

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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HUDSON VIEW PARK COMPANY,

Plaintiff,

-against-

**DECISION AND ORDER**

Index No.: 2020-51846

THE TOWN OF FISHKILL, THE TOWN OF FISHKILL TOWN BOARD, SUPERVISOR OZZY ALBRA, LOUISE DANIELLE, JACQUELINE BARDINI, ORI BRACHFELD AND KENYA GADSDEN, each in their individual and official capacities,

Defendant.

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**ACKER, J.S.C.**

The following papers, numbered 1 to 19<sup>1</sup>, were read on the motion of Defendants The Town of Fishkill, The Town of Fishkill Town Board (hereinafter "Town Defendants"), Supervisor Ozzy Albra, Louise Danielle, Jacqueline Bardini, Ori Brachfeld and Kenya Gadsden (hereinafter "Individual Defendants", and all collectively referred to herein as "Defendants") pursuant to CPLR 3211(a)(1) and (7) seeking dismissal of Plaintiff Hudson View Park Company's (hereinafter "Plaintiff") Complaint in its entirety:

Notice of Motion-Affirmation of Brian D. Nugent, Esq.-Exhibits A-F-	
Memorandum of Law in Support .....	1-9
Affirmation in Opposition of Michael D. Zarin, Esq.-Exhibit A-F-	
Memorandum of Law in Opposition .....	10-17
Reply Affirmation of Brian D. Nugent, Esq.-Reply Memorandum of Law.....	18-19

<sup>1</sup> The Court notes that the parties submitted a number of letters after the full submission of this motion regarding the recently decided Second Department case, *BT Holdings, LLC v. Vill. of Chester*, 2020 WL 7050587 [2d Dept. Dec. 2, 2020]. Other than considering that case in the context of the fully briefed motion, the Court did not consider any of the arguments made by the attorneys in those letters.

Plaintiff commenced the instant action against Defendants on or about July 9, 2020, asserting claims for breach of contract and breach of duty of good faith and fair dealing. The document upon which these claims are based is a Memorandum of Understanding (“MOU”), entered into between Plaintiff, the Defendant Town Board and non-party Planning Board of the Town of Fishkill on or about December 7, 2017. The MOU involves a project Plaintiff proposes to construct in the Town of Fishkill, consisting of a mixed-use residential and commercial project on a 55-acre site. In furtherance of the project, Plaintiff sought a zoning map change to zone the entire site as RMF-5, a zoning text amendment and site development plan approval. As relevant to the instant motion, the MOU contains certain “good faith commitments,” including that the Town Board would not terminate its review of Plaintiff’s zoning petition, and the project in general, “until it reaches a final determination on the merits in its legislative judgment regarding the best interest of the Town based upon empirical data and other objective factual bases.” According to the Complaint, the purpose of the MOU was to govern the “process” for Plaintiff’s application and the respective obligations for each party, but not the outcome. Complaint, ¶39. The MOU provides that it will be binding upon and inure to the benefit of the Parties and, *inter alia*, their “successors.”

During the approximate 18 months after the execution of the MOU, the zoning amendment application proceeded, which included the Planning Board moving forward with its SEQRA review. However, according to the Complaint, the Town’s environmental review of Plaintiff’s application came to a “grinding halt” when a new supervisor and Town Board were elected in November 2019.<sup>2</sup> Thereafter, on or about April 1, 2020, Defendant Town Board passed a

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<sup>2</sup> It appears that as a result of the election, only Defendant Ozzy Albra (Supervisor) and Defendant Louise Daniele (Council Member) were newly elected. Defendant Gadsden was appointment to the Board on January 1, 2020 and

resolution in which it ceased further review of Plaintiff's Petition seeking a zoning map change and a zoning text amendment. The instant litigation ensued.

Defendants move to dismiss the Complaint pursuant to CPLR 3211(a)(1) based upon documentary evidence and pursuant to CPLR 3211(a)(7) for failure to state a cause of action. In support of its motion, Defendant submits, *inter alia*, the Complaint, the MOU and certain resolutions of the Town Board.

In order to succeed on a motion to dismiss premised on documentary evidence pursuant to CPLR 3211(a)(1), it must be shown that the documentary evidence utterly refutes the Plaintiff's factual allegations and conclusively establishes a defense as a matter of law. *XXXX, L.P. v. 363 Prospect Place, LLC*, 153 AD3d 588 [2d Dept. 2017]; *Torres v. City of New York*, 153 AD3d 647 [2d Dept. 2017]; *Wilson v. Poughkeepsie City School Dist.*, 147 AD3d 1112 [2d Dept. 2017]. If the evidence submitted in support of the motion is not "documentary," the motion must be denied. *Phillips v. Taco Bell Corp.*, 152 AD3d 806, 807 [2d Dept. 2017]. To constitute documentary evidence, the evidence must be "unambiguous, authentic, and undeniable", such as judicial records and documents reflecting out of court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable. *Id.* In the instant matter, the MOU clearly meets the standard of documentary evidence.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. In considering such a motion, the court must accept the facts as alleged in the complaint as true,

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Defendants Brachfeld and Bardini had been members of the Town Board prior to November 2019. However, only Defendant Brachfeld was a member of the Board that approved the MOU.

accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *DeMarzo v. DeMarzo*, 150 AD3d 1202 [2d Dept. 2017]; *Rodriguez v. Daily News, L.P.*, 142 AD3d 1062 [2d Dept. 2016].

Defendants argue that Plaintiff's Complaint should be dismissed because the MOU is not a legal or enforceable contract. Assuming for purposes of this motion that the MOU constitutes a contract, Defendants assert two bases upon which the MOU should be found void and/or unenforceable.

First, Defendants argue that the MOU is unenforceable under the Term Limits Rule. It is well settled that "[t]he term limits rule prohibits one municipal body from contractually binding its successors in areas relating to governance unless specifically authorized by statute or charter provisions to do so." *Karedes v. Colella*, 100 NY2d 45, 50 [2003]. "Elected officials must be free to exercise legislative and governmental powers in accordance with their own discretion and ordinarily may not do so in a manner that limits the same discretionary right of their successors to exercise those powers." *Id.*; see also *BT Holdings, LLC v. Vill. of Chester*, 2020 WL 7050587, at \*5 [2d Dept. Dec. 2, 2020].

It is uncontested that the MOU provides that the parties intended to bind their successors – "This MOU shall be binding upon and inure to the benefit of the Parties and their respective legal representatives, designees, successors and assigns...[emphasis supplied]." (MOU, ¶5). In addition, the provision of the MOU at issue herein implicates Defendant Board's legislative and/or governmental powers. Indeed, the MOU specifically references the Town Board's legislative power in the relevant provision: the Town Board "shall not terminate its review of the [Plaintiff's] Zoning Petition, and the Project in general, until it reaches a final determination on

the merits in its legislative judgment regarding the best interest of the Town based upon empirical data and other objective factual bases... [emphasis supplied].” MOU, ¶1(a). Therefore, the plain language of the MOU demonstrates an intention to bind the Defendant Board, a successor municipal body, in the exercise of its legislative power. Thus, the MOU is prohibited under *Karedes, supra*, unless the prior Town Board was specifically authorized by statute to bind its successors.

In opposition, Plaintiff maintains that Town Law §64(6) authorized the prior Town Board to contractually bind its successors. That section provides that the Town Board may “award contracts for any of the purposes authorized by law and the same shall be executed by the supervisor in the name of the town after approval by the town board.” Plaintiff maintains that because Town Law §64(6) authorizes the execution of the MOU and the MOU contained a provision that bound future Boards, the 2017 Town Board was authorized by Town Law §64(6) to bind its successors. But, the language in the holding of *Karedes* makes clear that the enabling statute must “specifically” authorize the binding of the future Board. *See e.g., Morin v. Foster*, 45 NY2d 287, 293 [1978], cited by the *Karedes* Court, noting that “the county charter expressly empowered county legislature to bind successors by appointment of county manager for four-year term.” Town Law §64(6), which generally allows the Board to enter into a contract, is not a statute that specifically authorized the 2017 Town Board to bind its successors. Therefore, the MOU violates the Term Limits Rule.

Further, Plaintiff’s reliance on *Matter of County of Monroe*, 72 NY2d 338 [1988] is misplaced. Plaintiff asserts that the instant MOU should be found to be binding upon the Defendants based upon the balancing of interest test set forth by the Court of Appeals in *County*

*of Monroe, supra*. However, that case is distinguishable from the facts of the instant matter as it did not involve the issue of a municipal body attempting to contractually bind its successors. Although *County of Monroe* is cited by the *Karedes* Court, it was referenced in the context of the distinction between governmental and proprietary municipal action. As there is no claim here that the 2017 Town Board was acting in a proprietary, rather than governmental, function when this MOU was entered into, the balancing test discussed in *County of Monroe, supra* is inapplicable.

Accordingly, the MOU violates the Term Limits Rule and “[a]n agreement that violates the term limits rule is against public policy.” *City of Newburgh v. McGrane*, 82 AD3d 1225, 1227 [2d Dept. 2011]. Plaintiff’s first cause of action sounds in breach of contract and an essential element of such a cause of action is the existence of a contract (*Arnell Const. Corp. v. New York City Sch. Const. Auth.*, 144 AD3d 714, 715 [2d Dept. 2016]). As the MOU is void under the Term Limits Rule, there is no contract. Without a contract, the Complaint fails to state a cause of action for breach of contract and breach of duty of good faith and dealing based upon the MOU. As a result, Defendants’ motion to dismiss the Complaint for failure to state a cause of action is granted.<sup>3</sup>

Additionally, the MOU is void as it constitutes illegal contract zoning. “[N]o municipal government has the power to make contracts that control or limit it in the exercise of its legislative powers and duties [citation omitted].” *Neeman v. Town of Warwick*, 184 AD3d 567, 570 [2d Dept. 2020]. “The test is whether the [MOU] committed the Town to a specific course of action with respect to a zoning amendment.” *Id.*

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<sup>3</sup> Further, as the MOU is void, Defendants’ motion to dismiss pursuant to CPLR 3211(a)(1) based upon documentary evidence is granted. *XXXX, L.P., supra*.

Plaintiff highlights that the MOU repeatedly indicates that neither the Town Board nor the Planning Board committed to any particular outcome with respect to the zoning amendment or the project in general. However, these statements are not dispositive on the issue of contract zoning, as the “test” is whether the MOU committed the Town to a specific course of action.

*Id.* The terms of the MOU clearly prohibit Defendant Town Board from terminating its review of Plaintiff’s application until it reached a final determination on the merits in its legislative judgment. This prohibition necessarily controls or limits the Defendant Town Board in the exercise of its legislative power as it takes away the Town Board’s right not to vote on the application. *See Wolff v. Town/Vill. of Harrison*, 30 AD3d 432, 433 [2d Dept. 2006] (the amendment of a zoning ordinance is a purely legislative function and the applicable statute vests in the Town Board broad legislative power, in its discretion, to amend its zoning ordinance, and does not require it to consider and vote upon every application for a zoning change).

Plaintiff’s attempt to carve out the “process” of the application from the ultimate decision making on the application fails to rescue the MOU from the application of contract zoning. As acknowledged by Plaintiff in the Complaint, “Town Boards have absolute discretion in considering zoning amendments.” Complaint, ¶4. Such discretion would necessarily include not voting on Plaintiff’s zoning application. *Id.* As the “process” dictated by the MOU prohibited the Town from exercising its “absolute discretion,” the MOU clearly committed the Defendant Town to a “specific course of action” on the Plaintiff’s application. It is uncontested that but for the MOU, Defendant Town would have been entitled to cease its review, so it follows that the MOU committed the Town to a specific course of action and constituted impermissible contract zoning. *Neeman, supra.*

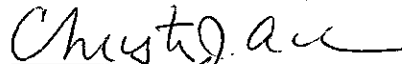
Moreover, although the terms of the MOU do not explicitly require a particular outcome on the zoning amendment, it does imply that said amendment would be approved. Paragraph 2(d), entitled "Formal Site Development Plan Review" provides that "[a]fter the Town Board votes on the Zoning Amendments, the [Plaintiff] shall submit a completed Site Development Plan Application...." However, if the zoning amendment was not approved, Plaintiff would not have been able to submit a Site Development Plan Application. This conclusion is supported by the fact that this litigation ensued after the Town ceased its review and Plaintiff's allegation that the project is now "dead." Complaint, ¶13. For the reasons discussed above, the MOU is rendered invalid as contract zoning and Defendants' motions pursuant to CPLR §§3211(a)(1) and (7) are granted in their entirety.<sup>4</sup>

The Court has considered the additional contentions of the parties not specifically addressed herein and finds them unavailing. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Accordingly, for all the reasons stated herein, it is hereby

ORDERED that Defendants' motion to dismiss the Complaint pursuant CPLR 3211(a)(1) and CPLR 3211(a)(7) is GRANTED and the Complaint is dismissed in its entirety.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York  
January 4, 2021

  
CHRISTI J. ACKER, J.S.C.

To: All Counsel Via ECF

<sup>4</sup> Given this determination, the Court need not reach Defendants' argument that the MOU is not a contract because no consideration was exchanged.