

DOCKET NO. CV 04 4006511 S : SUPERIOR COURT
WEST FARMS MALL, LLC : JUDICIAL DISTRICT OF HARTFORD
VS. : AT HARTFORD
TOWN OF WEST HARTFORD, : FEBRUARY 23, 2005
ET AL.

**MEMORANDUM OF DECISION RE:
MOTION TO DISMISS**

The plaintiff, West Farms Mall, LLC, is the owner of the Westfarms Mall property in West Hartford and Farmington. The plaintiff filed this action against several municipal and private defendants regarding the West Hartford Center redevelopment project known as Blue Back Square. The municipal defendants consist of the town of West Hartford, the town council and the town manager. The private defendants consist of the developers and the owners of property within the Blue Back project. The private defendants move to dismiss the plaintiff's action for lack of standing.¹ For the reasons given below, the motion is granted.

I.

The plaintiff's seven-count complaint, filed on November 4, 2004, alleges two types of claims. The first type, represented by counts one, two, three, five and six, focuses on the town's allegedly improper conduct in approving the redevelopment

¹ While the municipal defendants did not file a written motion to dismiss, they orally joined in the private defendants' motion.

project and establishing a special services district for it. According to the plaintiff, the town lacked power to approve the project (count one); failed to obtain independent expert analysis of the project's impact (count two); violated the town charter by issuing general obligation bonds for the project (count three); granted illegal power to the special services district (count five); and acted arbitrarily and capriciously (count six).

The second type of claims, represented by counts four and seven, allege constitutional violations. In the plaintiff's view, the town agreed to grant public emoluments prohibited by article first, § 1, of the constitution of Connecticut (count four); and violated substantive due process by allowing property owners within the special services district to choose to shift the burden of repaying the general obligation bonds to taxpayers outside the district (count seven).

The private defendants filed a motion to dismiss the complaint on December 29, 2004 on the grounds of lack of standing and nonjusticiability. The court held an evidentiary hearing on the issue of standing on January 25-26, 2005. At the beginning of the hearing, the plaintiff informed the court that it was amending its complaint to add an eighth count alleging that the zoning designation for Blue Back Square is unconstitutional. The plaintiff also attempted to add new parties plaintiff, but the court deferred ruling on the attempted joinder.

The court assumes, without deciding, that the eighth count may be added as to the present plaintiff, West Farms Mall, LLC, without permission because the amendment occurred within thirty days of the return date. For example, in *Santos v.*

Ahlberg, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV 01 0380397 (November 21, 2001, *Stevens, J.*), an amendment was permitted despite the prior filing of a motion to dismiss because the amendment required no action by the court. *Santos*, even if correct, however, would not justify the adding of new plaintiffs. By contrast, *Federal Deposit Ins. Corp. v. Peabody, N.E., Inc.*, 239 Conn. 93, 99, 680 A.2d 1321 (1996) involved the filing of a motion for permission to amend after the filing of a motion to dismiss. The amendment was not allowed. In the present case, count eight is therefore brought only by the original plaintiff, West Farms Mall, LLC.

II.

“The issue of standing implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . [I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.” (Citation omitted; internal quotation marks omitted.) *St. George v. Gordon*, 264 Conn. 538, 544-45, 825 A.2d 90 (2003).

The plaintiff argues that it has taxpayer standing to bring its claims regarding the town’s conduct.² “The plaintiff’s status as a taxpayer does not automatically give [it] standing to challenge alleged improprieties in the conduct of the defendant

² The plaintiff does not argue, and it cannot argue, that it has standing merely because Blue Back Square will be a competitor. See *West Farms Associates v. State Traffic Commission*, 951 F.2d 469, 473 (2d Cir. 1991) (“Connecticut has not established protection from competition as a property right.”), cert. denied, 503 U.S. 985, 112 S. Ct. 1671, 118 L. Ed. 2d 391 (1992).

town. . . . The plaintiff must also allege and demonstrate that the allegedly improper municipal conduct [caused it] to suffer some pecuniary or other great injury. . . . It is not enough for the plaintiff to show that [its] tax dollars have contributed to the challenged project; . . . the plaintiff must prove that the project has directly or indirectly increased [its] taxes . . . or, in some other fashion, caused [it] irreparable injury in [its] capacity as a taxpayer. . . . [B]ecause standing is a practical concept, common sense suggests that a taxpayer who challenges a part of a particular governmental program must demonstrate his or her injury in the entire fiscal context of that program, taking into account both the burdens and benefits of the program, and not just by demonstrating that the presumably burdensome part of the program itself, divorced from the larger program of which it is a part, causes injury.” (Citations omitted; internal quotation marks omitted.) *Seymour v. Region One Board of Education*, 261 Conn. 475, 489-90, 803 A.2d 318 (2002). “[T]he relevant comparison for purposes of inferring probable taxpayer injury is between the net economic benefit to the town with the development project and the tax revenue of the town without the project.” *Sadloski v. Manchester*, 235 Conn. 637, 649, 668 A.2d 1314 (1995).

The plaintiff presented three witnesses at the evidentiary hearing: Roderyck Blake, a Michigan-based manager of the Westfarms Mall property; Robert Doty, an expert on public finance; and Thomas Muller, an economist.

Blake testified that each tenant at Westfarms Mall pays a share of the mall’s property taxes as part of its rent. According to Blake, an increase in taxes would

increase rents at Westfarms and cause tenants to leave the mall for other locations with cheaper rent. On cross examination, however, Blake testified that he did not know what percentage of a tenant's rent is attributable to taxes. Blake further testified that he did not know how large a tax increase would have to be in order for a tenant to leave the mall. Blake also did not know whether the cost of property taxes had caused any Westfarms tenants to leave in the last five years.

Doty, the expert on public finance, testified that significant financial risks are attendant to the establishment of special services districts and new parking garages such as those to be constructed in the Blue Back project. In Doty's view, the town conducted insufficient due diligence because it relied on studies commissioned by the developer rather than independent economic feasibility studies.

The degree of Doty's knowledge about the Blue Back project was, however, minimal. On cross examination, Doty was asked to identify the materials he had reviewed regarding the project. As to the town's master agreement setting forth the details of the Blue Back transaction, Doty said: "I didn't read that in detail — it's too massive — but I did flip through portions of it." Transcript, January 25, 2005, p. 104.

The following exchange then occurred:

- Q: You didn't do any independent examination to determine what the town had done by way of due diligence, did you?
- A: I did not investigate that myself.
- Q: You only took whatever the Schnader Harrison lawyers decided you ought to see, correct?
- A: No. I also obtained some documents on line from Standard & Poors.

Id.

Doty was also unable to offer testimony as to the likelihood that property taxes would rise as a result of the Blue Back project:

Q: But you're just speculating, aren't you, sir? You have no way of knowing whether this is going to be a good project or a bad project, do you?

A: All of this — all of this is speculation.

Q: All of your testimony is speculation?

A: All of the analysis here is speculation. I cannot — I can't speak to whether they will or will not realize these returns because I don't have adequate information. The point that I am making about a project like this is, by definition, it is speculative.

Id., 120. Doty later agreed that any increase in property taxes would occur only after the taxes generated by the project were exhausted:

Q: We're talking here about a default, this risk that you talk about. And just isolating that risk and Blue Back Square, you would agree with me that in order for that to be felt in the town, everything else being kept equal, you would have to go through all of the additional general taxes that are generated by Blue Back Square before there was a tax increase, right?

A: Dealing with that narrow question of the risk —

Q: Yes.

A: — I believe that's correct with that narrow question.

Id., 146.

Muller, the economist, testified that the town had not adequately considered the financial impact of the bond issuance. According to Muller, the town did not take into account necessary expenditures for improvements to roads leading to Blue Back Square. Muller also testified that the town improperly calculated property tax revenues using the present value of money rather than the future value.

In Muller's view, the Blue Back project would also have secondary effects because 15 percent of the jobs created by the project would be taken by people who

would move into West Hartford in order to minimize their commuting time. Muller testified that the typical resident moving in and taking those jobs would have “an income slightly below the average of the community and is more likely to be nonwhite than the existing population.” Id., 177. Muller further testified that “minorities tend to have a larger number of school-age children than [the] white population.” Id. The increased number of children in town would place more stress on the school system, which, in Muller’s opinion, will soon be in need of an additional elementary school not contemplated in future town budgeting.

Muller also took issue with the town’s approach to the new parking garages at Blue Back Square. Muller testified that the town failed to budget for two additional employees he said would be needed to manage the garages. Muller also contended that the garages would not be financially self-sustaining, in part because an existing private garage near the Blue Back site is currently underused. On cross examination, the following exchange occurred:

Q: Did you make a determination regarding utilization of the parking garage that’s privately owned in the town of West Hartford?

A: Yes, I did.

Q: What did you do?

A: I drove in there twice, not once, and found that it was approximately 50 percent filled. I drove once in the late morning and once in the afternoon.

Id., 188.

Despite Muller’s depiction of the town as financially distressed even before it issues bonds for the Blue Back project, Muller agreed on cross examination that the town has two AAA credit ratings and that the few municipalities nationwide with

such high ratings do not typically suffer from financial distress. Although Muller noted that the Blue Back bonds will increase the town's debt service payments to 10.2 percent of the town budget in the first year, Muller acknowledged that the 10.2 percent figure is just slightly above the town's self-imposed limit of 10 percent of the budget for debt service.

The private defendants presented only one witness at the evidentiary hearing, town manager Barry Feldman. Feldman testified that the Blue Back master agreement contained safeguards such as making the transfer of town property to the developers contingent on the developers obtaining a construction loan, zoning approval, building permits, a traffic certificate and other requirements. Feldman testified that the town had refused to give the developers a property tax abatement or tax increment financing, instead agreeing to the establishment of a special services district. According to Feldman, the Blue Back bonds are to be repaid using only the special services district tax and parking revenue, which would be sufficient to meet the town's obligation on the bonds.

The court has carefully considered the testimony of the witnesses, the exhibits placed into evidence and the parties' briefs, and concludes that the plaintiff has not met its burden of proving that its taxes will rise because of the Blue Back project. The court's comparison of the net economic benefit to the town with the project and the tax revenue of the town without the project does not give rise to an inference of taxpayer injury.

In particular, Blake, the Westfarms manager, did not know the current extent of the tax burden on Westfarms tenants' rent and had no information about the degree to which a tax increase would cause the mall to lose tenants. Doty, the public finance expert, established that there are risks associated with the Blue Back project, but he had no basis on which to conclude that West Hartford property taxes are likely to rise because of the project.

Muller, the economist, cited numerous expenditures that the town did not consider, but the expenditures were inherently speculative. Muller merely estimated that 15 percent of the jobs at Blue Back Square would be held by new West Hartford residents who, he claimed, are more likely to be minorities adding many children to the schools. Similarly, Muller's opinion that the private parking garage currently located near the Blue Back site is underused is based merely on his two selective visits to the garage. The court gives little weight to such speculative projections.

Despite this finding that the plaintiff has failed to demonstrate that the Blue Back project will ultimately raise its taxes, the plaintiff contends that the inquiry on taxpayer standing is not complete. The plaintiff argues that it may alternatively show that it will suffer a great injury apart from pecuniary harm. Indeed, the standard governing taxpayer standing directs the plaintiff to demonstrate "some pecuniary or other great injury." (Emphasis added.) *Seymour v. Region One Board of Education*, supra, 261 Conn. 489. The plaintiff believes that the great injury it will suffer will be a decreased level of municipal services because the town will become burdened by the new expenditures that economist Muller identified. The plaintiff furthermore

claims that the value of Westfarms Mall will decrease because economic activity in West Hartford will shift to the Blue Back development.³ The remaining claims are based on the evidence that the court has already rejected as to the likelihood of an increase in property taxes. The plaintiff therefore has not demonstrated that it will suffer some other great injury.

III.

Next, the court examines whether the plaintiff has standing to bring its constitutional claims. "Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury [that] he has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy. . . .

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining aggrievement encompasses a well-settled twofold determination: [F]irst,

³ This is merely a restatement of the competition claim which the plaintiff has specifically disavowed.

the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected.” (Citation omitted; internal quotation marks omitted.) *Broadnax v. New Haven*, 270 Conn. 133, 153-54, 851 A.2d 1113 (2004).

The key to the inquiry is whether the plaintiff has made a colorable claim of direct injury that shows a personal stake in the controversy, not merely a general interest. The court concludes that the plaintiff has not made such a claim. The only direct injuries that the plaintiff has suggested it will suffer as a result of West Hartford’s allegedly unconstitutional actions are the same injuries that the plaintiff claimed it will suffer as a result of the town’s other improper actions in approving Blue Back Square. Having already determined that the plaintiff failed to show a likely increase in its taxes and a likely decrease in municipal services, the court has no other claim of direct injury to examine.

IV.

The plaintiff’s final argument is that even if it lacks standing to bring its claims, this court should nevertheless permit the plaintiff to proceed because there

would otherwise be no opportunity for judicial scrutiny of the municipal defendants' allegedly illegal conduct.


The basis for the plaintiff's argument is *Highgate Condominium Assn. v. Watertown Fire District*, 210 Conn. 6, 553 A.2d 1126 (1989). In *Highgate*, the plaintiff association was required to pay sewer service charges to the fire district although the plaintiff was located outside the district's boundaries. The court determined that "the plaintiff's members are in all significant respects the functional equivalent of taxpayers of the fire district. Further, our failure to recognize that the plaintiff and its members have standing to institute this declaratory judgment action would in effect erect an impenetrable barrier to any judicial scrutiny of the legality of the actions of the fire district." *Id.*, 16.

The plaintiff in the present case seeks to analogize the "impenetrable barrier" in *Highgate* to the problem it faces in demonstrating that it has standing to challenge West Hartford's approval of Blue Back Square. *Highgate* is, however, inapposite because that case involved the imposition of sewer service charges on condominium owners who were not residents and thus not taxpayers of the fire district. The condominium owners in *Highgate* were injured but they were not taxpayers. West Farms Mall, LLC is a taxpayer, but it has not proved injury. West Hartford has not imposed any new taxes on the plaintiff in connection with the Blue Back project, and the plaintiff failed in its attempt to show that its taxes would increase as a result of the project. The court therefore has no opportunity as in *Highgate* to grant de jure recognition to a de facto situation.

The plaintiff also points to *Mills v. Pettit*, Superior Court, judicial district of Litchfield, Docket No. 57933 (June 10, 1992, *Pickett, J.*), in which the court denied a motion to dismiss despite the plaintiff's lack of standing in order to prevent a board of selectmen from acting "in what may be an improper manner between elections." In the present case, however, the voters in West Hartford approved Blue Back Square in a referendum that followed the town's allegedly improper and unconstitutional actions. The court thus finds no equitable reason as in *Mills* to allow the plaintiff to continue prosecuting its claims despite the plaintiff's lack of standing.

V.

Having determined that the plaintiff lacks standing to bring its claims, the court need not reach the private defendants' other ground for dismissal, lack of justiciability. For the reasons given above, the motion to dismiss the plaintiff's claims is granted. So ordered.


Kevin E. Booth, J.