it operates a gas station.<sup>1</sup> The Verified Petition/Complaint further identifies a property located at 1071 Route 82 in the Town of East Fishkill as the “Subject Property.” This property was formerly a gas station which, Petitioners allege, is planned to be redeveloped as a gas station. Proposed Intervenor Gas Land Petroleum Inc. owns the Subject Property.

Petitioners commenced the instant hybrid Article 78 and declaratory judgment action seeking a judgment (1) reversing, annulling and declaring void and of no force and effect Town of East Fishkill Local Law No. 2-2017 (hereinafter “Local Law No. 2-2017”) as it pertains to Section 194-85 of the Zoning Code and other provision thereof which purport to regulate gasoline filling stations; (2) reversing, annulling and declaring void and of no force and effect

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<sup>1</sup> The Court will refer to these parties collectively as “Petitioners” hereafter.

Town of East Fishkill Local Law No. 4-2012 (hereinafter "Local Law No. 4-2012"); (3) awarding costs and reasonable attorney fees to Petitioners and (4) granting such other and further relief as the Court deems just and proper.

As an initial matter, the Court notes that Defendants-Respondents Town Board of the Town of East Fishkill and the Town of East Fishkill (hereinafter "Respondents") have conceded that said portion of Local Law 2-2017 that sought to amend Zoning Code §194-85 can be viewed as voided. Wood Affirmation, ¶5. Accordingly, the Court grants that portion of the Petition/Complaint seeking an Order reversing, annulling and declaring void and of no force and effect Local Law No. 2-2017 as it pertains to Section 194-85 of the Zoning Code. Therefore, only Petitioners' challenges to Local Law 4-2012 remain before the Court.

#### **Local Law 4-2012**

On or about July 23, 2012, Respondent Town Board passed Local Law 4-2012. This law made two changes to the Town's Zoning Code. First, it added a new section (E) to §194-85, addressed to lots formerly used by gasoline filling stations which have pre-existing, unremediated or non-compliant fuel storage tanks. Prior to Local Law 4-2012, new gas stations could only be developed in two zoning districts and only with a special permit from the Town of East Fishkill Zoning Board of Appeals ("ZBA"). Gas stations existing outside of these zoning districts were considered nonconforming uses and could only be enlarged with a special permit from the ZBA. The amendment contained in Local Law 4-2012 allowed contaminated, abandoned, nonconforming gas stations to be remediated and redeveloped with the bulk conditions that existed for the prior uses and buildings on the properties, without the need to apply for a special permit from the ZBA.

The second change effectuated by Local Law 4-2012 was an amendment to Article XV of the Zoning Code regarding nonconforming uses. It added Section 194-132.1 (misstated in the 2012 Local Law as Section 194-133), which allows properties eligible for remediation under §194-85(E) to be reestablished without being subject to the one-year nonconforming use expiration date contained in §194-25 and to exceed nonconforming bulk dimensional standards without obtaining a special permit from the ZBA.

### **Spot Zoning**

Petitioners contend that Local Law 4-2012 constitutes “spot zoning” and must be annulled. “Spot zoning is the singling out of a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners.” *Star Prop. Holding, LLC v. Town of Islip*, 164 AD3d 799, 802 [2d Dept. 2018].

“Generally, zoning determinations enjoy a strong presumption of validity and will only be overcome by a showing, beyond a reasonable doubt, that the determination was arbitrary and unreasonable or otherwise unlawful.” *Rotterdam Ventures, Inc. v. Town Bd. of Town of Rotterdam*, 90 AD3d 1360, 1361–62 [3d Dept. 2011]. “To that end, the burden rests on the party attacking the decision to overcome such presumption beyond a reasonable doubt.” *Boyles v. Town Bd. of Town of Bethlehem*, 278 A.D.2d 688, 690 [3d Dept. 2000]. “In evaluating a claim of spot zoning, courts ‘may consider several factors, including whether the rezoning is consistent with a comprehensive land use plan, whether it is compatible with surrounding uses, the likelihood of harm to surrounding properties, the availability and suitability of other parcels, and the recommendations of professional planning staff’ [internal quotations and citations

omitted].” *Rotterdam, supra*, at 1362.

In the instant matter, Petitioners do not, and apparently, cannot establish that the Subject Property, or any other properties covered by Local Law 4-2012, were singled out for a use classification “totally different from that of the surrounding area.” *Star Prop. Holding, LLC, supra*. Indeed, it appears from the record and the arguments of the parties that the Subject Property is in close proximity to Petitioner Flory’s Corp.’s own gas station. As such, there is no evidence before this Court that the Subject Property’s potential/proposed use as a gas station would be totally different from that of the surrounding area.<sup>2</sup>

Significantly, Petitioners fail to address whether the other properties identified by the Town Planner as having already been redeveloped pursuant to Local Law 4-2012 were singled out for use classification totally different from their surrounding area. Indeed, Petitioner Flory Corp. currently leases one of these redeveloped gas station properties, located at 1997 Route 52. Bumgarner Affidavit in Reply, ¶6. As such, said Petitioner should surely be in a good position to identify how, if at all, the redevelopment of that property was totally different from that of the surrounding area.<sup>3</sup> Based on the above, Petitioners have failed to demonstrate that Local Law 4-2012 singles out any parcels of land for a use classification totally different from that of the surrounding area.

Petitioners’ next argument that Local Law 4-2012 benefits few property owners to the detriment of all other surrounding property owners is similarly unavailing. Case law cited by

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<sup>2</sup> In fact, according to the affidavit of the Town Planner of Respondent Town, the Subject Property is located in a commercial section of Route 82, adjacent to the onramp to the Taconic State Parkway, across the street from a strip mall and down the street from a ShopRite grocery store. These facts are not contested by Petitioners.

<sup>3</sup> It appears uncontested that there are three properties (specifically identified in the Robbins Affidavit at ¶11) that have already been redeveloped pursuant to Local Law 4-2012. Yet, Petitioners fail to address these other similarly developed properties at all.

Petitioners makes clear that the fact that a zone change affecting only one property does not, without more, make it impermissible spot zoning. *Youngewirth v. Town of Ramapo Town Bd.*, 155 AD3d 755, 760 [2d Dept. 2017]; see also *Marcus v. Bd. of Trustees of Vill. of Wesley Hills*, 96 AD3d 1063, 1064–65 [2d Dept. 2012] (“zoning changes are not invalid merely because a single parcel is involved in or benefitted by said changes”). In any event, here, there is more than a single property at issue. There are at least four (4) properties covered by Local Law 4-2012 – the Subject Property and the three properties that have already been redeveloped under said law. Accordingly, the fact that only a few properties are involved in or benefitted by Local Law 4-2012, without more, does not invalidate said law.

Petitioners also argue that Local Law 4-2012 conflicts with Respondent Town’s Master Plan. It is Petitioners’ burden to demonstrate that Local Law 4-2012 is in clear conflict with Respondents’ comprehensive plan and “where the plaintiff fails to establish a clear conflict with the comprehensive plan, the zoning classification must be upheld.” *Bergstol v. Town of Monroe*, 15 AD3d 324, 325 [2d Dept. 2005]; see also *Youngewirth*, *supra* at 759.

Petitioners make speculative arguments that the potential redevelopment of the Subject Property would be contrary to Respondent Town’s Master Plan. Petitioners first assert that development of the Subject Property is inconsistent with the Master Plan because said plan discourages development of property located within a floodplain. It is alleged that the Subject Property is located in a vulnerable AE floodplain, however, Petitioners’ sole support for this allegation is their own Petition/Complaint. This is not sufficient to establish that Local Law 4-2012 is in clear conflict with the Master Plan. *Bergstol* and *Youngewirth*, *supra*.<sup>4</sup>

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<sup>4</sup> The Court also notes that the Robbins Affidavit avers that the Negative Declaration issued by Respondent Town under the State Environmental Quality Review Act (“SEQRA”) found that the 2012 local law would have no

Petitioners also note that the Master Plan provides that all possible uses that could contaminate groundwater should be sited to minimize any potential negative and harmful effects. Based upon this, Petitioners generalize that gas stations, particularly abandoned and discontinued sites, are uses which “could” lead to contamination of groundwater. They conclude that creating zoning exemptions for gas stations on pre-existing contaminated parcels is “clearly and unequivocally” contrary to the goals of the Master Plan. This summary conclusion also falls short in establishing a clear conflict between Local Law 4-2012 and the Master Plan.

As support for their motion for summary judgment, Respondents provide the Affidavit of Michelle Robbins, who has been the Town Planner for Respondent Town since 2008. The Robbins Affidavit, *inter alia*, identifies how Local Law 4-2012 is consistent with the Town’s comprehensive planning. Robbins avers that the Town’s comprehensive planning includes the 2002 Master Plan, as well as a number of other resources. It is unnecessary to identify the specific ways in which Robbins sets forth that Local Law 4-2012 complies with Respondent Town’s comprehensive planning, other than to note that in response thereto, Petitioners provide no contrary evidence, either documentary or expert, regarding these assertions. Thus, the un rebutted facts contained in Robbins’ sworn affidavit may be deemed admitted. *See e.g. Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539, 544 [1975].

Instead, Petitioners argue that Local Law 4-2012 is invalid because there is no evidence that the information contained in the Robbins Affidavit was considered by Respondent Town Board when passing Local Law 4-2012. However, Petitioners cite no case law demonstrating

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significant adverse environmental impacts, including impacts related to flooding. Robbins Affidavit, ¶10 and Administrative Record p. 28. Said Negative Declaration also states that the local law will not conflict with the Town’s Comprehensive Plan. Administrative Record p. 28, ¶12.

that Respondents were required to present specific information showing how said law was consistent with the Master Plan when considering Local Law 4-2012. Rather, “Town Law § 272-a(11) provides that where . . . a town has adopted a formal comprehensive plan, the town’s zoning decisions must be consistent with that plan.” *Bergstol, supra* at 325. Here, Respondents have demonstrated through the Robbins Affidavit the manner in which Local Law 4-2012 is consistent with the Town’s comprehensive plan and Petitioners have not contested the substance of her affidavit with admissible evidence.

Accordingly, Petitioners have failed to establish that Local Law 4-2012 is in clear conflict with the Master Plan or that it in any other way constitutes spot zoning and their First Cause of Action is denied/dismissed.

### **Municipal Home Rule §22**

Petitioners also argue that Local Law 4-2012 was adopted in violation of Municipal Home Rule Law (“MHRL”) §22(1) and must therefore be annulled. That section provides that

in adopting a local law changing or superseding any provision of a state statute or of a prior local law or ordinance, the legislative body shall specify the chapter or local law or ordinance, number and year of enactment, section, subsection or subdivision, which it is intended to change or supersede, but the failure so to specify shall not affect the validity of such local law.

Therefore, in order for Local Law 4-2012 to violate MHRL §22(1), said law must first change or supersede a provision of a state statute or prior local law or ordinance. Petitioners allege that Local Law 4-2012 supersedes Town Law §267-b by usurping the authority of the Zoning Board of Appeals to grant or deny variances for contaminated former gas stations.

Specifically, Petitioners allege that because Local Law 4-2012 removes the covered gas stations from the necessity of getting a special permit from the Zoning Board of Appeals, it

supersedes and usurps the exclusive statutory authority conferred to the Zoning Board by Town Law §267-b to grant variances from the applicable zoning requirements. However, as argued by Respondents, Local Law 4-2012 does not grant a variance to the properties covered by said local law. Instead, it is an amendment of the zoning code to change what can be developed as of right, without a special permit or variance from the Zoning Board. Petitioners fail to demonstrate how this change to the Respondent Town's Zoning Code actually supersedes Town Law §267-b. Indeed, Petitioners fail to address this issue in their opposition to Respondents' motion for summary judgment. Having failed to demonstrate that Local Law 4-2012 supersedes Town Law §267-b, Petitioners' Second Cause of Action seeking to reverse, annul and set aside Local Law 4-2012 in violation of MHRL §22(1) is denied/dismissed.

**Respondents' Motion for Summary Judgment on Petitioners' Standing and Gas Land's Motion to Intervene**

As Respondents have conceded that the portion of Local Law 2-2017 relevant to the instant proceeding is void and the Court is dismissing Petitioners' First and Second Causes of Action, Respondents' motion for summary judgment based upon Petitioners' standing is moot and is therefore denied. For these same reasons, Gas Land's motion to intervene is also moot. Accordingly, the motion to intervene is also denied.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Accordingly, it is hereby

ORDERED that the Petition/Complaint is GRANTED to the limited extent that Local Law No. 2-2017 as it pertains to Section 194-85 of the Zoning Code is reversed, annulled and declared void and of no force and effect; and it is further

ORDERED that the remainder of the Petition/Complaint is DENIED and dismissed; and  
it is further

ORDERED that Respondents' motion for summary judgment on the ground that  
Petitioners lack standing is DENIED as moot; and it is further

ORDERED that Gas Land's motion to intervene is denied as moot.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York  
January 7, 2019

  
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HON. CHRISTI J. ACKER, J.S.C.

To: All parties via ECF