6/17/2015

To: the Village of Kiryas Joel and the Monroe Town board

And Tim Miller associates

I've attended the Public Hearing for the 507 Acre annexation on June 10th and I heard a continues argument from the opponents to the annexation that the Hassidic Orthodox Jews are welcome to join all other citizens and live anywhere in New York State, so therefore there is no need to be annexed to get housing that serves for the needs of the Hassidic community because they will be fairly served and treated with housing and accommodations according to their religious needs in every area in Town of Monroe, Woodbury, Blooming Grove, Chester Etc, and anywhere in County of Orange or even State of New York, like any other citizen.

Starting by quoting from one of the most respectful national organizations to protect freedom of religion, The Becket Fund (See attached Exhibit #1):

> *But Orthodox Judaism is perhaps the religion that suffers the most hostility. In fact, this Court has previously held that several municipalities in New York were incorporated out of sheer "animosity toward Orthodox Jews as a group." LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 431 (2d Cir. 1995) (quoting leader of the incorporation movement as stating "the reason [for] forming this village is to keep people like you [i.e., Orthodox Jews] out of this neighborhood") (see attached page 16 - Ex. 1)*
>
> *One of the most common manifestations of hostility towards Orthodox Jews is abuse of land use regulations. It is a well-known fact that Orthodox Jews may not drive on the Sabbath and that they therefore must reside within walking distance of a synagogue. Thus if a community wishes to prevent Orthodox Jews from moving into the neighborhood, it will manipulate land use regulations to forbid the synagogue from being opened in the neighborhood. A number of cases with this fact pattern—neighbor-driven attacks on new Orthodox Jewish land use—have arisen in the New York City metropolitan area. See, e.g., United Talmudical Acad. Torah V'Yirah, Inc. v. Town of Bethel, 899 N.Y.S.2d 63 (N.Y. Sup. Ct. 2009) (Town mayor illegally prevented issuance of certificate of occupancy for Orthodox synagogue on the basis that it was a "community center" rather than a house of worship and thus subject to additional zoning requirements); Lakewood Residents Ass'n v. Congregation Zichron Schneur, 570 A.2d 1032 (N.J. Super. Ct. Law Div. 1989) (neighborhood association sought to keep Orthodox synagogue out of neighborhood); Landau v. Twp. of Teaneck, 555 A.2d 1195 (N.J. Super. Ct. Law Div. 1989) (neighbors sought to invalidate sale of land to Orthodox synagogue)" (see attached page 18 – Ex. 1)*
>
> *Beyond the land-use context, Orthodox Jews consistently face a variety of other types of hostility and discrimination. For instance, in Incantalupo v. Lawrence Union Free School District No. 15, 652 F. Supp. 2d 314 (E.D.N.Y. 2009), the court rejected a lawsuit claiming that a school board was unduly influenced by its Orthodox Jewish members. The court took plaintiffs to task for making allegations in the complaint about Orthodox Jews' different "grooming habits" and "wardrobes," "large nuclear families," and "political agendas," all offered in the course of insinuating that Orthodox Jewish members of the school board were wrongfully diverting money away from public schools for the benefit of Jewish private schools. Id. at 318 n.3. (see attached Page 24 – Ex. 1)*

That brief as attached goes on and on quoting cases that proves the fact that the Orthodox community are NOT welcome in New York State and their being rejected specifically thru so called local zoning rules, but rather than

quoting and repeating from several Court rulings that is already mentioned in the Becket Fund amicus brief as attached, I would only add some local history closer to the area of Kiryas Joel, which is not part of that record.

Orange County - Village of Bloomingburg

- Bloomingburg Decision #1 – Dated 6/9/2015 (see attached Exhibit #2)

  Judge ruled that a 25 Million dollar lawsuit filed by the Hasidic citizens against the village can move forward

- Bloomingburg Decision #2 – Dated 6/16/2015 (see attached Exhibit #3)

  Judge ruled that a lawsuit filed by the Hasidic citizens against the board of elections can move forward

Orange County - Town of Woodbury

- Village of Kiryas Joel Etc vs Village of Woodbury – Dated 3/19/2014 (see attached Exhibit #4)

  Judge nullified local law of Village of Woodbury because of is discrimination intent

- Brach vs Woodbury – Dated 9/4/2012 (see attached Exhibit #5)

  Judge ruled that the case can move forward against the town violating the constitution

Orange County - Blooming Grove

- Blooming Grove Brach (see attached Exhibit #6)

  Case against Blooming grove that the creation of the village was to violate religious right

- Blooming Grove Sheri Toreh (see attached Exhibit #7)

  Case against Blooming grove that the creation of the village was to violate religious right

- United Fairness times 2 (see attached Exhibits #8-9)

  Case against Blooming grove that the creation of the village was to violate religious right

Orange County - Chester

- Decision (see attached Exhibit #10)

  Case against Town of Chester that the creation of the zoning laws was to violate religious right

Rockland County - Sufferen

- Rockland vs Suffern (see attached Exhibit #11)

  Judge ruled that the case can move forward against the village of Sufferen for violating the constitution

Rockland County - Airmont

- Airmont decision LeBlanc-Sternberg v. Fletcher, 67 F.3d 412 (2d Cir. 1995)

  Discrimination lawsuit against Airmomt Zoning - discussed in Exhibit 1 at the Becket Fund Brief

These cases show a clear direct pattern of local boards and communities using local laws to discriminate against Jews, and -not like the opponents- the Orthodox-Jews are not welcome at all at the so called other municipalities in NYS, specifically Hassidic Jews within the communities surrounding Kiryas Joel, and the history of these cases are enough reasons to vote for religious freedom to survive and to vote YES to allow the Jewish people to live with freedom atleast somewhere in NYS.

I urge you to vote in the affirmative, because we live in the United States and we are allowed to practice our religion in the USA.

Please include my letter AND all its exhibits as part of the annexation record.

Thanks in advance.

Samson Szegedin

PS. Some people at the hearing stood up denying anti-Semitism against Jews because they are themselves Jewish or their grand-parents were Jewish, I would note a Federal Court of appeals ruling in Feingold v New York (Http://scholar.google.com/scholar_case?case=16168327816401827213) the 2d Cir rejected lower courts suggestion, that a Jew is unlikely to be discriminated by another Jew on the basis of religion, holding that: "It is not reasonable to presume that individuals will not discriminate against practitioners of their own religious faith."

Exhibit 1

No. 13-107

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CENTRAL RABBINICAL CONGRESS OF THE UNITED STATES & CANADA; AGUDATH ISRAEL OF AMERICA; INTERNATIONAL BRIS ASSOCIATION; RABBI SAMUEL BLUM; RABBI AHARON LEIMAN; AND RABBI SHLOIME EICHENSTEIN,

Plaintiffs-Appellants,

v.

NEW YORK CITY DEPARTMENT OF HEALTH & MENTAL HYGIENE; NEW YORK CITY BOARD OF HEALTH; AND DR. THOMAS FARLEY, COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF HEALTH & MENTAL HYGIENE,

Defendants-Appellees,

On Appeal From The United States District Court
For The Southern District of New York
Honorable Naomi Reice Buchwald
Case No. 12-Civ.-7590 (NRB)

Brief *Amicus Curiae* of
The Becket Fund for Religious Liberty
in support of Plaintiffs-Appellants and Reversal

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, The Becket Fund for Religious Liberty states that it has no parent corporation and that no publicly held corporation owns any part of it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a non-profit, public-interest legal and educational institute that protects the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. The Becket Fund has frequently represented religious people and institutions in cases involving the Religion Clauses. For example, The Becket Fund represented the successful Petitioner in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012), the first ministerial exception case to reach the Supreme Court.

The Becket Fund is concerned that the New York City Department of Health and Mental Hygiene's targeted regulation of a singularly Orthodox Jewish ritual has not received the constitutional scrutiny that the First Amendment requires. Close judicial scrutiny is particularly

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

necessary here because the City's targeted regulation comes in the context of a wide variety of government-sanctioned efforts in the New York metropolitan area to inhibit the practice of Orthodox Judaism. Especially against such a backdrop of religious discrimination, laws that target religious minorities must be tested to ensure that they are narrowly tailored to a compelling government interest.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

On the surface, this might appear to be a difficult appeal. The interests asserted are indisputably weighty. On one side there are the Plaintiffs: Orthodox Jews, especially Satmar, Bobov, Lubavitch, and other Hasidic groups, who seek to preserve a private, legal, consensual, millennia-old, and normally safe religious ritual from government interference. On the other side is the City of New York, arguing that it is trying to protect newborn babies from contracting a dangerous disease. These are among the most powerful interests known to constitutional law.[2]

But scratch below the surface, and this appeal becomes much easier. The regulation in question was, the City concedes, specifically targeted at Orthodox Jews like Plaintiffs and specifically at the religious ritual of *metzitzah b'peh*. The regulation stands alone; it is not part of a broader or more general effort to protect infants from consensual practices that carry similar risks or even greater risks of disease. Moreover, the regulation was put forward in a context of hostility towards Orthodox Jews. Thus although the interests in question are difficult and weighty

[2] *Amicus* expresses no opinion here on whether the regulation withstands strict scrutiny, only that strict scrutiny must be applied.

ones to be balanced, the proper *method* of balancing under the Free Exercise Clause in this case is strict scrutiny, not the rational basis review the district court erroneously applied. *Central Rabbinical Congress of the U.S. & Can. v. New York City Dep't of Health & Mental Hygiene*, 2013 WL 126399 at *78 (S.D.N.Y. Jan. 10, 2013) (applying rational basis scrutiny).

Indeed, the City's concession and the district court's finding that the City's regulation targets only a religious ritual of Orthodox Jews for disfavor is dispositive. That concession alone makes this appeal easier than *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), where the defendant city did not concede targeting. Moreover, the offensive ordinance in *Lukumi* burdened "almost" no one other than the targeted minority religion, *id.* at 536-537; here, the City's ordinance concededly burdens *only* the targeted minority religion.

Although the City's concession is enough to decide the appeal, there is another reason strict scrutiny is warranted. With the increase in the Orthodox Jewish population in the New York City metropolitan area, Orthodox Jews increasingly face laws and municipal regulations that inhibit their religious practices—many of which courts have found

deliberately designed to discourage the spread of Orthodox Jewish communities to integrated areas outside their traditional neighborhoods. That pattern of anti-Orthodox hostility is the telltale smoke alerting courts to strictly scrutinize the City's regulation of a religious ritual for anti-religious "fire." That is especially so where, as here, the judicial branch has a duty to conduct an "independent review" of the "constitutional facts" under *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 519 n.2 (1984).

Orthodox Judaism follows an internal rule of decision that does not yield easily to contrary social norms or external regulation, leading many people—including some government officials—to treat Orthodox Jews as hostile outsiders to American society. But what may to some eyes seem a stubborn adherence to inscrutable rules is in reality a deep commitment to following what Orthodox Jews believe to be Divine command. They have persevered in that commitment despite some of the worst religious persecution in human history. Given both that history and the balance struck by the First Amendment, using government power to force Orthodox Jews to contravene their beliefs

should be a last step after the proper level of judicial review has been applied.

ARGUMENT

I. The regulation triggers strict scrutiny because it targets a particular religious practice, and only that practice.

The Free Exercise Clause, as applied to the states via the Fourteenth Amendment, provides: "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. A law that burdens religious exercise violates the Free Exercise Clause if it is either "not neutral" or "not of general application" and the government cannot satisfy "strict scrutiny." *Lukumi*, 508 U.S. at 546; *see also Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). This form of analysis applies to both religious individuals and religious groups.

The Supreme Court's decision in *Lukumi* outlines multiple ways in which laws may fail the tests of neutrality and general applicability, and thereby trigger strict scrutiny. 508 U.S. at 525-46. *See also Stormans, Inc. v. Selecky*, 854 F. Supp. 2d 925, 967-990 (W.D. Wash. 2012) (comprehensively discussing the multiple ways that a regulation may violate the Free Exercise Clause under *Lukumi*).

Under *Lukumi*, one of the ways that a law is not neutral and thus triggers strict scrutiny is if it "targets religious conduct for distinctive treatment." *Lukumi*, 508 U.S. at 534, 546. This is measured by whether "the effect of [the] law in its real operation" accomplishes a "religious gerrymander." *Id.* at 535 (quoting *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

Importantly, to make out a religious targeting or "religious gerrymander" claim, the plaintiff does not have to provide direct proof of animus or discriminatory intent. Instead the "effect of the law in its real operation" is an objective test, based on the contours of the regulation rather than the subjective motives of the regulators. *Lukumi*, 508 U.S. at 535. Under that objective test, there are three main factors that demonstrate that the regulation is a clear case of religious targeting.

First, "the burden of the ordinance, in practical terms, falls on [religious objectors] but almost no others." *Id.* at 536. In *Lukumi*, the burden fell on "almost" no one but the disfavored religious minority. *Id.* But here, unlike in *Lukumi*, the practical burden of the City's regulation falls exclusively on Orthodox Jews. *Central Rabbinical*

Congress, 2013 WL 126399 at *1-2. No one else in the largest and most diverse municipality in the country—a municipality that is larger than thirty-nine states, *see American Atheists, Inc. v. City of Detroit*, 567 F.3d 278, 286 (6th Cir. 2009)—feels the slightest impact from the regulation. Just as "[a] tax on yarmulkes is a tax on Jews," *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993), a regulation of "direct oral suction as a part of circumcision" is a regulation imposed on Orthodox Jews alone—and, indeed, only on some sects within Orthodox Jewry. *See also Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1298 n.10 (7th Cir. 1996) ("A regulation that prohibited all private groups from displaying nine-pronged candelabra may be facially neutral, but it would still be unconstitutionally discriminatory against Jewish displays."). The exclusive targeting of *metzitzah b'peh* makes this an even easier case than *Lukumi*, where the Court was unanimous and found that the challenged ordinances fell "well below" the minimum constitutional standard. 508 U.S. at 543.

Second, the City's regulation is a far clearer candidate for strict scrutiny than the ordinance in *Lukumi* because of the City's admission from the outset that it was targeting Orthodox Jews. *Central*

Rabbinical Congress, 2013 WL 126399 at *3. In *Lukumi*, the defendant city refused to make such a concession but the Supreme Court found targeting anyway. *Lukumi*, 508 U.S. at 537 (noting that, to the contrary, the city claimed that its "ordinance is the epitome of a neutral prohibition"). Here, the City specifically admitted below that "the only presently known conduct" that implicates the regulation is "this particular religious ritual," *Central Rabbinical Congress*, 2013 WL 126399 at *2, and the ritual is what "prompted" the regulation. Dkt. 34, at 6 & 9 n.8. Hence the district court's finding that *metzitzah b'peh* is "the only activity the [City] expected the regulation to realistically apply to." *Central Rabbinical Congress*, 2013 WL 126399 at *1.

Third, the history leading up to the regulation's enactment further shows that the City was targeting Orthodox Jews with the regulation. Starting in 2005, the City met with Jewish leaders to discourage the ritual and released "An Open Letter to the Jewish Community," which stated that the ritual should not be performed and that parents should learn about its risks. *See* Letter from New York Department of Health and Mental Hygiene to the Jewish Community (Dec. 13, 2005), *available at* http://www.nyc.gov/html/doh/downloads/pdf/std/std-bris-

commishletter.pdf. The City also created a pamphlet entitled "Before the Bris" that, in both English and Yiddish, provided the City's view on the ritual. *Id.*; *see also Central Rabbinical Congress*, 2013 WL 126399 at *6. New versions of the pamphlet were created in 2010 and again in 2012, and they were distributed to hospitals throughout New York. *Id.* at *7-*8. Because the City felt that its efforts were not sufficiently inhibiting the observance of *metzitzah b'peh*, it stepped up that effort by passing the regulation (and taking steps to ensure distribution of the City's brochure by hospitals). The regulation took the same message that the City had been expressing—namely, that *metzitzah b'peh* is dangerous and should not be performed—and made the Orthodox Jewish mohels who carry out the ritual legally responsible for conveying the City's message to the parents.

And just before the Board of Health voted unanimously to enact the regulation, Commissioner Farley, the Chair of the Board of Health, conceded that it would affect a religious "practice that has been taking place for hundreds, if not thousands of years." *Id.* at *12.

Given these facts, the district court concluded that "the legislative history of section 181.21 focuses explicitly on [*metzitzah b'peh*]." *Id.* at

*26. More accurately, the legislative history focuses *entirely* on *metzitzah b'peh*.

These factors show that the sole intended target of the City's regulation is an Orthodox Jewish religious ritual, and there is no question that the regulation's sole purpose is to discourage that ritual's observance. And as Appellants note, the City has undertaken no efforts to inhibit other common practices with similar or more serious health risks. App. Br. 41-43. Strict scrutiny is therefore required. [3]

II. The regulation also triggers strict scrutiny because of its legislative history and the historical context of hostility towards Orthodox Jews.

Amicus cannot see into the hearts of men and thus does not know the subjective purposes of those who advocated this regulation, and the district court did not conduct fact-finding regarding secular purpose. But this Court should be aware, as City politicians are aware, of the context in which regulations of this sort arise. Indeed, this Court has a

[3] There is at least one way that this case is a closer question than *Lukumi*: the City's effort to stop *metzitzah b'peh* does not amount to the complete ban imposed in *Lukumi*. But that difference does not go to whether this Court should *impose* strict scrutiny, it goes to whether the regulation will *survive* strict scrutiny because it used allegedly less restrictive means.

duty to conduct an "independent review" of the record to ensure the robust protection of First Amendment interests. *Bose Corp.*, 466 U.S. at 499.

In *Lukumi*, Justice Kennedy, joined by one other Justice, said that determining whether a law or regulation is intended to discriminate requires consideration of the language of the law, its legislative history, and the broader historical context: "Relevant evidence includes . . . the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Lukumi*, 508 U.S. at 540. Although this part of the opinion garnered only two votes, elsewhere in the opinion the unanimous Court did look to legislative history, invalidating one of the four challenged ordinances solely because it was "passed the same day" and "was enacted, as were the three others, in direct response to the opening of the [plaintiff] Church." *Lukumi*, 508 U.S. at 540. In its next Free Exercise case, *Locke v. Davey*, 540 U.S. 712 (2004), the Court examined both "*the history* [and] text" of a law to probe for "anything that suggests animus toward

religion.") *Id.* at 723-25 (emphasis added). In Establishment Clause cases, it is commonplace to examine "legislative history" to see whether there was a "secular purpose" apart from *advancing* religion, *McCreary Cnty. v. ACLU*, 545 U.S. 844, 863 (2005); legislative history evidence should be equally relevant when it indicates the equally illicit purpose of *inhibiting* religion.

Although proof of anti-religious animus is not necessary to finding a free exercise violation, courts following *Lukumi* have treated animus as a relevant line of inquiry. *See, e.g.*, *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 633 (7th Cir. 2007) (court must examine "the 'historical background of the decision under challenge, the specific series of events leading to the enactment . . . and the [act's] legislative or administrative history'") (quoting *Lukumi*); *Wirzburger v. Galvin*, 412 F.3d 271, 281-82 (1st Cir. 2005) (considering, on free exercise challenge, "evidence of animus against Catholics in Massachusetts in 1855 when the [law] was passed," "the wide margin by which the [law] passed," and the convention's "significant Catholic representation"); *Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (8th Cir. 2000) ("the law's legislative history" is relevant); *Stormans*,

854 F. Supp. 2d at 985 (stating that, in Free Exercise challenges, "considering the historical background of a law is the best approach"). *See Shrum v. City of Coweta*, 449 F.3d 1132, 1138 (10th Cir. 2006) ("Proof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus." (citations omitted)).

The evidence in this appeal shows that the City's regulation was intended to affect *only* Orthodox Jews, and the broader historical context indicates that this targeting was not benign.

A. The history of the regulation itself demonstrates discriminatory intent.

As established above, the history of the regulation's adoption shows that the City was motivated by an intent to target religious behavior. There is no question that the history of the regulation—seven years of concerted efforts that focused entirely on stopping a single Orthodox Jewish ritual—evinced a specific intent to suppress Orthodox Jewish religious practices and literally no others.

B. The historical context of the regulation—widespread governmental hostility towards Orthodox Jews—also demonstrates discriminatory intent.

Evidence of discriminatory intent goes beyond the history of the specific law in question. More broadly, it includes "consistent pattern[s] of official . . . discrimination," *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977), and the broader societal context of discrimination. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 369 (1978) (broadly considering both government discrimination and societal discrimination in determining the history of discrimination against a minority); *see also Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343, 363 (5th Cir. 2011) (considering "any history of discrimination by the decisionmaking body").

Thus, in *Goosby v. Town Board*, 180 F.3d 476 (2d Cir. 1999), this Court evaluated voting-related discrimination by considering a broad range of factors, including the history of relevant discrimination by the State and its political subdivisions, the racial polarization within the State and its subdivisions, the use of racial appeals by public officials to obtain election, and effects of discrimination on the minority group. *See*

also League of United Latin Am. Citizens, Council No. 4434 v. Clements, 986 F.2d 728, 738 (5th Cir. 1993) (allowing plaintiffs to prove discrimination by, *inter alia*, showing a "history of official discrimination . . . and other features of the current or past racial climate of the community in question").

Here, that broader historical and societal context shows a pattern of targeted regulations against Orthodox Jews. Indeed, targeted government measures against Orthodox Jews are becoming depressingly regular features within the City and surrounding municipalities. As an initial matter, this may stem from an antagonism on the part of the secular leadership of the City toward public manifestations of religion in general, epitomized by the City's hard-fought eighteen-year battle to single out and ban "religious worship services" from its public school facilities. *See Bronx Household of Faith v. Bd. of Educ. of New York*, 876 F. Supp. 2d 419 (S.D.N.Y. 2012), on appeal as No. 12-2730 (2d Cir., argued Nov. 19, 2012).

But Orthodox Judaism is perhaps the religion that suffers the most hostility. In fact, this Court has previously held that several municipalities in New York were incorporated out of sheer "animosity

toward Orthodox Jews as a group." *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 431 (2d Cir. 1995) (quoting leader of the incorporation movement as stating "the reason [for] forming this village is to keep people like you [i.e., Orthodox Jews] out of this neighborhood"). That animosity appears to have worsened as the Orthodox Jewish population has grown dramatically in the City and surrounding areas. *See*, *e.g.*, Sharon Otterman, *Jewish Population Is Up in the New York Region*, N.Y. Times, Jan. 17, 2013, *available at* http://www.nytimes.com/2013/01/18/nyregion/reversing-past-trend-new-yorks-jewish-population-rises.html (noting the increase in the City's Jewish population as overwhelmingly the result of growth by "deeply Orthodox Jewish neighborhoods"); *see also* Steven M. Cohen, Jacob B. Ukeles, and Ron Miller, Jewish Community Study of New York: 2011 Comprehensive Report 123 (2011), *available at* http://www.ujafedny.org/get/494344/ ("61% of Jewish children in the eight-county area live in Orthodox households").

Recent examples of this hostility are lawsuits recently filed by the City's Commission on Human Rights against seven Orthodox Jewish businesses in Brooklyn. The lawsuits claim gender discrimination

because these businesses post signs that are a variation on the commercially common "no shoes, no shirt, no service" sign. *See* Michele Chabin, *New York City sues Orthodox shops over dress codes*, Religion News Service, Feb. 28, 2013, *available at* http://www.religionnews.com/2013/02/28/new-york-city-sues-orthodox-shops-over-dress-codes/. The signs read "No shorts, no barefoot [sic], no sleeveless, no low cut neckline allowed in this store." *Id.* Not only are the signs patently gender-neutral, the City's Commission on Human Rights turns a blind eye to upscale clubs and private schools that actually do have gender-specific attire requirements. *Id.* (quoting Marc Stern, General Counsel of the American Jewish Committee). Under the City's selective approach, dress codes are illegal only if they are motivated by Orthodox Jewish beliefs.

One of the most common manifestations of hostility towards Orthodox Jews is abuse of land use regulations. It is a well-known fact that Orthodox Jews may not drive on the Sabbath and that they therefore must reside within walking distance of a synagogue. Thus if a community wishes to prevent Orthodox Jews from moving into the neighborhood, it will manipulate land use regulations to forbid the

synagogue from being opened in the neighborhood. A number of cases with this fact pattern—neighbor-driven attacks on new Orthodox Jewish land use—have arisen in the New York City metropolitan area. *See, e.g.*, *United Talmudical Acad. Torah V'Yirah, Inc. v. Town of Bethel*, 899 N.Y.S.2d 63 (N.Y. Sup. Ct. 2009) (Town mayor illegally prevented issuance of certificate of occupancy for Orthodox synagogue on the basis that it was a "community center" rather than a house of worship and thus subject to additional zoning requirements); *Lakewood Residents Ass'n v. Congregation Zichron Schneur*, 570 A.2d 1032 (N.J. Super. Ct. Law Div. 1989) (neighborhood association sought to keep Orthodox synagogue out of neighborhood); *Landau v. Twp. of Teaneck*, 555 A.2d 1195 (N.J. Super. Ct. Law Div. 1989) (neighbors sought to invalidate sale of land to Orthodox synagogue).

An example of particularly virulent hostility towards Orthodox Jews is evident in *Congregation Rabbinical College of Tartikov v. Village of Pomona*, --- F. Supp. 2d ---, 2013 WL 66473 (S.D.N.Y. 2013). In that case, which is still pending, Orthodox Jewish plaintiffs have submitted copious evidence showing that the defendant municipality enacted anti-Orthodox Jewish zoning laws because local citizens found Orthodox

Jewish communities undesirable. *Tartikov*, No. 7:07-cv-06304 (S.D.N.Y.), Docket No. 28-2 at ¶¶ 150-155 (quoting a *New York Times* article where a citizen said that hearing about Orthodox Jewish communities "literally" made her "nauseous" and want to "throw up"); ¶ 176 (describing "Preserve Ramapo," a citizen group that wants to use Ramapo's zoning laws to stop "population growth in Ramapo's Hassidic communities"). Local officials had successfully run political campaigns based in part on promises that they would prevent the growth of Orthodox Jewish communities. *Id.* at ¶¶ 178-180. And the officials' constituencies were equally unenamored of Orthodox Jews. Just to list some of the more printable insults, citizens opposing Orthodox Jewish communities have referred to them in newspapers as "tribal ghetto[s]" and to Orthodox Jews as "fake people" and "blood sucking self centered leeches" who create Jonestown-like cults where they drink "spiked kool aid . . . kosher of course." *Id.* at ¶¶ 187-190.

In another case, *Westchester Day School v. Village of Mamaroneck*, 417 F. Supp. 2d 477, 485 (S.D.N.Y. 2006), affirmed, 504 F.3d 338 (2d Cir. 2007), an Orthodox Jewish day school successfully sued under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42

U.S.C. § 2000cc(a)(1), to challenge a zoning law that prevented the renovation of its school buildings. The district court found that the Orthodox school's permit "[a]pplication apparently was denied not because it failed to comply with the Village Code or otherwise would have an adverse impact on public health, safety or welfare, but rather upon undue deference to the opposition of a small but politically well-connected group of neighbors." 417 F. Supp. 2d at 539.

A variation on the attempt to zone Orthodox Jews out by zoning out their synagogues concerns *eruvim*, boundary lines typically consisting of wire, string, or plastic strips that Orthodox Jews use to mark a continuous boundary around their communities. An *eruv* sets a boundary inside which Orthodox Jews may engage in certain activities on the Sabbath—for example carrying objects or pushing a stroller—without breaking religious laws. They are an unobtrusive way to relieve Orthodox Jewish families from being confined to their homes for the duration of the Sabbath. But some people do not like living near *eruvim*—comparing them to "ghetto[s]" and an unwelcome "ever-present symbol" of the Orthodox Jews' religious presence. *See* Michael A. Helfand, *An* eruv *in the Hamptons?*, L.A. Times, Aug. 15, 2012,

available at http://articles.latimes.com/2012/aug/15/opinion/la-oe-0815-helfand-eruv-westhampton-sikh-20120815.

One of the most important *eruv* cases from the New York area was *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,* 309 F.3d 144 (3d Cir. 2002), *cert. denied*, 539 U.S. 942 (2003). In that case, the Borough of Tenafly refused to allow demarcation of an *eruv* on telephone poles in the borough. This decision came after Tenafly residents "expressed vehement objections prompted by their fear that an *eruv* would encourage Orthodox Jews to move to Tenafly." 309 F.3d at 153. One Council member at a public meeting noted "a concern that the Orthodoxy would take over." *Id.* (quotation omitted). Another "voiced his 'serious concern' that 'Ultra–Orthodox' Jews might 'stone [ ] cars that drive down the streets on the Sabbath.'" *Id.* (quoting district court opinion; alteration in original). The Borough invoked a municipal ordinance that prohibited affixing items to telephone poles to require removal of the *eruv*; however, the Borough did not apply this ordinance to other items such as house numbers, which it had long allowed to be affixed to the poles. *Id.* at 167. The Third Circuit held that the

Borough's discriminatory approach violated the Free Exercise Clause. *Id.* at 168.

Some of the most contentious of these disputes have taken place in Westhampton Beach, New York, where those opposed to an Orthodox Jewish presence are attempting to use municipal regulatory authority to prevent an *eruv* from being erected. *See East End Eruv Ass'n v. Village of Westhampton Beach*, No. 11-cv-00213 (E.D.N.Y.). Indeed, in their television appearances opponents of the *eruv* have been open—even absurdly so—about their goal of keeping Orthodox Jews out of their community. *See*, *e.g.*, John Stewart, *The Thin Jew Line*, The Daily Show, Mar. 23, 2011, *available at* http://www.thedailyshow.com/watch/wed-march-23-2011/the-thin-jew-line. Residents of Westhampton Beach "fear the prospect of more Orthodox Jews moving in if the eruv is constructed" and have stated "that the eruv 'will make more Orthodox people come in, and it's not right to the history of these towns.' 'Why are they forcing the community to change?'" Sharon Otterman, *A Ritual Jewish Boundary Stirs Real Town Divisions*, N.Y. Times, Feb. 4, 2013, *available at* http://www.nytimes.com/2013/02/05/nyregion/in-westhampton-beach-a-

ritual-jewish-boundary-stirs-real-town-divisions.html; *see also ACLU v. City of Long Branch*, 670 F.Supp. 1293 (D.N.J. 1987) (rejecting residents' Establishment Clause challenge to the erection of an *eruv*); *Smith v. Cmty. Bd. No. 14*, 491 N.Y.S.2d 584 (N.Y. Sup. Ct. 1985) (same).

Beyond the land-use context, Orthodox Jews consistently face a variety of other types of hostility and discrimination. For instance, in *Incantalupo v. Lawrence Union Free School District No. 15*, 652 F. Supp. 2d 314 (E.D.N.Y. 2009), the court rejected a lawsuit claiming that a school board was unduly influenced by its Orthodox Jewish members. The court took plaintiffs to task for making allegations in the complaint about Orthodox Jews' different "grooming habits" and "wardrobes," "large nuclear families," and "political agendas," all offered in the course of insinuating that Orthodox Jewish members of the school board were wrongfully diverting money away from public schools for the benefit of Jewish private schools. *Id.* at 318 n.3.

Nor is the problem of anti-Orthodox hostility limited to the New York metropolitan area; similar conflicts continue to occur across the country.[4]

* * *

Our point in putting these cases before the Court is not to assert that every claim of discrimination by an Orthodox Jewish plaintiff is valid. It is instead to point out what is common sense: deep hostility towards Orthodox Jews is present in American society in general and in New York in particular. And one of the methods used by municipalities to prevent an influx of Orthodox Jewish residents is to make it impossible for them to practice their religion in that jurisdiction. The existence of such endemic hostility does not mean that Plaintiffs automatically

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[4] *See*, *e.g.*, *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F. 3d 1214 (11th Cir. 2004) (town violated civil rights laws by applying zoning ordinances to allow synagogues only out of walking distance for most of the Orthodox Jewish population); *Chabad Lubavitch v. Borough of Litchfield*, 796 F. Supp. 2d 333 (D. Conn. 2011) (Orthodox synagogue land use dispute); *Chabad of Nova, Inc. v. City of Cooper City*, 575 F. Supp. 2d 1280 (S.D. Fla. 2008) (city violated civil rights laws by using zoning ordinances to prevent Orthodox Jewish Outreach Center from opening); *Toler v. Leopold,* 2008 WL 926533 (E.D. Mo. 2008) (prison violated civil rights laws by refusing to provide kosher food to Orthodox Jewish inmate); *Murphy v. Carroll*, 202 F. Supp. 2d 421 (D. Md. 2002) (prison officials forced Orthodox Jewish inmate to clean his cell on Saturday).

prevail under strict scrutiny—it is a balancing test—but it does mean that strict scrutiny must be applied to the targeted regulation in this appeal.

CONCLUSION

Amicus respectfully urges the Court to evaluate the regulation under strict scrutiny on appeal or remand the case with instructions for the district court to do so.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains 4,790 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Eric Rassbach
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Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on April 15, 2013.

I certify that all participants in the case have been served a copy of the foregoing by the appellate CM/ECF system or by other electronic means.

April 15, 2013

/s/ Eric Rassbach
Eric Rassbach
Counsel for *Amicus Curiae*

Exhibit 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BLOOMINGBURG JEWISH EDUCATION CENTER et al.,

Plaintiffs,

-v-

VILLAGE OF BLOOMINGBURG, NEW YORK et al.,

Defendants.

14-cv-7250 (KBF)

OPINION & ORDER

KATHERINE B. FORREST, District Judge:

Bloomingburg is a small, rural village in Sullivan County with a population of about 400 residents. Over the past several years, Hasidic Jews have been moving into the village in increasing numbers. The complaint in this action alleges that this influx of Hasidic Jews has been met with determined and concerted resistance by the local governments and public officials of the Village of Bloomingburg and the Town of Mamakating, who are defendants in this action. Plaintiffs allege that defendants' acts of resistance have violated their rights under the First Amendment, the Equal Protection Clause, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the Fair Housing Act ("FHA"), and New York state law. Defendants vigorously deny plaintiffs' assertions. Now pending before the Court are defendants' motions to dismiss. (ECF Nos. 67, 71.)

For the reasons set forth below, those motions are GRANTED IN PART AND DENIED IN PART. Plaintiffs Malka Rosenbaum and Winterton Properties, LLC

have stated plausible claims for relief under 42 U.S.C. § 1983 and 42 U.S.C. § 1985 against defendants the Town of Mamakating, the Zoning Board of Appeals of the Town of Mamakating, and William Herrmann in his official capacity based on these defendants' alleged roles in stymying the conversion of a property in Bloomingburg into a mikvah, a bath used by Hasidic Jews for ritual immersion and purification. Plaintiff Sullivan Farms II, Inc. has stated plausible claims for relief under § 1983, § 1985, and the FHA against defendants the Village of Bloomingburg, New York, the Village Board of Trustees of the Village of Bloomingburg, Frank Gerardi in his official capacity, James Johnson in his official capacity, and Katherine Roemer in her official capacity based on these defendants' alleged roles in obstructing the completion of a housing development project known as Chestnut Ridge. Plaintiffs' other claims are dismissed.

Accordingly the claims of plaintiffs the Bloomingburg Jewish Education Center, Learning Tree Properties, LLC, Sheindel Stein, and Commercial Corner, LLC are dismissed in their entirety, as are all claims against defendants the Planning Board of the Village of Bloomingburg, the Town Board of the Town of Mamakating, the Planning Board of the Town of Mamakating, Andrew Finnema, Ann Heanelt, Joseph B. Roe, and Eileen Rogers. All individual-capacity claims against defendants Frank Gerardi, Katherine Roemer, James Johnson, and William Herrmann are also dismissed on immunity grounds.

I. FACTUAL BACKGROUND[1]

In the First Amended Complaint (ECF No. 43 ("FAC")), plaintiffs allege that defendants are working together to prevent Hasidic Jews from moving into the vicinity of Bloomingburg, New York, a small village in Sullivan County with a population of about 400 (FAC ¶ 72). In particular, the First Amended Complaint alleges that defendants are (a) obstructing the completion of a housing development project known as Chestnut Ridge, which they believe is being marketed to Hasidic home buyers, (b) impeding the opening of the Bloomingburg Jewish Education Center, a private Hasidic religious school that plans to open on Bloomingburg's Main Street, (c) preventing a property in Bloomingburg from being converted to a mikvah, a bath used by Hasidic Jews for ritual immersion and purification, and (d) engaging in a program of harassment and discriminatory building code enforcement aimed at Jewish residents or prospective residents of Bloomingburg.

A. The Parties

The plaintiffs in this action are: Sullivan Farms II, Inc. ("Sullivan Farms"); the Bloomingburg Jewish Education Center; Learning Tree Properties, LLC ("Learning Tree"); Malka Rosenbaum; Sheindel Stein; Winterton Properties, LLC ("Winterton Properties"); and Commercial Corner, LLC ("Commercial Corner").

[1] In deciding the pending motions, the Court is legally required to accept as true all of plaintiffs' allegations, and to draw all reasonable inferences in their favor. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. at 555-57); N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC, 709 F.3d 109, 121 (2d Cir. 2013). Of course, the Court recognizes that defendants vigorously contest any allegations that their actions were motivated by bigotry, prejudice, or other improper motives. However, at this stage of the proceedings the law requires that this Court accept the allegations as true. Whether these allegations are in fact true, false, or misleading is something that must be resolved only at the later stages of this litigation.

Sullivan Farms is a New York corporation, and the record owner of the Chestnut Ridge properties. (FAC ¶ 23.) The Bloomingburg Jewish Education Center is a not-for-profit religious trust that seeks to open and operate a private Hasidic religious school (also named the Bloomingburg Jewish Education Center, to which the Court will refer as the "BJEC" or the "religious school") at 132 Main Street in Bloomingburg. (FAC ¶¶ 4, 22.) Learning Tree, a New York limited liability company, is the record owner of the BJEC property. (FAC ¶ 24.) Malka Rosenbaum and Sheindel Stein are Jewish residents of Bloomingburg who would like to send their children to school at the BJEC. (FAC ¶¶ 25-26.) Winterton Properties is a New York liability company that is the record owner of a property on which it seeks to build and operate a mikvah. (FAC ¶ 28.) Commercial Corner is a New York limited liability company that is the record owner of a retail building located at 79 Main Street in Bloomingburg, at which a hardware store plans to open. (FAC ¶¶ 27, 157.)

The defendants in this action can be separated into two groups. The first consists of entities and individuals associated with the Village of Bloomingburg (the "Village Defendants"). The second consists of entities and individuals associated with the Town of Mamakating (the "Town Defendants.")

The Village Defendants consist of the Village of Bloomingburg and constituent local municipal entities (the "Village Municipal Defendants") and several individuals who have held positions in the Village government (the "Village Individual Defendants"). The Village Municipal Defendants are: the Village of

Bloomingburg, New York (the "Village"), a political subdivision of the State of New York (FAC ¶ 29); the Village Board of Trustees of the Village of Bloomingburg (the "Village Board of Trustees"), the Village's legislative body (FAC ¶ 30); and the Planning Board of the Village of Bloomingburg (the "Village Planning Board"), which was dissolved by Village Local Law No. 4 of 2014 (FAC ¶ 33).

The Village Individual Defendants are Frank Gerardi, Eileen Rogers, Katherine Roemer, James Johnson, Andrew Finnema, Ann Heanelt, and Joseph B. Roe. Gerardi is the mayor of Bloomingburg. (FAC ¶ 12, 31.) He was elected in 2014 after allegedly campaigning on a platform that openly opposed Hasidic Jews moving into Bloomingburg. (FAC ¶ 12.) He is alleged to have made several anti-Semitic statements and to have verbally harassed members of the Hasidic community. (FAC ¶ 133.) Rogers is the Village Clerk. (FAC ¶¶ 16, 32.) She is alleged to have acted in concert with Gerardi to direct the Village's building inspector to engage in the discriminatory enforcement of Village regulations against Hasidic Jewish property owners and residents. (FAC ¶ 16.) Roemer and Johnson are Village trustees. (FAC ¶¶ 20, 41-42.) Finnema, Heanelt, and Roe were members of the Village Planning Board at the time the site plan application for the religious school was denied. (FAC ¶¶ 34-36.)

The Town defendants are: the Town of Mamakating, New York (the "Town"), a political subdivision of the State of New York (FAC ¶ 37); the Town Board of the Town of Mamakating (the "Town Board"), the Town's legislative body, which assumed the authority of the Village Planning Board following the passage of

Village Local Law No. 4 of 2014 (FAC ¶ 38); the Zoning Board of Appeals of the Town of Mamakating (the "Town ZBA") (FAC ¶ 39); the Planning Board of the Town of Mamakating (the "Town Planning Board") (FAC ¶ 40); and William Herrmann, the Town Supervisor (FAC ¶ 43). Herrmann and the Village Individual Defendants have each been sued in both their individual and official capacities.

Another entity that figures prominently in the First Amended Complaint, but which is neither a plaintiff nor a defendant in this action, is the Rural Community Coalition (the "RCC"). The RCC is an advocacy organization co-founded by Herrmann and several other area residents. (FAC ¶ 59.) The First Amended Complaint alleges that the RCC's publicly stated advocacy positions are in fact fig leaf justifications for their true agenda: blocking Hasidic Jews from moving into Bloomingburg, and making life difficult for those who already live there. (See FAC ¶¶ 59, 61, 65.) Several of the public officials named as defendants in this action, specifically Gerardi, Johnson, Roemer, and Herrmann, were elected with RCC support. (See FAC ¶¶ 72-73.) The First Amended Complaint also alleges that Herrmann has sought to advance the RCC's cause by appointing "a number of vocal opponents of the Jewish community" to "various town boards," including an appointee to the Town Planning Board and the chair of the Town ZBA. (FAC ¶¶ 139, 147.)

B. Chestnut Ridge

Plaintiff Sullivan Farms is currently developing Chestnut Ridge,[2] a subdivision located about a half-mile from the center of Bloomingburg consisting of 396 townhomes, a community clubhouse, and recreational amenities. (FAC ¶ 47.) Chestnut Ridge has been in development since 2006, when the Village annexed the 198-acre property on which it is being built from the Town following a public meeting. (FAC ¶¶ 49-51.) The plans were made public in 2008, after which Sullivan Farms began the lengthy multi-year process required for gaining the necessary initial regulatory approvals for building the development, including approval of the site plan and subdivision and an environmental review. (FAC ¶¶ 51-52.) Each of these steps was completed between July 2009 and June 2010. (FAC ¶¶ 52, 54-55.)

According to plaintiffs, Chestnut Ridge initially enjoyed broad support from the Bloomingburg community. (See FAC ¶¶ 53-54.) However, in 2012 opposition arose after rumors spread that the townhomes were being marketed to Hasidic Jews. (FAC ¶¶ 53, 57-58.) At this time, several local residents, including future Town Supervisor Herrmann, banded together to form the RCC, which then filed a lawsuit seeking to block the project. (FAC ¶¶ 59-62.) In addition, several residents publicly expressed concern about the prospect of Hasidic Jews moving into their community. For instance, at the May 17, 2012 public meeting of the Village trustees, a former Village trustee, Clifford Teich, asked the Village attorney, John

[2] The official name for the development is "Village of Chestnut Ridge." (FAC ¶ 49.)

Kelly, if there was a way to ensure that no Hasidic residents would move into the project, to which Kelly responded "[i]t's insane that you just asked me that question." (FAC ¶ 58.) RCC president Holly Roche also stated that there was no opposition to Chestnut Ridge until 2012 because before "that point in time, it was not known that the developer planned a Hasidic community." (FAC ¶ 59.)

In June 2013, Sullivan Farms applied for building permits for the first phase of Chestnut Ridge, and between July and November 2013 the Village granted 126 building permits. (FAC ¶ 63.) Between January 2014 and March 2014, several individuals who had campaigned on an allegedly anti-Hasidic platform took public office or were elected to public office in the Village and the Town, including Gerardi as Village mayor, Johnson and Roemer as Village trustees, and Herrmann as Town Supervisor. (FAC ¶¶ 12, 72-73.)

In February 2014, the New York State Supreme Court granted the RCC's request for a preliminary injunction enjoining nearly all construction on the Chestnut Ridge project site. (FAC ¶ 77.) The Town, under Herrmann's leadership, and the Village, under Gerardi's leadership, had publicly supported the injunction. (FAC ¶ 75.) The injunction was struck down by the Appellate Division of the New York Supreme Court on June 5, 2014. (FAC ¶ 77.)

The Village Board of Trustees (then comprised of Gerardi, Johnson, and Roemer) responded on June 12, 2014 by passing a moratorium on the issuance of building permits in Bloomingburg (the "Moratorium"). (FAC ¶¶ 13, 78-79, 243, 280,

299, 308, 310, 363.) The Moratorium, which was promulgated pursuant to a message of necessity from Mayor Gerardi (FAC ¶ 79), states that it is intended to

> allocate limited Village resources toward the investigation of a substantial number of complaints about the reported and documented failure of some residential and commercial owners and contractors to comply with the dictates of [local, state, and federal laws and regulations], which non-compliance poses an immediate and substantial risk to the health, safety, and welfare of those living and working in the Village.

(Declaration of Jody T. Cross, ECF No. 69 ("Cross Decl.") ex. C.) The First Amended Complaint alleges that this statement is misleading, because in opposing litigation over the Moratorium, the Village relied almost entirely on complaints submitted after the Moratorium was enacted, none of which concerned new construction. (FAC ¶ 81.) The Moratorium also states that it is intended to "allow the Village Board to undertake a comprehensive review of the Zoning Law of the Village of Bloomingburg and permit the Village Board to review, update, and potentially amend same." (Cross Decl. ex. C.) The Moratorium was enacted for 90 days, with the possibility of three additional 90-day extensions; it will expire on June 11, 2015.[3] (FAC ¶ 14; Cross Decl. ex. C; ECF No. 68 at 3.)

The First Amended Complaint alleges that the Moratorium prevents the construction of housing units with kosher kitchens and "all of the necessary religious requirements." (FAC ¶¶ 87, 279-80.) It also alleges that Gerardi, Rogers, and Village Code Enforcement Officer Joseph Smith work together to enforce the

[3] While outside the four corners of the First Amended Complaint, counsel for the Village represented to the Court at oral argument on April 24, 2015 that the Moratorium would expire on June 11, 2015, implying that it would not be renewed. (Transcript of Oral Argument on April 24, 2015, ECF No. 130 ("Tr.") 13:5-9, 14:10-14.)

Moratorium on a daily basis (FAC ¶ 365), though it does not describe how exactly they do so.

Sullivan Farms and its affiliates are responsible for most, if not all, current building activities in the Village. (FAC ¶ 13.) Sullivan Farms has submitted approximately 80 additional building permit applications, which are still pending and have not been acted on.[4] (FAC ¶¶ 86-87, 335.) To date, Sullivan Farms has completed 51 townhome units, and counsel for plaintiffs represented at oral argument that all of these units remain unsold and unoccupied.[5] (FAC ¶ 63; Tr. 43:5-8; see also Tr. 15:18-20.) Sullivan Farms alleges that the Village's failure to respond to its requests for certificates of occupancy for the completed townhouses explains why sales for the townhomes cannot be closed and why they remain unoccupied. (FAC ¶¶ 48, 64.) The First Amended Complaint also alleges that a landowner erected a 20-foot high wooden cross adjacent to the site.[6] (FAC ¶¶ 2, 69.)

C. The Religious School

Since 2013, plaintiffs the Bloomingburg Jewish Education Center and Learning Tree have sought to build and operate the BJEC, a Hasidic Jewish religious school for children, on Bloomingburg's Main Street. (FAC ¶¶ 4, 93.) Plaintiffs Rosenbaum and Stein wish to send their children to the BJEC, and if the

[4] This factual allegation is consistent with the representation at oral argument by counsel for the Village that 310 of the 396 building permits sought by Sullivan Farms have been issued. (Tr. 15:13-18.)

[5] At oral argument, counsel for the Village represented that Sullivan Farms has "contracts on these 50 units." (Tr. 69:1-5.) The Court notes that at present it has no reason to assume that plaintiffs have failed to comply with Federal Rule of Civil Procedure 11, and at this stage of the litigation accepts plaintiffs' allegations as true.

[6] At oral argument, counsel for the Village represented that the cross was not constructed by the Village or a Village official. (Tr. 69:15-17.)

BJEC is not available, they will homeschool their children or send them to a Jewish school in another town. (See FAC ¶¶ 122-24.)

In July 2013, Learning Tree submitted a site plan application for the school. (FAC ¶ 93.) The plan calls for a building currently constructed for use as an antique car garage to be converted into a schoolhouse, and also calls for the property's driveway and parking lot to be modified in order to accommodate school buses. (FAC ¶¶ 4, 92-93.) The first two times the Village Planning Board met to discuss Learning Tree's application, on August 29, 2013 and September 26, 2013, they were confronted with what Herrmann called "an angry mob scene," and protesting residents of the Village refused to allow the Board to vote on the application. (See FAC ¶¶ 5, 96-101.) At a third hearing on December 12, 2013, and with police present to control the crowd, the Village Planning Board agreed that the application was complete, and then rejected it, to cheers from the crowd. (FAC ¶¶ 5, 104-08.)

Learning Tree challenged the denial in an Article 78 proceeding in the New York State Supreme Court. (FAC ¶¶ 7, 109.) In a two-page order dated May 12, 2014, the New York Supreme Court annulled the Village Planning Board's denial of the site plan application for the BJEC and ordered the Village Planning Board to issue a decision on the site plan application within 30 days and without first holding a public hearing. (FAC ¶ 110; ECF No. 72 ("Dorfman Decl.") ex. B.) The court later extended the deadline to June 30, 2014. (FAC ¶ 110.)

However, instead of issuing a decision on the site plan application, on June 12, 2014, Gerardi, Johnson, and Roemer dissolved the Village Planning Board and the Village Zoning Board of Appeals, and authorized the Village to delegate those entities' responsibilities to the Town. (FAC ¶¶ 7, 179, 200.) On June 17, 2014, the Town agreed, in a document signed by Gerardi and Herrmann (the "inter-municipal agreement" or "IMA"), to assume those responsibilities and accept jurisdiction over the school's site plan application. (FAC ¶¶ 114, 179-80, 202, 222, 246, 267, 299, 301, 308, 310, 312.) The Town then restarted the site plan review process. (FAC ¶¶ 115-20.)

The First Amended Complaint alleges that the Town Planning Board has subsequently used various methods to deliberately stall making a final decision on the project. (See FAC ¶¶ 8, 181.) This process was ongoing as of the time that plaintiffs filed the First Amended Complaint, and the BJEC has yet to open. (FAC ¶ 8.) However, at oral argument on these motions on April 24, 2015, counsel for defendants represented that the site plan for the school was approved in March 2015—and public records of which this Court may take judicial notice confirm this. (Tr. 10:6-8, 26:19-22, 28:25-29:3; see also Town of Mamakating, Planning Board Meeting March 24, 2015 – 7:00 P.M., http://mamakating.org/townmeetingsdetail.php?03-24-2015-853 (last visited May 25, 2015) (listing school site plan approval on agenda for March 24, 2015 Town Planning Board meeting).)

D. The Mikvah

At present, there is no mikvah in Bloomingburg, and plaintiff Rosenbaum alleges that she is burdened by not having a mikvah in Bloomingburg because she

must pay someone to drive her a considerable distance to get to one.[7] (See FAC ¶ 167.) To serve the needs of the area's growing Hasidic community, plaintiff Winterton Properties seeks to open a mikvah in a building at 51 Winterton Road in Mamakating, which was formerly used as a day spa as well as a residence. (FAC ¶¶ 18, 135.) This property is located in the Village Center Zoning District, an area that permits a wide array of uses, including both commercial use and use as a "neighborhood place of worship." (FAC ¶ 18.)

In December 2013, Winterton Properties applied for site plan approval for the mikvah. (FAC ¶ 136.) As explained above, between January 2014 and March 2014, Gerardi, Herrmann, Johnson, and Roemer took public office or were elected to public office. (FAC ¶¶ 12, 72-73.) The First Amended Complaint alleges that in January 2014, Herrmann and another Town official entered the mikvah property without permission and inspected it. (FAC ¶ 136.) Afterward, the Town issued a stop-work order to Winterton Properties, on the ground that Winterton Properties was making improvements without a permit. (FAC ¶ 136.)

On May 12, 2014, the Town's building inspector, after consulting with the attorney for the Town Planning Board, concluded that the use of the property as a mikvah was permitted as of right under the Town's Zoning Local Law as a neighborhood place of worship. (FAC ¶¶ 19, 137.) The Town Planning Board approved the site plan for the property on July 3, 2014, and Winterton Properties

[7] The First Amended Complaint states that the Village received complaints that a private residential pool and/or Jewish-owned buildings were being used as a mikvah. (FAC ¶¶ 15, 84.) Nevertheless, the First Amended Complaint alleges that there is no mikvah available for use in Bloomingburg. (See FAC ¶ 167.)

then applied for demolition and building permits. (FAC ¶ 138.) Occupants of neighboring properties filed an appeal to the Town ZBA, arguing that a mikvah was not an approved use of the property. (FAC ¶¶ 19, 139.) The Town ZBA then reversed the Town building inspector's determination, and ruled that a mikvah is not a neighborhood place of worship, allegedly without providing a reasoned basis for this conclusion, or explaining how a mikvah would be classified. (FAC ¶¶ 19, 140.)

On December 23, 2014, Winterton Properties filed an Article 78 proceeding in the New York State Supreme Court against the Town ZBA challenging the determination as to the mikvah. Winterton Props., LLC v. Town of Mamakating Zoning Bd. of Appeals, No. 2014-2882 (N.Y. Sup. Ct. Dec. 23, 2014). The state court denied the petition, and an appeal is pending before the New York Supreme Court, Appellate Division, Third Judicial Department. See Matter of Winterton Props. LLC v. Town of Mamakating Zoning Bd. of Appeals, Motion No. 520885, 2015 WL 1947567 (N.Y. App. Div. Apr. 27, 2015).

E. Conspiracy, Discriminatory Code Enforcement, and Other Allegations

The First Amended Complaint alleges a conspiracy among the Village Defendants and the Town Defendants to prevent Hasidic Jews from moving into the Bloomingburg area. Herrmann and Gerardi are alleged to be ringleaders of this scheme. As explained above, Herrmann took office as Town Supervisor in January 2014. (FAC ¶ 72.) Herrmann campaigned on the slogan "stop 400 from turning into 4000," and he is alleged to have said that he was elected to "stop the Jewish infiltration," and that he wanted to "keep Jews out of the area." (FAC ¶¶ 20, 72.)

In March 2014, several RCC-backed candidates were elected to public office in the Village: Gerardi as mayor, and Johnson and Roemer as trustees. (FAC ¶ 73.) It is alleged that each had run on a platform of stopping Hasidic Jews from moving into the Village. (FAC ¶ 73.) Gerardi allegedly declared that he was elected to keep "those people" out and to condemn Jewish-owned buildings. (FAC ¶ 20.) He is also alleged to have referred to Jewish people as "those people" or "those things." (FAC ¶¶ 150, 157.) Johnson is alleged to have repeatedly referred to Hasidic women in derogatory terms and to have voiced his objection to their pushing baby carriages on streets in the Village. (FAC ¶ 20.)

The First Amended Complaint alleges that since the 2014 elections, the Village has engaged in a campaign of harassment and discriminatory building code enforcement aimed at Jewish residents and prospective residents of Bloomingburg. After Gerardi's election, the Village replaced the Village engineer, Tom Depuy, allegedly because he refused to condemn Jewish-owned buildings. (FAC ¶ 149.) The Village then cycled through three building inspectors and three code enforcement officers, allegedly because the Village was looking for ones that would act to block Chestnut Ridge and other Jewish developments. (FAC ¶ 149.)

In addition, the First Amended Complaint alleges that the Village has discriminatorily enforced building codes and regulations against Jewish-owned properties and issued frivolous stop-work orders, at the urging of Gerardi, Rogers, and Johnson. (See FAC ¶¶ 133, 149-65.) For instance Gerardi, Rogers, and Johnson allegedly instructed former code enforcement officer Todd Korn to more

strictly enforce land-use rules against Hasidic Jews' properties. (FAC ¶ 150.) The First Amended Complaint further alleges on August 18, 2014, Gerardi trespassed onto Learning Tree's property in order to question a hydrogeologist who was drilling an exploratory potable water well; the Village subsequently issued a stop-work order on the property for the drilling of water supply test wells without a permit, even though no such permitting requirement was in force. (See FAC ¶¶ 153, 155.) Learning Tree alleges that this stop-work order has further delayed the opening of the religious school. (FAC ¶ 156.)

In contrast, a non-Jewish-owned property in the Village has been allowed to continue operating despite alleged code violations. (FAC ¶ 164.) On one occasion, Rogers allegedly advised Korn to ignore a complaint against a non-Jewish-owned property because the owner was "one of us," meaning not Jewish. (FAC ¶ 151.) The Village has also allegedly hired a new code enforcement officer who is Gerardi's friend and who has been assisting Gerardi in obstructing "'Jewish' building in the Village." (FAC ¶ 152.)

Plaintiff Commercial Corner's property at 79 Main Street is alleged to have been a particular target of the Village Defendants' efforts. On one occasion when Gerardi saw Hasidic Jews entering that property, he instructed Korn to throw "those things out," to which Korn responded that he could not prevent the owners of the building from entering and exiting. (FAC ¶ 157.) Korn did, however, issue a stop-work order for the property, which is stayed pending a decision on appeal. (FAC ¶¶ 157-58.) A second stop-work order that allegedly prevents people from

entering the property issued on August 20, 2014; no rationale for the stop-work order was given, and the Village has declined to issue any clarifying information. (FAC ¶ 158.) On another occasion, when a group of 100 Jewish students on a field trip in the Catskill Mountains sought to use the property as a meeting place for morning prayers, which take approximately forty minutes, a building code enforcement officer ordered them to vacate the building and threatened to call the State Police. (FAC ¶ 160.) Plaintiffs also allege that the Village deliberately delayed the opening of a kosher pizza restaurant, although it is unclear where the pizza restaurant is located or who owns it.[8] (FAC ¶¶ 161-63.)

The First Amended Complaint contrasts the alleged treatment of Jewish-owned properties with that of a non-Jewish-owned property on which a business sought to change a warehouse space to a retail store known as the Quickway Thrift Shop. (See FAC ¶ 164.) The conversion has allegedly been allowed to proceed even though the owners have not obtained approvals or necessary permits, the size of the shop's sign violates Village regulations, and a number of complaints have been submitted to the Village. (FAC ¶ 164.) Although the Village has issued a stop-work order to the Quickway Thrift Shop, it remains open for business. (FAC ¶ 164.)

Plaintiffs also allege that the Village is now conspiring with the Town to dissolve itself, which would allow the Town to control all affairs previously conducted by the Village. (FAC ¶ 128.) In May 2014, the Village received proposals for professional services to conduct an urgent dissolution study, and around that

[8] The First Amended Complaint alleges that "[p]laintiffs have tried to open a pizza restaurant," but it does not specify which plaintiffs. (See FAC ¶¶ 161-63.)

time the RCC initiated a dissolution petition, which was signed by Gerardi and two Village trustees. (FAC ¶¶ 129, 131.) The Village Board scheduled a referendum vote on the RCC's dissolution petition for September 30, 2014, during the Jewish High Holy Days. (FAC ¶ 132.) It is evident from the Village's continued existence that the vote failed.

II. PROCEDURAL BACKGROUND

Plaintiffs commenced this litigation on September 8, 2014. (ECF No. 1.) The case was initially assigned to Judge Cathy Seibel. On October 7, 2014, plaintiffs moved for a preliminary injunction prohibiting the Village Defendants from enforcing the Moratorium. (ECF No. 7.[9]) The Court orally denied the motion at a hearing on November 13, 2014. (Cross Decl. ex. D 18:2-10.)

Plaintiffs filed the First Amended Complaint on November 26, 2014. (FAC.) The First Amended Complaint asserts fifteen repetitive causes of action.[10] (FAC ¶¶ 171-370.) In Causes of Action One, Two, Three, Four, and Five, the Bloomingburg Jewish Educational Center, Learning Tree, Rosenbaum, Stein, and Winterton Properties assert claims against all defendants under RLUIPA, 42 U.S.C. § 2000cc

[9] Plaintiffs filed an amended motion for a preliminary injunction on October 7, 2014. (ECF No. 11.)

[10] The Court's description of the causes of action is based on the First Amended Complaint, plaintiffs' representations at oral argument on April 24, 2015, and the chart submitted by plaintiffs on April 27, 2015. (ECF No. 121 ex. 1.) Because plaintiffs were expressly granted leave to file the chart by the Court at oral argument, defendants' argument that the Court should not consider the chart when deciding the pending motions lacks merit. The chart cannot, of course, amend the First Amended Complaint—but given the number of claims and allegations, it provides a useful reference tool as to that which has been alleged. To the extent the chart's content exceeds the pleadings, the Court ignores it. Further, the Court disregards any allegations in the chart that are unsupported by citation to the pleadings.

et seq., relating to the religious school.[11] (FAC ¶¶ 171-276; ECF No. 121.) In Causes of Action Six and Seven, plaintiffs Sullivan Farms, Rosenbaum, and Stein assert claims against the Village, the Village Board of Trustees, Gerardi, Rogers, Roemer, and Johnson under the FHA based on the allegations relating to Chestnut Ridge. (FAC ¶¶ 277-95; ECF No. 121.) In Causes of Action Eight, Nine, Eleven and Twelve, all plaintiffs assert various federal constitutional claims against all defendants based on alleged religious discrimination relating to the school, the mikvah, Chestnut Ridge, and the alleged conspiracy regarding the discriminatory and arbitrary enforcement of the Village's land use scheme. (FAC ¶¶ 296-316, 332-48; ECF No. 121.) In Cause of Action Ten, all plaintiffs assert a federal due process claim against the Village, the Village Board of Trustees, Gerardi, Johnson, Roemer, and Rogers based on their allegations relating to the Moratorium and the discriminatory and arbitrary enforcement of the Village's land use scheme. (FAC ¶ 317-31; ECF No. 121.) In Cause of Action Thirteen, all plaintiffs assert a § 1985 civil rights conspiracy claim against all defendants. (FAC ¶¶ 349-54; ECF No. 121.) In Causes of Action Fourteen and Fifteen, plaintiffs assert claims under New York state law that mirror plaintiffs' federal claims under Causes of Action Eight through Thirteen. (See FAC ¶¶ 355-70; ECF No. 121.) Plaintiffs seek damages, injunctive relief, costs, disbursements, and attorneys' fees. (FAC.)

[11] The Court declines to construe plaintiffs' RLUIPA claim as asserted based on the allegations relating to the mikvah. Although plaintiffs have at several points stated that their RLUIPA claims are predicated in part on the mikvah allegations (see, e.g., FAC ¶¶ 182-88, ECF No. 121 ex. 1 at 2-3; Tr. 43:23-44:2), plaintiffs have never adequately explained how the mikvah allegations are sufficient to support a claim under that statute—indeed, this point was barely covered in plaintiffs' opposition briefs or at oral argument. It is not this Court's duty to connect the necessary dots for plaintiffs. Plaintiffs' allegations regarding the mikvah are insufficient to support a RLUIPA claim.

On February 27, 2015, this litigation was reassigned to the undersigned. Defendants filed the instant motions to dismiss on March 5, 2015. (ECF Nos. 67, 71.) Plaintiffs submitted their opposition that same day. (ECF Nos. 70, 74.) Defendants submitted reply briefs on March 13, 2015. (ECF Nos. 80, 82.)

On April 24, 2015, the Court held oral argument on the motions. At oral argument, the Court granted plaintiffs leave to file a chart summarizing the fifteen causes of action in the First Amended Complaint; plaintiffs submitted the chart on April 27, 2015. (ECF No. 121.) On April 28, 2015, plaintiffs submitted a letter addressing several questions on legislative immunity raised by the Court during oral argument. (ECF No. 122.) On April 29, 2015, defendants submitted a letter in opposition to the chart. (ECF No. 123.) The Court then, in an order dated April 30, 2015, informed the parties that it would not accept further submissions on the pending motions to dismiss. (ECF No. 124.) Defendants requested permission to file a letter in response to plaintiffs' April 28, 2015 letter on legislative immunity, and the Court denied the request. (ECF No. 126.)

III. MOTION TO DISMISS STANDARD

A. Rule 12(b)(6) Standard

To survive a Rule 12(b)(6) motion to dismiss, "the plaintiff must provide the grounds upon which [its] claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). In other words, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." Starr v. Sony BMG Music Entm't, 592

F.3d 314, 321 (2d Cir. 2010) (quoting Twombly, 550 U.S. at 570); see also Iqbal, 556 U.S. at 678 (same). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949.

The Court must accept as true—for purposes of this motion only—the facts as alleged in the pleadings, and the Court must draw all inferences in plaintiffs' favor. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. at 555-57). Thus, if a fact is susceptible to two or more competing inferences, in evaluating these motions, the Court must, as a matter of law, draw the inference that favors the plaintiff so long as it is reasonable. N.J. Carpenters, 709 F.3d at 121. "[T]he existence of other, competing inferences does not prevent the plaintiff[s'] desired inference from qualifying as reasonable unless at least one of those competing inferences rises to the level of an obvious alternative explanation." Id. (internal quotation marks omitted).[12]

The Court does not, however, credit "mere conclusory statements" or "threadbare recitals of the elements of a cause of action." Id. If the court can infer no more than "the mere possibility of misconduct" from the factual averments—in other words, if the well-pleaded allegations of the complaint have not "nudged claims across the line from conceivable to plausible," dismissal is appropriate. Twombly, 550 U.S. at 570; Starr, 592 F.3d at 321 (quoting Iqbal, 129 S. Ct. at 1950).

[12] In their briefs, defendants argue that many of the allegations in the First Amended Complaint are false or misleading. However, at this stage plaintiffs are entitled to reasonable inferences being drawn in their favor. Discovery may make clear that there either is or is not a triable issue as to plaintiffs' claims.

B. Judicial Notice

In deciding a Rule 12(b)(6) motion, the Court may consider facts alleged in the complaint and documents attached to it or incorporated in it by reference, Rothman v. Gregor, 220 F.3d 81, 88 (2d Cir. 2000), as well as documents that are integral to the complaint and relied upon in it, even if not attached or incorporated by reference, Broder v. Cablevision Sys. Corp., 418 F.3d 187, 196 (2d Cir. 2005). The Court may also properly consider matters of public record of which it may take judicial notice. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007) (a court may consider "matters of which a court may take judicial notice" on a Rule 12(b)(6) motion to dismiss); Blue Tree Hotels. Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 217 (2d Cir. 2004) ("[W]e may also look to public records . . . in deciding a motion to dismiss.").

Under Federal Rule of Evidence 201, the Court may take judicial notice of a fact if it "(1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). When the Court takes judicial notice of a document, it takes notice of the document's existence, not the truth of the statements asserted in the document. Global Network Commc'ns, Inc. v. City of New York, 458 F.3d 150, 157 (2d Cir. 2006). "Facts admitted by a party are judicial admissions that bind that party throughout the litigation." Hoodho v. Holder, 558 F.3d 184, 191 (2d Cir. 2009) (internal quotation marks and alterations omitted).[13]

[13] Rule 8 provides that a defendant is entitled to notice of the claims brought against him, Fed. R. Civ. P. 8(a), and Twombly makes clear that at the pleading stage in a conspiracy case, that means

IV. DISCUSSION

A. Threshold Issues

1. Abstention.

The Town Defendants argue that the Court should abstain from hearing plaintiffs' claims relating to the mikvah in light of Winterton Properties' pending Article 78 challenge to the Town ZBA's decision. The Court declines to do so, as the instant litigation and the pending state court action concerning the mikvah involve different rights and different remedies, and no factors counsel toward abstention here.

Under the abstention doctrine first set forth by the Supreme Court in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), in certain "exceptional circumstances, a federal court may abstain from exercising jurisdiction when parallel state-court litigation could result in comprehensive disposition of litigation and abstention would conserve judicial resources." Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist., 673 F.3d 84, 100 (2d Cir. 2012) (citations and internal quotation marks omitted). "Suits are parallel when substantially the same parties are contemporaneously litigating substantially the same issue in another forum." Id. (quoting Dittmer v. County of Suffolk, 146 F.3d 113, 118 (2d Cir. 1998)).

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that each defendant is entitled to know how he is alleged to have conspired, with whom and for what purpose, see Twombly, 550 U.S. at 557–58. Defendants argue that the First Amended Complaint should be dismissed on the sole ground that the First Amended Complaint is unclear as to which claims plaintiffs are asserting against which defendants. While the First Amended Complaint casts a broad net and is not a model of clarity, it is not so deficient in this regard so as to justify dismissal under Rule 8.

First, the instant litigation and Winterton Properties' pending Article 78 challenge are not duplicative, as they involve different rights and different remedies. In that Article 78 proceeding, Winterton Properties seeks the reversal of the Town ZBA's determination that a mikvah is not a neighborhood place of worship on state law grounds. In this litigation, plaintiffs seek both injunctive relief and damages, and their claims are primarily based on federal law. Thus, the state court cannot provide plaintiffs with all of the relief they seek here for their claims based on the mikvah.

Further, in evaluating whether Colorado River abstention is appropriate, federal district courts consider six factors:

> (1) whether the controversy involves a res over which one of the courts has assumed jurisdiction; (2) whether the federal forum is less inconvenient than the other for the parties; (3) whether staying or dismissing the federal action will avoid piecemeal litigation; (4) the order in which the actions were filed, and whether proceedings have advanced more in one forum than in the other; (5) whether federal law provides the rule of decision; and (6) whether the state procedures are adequate to protect the plaintiff's federal rights.

Id. at 100-01 (quoting Woodford v. Cmty. Action Agency of Greene Cnty., Inc., 239 F.3d 517, 522 (2d Cir. 2001)). No one factor is determinative, and the balance is "heavily weighted in favor of the exercise of jurisdiction." Id. at 100-01 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 16 (1983)). "Only the clearest of justifications will warrant dismissal." Id. at 101 (quoting Colorado River, 424 U.S. at 819). These six factors do not weigh against abstention here: (1) this controversy does not involve a res; (2) the two forums are located

within a geographically compact area; (3) dismissing the federal claims relating to the mikvah will do nothing to avoid piecemeal litigation, as both actions will continue after the issuance of this Opinion & Order regardless of whether the Court abstains from hearing the mikvah claim; (4) this action was filed three months before the state court action; (5) federal law provides the rules of decision for all of plaintiffs' claims that survive this decision; and (6) a determination in the Article 78 proceeding cannot fully compensate plaintiffs for past injuries as only "incidental" damages are available in an Article 78 proceeding. Kirschner v. Klemons, 225 F.3d 227, 238 (2d Cir. 2000).

Accordingly, the Court declines to abstain from hearing plaintiffs' claims relating to the mikvah under Colorado River.

2. Mootness and ripeness.

Defendants argue that plaintiffs' claims that are based on the allegations regarding the religious school should be dismissed on mootness and ripeness grounds. In light of the issuance of the site plan approval for the religious school, and given that there are no allegations of further applications for approvals or permits, the Court agrees.

Pursuant to Article III of the Constitution, federal courts may only entertain actual cases or controversies. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). A matter is an actual case or controversy only if the matter is not moot. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc., 528 U.S. 167, 189 (2000). A matter is not moot if it is "real and live, not feigned, academic or conjectural." Russman v. Bd. of Educ., 260 F.3d 114, 118 (2d Cir. 2001); see also Powell v.

McCormack, 395 U.S. 486, 489 (1969). A case is not moot, however, if there is a reasonable expectation that the alleged violation may recur, see Murphy v. Hunt, 455 U.S. 478, 482 (1982), or if the underlying dispute is "capable of repetition, yet evading review," Irish Lesbian & Gay Org. v. Giuliani, 143 F.3d 638, 647 (2d Cir. 1998) (quoting Neb. Press Ass'n v. Stuart, 427 U.S. 539, 546 (1976)).

"Ripeness is a doctrine rooted in both Article III's case or controversy requirement and prudential limitations on the exercise of judicial authority." Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 347 (2d Cir. 2005). A claim is not ripe if it involves contingent future events that may or may not occur. See Thomas v. Union Carbide Agr. Prods. Co., 473 U.S. 568, 580-81 (1985). The Supreme Court has also "developed specific ripeness requirements applicable to land use disputes." Murphy, 402 F.3d at 347. One of these requirements is that the government entity in question "has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 191 (1985).

"[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." Id. at 193. The final-decision requirement applies to challenges to land use determinations based on the Constitution and RLUIPA. See Sunrise Detox V, LLC v. City of White Plains, 769 F.3d 118, 122 (2d Cir. 2014). It also applies to land use disputes arising under New York law. Congregation

Rabbinical Coll. of Tartikov, Inc. v. Village of Pomona, 915 F. Supp. 2d 574, 598 (S.D.N.Y. 2013) (collecting cases). Although the final-decision requirement should be applied cautiously in the First Amendment context, it must be applied nonetheless. See Murphy, 402 F.3d at 350-51.

The final-decision requirement is not "mechanically applied," and a plaintiff in a land use case may be "excused from obtaining a final decision if pursuing an appeal to a zoning board of appeals or seeking a variance would be futile," such as when "a zoning agency . . . has dug in its heels and made clear that all such applications will be denied." Id. at 349. District courts "have found that in order to invoke the futility exception, a plaintiff must demonstrate: (1) the inevitability of refusal of their application, taking into consideration factors such as the defendants' hostility, delay and obstruction; and (2) that plaintiff has filed at least one meaningful application." Quick Cash of Westchester Ave. LLC v. Village of Port Chester, No. 11–CV–5608 (CS), 2013 WL 135216, at *8 (S.D.N.Y. 2013) (quoting Osborne v. Fernandez, No. 06-CV-4127, 2009 WL 884697, at *5 (S.D.N.Y. Mar. 31, 2009)). Futility does not exist merely because public officials are hostile to the proposal at issue. See, e.g., S&R Dev. Estates, LLC v. Bass, 588 F. Supp. 2d 452, 463 (S.D.N.Y. 2008) (collecting cases); see also Quick Cash, 2013 WL 135216, at *8 ("[A]llegations of hostility or bad faith are insufficient to invoke the futility exception.").

Plaintiffs' claims with regard to the religious school must be dismissed on both mootness and ripeness grounds. The site plan for the school was approved in

March 2015. Thus, to the extent plaintiffs' claims concerning the religious school are based on defendants' delay in issuing site plan approval, these claims are no longer "real and live." Russman, 260 F.3d at 118. Further, the First Amended Complaint provides no basis on which this Court may infer that now that site plan approval has been given, it is reasonably likely to be revoked. Plaintiffs' claims concerning the site plan approval for the religious school must be dismissed as moot.[14]

Further, to the extent plaintiffs' claims concerning the religious school are predicated on the Town's determinations as to the remaining steps in the process for completing the BJEC project, these claims are not ripe. There is no allegation that plaintiffs have yet made any such applications, and the Town's approval of the site plan undercuts the argument that doing so would be futile. The Town Defendants' past hostility to the BJEC is insufficient, standing alone, to justify invoking the futility exception here. Accordingly, plaintiffs' claims concerning the religious school are dismissed. This disposes of all claims by plaintiff the Bloomingburg Jewish Education Center. Further, as the allegations against the

[14] It is unclear from the First Amended Complaint whether plaintiffs seek monetary damages in connection with their claims concerning the alleged delaying of the site plan approval for the religious school. Insofar as they do, the First Amended Complaint does not contain any specific allegations that any plaintiff suffered financial injury as a result of the BJEC's inability to open to date. The First Amended Complaint does allege that Rosenbaum and Stein will have to homeschool their children or send them to a Jewish school in another town (FAC ¶¶ 5, 122-23)—but it does not allege that doing either of these things will be more expensive than sending their children to the BJEC, nor can the Court properly infer that this is the case given the dearth of relevant allegations. Rosenbaum's bare allegation that her need to homeschool her children has prevented her from obtaining a job (FAC ¶ 124) is likewise insufficient to support a claim for damages. The Bloomingburg Jewish Education Center and Learning Tree similarly provide no detail as to the nature of the injury that they have suffered, beyond mere delay. Accordingly, to the extent that plaintiffs seek monetary damages stemming from the delay in the site plan application for the religious school, these claims are independently subject to dismissal for failure to satisfy the pleading requirements of Twombly.

Village Planning Board,[15] the Town Board,[16] the Town Planning Board,[17] and Finnema, Heanelt, and Roe[18] solely concern the religious school, all claims against them are accordingly dismissed.[19]

3. Article III standing.[20]

Plaintiffs' claims that are based on the Village's alleged campaign of discriminatory code enforcement must be dismissed due to lack of Article III standing because no plaintiff has alleged that they have suffered an actual, particularized injury as a result of this campaign. Further, plaintiffs lack standing to bring claims regarding the Village's consideration and pursuit of its own

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[15] The allegations against the Village Planning Board only implicate the site plan application for the religious school. (See, e.g., FAC ¶¶ 5, 104-08.)

[16] The Town Board is alleged only to have signed the IMA, which relates only to the claims concerning the religious school. (See FAC ¶¶ 38, 113, 180, 202, 222, 246, 267, 301, 312.)

[17] The Town Planning Board is alleged to have (1) delayed the site plan application for the religious school (see, e.g., FAC ¶¶ 115, 179), and (2) to have approved the site plan for the mikvah (FAC ¶ 138), only to have this approval reversed on appeal by the Town ZBA (FAC ¶¶ 139-40). However, since the Town Planning Board's decision as to the mikvah was favorable to plaintiffs, only the allegations concerning the religious school could support a claim against the Town Planning Board.

[18] Finnema, Heanelt, and Roe are alleged only to have been members of the Village Planning Board (see FAC ¶¶ 6, 34-36, 99-100, 105-06, 179, 200, 240, 298, 307), the allegations against which only implicate the site plan application for the religious school (see supra note 15).

[19] To the extent plaintiffs assert claims based on Town-imposed limits on plaintiffs' properties that are under consideration but have yet to be passed (see FAC ¶ 148), or based on the Village's consideration and pursuit of dissolving itself (see FAC ¶¶ 335, 341), these claims too are dismissed as unripe.

[20] The Court notes that defendants do not challenge the standing of any of the corporate plaintiffs to assert constitutional claims, and that Supreme Court and Second Circuit precedent suggest that corporations may assert claims under the First Amendment, the Equal Protection Clause, and the Due Process Clause of the Fourteenth Amendment. See, e.g., Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2772-73 (2014) (suggesting that a corporation has standing to bring a claim under the Free Exercise Clause); Barrett v. United States, 689 F.2d 324, 333 (2d Cir. 1982) ("Corporations, because they are associations of individuals united for a special purpose, have long been viewed as persons for due process purposes." (internal quotation marks omitted)); Hudson Valley Freedom Theater, Inc. v. Heimbach, 671 F.2d 702, 706-07 (2d Cir. 1982) (a corporation has standing to bring an equal protection claim based on discrimination against members of a protected class).

dissolution because plaintiffs do not allege that such dissolution is certainly impending.

Under Article III of the Constitution, federal courts may only exercise jurisdiction over actual cases or controversies. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013). "'One element of the case-or-controversy requirement' is that plaintiffs 'must establish that they have standing to sue.'" Id. (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)). To establish Article III standing, a plaintiff must allege an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Id. at 1147 (quoting Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149 (2010)). The Supreme Court has "repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact and that allegations of possible future injury are not sufficient." Id. (alterations and internal quotation marks omitted) (emphasis in original).

Plaintiffs have brought several constitutional claims pursuant to § 1983 and § 1985 based on the Village's allegedly discriminatory application and enforcement of the New York State Building Code. However, plaintiffs' vague allegations that the Village has discriminated against "[p]laintiffs' properties" (FAC ¶ 149), "Jewish-owned properties" (FAC ¶ 151), and "'Jewish' building in the Village" (FAC ¶ 152) are insufficient to support Article III standing because they are unconnected to any concrete, particularized alleged injury. Plaintiffs similarly lack standing to bring claims based on the allegations regarding the pizza restaurant, as none of them

alleges an ownership interest in the pizza restaurant or the property on which it was located.

The only two plaintiffs who actually allege that they suffered particularized injuries as a result of acts of discriminatory building code enforcement are Learning Tree and Commercial Corner. Learning Tree alleges that the Village's August 28, 2014 stop-work order forced a well driller off the BJEC project site, which allegedly injured Learning Tree by further delaying the opening of the religious school. (FAC ¶¶ 155-56.) However, Learning Tree does not explain how this stop-work order has delayed the opening of the religious school beyond the length of time required to obtain the necessary approvals—and, as explained above, plaintiffs have not alleged that they have yet made all of the necessary applications. Accordingly, it is implausible that Learning Tree has suffered an injury in fact as a result of the August 28, 2014 stop-work order, and Learning Tree therefore lacks Article III standing to bring claims based on the Village's allegedly discriminatory enforcement of the New York State Building Code.

Commercial Corner likewise lacks Article III standing to bring such claims. Commercial Corner alleges that the Village has issued two stop-work orders to 79 Main Street, one of which has been stayed and the other of which is currently preventing people from entering the property. (FAC ¶¶ 157-58.) Commercial Corner also alleges that on August 20, 2014, a building code enforcement officer ordered a student prayer group to leave the premises. (FAC ¶ 160.) However, the First Amended Complaint provides absolutely no detail on the effects of the second

stop-work order on Commercial Corner. Is Commercial Corner losing rental or business revenues as a result? Has the opening of the hardware store that plans to open on Learning Tree's property been delayed? Is Commercial Corner being prevented from making improvements to the property? There are no such allegations. Further, it is unclear from the First Amended Complaint how exactly Commercial Corner itself has been injured by its inability to host a student prayer group on its premises on a single occasion. Because Commercial Corner has failed to set forth any particularized allegations of concrete hardships or damages flowing from the stop-work order or from when the student prayer group was forced off its property, it has thus failed to plead an injury in fact, and therefore lacks standing to bring claims based on acts of allegedly discriminatory building code enforcement.[21]

Accordingly, all of plaintiffs' claims against the Village that are predicated on the allegedly discriminatory enforcement of the New York State Building Code are dismissed in their entirety due to lack of standing. Plaintiffs also lack standing under Article III to bring claims based on the Village's consideration of and steps toward dissolving itself. The First Amended Complaint does not state that any such dissolution has occurred or certainly will occur, and as the Supreme Court has repeatedly and clearly stated, possible future injuries are insufficient to support Article III standing. Clapper, 133 S. Ct. at 1147.

[21] On the same basis, Commercial Corner's claims must also be dismissed under Twombly due to lack of specificity.

4. Redundant state law claims.

Plaintiffs' New York state law claims under §§ 3, 6, and 11 of the New York Constitution as well as their request for an injunction on state law grounds against the Moratorium must be dismissed as redundant. The New York Constitution's due process, equal protection, and free exercise protections are essentially coextensive with those provided by the federal Constitution. See Town of Southold v. Town of E. Hampton, 477 F.3d 38, 52 n.3 (2d Cir. 2007) ("[T]he Equal Protection Clauses of the federal and New York Constitutions are coextensive . . . ."); Algarin v. N.Y.C. Dep't of Corr., 460 F. Supp. 2d 469, 478 (S.D.N.Y. 2006) ("The New York State Constitution's guarantee of due process is virtually coextensive with that of the U.S. Constitution."); In re Miller, 684 N.Y.S.2d 368, 370-71 (N.Y. App. Div. 1998) (analyzing free exercise claim under the New York Constitution based on federal case law and noting that "[t]he Court of Appeals has not definitively stated whether the scope of that provision is coextensive with the Free Exercise Clause of the First Amendment of the U.S. Constitution"). There is no private right of action for violations of the New York State Constitution where alternative remedies exist, for example under § 1983. E.g., Sherman v. Town of Chester, No. 12 Civ. 647(ER), 2015 WL 1473430, at *14 (S.D.N.Y. Mar. 31, 2015); Mahone v. City of New York, No. 13 Civ. 8014(PAE), 2014 WL 1407702, at *7 (S.D.N.Y. Apr. 10, 2014). "[D]ismissal of state law claims is generally appropriate where 'state law provides no theory for additional damages.'" Mitarotonda v. Gazzola, 172 F.3d 38, 38 (2d Cir. 1999) (summary order) (quoting Segendorf-Teal v. Cnty. of Rensselaer, 100 F.3d 270, 277 (2d Cir. 1996)).

Cause of Action Fourteen, which asserts claims under the New York Constitution, is based on the same factual allegations as and seeks the same relief as Causes of Action Eight, Nine, Ten, Eleven, Twelve, and Thirteen, which assert claims under the federal constitution, § 1983, and § 1985. (See ECF No. 121 at 7-8.) Accordingly, Cause of Action Fourteen must be dismissed.

Cause of Action Fifteen seeks an injunction against the enforcement of the Moratorium on the grounds that it is arbitrary and capricious under New York state law. This claim is based on the same allegations and seeks the same relief as plaintiffs' federal due process claims, under which arbitrary and capricious government conduct is unlawful. See Kurtz v. Verizon N.Y., Inc., 758 F.3d 506, 514 (2d Cir. 2014). Accordingly, Cause of Action Fifteen is dismissed as redundant.

Plaintiffs argue that the dismissal of their state law religious liberty claims at this stage would be premature, citing Fortress Bible Church v. Feiner, 734 F. Supp. 2d 409 (S.D.N.Y. 2010), Tartikov, 915 F. Supp. 2d 574, and People v. Kern, 75 N.Y.2d 638 (1990). As to Fortress Bible Church and Tartikov, the fact that district courts have in certain circumstances permitted both federal and state law claims to go forward does not imply that this Court must do so here. Further Kern is inapposite, as that case was a state court criminal case that did not involve federal constitutional claims for relief. Accordingly, plaintiffs' arguments against dismissal of their state law claims lack merit.

B. § 1983 Claims

Plaintiffs Rosenbaum, Stein, Winterton Properties, and Sullivan Farms[22] have brought several federal constitutional claims against defendants via § 1983. Those which have not already been dismissed above concern the mikvah and Chestnut Ridge. As will be explained below, plaintiffs Rosenbaum, Winterton Properties, and Sullivan Farms (but not Stein) have stated plausible First Amendment, equal protection, and due process claims based on the mikvah allegations, as well as plausible equal protection and due process claims based on the Chestnut Ridge allegations.

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." West v. Atkins, 487 U.S. 42, 48 (1988) (citations omitted). Municipalities and other local government units may be held liable under § 1983. Monell v. Dep't of Social Servs. of City of N.Y., 436 U.S. 658, 690 (1978). To hold a municipality liable for a § 1983 claim, a plaintiff must ultimately prove that an official municipal policy or custom caused the constitutional injury. See Connick v. Thompson, 131 S. Ct. 1350, 1359 (2011).

To make out a colorable claim of municipal liability, a plaintiff must allege: "(1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right." Wray v. City of New York, 490 F.3d 189, 195 (2d

[22] These are the plaintiffs whose claims have not been dismissed under the threshold analyses above.

Cir. 2007) (internal quotation marks and citation omitted). "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." Connick, 131 S. Ct. at 1359.

1. First Amendment.

All plaintiffs whose claims have not yet been dismissed—Rosenbaum, Stein, Winterton Properties, and Sullivan Farms—allege that defendants have violated their right to free exercise of religion and freedom of association under the First Amendment by thwarting the mikvah project and delaying the development of Chestnut Ridge. Plaintiffs Winterton Properties and Rosenbaum have stated a cognizable First Amendment claim against the Town, the Town ZBA, and Herrmann as to the mikvah, which is a facility that is clearly used for ritual practices. Plaintiffs have not stated a cognizable First Amendment claim as to Chestnut Ridge, which bears only a tenuous tie to any particular plaintiff's own religious worship and observance.

The First Amendment prohibits government actions that "substantially burden the exercise of sincerely held religious beliefs" unless those actions "are narrowly tailored to advance a compelling government interest." Fortress Bible Church v. Feiner, 694 F.3d 208, 220 (2d Cir. 2012) (quoting Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570, 574 (2d Cir. 2002)). When a plaintiff claims their rights under the Free Exercise Clause have been violated, they must demonstrate that the official conduct at issue operated coercively against them "in the practice of [their] religion." Harris v. McRae, 448 U.S. 297, 321 (1980) (quoting

Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963)). A law or regulation that is neutral and of general applicability is constitutional even if it has an incidental effect on religion. See Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878 (1990). However, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993).

The First Amendment right to freedom of association protects a person's right to enter into "intimate human relationships" as well as associations for the purpose of exercising other First Amendment liberties including "speech, assembly, petition for the redress of grievances, and the exercise of religion." Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984).

Plaintiffs Winterton Properties and Rosenbaum have stated a First Amendment claim against the Town, the Town ZBA, and Herrmann under the First Amendment. According to plaintiffs, the stymying of the mikvah project started with the Town's issuance of a stop-work order to Winterton Properties following a personal inspection of the mikvah property by Herrmann, which in turn occurred around the time Herrmann took office as Town Supervisor in January 2014. Plaintiffs allege that Herrmann's and the Town's actions with regard to the mikvah stem from improper, discriminatory motives on Herrmann's part, as shown by his role in founding the allegedly anti-Hasidic RCC, his campaign slogan "stop 400 from turning into 4000," his appointment of opponents of the Hasidic community to town

boards, and his alleged public comments regarding his desire to keep Jews from moving into the Town. Plaintiffs further allege that the Town ZBA, whose chair was appointed by Herrmann, overturned the Town Planning Board's approval of the site plan for the property without providing a reasoned basis for its conclusion or explaining why a mikvah is not a neighborhood place of worship.

Given this sequence of events, at this stage in the litigation, plaintiffs are entitled to the reasonable inference that the stop-work order and the Town ZBA's determination were designed to coercively prevent Hasidic Jewish residents of Bloomingburg such as Rosenbaum and property owners affiliated with the Hasidic Jewish community such as Winterton Properties from exercising their religion and associating with others to do the same. Further, according to plaintiffs' allegations the Town's actions with respect to the mikvah did not advance any legitimate government interest. Therefore, plaintiffs Winterton Properties and Rosenbaum have stated valid free exercise and freedom of association claims against the Town, the Town ZBA, and Herrmann.

However, plaintiffs' allegations regarding Chestnut Ridge are only tenuously tied to actual religious practices by plaintiffs, and are accordingly insufficient to support plausible claims for relief under the First Amendment. The only way in which plaintiffs connect the Chestnut Ridge housing developing with the practice of religion is through the First Amended Complaint's allegation that the Moratorium has prevented the construction of housing units with kosher kitchens and "all of the necessary religious requirements." (FAC ¶¶ 87, 279-80.) But the only two plaintiffs

who could theoretically have standing to bring such a claim are Rosenbaum and Stein. Yet the First Amended Complaint does not allege that Rosenbaum and Stein have been prevented from obtaining housing with kosher kitchens, nor does it allege that any individual in Bloomingburg has been prevented from converting an existing kitchen to a kosher kitchen, or whether a permit or license is required to do so and, if so, whether any such applications have been made. Nor do Rosenbaum and Stein allege that the lack of kosher kitchens has hindered their ability to observe kosher dietary laws while living in Bloomingburg. Nor do plaintiffs specify what the other "necessary religious requirements" are. Plaintiffs' allegations regarding Chestnut Ridge are simply too tenuously connected with actual religious practice to support a plausible First Amendment Claim.

2. Equal Protection Clause.

All plaintiffs whose claims have not yet been dismissed—Rosenbaum, Stein, Winterton Properties, and Sullivan Farms—allege that the Town Defendants' actions to prevent the development of a mikvah and the Village Defendants' enactment of the Moratorium and failure to issue certificates of occupancy for units at Chestnut Ridge have violated their rights under the Equal Protection Clause, which prohibits state actors from discriminating on the basis of religion. Knight v. Conn. Dep't of Public Health, 275 F.3d 156, 166 (2d Cir. 2001). The Court agrees that plaintiffs have stated valid equal protection claims. Specifically, Rosenbaum and Winterton Properties have stated a valid equal protection claim against the Town, the Town ZBA, and Herrmann, and Sullivan Farms has stated a valid equal protection claim against the Village, the Village Board of Trustees, Gerardi,

Johnson, and Roemer, but not against Rogers. The allegations regarding plaintiff Stein are insufficient to support an equal protection claim.

There are several ways for a plaintiff to plead intentional religious discrimination that violates the Equal Protection Clause: (1) a plaintiff could point to a law or policy that expressly classifies persons on the basis of religion; (2) a plaintiff could allege that a facially neutral law or policy has been applied in an intentionally discriminatory manner; or (3) a plaintiff could allege that a facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus. See Brown v. City of Oneonto, N.Y., 221 F.3d 329, 337 (2d Cir. 1999). Discriminatory intent may be evidenced by such factors as disproportionate impact, the historical background of the challenged decision, antecedent events, departures from normal procedures, and contemporary statements by decisionmakers. Vill. of Arlington Heights v. Metro Housing Dev. Corp., 429 U.S. 252, 266-68 (1977). "A plaintiff alleging an equal protection claim under a theory of discriminatory application of the law, or under a theory of discriminatory motivation underlying a facially neutral policy or statute, generally need not plead or show the disparate treatment of other similarly situated individuals." Pyke v. Cuomo, 258 F.3d 107, 108-09 (2d Cir. 2001).

Plaintiffs Rosenbaum and Winterton Properties have stated a plausible equal protection claim against the Town, the Town ZBA, and Herrmann based on the allegations pertaining to the mikvah. Essentially, Rosenbaum and Winterton Properties argue that the stop-work order issued to Winterton Properties and the

Town ZBA's determination that the mikvah is not a neighborhood place of worship constitute applications of otherwise facially neutral policies that were designed to intentionally discriminate against Winterton Properties because it is affiliated with the Hasidic Jewish community. Plaintiffs' allegations of discriminatory motivation and intent are sufficient to support such a claim. As explained above in the discussion of Rosenbaum's and Winterton Properties' First Amendment claims, Town Supervisor Herrmann is alleged to have founded the anti-Hasidic RCC and to have publicly opposed Hasidic Jews' moving into the Town, and the stymying of the mikvah project is alleged to have started shortly after Herrmann took office as Town Supervisor. Further, the Town ZBA is alleged to have provided no reasoned basis for its conclusion that a mikvah is not a neighborhood place of worship. These allegations are sufficient to support an equal protection claim by Rosenbaum and Winterton Properties against the Town, the Town ZBA, and Herrmann.

As to Chestnut Ridge, plaintiff Sullivan Farms has stated a plausible equal protection claim against the Village, the Village Board of Trustees, Gerardi, Johnson, and Roemer, but not against Rogers. Sullivan Farms alleges that the Moratorium, which is a facially neutral statute or policy, has had an adverse effect on the Chestnut Ridge project (which is responsible for most, if not all, current building activities in the Village), and that the Village has failed to issue certificates of occupancy for the 51 completed townhome units at Chestnut Ridge, notwithstanding whatever assumedly facially neutral policy the Village has in place for the issuance of certificates of occupancy.

Further, plaintiffs have provided detailed and legally sufficient allegations that lead to the reasonable inference that in taking these actions, the Village, the Village Board of Trustees, Gerardi, Johnson, and Roemer were motivated by discriminatory animus and intentionally acted to discriminate against Hasidic Jews. For instance, Mayor Gerardi, who voted for the Moratorium, is alleged to have campaigned for office on a platform that openly opposed Hasidic Jews moving into Bloomingburg; to have received political support from the RCC, an allegedly anti-Hasidic organization; and to have referred to Jewish people as "those things." (FAC ¶ 157.) Johnson and Roemer, who also voted for the Moratorium, were elected on what are alleged to have been anti-Hasidic platforms and with RCC support, and Johnson has allegedly made several derogatory remarks about Hasidic women. Further, the Moratorium was passed only a week after the injunction was struck down by the Appellate Division of the New York Supreme Court, and several months after a rising tide of anti-Hasidic sentiment in the Village led to the election of several individuals who had run on openly anti-Hasidic platforms. The allegations in the First Amended Complaint can therefore support Sullivan Farms' equal protection claim based on the Chestnut Ridge allegations.

However, Sullivan Farms has failed to state an equal protection claim against Rogers. Rogers did not vote for the Moratorium and is not alleged to have been involved in the Village's failure to issue certificates of occupancy to Sullivan Farms. Rather, Rogers is alleged only to work with Gerardi and a Village code enforcement officer to enforce the Moratorium. (FAC ¶ 365.) The First Amended

Complaint provides no detail as to what actions Roger has taken in this regard. This bare, vague allegation is insufficient to support an equal protection claim against Rogers.

As to plaintiff Stein, she alleges only that she resides in Bloomingburg (FAC ¶ 26), she desires to send her children to the BJEC (FAC ¶ 26), and that she currently sends her children to schools in Kiryas Joel, another nearby town (FAC ¶ 123). As Stein does not allege any connection to the mikvah allegations or the Chestnut Ridge allegations, her equal protection claim must be dismissed.

In sum, Rosenbaum and Winterton Properties have stated a valid equal protection claim against the Town, the Town ZBA, and Herrmann, and Sullivan Farms has stated a valid equal protection claim against the Village, the Village Board of Trustees, Gerardi, Johnson, and Roemer. The allegations as to Stein are insufficient under Twombly to support any equal protection claim by her.

3. Due Process Clause.

Plaintiffs argue that the Village's enactment of the Moratorium was arbitrary and therefore violated their federal due process rights.[23] The only plaintiff with standing to bring such a claim is Sullivan Farms, which has stated a cognizable due process claim against the Village, the Village Board of Trustees, Gerardi, Johnson, and Roemer.

To state a claim under the Due Process Clause a party must allege that "(a) there has been a deprivation of liberty or property in the constitutional sense; and

[23] Plaintiffs do not assert any federal due process claims against the Town Defendants. (See FAC ¶¶ 317-331; ECF No. 121.)

(b) the procedures used by the state to effect this deprivation were constitutionally inadequate." Rivera v. Marcus, 696 F.2d 1016, 1022 (2d Cir. 1982) (citations omitted). "Substantive due process requires only that economic legislation be supported by a legitimate legislative purpose furthered by a rational means." In re Chateaugay Corp., 53 F.3d 478, 486–87 (2d Cir. 1995) (internal quotation marks omitted). Legislation that does not infringe fundamental rights or target suspect classifications enjoys a "strong presumption of rationality." Beatie v. City of N.Y., 123 F.3d 707, 712 (2d Cir. 1997). "Thus to survive a Rule 12(b)(6) motion, a substantive due process claim must allege that the 'legislature has acted in an arbitrary and irrational way.'" Alliance of Auto Mfrs., Inc. v. Currey, No. 13–4890–cv, 2015 WL 1529018, at *3 (2d Cir. Apr. 7, 2015) (quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984)).

Plaintiffs' allegations are sufficient to state a claim under the Due Process Clause by Sullivan Farms against the Village, the Village Board of Trustees, Gerardi, Johnson, and Roemer.[24] Sullivan Farms has adequately alleged that it suffered has been deprived of a property interest via the diminution in the value of its investment in Chestnut Ridge that has been caused by the financial injury due to the delays in closing sales on the completed townhomes. Further, Sullivan Farms has alleged that the Village's actions with regard to Chestnut Ridge have been arbitrary and designed to target current and prospective Hasidic Jewish residents of Bloomingburg, for whom Chestnut Ridge would be an especially

[24] Sullivan Farms' federal due process claim against Rogers must be dismissed for the same reason that the federal equal protection claim against her was dismissed, namely, that the First Amended Complaint provides no detail as to what actions Roger has taken to enforce the Moratorium.

attractive place to live. Specifically, the First Amended Complaint alleges that the Moratorium was enacted by the Village Board of Trustees, which at the time was comprised of Gerardi, Johnson, and Roemer, for the sole purpose of hindering the Chestnut Ridge project, and that its purported justification—the investigation of a "substantial number of complaints" (Cross Decl. ex. C)—had no basis in fact, as demonstrated by the Village's reliance on post-Moratorium complaints when pressed in subsequent litigation. Accordingly, Sullivan Farms has stated a plausible due process claim against the Village, the Village Board of Trustees, Gerardi, Johnson, and Roemer.

C. § 1985 Claim

Those plaintiffs who have not yet been dismissed from this action have also stated plausible claims against those defendants who have not yet been dismissed under 42 U.S.C. § 1985, which authorizes actions based on conspiracies to interfere with federal civil rights. "To state a claim under 42 U.S.C. § 1985, a plaintiff must allege: (1) a conspiracy, (2) an intent or purpose to deprive a person of equal protection of the law; (3) an act in furtherance of the conspiracy; and (4) an injury to a person, including injury to property, person, or constitutional right." Bhatia v. Yale Sch. of Med., 347 Fed. App'x 663, 664 (2d Cir. 2009) (summary order). The conspiracy must be motivated by "some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action." Robinson v. Allstate Ins. Co., 508 Fed. App'x 7, 9 (2d Cir. 2013) (summary order) (quoting Britt v. Garcia, 457 F.3d 264, 270 n.4 (2d Cir. 2006)). The complaint must also "provide some factual basis supporting a meeting of the minds, such that defendants entered

into an agreement, express or tacit, to achieve the unlawful end." Webb v. Goord, 340 F.3d 105, 110 (2d Cir. 2003).

Plaintiffs' allegations are sufficient to state a plausible § 1985 claim. Indeed, the picture painted by the First Amended Complaint is one of a concerted scheme actually carried out by political allies (such as Herrmann, Gerardi, Johnson, and Roemer, who are all alleged to be involved with or supported by the RCC) and the Town and Village government entities under their control to engage in a pervasive and wide-ranging scheme to keep Hasidic Jews out of Bloomingburg. And as explained above in the discussion of plaintiffs' equal protection claims, plaintiffs allege that they were deprived of equal protection of the law through defendants' enactment of the Moratorium and failure to issue certificates of occupancy for the completed townhomes at Chestnut Ridge, actions which are alleged to have been intentionally discriminatory or motivated by discriminatory animus and to have had an adverse effect on plaintiffs' properties. Accordingly, plaintiffs Rosenbaum, Sullivan Farms, and Winterton Properties have alleged plausible § 1985 claims against defendants the Town, the Town ZBA, Herrmann, the Village, the Village Board of Trustees, Gerardi, Johnson, and Roemer.

D. Fair Housing Act Claim

Plaintiffs Sullivan Farms, Rosenbaum, and Stein have brought claims under the FHA, which protects buyers and renters of housing from discrimination. Because Rosenbaum and Stein already live in Bloomingburg and there are no allegations that they seek to live in Chestnut Ridge or that real estate sellers or landlords discriminated against them, they lack standing to sue under the FHA.

Sullivan Farms, on the other hand, does have standing to sue under the FHA, and it has stated a cognizable FHA claim against the Village, the Village Board of Trustees, Gerardi, Johnson, and Roemer.

The FHA prohibits discrimination in the housing market based on religion. United States v. Space Hunters, Inc., 429 F.3d 416, 419 (2d Cir. 2005). "An FHA violation may be established on a theory of disparate impact or one of disparate treatment." LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 425 (2d Cir. 1995). In a case involving a challenge to actions taken by a municipality, "[u]nder the latter theory, a plaintiff can establish a prima facie case by showing that animus against the protected group was a significant factor in the position taken by the municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive." Id. (internal quotation marks omitted); see also Smith v. NYCHA, 410 Fed. App'x 404, 406 (2d Cir. 2011) (summary order) (same). "If the motive is discriminatory, it is of no moment that the complained-of conduct would be permissible if taken for nondiscriminatory reasons." LeBlanc Sternberg, 67 F.3d at 425. Discriminatory intent may be inferred from the totality of the circumstances. Id.

"The FHA confers standing to challenge . . . discriminatory practices on . . . any person who—(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." Id. at 424 (quoting 42 U.S.C. § 3602(i)). "[A]s long as the plaintiff suffers actual injury as a result of the defendant's conduct, he is

permitted to prove that the rights of another were infringed." Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 103 n.9 (1979); see also Andujar v. Hewitt, No. 02 CIV. 2223(SAS), 2002 WL 1792065, at *8 n.7 (S.D.N.Y. Aug. 2, 2002) (under the FHA, "membership in a protected class is not required as a prerequisite to sue"). Thus, to have standing under the FHA, a private plaintiff need only allege "injury in fact within the meaning of Article III of the Constitution, that is, . . . distinct and palpable injuries that are fairly traceable to [defendants'] actions." LeBlanc Sternberg, 67 F.3d at 424 (alteration in original) (internal quotation marks omitted). "Under this lenient standard, courts have granted standing to, among others, developers asserting challenges under the FHA against municipal decisions that present a barrier to developments." Anderson Grp., LLC v. City of Saratoga Springs, No. 1:05–cv–1369 (GLS\DRH), 2011 WL 2472996, at *2 (N.D.N.Y. 2011) (collecting cases from the Second Circuit, this District, and the Northern District of New York); see also El Dorado Estates v. City of Fillmore, 765 F.3d 1118, 1122 (9th Cir. 2014) (mobile park home owner had standing to bring FHA claim on behalf of future residents of subdivision because "[t]he right not to have to endure housing discrimination, even if one is not among the class of persons discriminated against, is a constitutionally cognizable legal interest supporting standing"). "An injury need not be economic or tangible in order to confer standing" under the FHA. LeBlanc Sternberg, 67 F.3d at 425.

In Causes of Action Six and Seven, Sullivan Farms, Rosenbaum, and Stein assert FHA claims based on the allegations relating to Chestnut Ridge. Rosenbaum

and Stein, however, already reside in Bloomingburg, and there are no allegations in the First Amended Complaint tying them to housing discrimination—Rosenbaum alleges only that she has been personally subjected to acts of discrimination in Bloomingburg, and Stein does not make any allegations concerning discrimination or housing at all. Rosenbaum's and Stein's FHA claims must accordingly be dismissed.

Sullivan Farms, on the other hand, has adequately alleged a cognizable injury—specifically, its inability to economically benefit from its commercial real estate development, Chestnut Ridge. Defendants argue that Sullivan Farms has not alleged a cognizable injury under the FHA because it has already completed a significant number of units and because once the Moratorium expires Sullivan Farms can complete many more. This argument ignores the fact that Sullivan Farms is not building Chestnut Ridge for the sheer sake of building, but rather to profit from it as a commercial venture, and it fails to address Sullivan Farms' allegations that it has been deprived of the ability to economically benefit from the Chestnut Ridge project due to being unable to close on sales of its 51 completed townhomes, which is in turn due to the Village's failure to respond to its requests for certificates of occupancy, as well as the delays caused by its still-pending building permit applications. (See FAC ¶¶ 48, 63-64, 86-87, 335; Tr. 43:5-8; see also Tr. 15:18-20.) Sullivan Farms has thus alleged an economic injury that is "distinct and palpable" and "fairly traceable" to defendants' alleged discriminatory conduct, LeBlanc-Sternberg, 67 F.3d at 424, and therefore has alleged injury in fact under

Article III of the Constitution. And because—as explained above—the First Amended Complaint adequately alleges that the Village's enactment of the Moratorium and its failure to issue certificates of occupancy for Chestnut Ridge were motivated by discriminatory animus against Hasidic Jews, Sullivan Farms has stated a plausible and cognizable claim under the FHA.

In sum, Rosenbaum's and Stein's FHA claims must be dismissed, and Sullivan Farms' FHA claim shall proceed against the Village, the Village Board of Trustees, Gerardi, Johnson, and Roemer.[25]

E. Immunity

Having now determined that plaintiffs have stated plausible claims against Gerardi, Herrmann, Johnson, and Roemer, the Court must address whether any of these individual defendants are immune from suit. Each of these individual defendants argues that the Court should find they are immune from suit because the allegations against them only concern legislative acts and general policymaking. Herrmann also argues that he is not alleged to have violated a clearly established federal right, and therefore the claims against him should be dismissed under the doctrine of qualified immunity.

"Immunity, either absolute or qualified, is a personal defense that is available only when officials are sued in their individual capacities." Almonte v. City of Long Beach, 478 F.3d 100, 106 (2d Cir. 2007) (quoting Morris v. Lindau, 196 F.3d 102, 111 (2d Cir. 1999)); see also State Emps. Bargaining Agent Coal. v.

[25] Sullivan Farms' FHA claim against Rogers must be dismissed for the same reason that the federal equal protection and due process claims against Rogers have been dismissed.

Rowland, 494 F.3d 71, 86 (2d Cir. 2007) (immunity is not a defense to "official-capacity claims against local-level officials"). The Court concludes that Gerardi, Johnson, and Roemer have legislative immunity against individual-capacity claims based on their votes for the Moratorium, and Herrmann is entitled to qualified immunity because the only live allegation against him concerns a singular act of trespass on the mikvah property, which standing alone cannot support an argument that he violated a clearly established federal right.

1. Legislative immunity.

All of the individual defendants argue that they are entitled to absolute legislative immunity. Absolute legislative immunity attaches to all actions taken "in the sphere of legitimate legislative activity." Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998) (quoting Tenney v. Brandhove, 341 U.S. 367, 376 (1951)). Legislative immunity applies to actions that are both "(1) substantively legislative, i.e., acts that involve policy making," and "(2) procedurally legislative, i.e., passed by means of established legislative procedures." State Emps. Bargaining Agent Coal. v. Rowland, 494 F.3d 71, 89 (2d Cir. 2007) (quoting State Emps. Bargaining Agent Coal. v. Rowland, No. Civ. 303CV221 AVC, 2006 WL 141645, at *3 (D. Conn. 2006)).

Legislative immunity does not apply to administrative acts or the enforcement of existing laws, ordinances, or regulations. See, e.g., id. at 83-84 (legislative immunity does not apply to enforcement activities); Harhay v. Town of Ellington Bd. of Educ., 323 F.3d 206, 211 (2d Cir. 2003) (public officials not entitled to legislative immunity that were "administrative, not legislative, in nature" in that they did not implicate "the kind of broad, prospective policymaking that is

characteristic of legislative action"); Jessen v. Town of Eastchester, 114 F.3d 7, 8 (2d Cir. 1997) (per curiam) (challenged determination "was an administrative act that legislative immunity does not protect"). A municipal action may be administrative in nature even if is subject to a vote by public officials. See Harhay, 323 F.3d at 211.[26]

Gerardi, Johnson, Roemer, and Herrmann argue that all claims against them in their individual capacities are barred based on legislative immunity. Gerardi, Roemer, and Johnson are indeed entitled to legislative immunity as to claims against them in their individual capacity predicated on their votes for the Moratorium, which they cast as members of the Village Board of Trustees. The passage of the Moratorium was undoubtedly a legislative act, and not an administrative one, in that it both involved the making of policy regarding building and construction in the Village, and it was passed by means of the Village's established legislative procedures. In sum, Gerardi, Johnson, and Roemer have legislative immunity against individual-capacity claims based on the Chestnut Ridge allegations.[27]

Because plaintiffs' claims concerning the religious school have been dismissed on ripeness and mootness grounds, the Court need not reach the issue of whether

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[26] Plaintiffs argue that "common law immunity for state government officials does not extend to federal civil rights claims," citing as support Yeshiva Chofetz Chaim Radin, Inc. v. Vill. of New Hempstead, 98 F. Supp. 2d 347, 356 (S.D.N.Y. 2000). (ECF No. 74 at 23.) This assertion confuses language in that opinion regarding New York's common law immunity principles with the "very different guidelines that govern immunity under federal civil rights claims." Yeshiva Chofetz, 98 F. Supp. 2d at 356.

[27] Gerardi, Johnson, and Roemer are not alleged to have been personally involved in the Village's failure to issue certificates of occupancy for the completed townhomes at Chestnut Ridge.

Gerardi, Herrmann, Johnson, and Roemer are entitled to legislative immunity for claims against them in their individual capacity that are predicated on actions relating to the IMA. Likewise the Court need not reach the issue of whether Finnema, Heanelt, and Roe are entitled to legislative immunity for claims based on their denial of the school's site plan application.

2. Qualified immunity.

Herrmann argues that the claims against him should be dismissed under the doctrine of qualified immunity because plaintiffs have failed to allege that he violated a clearly established federal right. Herrmann is correct.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Id. at 243 (quoting Wilson v. Layne, 526 U.S. 603, 615 (1999)) (internal quotation marks omitted). The doctrine of qualified immunity "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Id. at 231.

In order for the doctrine of qualified immunity to serve its purpose, the availability of qualified immunity should be decided "at the earliest possible stage in litigation." Hunter v. Bryant, 502 U.S. 224, 227 (1991). "[D]efendant bears the burden of pleading and proving the affirmative defense of qualified immunity." Blissett v. Coughlin, 66 F.3d 531, 539 (2d Cir. 1995). When a defendant raises a qualified immunity defense on a motion to dismiss, "the plaintiff is entitled to all reasonable inferences from the facts alleged, not only those that support his claim, but also those that defeat the immunity defense." McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004).

Herrmann is entitled to qualified immunity with respect to those claims against him that remain live. Herrmann is alleged to have co-founded the RCC and to have campaigned for office on an anti-Hasidic platform—which suggests that he was motivated to engage in unconstitutional religious discrimination—and he is alleged to have been a ringleader in a conspiracy to keep Hasidic Jews out of Bloomingburg. However, in terms of actual actions taken by Herrmann, the First Amended Complaint alleges only that he: (1) signed the IMA on behalf of the Town Board (FAC ¶¶ 114, 180, 202, 222, 246, 267, 299, 301, 308, 310, 312); (2) trespassed on the property on which plaintiffs seek to build a mikvah in January 2014 in order to facilitate the issuance of a discriminatory stop-work order (FAC ¶ 136); and (3) appointed anti-Hasidic individuals to various town boards (FAC ¶ 147). But plaintiffs' claims regarding the IMA have already been dismissed on ripeness and mootness grounds, and while Herrmann's alleged act of trespass could be relevant

to a federal constitutional claim, one cannot say that by a singular act of crossing a property line he could have violated any clearly established federal right. As to the appointments to the town boards, it is not possible for a public official to violate the Constitution or a federal statute by virtue of appointing a public official who expressed a particular view as to a particular political or social issue—even if the view expressed is widely regarded to be abhorrent. Thus, Herrmann is not alleged to have violated a clearly established federal right, and he is therefore entitled to qualified immunity from suit. The live claims against him in his individual capacity (but not those against him in his official capacity) must accordingly be dismissed.[28] Those official capacity claims against Herrmann that remain shall proceed.

V. CONCLUSION

For the foregoing reasons, defendants' motions to dismiss are GRANTED IN PART AND DENIED IN PART. Plaintiffs Rosenbaum and Winterton Properties have stated plausible claims for relief based on the mikvah allegations under § 1983 (via the First Amendment and the Equal Protection Clause) and § 1985 against the Town, the Town ZBA, and Herrmann in his official capacity. Plaintiff Sullivan Farms has stated plausible claims for relief based on the Chestnut Ridge allegations under § 1983 (via the Equal Protection Clause and the Due Process Clause of the

[28] Plaintiffs argue that it would be too early at this stage to dismiss Herrmann on immunity grounds, because the determination of whether he is entitled to qualified immunity is a fact-specific inquiry. Plaintiffs are correct that as a general matter resolving the issue of qualified immunity at the motion to dismiss stage, "when the facts are not clear, would be inappropriate." Young v. State of N.Y. Office of Mental Retardation and Dev. Disabilities, 649 F. Supp. 2d 282, 292 & n.63 (S.D.N.Y. 2009) (collecting cases). But here the dearth of factual allegations concerning potentially unlawful actions taken by Herrmann, who as the Town Supervisor is a particularly high-profile individual in his community and whose actions one would expect to be particularly conspicuous, if there were any, counsel toward dismissing Herrmann at this early stage of the litigation.

Fourteenth Amendment), § 1985, and the FHA against the Village, the Village Board of Trustees, Gerardi in his official capacity, Johnson in his official capacity, and Roemer in her official capacity. All of plaintiffs' other claims are dismissed. The following parties have been fully dismissed from this action: plaintiffs the Bloomingburg Jewish Education Center, Commercial Corner, Learning Tree, and Stein; and defendants the Village Planning Board, the Town Board, the Town Planning Board, Rogers, Finnema, Heanelt, and Roe. Gerardi, Johnson, and Roemer have legislative immunity against all live individual-capacity claims against them based on their votes for the Moratorium, and Herrmann is entitled to qualified immunity.

Plaintiffs shall **within 14 days** file a Second Amended Complaint, which shall remove those parties and claims that have been dismissed and eliminate all redundancy. Plaintiffs shall not add any new allegations. Defendants shall then answer **within 14 days** of the filing of the Second Amended Complaint. No additional motions to dismiss shall be permitted.

The Clerk of Court is directed to close the motions at ECF Nos. 67 and 71.

SO ORDERED.

Dated: New York, New York
June 9, 2015

KATHERINE B. FORREST
United States District Judge

Exhibit 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MOSHE SMILOWITZ et al.,

Plaintiffs,

-v-

SULLIVAN COUNTY BOARD OF ELECTIONS et al.,

Defendants.

15-cv-1757 (KBF)

ORDER

KATHERINE B. FORREST, District Judge:

Plaintiffs are Hasidic Jewish voters who allege that the Sullivan County Board of Elections, along with certain officials, have deprived them of their right to vote. On behalf of themselves and a proposed class, plaintiffs have asserted ten separate causes of actions based, inter alia, on the following factual assertions set out in some detail in their 66-page complaint (ECF No. 1):

Defendants have deprived plaintiffs of their right to vote, thereby infringing on plaintiffs' constitutional and statutory rights, by:

1. entertaining frivolous challenges to Hasidic Jewish voters that were submitted by citizens with the agenda of depriving individuals with Hasidic Jewish names of the right to vote on the basis of religion;
2. responding to those challenges by requiring Hasidic Jewish voters, including plaintiffs, to answer extensive and burdensome questionnaires that have never been used in connection with any other voter registration challenge in the county, for the purpose of making it

more difficult for Hasidic Jewish voters to prove that their voter registration was correct;

3. selectively and arbitrarily relying upon the Sheriff's reports to justify cancellation;
4. retroactively annulling the votes of Hasidic Jewish voters;
5. placing exceptional burdens on Hasidic Jewish voters to prove their residency;
6. ignoring evidence plaintiffs submitted to prove their residency and instead relying upon other facts to support cancellation of their voter registrations;
7. conducting and concluding sham and perfunctory investigations and hearings to determine the eligibility of certain Hasidic Jewish voters.

Plaintiffs further allege that defendants' actions were not motivated by, and did not serve any legitimate, rational, or compelling governmental interest but were instead motivated by anti-Semitic animus. In terms of the individual defendants, plaintiffs allege that they are state actors who, while acting in their official capacities, engaged in intentional discrimination in violation of plaintiffs' constitutional rights.

Defendants have moved to dismiss all claims. (ECF No. 23.) Defendants' core arguments in support of the motion revolve around whether what plaintiffs allege to have happened in fact happened. Defendants vigorously contest plaintiffs' allegations and insist that they possess evidence that disproves them. The Court

cannot, however, resolve questions of fact on a motion to dismiss. Plaintiffs are entitled to have their complaint proceed to the next stage so long as their allegations—which for purposes of this motion, this Court, as any court, must take as true—state a claim. Stating a claim requires only that facts be alleged that support the legal elements of each cause of action.

The Court has reviewed each cause of action against the applicable legal standards. Plaintiffs have met their pleading burden as to each claim.

The Court has also considered whether the pending Article 78 proceeding requires or supports abstention. It does not. As an initial matter, there are more and different claims with different relief sought in this action versus in the Article 78 proceeding. There are also more and different plaintiffs. This action has also been brought as a purported class action—presenting the possibility of an even more differentiated group of plaintiffs. Having reviewed all of the factors set forth in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), the Court does not find abstention to be appropriate here.

The Court has also considered whether the individual defendants are entitled to qualified immunity. There may be a basis for such a motion at a later stage. At this stage, the allegations in the complaint sufficiently state the elements of a cognizable claim as to them.[1]

[1] Defendants' motion to strike portions of the complaint is denied. The nature of plaintiffs' claims depends on certain allegations; certain factual statements are necessarily included in a pleading in order to state a claim. While there are understandable concerns with the language used, there is no basis to strike them as a matter of law.

Finally, while it is unnecessary to state procedure of which the Court is certain counsel are well aware, upon development of the factual record, the Court will entertain motions for summary judgment by any party on any legal issue that may assist with the early or targeted disposition of some or all claims.

Accordingly, defendants' motion to dismiss is DENIED.

The Clerk of Court is directed to terminate the motion at ECF No. 23.

SO ORDERED.

Dated: New York, New York
June 16, 2015

KATHERINE B. FORREST
United States District Judge

Exhibit 4

Copy

To commence the statutory time 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
ENVIRONMENTAL CLAIMS PART
NINTH JUDICIAL DISTRICT, COUNTY OF ORANGE

----------X

In the Matter of the Application of

VILLAGE OF KIRYAS JOEL, NEW YORK, MAYOR ABRAHAM WIEDER, VILLAGE ADMINISTRATOR GEDALYE SZEGEDIN, VILLAGE TRUSTEE JACOB FREUND, VILLAGE TRUSTEE SAMUEL LANDAU, VILLAGE TRUSTEE JACOB REISMAN, each in his official capacity as an officer of the Village of Kiryas Joel, ROSE UNGAR, DAVID UNGAR, MOSES WITRIOL, ATKINS BROTHERS ASSOCIATES, INC., BURDOCK REALTY ASSOCIATES, INC., COMMANDEER REALTY ASSOCIATES, INC., DILIGENT REALTY ASSOCIATES, INC., and "JOHN DOES and JANE DOES" "1" through "250" as residents of Woodbury of Orthodox Jewish origin living in Western Woodbury,

Petitioners-Plaintiffs,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and a Declaratory Judgment Pursuant to Section 3001 of the Civil Practice Law and Rules.

-against-

VILLAGE OF WOODBURY, NEW YORK, and VILLAGE OF WOODBURY BOARD OF TRUSTEES,

Respondents-Defendants.

-and-

TOWN OF WOODBURY, NEW YORK, VILLAGE OF WOODBURY PLANNING BOARD, and GARY THOMASBERGER, as the Village of Woodbury Building/Zoning Inspector and Code Enforcement Officer,

Defendants.

----------X

DECISION, ORDER & JUDGMENT

Index No.: 9655/11

Fully Submitted: 11/18/13

FILED
2014 MAR 20 A 9:
ORANGE COUNTY CLERK

ORIGINAL FILED

NICOLAI, J.,

To commence the statutory time 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
ENVIRONMENTAL CLAIMS PART
NINTH JUDICIAL DISTRICT, COUNTY OF ORANGE

----------X

In the Matter of the Application of

VILLAGE OF KIRYAS JOEL, NEW YORK, MAYOR ABRAHAM WIEDER, VILLAGE ADMINISTRATOR GEDALYE SZEGEDIN, VILLAGE TRUSTEE JACOB FREUND, VILLAGE TRUSTEE SAMUEL LANDAU, VILLAGE TRUSTEE JACOB REISMAN, each in his official capacity as on officer of the Village of Kiryas Joel, ROSE UNGAR, DAVID UNGAR, MOSES WITRIOL, ATKINS BROTHERS ASSOCIATES, INC., BURDOCK REALTY ASSOCIATES, INC., COMMANDEER REALTY ASSOCIATES, INC., DILIGENT REALTY ASSOCIATES, INC., and "JOHN DOES and JANE DOES" "1" through "250" as residents of Woodbury of Orthodox Jewish origin living in Western Woodbury,

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DECISION, ORDER & JUDGMENT

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and a Declaratory Judgment Pursuant to Section 3001 of the Civil Practice Law and Rules,

Index No.: 9655 /11

Fully Submitted: 11/18/13

-against-

VILLAGE OF WOODBURY, NEW YORK, and VILLAGE OF WOODBURY BOARD OF TRUSTEES,

Respondents-Defendants,

-and-

TOWN OF WOODBURY, NEW YORK, VILLAGE OF WOODBURY PLANNING BOARD, and GARY THOMASBERGER, as the Village of Woodbury Building/Zoning Inspector and Code Enforcement Officer,

Defendants.

----------X

NICOLAI, J.,

The following documents numbered 1 to 156 were read on (1) these motions by Respondents-Defendants, Village of Woodbury, New York (hereafter, the "Village"), Village of Woodbury Board of Trustees, and Defendant, Gary Thomasberger (collectively hereafter, the "Village Respondents") for an order pursuant to section 3024(b) of the Civil Practice Law and Rules striking portions of the pleadings, and an order pursuant to CPLR 7804(f) and 3211(a)(1), (a)(2), (a)(3), (a)(5) and (a)(7) dismissing the Verified Petition-Complaint (hereafter, the "Petition"), and (2) the merits of the Petition as against all Respondents-Defendants and the answering[1] Defendants:

Notice of Petition - Petition - Exhibits - Affirmation - Affidavits - Exhibits - Memorandum of Law	1 - 30
Notice of Motion (Village Respondents) - Affirmation - Exhibits - Affidavits - Exhibits - Answer and Objections in Point of Law (Village Respondents) - Memorandum of Law	31 - 46
Verified Answer and Affirmative Defenses (Defendant, Town of Woodbury, New York) - Objections in Point of Law - Affirmation - Exhibits	47 - 61
Reply Affirmation (Petitioners-Plaintiffs) - Exhibits - Memorandum of Law (in reply and support of Petition and opposition to motion of Village Respondents) - Exhibits - Affidavit	62 - 71
Reply Affirmation (Village Respondents) - Affidavits - Memorandum of Law (in reply and support of motion of Village Respondents) - Exhibit	72 - 76
Certified Joint Transcript of the Record of the Proceedings (hereafter, the "Record")	77 - 149
Supplemental Affirmation (Petitioners-Plaintiffs) - Exhibits - Affidavit	150-153
Supplemental Affidavit (Village Respondents) - Exhibit - Affidavit	154-156

Upon consideration of the foregoing, and for the following reasons, the Court will treat the pleadings, motions and submissions as motions for summary judgment, and the Petition is granted in part and denied in part as follows:

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[1] Defendant, Village of Woodbury Planning Board, is not among the parties who made the instant motions, but is among the parties named in the Answer and Objections in Point of Law served and filed by the Village Respondents.

Factual and Procedural Background

Defendant, Town of Woodbury, New York (hereafter, the "Town"), is a municipality located in the County of Orange. In 2004, the Town commenced the comprehensive planning process pursuant to its authority under article 16 of the Town Law. The Town Board of the Town of Woodbury (hereafter, "Town Board") declared itself lead agency for the purpose of conducting an environmental review under article 8 of the Environmental Conservation Law (also known as the State Environmental Quality Review Act [hereafter, "SEQRA"]), and engaged Saratoga Associates to perform analyses and studies, and prepare a draft comprehensive plan for the Town Board to consider. Saratoga Associates prepared and forwarded to the Town Board a Draft Comprehensive Plan for the Town dated October 14, 2005 (hereafter, the "Town DCP")(Exhibit 3 in the Record). Saratoga Associates also prepared and forwarded to the Town Board a Draft Generic Environmental Impact Statement dated October 31, 2005 (hereafter, the "2005 DGEIS")(Exhibit 4 in the Record), concerning potential environmental impacts associated with the Town DCP. In December 2005, the Town Board forwarded the Town DCP and 2005 DGEIS to the Orange County Planning Department for review (hereafter "the Planning Department") .

In August 2006, before the Town Board completed its SEQRA review, the Village of Woodbury (hereafter the "Village") was incorporated as a separate municipality, the boundaries of which are coterminous with the boundaries of the Town except for those portions of the Town that fall within the Village of Harriman. In June 2007, the Village agreed to assume the Town's zoning and planning functions within the Village's boundaries, including the comprehensive planning process begun in 2004. Respondent-Defendant, Village of Woodbury Board of Trustees (hereafter, the "Village Board"), adopted the Town DCP and designated the Village as lead agency in place of the Town Board for the purpose of conducting the SEQRA review. Saratoga Associates prepared and forwarded to the Village Board a Draft Comprehensive Plan for the Village (hereafter, the "Village DCP")(Exhibit 4 to the Petition). In November 2008, following public hearing and comment on the Village DCP, the Village Board designated the adoption thereof as a Type I action and issued a positive declaration under SEQRA, thereby mandating the preparation of an environmental impact statement.

On April 30, 2009, the Village Board accepted a Preliminary Draft Generic Environmental Impact Statement (hereafter, "2009 DGEIS")(Exhibit 26 in the Record), concerning potential environmental impacts associated with the Village DCP and proposed amendments to the Village zoning law (hereafter, "Zoning Amendments"). On January 26, 2010, the Village Board issued a Positive Declaration (Exhibit 38 in the Record). On February 16, 2010, the Village Board submitted the Village DCP and proposed Zoning Amendments to the Planning Department. On February 23, 2010, the Village Board commenced a public hearing that was continued to March 9, 2010, then followed by a public comment period.

On July 27, 2010, before the Village completed its SEQRA review, the Village Board declared itself lead agency and issued a full environmental assessment form in connection with another proposal to amend the Village zoning law (Full Environmental Assessment Form [hereafter, "EAF"](Exhibit 11 to the Petition). The proposed set of amendments contemplated in the EAF would add to the zoning law the definition of a "place of worship," regulations concerning the use of land for a place of worship and the designation of districts in which said use would be permitted "by special permit and site plan approval of the Planning Board" (*see* Village of Woodbury, Local Law No. 1 of 2010)(Exhibit 13 to the Petition). The proposal also included amendments to the zoning map (*see* Village of Woodbury, Introductory Law No. 2 of 2010)(Exhibit 7 to the Petition). This proposed set of amendments was referred to as the "Religious Land Use Local Law" (hereafter, "RLULL" ; *see* EAF at 1). On September 28, 2010, the Village Board issued a notice that it had determined that enactment of the RLULL would not have a significant adverse impact on the environment (*see* Negative Declaration [hereafter, "RLULL/Neg Dec"])(Exhibit 47 in the Record).

Another proposal before the Village Board was the addition to the zoning law of the definition of "ridge preservation view corridor," the designation of "all areas with a natural elevation above mean sea level of 600 feet . . . as 'critical environmental areas' pursuant to the State Environmental Quality Review Act" and restrictions and standards concerning the development of land located in any such area within the Village (*see* Village of Woodbury, Introductory Local Law No. 1 of 2010)(Exhibit 7 to the Petition at 13, 16-17). This proposed set of amendments was referred to as the Ridge Preservation Overlay District (hereafter, "RPOD"; *see* Petition at 46). Neither the EAF nor the RLULL/Neg Dec include any reference to the RPOD.

On January 25, 2011, Turner Miller Group submitted to the Village a final generic environmental impact statement, concerning potential environmental impacts associated with the Village DCP and proposed amendments to the Village zoning law (*see* Village of Woodbury Comprehensive Plan Update And Associated Zoning Amendments Final Generic Environmental Impact Statement [hereafter, "2011 FGEIS"])(Exhibit 51 in the Record). A public hearing was held on March 22, 2011, then followed by a public comment period. Revisions to the 2011 FGEIS were submitted to the Village on April 26, 2011. On May 10, 2011, the Village Board accepted the 2011 FGEIS as complete.

On June 14, 2011, inter alia, the Village Board adopted (1) a findings statement based on the 2011 FGEIS and "concluded that all identified environmental impacts of the proposed Action will be avoided or minimized to the greatest extent practicable," (2) the comprehensive plan (hereafter, "Village CP") and, (3) the amendments to the zoning law and zoning map associated with the Village CP including the Zoning Amendments, the RLUL and the RPOD[3] which amendments were identified as "Local Law 3 of 2011" and "Local Law 4 of 2011," respectively (*see* minutes of the Village Board Meeting held at Town Hall on June 14, 2011at 6:30 PM, [hereafter, "6/14/11 Resolution"])(Exhibit 63 in the Record). The instant special proceeding/action was commenced by filing the Notice of Petition, Petition and supporting papers with the Orange County Clerk on October 14, 2011.

Petitioner-Plaintiff, Village of Kiryas Joel (hereafter, "VOKJ"), is a municipal corporation in the Town of Monroe located adjacent to the western boundaries of the Village, and is alleged to also own property located within the Village within the R-2A zoning district (*see* Petition at ¶12). Petitioner-Plaintiff, Abraham Wieder (hereafter, "Wieder"), is the Mayor of VOKJ (*see* Petition at ¶15). Petitioner-Plaintiff, Gedalye Szegedin (hereafter, "Szegedin"), is the Village Administrator and Village Clerk of VOKJ (*see* Petition at ¶16). Petitioner-Plaintiffs, Moses Goldstein (hereafter, "Goldstein"), Jacob Freund (hereafter, "Freund"), Samuel Landau (hereafter, "Landau") and Jacob Reisman (hereafter, "Reisman"), are Trustees of VOKJ (*see* Petition at ¶¶17-20). VOKJ, Wieder, Szegedin, Goldstein, Freund, Landau and Reisman will collectively be referred to hereafter as VOKJ

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[3] The RPOD is codified as section 310-13, in the Village of Woodbury Zoning Code (hereafter, "Village Code").

or the "VOKJ Petitioners."

Petitioner-Plaintiff, Rose Ungar, owns property and is a resident of the Village (see Petition at ¶22), and Petitioners, David Ungar and Moses Witriol, are residents of the Village (*see* Petition at ¶¶23, 24). Rose Ungar, David Ungar and Moses Witriol (collectively hereafter, the "Individual Petitioners") are members of the Hasidic Jewish community. Petitioner-Plaintiff, Atkins Brothers Associates, LLC (hereafter, "Atkins") is a domestic limited liability company and owns property located within the Village within the R-2A zoning district (*see* Petition at ¶26), and Petitioners, Amazon Realty Associates, Inc. (hereafter, "Amazon"), Burdock Realty Associates, Inc. (hereafter, "Burdock"), Commandeer Realty Associates, Inc. (hereafter, "Commandeer") and Diligent Realty Associates, Inc. (hereafter, "Diligent"), are domestic business corporations and own real property located within the Village within the R-2A zoning district (*see* Petition at ¶¶27-30). Atkins, Amazon, Burdock, Commandeer and Diligent (collectively hereafter, the "Corporate Petitioners") desire to construct on their properties a development(s) suitable for residents of the Hasidic Jewish community.

There is a large, expanding Hasidic Jewish community located within VOKJ, near its border with the Village. Petitioners state that in order to comply with the tenets of their religion, members of their community are prohibited from using vehicles on the Sabbath and Jewish holy days, and consequently reside in areas with integrated schools, synagogues, shuls, mikvas, and other religious facilities that residents can reach on foot. Petitioners also point out that because Hasidic Jewish communities are congregational by nature and individual families tend to be large, residents of such communities require multi-family housing with individual units that can accommodate eight or more people. Petitioners allege that the enactments at issue prohibit the construction anywhere in the Village and particularly in the geographic areas near its border with VOKJ of such high-density, multi-family, and walkable developments, thereby effectively, if not intentionally, discriminating against and violating the rights of members of VOKJ and the greater Hasidic Jewish community.

The Petition pleads eighteen causes of action. In the first and second causes of action Petitioners-Plaintiffs (hereafter, "Petitioners") seek relief pursuant to CPLR article 78 for a judgment annulling the Village CP and the Zoning Amendments alleging that the Village Board failed to comply with SEQRA in adopting them (hereafter, the "SEQRA Claims"). In the remaining causes

of action Petitioners seek relief pursuant to CPLR 3001 for a judgment declaring the Village CP and Zoning Amendments, the RPOD and the RLUL, invalid as allegedly unconstitutional or otherwise in contravention of state or federal law.

On August 9, 2012, the Town served upon Petitioners an answer to the Petition (*see* Verified Answer and Affirmative Defenses to Verified Petition and Complaint [hereafter, the "Town Answer"], with supporting papers and affidavit of service). The Village Respondents interposed the instant motions by notice of motion dated August 27, 2012 , on which date the Village Respondents and Defendant, Village of Woodbury Planning Board (hereafter, "Planning Board"), also served upon Petitioners an answer to the Petition (*see* Answer and Objections in Point of Law [hereafter, the "Village Answer"], with supporting papers and affidavit of service). On October 16, 2012, Petitioners served upon all movants and answering parties an affirmation in opposition to the instant motions and reply to the answers (*see* Reply Affirmation of Robert S. Rosborough IV, with affidavit of service). On October 26, 2012, the Village Respondents served upon Petitioners an affirmation in reply to Petitioners' opposition to the instant motions (*see* Reply Affirmation of John G. Stepanovich, with affidavit of service).

The Petition and motions were deemed fully submitted on November 18, 2013, upon submission of affirmations and affidavits in response to the Court's directive (*see* Petitioners' Affirmation of Michael G. Sterthous [hereafter, "Sterthous Affirmation"], with affidavit of service, and Village Respondents' Affidavit of Kristen O'Donnell [hereafter, "O'Donnell Affidavit"], with affidavit of service).[3]

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[3]In the instant matter, Petitioners seek judgments pursuant to both article 78 and section 3001 of the CPLR. The Village Respondents elected to respond to the Petition by simultaneously serving and filing both a Motion to Dismiss under CPLR 3211(a)(1), (2), (3), (5) and (7), and an Answer. Because this response was arguably prohibited by CPLR 7804(f), on October 31, 2012, during a conference call with the Part's court attorney-referee, the parties agreed that this Court should deem the matter fully submitted and determine it on its merits and that, in doing so, the Court would consider all papers submitted in support of, opposition to and reply to the Petition as well as the Village's dismissal motion.

Discussion

The standard for determining a fully submitted article 78 proceeding is the same as that for summary judgment in a plenary action (*see Matter of Bahar v Schwartzreich*, 204 AD2d 441, 443 [2d Dept 1994]), "requiring the court to decide the matter 'upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised'" (CPLR 409[b] [other internal citations omitted]); *Matter of Kerr v Black*, 55 AD3d 82, 86 [1st Dept 2008]). In a hybrid article 78 proceeding/declaratory judgment action, each portion is governed by separate procedural rules and the court may not use the same summary procedure to determine a cause of action for declaratory judgment (*see Matter of 24 Franklin Ave. R.E. Corp. v Heaship* ("*Heaship I*"), 74 AD3d 980, 980-981 [2d Dept 2010]; *Matter of 24 Franklin Ave. R.E. Corp. v Heaship*, 101 AD3d 1034 [2d Dept 2012] [clarifying on appeal after remittal, that the determination of a plea for an order declaring a local law invalid is governed by the procedural rules for a plenary action, and not an article 78 proceeding, regardless of the alleged grounds of such invalidity]). Consequently, determination of Petitioners' declaratory judgment causes of action is governed by the procedural rules applicable to plenary actions generally.

However, pursuant to CPLR 3211(c), "[w]hether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion [made under 3211(a) or (b)] as a motion for summary judgment." A court need not provide notice of its intent where the dismissal motion "was made after issue had been joined, and the parties clearly charted a summary judgment course by laying bare their proof and submitting documentary evidence and evidentiary affidavits" (*see Hopper v McCollum*, 65 AD3d 669, 670 [2d Dept 2009] [internal citations omitted]; *see also Hamlet at Willow Creek Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 99 [2d Dept 2009]; *lv dismissed* 13 NY3d 900 [2009]. Here, the Village Answer was filed simultaneously with the Village's Motion to Dismiss and, on October 31, 2012, the Village Respondents agreed to a summary disposition of the entire proceeding/action. Therefore, the Court determined it appropriate to treat the Village Respondents' motion to dismiss, and the Town's Answer and submissions in support thereof, as motions for summary judgment on the declaratory judgment causes of action as well.

Indeed, while the Village Respondents had not sought summary judgment in their notice of motion, Petitioners had alleged in opposition to the Village's motion that it should be treated "as one for summary judgment pursuant to CPLR 3211(c) and 3212" (*see* Reply Affirmation of Robert S. Rosborough IV at ¶5), to which the Village Respondents had objected but stated, "should this Court wish to consider Summary Judgment, it is to the [Village Respondents] to whom Summary Judgment should be granted" (*see* Memorandum of Law In Reply to Petitioners Opposition to the Motion by Respondents at 5). The Town did not make a formal motion to dismiss, but the first three of the four affirmative defenses pled in the Town's Answer could have been raised in such a motion under CPLR 3211(a)(7), (5) and (3), respectively, and the Town also agreed to a summary disposition of the entire proceeding/action, by dismissal or otherwise, based on such affirmative defenses.[4]

Thus, issue had been joined when the Village's formal motion and before the Town's de facto motion to dismiss were made, and all of the parties agreed that the merits of the entire matter should be determined on their submissions. Those submissions consist of attorney affirmations, witness affidavits, legal memoranda and extensive documentary evidence, including the Record of the administrative and legislative proceedings and enactments at issue. Upon consideration of all of said submissions, the Court has determined that there are no issues of fact, only issues of law which the parties fully briefed and argued. Therefore, the parties have clearly charted a summary judgment course and it is appropriate for the Court to treat their pleadings, dismissal motions and submissions as motions for summary judgment without prior notice of its intent (*see F & T Mgt. & Parking Corp. v Flushing Plumbing Supply Co.*, 68 AD3d 920, 923 [2d Dept 2009], *lv denied* 15 NY3d 702 [2010]; *Hopper v McCollum*, 65 AD3d at 670).

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[4] Although the Town's Answer alleges that "Defendant hereby demands a hearing as to the disputed issues of fact raised herein" (Town's Answer at ¶160), that demand refers only to Petitioners' article 78 claims. To the extent that the Town's Answer purports to demand a hearing or trial on Petitioners' claims for "declaratory relief pursuant to CPLR § 410 and Article 40 of the CPLR" (*id.*), the demand is unavailing because the procedural rules in article 40, including section 410, govern special proceedings, not plenary actions for declaratory judgment (*see Heaship I, supra*). In any event, both demands were supereeded by the October 31, 2012 agreement.

The First and Second Causes of Action

In the first cause of action, Petitioners contend that the Village Board failed in several respects "to strictly comply with SEQRA procedural mandates" (*see* Petition at 32). In the second cause of action, Petitioners contend that the Village Board failed in several respects "to strictly comply with SEQRA substantive mandates" (*Id.* at 35). The Respondents-Defendants contend that the Petitioners lack standing to assert a challenge under SEQRA.

Standing

To establish standing to challenge administrative action, a petitioner must demonstrate that as a result of such action it would sustain a direct injury which is within the zone of interests promoted or protected by the statutory provision pursuant to which the action was undertaken, and that the harm the petitioner will suffer from such injury is different in some way from that suffered by the public at large (*see Society of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 772-775 [1991]). Consequently, to establish standing to maintain a claim under SEQRA, a petitioner must demonstrate that the injury he, she or it has sustained or may sustain is "environmental" in nature (*see Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, 76 NY2d 428, 433 [1990].

An owner of property that is the subject of a zoning change enacted in purported compliance with SEQRA is presumed to have sustained an environmental injury and to have suffered harm different from that suffered by the public at large (*see Matter of Har Enters. v Town of Brookhaven*, 74 NY2d 524, 528-529 [1989]; *see also Land Master Montg I, LLC v Town of Montgomery*, 13 Misc 3d 870, 876 [Sup Ct, Orange County 2006] [holding that petitioners had standing to maintain SEQRA challenge to adoption of comprehensive plan and related zoning laws, "by virtue of their status as property owners subject to the challenged zoning changes"], *affd* 54 AD3d 408 [2d Dept 2008], *affd* 11 NY3d 864 [2008]). An owner of property unaffected by the zoning change is not entitled to the presumption (*see Matter of Assn. for a Better Long Is. v New York State Dept. of Envtl. Conservation*, 97 AD3d 1085, 1086 [3d Dept 2012], *lv granted* 20 NY3d 852 [2012]).

Respondents argue that by their terms, neither the Village CP nor the Zoning Amendments change the zoning of any of the properties of which the Individual Petitioners or Corporate Petitioners are owners or residents. Thus, the Respondents assert that the Individual Petitioners and Corporation Petitioners are not entitled to this presumption.

However, a petitioner whose property is located in close proximity to the site of the project to which the challenged action relates is the beneficiary of a different presumption – to wit, that it is adversely affected thereby – and, accordingly, need not allege a specific, or non-public, harm (*see Matter of Long Island Pine Barrens Socy. v Planning Bd. of the Town of Brookhaven*, 213 AD2d 484, 485 [2d Dept 1995]). In response to this Court's directive, Petitioners and the Village Respondents have submitted maps depicting the geographic locations of the properties within the boundaries of the Village that are owned by the Individual Petitioners and the Corporate Petitioners, and the distances of those properties from the nearest parcel affected by the Zoning Amendments and the RPOD (*see* Sterthous Affirmation, Exhibits 1 and 2, and O'Donnell Affidavit, Exhibit A). Based upon said submissions, Petitioners have established that the properties owned by the Individual Petitioners and the Corporate Petitioners are sufficiently close in proximity to parcels affected by the Zoning Amendments and the RPOD for them to benefit from the presumption that they are adversely affected by those enactments. Therefore, the Individual Petitioners and the Corporate Petitioners have standing to maintain the first and second causes of action.

With regard to VOKJ's standing to maintain the SEQRA Claims, it is clear that "[a] municipality is limited to asserting rights that are its own and is not permitted to assert the collective individual rights of its residents" (*Matter of Vil. of Chestnut Ridge v Town of Ramapo*, 45 AD3d 74, 91 [2d Dept 2007] (internal citations omitted), *appeal dismissed*, 12 NY3d 793 [2009], 15 NY3d 817 [2010]). Thus, to have standing to challenge its neighbor's failure to comply with SEQRA, a municipal entity must articulate a specific municipal interest in the potential environmental impacts of the action at issue, which interest can be established in several ways (*id.* at 91).

A municipality may have a specific municipal interest based upon the same considerations and principles upon which a member of the public would have standing (*id.*, at 86). Therefore, in its capacity as an owner of property, a municipality may have the same standing and is subject to the same burdens "as an[y other] interested property owner facing injury in fact" (*see Matter of County of Orange v Vil. of Kiryas Joel*, 44 AD3d 765, 767 [2d Dept 2007]). In the Petition,

Petitioners allege that, like the Individual Petitioners and the Corporate Petitioners, VOKJ owns property in the Village (*see* Petition at ¶12). However, on the Record before this Court, Petitioners have not identified the property owned by VOKJ located in the Village and/or in close proximity to any parcels affected by the enactments challenged in this proceeding. Therefore, VOKJ has not demonstrated entitlement to the benefit of the ownership presumption or the close proximity presumption.

Aside from standing based on ownership, a municipality that is an "involved agency" within the meaning of 6 NYCRR 617.2(s) has a specific municipal interest sufficient of itself to confer standing to challenge compliance with SEQRA (*see Chestnut Ridge v Ramapo*, 45 AD3d at 91-92). VOKJ was not identified as an involved agency during the environmental review that culminated in the adoption of the Village CP and the Zoning Amendments. Petitioners have not alleged that VOKJ should have been so identified but have alleged that it is an "interested agency" within the meaning of 6 NYCRR 617.2(t). Generally, "interested agency" status is not sufficient of itself to confer standing under SEQRA (*see Chestnut Ridge v Ramapo*, 45 AD3d at 86) [holding that the right of a neighboring municipality that is an "interested agency," but not an "involved agency," to challenge a SEQRA determination is the same but no greater than that of any other interested party]).

However, a municipality has standing under SEQRA where the potential environmental impacts of the challenged action may adversely affect the ability of that municipality to provide or maintain public facilities or services (*see Matter of Town of Coeymans v City of Albany*, 284 AD2d 830, 833 [3d Dept 2001]), or when necessary "to protect [its] unique governmental authority to define [its] community character" (*Chestnut Ridge*, 45 AD3d at 93-95; *see also Village of Pomona v Town of Ramapo*, 94 AD3d 1103, 1105-1106 [2d Dept 2012]). Here, Petitioners allege that the failure of the Village CP and Zoning Amendments to provide for adequate high-density, multi-family, walkable developments within the Village's borders will compel members of the Hasidic Jewish community who might have resided in such developments to settle instead in VOKJ, thereby overburdening its public facilities. Petitioners further argue that standing is necessary to protect VOKJ's unique governmental authority to define its community character. This Court agrees. VOKJ, an interested party, has standing under SEQRA to maintain the challenge which may adversely affect its ability to provide or maintain public facilities or services (*see Matter of Town of*

Coeymans v City of Albany, 284 AD2d 830, 833 [3d Dept 2001]) and to protect its unique governmental authority to define its community character (*see Chestnut Ridge*, 45 AD3d at 93-95; *see also Village of Pomona v Town of Ramapo*, 94 AD3d 1103, 1105-1106 [2d Dept 2012]). Therefore, VOKJ has standing to maintain the first and second causes of action.

The Merits of the First Cause of Action

In the first cause of action, Petitioners contend that the Village CP and the Zoning Amendments "must be declared null and void" (*see* Petition at ¶140) because the Village Board failed "to Strictly Comply with SEQRA Procedural Mandates" (*id.* at 32).

As the Court of Appeals has said:

> The mandate that agencies implement SEQRA's procedural mechanisms to the "fullest extent possible" reflects the Legislature's view that the substance of SEQRA cannot be achieved without its procedure, and that departures from SEQRA's procedural mechanisms thwart the purposes of the statute. Thus, it is clear that strict, not substantial, compliance is required.

(*Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 347 [1996]; *see also Matter of Baker v Village of Elmsford*, 70 AD3d 181, 189-190 [2d Dept 2009] (holding that "[l]iteral compliance with both the letter and spirit of SEQRA . . . is required").

The Village Board failed to strictly comply with SEQRA's procedural mechanisms. Pursuant to 6 NYCRR 617.6(a), "(1) [f]or Type I actions, a full EAF . . . must be used to determine the significance of such actions. The project sponsor must complete Part 1 of the full EAF . . . . The lead agency is responsible for preparing Part 2 and, as needed, Part 3." Pursuant to 6 NYCRR 617.7(b), "[f]or all Type I . . . actions the lead agency making a determination of significance must [among other things,] (2) review the EAF, the criteria contained in subdivision (c) of this section and any other supporting information to identify the relevant areas of environmental concern." It is undisputed that no EAF was used to determine the significance of the Village CP or the Zoning Amendments. Consequently, the Village Board also could not have reviewed an EAF in making said determination. Therefore, the Village Board failed to strictly comply with either of those procedural mechanisms.

An action approved or undertaken without such strict compliance must be annulled (*see*

Matter of New York City Coalition to End Lead Poisoning v Vallone, 100 NY2d 337, 348 [2003]; *Matter of Yellow Lantern Kampground v Cortlandville*, 279 AD2d 6, 12 [3d Dept 2000]). Therefore, the first cause of action seeking annulment of the Village CP and Zoning Amendments is granted.

The Merits of the Second Cause of Action

In the second cause of action, Petitioners contend, inter alia, that the Village CP and the Zoning Amendments "must be declared null and void" (*see* Petition at ¶157), because "the Village Board failed to take the requisite SEQRA hard look" (*id.* at 35).

Upon a claim that an agency determination does not satisfy SEQRA substantively, a court "may review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination (source of quoted language and other internal citations omitted)" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]). If the record establishes that "the agency has failed to take the required hard look . . . its action will be annulled as arbitrary and capricious" (*Matter of Troy Sand & Gravel Co. v Town of Nassau*, 82 AD3d 1377, 1378 [3d Dept 2011]).

The Village Board failed to fulfill its obligation as lead agency to take a hard look at the relevant areas of environmental concern. Pursuant to 6 NYCRR 617.9(b)(5), "all draft EIS must include . . . (v) a description and evaluation of the range of reasonable alternatives to the action that are feasible, considering the objectives and capabilities of the project sponsor[, including] the no action alternative." Literal compliance with this requirement is mandated (*see Matter of Rye Town/King Civic Assn. v Town of Rye*, 82 AD2d 474, 480-481 [2d Dept 1981], *appeal dismissed* 56 NY2d 508 [1982]). Thus, a lead agency "must consider a reasonable range of alternatives to the specific project" under review (*Matter of Town of Dryden v Tompkins County Bd. of Representatives*, 78 NY2d 331, 334 [1991]), and a discussion of such alternatives must be included in the draft EIS (*see Webster Assoc. v Town of Webster*, 59 NY2d 220, 227-228 [1983] [holding that failure to include discussion of alternatives in draft EIS was not cured simply by including the discussion in the final EIS]).

The 2009 DGEIS includes a discussion of what it terms, the "HIGHER DENSITY ALTERNATIVE" (2009 DGEIS at 4.1, and the "NO ACTION ALTERNATIVE" (*id.* at 4.5). The Higher Density Alternative discussion assumes development as of right of "two dwelling units per acre" in all areas that would have been classified R2-A and R3-A under the proposed Zoning Amends, which "would result in approximately 4,000 dwelling units more than might occur under current planned density (900 v. 5,000)" (*Id.* at 4.1). However, the 2009 DGEIS does not include any discussion indicating that the Village Board considered other feasible alternatives such as, for example, higher density development within R2-A and/or R3-A zoning districts by special use permit or the creation of smaller higher density, as of right zoning districts located within or adjacent to the proposed boundaries of the planned R2-A or R3-A districts. Such omission establishes that the Village Board failed to take the required hard look. Therefore, the second cause of action seeking annulment of the Village CP and Zoning Amendments is granted.

The Third Cause of Action

In the third cause of action, Petitioners allege that the Village CP and the Village Board's adoption thereof violate section 7-722 of the Village Law because it "wholly fails to consider the needs of all residents of [the Village], including the Village's Hasidic Jewish population" (*see* Petition at ¶171). Pursuant to article 7 of the Village Law, village boards of trustees are empowered to regulate by local laws the use of land within their borders "[f]or the purpose of promoting the health, safety, morals, or the general welfare of the community" (*see* Village Law 7-700). Included therein is the power to prepare and adopt a village comprehensive plan (*see* Village Law 7-722[1]), but a village is not required to do so (*see* Village Law 7-722[1][h]). Thus, Petitioners' contention that the Village CP violates section 7-722 is without statutory support (*see Mc Gann v Inc. Vil. of Old Westbury*, 256 AD2d 556, 557 [2d Dept 1998]). Therefore, while annulment of the Village CP is warranted on other grounds as set forth herein, the third cause of action is denied.

The Fourth Cause of Action

In the fourth cause of action, Petitioners contend that the Village CP and the Zoning

Amendments constitute unconstitutional exclusionary zoning (*see* Petition at ¶201). In support of this claim, Petitioners allege that the Village CP and Zoning Amendments prohibit members of the Hasidic Jewish community from residing in the Village; in other words, because members of the community are required by the tenets of their religion to reside in high-density, multi-family, walkable developments, the Village's failure to zone land located near its border with VOKJ to permit such developments as of right is exclusionary.

The test for determining whether a local law, or other action undertaken pursuant to the powers bestowed under Village Law article 7 constitutes unconstitutional exclusionary zoning is (1) whether the municipality has provided a properly balanced and well ordered plan for the community, and (2) whether consideration was given to regional housing needs and requirements (*see Berenson v Town of New Castle*, 38 NY2d 102, 110-111 [1975]). "A zoning ordinance enacted for a statutorily permitted purpose will be invalidated only if it is demonstrated that it actually was enacted for an improper purpose or if it was enacted without giving proper regard to local and regional housing needs and has an exclusionary effect" (*Robert E. Kurzius, Inc. v Incorporated Vil. of Upper Brookville*, 51 NY2d 338, 345 [1980]).

On the Record before this Court, Petitioners have demonstrated that the Village CP and/or the Zoning Amendments has the effect of exclusionary zoning. While neither document contains any language or provision expressly prohibiting members of the Hasidic Jewish community from residing in the Village, it is clear that if such was not enacted for an improper purpose, the Village CP and the Zoning Amendments were enacted without giving proper regard to local and regional housing needs of the Hasidic Jewish community and will have an exclusionary effect (*see Robert E. Kurzius, Inc. v Incorporated Vil. of Upper Brookville*, 51 NY2d 338 at 345; *see also Allen v Town of N. Hempstead*, 103 AD2d 144 [2d Dept 1984] [holding that durational residency requirement for proposed affordable senior citizen housing district, and comments made by town officials in support thereof, evinced an actual purpose to improperly exclude non-resident senior citizens of low and moderate income], *appeal withdrawn* 63 NY2d 944 [1984]). Notably, no zoning for high density, multi-family housing is proposed in the westernmost part of the Village, bordering VOKJ. While a municipality is not required to permit affordable housing in every zoning district or geographical area within its borders, and the failure to do so within any particular area or district does not in itself constitute an exclusionary zoning practice (*see Asian Americans for Equality v Koch*, 72 NY2d 121,

133-134 [1988]; *Suffolk Interreligious Coalition on Hous. v Town of Brookhaven*, 176 AD2d 936, 937-938 [2d Dept 1991]), *lv denied* 80 NY2d 757 [1992]), the Village CP and Zoning Amendments would eliminate high density, multi-family zoning from the area in question (*see Continental Bldg. Co. v Town of N. Salem*, 211 AD2d 88, 92-93 [3d Dept 1995], *appeal dismissed, lv denied*, 86 NY2d818 [1995]][holding that zoning ordinance that drastically reduced area in which multi-family development would be permitted actually was enacted for exclusionary purpose]).

Respondents' argument that since the majority of the Village's land mass has been zoned for single family residences on large lots before the incorporation of both the Village and VOKJ, the Village CP and Zoning Amendments is not exclusionary is unavailing (*see Land Master Montg I, LLC v Town of Montgomery*, 13 Misc3d 870, 878 [Sup Ct, Orange County 2006][holding that comprehensive plan and zoning ordinances were exclusionary on their face because the elimination of dedicated multi-family districts contemplated therein "constitute a marked departure from the prior zoning structure"]). While the majority of the Village's land mass is zoned for single family residences on large lots, high density, multi-family development is permitted in the Workforce Housing Overlay District,[5] which encompasses the Light Commercial and Hamlet Business districts, which are located in and around the two hamlets, and the Transit Village Zoning District.[6] Thus, the Village CP and Zoning Amendments constitute a departure from the prior zoning structure which permits high density, multi-family development (*see Land Master Montg I, LLC v Town of Montgomery*, 13 Misc3d at 878).

Further, Respondents did not provide a properly balanced and well ordered plan for the community to satisfy the first prong of the test set forth in *Berenson* (*see Berenson v Town of New Castle*, 38 NY2d at 110-111). Moreover, even if the first prong of the *Berenson* test was met, it has not been shown that the Village Board considered regional housing needs and requirements. Petitioners cite several documents, including: the *Orange County Comprehensive Plan* (hereafter, the "OCCP"(Exhibit 19 to the Petition), *A Three-County Regional Housing Needs Assessment: Orange, Dutchess and Ulster Counties 2006 to 2020* (hereafter, the "3-County Study")(Exhibit 9 to the Petition), and the *Southeast Orange County Land Use Study* (hereafter, the "SOCLUS")(Exhibit

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[5] The Workforce Housing Overlay District is codified as Village Code 310-31.2.

[6] The Transit Village Zoning District is codified as Village Code 310-31.3.

14 to the Petition). Such studies and analyses may constitute evidence informing a court's determination of whether regional housing needs have been considered (*see, e.g., North Shore Unit. Universalist Socy. v Incorporated Vil. of Upper Brookville*, 110 AD2d 123, 126-128 [2d Dept 1985]; *Allen v Town of N. Hempstead*, 103 AD2d 144, 149 [2d Dept 1984]). The crux of each of the studies and analyses is that there is a regional affordable housing shortage which would be best addressed by increasing multi-family development in and around the region's cities, village centers, hamlets and transportation centers. Therefore, the fourth cause of action is granted.

The Fifth Cause of Action

In the fifth cause of action, Petitioners contend that the RPOD is ultra vires and must be annulled because the restrictions imposed thereby are not substantially related to the public health, safety or welfare (*see* Petition at ¶215). Villages are authorized to enact zoning laws (*see* Village Law 7-700; Statute of Local Governments 10[6]). "Additionally, section 10(1)(ii)(a)(11) of the Municipal Home Rule Law gives . . . villages the power to enact local laws for the 'protection and enhancement of [their] physical and visual environment.'" (*Incorporated Vil. of Nyack v Daytop Vil.*, 78 NY2d 500, 505 [1991]). Thus, "the esthetic enhancement of a particular area" within a municipality is a legitimate governmental objective of a zoning law (*Matter of Cromwell v Ferrier*, 19 NY2d 263, 269 [1967]). A zoning law will not be annulled as ultra vires if it bears a reasonable relationship to a legitimate governmental objective (*see Marcus Assocs. v Town of Huntington*, 45 NY2d 501, 506-508 [1976]).

The stated purpose of the RPOD is to preserve and protect the "ridgelines and hilltops [which] form a scenic background to the developed areas of the Village, softening the visual impact of buildings and giving to the Village a natural and rural atmosphere" (*see* Village Code 310-13(A)(1)). The Record before this Court establishes that the RPOD bears a reasonable relationship to a legitimate governmental objective and its stated purpose. The RPOD is directly related to said objective as it applies only to buildings which may become part of the "scenic background" because they are located above a certain elevation on ridgelines and hilltops (*cf. e.g., Russell v Town of Pittsford*, 94 AD2d 410, 413-414 [4th Dept 1983][holding that ordinance requiring street peddlers to be in constant motion bore no reasonable relationship to stated purpose of "alleviating traffic

congestion . . . and preserving the town's aesthetics"]). Therefore, the fifth cause of action is denied.

The Sixth Cause of Action

In the sixth cause of action, Petitioners contend that the RPOD must be annulled as unconstitutionally vague (*see* Petition at ¶234). "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement" (*Hill v Colorado*, 530 US 703, 732 [2000]; *see also Town of Islip v Caviglia*, 141 AD2d 148, 163 [2d Dept 1988], *affd* 73 NY2d 544 [1989] [applying such "a two-part analysis"]). As a zoning ordinance, the RPOD carries a presumption of constitutionality and Petitioners bear the burden of proof beyond a reasonable doubt in rebutting that presumption (*see North Shore Unit. Universalist Socy. v Incorporated Vil. of Upper Brookville*, 110 AD2d at 124). Moreover, "it is incumbent upon the courts 'to avoid interpreting a statute in a way that would render it unconstitutional if such a construction can be avoided and to uphold the legislation if any uncertainty about its validity exists'" (*Alliance of Am. Insurers v Chu*, 77 NY2d 573, 585 [1991]; *see also Astoria Fed. Sav. & Loan Assn. v State*, 222 AD2d 36, 45 [2d Dept 1996]). In the Record before this Court, Petitioners have not satisfied their burden.

On its face, the RPOD provides people of ordinary intelligence with a reasonable opportunity to understand what it prohibits. Pursuant to Village Code 310-13(B)(1), "[t]he roof of any development in an area having a natural elevation above sea level of 600 feet, to the maximum practical extent, shall not be visible from any designated ridge preservation view corridor, as defined herein, or such structures shall blend into the hillside." Ridge preservation view corridor is defined as "[t]hose state and county roadways designated on the Zoning Map from which development at elevation of 600 feet or higher along ridges and hillsides is visible" (Village Code 310-2[B]). Subsections 310-13(B)(2) through (4) impose restrictions on building materials and roof slopes for visible structures in order that they satisfy the requirement that they blend into the hillside. Subsections 310-13(B)(5) imposes restrictions on the cutting and removal of trees that may be visible from a view corridor.

These provisions set out the criteria by which a person seeking to build a structure may

determine whether any part of said structure would fall within the RPOD's proscriptions. The language is objective (*cf. e.g., People v New York Trap Rock Corp.*, 57 NY2d 371, 381 [1982] [holding that subjective terms used in noise ordinance did not provide adequate notice of the conduct prohibited thereby]) and specific (*cf. e.g., Russell v Town of Pittsford*, 94 AD2d 410, 414 [4th Dept 1983] [holding that street peddlers ordinance was also impermissibly vague because phrase used to describe prohibited conduct was "subject to various interpretations"]). Petitioners complain that the RPOD fails "to clearly identify the properties in [the Village] that are actually subject to its restrictions." (Petition at ¶234). However, in combination with the Zoning Map, the RPOD provides points from which the operative views may be ascertained and the visibility of potential structures may be calculated with respect to any property located in the village. While the RPOD could have been better drafted,[7], the possibility that compliance may require some effort on the part of an applicant does not render a zoning ordinance impermissibly vague (*see Clements v Village of Morristown*, 298 AD2d 777, 778 [3d Dept 2002] [holding that the challenging party bears the burden of demonstrating that he could not have understood the statutory language]).

The RPOD does not authorize or encourage arbitrary and discriminatory enforcement. Village Code 310-13(C) sets out the criteria which the Planning Board must consider "[i]n making its decision regarding the visibility and compatibility of proposed structures" (*see* Village Code 310-13[C][1]-[4]). In conjunction with the precise restrictions and standards imposed by subsection 310-13(B), these criteria effectively eliminate the risk of arbitrary or discriminatory enforcement (*cf. e.g., People v New York Trap Rock Corp.*, 57 NY2d 371, 381 [1982] [holding that "[o]verall, . . . the pervasive nature of its catchall effect" made noise ordinance "a ready candidate for *ad hoc* and discriminatory enforcement"]; *Bakery Salvage Corp. v City of Buffalo*, 175 AD2d 608, 610 [4th Dept 1991] [holding that offensive odor ordinance lacked adequate enforcement standards despite enumerated criteria because of "imprecise definition" of prohibited conduct].

Therefore, Petitioners have failed to satisfy their burden of proof to rebut the presumption of constitutionality of the RPOD beyond a reasonable doubt by demonstrating that on its face, it is impermissibly vague. Therefore, while annulled on other grounds as set forth herein, the sixth cause

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[7] For example, Village Code 310-13(B)(1) does not indicate an elevation point above a view corridor from which visibility is to be calculated (*see, e.g., Cumney v Board of Trustees of Village of Grand View, NY*, 660 F3d 612, 621 [2d Cir 2011] [holding that view-obstruction ordinance did not provide adequate notice because, among other defects, it failed to describe elevation point from which the height of a building must be measured]).

of action is denied.

The Seventh Cause of Action

In the seventh cause of action, Petitioners contend that the RPOD must be annulled because regulation of the scenic views from the New York State Thruway and State Route 32 is preempted by section 349-bb of the Highway Law[8] (*see* Petition at ¶¶238-243). Local governments "cannot adopt laws that are inconsistent with the Constitution or with any general law of the State" (*Incorporated Vil. of Nyack v Daytop Vil., Inc.*, 78 NY2d at 505). "Thus, the power of local governments to enact laws is subject to the fundamental limitation of the preemption doctrine. Broadly speaking, State preemption occurs in one of two ways – first, when a local government adopts a law that directly conflicts with a State statute and second, when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility" (*DJL Rest. Corp. v City of New York*, 96 NY2d 91, 95 [2001][internal citations omitted]).

The RPOD does not directly conflict with the Scenic Byways Program. "[C]onflict preemption occurs when a local law prohibits what a state law explicitly allows, or when a state law prohibits what a local law explicitly allows" (*Matter of Chwick v Mulvey*, 81 AD3d 161, 168 [2d Dept 2010]). There is nothing that the Scenic Byways Program or the RPOD explicitly allow which is prohibited by the other. The Scenic Byways Program is concerned with the condition, appearance and esthetic value of the highways that comprise certain portions of the State highway system – i.e., the roadways themself – and the rights-of-way attendant thereto; there is no mention of ridgelines or hilltops that may be near or which could be viewed from said highways (*see* Highway Law §349-aa). Arguably, the structural proscriptions imposed by the RPOD would be implicitly allowed by Highway Law §349-bb because the State statute is silent as to the specific subjects of those proscriptions. "However, the mere fact that the Legislature's silence appears to allow an act that a local law prohibits does not automatically invoke the preemption doctrine" (*Matter of Chwick v Mulvey*, 81 AD3d at 168).

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[8] Section 349-bb is part of article XII-C of the Highway Law, also known as the New York State Scenic Byways Program (hereafter, the "Scenic Byways Program").

The RPOD is not concerned with a field in which the State Legislature has assumed full regulatory responsibility.

> Field preemption applies under any of three different scenarios. First, an express statement in the state statute explicitly avers that it preempts all local laws on the same subject matter. Second, a declaration of state policy evinces the intent of the Legislature to preempt local laws on the same subject matter. And third, the Legislature's enactment of a comprehensive and detailed regulatory scheme in an area in controversy is deemed to demonstrate an intent to preempt local laws.

(*Id.*, 81 AD3d at 169-170 [internal citations omitted]).

The instant situation does not fall into any of the three scenarios. There is no express statement in Highway Law article XII-C explicitly averring that the Scenic Byways Program preempts any local law, there is no declaration of State policy in article XII-C evincing such an intent, and the State Legislature has not enacted a regulatory scheme that would demonstrate such an intent. According to Highway Law §349-aa, the legislative intent in establishing the Scenic Byways Program is "to guide and coordinate the activities of state agencies, local governments and not-for-profit organizations in order to create a comprehensive program that will better serve the public interest." But the interests served by the program created thereby do not entail the views of ridgelines and hillsides located within the boundaries of local municipalities (*see generally* Highway Law §349-aa). In other words, the Scenic Byways Program and the RPOD are not concerned with the same subject matter. Nor is the RPOD preempted because the roadways from which the visibility of structures regulated thereby is calculated include State highways (*see DJL Rest. Corp. v City of New York*, 96 NY2d 91, 97 [2001] [holding that "State statutes do not necessarily preempt local laws having only a 'tangential' impact on the State's interests"]).

In sum, the RPOD does not conflict with and is not otherwise preempted by Highway Law §349-bb or the Scenic Byways Program. Therefore, although annulled on other grounds as set forth herein, the seventh cause of action is denied.

The Eighth Cause of Action

In the eighth cause of action, Petitioners contend that the Village CP, RLUL and Zoning Amendments must be annulled because in adopting them, the Village Board did not comply with the

provisions of sections 239-l and 239-m of the General Municipal Law (*see* Petition at ¶¶253-261). The purpose of those provisions is "to bring pertinent inter-community and county-wide planning, zoning, site plan and subdivision considerations to the attention of neighboring municipalities and agencies having jurisdiction" (General Municipal Law §239-l[2]). In furtherance of said purpose, a village that is considering such an action , and "which is located in a county which has a county planning agency . . . shall, before taking final action . . . [,]refer the same to such county planning agency" (General Municipal Law §239-m[2]). The county planning agency "shall have thirty days after receipt of a full statement of such proposed action, or such longer period as may have been agreed upon . . . [,]to report its recommendations to the referring body" (General Municipal Law §239-m[4][b]). "Within thirty days after final action, the referring body shall file a report of the final action it has taken with the county planning agency" (General Municipal Law §239-m[6]). The failure to comply with the referral provisions of said statutes is a jurisdictional defect that renders the action taken invalid (*see Matter of Ernalex Constr. Realty Corp. v City of Glen Cove*, 256 AD2d 336, 338 [2d Dept 1998]).

It is undisputed that the Village DCP, RLULL and Zoning Amendments constituted proposed actions as to which referral to the Planning Department was required and that the Village Board referred the Village DCP and Zoning Amendments to the Planning Department. Petitioners allege that the Village Board did not refer the RLULL, that the referral upon which the Planning Department reported its recommendations did not constitute a "full statement of such proposed action[s]" as that term is defined in section 239-m(1)(c), and that the Village Board did not file a report of its final actions with the Planning Department.

It is established in the Record that the referral complied with General Municipal Law §239-m. Nor was the Village Board required to make an additional referral after receiving the Planning Department's response; the Planning Department did not identify any problems with the proposed actions or recommend any measures that might be taken to comply therewith and there were no post-response revisions to any of the proposed actions that rendered them so substantially different than were embraced within and reflected by the original referral, as to require a second referral (*see Matter of Benson Point Realty Corp. v Town of E. Hampton*, 62 AD3d 989, 992 [2d Dept 2009], *lv dismissed* 13 NY3d 788 [2009]). A second referral was not required because the original referral and the Planning Department's review and response arguably satisfied the statutory purpose of

General Municipal Law 239-l and 239-m.

However, Respondents do not contravene Petitioners' allegations that the Village Board did not file with the Planning Department a timely report of its final actions as required under General Municipal Law 239-m(6), and there is no evidence that such a report was ever filed. Therefore, the eighth cause of action is granted.

The Ninth Cause of Action

In the ninth cause of action, Petitioners contend that the Zoning Amendments must be annulled because, "[u]pon information and belief, the Village Board substantially revised the Zoning Amendments less than seven days prior to their final passage and, therefore, it violated the procedural safeguards of the Municipal Home Rule Law" (Petition at ¶266). Pursuant to section 20(4) of the Municipal Home Rule Law, "[n]o local law shall be passed until it shall have been in its final form and either (a) upon the desks or table of the members at least seven calendar days . . .prior to its final passage, or (b) mailed to each of them . . . at least ten calendar days . . . prior to its final passage" (*see also Matter of Carpenter v Laube*, 109 AD3d 1018 [2d Dept 2013]). However, the Record does not contain sufficient information to substantiate Petitioners' contention that the Village Board violated the seven-day requirement (*cf. Matter of Tyler v Niagra County Legislature*, 175 AD2d 676 [4th Dept 1991]). Therefore, although annulled on other grounds as set forth herein, the ninth cause of action is denied.

The Twelfth, Thirteenth and Fourteenth Causes of Action

In the twelfth, thirteenth and fourteenth causes of action, Petitioners contend that the RLULL must be annulled because (1) it unlawfully delegates legislative power to the Planning Board (Petition at ¶¶300-302), (2) violates the rights of the Individual Petitioners and Corporate Petitioners to due process of law (Petition at ¶¶309-310) and, (3) is unconstitutionally vague (Petition at ¶¶320-323). The RLULL carries a presumption of constitutionality and Petitioners bear the burden of proof beyond a reasonable doubt in rebutting that presumption (*see North Shore Unit. Universalist Socy. v Incorporated Vil. of Upper Brookville*, 110 AD2d at 124).

Pursuant to the RLULL, a place of worship is a special permit use subject to minimum area and setback requirements set forth in the table entitled "Special Permit and Site Plan Approval by Planning Board" in each of the schedules of zoning districts to which the RLULL applies, and the following language appears in the Village Code as a footnote to those requirements:

> The Planning Board shall have discretion to waive any number of these requirements to the extent necessary if certain requirement(s) places a substantial burden on the religious exercise of a person, religious assembly or institution."

The gravamen of Petitioners' allegations in support of these causes of action is that the RLULL delegates to the Planning Board power to grant variances from the zoning laws, which power it could lawfully delegate only to a zoning board of appeals, and that the "substantial burden" criteria pursuant to which such determinations are to be made is both insufficient to limit the Planning Board's discretion and fails to provide potential applicants with a reasonable opportunity to know the circumstances under which the waiver provision will be applied. The Record does not indicate whether any of the Petitioners submitted a site plan or applied for a special use permit or a variance to build a place of worship in the Village. However, "a legal challenge to a local government's delegation of its land use regulatory powers to an administrative agency may properly be reviewed before the complaining party has sought relief from the agency" (*Town of Islip v Zaluk*, 165 AD2d 83, 97 [2d Dept 1991]).

The legislature of a local government may lawfully delegate certain of its powers to an administrative body so long as "[s]tandards are provided which, though stated in general terms are capable of a reasonable application and are sufficient to limit and define the [body's] discretionary powers" (*Matter of Aloe v Dassler*, 278 AD 975 [2d Dept 1951], *affd* 303 NY 878 [1952]). And "the legislative body has considerable latitude in determining the reasonable and practical point of generality in adopting a standard for administrative action" (*Matter of Big Apple Food Vendors' Assn. v Street Vendor Review Panel*, 90 NY2d 402, 407 [1997]). A village board of trustees is

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[4] A place of worship is defined as "[a] building designed or adapted for use by a religious organization for conducting formal religious services or religious assembly on a regular basis." Village Code 310-2. Petitioners contend that the minimum area and setback requirements for the siting of such structures effectively prohibit the use thereof within the tenets of the Hasidic Jewish religion.

empowered to authorize a planning board "to review and approve, approve with modifications or disapprove site plans" (Village Law §7-725-a[2]) and "to grant special use permits" (Village Law 7-§725-b[2]). A village board of trustees is also empowered to authorize a planning board to "waive any requirements for the approval, approval with modifications or disapproval of site plans" (Village Law §7-725-a[5]) and "special use permits" (Village Law §7-725-b[5])(*see also Town of Islip v Zalak*, 165 AD2d at 97-99 [holding that local government may lawfully delegate to a planning board the power to grant area variances]).

Any waiver of requirements by a planning board to which a village government has delegated such powers may be exercised only "in the event any such requirements are found not to be requisite in the interest of the public health, safety or general welfare or inappropriate to a particular site plan" (Village Law §725-a[5]) or "special use permit" (Village Law §725-b[5]); *see, e.g., Town of Islip v Zalak*, 165 AD2d at 98-99; *Dur-Bar Realty Co. v City of Utica*, 57 AD2d 51, 56 [4th Dept 1977], *affd* 44 NY2d 1002 [1978]. Protection of the rights of its citizenry to the free exercise of religion is a legitimate purpose of a local government (*see, e.g., Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Sts. v Amos*, 483 U.S. 327, 335 [1987]) (holding that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions"). On its face, the language utilized in the RLUIL describes a lawful delegation of powers that does not offend due process (*see Brightonian Nursing Home v Daines*, 21 NY3d 570, 575-579 [2013]), and is not unconstitutionally vague. Therefore, although annulled on other grounds as set forth herein, the twelfth, thirteenth and fourteenth causes of action are denied.

The Tenth, Eleventh and Fifteenth through Eighteenth Causes of Action

In the tenth cause of action, Petitioners contend that the Village CP and Zoning Amendments must be annulled because they have imposed a substantial burden on the religious exercise of the Individual Petitioners and the Corporate Petitioners and Woodbury's Hasidic Jewish population

(Petition at ¶276) in violation of section 2000 cc(a) of the United States Code.[10] In the eleventh cause of action Petitioners contend that the RLULL must be annulled because as a result of said law "Hasidic Jewish religious assemblies, institutions or structures will either be totally excluded from the Village or will be unreasonably limited within the Village" (Petition at ¶288), in violation of 42 USCA § 2000cc (b)(3). In the fifteenth through eighteenth causes of action Petitioners contend that the Village CP, RLULL and Zoning Amendments must be annulled because they violate Petitioners' rights to equal protection (Petition at ¶¶336, 366), free exercise of religion (Petition at ¶350), and due process (Petition at ¶378). The gravamen of Petitioners' allegations in support of these causes of action is that the failure to create multi-family districts in which would be permitted as of right the development of communities of sufficient residential density needed to satisfy the unique needs of the Hasidic Jewish community including the siting of places of worship within such communities -- effectively prohibits or makes it prohibitively difficult for members of the Hasidic Jewish community to live and worship in the Village in a manner consistent with their religious beliefs.

The analysis under RLUIPA tracks that of the United States Supreme Court under the First Amendment, so that a land use regulation violates RLUIPA where it is determined that it violates the Free Exercise Clause (*see Chabad Lubavitch of Litchfield County v Borough of Litchfield*, 853 F Supp 2d 214, 222 [D Conn 2012]. Thus, a determination that the Village CP, RLULL and Zoning Amendments violate RLUIPA necessarily entails an interpretation that renders said enactments unconstitutional.

In light of the fact that the Court has addressed those causes of action seeking annulment on non-constitutional grounds of the enactments at issue herein, the Court declines to address the claims raised in the tenth, eleventh and fifteenth through eighteenth causes of action at this time, without prejudice to a renewal of such claims should subsequent litigation ensue.

Accordingly, for the foregoing reasons, it is hereby

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[10] Section 2000cc is part of chapter 21C of the United States Code, otherwise known as the Religious Land Use and Institutionalized Persons Act (hereafter, "RLUIPA").

ORDERED and ADJUDGED that the Petition is granted to the extent that the first, second, fourth, and eighth causes of action are granted, and the third, fifth, sixth, seventh, ninth, twelfth, thirteenth and fourteenth causes of action are denied; and it is further

ORDERED and ADJUDGED that in view of the foregoing, this Court need not reach a determination with respect to the remaining causes of action; and it is

ORDERED and ADJUDGED that the Resolution dated June 14, 2011, of the Village Board of the Village of Woodbury, adopting the Comprehensive Plan for the Village of Woodbury, is annulled, and the Comprehensive Plan for the Village of Woodbury adopted pursuant thereto is declared void and unenforceable; and it is further

ORDERED and ADJUDGED that the Resolution dated June 14, 2011, of the Village Board of the Village of Woodbury, adopting Local Law 3 of 2011, consisting of amendments to Chapter 310 of the Village Code of the Village of Woodbury, is annulled, and the amendments adopted pursuant thereto, with the exception of the amendments adopted and codified as section 310-13 of the Village Code of the Village of Woodbury (otherwise known as the Ridge Preservation Overlay District), are declared void and unenforceable and, it is further

ORDERED and ADJUDGED that the Resolution dated June 14, 2011, of the Village Board of the Village of Woodbury, adopting Local Law 4 of 2011, consisting of amendments to the Zoning Map of the Village of Woodbury, is annulled, and the amendments adopted pursuant thereto, with the exception of the amendments adopted and codified as section 310-13 of the Village Code of the Village of Woodbury (otherwise known as the Ridge Preservation Overlay District), are declared void and unenforceable.

The foregoing constitutes the decision, order and judgment of the Court.

Dated: White Plains, New York
March 19, 2014

ENTER:

HON. FRANCIS A. NICOLAI
Justice of the Supreme Court

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Exhibit 5

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

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ZIGMOND BRACH, Individually and on Behalf of all Persons Similarly Situated,

Plaintiff,

- against -

TOWN OF WOODBURY, VILLAGE OF WOODBURY and STATE OF NEW YORK,

Defendants.

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To commence the 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.

Index No. 11364/2011

DECISION AND ORDER

Motion Dates: February 24, 2012

The following papers numbered 1 to 14 were read and considered on this motion by defendant Village of Woodbury, pursuant to CPLR §3211, dismissing the complaint insofar as asserted against it, and defendant Town of Woodbury, pursuant to CPLR §3211, dismissing the complaint insofar as asserted against it.

Notice of Motion - Nugent Affirmation- Exhibit A- Memorandum of Law 1- 3
Notice of Motion– McKay Affirmation- Memorandum of Law 4-6
Affidavit in Opposition- Brach- Affirmation in Opposition- Klatsky- Exhibits A-J - Memorandum of Law 7-10
Reply Affirmation– McKay- Exhibit A 11-12
Reply Affirmation - Nugent - Exhibits A-E 13-14

Upon the foregoing papers, it is hereby,

ORDERED, that the motions are decided as set forth herein.

Introduction

Plaintiff Zigmond Brach is a Hasidic Jew who lives and owns property in a community of Hasidic Jews in the western portion of defendants Town of Woodbury and Village of Woodbury. His community abuts the Village of Kiryas Joel, which is a community of Hasidic Jews in the Town

of Monroe. Plaintiff commenced this action to challenge various actions taken by Town of Woodbury and Village of Woodbury which he alleges, *inter alia*, was intended to prevent his community from forming a village, and to prevent the spread of the Hasidic community into the area in general. Such action includes, *inter alia*, creating a Village of Woodbury that is almost completely coterminous with the Town of Woodbury, which, in effect, prevents the formation of any new Village within the same, and passing zoning laws which restrict the density of housing to two acre lots. Plaintiff alleges, *inter alia*, that the nature of his community, and the fact that its members must walk to religious services, necessitates the need for more dense and affordable housing. Thus, he argues, the action taken, *inter alia*, violates his constitutional rights and must be annulled.

The Town of Woodbury and the Village of Woodbury move to dismiss the complaint. In so moving, they argue, *inter alia*, that plaintiff lacks standing, that most of the claims are not ripe for judicial determination and, in certain instances, the challenges are time-barred.

The motions are granted in part and denied in part.

Procedural History/Factual Background

The following background facts do not appear to be in dispute:

In July of 2004, the residents of the Town of Woodbury filed a petition to incorporate the Village of Woodbury. The proposed Village of Woodbury was coterminous with the existing Town of Woodbury, with the exception of the Village of Harriman, and included plaintiff's property and that of his community. Signers of the petition included several current village officials, including the mayor. The stated purpose of the petition was to preserve the character, heritage, zoning and quality of life of the town, and the continuity of its existing borders.

In August of 2004, counsel representing Jewish and Hasidic residents in general filed written

comments and objections to the petition. On August 28, 2006, the petition was approved and the Village of Woodbury was incorporated.

Thereafter, and on or about June 8, 2010, the village trustees adopted a resolution to submit a Municipal Home Rule request to the state legislature to pass a special law permitting the consolidation of the governments of Town of Woodbury and Village of Woodbury (hereinafter the "Resolution" - Reply Affirmation, Nugent, Exh. C), the stated purpose of which was to provide more efficient and economical government services by: (1) the elimination of duplicate services; and (2) the utilization of special districts for water, sewer and other municipal services that villages are not permitted to supply under the Village Law. Further, the Village of Woodbury sought a "restriction that no new Villages may be incorporated within its municipal boundaries, ensuring efficient and economical provision of governmental services by a singular governmental entity into the future." The Resolution noted that such a mixed form of government was not permitted under the New Governmental Reorganization and Citizen Empowerment Act (Article 17-A of the General Municipal Law). Finally, the Resolution provided that defendants reserved the right to revert to their former status should the law once passed be thereafter found invalid, in whole or in part, by a court of competent jurisdiction.

Based upon the foregoing, plaintiff commenced the action at bar asserting twelve (12) causes of action seeking various declaratory, injunctive and other relief. As background, plaintiff alleges that he is a Hasidic Jew who lives and owns various property in a "separate, built-up community" of mainly Hasidic Jews that occupies an approximate 1.2 acre area along the western border of the Town/Village of Woodbury. He further alleges that his community lies in the immediate vicinity of the Village of Kiryas Joel, which is situate in the Town of Monroe, and which is also comprised

mainly of Hasidic Jews. Plaintiff also alleges that his community is geographically remote from other built-up areas in the Town/Village of Woodbury, and is provided with few if any municipal services from the same. He notes that neither sewer nor water services are provided. Further, that his community has a sufficient population to be eligible to form a village pursuant to section 2-200 of the Village Law. This, he alleges, has created several problems, to wit: In or about 2004, the Village of Kiryas Joel entered into discussions with New York City to build a water pipeline to supply the village with water. The proposed pipeline became a focal point of people seeking to limit the growth of the Hasidic community in the area. As a result, there were various petitions and websites opposing the pipeline, and hate speech directed against Jews and the Hasidic community in general. In July of 2004, the residents of the Town of Woodbury filed the aforementioned petition to incorporate a Village of Woodbury. The proposed Village of Woodbury was coterminous with the existing Town of Woodbury, with the exception of the Village of Harriman, and included plaintiff's property and that of his community. Plaintiff alleges that the real purpose of the petition was to prevent the formation of a new village out of the plaintiff's community and to put up barriers to the settlement of additional Hasidic Jews in the area, *i.e.*, under the state Village Law, a new village cannot be created within an existing village. In August of 2004, counsel representing Jewish and Hasidic residents filed written comments and objections to the petition. However, he alleges, the comments were summarily ignored by town officials, the petition was unanimously approved and on August 28, 2006, the Village of Woodbury was incorporated.

Plaintiff further notes, that in 2004 the Town of Woodbury also undertook to prepare a Comprehensive Plan for the town which included changes to the zoning laws; changes which included, *inter alia*, a requirement for larger building lots. Thereafter, and in December of 2005 and

February 2006, counsel representing the Village of Kiryas Joel and Hasidic residents of plaintiff's community again submitted comments objecting to portions of the plan; objections which included, *inter alia*: (1) that the proposed plan violated SEQRA; (2) that the proposed plan did not accommodate the Hasidic community, which needed to live within walking distances of their places of worship and, therefore, needed higher density housing; and (3) that the proposed plan failed to provide adequate affordable housing in violation of the Fair Housing Act.

Thereafter, and in June of 2007, the Village of Woodbury assumed lead agency status for the purpose of the SEQRA review and on December 8, 2008, a final draft of the plan was submitted to the Village Board for consideration and approval. On March 22, 2011, counsel for the Village of Kiryas Joel again submitted objections to the plan. On June 14, 2011, the Comprehensive Plan was adopted, along with Local Laws 3 and 4, which implemented various aspects of the plan.

Finally, plaintiff notes that, on or about June 8, 2010, the village trustees adopted the aforementioned Resolution , seeking a special law to permit the consolidation of the governments of the Town and Village of Woodbury without permitting the formation of a new village.

As a first cause of action, plaintiff alleges that the Resolution fails to comply with section 40 of the Municipal Home Rule Law in that it fails to set forth facts demonstrating the "necessity" for the request. Plaintiff further alleges that the defect is fatal because there is no justification for the provision barring the formation of new villages. Moreover, he alleges, the true intent of the law was to create barriers to the settlement of additional Hasidic Jews in the area. Thus, plaintiff seeks a declaration that the Resolution is invalid for that reason.

As and for a second cause of action, plaintiff alleges that the Resolution violates the equal protection clause of Article I, Section 11 of the New York State Constitution because it deprives him

and his community of their right under the Village Law to petition to create a village. Plaintiff seeks a declaration that the Resolution be deemed invalid for that reason.

As a third cause of action, plaintiff alleges that the Resolution violates the equal protection clause of Article I, Section 11 of the New York State Constitution because it creates "territorial distinctions affecting Plaintiff's community unequally with other territorial areas in the State of New York that have no rational basis." Plaintiff further seeks a declaration that the Resolution is invalid for that reason.

As a fourth cause of action, plaintiff alleges that, in or about April of 2008, the Village of Woodbury adopted a zoning code which required that all residences be built on lots of no less than two (2) acres, "whereas property owners in other sections of the Town and Village of Woodbury are not similarly restricted, without cause for the disparate treatment." Thus, plaintiff alleges, the zoning code violates the equal protection clause of the New York State Constitution, and must be declared invalid for that reason.

As a fifth cause of action, plaintiff alleges that the zoning board and zoning board of appeals of the Town and Village of Woodbury do not adequately represent his community and are not responsive to their need for affordable and high-density housing. Thus, he alleges, the needs of his community require the creation of a special zoning district pursuant to section 7-702 of the Village Law, the request for which, he alleges, would nevertheless be futile. Thus, he argues, he and his community are entitled to a permanent injunction mandating the creation of a special zoning district and directing the adoption of a special zoning code that addresses the needs of plaintiff and his community, and which provides for the appointment of a special referee to monitor the implementation of same.

As a sixth cause of action, plaintiff alleges that the zoning board and zoning board of appeals of the Town and Village of Woodbury are comprised entirely of persons who reside outside of his community and who do not represent the same. Indeed, he alleges, the Village of Woodbury has pursued a policy of excluding members of his community to prevent such representation. Thus, he alleges, he and his community are entitled to a permanent injunction mandating the appointment of members to the boards that will provide adequate representation for him and his community.

As a seventh cause of action, plaintiff alleges that the proposed consolidation of the county and village governments by the Resolution will prevent him and his community from exercising their statutory right to form a village. Thus, he seeks an order directing that plaintiff's community "revert to the Town of Woodbury."

As an eighth cause of action, plaintiff seeks a declaration that the Comprehensive Plan and accompanying Local Laws 3 and 4 be declared invalid because they deprive him and his community of their right to due process under Article 1, section 6 of the New York State Constitution.

As an ninth cause of action, plaintiff seeks a declaration that the Comprehensive Plan and accompanying Local Laws 3 and 4 be declared invalid because they deprive him and his community of their right to equal protection under the law pursuant to Article 1, section 11 of the New York State Constitution.

As an tenth cause of action, plaintiff seeks a declaration that the Comprehensive Plan and accompanying Local Laws 3 and 4 are invalid because they deprive him and his community of their right to the free exercise of religion under Article 1, section 3 of the New York State Constitution.

As an eleventh cause of action, plaintiff seeks a declaration that the Comprehensive Plan and accompanying Local Laws 3 and 4 violate SEQRA.

As a twelfth cause of action, plaintiff seeks a declaration that the designation of his community as a "critical environmental area" under section 617.14(g) of SEQRA is in violation of lawful procedure, and affected by an error of law, and is arbitrary and capricious.

Village of Woodbury's Motion

The Village of Woodbury now moves to dismiss the complaint insofar as asserted against it. As a threshold issue, the Village of Woodbury argues that, in the main, plaintiff is seeking to raise untimely challenges to municipal action by framing the complaint as seeking declaratory and injunctive relief. Further, that, as to some causes of action, plaintiff is asking the court to act, in effect, as a judicial legislature, directing the village to enact certain laws and appoint certain persons to various official positions. In any event, the Village of Woodbury argues that, plaintiff's challenges to the Resolution are premature, as the Resolution has yet to be acted upon. In addition, there is no private right of action to challenge a request made pursuant to section 40 of the General Municipal Law. Similarly, neither plaintiff nor his community have a statutory right to incorporate a village, since they are already a part of the Village of Woodbury. Moreover, they argue that pursuant to Village Law § 2-200, a new village cannot be created out of an existing village. On the merits, the Village of Woodbury asserts, the zoning laws being challenged apply to all property in the village on an equal basis, and do not deprive the plaintiff of the beneficial use of his property. Further, there is no obligation, and it is not possible, for the zoning board of the village to have a representative from every group in a village. Moreover, it asserts, there is no evidence or allegation that plaintiff, or any member of his community, sought or was denied a position on such board, and there is no basis or authority for the court to order that plaintiff's community "revert" to the Town

of Woodbury. In addition, the Village of Woodbury notes, although plaintiff raises various challenges to the Comprehensive Plan and attendant local laws, he expressly lists the various ways in which he and his community were allowed to participate in the process which led to the same. Moreover, all of plaintiff's SEQRA claims are barred by the applicable four (4) month statute of limitation, and should have been raised by a petition pursuant to article 78 of the CPLR. Finally, the Village of Woodbury asserts that, plaintiff is not an appropriate class representative for a class action suit, and a class action suit would not be a superior method to challenge the action taken. In sum, it argues, the action must be dismissed insofar as asserted against it.

Town of Woodbury's Motion

The Town of Woodbury also moves to dismiss the complaint insofar as against it.

Initially, the Town of Woodbury asserts, the arguments raised in the instant litigation are identical to arguments raised in *United Fairness v Village of Woodbury (Index No. 010884/10);* an action ultimately dismissed for lack of standing. In fact, the Town of Woodbury argues, this represents the third time plaintiff and his community have sought to challenge the legislation at issue. However, the Town of Woodbury opines, plaintiff, and the members of his community, did not all move into the area after the passage of the legislation at issue. Thus, they had an opportunity to form a village prior to the same, but did not take it. Moreover, they were afforded an opportunity to participate in the creation of the legislation challenged. Thus, the Town of Woodbury asserts, plaintiff has not suffered an injury in fact. In addition, it argues, obviously, not every member of the putative class will seek to build high density housing or has applied to be on the zoning board. In any event, courts do not render advisory opinions, and none of plaintiff's claims are ripe for

determination. Further, there are statutory bars to the review sought. For example, the Town of Woodbury argues, there is no statutory right to form a village; the legislation challenged does not disproportionately impact any person or property; and it cannot be compelled to enact particular zoning laws or appoint specified persons to boards. Further, the court cannot simply order plaintiff's community to "revert" to the Town of Woodbury. Finally, the Town of Woodbury asserts that: there has been no violation of due process or, for that matter, any of plaintiff's other constitutional rights; all of plaintiff's claims concerning SEQRA are time-barred; there is no basis to certify a class action suit; and the complaint contains scandalous and prejudicial information alleging anti-Semitism that should be struck out.

In opposition, plaintiff avers that he is a business man and owns property both for personal and business use in the Town of Woodbury and Village of Woodbury. Further, that he is an active member of his community. Plaintiff further asserts that he is affected by the legislation because he will be deprived of living in a community with persons of his religious sect. He also contends that there is a long history of animus against the Hasidic Jews in the area, and a long history of efforts at exclusion. Plaintiff argues that, during the comment period on the Comprehensive Plan adopted by defendants, it was noted that his community was being treated differently than the similarly situated Village of Harriman, to wit: The new plan would require two-acre lots, ostensibly on the ground of environmental protection and the preservation of views and sight lines. This was true even though the Village of Harriman, which permitted and in fact had dense development, had greater environmental sensitivity than plaintiff's community and adjoined a state park. Indeed, plaintiff avers, his community has no scenic views of any type, no wetlands, no state parks, and no environmentally sensitive soils. Further, it had existing single family homes on half-acre plots and

cluster developments that pre-dated the arrival of Hasidic Jews. In addition, the Village of Harriman is located wholly over an aquifer, whereas no portion of his community is. Further, he notes, it was commented on that the Comprehensive Plan was inconsistent with the Southeast Orange County Land Use Study, which describes how the Village of Kiryas Joel adhered to smart growth principals, and which expressly advocated that it be extended into plaintiff's community. The comments on the plan also noted that the Final Generic Environmental Impact Statement required not less than one acre of property per place of worship, whereas all existing houses of worship (which were almost entirely Christian) were "grand-fathered" in. This is true even though Jewish worshipers are required to walk to their services. Further, the law does not permit multiple family dwellings and designates all areas over 600 feet in elevation to be "Critical Environmental Areas" within the meaning of section 617.14(g) of SEQRA. This provision was objected to on the ground that it was enacted without adhering to required procedures, and because there was no basis to find that there was a natural setting or inherent ecological sensitivity to effect. Moreover, plaintiff argues, the designation is arbitrary, capricious and contrary to law.

In addition, plaintiff asserts, in 2009, the Planning Departments of Orange, Dutchess and Ulster Counties prepared a study entitled Three County Regional Housing Needs Assessment. The study concluded that there was an "affordability gap" in the area (*i.e.*, a lack of affordable housing) of 31,272 units, that would grow to 44,000 units by 2020. Specifically, a deficit of 980 units was found in Town and Village of Woodbury, which would increase to 1,390 units by 2020. These figures, he argues, are undoubtedly conservative, as the population growth figures used were low. The Comprehensive Plan makes no mention of affordable housing. Thus, he asserts, Town of Woodbury failed to take the required "hard look" under SEQRA concerning affordable housing.

Further, the Comprehensive Plan is being used to carry out a discriminatory purpose, as it disproportionately affects Hasidic Jews, who are both less affluent than other residents of Town and Village of Woodbury, and which have an increased need for multi-family housing for both economic reasons and for their religious lifestyle.

In further opposition to the motion, plaintiff submits the affirmation of his attorney, James Klatsky, in which Klatsky argues that the eleventh and twelfth causes of action are both timely because: The Comprehensive Plan was adopted on June 14, 2011 and at that time, *United Fairness Inc. v Town of Woodbury, supra*, was still pending. On October 7, 2011, within the four month period of limitation, plaintiff herein filed a motion to intervene in the *United Fairness* action. On November 15, 2011, the court in *United Fairness* (Ecker, J.), granted a motion to dismiss the action and denied plaintiff's motion to intervene as moot. That decision was served with notice of entry on December 8, 2011. Klatsky argues that the statute of limitation as against plaintiff was tolled from October 7, 2011, until December 8, 2011. Thus, he asserts, this action, commenced on December 14, 2011, is timely. Finally, he argues, defendants should be estopped from asserting a statute of limitation defense, as they requested that the motion to intervene in *United Fairness* be stayed pending determination of its motion to dismiss.

In reply, the Town argues that plaintiff has not raised a justiciable controversy, as the Legislature has yet to act on its proposed Home Rule request. Further, plaintiff does not allege that either he or any of his proposed projects were the subject of religious animus, or that he was denied any permit, or that he had any pre-existing rights that were violated. Nor does he allege that he or anyone else desired or previously sought to form a village. In addition, the Town of Woodbury argues, plaintiff claims that the Resolution fails to comply with section 40 of the Municipal Home

Rule Law because he cites only one paragraph of the same. When the entire Resolution, which is appended as an exhibit, is considered, it is clear that a justification for the request is stated. Further, the true purpose of the proposed consolidation is that which is expressed in the Resolution, to wit: to take advantage of special district taxing benefits generally authorized under a town form of government, which will facilitate the delivery of localized water, sewer and similar services. In addition, the Town of Woodbury argues, the equal protection clause does not require the territorial uniformity of law within the state. Further, plaintiff does not allege that either he or any proposed class member has a prior or pending application before the zoning board that had been denied, or had sought any other relief that was not accommodated. Nor does he allege that he or any member of his community had sought and/or been denied a position on a board. The Town of Woodbury further argues that plaintiff's SEQRA claims must be dismissed because he has not alleged to have suffered any ecological harm from the same. Further, his SEQRA claims are time-barred. Finally, the Town of Woodbury asserts, contrary to plaintiff's contentions, these allegations are not saved by the relation-back doctrine of CPLR 203 because the *United Fairness* action did not raise SEQRA claims. Moreover, the case law does not support application of the doctrine to plaintiff on these facts.

In reply, the Village of Woodbury also argues that the timeliness of the eleventh and twelfth causes of action is not saved by the relation-back doctrine. Further, that even if the doctrine were applicable, the claims would still be untimely, to wit: The motion to intervene was made by plaintiff *United Fairness*, not plaintiff herein, and was filed on October 12, 2011, not October 7, 2011. Further, the decision denying the motion was entered on November 23, 2011, not December 8, 2011. Thus, plaintiff needed to commence this action by November 27, 2011, to have been timely. However, the action was not filed until December 14, 2011. Otherwise, the Village of Woodbury

asserts, plaintiff's challenge to the Resolution is premature and, in any event, without merit; the Resolution contains a justification for the same; and plaintiff is merely speculating that either he or a member of his community intends to incorporate a village, and has failed to identify a single way in which his community is being treated differently than any other community in the Town or Village of Woodbury. Finally, the Village of Woodbury argues, the proposed consolidation will prevent wasteful government, and the court should not convert this action to one seeking relief pursuant to Article 78 of the CPLR.

Discussion/Legal Analysis

Law of General Application

a. Standard on a Motion to Dismiss

The Town of Woodbury and the Village of Woodbury each move, pursuant to CPLR 3211(a)(7), to dismiss the complaint insofar as asserted against them.

In determining the facial sufficiency of a pleading on a motion to dismiss, pursuant to CPLR 3211(a)(7), the court must give the pleading a liberal construction, take the facts alleged in the complaint as true, and afford the plaintiff the benefit of every reasonable inference in determining whether the allegations fit within any cognizable legal theory. *Leone v Martinez, 84 N.Y.2d 83, 87, 638 N.E.2d 511 (1994); Cron v. Hargro Fabrics, Inc., 91 N.Y.2d 362, 670 N.Y.S.2d 973 (1998); Lester v. Braue, 25 A.D.3d 769, 808 N.Y.S.2d 778 (2nd Dept.2006); Uzzle v Nunzie Court Homeowners Association, Inc., 70 A.D.3d 928, 895 N.Y.S.2d 203 (2nd Dept. 2010).* Bare legal conclusions and factual claims, however, which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action. Further, when the

moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has *any* viable cause of action, not just whether he or she has stated one. *Jesmer v Retail Magic, Inc., 55 A.D.3d 171, 863 N.Y.S.2d 737 (2nd Dept.2008).* Moreover, a plaintiff may submit affidavits to remedy defects in the complaint and to preserve in-artfully pleaded, but potentially meritorious claims. Such additional submissions must likewise be given their most favorable intendment. *Cron v Hargro Fabrics, Inc., 91 NY2d 362, 694 N.E.2d 56 (1998); Lester v Braue, 25 A.D.3d 769, 808 N.Y.S.2d 778 (2nd Dept.2006).*

b. Standing

Standing is critical to the proper functioning of the judicial system, and is a threshold issue. *Saratoga County Chamber of Commerce, Inc. v Pataki. 100 N.Y. 2d 901, 798 N.E.2d 1047 (2003).* Standing requires an inquiry into whether a litigant has a sufficient interest in the lawsuit that the law will recognize as a sufficient predicate for determining an issue at the litigant's request. *Bank of New York v. Silverberg, 86 A.D.3d 274, 926 N.Y.S.2d 532 (2nd Dept.2011); Caprer v. Nussbaum, 36 A.D.3d 176, 825 N.Y.S.2d 55 (2nd Dept.2006).* In order to have standing in a particular dispute, a plaintiff must demonstrate an injury that in fact falls within the relevant zone of interest sought to be protected by the law. *Bernfeld v. Kurilenko, 91 A.D.3d 893, 937 N.Y.S.2d 314 (2nd Dept.2012); Village of Elmsford v. Knollwood Country Club, Inc., 60 A.D.3d 934, 875 N.Y.S.2d 560 (2nd Dept.2009); Caprer v. Nussbaum, supra..* The rules governing standing assist the courts in differentiating the tangible from the abstract or speculative injury, and the genuinely aggrieved from the judicial dilettante or amorphous claimant. *Saratoga County Chamber of Commerce, Inc. v Pataki. 100 N.Y. 2d 901, 798 N.E.2d 1047 (2003); Sharrow v. Sheridan, 91 A.D.3d 940, 937*

N.Y.S.2d 320 (2nd Dept. 2012)(status as potential heir was speculative). Moreover, the litigant must have something truly at stake in a genuine controversy. *Saratoga County Chamber of Commerce, Inc. v Pataki. 100 N.Y. 2d 901, 798 N.E.2d 1047 (2003).* The mere fact that an issue may be one of "vital public concern" does not, without more, entitle a party to standing. Here, the difficulty typically lies in delineating a sharp line which differentiates a worthy litigant from one who simply generates a lawsuit for the primary purpose of advancing another party's cause or interest. *Society of the Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761, 573 N.E.2d 1034 (1991) Saratoga County Chamber of Commerce, Inc. v Pataki. 100 N.Y. 2d 901, 798 N.E.2d 1047 (2003).*

c. Ripeness

The ripeness doctrine, and companion rule that there must be an actual controversy between genuine disputants with a stake in the outcome, serve the same purpose– to conserve judicial machinery for problems that are real, present or imminent, not to squander it on abstract, hypothetical or remote problems. Simply put, courts should not be called upon to adjudicate controversies or take action to prevent perceived harm that is contingent in nature and dependent upon events which may never come to pass. *Church of St. Paul and St. Andrew v. Barwick, 67 N.Y.2d 510, 496 N.E.2d 183 (1986); Community Housing Imp. Program, Inc. v. New York State Div. of Housing and Community Renewal, 175 A.D.2d 905, 573 N.Y.S.2d 522 (2nd Dept.1991).* The jurisdiction of the courts extends only to live controversies. Courts are thus prohibited from giving advisory opinions or ruling on academic, hypothetical, moot, or otherwise abstract questions. *Church of St. Paul and St. Andrew v. Barwick, 67 N.Y.2d 510, 496 N.E.2d 183 (9186); Community Housing Imp. Program, Inc. v. New York State Div. of Housing and Community Renewal, 175 A.D.2d 905, 573 N.Y.S.2d 522 (2nd Dept.1991).*

d. Overview

The following overview is noted.

Here, the thrust of the alleged harm which plaintiff seeks to prevent is contingent and speculative. That is, plaintiff does not allege any direct and immediate injury from any of the actions challenged, *i.e.*, plaintiff does not allege that either he or any member of his community: (1) has sought or will seek to form a village; (2) has sought or will seek permission to build high density housing; (3) has sought or will seek a position on the zoning board or zoning board of appeals; or (4) has sought or will seek relief before the zoning board or board of zoning appeals which has been or will be denied without cause. Further, he does not allege that the action challenged has deprived him of an opportunity to live in a Hasidic community or to freely practice his faith. On the contrary, plaintiff repeatedly refers to already living in a "community" of Hasidic Jews sufficiently large to form its own village. Reduced to its core, the gist of plaintiff's argument is that there is a *potential* for him to be deprived of the opportunity to live in a larger Hasidic community if additional Hasidic Jews wish to move into the area but are prevented from doing so by restrictive zoning. The court notes, and significantly so, that plaintiff has not demonstrated any evidentiary basis to conclude, either directly or inferentially, that additional Hasidic Jews intend to move into his community but will be prevented from doing so by the actions so challenged, or any evidentiary foundation to support his general demographic assertion that such individuals typically and predominately have low income. It is these factors that raise issues of standing and ripeness; issues that will be addressed *in seriatim*.

The First, Second, Third and Seventh Causes of Action

As for his first, second, third and seventh causes of action, plaintiff raises various challenges to the Resolution, pursuant to which the Town and Village are seeking a special law under Municipal Home Rule Law § 40. However, plaintiff lacks standing to assert such causes of action and the issues so raised, at least in the present context, are not ripe for judicial review.

Municipal Home Rule Law § 40 permits specified local officials to make a request to the state legislature to pass "a specific bill relating to the property, affairs or government of such local government which does not in terms and in effect apply alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages, as the case may be." Municipal Home Rule Law §40 also provides, in relevant part, that:

> "Every such request shall declare that a necessity exists for the passage of such bill by the legislature and shall recite the facts establishing such necessity. . . . The validity of an act passed by the legislature in accordance with such a request shall not be subject to review by the courts on the ground that the necessity alleged in the request did not exist or was not properly established by the facts recited."

Here, plaintiff argues: (1) that the application for the special law is invalid because it fails to demonstrate the "necessity" for the law; (2) that the passage of the requested special law will result in him and his community being deprived of their statutory right to petition to become a village; and (3) that the passage of the requested special law will result in him and his community being deprived of their equal protection rights by virtue of the requirement that all residences be constructed on lots of at least two (2) acres.

As a threshold issue, plaintiff has not demonstrated any direct and immediate injury from the action challenged, *i.e.*, that either he or any member of his community: (1) has sought or will seek

to form a village, or (2) has sought or will seek permission to build high density housing. Further, plaintiff has not cited, and research has not revealed, any authority for a private right of action to challenge the sufficiency of a request made pursuant to Municipal Home Rule Law § 40. Indeed, by its express terms, section 40 provides that a determination as to the "necessity" of the request– one issue sought to be raised herein– is reserved to the legislature, and is not subject to court review. *Ferdon v Rogers, 43 Misc.2d 676, 252 N.Y.S.2d 1 (Westchester S. Ct, 1964) aff'd 23 A.D.2d 851, 259 N.Y.S.2d 187 (2nd Dept.1965).* Thus, the first, second, third and seventh causes of action are dismissed for lack of standing.

Further, and in any event, none of the issues raised concerning the Resolution are justiciable and ripe for judicial review. Moreover, as noted *supra*, courts do not issue advisory opinions. A declaratory judgment should only be granted when it will have a direct and immediate effect upon the rights of the parties. *CPLR §3001; Enlarged City School Dist. of Middletown v. City of Middletown, 96 A.D.3d 840, 946 N.Y.S.2d 208, (2nd Dept.2012); Cuomo v. Long Island Light Co., 71 N.Y.2d 349, 525 N.Y.S.2d 828 (1988); Koehler v. Town of Smithtown, 305 A.D.2d 550, 759 N.Y.S.2d 392 (2nd Dept.2003).* The dispute must be real, definite, substantial, and sufficiently matured. A request for a declaratory judgment is premature if the future event upon which it is premised is beyond the control of the parties and may never occur. The threat of a hypothetical, contingent, or remote prejudice to a party does not represent a justiciable controversy. *Enlarged City School Dist. of Middletown v. City of Middletown, 96 A.D.3d 840, 946 N.Y.S.2d 208, (2nd Dept. 2012); Waterways Development Corp. v. Lavalle, 28 A.D.3d 539, 813 N.Y.S.2d 485 (2nd Dept.2006); Ashley Builders Corp. v. Town of Brookhaven, 39 A.D.3d 442, 833 N.Y.S.2d 230 (2nd Dept.2007).*

Here, none of the potential damages alleged will arise unless and until the legislature enacts

the special law requested in the Resolution, which it has yet to do and which it in fact may never do. Presumably, the legislature has already failed to act on the request twice. Thus, the potential damages which are alleged all turn on a future event that is beyond the control of the parties and which may never occur. Consequently, the first, second, third and seventh causes of action are dismissed for lack of ripeness.

Finally, it is noted, as to the remedy sought on the seventh cause of action, plaintiff has not cited, nor has research revealed, any authority which would serve as a sustainable basis for this court to summarily direct that his community "revert to the Town of Woodbury."

Fifth and Sixth Causes of Action

In his fifth and sixth causes of action, plaintiff seeks a permanent injunction directing the Village of Woodbury to create a special zoning district for the plaintiff and his community, together with a special zoning code which addresses the community's special needs, and/or mandating that he and/or members of his community be appointed to the zoning board or board of zoning appeals of the Village. However, plaintiff lacks standing to assert this claim. Further, if reached, the cause of action would be dismissed on the merits.

Initially, again, plaintiff does not allege any direct and immediate injury from the action at issue, *i.e.*, that either he or any member of his community has sought or will seek a position on the zoning board or zoning board of appeals, or has sought or will seek relief from the existing boards that has been denied or will be denied without valid reason. Thus, the fifth and sixth causes of action are properly dismissed for lack of standing.

In any event, if reached, the causes of action would be dismissed on the merits. Plaintiff has

not demonstrated any basis or authority for this court to grant the extraordinary relief requested. Indeed, it would require substantial interference by this court into matters fundamentally legislative and governmental in nature. *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980).* Thus, if reached, the fifth and sixth causes of action would be dismissed on the merits.

Fourth, Eighth, Ninth and Tenth Causes of Action

Plaintiff's fourth, eighth, ninth and tenth causes of action raise constitutional challenges to the actions of the Town and Village of Woodbury which resulted in the inclusion of the zoning requirement that building lots contain a minimum of two-acres, either pursuant to the 2008 zoning code enacted by the Village of Woodbury (fourth cause of action) or the 2011 Comprehensive Plan and related laws (the eighth, ninth and tenth causes of action). In relevant part, Plaintiff alleges constitutional deprivations and violations of his due process and equal protection rights as well as the abridgment of his right to the free exercise of his religion.

Initially, it is noted, the challenge to the zoning code enacted by the Village of Woodbury in April of 2008 is timely. In determining the limitations period applicable to a declaratory judgment action, the court is required to examine the substance of the action, to identify the relationship out of which the claim arises, and the relief sought. If the claim could have been made in a form other than in an action for a declaratory judgment and the limitations period for an action in that alternate form has already expired, the time for asserting the claim cannot be extended through the simple expedient of denominating the action as one for declaratory relief. *South Liberty Partners, L.P. v. Town of Haverstraw, 82 A.D.3d 956, 918 N.Y.S.2d 563 (2nd Dept. 2011); Matter of Save the Pine Bush*

v. City of Albany, 70 N.Y.2d 193, 512 N.E.2d 526 (1987); Solnick v. Whelan, 49 N.Y.2d 224, 401 N.E.2d 190 (1980); New York City Health & Hospitals Corp. v. McBarnette. 84 N.Y.2d 194, 639 N.E.2d 740 (1994). If issues presented in a declaratory judgment action could have been raised in a proceeding pursuant to CPLR article 78, that action must be brought within four months of the act giving rise to the litigation. *South Liberty Partners, L.P. v. Town of Haverstraw, 82 A.D.3d 956, 918 N.Y.S.2d 563 (2nd Dept. 2011); SJL Realty Corp. v. City of Poughkeepsie, 133 A.D.2d 682, 519 N.Y.S.2d 852 (2nd Dept.1987).* Moreover, an CPLR article 78 proceeding is not the proper vehicle for challenging the constitutionality of a legislative enactment, and is unavailable to challenge the validity of a legislative act except where the challenge is directed not at the substance of the ordinance but at the procedures followed in its enactment. *South Liberty Partners, L.P. v. Town of Haverstraw, 82 A.D.3d 956, 918 N.Y.S.2d 563 (2nd Dept. 2011).* Thus, such claims are subject to the six-year statute of limitations period set forth in CPLR 213(1). *South Liberty Partners, L.P. v. Town of Haverstraw, 82 A.D.3d 956, 918 N.Y.S.2d 563 (2nd Dept. 2011).* Here, the provision at issue was allegedly enacted in April of 2008. Thus, the challenge to its validity is timely.

As a further threshold issue, plaintiff, as noted *supra*, does not allege any direct and immediate injury from the zoning law at issue, *i.e.*, that either he or any member of his community has sought or will seek permission to build high density housing. Further, his interests and those of his community as to the zoning were admittedly put before the local boards while they were considering the same. Rather, as noted *supra*, plaintiff's claim of injury is considerably more contingent and speculative, *i.e.*, that additional Hasidic Jews may wish to move into the area but will be prevented from doing so by the restrictive zoning, and that he will be deprived of living in a larger Hasidic community. Thus, plaintiff would not appear to have standing. However, case law from

the Court of Appeals has indicated a rather generous approach to standing in cases raising constitutional challenges to zoning. For example, in *Asian Americans for Equality v Koch, 72 N.Y.2d 121, 527 N.E.2d 265 (1988)*, the plaintiffs challenging a zoning amendment establishing the Special Manhattan Bridge District in Chinatown were persons who "either live[d] or work[ed] in Chinatown or represent[ed] those who [did]," and the "gist" of their complaint was that the new zoning would displace residents who required low-income housing because it would "eliminate some of the existing housing without providing sufficient incentives for the development of affordable new housing to replace it." Given such, the fourth, eighth, ninth and tenth causes of action are not dismissed for lack of standing.

Due Process and Equal Protection

The relevant case law from the Court of Appeals addressing challenges to zoning laws as being in violation of the equal protection clause, due process and just compensation clauses of the state and federal constitutions, including challenges to large building lot requirements, may be summarized as follows:

The Legislature has authorized town and village zoning boards, for the purpose of promoting the health, safety, morals, or the general welfare of the community, to adopt zoning ordinances regulating and restricting, among other things, the height, number of stories and size of buildings and other structures, the size of building lots, and the over-all population density. *Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 527 N.E.2d 265 (1988); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236 (1975).* Because zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of constitutionality, and the burden rests on the party

attacking them to overcome that presumption beyond a reasonable doubt. *Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 527 N.E.2d 265 (1988).* The burden of proof is to show that the zoning is not justified under the police power of the state by any reasonable interpretation of the facts. If the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control. *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980).* If the zoning ordinance is adopted for a legitimate governmental purpose and there is a reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end, it will be upheld. *Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 527 N.E.2d 265 (1988).* Thus, in general, the enactment of a zoning ordinance is a valid exercise of the police power if its restrictions are not arbitrary and they bear a substantial relation to the health, welfare and safety of the community. *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980).* Conversely, a zoning ordinance is susceptible to constitutional challenge if it is clearly arbitrary, unreasonable and bears no substantial relationship to the public health, safety, morals, or general welfare. Implicit in such susceptibility is the courts' long standing recognition of the principle that a municipality may not legitimately exercise its zoning power to effectuate socioeconomic or racial discrimination. *Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236 (1975); Matter of Golden v. Town of Ramapo Planning Board, 30 N.Y.2d 359, 334 N.Y.S.2d 138 (1972); Suffolk Housing Services v. Town of Brookhaven, 70 N.Y.2d 122, 511 N.E.2d 67, 517 N.Y.S.2d 924 (1987).* Accordingly, it necessarily follows that the validity of a zoning ordinance is fact driven; it depends on the facts of the particular case and whether it is really designed to accomplish a legitimate public purpose. *Robert E. Kurzius, Inc. v. Incorporated Village of Upper*

Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980); Benson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236 (1975); Suffolk Housing Services v. Town of Brookhaven, supra..

A zoning ordinance will be invalidated on both constitutional and state statutory grounds if it is demonstrated that it was actually enacted for an improper purpose or if it was enacted without giving proper regard to local and regional housing needs and has an exclusionary effect. Once an exclusionary effect coupled with a failure to balance the local desires with housing needs has been proved, then the burden of otherwise justifying the ordinance shifts to the defendant. *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980).*

Exclusionary zoning may occur either because the municipality has limited the permissible uses within a community to exclude certain groups, or has imposed restrictions so stringent that their practical effect is to prevent all but the wealthy from living there. *Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 527 N.E.2d 265 (1988).* It is a form of racial or socioeconomic discrimination which the courts, as noted *supra,* have repeatedly condemned. *Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 527 N.E.2d 265 (1988); Suffolk Housing Services v. Town of Brookhaven, supra; Berenson v. Town of New Castle, Supra; Matter of Golden v. Town of Ramapo Planning Board, supra.* If the party attacking the ordinance establishes that it was enacted for an exclusionary purpose or has an exclusionary effect, then the ordinance will be annulled. *Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 527 N.E.2d 265 (1988).* To avoid such annulment, there must be a legitimate basis for the exclusions– limitations on development will be permitted only if the ordinance satisfies the needs of the community and also reflects a consideration of regional needs and requirements. The concern is not whether the zones, in and of themselves, are balanced communities, but whether the town or village itself, as provided by its zoning ordinances, will be

a balanced and integrated community. *Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 527 N.E.2d 265 (1988).* Constitutional principles are not necessarily offended if one or several uses are not included in a particular area or district of the community as long as adequate provision is made to accommodate the needs of the community and the region. *Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 527 N.E.2d 265 (1988).*

Specific to the issues raised in the action at bar, large-lot zoning has been sustained as a legitimate means to achieve the public welfare, and minimum acre lot restrictions have been upheld on several occasions for varying reasons, including the preservation of open-space land and the protection of a municipality's residents from the ill-effects of urbanization. *See generally Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980).* Preserving open-space areas of a village is a legitimate goal of multi-acre zoning. *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980).* Of course, large-lot zoning may also be used as a means to exclude persons of low or moderate income, and the courts will not countenance community efforts at exclusion under any guise. *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980).* Thus, a restrictive ordinance must be enacted in accordance with a comprehensive master plan, and cannot ignore pressing regional needs. *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980).* It is these concerns that gave rise to a two-part test articulated in *Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236 (1975).*

First, the zoning power must be exercised in accord with a comprehensive or well-considered plan. *Town Law § 263; Village Law § 7-704; Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980).* This ensures that local authorities act for

the benefit of the community as a whole and protects individuals from arbitrary restrictions on the use of their land. *Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 527 N.E.2d 265 (1988).* The test is simply whether the board has provided a properly balanced and well ordered plan for the community. *Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236 (1975).* Of course, what may be appropriate for one community may differ substantially from what is appropriate for another. Thus, the court must ascertain what types of housing presently exist in the subject municipality, their quantity and quality, and whether this array adequately meets the present needs of the town or village. It must also be determined whether new construction is necessary to fulfill the future needs of the residents, and if so, what forms the new developments ought to take. *Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236 (1975).* By balance, it is not meant that a community must maintain a certain quantitative proportion between various types of development. The concern is not whether the zones, in and of themselves, are balanced communities, but whether the town or village itself, as provided for by its zoning ordinances, will be a balanced and integrated community. *Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236 (1975).*

A comprehensive or well-considered plan need not be contained in a single document, and need not be written at all. Rather, a court may satisfy itself that the municipality has a well-considered plan and that authorities are acting in the public interest to further it by examining all available and relevant evidence of the municipality's land use policies. Zoning legislation is tested not by whether it defines a comprehensive or well-considered plan, but by whether it accords with the same for the development of the community. *Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 527 N.E.2d 265 (1988).* Any amendment of the well-considered plan must be because of the community's change and growth, and must be calculated to benefit the community as a whole, as

opposed to only certain individuals or a group of individuals. *Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 527 N.E.2d 265 (1988).* An amendment which has been carefully studied, prepared and considered meets the general requirement for a well-considered plan and satisfies the statutory requirement and the court will not pass on its wisdom. *Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 527 N.E.2d 265 (1988).*

Second, in enacting the zoning ordinance, consideration must be given to regional needs and requirements. *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980).* There must be a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met. It must be recognized that zoning often has a substantial impact beyond the boundaries of the municipality. *Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236 (1975).* Thus, while the people of a municipality may fervently desire to be left alone by the forces of change, the ultimate determination is not solely theirs. Whether a municipality should be permitted to exclude high density residential development depends on the facts and circumstances present in the town or village and the community at large. Thus, in examining an ordinance, the court should take into consideration not only the general welfare of the residents of the zoning town or village, but also the effect of the ordinance on the neighboring communities. Consequently, a town or village need not permit a use solely for the sake of the people of the region if regional needs are presently provided for in an adequate manner. *Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236 (1975).* Thus, for example, if a municipality's neighbors supply enough multiple-dwelling units or land to build such units to satisfy its needs as well as their own, there would be no obligation on the municipality to provide more, assuming there is no overriding regional need. *Berenson v. Town of*

New Castle, 38 N.Y.2d 102, 341 N.E.2d 236 (1975). As long as the regional and local needs for such housing are supplied by either the local community or by other accessible areas in the community at large, it cannot be said, as a matter of law, that a zoning ordinance has no substantial relation to the public health, safety, morals or general welfare. *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236 (1975).* The second branch of the test is thus whether the town or village, in enacting exclusionary zoning, considered the needs of the region as well as the town or village for the housing excluded. *Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236 (1975).* The zoning ordinance must promote the regional welfare. It requires the balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met. *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980).*

In *Berenson*, the Court pointed out the anomaly of a court being required to perform the tasks of a regional planner, in that zoning and regional planning are essentially legislative acts. *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980).* However, it is nonetheless the case, and the court may consider comprehensive plans for the region, as well as any other relevant studies. *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980).*

The rationale underlying the *Berenson* rule is that such scope of review is necessary to avoid the parochialism of elected local officials in communities which excluded minorities and socioeconomic groups from undeveloped areas of their municipalities to cater to a favored constituency. *Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 527 N.E.2d 265 (1988).*

Absent a showing of an exclusionary purpose behind a zoning ordinance, or that the zoning authority had failed to meet the criteria set forth in *Berenson*, *supra*, the presumption of constitutionality which accompanies the legislative act must prevail unless the ordinance is found to be manifestly facially invalid. *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980).* New York courts do not regard multi-acre zoning as exclusionary *per se* and thus invalid. Rather, as noted *supra*, it may serve legitimate purposes. *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980).* A quiet place where yards are wide, people few, and motor vehicles restricted, are legitimate guidelines in a land-use project addressed to family needs. *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980).* However, in order to be insulated from the claim of its potential exclusionary effect, an ordinance must be motivated by a proper purpose. *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680 (1980).*

Here, plaintiff has not adequately alleged that the zoning at issue was enacted for the improper purpose of preventing either him or any other member of his community from practicing their religion. Indeed, plaintiff does not allege that the official action challenged will change his current way of life. Rather, his allegations all involve limitations on the expansion of his community. While recognizing that these types of cases are not decided in a vacuum and where, as here, ordinances are sometimes an outgrowth and by-product of heated and vitriolic public debate, nothing set forth in this lawsuit, demonstrates, at least to this court, that any official action has been aimed at preventing the practice of religion. Thus, plaintiff has not adequately alleged that the challenged action was motivated by an improper purpose.

However, plaintiff *has* adequately alleged that the minimum two-acre lots was not enacted pursuant to a comprehensive or well-considered plan need, and does not give due consideration to regional needs and requirements. Indeed, plaintiff alleges that the zoning is contrary to two regional reports which indicate the need for additional low-income housing. Taking these allegations as true, as the court must, they are sufficient to state a viable cause of action challenging the zoning at issue as being impermissibly exclusionary.

In opposition, the Town and Village of Woodbury did not demonstrate such allegations are merely bare legal conclusions, or that they are flatly contradicted by the evidence. Nor can the competing positions be otherwise resolved as a matter of law. In sum, so much of the allegations of the fourth, eight and ninth causes of action which allege violations of due process and equal protection are sufficient to withstand dismissal. As such, that branch of defendants' motions which seek such dismissal is denied.

Free Exercise of Religion

The standard to be applied in determining whether there has been a violation of the constitutional right to the free exercise of religion depends on whether the New York State or United States Constitution is at issue.

Under the United States Constitution, the right of free exercise of religion does not relieve an individual of the obligation to comply with any valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes). *In Catholic Charities of Diocese of Albany v. Serio, 7 N.Y.3d 510, 859 N.E.2d 459 (2006).* Where a prohibition on the exercise of religion is not the object, but merely the incidental effect of a

generally applicable and otherwise valid provision, the First Amendment of the United States Constitution is not offended. *In Catholic Charities of Diocese of Albany v. Serio, 7 N.Y.3d 510, 859 N.E.2d 459 (2006).*

Under the New York State Constitution, when the State imposes an incidental burden on the right to free exercise of religion, the court must consider the interest advanced by the legislation that imposes the burden, and the respective interests must be balanced to determine whether the incidental burdening is justified. *Catholic Charities of Diocese of Albany v. Serio, 7 N.Y.3d 510, 859 N.E.2d 459 (2006).* In making such a determination, substantial deference is given to the Legislature, and the party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, constitutes an unreasonable interference with religious freedom. *Catholic Charities of Diocese of Albany v. Serio, 7 N.Y.3d 510, 859 N.E.2d 459 (2006).* Where the State has not set out to burden religious exercise, but seeks only to advance, in a neutral way, a legitimate object of legislation, the New York Free Exercise Clause does not require the State to demonstrate a "compelling" interest in response to every claim by a religious believer to an exemption from the law. Such a rule of constitutional law would give too little respect to legislative prerogatives, and would create too great an obstacle to efficient government. *Catholic Charities of Diocese of Albany v. Serio, 7 N.Y.3d 510, 859 N.E.2d 459 (2006).* Rather, the principle stated in federal law– that citizens are not excused by the Free Exercise Clause from complying with generally applicable and neutral laws, even ones offensive to their religious tenets—should be the usual, though not the invariable, rule. *Catholic Charities of Diocese of Albany v. Serio, 7 N.Y.3d 510, 859 N.E.2d 459 (2006).* The burden of showing that an interference with religious practice is unreasonable, and therefore requires an exemption from the statute, must be on the person claiming the exemption. The

burden, however, should not be impossible to overcome. *Catholic Charities of Diocese of Albany v. Serio, 7 N.Y.3d 510, 859 N.E.2d 459 (2006).* The courts do not exclude the possibility that, even in much less extreme cases, parties claiming an exemption from generally applicable and neutral laws will be able to show that the State has interfered unreasonably with their right to practice their religion. *Catholic Charities of Diocese of Albany v. Serio, 7 N.Y.3d 510, 859 N.E.2d 459 (2006).*

Here, the zoning at issue is a valid and neutral law of general applicability. Further, as discussed *supra*, the prohibition of the exercise of plaintiff's religion is not the object, but merely a potential incidental effect, of the zoning. Thus, the First Amendment of the United States Constitution has not been offended. *In Catholic Charities of Diocese of Albany v. Serio, 7 N.Y.3d 510, 859 N.E.2d 459 (2006).*

Similarly, as discussed *supra*, the zoning does not in fact prohibit plaintiff's free exercise of his religious beliefs. Rather, the only prejudice claimed is the speculative and conditional deprivation of a larger community of religious persons. In light of the substantial deference given the Legislature, this is insufficient to allege that the challenged zoning unreasonably interferes with plaintiff's religious freedom. Thus, the tenth cause of action is dismissed.

Eleventh and Twelfth Causes of Action

As an eleventh cause of action, plaintiff seeks a declaration that the Comprehensive Plan and accompanying Local Laws 3 and 4 violate SEQRA. As a twelfth cause of action, plaintiff seeks a declaration that the designation of his community as a "critical environmental area" under section 617.14(g) of SEQRA is in violation of lawful procedure, is affected by an error of law, and is arbitrary and capricious.

As a preliminary matter, the court concludes, and so finds, that plaintiff has the requisite standing to raise such causes of action. In general, standing to challenge an administrative action turns on a showing that the action will have a harmful effect on the challenger and that the interest to be asserted is within the zone of interest to be protected by the statute. *Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 N.Y.2d 668, 664 N.E.2d 1226 (1996); Dairylea Cooperative, Inc. v. Walkley, 38 N.Y.2d 6, 339 N.E.2d 865,377 N.Y.S.2d 451 (1975).* To have standing to raise a SEQRA claim, a party must generally demonstrate that he or she will suffer an injury that is environmental and not solely economic in nature. *Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 N.Y.2d 668, 664 N.E.2d 1226 (1996); Matter of Mobil Oil Corp. v. Syracuse Industrial Development Agency, 76 N.Y.2d 428, 559 N.Y.S.2d 947, 559 N.E.2d 641 (1990).* However, relevant to the action at bar, where the challenge is to the SEQRA review undertaken as part of a zoning enactment, the owner of property that is the subject of re-zoning need not allege the likelihood of environmental harm. In those circumstances, the property owner has a legally cognizable interest in being assured that the town or village has satisfied the SEQRA requirements before taking action to re-zone his or her land. *Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 N.Y.2d 668, 664 N.E.2d 1226 (1996); Matter of Har Enterprises v. Town of Brookhaven 74 N.Y.2d 524, 549 N.Y.S.2d 638, 548 N.E.2d 1289 (1989)* . Thus, plaintiff has standing. However, plaintiff's SEQRA challenges are untimely and thus barred.

An article 78 proceeding brought to review a determination by a body or officer must be commenced within four (4) months after the determination to be reviewed becomes final and binding upon the petitioner. *CPLR 217(1).* This time period begins to run when the petitioner suffers a "concrete injury" that is not amenable to further administrative review and corrective action. *Eadie*

v. Town Bd. of Town of North Greenbush, 7 N.Y.3d 306, 854 N.E.2d 464, 821 N.Y.S.2d 142 (2006); Matter of City of New York [Grand Lafayette Properties, LLC], 6 N.Y.3d 540, 814 N.Y.S.2d 592, 847 N.E.2d 1166 (2006); Matter of Best Payphones, Inv. v. Department of Information Technology and Telecommunications of City of New York, 5 N.Y.3d 30, 832 N.E.2d 38, 799 N.Y.S.2d 182 (2005). A petitioner suffers a "concrete injury" from alleged SEQRA violations when the municipality enacts re-zoning pursuant thereto, not when the SEQRA process culminates in the issuing of a findings statement. *Eadie v. Town Bd. of Town of North Greenbush, 7 N.Y.3d 306, 854 N.E.2d 464, 821 N.Y.S.2d 142 (2006); Matter of Save the Pine Bush v. City of Albany, 70 N.Y.2d 193, 518 N.Y.S.2d 943, 512 N.E.2d 526 (1987).* Thus, an article 78 proceeding brought to annul a zoning change must be commenced within four months of the time the zoning change is adopted. *Eadie v. Town Bd. of Town of North Greenbush, 7 N.Y.3d 306, 854 N.E.2d 464, 821 N.Y.S.2d 142 (2006).* Here, the court agrees with plaintiff that *Perez v. Paramount Communications, Inc., 92 N.Y.2d 749, 709 N.E.2d 83 (1999)* is relevant to determination as to the timeliness of his eleventh and twelfth causes of action.

In *Perez*, plaintiff had filed a supplemental summons and amended complaint seeking to add additional defendants. The Court noted that, under then existing precedent, service of a notice of motion for leave to amend a complaint to add a defendant to an action was not considered commencement of the action against the party sought to be added. Further, that, unless and until judicial permission to add the party was obtained, service of the motion papers did not stop the running of the statute of limitation. The *Perez* Court found that such precedent was not appropriate for the age of a commencement-by-filing system, and was offensive to the CPLR's liberal policies of promoting judicial economy and preventing a multiplicity of suits. Further, the *Perez* Court noted, statutes of limitation are designed to promote justice by preventing prejudice through the revival of

stale claims, and that goal would not be served by a rule which would render the timeliness of a claim dependent upon the speed with which a court decides a motion. However, the Court declined to adopt a rule whereby the filing of the motion alone would be considered the formal interposition of the claim within the meaning of CPLR 203. Rather, drawing an analogy to federal law, which served as the model for New York's commencement-by- filing rules, the *Perez* Court held that a motion to amend a complaint to add a defendant, when accompanied by a copy of the amended complaint, was sufficient to stop the running of the statute of limitation. This resulted in a toll which commenced upon the filing of the motion and which ended upon the entry of the order deciding the motion.

However, the facts in the action at bar are not the same as in *Perez*, to wit: Plaintiff did not move to add a defendant to a pending, timely action (*i.e.*, *United Fairness)*, but moved to intervene in that action and to assert additional causes of action– causes of action raising the SEQRA challenges raised herein as his eleventh and twelfth causes of action. The court nevertheless agrees that the principles set forth in *Perez* are applicable to the facts, and that, based on such principles, the statute of limitation as to the allegations in plaintiff's eleventh and twelfth causes of action was tolled from the date he filed his motion to intervene in *United Fairness* to the date of entry of the order denying the motion. Using these dates, plaintiff's eleventh and twelfth causes of action still must be dismissed as untimely.

The Comprehensive Plan and Local Law 3 and 4 were adopted on June 14, 2011. Accordingly, plaintiff had until October 14, 2011, (*i.e.*, four months) to raise his challenges to the same. Here, plaintiff argues, he filed his motion to intervene in *United Fairness* on October 7, 2011, thereby tolling the statute of limitation. However, this cannot be correct, since several papers

submitted in support of the motion were not signed until October 11, 2011. Further, the Village of Woodbury has submitted a printout which indicates that the motion was filed on October 12, 2011; a date that appears correct. However, resolution of this issue is not determinative, as the action at bar is untimely in any event, to wit: Assuming, *arguendo,* that plaintiff's motion to intervene was filed on October 7, 2011, the statute of limitation was tolled with just 7 days to spare. The order denying the motion was entered on November 25, 2011. Thus, plaintiff had, at best, until December 2, 2011, to commence this action. However, this action was not commenced until December 14, 2011. Thus, plaintiff's eleventh and twelfth causes of action are dismissed as time-barred.

Class Action

Lastly, Plaintiff has not moved to certify a class nor made any detailed showing that the prerequisites of class certification have been met. *CPLR §§901 and 902.* Thus, the court need not and will not address these issues . Instead, all such issues concerning the same will be addressed if and when such a motion is made.

Accordingly, and for the reasons cited herein, it is hereby

ORDERED, that the motions are granted in part and denied in part as set forth herein, and it is further,

ORDERED, that the parties are directed to appear for a Preliminary/Status Conference on Wednesday October 3, 2012 at 9:15 A.M. at the Orange County Surrogate's Court House, 30 Park Place, Goshen, New York.

The foregoing constitutes the decision and order of the court.

Dated: September 4, 2012
Goshen, New York

ENTER

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Exhibit 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ZALMAN BERKOVITZ, SOLOMON WITRIOL, MENDEL SCHWIMMER, BERNIE JACOBOWITZ, JOSEPH STRULOVITCH, JACOB GOLD, MOSES GREENFIELD, and SAM WIESNER,

Plaintiffs,

-against-

VILLAGE OF SOUTH BLOOMING GROVE,

Defendant.

09 Civ. 0291 (CM)

MEMORANDUM AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

McMahon, J.:

INTRODUCTION

In the pastoral hill country just west of West Point, in the Town of Monroe, there sits the separately-incorporated Village of Kiryas Joel. Founded over three decades ago by Grand Rebbe Joel Teitelbaum, the son of a prominent Satmar Hassidic rabbi, Kiryas Joel offered an alternative, ex-urban place where members of the sect could live and work and worship together, far from Brooklyn, where the group's New York origins lay. See Bd. of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 691 (1994). Originally a tiny hamlet in a valley that could not be seen from main-traveled roads, Kiryas Joel has grown rapidly over the past 35 years. Today, the village covers 704 acres and contains approximately 16,329 residents occupying 3,105 residential units—nearly all of them multifamily residential housing. See American FactFinder, United States Census Bureau, http://factfinder.census.gov/home/saff/main.html?_lang=en (last visited July, 21, 2010).

The village is, by choice, an insular community, where residents are comfortable living outside of the mainstream. See Bd. of Educ. of Kiryas Joel Village School Dist., 512 U.S. at 691. Life there is centered on the local Hassidic community rather than the wider civic community; the children attend religious schools and the residents do not, as a rule, interact very much with their non-Hassidic neighbors—many of whom resent the newcomers for their "otherness" and their perceived lack of interest in the concerns of anyone who is not a member of the Hassidic community. Id.

The village has outgrown its original boundaries many times over, but the population continues to spiral upward, as adherents make good on their promise to repopulate the Jewish community that was decimated by the Holocaust. See About KJ, Kiryas Joel Voice, http://www.kjvoice.com/aboutkjDet.asp?ARTID=2 (last visited July 21, 2010). More housing is always needed to accommodate the burgeoning families that are being created by the children, and children's children, and children's children's children of long-time residents. See id. at http://www.kjvoice.com/aboutkjDet.asp?ARTID=5.[1]

Plaintiffs are eight investors/developers who, "alone or, in partnership with other unnamed persons," have allegedly spent in excess of $25,000,000 to purchase 1000 acres of land close to Kiryas Joel, in an adjacent Orange County town known as Blooming Grove. Plaintiffs do not plead when they purchased their property, but since 2006, that property has been located in the separately-incorporated Village of South Blooming Grove.

[1] Kiryas Joel has one of the lowest estimated median ages of any community in the United States—12.6 years. American FactFinder, United States Census Bureau (last visited July, 21, 2010), available at: http://factfinder.census.gov/home/saff/main.html?_lang=en. The need for additional housing in the community is tied to an extraordinarily high birth rate. As the village administrator, Gedalye Szegedin, put it: "There are three religious tenets that drive our growth: our women don't use birth control, they get married young and after they get married, they stay in Kiryas Joel and start a family. Our growth comes simply from the fact that our families have a lot of babies, and we need to build homes to respond to the needs of our community." Fernanda Santos, Reverberations of a Baby Boom, N.Y. Times (Dec. 13, 2006), available at: http://www.nytimes.com/2006/08/27/nyregion/27orange.html.

The Village of South Blooming Grove was created by vote of the residents of the Town of Blooming Grove on June 29, 2006. (Am. Compl. ¶¶ 1,4). Plaintiffs estimate that, collectively, they own more than one-third of the total land area in the Village of South Blooming Grove. (Id.)

On January 12, 2009, plaintiffs commenced this action against the Village of South Blooming Grove. In an amended complaint, plaintiffs allege that the village was formed in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the federal Fair Housing Act ("FHA"), 42 U.S.C. § 3601, for the improper purpose of curbing the expansion of Kiryas Joel by preventing Hassidic Jews from building multifamily dwellings within the Town of Blooming Grove. (Am. Compl. ¶¶ 6,8.)

On August 31, 2009, defendant moved to dismiss the action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), arguing, inter alia, that plaintiffs' claims were not ripe, since they had never applied for, nor been granted, a building permit.

For the reasons set forth below, defendant's motion to dismiss is granted.

FACTS

Outside of incorporated cities, the entire State of New York is divided into polities called towns. There are 932 of them. Within towns, areas or neighborhoods can separately incorporate into smaller political units known as villages. The village remains part of the town—the Village of South Blooming Grove lies within the Town of Blooming Grove—but has its own local government and controls its own development.

For a village to be incorporated under New York law, it must have at least 500 inhabitants, not be part of an existing city or village, and must span no more than five

square miles unless certain exceptions apply. N.Y. Village Law § 2-200. The process of incorporation begins with a petition by either twenty percent of the residents, or owners of fifty percent of the assessed real property. If the petition is deemed legally sufficient by the supervisor of the town in which the land area of the proposed village is located, the question of incorporation is put to the voters in the affected area. Id.; see also N.Y. Dept. of State, Local Gov't Handbook 68-70 (6th ed. 2009). Such a vote was held in the Town of Blooming Grove in 2006, and the new municipality, the Village of South Blooming Grove, was born. Id. at 69.

Plaintiffs do not challenge the electoral process that begot the village. They point to no irregularities in the 2006 election in which the incorporation of the Village of South Blooming Grove was approved by the voters of the Town of Blooming Grove. Nor do they allege that any Hassidic Jews who might have been residents of the Town were denied the opportunity to vote in that election—although, since Kiryas Joel is located in the adjacent town of Monroe, residents of that community were not eligible to vote in the election that created the new village.

Instead, plaintiffs allege that the formation of the village was motivated by a "discriminatory founding intent." (Am. Compl. ¶¶ 7-8.) According to the Amended Complaint, certain unnamed residents of the Town of Blooming Grove "expressed fear that without the creation of a village to block the expansion of Kiryas Joel, large tracts of developable land . . . would be absorbed into the Village of Kiryas Joel or otherwise used for the erection of dense housing . . . ." (Id.) As a result, a movement began to create a separately-incorporated village in the portion of Blooming Grove that was adjacent to Kiryas Joel. Plaintiffs plead that, "During the campaign to create the Village its [unnamed]

sponsors repeatedly advised residents of the Town of Blooming Grove that, for legal reasons arising under State law, the creation of a village could better protect them against expansion of the Village of Kiryas Joel than could the Town of Blooming Grove." (Id. ¶ 9.)

Plaintiffs also plead that, after its founding, the Village of South Blooming Grove's "actions and failures to act have been principally and substantially motivated by the collective municipal desire to exclude plaintiffs, their business partners and other similarly-situated Jews from developing their properties." (Id. ¶ 12.) Specifically, in paragraph 13 of their complaint, plaintiffs state that the Village of South Blooming Grove has:

(a) declared a moratorium on consideration of development projects within the Village;

(b) extended said moratorium on three occasions for a period now totaling two and one-half years subsequent to a two year moratorium imposed on the same lands by the Town of Blooming Grove [before the creation of the Village]; indeed, the Village did not end the moratorium until after the filing of this case;

(c) appointed a Zoning Commission comprised of members who lack expertise in the areas of planning and zoning and, instead, include persons who have expressed hostility toward the Village of Kiryas Joel;

(d) allowed said Zoning Commission to unduly delay preparation of a new zoning law and map;

(e) proposed a zoning ordinance which substantially alters the land use pattern that now exists in the Village, i.e., small lots and multi-family housing, in a manner intended to prevent the construction of affordable, multi-family housing in the undeveloped sections of the village, particularly on large parcels owned by plaintiffs and their business partners

(f) eliminated from the Town zoning law elements intended to foster affordable housing and replaced these with new provisions intended

> to delay the approval of developments on substantial parcels, like plaintiffs' and their partners.

(Id. ¶ 13.) The crux of plaintiffs' grievance is that the Village of South Blooming Grove is preventing them from developing multifamily housing – which, in that region, would be occupied primarily (if not exclusively) by Hassidic Jews. (See id. ¶¶ 8, 24.)

Plaintiffs allege that, "This course of conduct has disadvantaged, harmed and discriminated against plaintiffs, their partners and those similarly-situated *on the basis of their religion and stereotypes associated with that religion*." (Id. ¶ 14 (emphasis added).)

Plaintiffs have never been denied a building permit by the Village of South Blooming Grove, because they have never officially applied for any such permit. However, in 2008, an "associate" of plaintiffs named Ziggy Brach, "met with representatives of the Village government to share plans for the development of some of plaintiffs' land." (Id. ¶ 16.) Plaintiffs say that Brach presented village representatives with a "schematic" plan that "showed a progression of proposed land uses, including some multi-family housing and some larger lot housing." (Id. ¶ 17.) Plaintiffs do not identify who was at the meeting representing South Blooming Grove, but they note that it took place at the offices of the village's lawyer, Gary Greenwald. (Id. ¶¶ 18, 21.) Plaintiffs plead that, "The express purpose of the meeting . . . was to explore the attitude of leading village officials to the development of plaintiffs' lands." (Id.)

Plaintiffs explain that "Within two weeks after this meeting, counsel for the Village contacted Brach and invited him to his offices," where Greenwald "advised Brach that he should not waste his time and money trying to develop land in the Village of South Blooming Grove, that the Village Board was hostile to proposals by Jewish developers and would resist the efforts of the plaintiffs and people like them." (Id. ¶¶ 20, 22.)

Shortly thereafter, on January 12, 2009, plaintiffs commenced this action by filing a complaint, which they amended on July 29, 2009. Both the initial and amended complaints include claims against the Village of South Blooming Grove for violations of 42 U.S.C. § 1982, the Fair Housing Act, the Equal Protection Clause of the Fourteenth Amendment, and the "Takings Clause of the Fourteenth Amendment."[2] (Am. Compl. ¶¶ 30-31.)

The principal difference between plaintiffs' original and amended complaints relates to the prayer for relief. Plaintiffs originally asked the Court to "declare that the moratorium adopted by the Village intentionally discriminates against plaintiffs," and to enter an injunction "direct[ing] the Village of South Blooming Grove to adopt a zoning ordinance which does not internalize religious bias and require the Village to consider plaintiffs' proposals in a fair and equitable manner and without undue delays." Plaintiff also sought damages and attorneys' fees. (Compl. at 6-7.)

But by the time plaintiffs' filed their amended complaint, their cause of action had transmogrified. The amended complaint now asks this Court to "declare that the Village of South Blooming Grove was established for a purpose which violates the aforecited [sic] federal statutes, enter an order dissolving the Village of South Blooming Grove, award plaintiffs compensatory damages, the fees and costs arising from his [sic] prosecution of this matter and any other relief which the Court deems in the interests of law and equity." (Am. Compl. ¶ V.) Plaintiffs no longer request mandatory injunctive relief requiring the

[2] With respect to the takings claim, the Court deems plaintiffs' complaint amended to assert a cause of action under the Takings Clause of the Fifth Amendment as incorporated against the states by the Fourteenth Amendment, since the Fourteenth Amendment does not contain a Takings Clause. However, as explained below, since plaintiffs have agreed to dismiss their takings claim, this correction is purely academic.

Village of South Blooming Grove to adopt a new zoning ordinance, as they did in their initial complaint; instead they want the Village to disappear.

Plaintiffs made only a few changes in the facts pleaded when they amended their complaint, principally by way of adding allegations about the meetings between Mr. Brach, unnamed officials from the Village of South Blooming Grove, and the village's attorney. Almost all of the factual allegations in both the complaint and the amended complaint relate to allegedly discriminatory zoning practices in the Village of South Blooming Grove. Nonetheless, plaintiffs' brief in opposition to this motion to dismiss explains, "Here, plaintiffs are not challenging the denial of a specific land use application by a municipality, but, rather, allege that *creation of that governmental unit itself* violated the FHA and the equal protection clause because its express and principal purpose was to fence out members of a group protected by that statute." (Mem. in Opp. to Mot. to Dismiss, Sept. 7, 2009 ("Pls.' Br."), at 10 (emphasis added).) Plaintiffs underscore this theme throughout their brief in opposition to the motion to dismiss, stating that: "plaintiffs plainly allege injury in fact by and through the creation of a village . . . " (id. at 9); "plaintiffs here allege that the creation of a village intended to discriminate against them on the basis of religion constitutes a distinct constitutional injury" (id. at 14); "This case is not about plaintiffs' 'disagreement[']' with a land use decision; rather, it is about the *defendant's blatantly exclusionary intent*, which inspired its very creation." (Id. at 19 (emphasis added).) Or, to put it more plainly, "The Amended Complaint asserts that the village was created for a discriminatory purpose" (id. at 20)—keeping the Hassidim out.

On August 31, 2009, defendant moved to dismiss plaintiffs' amended complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) (lack of subject-matter jurisdiction)

and 12(b)(6) (failure to state a claim). In response, plaintiffs have withdrawn two of their four claims: they have agreed to the dismissal of their 42 U.S.C. § 1982 claim (presumably because section 1982 is limited to racial discrimination, whereas plaintiffs allege only religious discrimination); and they also withdraw their Takings Clause claim, which they concede is not ripe, since plaintiffs have never applied for, and therefore were never denied, any building permit. (Pls.' Br. at 12, 22.)

As a result, only plaintiffs' claims that the act of incorporating the Village of South Blooming Grove violated the Equal Protection Clause and Fair Housing Act are the subject of this motion to dismiss.

DISCUSSION

I. Standard of Review

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (internal quotations, citations, and alterations omitted). Thus, unless a plaintiff's well-pleaded allegations have "nudged [its] claims across the line

from conceivable to plausible, [the plaintiff's] complaint must be dismissed." Id. at 570; Iqbal, 129 S. Ct. at 1950-51.

In resolving the motion, this Court may consider the full text of documents that are quoted in the complaint, or documents that the plaintiff either possessed or knew about and relied upon in bringing the suit. Rothman v. Gregor, 220 F.3d 81, 88-89 (2d Cir. 2000); San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos., 75 F.3d 801, 808 (2d Cir. 1996).

The standard for a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is "substantively identical" to the 12(b)(6) standard, except that the plaintiff has the burden of establishing jurisdiction in a 12(b)(1) motion. See Lerner v. Fleet Bank, N.A., 318 F.3d 113, 128 (2d Cir. 2003). As with a 12(b)(6) motion, in deciding a Rule 12(b)(1) motion to dismiss, the Court "'must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff.'" Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 170 (2d Cir. 2008) (Rule 12(b)(1)) (citation omitted); see also Cargo Partner AG v. Albatrans, Inc., 352 F.3d 41, 44 (2d Cir. 2003) (Rule 12(b)(6)). But "'jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it.'" Id. (quoting APWU v. Potter, 343 F.3d 619, 623 (2d Cir. 2003)). Accordingly, in deciding the motion, a court "may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue." J.S. ex rel. N.S. v. Attica Cent. Schs., 386 F.3d 107, 110 (2d Cir. 2004).

II. The Motion to Dismiss

Where, as here, a defendant moves for dismissal under both Rule 12(b)(1) and Rule 12(b)(6), a court should generally consider the alleged lack of subject matter under Rule

12(b)(1), "since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined." Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n, 896 F.2d 674, 678 (2d Cir. 1990) (citation and internal quotations omitted). However, this is not an absolute and unwaivable requirement.

In this case, prudent case management dictates that the Court turn first to the Rule 12(b)(6) motion. Defendant's motion to dismiss is predicated on plaintiffs' alleged failure to exhaust their administrative remedies. Resolution of this motion will require extended discussion of the law relating to a facial challenge to regulation and whether that is the standard applicable to plaintiffs' unusual request to nullify the creation of a municipal polity.[3] But it should not be necessary to engage in that discussion, since I see no way that plaintiffs can state a claim against the Village of South Blooming Grove on the theory that the incorporation of the village has deprived them of any constitutional or statutory rights. That being so, plaintiffs' claims against the village would necessarily fail a 12(b)(6) motion, even if they were required to, and had, exhausted any available administrative remedies.

I turn, then, to the motion to dismiss for failure to state a claim.

A. Equal Protection Clause

The Fourteenth Amendment to the United States Constitution provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living

[3] It does not put too fine a point on the matter to state that the parties' development of these issues in their briefs ranges from superficial to non-existent.

Ctr., Inc., 473 U.S. 432, 439 (1985). To state a claim under the Equal Protection Clause, plaintiffs must prove that the alleged discrimination by the Village of South Blooming Grove was intentional. See Reno v. Bossier Parish School Bd., 520 U.S. 471, 481 (1997).

There are several ways for a plaintiff to plead intentional discrimination that violates the Equal Protection Clause. A plaintiff can point to a law or policy that "expressly classifies persons on the basis of race." Hayden v. County of Nassau, 180 F.3d 42, 48 (2d Cir. 1999) (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213 (1995)). Alternatively, a plaintiff may identify a facially neutral law or policy that has been applied in an intentionally discriminatory manner. See United States v. Armstrong, 517 U.S. 456, 464-65 (1996). Neither of these two theories is applicable in this case. Rather, Plaintiffs have attempted to state a cause of action under a third theory, by attempting to allege that a facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus. See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977).

B. Fair Housing Act

The Fair Housing Act's proscriptions are similar to those of the Equal Protection Clause. Section 3604(a) of the FHA makes it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status or national origin." 42 U.S.C. § 3604(a) (emphasis added). The statute defines "dwelling" as "any building . . . intended for occupancy as[ ] a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building . . . ." Id. § 3602(b). A plaintiff can establish a

violation under the FHA, inter alia, by proving discrimination in the form of: (1) disparate treatment or intentional discrimination, see Regional Econ. Comm. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 48 (2d Cir. 2002); or (2) disparate impact of a law, practice or policy on a covered group, see, e.g., Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 933 (2d Cir. 1988), aff'd, 488 U.S. 15 (1988). Intentional discrimination of the sort alleged in this case is sufficient, but not required, to state a cause of action under the FHA.

The fact that a law was ratified by the electorate, as in this case, does not relieve a municipality or other government actor from liability under federal law. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect." United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1224 (2d Cir. 1987) (internal quotation and citation omitted). "It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, . . . and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." Id. (internal quotations and citation omitted).

Typically, the Court would analyze plaintiffs' FHA and Equal Protection Clause claims separately, since they are not necessarily coextensive. However, because plaintiffs' allegation of injury in this case is the same for both causes of action—namely, that the incorporation of the Village of South Blooming Grove violated their statutory and constitutional rights by preventing them from developing (and making available) multifamily housing—the Court analyzes the two claims together. As set forth below, the Court concludes that plaintiffs have failed to state a claim on which relief may be granted

because they have failed to plead facts tending to show that the incorporation of the village injured them by hindering their efforts to build housing.

C. Plaintiffs' Failure to Allege That Incorporation Caused Their Injury

Plaintiffs' first allegation of "injury" involves substantial delays in their effort to develop their land via development moratoria. The amended complaint carefully avoids specifying exactly when plaintiffs and their unnamed business partners acquired their property, but it does reveal that the Town of Blooming Grove imposed some sort of moratorium on the development of land in the area that would later become the Village of Blooming Grove two years prior to the incorporation of the Village of South Blooming Grove. (Am. Compl. ¶ 13(b)). Aside from the fact that plaintiffs' complaint fails to allege that the moratorium had any specific, adverse effect on them and them alone, if plaintiffs acquired their parcels prior to the incorporation of the village, then it is action of the *Town* of Blooming Grove, taken in 2004, that originally halted their ability to develop the property for multifamily housing. The town-imposed moratorium continued in effect upon the incorporation of the Village of South Blooming Grove solely by virtue of the Village Law of the State of New York, which provides that town laws (including zoning ordinances) shall continue to apply in a newly-formed village after incorporation until the village adopts its own laws. See N.Y. Village Law § 2-250.

It is true that the Village of South Blooming Grove eventually extended the town-imposed moratorium (though *when* it did so is not alleged), and did not repeal the moratorium until February 2009. These extensions obviously delayed the development of the plaintiffs' property in the manner they wished to develop it. But no fact is alleged tending to show that the Town of Blooming Grove would not have extended the

development moratorium that *it* imposed on plaintiffs' property in 2004—well prior to the village's incorporation—if the incorporation movement had failed. The *incorporation* of the village, in other words, did not cause damage to the plaintiffs; the *development moratorium*, by whomever imposed, is the real offending act, and the development moratorium predates incorporation, so incorporation cannot be assigned as its cause. Since plaintiffs are not challenging the moratorium—only the village's incorporation—they have failed to state a claim.[4]

The complaint also pleads that there is a "substantial probability" that the village will adopt exclusionary zoning laws in the future, which will further delay their efforts to build the sort of inexpensive multifamily housing that would meet a "broad regional need" for housing for working families of all religions. Plaintiffs' complaint about hypothetical future laws or regulations that have not even been drafted is obviously premature—especially in light of the fact that the development moratorium is no longer in place, and plaintiffs are free to apply for a building permit and test the waters.

There is yet another problem with the allegations of the complaint: if the incorporation of the village is the unconstitutional act about which plaintiffs complain, then they have sued the wrong defendant. Whatever the motive behind its incorporation—and I accept as true plaintiffs' allegation that the impetus was to prevent the southern portion of Blooming Grove from becoming Kiryas Joel North—the Village of South Blooming Grove did not incorporate itself. The village did not exist until after the allegedly unconstitutional act of incorporation was complete. And it was the Town of Blooming Grove and its voters who did that deed. The village and its officials can and

[4] Additionally, no fact is alleged tending to show that other developers or potential developers of land in the area that became South Blooming Grove were exempt from the moratorium (whether imposed by the town or the subsequently-incorporated village).

should be held accountable for any acts taken by them that violate the Equal Protection Clause or the FHA, but I do not see how the act of incorporation can be assigned to the village itself.

All of this leads to the conclusion that plaintiffs are trying to transform a challenge to zoning ordinances and regulations—laws and rules that were adopted months, even years, after the incorporation of the Village of South Blooming Grove—into something else. Plaintiffs' alleged injury does not flow directly and logically from incorporation; it flows directly and logically from the adoption of various zoning ordinances and regulations adopted by village officials following incorporation and, prior to that, by the town and its officials. If plaintiffs can mount a facial challenge to those ordinances and regulations (as opposed to the incorporation of the village), they should do so. The village and its officials can be held liable for passing statutes that on their face violate the Equal Protection Clause and the FHA, and statements made prior to incorporation about creating the Village of South Blooming Grove in order to stop development may end up providing evidence of constitutional violations that occurred after the village was incorporated. But plaintiffs cannot rely on the publicly-stated prejudices of some of the people involved in the incorporation movement to plead a claim against the village itself. It may well be that prejudices harbored by the people of the Town of Blooming Grove led them to carve out a separately incorporated village in the area where plaintiffs owned land, so they could halt a particular form of development. But that does not give rise to a claim against the village that was ultimately created.

Alternatively, plaintiffs can apply for permits to develop their land, and if they are denied permission to use the land for multifamily housing (that will, presumably, be

available to anyone who wishes to live in such housing, not just to members of the Hassidic community), they can raise the claims that were initially pleaded but subsequently withdrawn. But they cannot use incorporation as a fig leaf to try to obscure what it is that they are in fact challenging.

CONCLUSION

Defendant's motion to dismiss is granted and plaintiffs' complaint is dismissed.

The Clerk of the Court is instructed to remove the motion to dismiss (docket no. 16) from the Court's active motion list and to close the case.

This constitutes the decision and order of this Court.

Dated: September 3, 2010

U.S.D.J.

BY ECF TO ALL PARTIES

Exhibit 7

COPY

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

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SHERI TORAH, INC.,

Plaintiff,

-against-

VILLAGE OF SOUTH BLOOMING GROVE,

Defendant.

----------x

To commence the 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.

DECISION/ORDER

Index No. 13428/2009
Motion Date: February 16, 2012

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VILLAGE OF SOUTH BLOOMING GROVE,

Counter-Claiming Defendant,

-against-

SHERI TORAH, INC., BLUE ROSE ESTATES LLC and KEEN EQUITIES LLC,

Defendants.

----------x

The following papers numbered 1 to 15 were read and considered on this motion filed by Defendant Blue Rose Estates, LLC, for an Order, pursuant to CPLR §3211(a)(7), dismissing the counterclaim asserted by Counter-Claiming Defendant Village of South Blooming Grove; and on this motion by Defendant Keen Equities, LLC for summary judgment, pursuant to CPLR §3212, granting summary judgment to co-defendant Keen Equities, LLC and dismissing Defendant's Counterclaim; and upon this cross-motion by Defendant Village of South Blooming Grove seeking a declaratory judgment and summary judgment on its Counterclaim, pursuant to CPLR §§3001 and 3212, declaring the purported "judicial subdivision" effectuated by Defendants Keen Equities, LLC and Blue Rose Estates, LLC null and void and invalid.

Notice of Motion-Blue Rose Estates, LLC - Affirmation Klatsky - Exhibits A-D and Memorandum of Law 1-3
Notice of Motion to Dismiss Counterclaim-Blue Rose Estates, LLC - Appendix - Memorandum of Law 4-6
Notice of Cross-Motion - Village of South Blooming Grove - Affidavit Lynch - Affidavit Geneslaw - Affidavit Jeroloman -

Exhibits A-Y 7-10
Affidavit in Opposition - Sweeney 11
Reply Affirmation - Klatsky ..... .12
Reply Affirmation - Lynch - Exhibit A-B 13
Post-Argument Memorandum of Law - Sweeney 14
Post-Argument Memorandum of Law - Lynch 15

Upon the foregoing papers, and upon oral argument, it is

ORDERED, that Defendant Blue Rose Estates, LLC's Motion to Dismiss, pursuant to CPLR §3211(a)(7), is denied; and it is further

ORDERED, that Defendant Keen Equities, LLC's Motion to Dismiss and for Summary Judgment, pursuant to CPLR §3212, is denied; and it is further

ORDERED, that the Cross-Motion of Counter-Claiming Defendant Village of South Bloomingrove which is for Summary Judgment and for a Declaratory Judgment, pursuant to CPLR §§3001 and 3212, as to the invalidity of the purported judicial subdivision concerning the subject property, now or formerly owned by Defendants Blue Rose Estates, LLC and Keen Equities LLC, is granted to the extent indicated; and it is further

ORDERED, that due to the insufficiency of the record, Village application for attorneys fees is denied, without prejudice to renew.

Factual Background/Procedural History

The pending motions and cross-motion come before the Court in the context of three (3) companion, and interrelated, motions concerning the creation, development and use of a 26.228 acre improved parcel of land; a parcel located within the territorial boundaries of the Village of South Blooming Grove and derived from property commonly

known as the former Lake Anne Country Club property.[1] The pending motions, and cross-motion, are also an outgrowth of two (2) prior decisions issued by this Court.[2]

The facts, insofar as they are relevant to the pending action, reveal that, in or about June of 2008 Defendants Blue Rose Estates, LLC (hereinafter "Blue Rose" or "Blue Rose Estates")and Keen Equities, LLC (hereinafter "Keen Equities"), then embroiled in a business dispute, submitted their dispute to binding arbitration before the Rabbinical Court of New Square (the "Rabbinical Court"); the submission of which resulted in a June 8, 2008 Arbitration Award (the

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[1]This pending action represents one of three actions/proceedings commenced by Plaintiff/Petitioner Sheri Torah, Inc., against the Village of South Blooming Grove, the Village Planning Board and the Village Zoning Board of Appeals.

By Article 78 proceeding, [Index No. 2011/6879] Sheri Torah, Inc. seeks to annul a June 16, 2011 determination issued by the Zoning Board of Appeals of the Village of South Blooming Grove.

In a second companion action [commenced under Index No. 2011/9165] Sheri Torah, Inc. seeks to compel, pursuant to CPLR §7806, the Planning Board of the Village of South Blooming Grove [the "Village Planning Board"], to complete a report or make a recommendation required by the Village Zoning Law with respect to Sheri Torah's application for a Special Use Permit to operate a religious school, a shul, for boys adhering to the Hasidic Jewish faith, on the former Lake Anne Country Club property.

[2]By Decision and Order dated July 1, 2010 [Lubell,J], the Court annulled that portion of the Taxpayer's Protection Act (Chapter 240 of the Village Code of the Village of South Blooming Grove) which permitted the Village to pass along to various applicants costs incurred by the Village for counsel fees. The Court also denied the motion for dismissal filed by the Village and so much of Sheri Torah's application which sought severance of the remaining portion of the action.

By Decision and Order dated December 21, 2010 [Lubell,J] the Court, recognizing the apparent conflict existing between a certain Order of Kings County Supreme Court dated November 13, 2008, purportedly confirming the Rabbinical Ruling [Arbitration Award between Blue Rose Estates, LLC and Keen Equities, LLc] and the Village Subdivision Regulation ordered, *inter alia*, the mandatory joinder, pursuant to CPLR §1001(a), of Blue Rose Estates, LLC and Keene Equities, LLC, as "necessary parties" who may or would be "inequitably affected" by a determination on the Counterclaim asserted by the Village.

"Rabbinical Court Ruling") which Award/Ruling provided, in relevant part, for the following:

> "Now, the case presented before us *about the apartments at the building which is located at 505 Clove Rd. in the Town of Bloomingrove, which is situated on a property in the size of 26.2 acres, that are for rent*-after determining the facts and after deliberations on the matter from a Halachic [Jewish law] and fairness perspectives, a Rabbinical Court Ruling was issued by us that *all of the above apartments* belong to Party A [Blue Rose Estates],*and all rental income that are paid by the residents belong to Party A and Party B* [Keen Equities] has no claim and argument against him.
>
> So therefore, it is incumbent upon Party B to record the *above mentioned building* in the government offices in the name of Party A, and it is incumbent upon him to sign all documents necessary for that purpose, and to make these arrangements as soon as possible."

Thereafter, and by Kings County Supreme Court Order dated November 13, 2008,[In the Matter of the Petition of BLUE ROSE ESTATES,LLC against KEEN EQUITIES LLC - Hon. Wayne R. Saitta, J.S.C] the aforementioned Arbitration Award/Rabbinical Ruling of June 8, 2008 was purportedly confirmed without opposition from, and upon the default of, Respondent KEEN EQUITIES, LLC; an order which provided, in relevant part, for the following:

> "ORDERED, that the arbitration award dated June 8, 2008 is confirmed, and the respondents are directed to execute and deliver all documents required to transfer title to real property that was the subject of the arbitration, in accordance with the legal description and map annexed hereto, and that plaintiff shall have judgment therefore."

Thereafter, and on May 5, 2009, Keen Equities, LLC executed, acknowledged and delivered to Blue Rose Estates, LLC a deed conveying

to Blue Rose all of its right, title and interest of, in and to a 26.228 parcel of land, together with the buildings and improvements erected thereon, lying situate and being in the Village of South Blooming Grove, Orange County, New York which deed was thereafter recorded in the Orange County, New York Clerk's Office on May 12, 2009 in Liber 12823 of Deeds at page 1332; a deed presumptively tendered in accordance with the aforementioned Arbitration Award, as confirmed.

It is undisputed that the aforementioned deed was carved out of, and derived from, a parent parcel containing approximately 785 acres owned by Keen Equities, and which constituted a portion of Section 208 Block 1 Lot 3 on the tax map for the Village of South Blooming Grove. It is further undisputed that no sub-division approval was ever secured from the Village Planning Board prior to the conveyance and the recording of same.

During the intervening period between the Rabbinical Ruling, and the Order confirming same, and prior to the aforementioned conveyance, the Village of South Blooming Grove adopted various land use regulations including, *inter alia*, Subdivision Regulations regulating the SUBDIVISION OF LAND; Subdivision Regulations which, by their terms, prohibited the subdivision of land unless approved by the Village Planning Board.[3]

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[3] On June 23, 2008 the Village of South Blooming Grove adopted a comprehensive set of Subdivision Regulations; regulations adopted in conformity with, *inter alia*, Village Law §7-728, Subdivision 2 and Municipal Home Rule Law §20,Subdivision 5 and §22 [§163-1]and whose stated purpose was to control the subdivision of land within the Village in order to, *inter alia*, promote the orderly, planned, efficient, physical and economical development of land . . . maintain the current character and stability of land . . . promote open space . . . prevent degradation of the environment through the improper use of land . . . [and to vest] legal authority in the Planning Board to disapprove plots if the requirements of [the] regulations and the policies

Article II, §163-10 of the Ordinance defines the terms which guide the Village Planning Board and which govern the implementation of the Subdivision Regulations themselves. The Regulations define a SUBDIVIDER and SUBDIVISION as follows:

> "SUBDIVIDER - Any person who, having an interest in land, (1) causes it, directly or indirectly, to be divided into a subdivision, or (2) directly or indirectly sells, leases or develops or offers to sell, lease or develop, or advertises for sale, lease or development, any interest, lot, parcel, site, unit or plot in a subdivision . . ."

> "SUBDIVISION - The division of any parcel into a number of lots, blocks or sites as specified in the law, rule or regulation, with or without streets or highways, for the purpose of sale, transfer of ownership or development. The term "subdivision" shall include any alteration of lot lines or dimensions of any lots or sites shown on a plat previously approved and filed in the office of the County Clerk or register of the county in which such plat is located. Subdivisions may be delineated by local regulation, as either "major" or "minor", with the review procedures and criteria for each set forth in such local regulations."

Subdivision of land within the Village is prohibited unless

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and purposes of the regulations were not met [§163-3 (Policy and Purposes), Subdivisions A, D, and H].

The Village Subdivision Regulations place the onus for compliance upon the developer [§163-7] and "any and all final approvals granted by the Planning Board" are deemed "conditional upon compliance with the regulations" [§163-8].

Article III of the Regulations outlines a detailed "Application Procedure and Approval Process"; a process which includes, and requires, Preliminary Plot Approval [§163-12] and which mandates that the application be accompanied by a "full environmental form per 6 NYCRR Part 617." [§163-12(f)]. The regulations further require a Public Hearing [§163-12(B)] and thereafter Final Plat Approval [Article VI- §163-13 through §163-33].

Detailed professional review is also contemplated at both the Village and, where applicable, the County level [§163-13(B)], since Final Plat Approval contemplates, and requires, not only compliance with all requirements set forth in the Preliminary Approval but the payment of all fees including reimbursement for professional review by Village consultants. [§163-13(A)(5)]. Both Preliminary and Final Plat Approvals are effectuated based upon detailed design specifications [Article VI, §163-31]which include, *inter alia*, base data, identification of property lines, elevation, slopes, topography and contours.

approved by the Village Planning Board; a prohibition underscored in both the jurisdictional and enforcement sections of the Subdivision Regulations.

Article I, §163-2 (Jurisdiction) of the Village SUBDIVISION REGULATIONS provides, in relevant part, for the following:

> "[n]o land shall be subdivided within the Village of South Blooming Grove until the sub-divider or his agent has complied with these regulations . . . and until the *approved lot* is filed with the Orange County Clerk. No building permit or certificate of occupancy shall be issued for any parcel or plot of land which was created by subdivision . . [and] . . not in conformity [with] the subdivision regulations . . .". (Emphasis supplied).

Article VIII of the SUBDIVISION REGULATIONS, which provides for enforcement of the regulations, includes, *inter alia*, the following provision:

> §163-49. Conformance required.
> "No land in the Village of South Blooming Grove shall be subdivided except in conformance with Village of South Bloomingrove Subdivision of Land Regulations, duly adopted by the Village Board and any amendments thereof."

Based upon the foregoing, the Village has asserted, in its responsive pleading, a Counterclaim in which it seeks, pursuant to CPLR §3001, various forms of declaratory relief, including, *inter alia*, a determination regarding the validity, and binding nature, of a purported "judicial subdivision", a declaration that it is not bound by the terms of the Rabbinical Ruling, and the Order confirming same, together with a declaration that the Plaintiff, together with Defendants Blue Rose Estates and Keen Equities, are bound by the terms of the Village Subdivision Regulations.

Based upon the foregoing, Defendant Blue Rose Estates moves for

dismissal, pursuant to CPLR §3211(a)(7), and, by companion motion, Defendant Keen Equities moves for summary judgment and dismissal, pursuant to CPLR §3212. In so moving, Defendants Blue Rose and Keen Equities substantively argue that: (1) As a stranger to the Arbitration Ruling and Confirmation Order, the Village lacks standing to collaterally attack either its terms or its effect; (2) The Arbitration Award did not create a "subdivision" as the term is applied in the Village Subdivision Regulations; and (3) That the Village Subdivision Regulations are in conflict with superior state policy which do not constrain the Arbitration Award.

In response, the Village cross-moves for summary judgment on its Counterclaim asserting that a Declaratory Judgment in its favor is warranted, as a matter of law, since: (1) There is no basis, in law or in fact, to sustain Defendant's claim that the 26.228 acre parcel was created by "Judicial Subdivision"; (2)The Village, in any event, was not a party to the underlying Rabbinical Ruling, or the Kings County proceedings purportedly confirming the Award, or had notice of the same and is therefore not bound by the purported determinations as it relates to the regulation of land use within the Village;(3)It is undisputed that the lot in issue [the 26.228 acre parcel conveyed by Keen Equities to Blue Rose Estate] was created without Village Planning Board Approval and thus in violation of the Village Subdivision Regulations; and (4) That SHERI TORAH, INC. is bound by the Village land use regulations, and specifically the SUBDIVISION REGULATIONS, and compliance is required prior to the prospective issuance of any permit which it seeks from the Village.

Discussion/Legal Analysis

As a preliminary matter, since the motion to dismiss filed by Defendant Blue Rose would be dispositive, and render academic, many of the issues raised in the respective motions for summary judgment, the Court will address the dismissal motion first, and then address *in seriatim* the remaining issues embraced within the motions and cross-motions filed by Keen Equities and the Village.

The CPLR §3211(a)(7) Motion to Dismiss of Blue Rose Estates

Defendant, Blue Rose Estates, LLC moves, pursuant to CPLR §3211(a)(7), to dismiss the Counterclaim asserted by Defendant Village of South Bloomingrove for its failure to state a viable cause of action, the ostensible basis for which is three-fold: (1)The Kings County Supreme Court Order merely confirmed an arbitration award between Blue Rose and Keen Equities and the Village was a stranger to the arbitration; (2) Ownership of the Blue Rose property is a private matter between Blue Rose and Keen Equities and the Village has no right to approve or disapprove the transfer; and (3) the Arbitration Award did not involve any matters of state or local law and as such the Village has no basis to challenge its confirmation.

Viewed in a vacuum, Defendant's arguments have potential merit. Viewed in the context of the current litigation, they do not.

CPLR §3211(a)(7) motions for dismissal are addressed to the facial sufficiency of a pleading. In determining whether dismissal is warranted under CPLR §3211(a)(7), the court must give the pleading a

liberal construction, take the facts alleged as true, and afford the plaintiff or defendant the benefit of every reasonable inference in determining whether the allegations fit within *any cognizable legal theory*. *Leone v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Uzzle v. Nunzie Court Homeowners Association, Inc.*, 70 A.D.3d 928, 895 N.Y.S.2d 203 [2nd Dept. 2010]. In determining facial sufficiency, the court is required to determine whether the proponent of the pleading has any cognizable cause of action, not just whether he or she has stated one within the four corners of the pleading. *Jesmer v. Retail Magic, Inc.*, 55 A.D.3d 171, 863 N.Y.S.2d 737 [2nd Dept.2008]. Furthermore, a party opposing a §3211(a)(7) motion may submit additional affidavits or documentary evidence to remedy defects in pleading in order to preserve in-artfully pleaded causes of action or defenses, but potentially meritorious claims. *Cron v. Hargro Fabrics, Inc.*, 91 N.Y.2d 362, 670 N.Y.S.2d 973 (1998); *Lester v. Braue*, 25 A.D.3d 769, 808 N.Y.S.2d 778 [2nd Dept.2006].

Here, the thrust of Village's Counterclaim, although articulated in the nature of seeking Declaratory relief, is unmistakable: (1) It was not a party to the Rabbinical Arbitration, nor to the Kings County Supreme Court Order confirming the arbitration award, and therefore cannot be collaterally estopped from challenging its legal effect as it pertains to real property situate within the Village and *its* land use regulations; (2) Neither the Arbitration Award issued by the Rabbinical Court nor the Kings County Supreme Court Order, confirming the award, says what Defendants Blue Rose and Keen Equities say it says, i.e., that it effectuated a "Judicial Subdivision" of the land

at issue, a Judicial Subdivision that is exempt from the requirements of the Village Subdivision Ordinance; and(3) The transfer from Keen Equities, LLC to Blue Rose Estate, LLC of the 26.228 acre parcel, which was ostensively based upon the Rabbinical Court arbitration award, as confirmed, should be voided, i.e Keen Equities should be declared the current owner of the parcel, not Blue Rose, since the conveyance was made in derogation of the Village's sub-division regulations.

For the reasons hereinafter set forth, the Court concludes, and so finds that, the declaratory relief which the Village seeks is sufficiently pleaded to withstand Blue Rose's dismissal motion, pursuant to CPLR §3211(a)(7)and the motion is denied.

First, even though the Village was a "stranger" to both the Arbitration Award and the order confirming the same, Blue Rose's two-pronged argument that the Village lacks standing and is collaterally estopped from challenging the purported effect of the same lacks merit.

Standing is a threshold issue and requires an inquiry into whether a litigant has a sufficient interest in the lawsuit such that the law will recognize that interest as a sufficient predicate for determining an issue at the litigant's request. *Bank of New York v. Silverberg*, 86 A.D.3d 274, 926 N.Y.S.2d 532 [2nd Dept.2011]; *Carper v. Nussbaum*, 36 A.D.3d 176, 825 N.Y.S.2d 55 [2nd Dept.2006]. In order to have standing in a particular dispute, a party must demonstrate an injury that falls within the relevant zone of interest sought to be protected by the law. *Bernfeld v. Kurilenko*, 91 A.D.3d 893, 937

N.Y.S.2d 314 [2ndDept.2012]; *Village of Elmsford v. Knollwood Country Club, Inc.*, 60 A.D.3d 934, 875 N.Y.S.2d 560 [2ndDept.2009]. The rules governing standing assist the courts in differentiating a tangible injury from the abstract or speculative. In short, the litigant must be genuinely aggrieved. *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 901, 798 N.E.2d 1047 (2003); *Sharrow v. Sheridan*, 91 A.D.3d 940, 937 N.Y.S.2d 320 [2ndDept.2012].

Here, the Village of South Blooming Grove seeks to enforce its subdivision regulations; regulations ostensively enacted to regulate and control the development of land within the Village and regulations crafted and adopted to promote the health, safety and welfare of its residents. It therefore has sufficient standing.

Nor is the Village collaterally estopped from challenging the purported benefit which Blue Rose seeks to derive from the Rabbinical Court Arbitration Award; an Award which concerns property situate within, and subject to, the Village land use/sub-division regulations.[*See discussion infra, on summary judgment*]. Here, the Village is not collaterally estopped from attacking the transfer and purported sub-division since neither the material issue sought to be precluded [i.e., the sub-division of Keen Equities parent parcel by the creation of the 26.228 acre parcel ultimately conveyed to Blue Rose Estates] was decided in the prior Arbitration Award nor was the Village afforded a full and fair opportunity to contest the same. Both conditions must be met in order for the preclusion to apply. *See, Jeffreys v. Griffin*, 1 N.Y.3d 34, 801 N.E.2d 404(2003); *Mavco Realty Corp. V. M. Slayton Real Estate, Inc.*, 77 A.D.3d 892, 909 N.Y.S.2d 759

[2nd Dept.2010]; *Ryan v. New York Telephone Company*, 62 N.Y.2d 494, 478 N.Y.S.2d 823(1984).

Indeed, it is somewhat disingenuous for Blue Rose to assert, on the one hand, that the Rabbinical Court Arbitration Award concerned a "private matter" only, as between Blue Rose Estates and Keen Equities, and "did not involve any matters of state or local law [or] the Village" [Klatsky Affirmation, ¶2] and, on the other hand, use that same purported determination as a hammer to circumvent the Village's land use/sub-division regulations. In sum, the Village is not collaterally estopped from attacking the transfer.

Turning to the facial sufficiency of the Counterclaim itself, the Court concludes, and so finds, that the Village has properly articulated a claim for the declaratory relief which it seeks.

In so concluding, the Court begins its analysis with an examination of the statutory basis for the requested declaratory relief, CPLR §3001, which provides, in relevant part, that:

> "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy, whether or not further relief is or could be maintained . . .".

An action for a declaratory judgment is one that seeks to have the court establish and promulgate the rights of the parties on a particular subject matter. It is remedial in nature. Its primary purpose is to stabilize the legal relations which exist between the parties and to eliminate uncertainty as to the scope and content of both present and prospective legal obligations (*See, Goodman v. Reisch*, 220 A.D.2d 383, 631 N.Y.S.2d 890 [2nd Dept.1995]; *Chanos v.*

Madac, LLC, 74 A.D.3d 1007, 903 N.Y.S.2d 506 [2nd Dept.2010]); the prerequisites for which are the existence of an actual controversy, a controversy that is *justiciable*, and a controversy where a legally protectible interest is present and directly in issue. *Long Island Lighting Co. v. Allianz Underwriters Insurance Co.*, 35 A.D.3d 253, 826 N.Y.S.2d 55 [1st Dept.2006]; *Enlarged City School District of Middletown v. City of Middletown*, 96 A.D.3d 840, 946 N.Y.S.2d 208 [2nd Dept.2012]; *New York State Inspection v. Cuomo*, 64 N.Y.2d 233, 485 N.Y.S.2d 719 (1984); *New York Public Interest Research Group, Inc. v. Carey*, 42 N.Y.2d 527, 399 N.Y.S.2d 621 (1977). All of the prerequisites are present here.

A declaratory judgment requires an actual controversy between genuine disputants with a stake in the outcome. The dispute must have a direct and immediate effect upon the rights of the parties and must be real, definite, substantial and sufficiently matured. *Ashley Builders Corp. v. Town of Brookhaven*, 39 A.D.3d 442, 833 N.Y.S.2d 230 [2nd Dept.2007]; *Long Island Lighting Co. v. Allianz Underwriters Ins. Co., supra; Enlarged City School District of Middletown v. City of Middletown, supra; DiCanio v. Incorporated Village of Nissequoque*, 180 A.D.2d 223, 596 N.Y.S.2d 74 [2nd Dept.1993]. The controversy cannot be hypothetical, contingent in nature, or advisory. *In re Workman's Compensation Fund*, 224 N.Y.13, 119 N.E. 1027 (1918)(Cardoza, J.); *Church of St. Paul and St. Andrew v. Barwick*, 67 N.Y.2d 510, 496 N.E.2d 183 (1986); *Community Housing Imp. Program, Inc. v. New York Div. Of Housing and Community Renewal*, 175 A.D.2d 905,573 N.Y.S.2d 522

[2nd Dept. 1991].

On the record presented, there is no question that a bona fide controversy, between actual disputants, exists. The core issue presented relates to whether the conveyance of the 26.228 acre parcel at issue violated the duly enacted Village Subdivision Regulations; regulations which bear directly on not only the future development of the 26.228 acre parcel itself, but its parent parcel, and regulations which were promulgated to ensure and protect the health, safety and welfare of the Village residents. In sum, there is a compelling governmental interest which the Village seeks to enforce and protect.

Correspondingly, and for the reasons discussed *supra*, the controversy at issue is clearly *justiciable* and ripe for judicial review. It will have a direct and immediate effect upon the rights of the parties and the court's assumption of jurisdiction will involve the appropriate exercise of its jurisdiction of the subject matter. *New York State Inspection v. Cuomo, supra*. To meet the test of justiciability, it is necessary for the court to be presented with a controversy which touches the legal relations of the parties having adverse interests from which harm is presently flowing or would flow in the future in the absence of a court determination of the parties' rights. Their must be an uncertain or disputed jural relationship of either present or prospective obligations. *New York State Inspection v. Cuomo, supra; Jiggetts v. Grinker*, 75 N.Y.2d 411, 554 N.Y.S.2d 92 (1990); *Waterways Development Corp. v. Lavalle*, 28 A.D.3d 539, 813 N.Y.S.2d 485 [2nd Dept. 2006].

Suffice to say, all the prerequisite for declaratory relief are present here. The declaratory relief which the Village seeks, and as articulated in its Counterclaim, is facially sufficient and alleges a viable cause of action and a potentially meritorious claim ripe for judicial review. As such, Defendant Blue Rose Estates, LLC's motion for dismissal, pursuant to CPLR §3211(a)(7), must be, and is hereby, denied.

The Motion and Cross-Motion for Summary Judgment

Having denied Defendant Blue Rose Estates' motion for dismissal, the Court now turns to the respective summary judgment motions.

In addressing the opposing motions, the Court begins with the well settled principle that a grant of summary judgment is appropriate only where the Court determines that there are no material or triable issues of fact. Issue identification not issue determination is controlling. Therefore, the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to do so requires denial of the motion, regardless of the sufficiency of the opposing papers. See, *Weingard v. New York University Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 [1985]; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 [1980]; *Stillman v. Twentieth Century Fox Film Corporations*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 [1957];

Correspondingly, in order to defeat such a motion, it is incumbent upon the opponent to produce evidentiary proof, in admissible form, sufficient to require a trial of material questions of fact or demonstrate [an acceptable] excuse for his, her or its failure to do so. See, *Alvarez v. Prospect Hospital* 68 N.Y.2d 320, 508 N.Y.S.2d 923 [1986]; *Marine Midland Bank, N.A. v. Brown,* 115 A.D.2d 523, 496 N.Y.S.2d 53 [2d Dept. 1985]; *City of New York v. Grosfeld Realty Company,* 173 A.D.2d 436, 570 N.Y.S.2d 61 [2d Dept. 1991].

Applying the same, the Court concludes, and so finds, that the Village has established, *prima facie,* its entitlement to the declaratory relief which it seeks on its Counterclaim, and Defendants Blue Rose Estates, LLC and Keen Equities LLC have failed to rebut or raise a triable issue of fact as to the same, thus warranting the denial of their motions and the granting of summary judgment in favor of the Village on its cross-motion and Counterclaim.

In so concluding, it is noted that the record has been sufficiently developed to enable the Court to render a dispositive ruling as a matter of law; a dispositive ruling, in large part, premised upon the threshold construction and interpretation of the Rabbinical Ruling itself, the Order which affirmed it, and the clear and unambiguous terms of the Village Subdivision Regulations.

Consistent with the foregoing, and as a threshold matter, the Village is not collaterally estopped from attacking the validity of the Rabbinical Ruling, and the order confirming same, insofar as it pertains to its ability to enforce its Subdivision Ordinance,

particularly where, as here, there is a compelling governmental interest at stake, i.e. the ability of the Village to regulate land use within its municipal boundaries and to ensure that the health, safety and welfare of its residents is protected.

The doctrine of collateral estoppel precludes a party from relitigating, in a subsequent action or proceeding, an issue clearly raised in a prior action or proceeding and decided against that party or someone who stands in privity to that party, whether or not the tribunals or the causes of action are the same. *Ryan v. New York Telephone Company,* 62 N.Y.2d 494, 478 N.Y.S.2d 823(1984); *Mavro Realty Corp. v. M. Slayton Real Estate, Inc.*, 77 A.D.3d 892, 909 N.Y.S.2d 759 [2ndDept.2010]. In order for collateral estoppel to apply, two conditions must be present: (1) The issue sought to be precluded must be identical to the material issue decided in the prior action or proceeding; and (2) There must have been a full and fair opportunity to contest the same. *Jeffreys v. Griffin*, 1 N.Y.3d 34, 801 N.E.2d 404(2003); *Mavro Realty Corp.v. M. Slayton Real Estate, Inc.*, 77 A.D.3d 892, 909 N.Y.S.2d 759 [2ndDept.2010]; *Mallick v. Farfan*, 33 A.D.3d 762, 823 N.Y.S.2d 200 [2ndDept.2006]. Neither condition is present.

In sum, the Court concludes, and so finds, that the authority offered by Defendants Blue Rose Estates and Keen Equities is unpersuasive and further concludes, and so finds, that the Village is not collaterally estopped from either challenging the validity of the purported subdivision, which created the 26.228 parcel, or the extent to which, if at all, its Subdivision Regulations are subordinate to

the Rabbinical Ruling and the Kings County Supreme Court Order confirming same.

Turning to the companion issues of interpreting, and determining, the legal effect of the the Rabbinical Arbitration Award and the November 13, 2008 Order confirming the same, and their collective binding effect on the Village, the Court begins its analysis with the fundamental principle of document interpretation, that is: written documents are to be construed in accordance with the intent of the parties and the best evidence of that intent is what is expressed in the writing itself. *See, e.g., Goldman v. White Plains Center for Nursing,* 11 N.Y.3d 173, 867 N.Y.S.2d 27(2008); *Innophos, Inc. v. Rhodia, S.A.,* 10 N.Y.3d 25, 852 N.Y.S.2d 820(2007). A companion interpretative principle is that the language so used is to be accorded its plain and natural meaning without resort to forced construction. *Greenfield v. Phillies Records, Inc.,* 98 N.Y.2d 562, 750 N.Y.S.2d 565(2002); *Goldman v. White Plains Center for Nursing, supra; Innophos v. Rhodia, S.A., supra.* Moreover, matters of interpretation, including the determination of whether an ambiguity exists, is a question of law for the court. *Bailey v. Fish & Neave,* 8 N.Y.3d 523, 837 N.Y.S.2d 60(2007); *R/S Associates v. New York Job Authority,* 98 N.Y.2d 29, 744 N.Y.S.2d 358(2002); *W.W.W. Associates v. Ginacontieri,* 77 N.Y.2d 157, 565 N.Y.S.2d 440(1990); *White v. Continental Casualty Company,* 9 N.Y.3d 264, 848 N.Y.S.2d 607(2007).

In applying these principles, it is equally well settled that a court may not rewrite or remake a document to implement an otherwise unexpressed intention, or supply a missing term or missing language

under the guise of its powers of construction and interpretation. *Matter of Salvano v. Merrill, Lynch, Pierce, Fenner & Smith*, 85 N.Y.2d 173, 623 N.Y.S.2d 790(1995); *Scalabrini v. Scalabrini*, 242 A.D.2d 725, 662 N.Y.S.2d 581 [2ndDept.1997]; *Tri Messine Construction Co., Inc. v. Telesector Resources Group, Inc.*, 287 A.D.2d 558, 731 N.Y.S.2d 648 [2ndDept.2001]. The latter prohibition applies equally to the parties themselves.

Here, Defendant Keen Equities' reliance on the Rabbinical Arbitration Award and the November 13, 2008 Supreme Court Order confirming the same, as the ostensible justification for the validity of the "Judicial Subdivision" of the 26.228 parcel at issue and its binding effect on the Village, fails in at least four (4) respects: (1)The subdivision of the 26.228 acre parcel was never ordered as a remedy by the Rabbinical Court in the first instance; (2) The language inexplicably inserted in the November 13, 2008 Supreme Court Order confirming the award, and which referenced the conveyance of the 26.228 acre parcel, essentially transformed a Rabbinical Award that was otherwise limited in its application and scope and therefore impermissibly modified; (3) There is no legal authority for the creation of the 26.228 acre parcel by the purported methodology of a "Judicial Subdivision"; and(4) Since the 26.228 parcel was carved out of the 785 consolidated parent parcel owned by Keen Equities LLC, [as Keen Equities concedes that it was] the creation and conveyance of the parcel, without Village Planning Board approval, constituted a impermissible and illegal subdivision under the Village Subdivision Regulations; Regulations which, in any event, take precedence over any

purported ruling emanating from the Rabbinical Court concerning the subdivision and/or use of land within the Village boundaries.

In addressing the issues presented, the Court, as a preliminary matter, is cognizant of the longstanding, and firmly entrenched, policy favoring arbitration as an expeditious and economical alternative to judicial resolution (*See, Weinrott v. Carp*, 32 N.Y2d 190, 344 N.Y.S.2d 848 [1973]; *Smith Barney Shearson, Inc. v. Sacharow*, 91 N.Y.2d 39, 666 N.Y.S.2d 990 [1997]; *Board of Education of Bloomfield Central School District v. Christa Construction, Inc.*, 80 N.Y.2d 1031, 593 N.Y.S.2d 178 [1992]); the underpinnings of which are guided by the fundamental principle that resolution of disputes by arbitration is grounded in the agreement of the parties. *See, County of Sullivan v. Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 397 N.Y.S.2d 371 (1977).

Here, however, even when according proper deference to the substance of the Rabbinical Ruling itself, as the court should, no "Judicial Subdivision" of the 26.228 parcel was ever adjudicated or ordered. The clear and unambiguous terms of Rabbinical Ruling and Award reveal that its determination was limited in scope to the ownership of the apartment building itself and Blue Rose Estates' entitlement to the rents and profits derived therefrom, and nothing more; issues easily resolvable without the necessity of a subdivision.

Conspicuously absent from the Award is any mention, either directly or inferentially, that a subdivision was being ordered or that it was even needed. As a matter of law, the omission of material language is not be construed as a mere oversight, but rather an

indication that such omission was intended. *See, e.g., McKinney's Consolidated Laws of New York,* Book 1, Statutes, §74; *Pajak v. Pajak,* 56 N.Y.2d 394, 452 N.Y.S.2d 381(1982); *Bayshore Family Partners v. Foundation,* 239 A.D.2d 373 N.Y.S.2d 326 [2nd Dept.1997].

On the contrary, rather than ordering the division and creation of the 26.2 acre parcel, the factual underpinnings on which the Ruling was premised presupposed that the 26.228 acre parcel was already in existence and that the building at issue was located on it. In relevant part, the Rabbinical Court stated the following: "*the case presented before us [is] about the apartments at the building . . at 505 Clove Rd. in the Town of Bloomingrove,* ***which is situated on property in the size of 26.2 acres*** *...* ". (Emphasis supplied). Further, Party B [Keen Equities] was directed to "record *the above mentioned building* . . . in the name of Party A [Blue Rose Estates] . . . and sign all documents for that purpose". Save and except for the above reference, the Arbitration Award was silent in directing either the subdivision or the conveyance of the 26.228 parcel; a parcel that did not come into existence until May 5, 2009, a year later, and which was a by-product of a "transformed" confirmatory order.

The Ruling was equally silent in directing that any such conveyance could be done so exempt from any municipal land use regulations. On the contrary, the Rabbinical Ruling stated that "it [was] incumbent upon him [Keen Equities] to sign all documents necessary for that purpose". That language, by any fair interpretation, does not exclude following the required subdivision

process. In sum, no subdivision of the Keen Equities parcel was ever ordered by the Rabbinical Court.

Moreover, even if this Court were to construe, in decidedly liberal fashion, that the Rabbinical Court intended, albeit by implication, to create the 26.228 acre parcel as a means of effectuating its ruling [which it is not], such an order would at the very least require an order directing partition[4] of the property, using existing statutory procedures. Even in instances where partition has been ordered, research has not revealed [nor has counsel cited] any authority which suggests, either directly or inferentially, that court ordered partition is exempt from municipal subdivision

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[4]Article 9 of the Real Property Actions and Proceedings Law (RPAPL), as enacted by the New York State Legislature, provides a detailed statutory and comprehensive mechanism for the division of land. Article 9 proceedings which affect title to, or possession, use or enjoyment of, real property are properly venued in the county in which the real property is situate. See, CPLR §507. See also, *Equestrian Associates v. Friedus*, 192 A.D.2d 572, 595 [2nd Dept.1993].

Although a creature of statute, it is well established that the remedy of partition is equitable in nature and as such an accounting is deemed a necessary incident thereof. Consequently, a court may adjust the rights of the parties where one party obtains more than his or her proper share of the rents, issues and profits derived from that property; a remedy that, on its face, appears to go to the heart of the Rabbinical Ruling. See, e.g., *Deitz v. Deitz*, 245 A.D.2d 638, 654 N.Y.S.2d 868 [3rd Dept.1997]; *Tedesco v. Tedesco*, 269 A.D.2d 660, 702 N.Y.S.2d 459 [3rd Dept.2000]. Since an accounting is deemed a necessary incident of a partition action it should be had, as a matter of right, before the entry of an interlocutory or final judgment and before the division of any property or money by the parties. See, *McCormick v. Pickert*, 51 A.D.3d 1109, 856 N.Y.S.2d 306 [3rd Dept.2008]; *McVicker v. Sarma*, 160 A.D.2d 721, 558 N.Y.S.2d 997 [3rd Dept.1990]; *Colley v. Romas*, 50 A.D.3d 1338, 857 N.Y.S.2d 259 [3rd Dept.2008].

The actual partition of land is typically governed by RPAPL §921. Moreover, the statutory scheme contemplates the appointment of a referee who is required to report to the court concerning the character and condition of the land prior to partition and the issuance of the judgment. Notably, RPAPL §917 allows the court, in recognition of particular set offs or shares accruing to the respective parties to allocate those shares *without* partition such that the property could be held "in common", a remedy easily employable here as first step to the ultimate division of the 785 acre parcel.

regulations or that any court has ever ordered the same.

Second, and according proper deference to the Kings County Supreme Court proceeding, the order, as approved, contained extraneous and clearly expansive language [i.e., the dispositive provisions] which far exceeded what was contained in, or ordered by, the Rabbinical Award. In short, the order confirmed aspects of an arbitration award that were never decided, ordered or even contained in the Award.

Here, this Court is compelled to make the several findings. First, as a matter of law, the Kings County Supreme Court was constrained by the Rabbinical Court's findings, its rulings, its terms and the remedies so ordered. Confirming what was ordered means just that. The scope of review in confirming, vacating and/or modifying an arbitration award is extremely limited, narrowly construed and governed by statute. *See*, CPLR §§7510 and 7511. Moreover, the statutory grounds for vacating [CPLR §7511(b)]and/or modifying [CPLR§7511(c)] an arbitration award are deemed exclusive. *See, e.g., In re State of New York Office of Mental Health*, 46 A.D.3d 1269, 848 N.Y.S.2d 444 [3rdDept.2007].[5]

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[5]Pursuant to CPLR §7511(c), an arbitrator's award may only be modified in three (3) distinct and enumerated instances: (1) Where there was a miscalculation of figures or a mistake in the description of any person, thing or property; (2) Where an award was rendered on a matter not submitted for arbitration; and (3) Where the award is imperfect as to form, but not affecting the merits of the decision.

The purported change between the rabbinical ruling and the order confirming same (i.e., the authorization to convey the 26.228 acre parcel) related to none of these factors. In fact, Blue Rose Estates neither sought, nor was granted, a modification of the underlying award. In merely sought, and was granted, an order confirming the June 8, 2008 Rabbinical Ruling, as issued.

It is equally well settled that a court is bound by an arbitrator's factual findings, the interpretation of evidence and the remedies so ordered, and cannot examine the merits of the award and substitute its judgment for that of the arbitrator's simply because it believes its interpretation would be a better one. *See, e.g., Azrielant v. Azrielant*, 301 A.D.2d 269, 752 N.Y.S.2d 19 [1st Dept.2002]; *Marfrak Corp. v. Gardner*, 176 A.D.2d 323, 574 N.Y.S.2d 764 [2nd Dept.1991]. Thus, that portion of the Order which referenced the conveyance of the 26.228 acre parcel, transformed, and impermissibly so in this Court's view, an arbitration award that was otherwise limited in its scope and application. It is therefore [at least in the context of the issues presented herein] irrelevant and extraneous surplusage.

Third, Defendant's arguments to the contrary [i.e. that the purported "Judicial Subdivision" is controlling and "trumps" the Village Subdivision regulations or that this conveyance is not the type of conveyance which is subject to subdivision regulations] is neither persuasive nor supportable, as a matter of law. Indeed, research has not revealed, nor has counsel cited, any New York authority which lends support to the theory that the 26.228 acre parcel was [or can be] permissibly created by "Judicial Subdivision" or that if it can, that any duly adopted municipal subdivision regulations are, as a matter of law, subordinate to it.

Counsels' reliance upon the application, and binding nature, of Real Property Law §334 is likewise misplaced. RPL §334 was not, as counsel suggests, adopted as the controlling and dispositive

definition of what constitutes a subdivision or a subdivided lot, but a statute designed to provide prospective purchasers with notice. It merely imposes an affirmative duty on a subdivider to file a map of the subdivision, when subdivided lots are offered for sale. Its purpose is merely to make a public record of the map for the sake of "definiteness and certainty". *See, In re East 177th Street in the Borough of Bronx, New York City*, 239 N.Y.119, 145 N.E.903 (1924); *Pattern Corp. V. Association of Property Owners of Sleepy Hollow Lake, Inc.*, 172 A.D.2d 996, 568 N.Y.S.2d 970 [3rdDept.1991]. On this very point, the Second Department has observed that state and local governments have different interests in requiring the filing of approved maps. The State's purpose is to establish a public record with "definiteness and certainty", while the county seeks to insure that the development of real property within its border proceeds in an orderly fashion. *See, Landmark Colony at Oyster Bay v. Board of Supervisors*, 113 A.D.2d 741, 491 N.Y.S.2d 340 [2ndDept.1985].

Moreover, on its face, the notion that an arbitral forum or a court of competent jurisdiction sitting in a county that shares no identifiable nexus with the county [or the municipality] in which the real property is situate can, by judicial edict, effectuate a "Judicial Subdivision" of land within such municipality and circumvent a municipality's otherwise duly adopted subdivision/land use regulations which are designed to ensure and enhance the health, safe and welfare of its residents, [regulations ostensively adopted under the auspices of state statutory authority], flies in the face of existing, and integrated, land use and/or development regulatory

schemes.

Fourth, even assuming the Court were to conclude that the Order properly confirmed what was ordered by the Rabbinical Court, the Village is nevertheless entitled to the relief which it seeks on its Counterclaim since the 26.228 acre parcel, as created and conveyed in the May 5, 2009 deed from Keen Equities to Blue Rose Estates, LLC, was clearly subject to the Village Subdivision Regulations. The parcel at issue, [as Defendant concedes and which the documentary evidence confirms] was derived from Keen Equities' consolidated "parent parcel" of 785 acres. As such, the division of the parent parcel, without proper, and prior, Village Planning Board approval, constituted a violation of the Village Subdivision Regulations and thus an illegal subdivision.

In so concluding, the Court begins with the well established principle that a subdivision plat involves the division of a parcel into multiple lots. It contemplates the division of a larger tract into smaller lots with eventual separate ownership of each. *Rieger Apts. Corp. v. Planning Board of the Town of Clarkstown*, 57 N.Y.2d 206, 455 N.Y.S.2d 558, 441 N.E.2d 1076 (1982); *Marx v. Zoning Board of Appeals of the Village of Mill Neck*, 137 A.D.2d 333, 529 N.Y.S.2d 330 [2nd Dept.1988]. It is equally well settled that the approval of subdivision plats typically lies within the province of the planning board and "[t]he main tool of the municipal planner is the power to regulate the development of unimproved land through subdivision control . . . [and that] subdivision control is aimed at protecting the community from [*inter alia*] the uneconomical development of land

. . .". *Marx v. Zoning Board of Appeals of the Village of Mill Neck, supra at* 336, *citing Matter of Golden v. Planning Board of the Town of Ramapo*, 30 N.Y.2d 359, 372, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972). *See also, Viscio v. Town of Wright*, 42 A.D.3d 728, 839 N.Y.S.2d 840 [3rdDept.2007]; *Reynolds v. Weiss*, 147 A.D.2d 446, 537 N.Y.S.2d 304 [2ndDept.1989].

On the record presented, there is nothing to suggest that the Village Subdivision Regulations [and particularly the definition of a "Subdivision" or "Subdivider"] in any way deviates, or was intended to deviate, from these basic principles. The language is clear, complete and unambiguous on its face, and as such is enforceable by the Village, and binding upon Defendants Blue Rose Estates and Keen Equities, in accordance with its terms. *Goldman v. White Plains Center for Nursing, supra; Innophos, Inc. v. Rhodia, S.A., supra; Bailey v. Fish & Neave, supra; White v. Continental Casualty Company, supra.*

The term "Subdivision", referenced in §163-10 of the Village Regulations, embraces the "division of *any parcel* into a number of lots . . . for the purpose of sale, *transfer of ownership* or development." Although Defendants argue that the Village Subdivision Regulations are inapplicable since no sale was intended and no development contemplated, in instances such as these, those arguments have historically been rejected by the courts. *See, Voorheesbille Rod and Gun Club, Inc. v. E.W. Tompkins Company, Inc.*, 82 N.Y.2d 564, 626 N.E.2d 917, 606 N.Y.S.2d 132 (1993); *Matter of Esposito v. Town of Fulton Planning Board*, 188 A.D.2d 779, 591 N.Y.S.2d 254 [3rdDept.1992]. In any event, there is no doubt that the conveyance at issue

constituted a "transfer of ownership" which brings it within the ambit of the Village Subdivision Regulations.

Not only does the conveyance at issue bypass, pre-empt and circumvent required Village Planning Board Approval, the Preliminary and Final Approval Procedures themselves, and numerous regulatory sections including, *inter alia*, §§163-2 and 163-49, it has the effect of skewing [and impermissibly limiting] any prospective Site Plan review or the Planning Board's requirement to issue and provide recommendations and reports which may be required in the context , and the consideration, of Special Use Permits.

In this regard, it has long since been recognized that there is considerable "interplay between the closely related, yet distinct, zoning and planning functions of local government . .". , i.e. between subdivision, site plan and zoning considerations (*See, Marx v. Zoning Board of Appeals of the Village of Mill Neck, supra at* 336; *Viscio v. Town of Wright, supra; See, also, Rieger Apts. Corp v. Planning Board of the Town of Clarkstown, supra*)and that the regulation of land is a local issue requiring a balanced community approach. *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975).

Moreover, although Defendants argue that the there was no intent to circumvent the Village Subdivision Regulations, the argument is unpersuasive for a variety of reasons. First, the multiple acquisitions engineered by Keen Equities in accumulating the 785 acre parent parcel, coupled with the $10,000,000.00 mortgage encumbering the same, ostensively undertaken for prospective development purposes,

demonstrates, at least in this Court's view, a level of sophistication that removes Keen from the realm of the unwary landowner. Second, what ascertainable standard could the court possibly use in measuring the level of intent, ignorance or naivete justifying the exemption? Third, motive is irrelevant. The potential damage which may accrue to the Village, and its residents, arising from the non-compliance or circumvention of its overall land development/regulatory scheme, is the same whether intentional or unintentional and whether based on calculated circumvention or innocent oversight.

The Declaratory Relief

In fashioning the declaratory relief which the Village seeks, the parties are reminded that the purpose of a declaratory judgment is to stabilize legal relations between the parties through the establishment and promulgation of the rights of the parties on a particular subject matter. It is distinguishable from other actions in that it does not end in a judgment enforceable through some kind of coercive relief; it merely declares what the present and prospective rights and obligations of the parties are. Thus, the request of the Village for declaratory relief is granted to the extent hereinafter indicated.

First: For the reasons hereinbefore enumerated, the Village is not collaterally estopped from challenging the legality of the May 5, 2009 conveyance of the 26.228 parcel from Keen Equities to Blue Rose Estates, LLC, and has the requisite standing to do so in the context of regulating and/or enforcing its subdivision/land use regulations.

Second: The May 5, 2009 deed from Keen Equities to Blue Rose Estate, LLC, which conveyed to Blue Rose the 26.228 acre parcel at issue, constituted a "subdivision" within the meaning of the Village of South Blooming Grove Subdivision Regulations and was therefore subject to the approval process contained in the Village Subdivision Regulations. To the extent that a conflict exists between the Rabbinical Arbitration Award, the Kings County Supreme Court Order of November 13, 2008 confirming the Award, and the Village of South Blooming Grove Subdivision Regulations, the Village Subdivision Regulations are superior and controlling.

Third: The aforementioned conveyance, was executed, acknowledged, delivered and recorded without prior Village Planning Board Approval and as such constituted an illegal subdivision of land, as the term is defined, under the Village Subdivision Regulations.

Fourth: By virtue of the foregoing, Blue Rose Estates, LLC and Keen Equities LLC are "materially or substantively affected by the relief sought" herein, as the term is defined and intended in Article II [Ownership "C"].

Fifth: By virtue of the foregoing, Keen Equities LLC and Blue Rose Estates, or both, are jointly and severally liable for, and subject to, any and all penalties and prohibitions applicable thereto, and provided for, in the Village Subdivision Regulations, including, but not limited to those enumerated in §163-2, §163-50 and §163-51, the foregoing enumeration being by way of example and not by way of limitation. Further, all remedies of the Village, including those enumerated in sections "Fifth", "Sixth" and "Seventh, as set forth

herein, are cumulative and may be employed in such fashion.

Sixth: Consistent with the foregoing, and consistent with the clearly articulated legislative intent derived from the an examination of the Village Regulations as a whole, the Village is entitled to withhold the issuance of, or deny, any application for a building permit, certificate of occupancy or any other permit pertaining to the use or development of the subject property until appropriate subdivision approval is secured from the Village Planning Board.

Seventh: Recognizing that zoning and land use regulations are in derogation of the common law and must be strictly construed, the Court nevertheless concludes, based upon a review and analysis of the Village Subdivision Regulations as a whole and the remedies that may reasonably be construed as emanating therefrom, that the May 5, 2009 conveyance from Keen Equities LLC to Blue Rose Estates, LLC is voidable, at the election of the Village, by the commencement of a separate plenary action for such relief.

Consistent therewith, the Village, may, at its election, and to the extent required, seek to vacate and/or expunge such conveyance from the records of the Orange County Clerk.

Further Orders of the Court

Based upon the foregoing, and pending further order of the Court, the parties are directed to, and shall, appear, through respective counsel, for a Status Conference, such Conference to conducted on Wednesday, January 30, 2013 at 9:15 A.M. the Orange County Surrogate's Courthouse, 30 Park Place, Goshen, New York.

This constitutes the decision and order of the Court.

Dated: December 31, 2012
Goshen, New York

E N T E R

HON. ROBERT A. ONOFRY,
ACTING SUPREME COURT JUSTICE

TO: James J. Sweeney, P.C.
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Exhibit 8

United Fairness, Inc. v Town of Woodbury

2011 NY Slip Op 21406 [34 Misc 3d 725]

November 15, 2011

Ecker, J.

Supreme Court, Orange County

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, March 21, 2012

[*1]

United Fairness, Inc., Individually and on Behalf of All Persons Similarly Situated, Plaintiff,
v
Town of Woodbury et al., Defendants.

Supreme Court, Orange County, November 15, 2011

APPEARANCES OF COUNSEL

Tarshis, Catania, Liberth, Mahon & Milligram, PLLC, Newburgh (*Joseph G. McKay* of counsel), for Town of Woodbury, defendant. *Feerick, Lynch MacCartney, PLLC*, South Nyack (*Bryan D. Nugent* of counsel), for Village of Woodbury, defendant. *Eric T. Schneiderman, Attorney General*, New York City, for State of New York, defendant. *James Klatsky*, New York City, for plaintiff.

{**34 Misc 3d at 726} OPINION OF THE COURT

Lawrence H. Ecker, J.

[*2]The decision and order of the court is as follows:[FN1] [*3]

Facts

The Town of Woodbury and the Village of Woodbury, until 2006, were separate governmental entities within Orange County. In that year, pursuant to a joint consolidation agreement, the two entities merged, created contiguous borders, and have since operated as one entity. Left undisturbed in 2006 was the Village of Harriman, which still exists as a separate governmental entity, within the Town of Woodbury.

By resolution passed by a majority of the village trustees in 2010, and again in 2011, the Village has authorized the sending of a home rule message to the State Legislature, seeking in essence to abolish the Village, restore the Town to its status prior to the 2006 merger, including the continuing existence of the Village of Harriman, and to prohibit the formation of any additional village within the Town. The consideration of the home rule message, with bill designations from both the New York State Assembly and the New York State Senate, did not make it out of committee in either 2010 or 2011. The earliest the home rule message can next be considered is January 2012.

Plaintiff United Fairness, Inc. (plaintiff),[FN2] a New York for-profit corporation, purports to represent a group of property owners who are Hasidic Orthodox Jews living in the western part of the town/village. They oppose the home rule message because if the proposed legislation is passed, they will not be{**34 Misc 3d at 727} able to create their own separate village in accordance with Village Law § 2-200. Plaintiff asserts its shareholders have been, and will be, the victims of religious persecution, and denied equal protection under the law, citing article I, § 11 of the New York Constitution, should the home rule message be adopted and become law by enactment of the State Legislature.

In this action for a declaratory judgment and injunctive relief against defendants Town of Woodbury (herein the Town), Village of Woodbury (herein

the Village) and the State of New York, plaintiff asserts seven causes of action pertaining to the proposed consolidation of the Town and Village into one entity, namely, the Town of Woodbury.

Plaintiff contends the form of the home rule message is deficient as to form and substance, in derogation of the requirements of Municipal Home Rule Law § 40. It seeks a declaration declaring the home rule message a nullity.

Included in United Fairness' claims, in essence, are allegations that plaintiff's shareholders are being discriminated against as follows:

1. The two-acre zoning requirement now imposed upon the area of the Town where plaintiff's "members" own property creates "barriers to the settlement of Hasidic Orthodox Jewish persons in the Town of Woodbury" (¶ 54 of complaint, first cause of [*4]action [exhibit B, Town's motion to dismiss]);[FN3]

2. Plaintiff members will be deprived of their rights under the Village Law to petition for the formation of a village (¶ 58, second cause of action);

3. The adoption of the resolution creates territorial distinctions affecting plaintiff's community unequally with other territorial areas in the State of New York (¶ 63, third cause of action);

4. The zoning code adopted by the Village imposes an unequal burden on the plaintiff's "members" in that all residences in the plaintiff's community are required to be built on lots of not less than two acres, whereas property owners in other sections of the Town and Village are not similarly situated (¶ 69, fourth cause of action);

5. Plaintiff's community has unmet needs for affordable housing and higher-density zoning that are not being provided for in the zoning code adopted by the

Village. The needs of plaintiff's{**34 Misc 3d at 728} community require the creation of a special zoning district pursuant to Village Law § 7-702. However, no demand has been made to the Zoning Board of the Village of Woodbury for the creation of a special zoning district because such demand would be futile (¶¶ 76, 77, 78, fifth cause of action);

6. The Village Zoning Board of Appeals is composed entirely of persons who do not reside in the plaintiff's community and who do not represent that community. Further, the Village has pursued a policy of excluding members of the plaintiff's community from appointment to the Planning Board[FN4] and the Zoning Board of Appeals with the intent of excluding the plaintiff's community from representation on those bodies (¶¶ 84, 85, sixth cause of action);

7. Plaintiff's "members" have the statutory right under article 2 of the Village Law to petition for the formation of a village in the plaintiff's community, and the Resolution, if enacted, would deprive plaintiff's members of such statutory right. Further, the needs of plaintiff's community are not being served adequately by the Village and will not be served adequately if a consolidated governmental entity is formed as the Town which is coterminous with the presently existing Village. (¶¶ 91, 92, 93, seventh cause of action.)

The Town and the Village have each moved to dismiss the complaint pursuant to CPLR 3211 on various grounds. As threshold matters, defendants argue: (1) the plaintiff organization does not have standing to assert claims on behalf of its members; and (2) the claims asserted are not justiciable because the lawsuit has been filed before the New York State Legislature has taken any action to approve or deny the Village's request for special legislation. Therefore, defendants contend, it would be a futile act for this court to adjudge the constitutionality of a resolution requesting legislation which does not exist.

The State of New York has not submitted any papers in regard to this dispute. [*5]

Issues

Does plaintiff as a for-profit corporation have standing to bring this action on behalf of its shareholders?

If the answer to No. 1 is in the affirmative, does this court have the power to enjoin the filing of the home rule message{**34 Misc 3d at 729} with the State Legislature, or to grant any other relief demanded by plaintiff?

Discussion

The standing of a party to seek judicial review of a claim or controversy is a threshold matter which must be resolved by the court before the merits of the application may be considered. (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761 [1991].) "Whether a person seeking relief from a court is a proper party to request an adjudication 'is an aspect of justiciability which must be considered at the outset of any litigation.' " (*Roberts v Health & Hosps. Corp.*, 87 AD3d 311, 318 [1st Dept 2011], quoting *Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 9 [1975].) Standing is thus a threshold determination that allows a litigant access to the courts to adjudicate the merits of a particular dispute that otherwise satisfies other justiciability criteria. As a general proposition, a plaintiff only has standing to assert claims on his or her own behalf. Unless permitted by statute or in accord with case law, one does not have standing to assert claims on behalf of another. (*Society of Plastics Indus. v County of Suffolk* at 769.)

Typically, a plaintiff's claims are put forward either by individuals, individuals seeking class action status pursuant to CPLR article 9, or as part of the stated purposes of a not-for-profit corporation formed pursuant to the Not-

for-Profit Corporation Law. The plaintiff fits into none of these categories. It describes itself as a corporation formed to engage in advocacy for Jewish residents and property owners in the Town and Village of Woodbury. The action is brought "on behalf of residents and property owners in the Plaintiffs' Community" which it further describes as "a concentration of Jewish residents and property owners in a section of the westernmost part of the Town and Village of Woodbury comprising 1.2 miles" as set out in a map annexed to the complaint. (Plaintiff's mem of law in opposition at 2.)

A review of the certificate of incorporation of United Fairness, Inc. indicates eligible shareholders are limited to persons who reside in, or own property, in the section of the Town of Woodbury described in a map annexed to the certificate and who support the advancement of the rights of Jewish residents [*6]and property owners in the Town of Woodbury. (Art XII, certificate of incorporation.) There is nothing in plaintiff's certificate of incorporation indicating a purpose of the corporation is to be{**34 Misc 3d at 730} engaged in advocacy for Jewish residents and property owners of the Town and Village of Woodbury.

Plaintiff's complaint clearly does not involve "for profit" issues. Plaintiff provides no case authority which unequivocally supports the proposition that a for-profit corporation, that is, a corporation formed under the Business Corporation Law, may engage in the advocacy that has been advanced here.

When an organization seeks standing to challenge governmental action, there must exist concrete adversarial interests requiring judicial intervention. That is,

"an organizational plaintiff must demonstrate a harmful effect on at least one of its members; it must show that 'the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those

interests;' and it must establish that the case would not require the participation of individual members." (*Rudder v Pataki*, 93 NY2d 273, 278 [1999].)

Plaintiff fails to meet the three-prong *Rudder* test. That is, the court is not convinced that plaintiff, a for-profit corporation, is the proper party to bring on this challenge to the home rule message. As pointed out by defendants, each of the cases cited by plaintiff in support of plaintiff's right to pursue this action actually dealt with plaintiffs whose authority derived from its corporate status pursuant to the N-PCL. (*See New York City Coalition to End Lead Poisoning v Giuliani*, 245 AD2d 49 [1st Dept 1997]; *Boulevard Gardens Tenants Action Comm. v Boulevard Gardens Hous. Corp.*, 88 Misc 2d 98 [Sup Ct, Queens County 1976].)

In each of these cases, the corporate plaintiff was formed pursuant to the N-PCL, as confirmed by exhibits B, C and D to the Town's reply affirmation dated July 25, 2011. In addition to the cases cited by the Town, the court has conducted its own analysis of seminal cases decided by the Court of Appeals where challenges such as the one at bar have been made by plaintiffs purporting to represent a class. In each of these cases, the corporate plaintiff was formed pursuant to the Not-for-Profit Corporation Law. (*See New York State Assn. of Nurse Anesthetists*, 2 NY3d 207 [2004] [where plaintiff challenged certain enactments of the Commissioner of Health affecting plaintiff's members]; *Society of Plastics Indus. v County of Suffolk*, *supra*[where plaintiff was [*7]a trade organization made up of for-profit businesses concerned about the passage of proposed legislation{**34 Misc 3d at 731} affecting their industry]; *New York Pub. Interest Research Group v Carey*, 42 NY2d 527 [1977] [where the advocacy group was operating as a not-for-profit corporation concerned about proposed increases in utility rates].)

Plaintiff cites *Bay Crest Assn., Inc. v Paar* (2008 NY Slip Op 33111[U] [Sup Ct, Suffolk County 2008]), for the proposition that "the Court rejected a

challenge to the standing of the plaintiff corporation on the grounds that it did not operate a for-profit business." This case is clearly inapposite. The plaintiff in *Bay Crest* is, in fact, a not-for-profit corporation composed of property owners living within a private community. The action was brought in the name of the plaintiff against defendants who refused to pay annual assessments, as required pursuant to the plaintiff's certificate of incorporation and bylaws. (*See Bay Crest Assn., Inc. v Paar*, 72 AD3d 713 [2d Dept 2010].)

At a minimum, plaintiff must establish that the participation of its individual "members" in this action is not required. Plaintiff alleges broad claims of discrimination in unmet housing needs, municipal services, and lack of representation on the planning and zoning boards. Such blanket allegations of discrimination, without the participation of any individual member who can allege specific acts of discrimination, is not sufficient to support plaintiff's organization standing as an "appropriate representative" of the interests of its members. Tenuous and ephemeral harm is insufficient to trigger judicial intervention. "Without an allegation of injury-in-fact, plaintiffs' assertions are little more than an attempt to legislate through the courts." (*Rudder v Pataki* at 280; *Society of Plastics Indus. v County of Suffolk* at 777-778; *Matter of East End Prop. Co. #1, LLC v Kessel*, 46 AD3d 817 [2d Dept 2007].)

Plaintiff argues there is no other statute, other than the Business Corporation Law, which controls the activity sought to be carried out by plaintiff herein. The court disagrees in that N-PCL provides for such activity. Plaintiff further contends, "Section 201 (a) of the Business Corporation Law excludes only 'any *business* for which formation is permitted under any other statute . . . unless such statute permits formation under this chapter' " (emphasis added by plaintiff). Plaintiff then references the Banking Law, the Insurance Law, and the provisions of the N-PCL law dealing with [*8]cemeteries. (Plaintiff aff, ¶ 5, Aug. 18, 2011.)

The court notes with interest that plaintiff chose to italicize and emphasize the word "business." As a matter of statutory {**34 Misc 3d at 732}construction, the rule of noscitur a sociis would apply: words employed in a statute are construed in connection with, and their meaning is ascertained by reference to the words and phrases with which they are associated. (McKinney's Cons Laws of NY, Book 1, Statutes § 239.)

In this case, the referenced language is within the Business Corporation Law, an act of the Legislature which was clearly created to monitor and control the operation of "for profit" businesses within the context of commercial or mercantile activity. The N-PCL was created by the Legislature to monitor and control the operation of entities formed for a specific purpose other than "for profit." N-PCL 201 (b) defines four types of corporations, A through D, that are subject to that statute, two of which—Type A and Type B—are for any "non-business purpose" or purposes of a nonpecuniary purpose, which are listed by category therein. The statute states a Type C not-for-profit corporation may be formed for any lawful business purpose to achieve a lawful public or quasi-public objective and that a Type D a not-for-profit corporation may be formed if authorized by any other corporate law for any business or nonbusiness, or pecuniary or nonpecuniary purpose, whether such purposes are also within types A, B, C above or otherwise. The Practice Commentaries to McKinney's references entities formed under the Social Services Law, the Benevolent Orders Law and the Mental Hygiene Law, by way of example.

Plaintiff admits the class members it purports to represent are shareholders. In response to the court's directive, plaintiff provided a submission setting forth the names and addresses of the shareholders. Shareholders' rights and responsibilities are defined in article 6 of the Business Corporation Law. The term "shareholder" is not found in the Not-for-Profit Corporation Law. Instead, the participants in the corporate entity are defined as "members." (*See* N-PCL

601 [a].) Members are not issued shares of stock. Rather, members are issued a membership certificate, card, or capital certificate. (*See* N-PCL 601 [b] [2].)

Pursuant to N-PCL 102 ("Definitions"), and as referenced in N-PCL 201,

" 'Corporation' or 'domestic corporation' means a corporation (1) formed under this chapter. . . exclusively for a purpose or purposes, not for pecuniary profit or financial gain . . . and (2) no part of the assets, income or profit of which is distributable{**34 Misc 3d at 733} to, or enures to the benefit of, its members, [*9]directors or officers" (N-PCL 102 [a] [5]).

The court is unable to discern how this definition describes anything other than the entity which has been formed to act as the plaintiff in this case.

The first paragraph of the complaint states "Plaintiff is a corporation organized under the laws of New York and is engaged in advocacy for Jewish residents and property owners of the Town and Village of Woodbury." The rest of the complaint focuses upon grievances this group of individual property owners (*see* complaint ¶ 2), i.e., the "shareholders," claims to have suffered due to the conduct of the Village and Town. Nowhere in the complaint does it state that plaintiff has been formed to promote the pecuniary interests of the shareholders. In contrast, the advocacy undertaken in the complaint is clearly that which is contemplated to be pursued by a corporation formed under the N-PCL and its "members."

Although the affidavits submitted by certain members of the class identify themselves as real estate investors within the described affected area in the western part of the Village, there are no facts alleged that bind them together within the context of a for-profit enterprise. That they may ascribe to the mission statement or goals of plaintiff does not give these shareholders the right to be represented in court by this for-profit plaintiff. The form they have

selected to air their grievances is inappropriate, notwithstanding their perception of the rightness of their claims.

The court can only surmise that the shareholders, for whatever reason, did not elect to form a not-for-profit corporation. It is not for the court to speculate, but only to assure that what they seek to accomplish is cognizable under the law. It is clear to the court, however, that what they seek to accomplish in this litigation is well within, and properly maintainable, within the framework of N-PCL 201 (b) and not the Business Corporation Law.

The plaintiff has no assets and holds no property within the defined, affected area of the Village. The plaintiff is not a member of the Hasidic Orthodox community. The plaintiff conducts no business within the defined, affected area. The plaintiff's principal office is located at its attorney's law office in New York, New York. The plaintiff has no stated business purpose to operate for pecuniary gain, which the court finds is contradictory to the stated purposes of the Business Corporation{**34 Misc 3d at 734} Law. Plaintiff does not assert that, as a result of its corporate activities, it has been injured, or will be injured, or caused to have sustained [*10]economic injury, or will sustain economic injury.

Each of the seven causes of action in plaintiff's complaint allege violations of the constitutional rights of its individual "shareholders." This court is constrained to find that a corporation that was admittedly formed to assert the aims and objectives of plaintiff's individual "shareholders" may not do so as a "for-profit" corporation pursuant to the Business Corporation Law. These shareholders may well have a commonality of interests that are worthy of pursuit. However, this court will not condone their doing so under the guise of a "for-profit" corporation.

Conclusion

That having been said, the court finds that United Fairness, Inc. lacks standing, and is not a proper party to bring this action on behalf of its "shareholders." Accordingly, the complaint seeking injunctive relief and a declaratory judgment is hereby dismissed in its entirety. (CPLR 3211 [a] [3]; *Village of Pomona v Town of Ramapo*, 41 AD3d 837 [2d Dept 2007].)

Given this determination, the court declines to adjudicate the specifics of the complaint or the opposition thereto. In so doing, the court is not considering or rendering an opinion as to the merits of any other issue raised in the parties' submissions. Such issues include plaintiff's challenge to the sufficiency of the home rule message and defendants' opposition that plaintiff's claims are not justiciable at this point because the Legislature has taken no action to either approve or deny the Village's request concerning the consolidation of the village and town governments.

Footnotes

Footnote 1: The court has not considered any of the letter correspondence from the parties during the pendency of these proceedings. Further, while the court's part rules do not permit surreply filings, the court has considered all of the supplemental arguments and exhibits submitted by counsel as a matter of discretion and to provide the parties with the fullest opportunity to argue the merits of their respective cases.

Footnote 2: In the complaint, plaintiff refers to itself interchangeably in the singular (plaintiff), the plural (plaintiffs) and as "plaintiff's community" and "plaintiffs' community." There is but one plaintiff in this action, United Fairness, Inc.

Footnote 3: References hereafter are to the same exhibit.

Footnote 4: Complaint, ¶ 84 refers to "[t]he zoning board and zoning board of appeals of the Village of Woodbury" which presumably is meant to refer to the Planning Board and Zoning Board of Appeals.

Exhibit 9

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D40433
C/ct

_____AD3d_____ Argued - December 10, 2013

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
LEONARD B. AUSTIN
SANDRA L. SGROI, JJ.

2012-01144 DECISION & ORDER
2012-01172

United Fairness, Inc., etc., appellant, v Town of Woodbury, et al., respondents, et al., defendants.

(Index No. 10884/10)

James Klatsky, New York, N.Y., for appellant.

Joseph G. McKay, Newburgh, N.Y., for respondent Town of Woodbury.

Feerick Lynch MacCartney, PLLC, South Nyack, N.Y. (Brian D. Nugent of counsel), for respondent Village of Woodbury.

In a putative class action for declaratory and injunctive relief, the plaintiff appeals (1), as limited by its brief, from so much of an order of the Supreme Court, Orange County (Ecker, J.), dated November 15, 2011, as denied that branch of its motion which was for leave to amend the complaint to substitute Zigmond Brach as the plaintiff and add two causes of action, and (2) from an order of the same court, also dated November 15, 2011, which granted the separate motions of the defendants Town of Woodbury and Village of Woodbury pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against each of them.

ORDERED that the first order dated November 15, 2011, is reversed insofar as appealed from, on the law and in the exercise of discretion, and that branch of the plaintiff's motion which was for leave to amend the complaint to substitute Zigmond Brach as the plaintiff and add two causes of action is granted; and it is further,

ORDERED that the second order dated November 15, 2011, is reversed, on the law,

and the motions of the defendants Town of Woodbury and Village of Woodbury to dismiss the complaint insofar as asserted against each of them are denied; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

In September 2010, the plaintiff commenced this action for declaratory and injunctive relief against, among others, the Town of Woodbury and the Village of Woodbury. The Town and the Village separately moved pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against each of them, inter alia, on the ground of lack of standing. Thereafter the plaintiff moved, among other things, for leave to amend the complaint to substitute Zigmond Brach as the plaintiff and add two causes of action. In an order dated November 15, 2011, the Supreme Court granted the motions of the Town and the Village on the ground that the plaintiff lacked standing to commence the action. In another order, also dated November 15, 2011, the Supreme Court denied the plaintiff's motion because "the original complaint is dismissed."

Under the circumstances presented herein, the Supreme Court should have decided, on the merits, that branch of the plaintiff's motion which was for leave to amend the complaint before the court decided the motions of the Town and the Village to dismiss the complaint (*see generally Cooke-Garrett v Hoque*, 109 AD3d 457). Leave to amend a pleading should be freely given absent prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or patently devoid of merit (*see* CPLR 3025[b]; *Carroll v Motola*, 109 AD3d 629; *Finkelstein v Lincoln Natl. Corp*., 107 AD3d 759, 761; *Lucido v Mancuso*, 49 AD3d 220, 227). Moreover, a court shall not examine the legal sufficiency or merits of a pleading unless such insufficiency or lack of merit is clear and free from doubt (*see Lucido v Mancuso*, 49 AD3d at 227). Here, the proposed amended complaint, which principally sought to shift the claims from the plaintiff to a party who could have asserted those claims in the first instance, is proper, since "such an amendment, by its nature, did not result in surprise or prejudice to the [defendants], who had prior knowledge of the claim[s] and an opportunity to prepare a proper defense" (*Fulgum v Town of Cortlandt Manor*, 19 AD3d 444, 446; *see JCD Farms v Juul–Nielsen*, 300 AD2d 446; *New York State Thruway Auth. v CBE Contr. Corp*., 280 AD2d 390). In addition, the proposed amended complaint was not palpably insufficient or patently devoid of merit.

Accordingly, that branch of the plaintiff's motion which was for leave to serve an amended complaint should have been granted. Additionally, since the proposed amended complaint rectified the plaintiff's lack of standing, the Supreme Court should not have granted the motions to dismiss the complaint on the basis of lack of standing.

DILLON, J.P., DICKERSON, AUSTIN and SGROI, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

Exhibit 10

13-1503-cv
Sherman v. Town of Chester

In the
United States Court of Appeals
For the Second Circuit

August Term, 2013
No. 13-1503-cv

NANCY J. SHERMAN,
Plaintiff-Appellant,

v.

TOWN OF CHESTER,
Defendant-Appellee.[*]

Appeal from the United States District Court
for the Southern District of New York.
No. 12-cv-647 — Edgardo Ramos, *Judge*.

ARGUED: MARCH 18, 2014
DECIDED: MAY 16, 2014

Before: STRAUB, SACK, and LOHIER, *Circuit Judges*.

[*] The Clerk of Court is directed to amend the official caption of this case to conform to the listing of the parties shown above.

Appeal from an order of the United States District Court for the Southern District of New York (Edgardo Ramos, *Judge*) granting defendant Town of Chester's motion to dismiss plaintiff Steven M. Sherman's complaint.

We hold that Sherman's takings claim was ripe under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Seeking a final decision from the Town would be futile because the Town used unfair and repetitive procedures to avoid a final decision. Additionally, the "state procedures" prong of *Williamson County* is satisfied because the Town removed the case from state court. Sherman also adequately alleged a taking. Accordingly, we **REVERSE** that part of the District Court's decision that dismissed Sherman's takings claim.

We **VACATE** the District Court's decision to dismiss Sherman's federal non-takings claims solely on ripeness grounds and to decline to exercise supplemental jurisdiction over Sherman's state claw claims. Finally, we **AFFIRM** the District Court's decision to dismiss certain claims on the merits.

MICHAEL D. DIEDERICH, JR. Stony Point, NY, *for Nancy J. Sherman*.

ANTHONY CARDOSO (Steven C. Stern *on brief*), Sokoloff Stern LLP, Carle Place, NY, *for Town of Chester*

J. David Breemer, Pacific Legal Foundation, Sacramento, CA, *for amicus curiae Pacific Legal Foundation in support of appellant*.

STRAUB, *Circuit Judge*:

Hungry Joe packed up his bags and wrote happy letters home. He had flown the 25 missions required to complete a tour of duty. But things were not so simple on *Catch-22*'s Pianosa island. He soon discovered that Colonel Cathcart had just raised the number of missions to 30, forcing Hungry Joe to unpack his bags and rewrite his happy letters. At the time, Yossarian had flown 23 missions.

The Colonel later increased the number to 35. When Yossarian was just three away from that mark, the number was increased to 40, and then to 45. When Yossarian had 44 missions under his belt, the Colonel made the number 50. And later 55.

When Yossarian reached 51 missions, he knew it was no cause to celebrate: "He'll raise them," Yossarian understood. He appealed to squadron commander Major Major to be exempted from flying his four remaining missions. "Every time I get close he raises them," Yossarian complained. Major Major responded, "Perhaps he won't this time." But of course Yossarian was right. Colonel Cathcart

raised the number to 60, then 65, then 70, then 80, with no end in sight.

Plaintiff Steven M. Sherman must have felt a lot like Yossarian in his decade of dealing with defendant Town of Chester. In 2000, Sherman applied for subdivision approval while he was in the process of buying a nearly 400 acre piece of land for $2.7 million. That application marked the beginning of his journey through the Town's ever-changing labyrinth of red tape. In 2003, the Town enacted a new zoning ordinance, requiring Sherman to redraft his proposed development plan. When he created a revised proposal in 2004, the Town again enacted new zoning regulations. When he created another revised plan in 2005, the Town changed its zoning laws once more. And again in 2006. And again in 2007.

On top of the shifting sands of zoning regulations, the Town erected even more hurdles. Among other tactics, the Town announced a moratorium on development, replaced its officials, and

required Sherman to resubmit studies that he had already completed. When the Town insisted that Sherman pay $25,000 in consultants' fees before he could obtain a hearing, he might have thought, "The Colonel will just raise it again." And he would have been right. After paying the $25,000, he was told he owed an additional $40,000, and that he would also have to respond to a lengthy questionnaire.

By the time this lawsuit was filed, over ten years had passed. In that time, Sherman became financially exhausted – forced to spend $5.5 million on top of the original $2.7 million purchase. The District Court (Edgardo Ramos, *Judge*) ruled that Sherman's claim under the Takings Clause was not ripe under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), because Sherman had not received a final decision on his property and seeking a final decision would not be futile. The court reasoned that while Sherman may have to jump through more

hoops in the future, he had not established that his application would definitely be denied in the end. To Sherman, this must have sounded a lot like: "Perhaps he won't raise the number this time."

We conclude that under these circumstances, Sherman was not required to obtain a final decision from the Town. Sherman's takings claim was ripe and adequately alleged. Accordingly, we **REVERSE** that part of the District Court's decision that dismissed the takings claim, and we **REMAND** for further proceedings consistent with this opinion.

BACKGROUND

The allegations recited below are taken from the complaint, and we assume they are true for the purposes of this appeal.

This case concerns the decade's worth of red tape put in place by the Town of Chester, its Town Board, and its Planning Board. The Town Board is the governing body of the Town, and the Planning Board appears to give at least preliminary approval to development proposals.

In March of 2000, Sherman applied to the Planning Board for subdivision approval so that he could use and develop MareBrook. The proposed project would include 385 units of housing as well as "an equestrian facility, baseball field, tennis courts, clubhouse, on-site restaurant and a golf course that wove through the property." When Sherman completed his purchase of the property in 2001, it was already zoned for residential use. But soon thereafter, Sherman's troubles began.

I. The Moratorium

In July 2001, the Town Board announced that it was imposing a six month moratorium on major subdivision approvals retroactive to May 1, 2001. At least two members of the Town Board "expressed the view that the Moratorium was specifically aimed at Plaintiff's MareBrook project." Sherman was the only developer affected even though other projects were similarly situated.

When the six month period expired, the moratorium was extended, which "singularly affected" Sherman. During the

extension, Sherman applied for a "minor" subdivision approval that was permitted under the moratorium. However, the Town still refused to allow Sherman to pursue the application.

Sherman brought suit against the Town in state court, and as a result of the lawsuit, the Town ended the moratorium, but not until January 2003. In other words, the six month moratorium lasted over a year and a half.

II. Draft Environmental Impact Statement and the First Zoning Change

In October 2003, the Planning Board "deemed complete" Sherman's Draft Environmental Impact Statement ("DEIS"). That determination established that Sherman's application to the Town was satisfactory in form and content.

In 2003, the Town Board approved the first in a series of changes to its zoning regulations. When Sherman learned of the new requirements early the next year, he was assured by the Town Planner, Garling Associates, that he could meet all its requirements

with only "a modest amount of additional work" and that he would soon obtain preliminary approval.

III. More Changes to the Zoning Regulations

Approximately five months later, sometime in late May to early June 2004, Sherman finished revising his plan. But the Town had already amended its zoning regulations. Garling Associates, which helped write the new regulations, did not tell Sherman about the changes even though it was advising Sherman about complying with the 2003 regulations. These amendments created several new requirements, further delaying Sherman.

It took him approximately eleven months to once again revise his application. In May 2005 – five years after he first sought subdivision approval – he finally met with some success. The Planning Board approved the MareBrook proposal. But this success was not to last. The Town Board refused to entertain Sherman's application, despite holding meetings concerning another development.

One month later, the Town amended its zoning law for a third time without informing Sherman in advance. Sherman revised his application again, and in February 2006, the Town for the fourth time changed its zoning law without warning Sherman. Sherman responded by submitting yet another revised plan, this one in March 2007. That same month, the Town changed its zoning for the fifth time, and it once again did not let Sherman know these changes were coming.

Fed up, Sherman filed suit in federal court in May 2008, a precursor to the case before us now.

IV. Further Obstruction

In November and December of 2008, Sherman resubmitted his MareBrook application and Supplemental DEIS. By this point, over eight years had passed since Sherman first applied for subdivision approval.

A. The Town Engineer

In January 2009, the Town Engineer gave Sherman a list of corrections to the 2008 Supplemental DEIS. As part of that list, the Town Engineer demanded final designs for water and sewer plants. But Sherman could not submit the final water and sewer designs until other aspects of the plan – like the number and location of the homes – were finalized. That, in turn, required preliminary approval, which is the very thing he was trying to obtain from the Town Engineer.

A few months later, the Town appointed a new Town Engineer. The new appointee needed time to get up to speed on MareBrook. The Town billed Sherman for the expense of having the new Town Engineer review the entire MareBrook project, even though Sherman already paid for the first engineer to conduct that same review. The new Town Engineer had an entirely new set of questions, concerns, and items for Sherman to address. Despite that,

for two years the new Town Engineer maintained his predecessor's requirement regarding sewer and water plant designs.

B. The Chairman

In September 2009, Sherman submitted two different versions of his subdivision proposal. By now, the proposals had become much more conventional than his first application, and they did not include the recreational facilities initially envisioned.

Soon after submitting the proposals, Sherman discovered that the Planning Board Chairman had been replaced. The new Chairman, Don Serotta, was "openly hostile" towards the MareBrook application and had written letters to the Town in 2001 against the project.

For three months, the Planning Board refused without explanation to put Sherman's proposals on the agenda. Then in December 2009, Serotta explained that Sherman needed to pay $25,000 in consultants' fees. Yet Sherman did not receive an invoice

for those fees as required by the Town Code for approximately two months.

Serotta had other demands as well. He required an additional "cluster plan," which would lead to another reworking of Sherman's DEIS. Serotta also insisted that all roads must be twenty-four feet wide instead of thirty feet. This required Sherman to redraw his plans to relocate curbs, drainage, water and sewer mains, and grading.

Later, Serotta canceled Sherman's appearance at the Planning Board's monthly meeting and demanded $40,000 more in consultants' fees. The Planning Board also insisted that Sherman respond to a questionnaire, which required Sherman to provide, among other things, an evaluation of a traffic intersection in the Town of Monroe (located miles away) and the details of a wetlands walking trail crossing that did not cross any wetlands.

Sherman was also required to answer all inquiries by local residents. Some answers to these questions needed to be repeated twenty to forty times because the Planning Board did not permit him to quote a previous answer.

C. The Town Planner

In September 2010, the Planning Board voted to accept Sherman's DEIS as complete, seven years after his original DEIS was "deemed complete" in October 2003. A few months later, Ted Fink replaced Garling Associates as the Town Planner. Fink requested an additional study regarding traffic on the other side of town, even though Sherman had long before completed that study. Fink also sent monthly lists of demands to Sherman, which included a "wetland study," a "concerted species study," and a "constraints study." The new studies concluded that there were no changes since those same studies were completed in 2003. Fink also required Sherman to redo the DEIS that had just been deemed complete.

V. Financial Losses and Subsequent Death

The Town's machinations to prevent the development of MareBrook were not without their cost. Between taxes, interest charges, carrying costs, and expenses, Sherman spent approximately $5.5 million on top of the original $2.7 purchase price. As a result, Sherman became financially exhausted to the point of facing foreclosure and possible personal bankruptcy. And while the case was pending on appeal, Sherman died. Nancy J. Sherman, his widow, was substituted for him on appeal as his personal representative.[2]

VI. Procedural History

As already mentioned, in 2008 Sherman filed suit against the Town and other defendants in federal court. He brought many of the same claims that he raises today. The Town moved to dismiss, arguing among other things that Sherman's takings claim was not

[2] Nancy Sherman was substituted after the briefs were filed. For this reason, and for the sake of simplicity, we will refer only to Steven Sherman throughout this opinion.

ripe because he had not sought compensation from the state. Sherman voluntarily dismissed the case and then filed the case now before us in state court. The Town removed to federal court, where it once again moved to dismiss in part on ripeness grounds.

The District Court dismissed some of Sherman's federal claims on the merits, and most because they were unripe. While acknowledging it was a close case, the District Court concluded that Sherman had failed to show that seeking a final decision from the Town would be futile.

Sherman timely appealed.

DISCUSSION

"We review *de novo* a district court's order granting a motion to dismiss under Rule 12(b)(6), accepting as true all allegations in the complaint and drawing all reasonable inferences in favor of the nonmoving party. To survive a Rule 12(b)(6) motion to dismiss, the complaint must include enough facts to state a claim to relief that is plausible on its face. A claim will have facial plausibility when the

plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Wilson v. Dantas*, --- F.3d ---, 2014 WL 866507, at *2 (2d Cir. Mar. 6, 2014) (internal citations and quotation marks omitted).

Although Sherman brought numerous federal and state claims, the main dispute on appeal concerns Sherman's takings claim, which was dismissed as unripe under the first prong of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). The District Court dismissed most of the other federal claims for the same reason, and some of them, in the alternative, for failure to state a claim. Finally, the District Court declined to exercise supplemental jurisdiction over Sherman's state law claims.[3]

[3] The District Court also dismissed Sherman's freedom of religion and right to association claims as frivolous. Sherman has not challenged that ruling on appeal.

I. Takings Claim and *Williamson County* Ripeness

We evaluate the ripeness of a takings claim under the two prong test established by the Supreme Court in *Williamson County*. For the claim to be ripe, the plaintiff must "show that (1) the state regulatory entity has rendered a 'final decision' on the matter, and (2) the plaintiff has sought just compensation by means of an available state procedure." *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002).

"Because *Williamson County* is a prudential rather than a jurisdictional rule, we may determine that in some instances, the rule should not apply and we still have the power to decide the case." *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013); *see also Horne v. Dep't of Agric.*, 133 S.Ct. 2053, 2062 (2013) (recognizing that *Williamson County* "is not, strictly speaking, jurisdictional"); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1997) (describing the *Williamson County* prongs as "two independent prudential hurdles").

A. The Final Decision Prong

Sherman concedes that the Town has not reached an official final decision. He argues instead that he does not need to meet this requirement because seeking a final decision would be futile.

"[T]he finality requirement is not mechanically applied. A property owner, for example, will be excused from obtaining a final decision if pursuing an appeal to a zoning board of appeals or seeking a variance would be futile. That is, a property owner need not pursue such applications when a zoning agency lacks discretion to grant variances or has dug in its heels and made clear that all such applications will be denied." *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 349 (2d Cir. 2005).

Additionally, "[g]overnment authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision." *Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001); *see also MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 350 n.7 (1986) ("A property owner is of

course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination.").

While these two exceptions to the finality requirement – futility and unfair/repetitive procedures – are distinct concepts, in this case, the analyses for the two are the same. Sherman argues that seeking a final decision would be futile because the Town used – and in all likelihood will continue to use – repetitive and unfair procedures in order to avoid a final decision.

The final decision requirement "follows from the principle that only a regulation that 'goes too far,' results in a taking under the Fifth Amendment." *Suitum*, 520 U.S. at 734 (internal citations omitted). Normally, "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald*, 477 U.S. at 348. However, in this case, Sherman is not challenging any one regulation. Rather, he argues that the repeated zoning changes and other roadblocks – the "procedure he

had to endure" – constituted a taking. *See* Appellant's Brief at 27. A final decision is not necessary to evaluate whether that obstruction itself constituted a taking.

In *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, the Ninth Circuit ruled that seeking a final decision would be futile under similar circumstances. 920 F.2d 1496, 1506 (9th Cir. 1990). In that case, the property owners submitted a proposal to develop their property with 344 residential units. *Id.* at 1502. The plan was denied by the planning commission, and the city planners stated that a proposal with 264 units would be received favorably. *Id.* When the owners submitted a new 264-unit plan, it was denied, and the city planners this time stated that a proposal with 224 units would be received favorably. *Id.* When the owners submitted a new 224-unit plan, it was denied as well. *Id.* That decision was appealed to the city council, which referred the project back to the planning commission with a request that it consider a 190-unit plan. *Id.* The

owners submitted a new 190-unit plan, which was also denied. *Id.* The owners once again appealed to the city council, which approved the plan so long as fifteen conditions were met. *Id.* at 1503. The owners submitted a new plan which substantially met those conditions. That too was denied by both the planning commission and the city council. *Id.* at 1504, 1506. Yet none of this constituted a "final decision."

The Ninth Circuit ruled that the property owners did not need to meet the final decision prong of *Williamson County*. *Id.* at 1506. The court reasoned that "[r]equiring [the owners] to persist with this protracted application process to meet the final decision requirement would implicate the concerns about disjointed, repetitive, and unfair procedures expressed in *MacDonald* . . . ." *Id.* (internal citations omitted).

Requiring Sherman to persist with a similar protracted application process would implicate these same concerns. For years,

every time Sherman submitted or was about to submit a proposal for MareBrook, the Town changed its zoning regulations, sending Sherman back to the drawing board. It retroactively issued a six month moratorium on development that appears to have applied only to Sherman's property. That six month moratorium was extended for another year until after Sherman sued the Town. Town officials also repeatedly asked Sherman to resubmit studies and plans that had already been approved.

The District Court adopted a narrower view of futility than the Ninth Circuit's: that while "the ripeness doctrine does not require litigants to engage in futile gestures such as to jump through a series of hoops, the last of which is certain to be obstructed by a brick wall, the presence of that brick wall must be all but certain for the futility exception to apply." *Sherman v. Town of Chester*, No. 12 Civ. 647, 2013 WL 1148922, at *9 (S.D.N.Y. Mar. 20, 2013) (internal alteration omitted). Applying that standard to our case, the court

below concluded, "Here, all that is known is that Plaintiff has jumped through many hoops – more, perhaps, than sound policy should require – and there are one or more hoops in the future. The inference that there is a brick wall at the end is hard to establish, and it is not established here, though it is a close case." *Id.*

This analysis does not account for the nature of the Town's tactics. The Town will likely never put up a brick wall in between Sherman and the finish line. Rather, the finish line will always be moved just one step away until Sherman collapses. In essence, the Town engaged in a war of attrition with Sherman. Over ten years, Sherman was forced to spend over $5.5 million on top of the original $2.7 million purchase. As a result, he became financially exhausted to the point of facing foreclosure and possible personal bankruptcy. Moreover, at no point could Sherman force the Town to simply give a final "yay or nay" to his proposal. When asked at argument, the Town's counsel could not name one way Sherman could have

appealed any aspect of the Town's decade of maneuvers in order to obtain a final decision. *See* Oral Arg. Tr. at 21:20-22:9.

"We are mindful that federal courts should not become zoning boards of appeal . . . ." *Sullivan v. Town of Salem*, 805 F.2d 81, 82 (2d Cir. 1986). Every delay in zoning approval does not ripen into a federal claim. Unfortunately, it is no simple task to distinguish procedures that are merely frustrating from those that are unfair or would be futile to pursue. But when the government's actions are so unreasonable, duplicative, or unjust as to make the conduct farcical, the high standard is met.

And it was met in this case. Seeking a final decision would be futile because the Town used – and will in all likelihood continue to use – repetitive and unfair procedures, thereby avoiding a final decision. Sherman is therefore not required to satisfy the first prong of *Williamson County*. This conclusion is consistent with the principles behind *Williamson County*. The final decision requirement

ensures that a court knows how far a regulation goes before it is asked to determine whether that regulation "goes too far." In this case, we are not dealing with any one regulation but the Town's decade of obstruction. A final decision is not necessary to evaluate whether that obstruction was itself a taking.

B. State Procedures Prong

Under the second prong of *Williamson County*, a plaintiff's claim is ripe only if the "plaintiff has sought just compensation by means of an available state procedure." *Dougherty*, 282 F.3d at 88.

While *Williamson County* prevents a plaintiff from bringing his takings claim in federal court before first seeking compensation from the state, it "does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the [Takings Clause of the] Fifth Amendment of the Federal Constitution." *San Remo Hotel, L.P. v. City and Cnty. of S.F.*, 545 U.S. 323, 347 (2005). This is because "[r]eading *Williamson*

County to preclude plaintiffs from raising such claims in the alternative would erroneously interpret [the Supreme Court's] cases as requiring property owners to 'resort to piecemeal litigation or otherwise unfair procedures.'" *Id.* (quoting *MacDonald*, 477 U.S. at 350 n.7).

Sherman first brought suit against the Town in federal court in 2008. The Town argued that the takings claim was unripe in part because Sherman had not alleged that he sought and was denied just compensation by an available state procedure. Sherman voluntarily dismissed the case, and followed *San Remo* by filing his federal takings claim and his state law claim for compensation in state court. The Town then removed the case from state court to federal court, where it argued once again that the takings claim must be dismissed because it can be heard only in state court under *Williamson County*.

In *Sansotta v. Town of Nags Head*, 724 F.3d 533 (4th Cir. 2013), the Fourth Circuit concluded that when the defendant removes a

takings claim to federal court, the state procedures prong of *Williamson County* does not apply. We agree with that court's reasoning that "refusing to apply the state-litigation requirement in this instance ensures that a state or its political subdivision cannot manipulate litigation to deny a plaintiff a forum for his claim." *Id.* at 545.

The removal maneuver prevents Sherman from litigating his federal takings claim until he finishes litigating his state law claim for compensation. In other words, it prevents Sherman from pursuing both claims simultaneously, no matter what forum they are brought in. This runs against *San Remo*, which allows plaintiffs to do just that. In other words, the removal tactic can "deny[ ] a plaintiff *any* forum for having his claim heard," or at least force the plaintiff into the kind of piecemeal litigation that, under *San Remo*, cannot be required. *See id.* at 547.

We conclude that when a defendant removes a takings claim from state court to federal court, the second prong of *Williamson County* is satisfied. Sherman's takings claim is ripe, and we may address the merits.

C. Merits of the Takings Claim

"The law recognizes two species of takings: physical takings and regulatory takings." *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 374 (2d Cir. 2006). This case concerns a regulatory taking, which occurs "when the government acts in a regulatory capacity." *Id.* "The gravamen of a regulatory taking claim is that the state regulation goes too far and in essence 'effects a taking.'" *Id.*

"Regulatory takings are further subdivided into categorical and non-categorical takings." *Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1378 n.2 (Fed. Cir. 2008). A categorical taking occurs in "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002).

"Anything less than a complete elimination of value, or a total loss," is a non-categorical taking, which is analyzed under the framework created in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *Tahoe-Sierra*, 535 U.S. at 330 (internal quotation marks omitted).

In *Tahoe-Sierra*, the Supreme Court advises three times to "resist the temptation to adopt what amount to *per se* rules" for regulatory takings. *Id.* at 326; *see also id.* at 321, 342. In that case, the Court addressed whether temporary moratoria on development constituted a taking. *Id.* at 321. It concluded that the answer was "neither 'yes, always' nor 'no, never.'" *Id.* The Court therefore rejected a categorical taking analysis and decided that issue was "best analyzed within the *Penn Central* framework." *Id.*

We follow the Supreme Court's guidance to resist *per se* rules. Like the temporary moratoria at issue in *Tahoe-Sierra*, evaluating the type of obstruction at issue here is not susceptible to a yes-always or

no-never categorical approach. We will therefore analyze Sherman's takings claim within the *Penn Central* framework. We will then consider the Town's argument that the claim is time barred. And because we conclude under the non-categorical method that Sherman has stated a claim that the Town effected a taking, we need not decide the issue under the categorical approach.

1. Non-Categorical Taking and *Penn Central*

The *Penn Central* analysis of a non-categorical taking "requires an intensive *ad hoc* inquiry into the circumstances of each particular case." *Buffalo Teachers Fed'n*, 464 F.3d at 375. "We weigh three factors to determine whether the interference with property rises to the level of a taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Id.* (internal quotation marks omitted). Sherman's claim passes this test.

First, the Town's actions effectively prevented Sherman from making any economic use of his property. New studies were demanded after they were already completed; new deficiencies in Sherman's proposals were found after they were already approved; new fees were required after they had already been paid; and new regulations were created when Sherman complied with what had previously been required. Because the Town kept stringing him along, Sherman could never develop his property. The Town won its war of attrition.

Second, the Town interfered with Sherman's reasonable investment-backed expectations, "a matter often informed by the law in force in the State in which the property is located." *Ark. Game & Fish Comm'n v. United States*, 133 S.Ct. 511, 522 (2012). When Sherman bought MareBrook, it was already zoned for residential use. His reasonable expectation, therefore, was that he would begin recouping that investment after a reasonable time to get the Town's

approval on at least some form of development. He could not have expected the Town's decade of obstruction that pushed him to the brink of bankruptcy.

The third factor – the character of the government action – is the most elusive. *See* John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 186-99 (2005) (outlining nine possible definitions of "character"); Thomas W. Merrill, *The Character of the Governmental Action*, 36 VT. L. REV. 649, 661-71 (2012) (outlining six "themes or ideas" considered by courts when evaluating "character").

In *Penn Central* itself, the Court stated that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124 (internal citation omitted). In this case, the Town's

actions are not part of a public program adjusting the benefits and burdens of public life. Rather, the Town singled out Sherman's development, suffocating him with red tape to make sure he could never succeed in developing MareBrook. The Town's alleged conduct was unfair, unreasonable, and in bad faith. Though the precise contours of the "character" factor may be blurry, we can nevertheless conclude that the Town's conduct in this case falls safely within its ambit.

Balancing the *Penn Central* factors, we conclude that Sherman stated a non-categorical takings claim.

2. Statute of Limitations

The Town argues that Sherman's takings claim is barred by 42 U.S.C. § 1983's statute of limitations, which the parties do not dispute is three years in this case. *See Ormiston v. Nelson*, 117 F.3d 69, 71 (2d Cir. 1997). According to the Town, in evaluating whether Sherman stated a claim, we should have considered only what occurred in the three years before the complaint was filed.

But that argument would mean that a government entity could engage in conduct that would constitute a taking when viewed in its entirety, so long as no taking occurred over any three-year period. We do not accept this. The Town used extreme delay to effect a taking. It would be perverse to allow the Town to use that same delay to escape liability.

The only way plaintiffs in Sherman's position can vindicate the Supreme Court's admonition in *Palazzolo* that government authorities "may not burden property by imposition of repetitive or unfair land-use procedures" is to allow to them aggregate acts that are not individually actionable. *See* 533 U.S. at 621. A claim based on such a "death by a thousand cuts" theory requires a court to consider the entirety of the government entity's conduct, not just a slice of it.

In fact, in support of the prohibition on repetitive and unfair procedures, the Supreme Court cited a case much like the one before

us: *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). That case, already described above in more detail, involved nineteen different site plans and five formal decisions over five years. *Id.* at 698. City planners kept demanding proposals with fewer residential units after the property owners complied with the previous demand. *Id.* at 695-98; *see also Tahoe-Sierra*, 535 U.S. at 333-34 (citing *Del Monte Dunes* and suggesting that delay in bad faith could support a takings claim).

In *National Railroad Passenger Corp. v. Morgan*, the Supreme Court allowed hostile work environment claims to similarly be evaluated in their entirety. 536 U.S. 101 (2002). In that situation, the "unlawful employment practice . . . cannot be said to occur on any particular day. It occurs over a series of days or perhaps years . . . ." *Id.* at 115 (internal quotation marks omitted). And each act that makes up the unlawful conduct is likely not actionable on its own. *Id.* As a result, the Supreme Court concluded, hostile work

environment claims are timely "so long as an act contributing to that hostile environment takes place within the statutory time period." *Id.* at 105.

Although this way of applying a statute of limitations is generally used in the employment discrimination context, we have not limited it to that area alone. *See Shomo v. City of New York*, 579 F.3d 176, 181-82 (2d Cir. 2009) (concluding that the "continuing violation doctrine" can apply to Eighth Amendment deliberate indifference claims); *see also Fahs Constr. Grp., Inc. v. Gray*, 725 F.3d 289, 292 (2d Cir. 2013) (per curiam) (concluding that for Equal Protection claims brought under § 1983, "[w]here a plaintiff challenges a continuous practice and policy of discrimination . . . the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it" (internal quotation marks omitted)).

Here, Sherman's claim is based on an unusual series of regulations and tactical maneuvers that constitutes a taking when considered together, even though no single component is unconstitutional when considered in isolation. As in the context of the cases described above, it cannot be said that Sherman's property was "taken" on any particular day. But because Sherman alleges that at least one of the acts comprising the taking occurred within three years of filing the case, his claim is not time barred. We therefore need not reach the issue of whether the limitations period is tolled under 28 U.S.C § 1367(d).

II. Other Federal Claims

The District Court ruled that other federal claims were unripe for the same reason it concluded Sherman's takings claim was unripe. Because we have determined that Sherman's takings claim was, in fact, ripe, the District Court's ruling can no longer stand. Therefore, for the federal non-takings claims that were dismissed

solely on ripeness grounds, the District Court should consider on remand whether Sherman stated a claim.

Some claims, however, the District Court dismissed for failure to state a claim. They were (A) claims under 42 U.S.C. §§ 1981 and 1982; and (B) a procedural due process claim based on the Town's consultants' fee law. Those claims were properly dismissed.

A. Section 1981 and Section 1982 Claims

The District Court concluded that Sherman did not state a claim based on § 1981, and it denied as futile Sherman's request to add a claim under 42 U.S.C. § 1982 for the same reasons it dismissed the § 1981 claim. *See Sherman*, 2013 WL 1148922, at *6 n.6.

For both claims, Sherman must allege facts supporting the Town's intent to discriminate against him on the basis of his race. *See Rivera v. United States*, 928 F.2d 592, 607-08 (2d Cir. 1991). Jews are considered a race for the purposes of §§ 1981 and 1982. *United States v. Nelson*, 277 F.3d 164, 177 (2d Cir. 2002).

Sherman's allegations that the Town discriminated against him because he was Jewish are insufficient. He states that the "municipal Defendants" knew that he was Jewish, and that at a Town Board meeting, he heard Town citizens express fear that MareBrook might become a "Hassidic Village" like the nearby Kiryas Joel. He also alleges that a "model home was vandalized with a spray-painted swastika." However, none of this is linked to any Town official. Nor does he allege that any similarly situated non-Jews were treated differently. Therefore, the District Court correctly dismissed the § 1981 claim and denied Sherman leave to amend to add the § 1982 claim.

B. Due Process Challenge to Consultants' Fee Law

The District Court also properly dismissed Sherman's claim that the Town's imposition of its consultants' fee law did not provide sufficient procedural due process. Town Code § 48-3 provides that an applicant for approval of any land development proposal shall reimburse the Town's reasonable fees. Pursuant to

§ 48-5(A), "[a]n applicant may appeal, in writing, to the Town Board for a reduction in the required reimbursement amount." The appeal must be filed within fifteen days from the delivery of the voucher itemizing the services performed and the amount charged for those services. §§ 48-5(B); § 48-3(K)-(L). The itemized voucher is accompanied by a notice, informing the applicant of these requirements. § 48-3(L).

Sherman makes two arguments in support of his due process claim.[4] First, he argues that "the Town did not provide Sherman with actual notice of what he was being asked to pay for . . . ." Appellant's Brief 58. However, the complaint states that while he initially did not receive invoices for the required consultants' fees,

[4] Sherman's arguments in support of the due process claim raised for the first time in his reply brief are waived. *See JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) ("[A]rguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief."). We also do not consider Sherman's argument that the provisions in question violated New York law because the District Court declined to exercise supplemental jurisdiction over that claim.

"the Planning Board eventually provided Plaintiff with its consultants' invoices . . . ."

Sherman also argues that the Town did not "allow a pre-deprivation hearing when he complained . . . ." Appellant's Brief 58-59. However, Sherman did not object to the fees in the 15 days required by § 48-5(A). He received the invoice for the $25,000 fee in February 2010. He paid the fee in March of that year. He did not did not appeal the fee until June 24, 2011 – over a year after the he received the invoices.[5]

In short, Sherman does not allege that he was not provided with an opportunity to be heard. Rather, he alleges that he did not take advantage of that opportunity. "[I]f reasonable notice and

[5] The complaint also references a "timely filed" appeal in 2010. However, the complaint explicitly states that Sherman filed the appeal on June 24, 2011 and does not otherwise mention a 2010 appeal. "Although factual allegations of a complaint are normally accepted as true on a motion to dismiss, that principle does not apply to general allegations that are contradicted by more specific allegations in the [c]omplaint." *DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, ---F.3d---, 2014 WL 1244184, at *6 (2d Cir. Mar. 27, 2014) (internal citation and quotation marks omitted). Moreover, the appeal's timeliness is a legal conclusion that we need not accept as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

opportunity for a hearing are given, due process will be satisfied, regardless of . . . whether the owner takes advantage of the opportunity for a hearing." *Brody v. Vill. of Port Chester*, 434 F.3d 121, 131 (2d Cir. 2005); *see also Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 708-09 (2d Cir. 1985) (rejecting procedural due process challenge to the imposition of costs and attorney's fees because the party had an opportunity to be heard "but failed to take advantage of the opportunity"). The District Court therefore properly dismissed this claim.

III. State Law Claims

The District Court declined to exercise supplemental jurisdiction over Sherman's state law claims on the ground that it had dismissed all of his federal claims. Because Sherman stated at least one federal claim, we also vacate the District Court's decision to remand the state law claims to state court.

CONCLUSION

Because of the way the Town handled Sherman's MareBrook proposal and subsequent litigation, Sherman's claim became ripe. According to the allegations in the complaint, which we take as true for these purposes, the Town employed a decade of unfair and repetitive procedures, which made seeking a final decision futile. The Town also unfairly manipulated the litigation of the case in a way that might have prevented Sherman from ever bringing his takings claim. It removed the case from state court, and then moved to dismiss on the ground that the takings claim must be heard in state court. We cannot accept this tactic. Throughout it all, the Town prevented Sherman from developing his land. Had the Town acted more reasonably, the claim may never have become ripe, and no taking may ever had occurred. We **REVERSE** the District Court's decision to dismiss Sherman's federal takings claim.

Because the *Williamson County* ripeness requirements are satisfied, we **VACATE** the District Court's decision to the extent it

dismissed Sherman's federal non-takings claims solely on ripeness grounds. On remand, the District Court may consider whether Sherman has sufficiently stated those claims.

We **AFFIRM** the District Court's decision (1) to dismiss Sherman's § 1981 claim, (2) to deny Sherman leave to amend to add a § 1982 claim, and (3) to dismiss Sherman's procedural due process claim based on the consultants' fee law.

Because at least one federal claim has been stated, we **VACATE** the District Court's decision to decline to exercise supplemental jurisdiction over Sherman's state law claims on the ground that all the federal claims had been dismissed. On remand, the District Court may reconsider whether to exercise supplemental jurisdiction in light of the new posture of the case.

We **REMAND** to the District Court for further proceedings consistent with this opinion.

Exhibit 11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BIKUR CHOLIM, INC.; RABBI SIMON LAUBER; FELLOWSHIP HOUSE OF SUFFERN, INC.; MALKA STERN; MICHAEL LIPPMAN; SARA HALPERIN; ABRAHAM LANGSAM and JACOB LEVITA, Plaintiffs,	:	
v.	:	7:05-cv-10759 (WWE)
VILLAGE OF SUFFERN, Defendant.	:	
UNITED STATES OF AMERICA, Plaintiff,	:	
v.	:	7:06-cv-7713 (WWE)
VILLAGE OF SUFFERN, Defendant.	:	

MEMORANDUM OF DECISION ON VARIOUS MOTIONS

These consolidated actions arise from the denial by the Village of Suffern Zoning Board of Appeals[1] of an application for a zoning variance that would permit plaintiffs Bikur Cholim, Inc., Rabbi Simon Lauber and the Fellowship House of Suffern, Inc. (collectively "Bikur Cholim") to use their property in Suffern, New York as a guesthouse for observant Jewish visitors to Good Samaritan Hospital in Suffern.

Bikur Cholim, together with Malka Stern, Michael Lippman, Sara Halperin, Abraham Langsam and Jacob Levita (collectively "private plaintiffs"), commenced this action on December 23, 2005. The United States of America filed suit on September

[1] The Zoning Board of Appeals is not a party to either action pending before the Court.

26, 2006. These actions were then consolidated.

Now pending before the Court are (1) private plaintiffs' motion for a preliminary injunction (Doc. #4);[2] (2) private plaintiffs' second motion for a preliminary injunction (Doc. #17); (3) defendant Village of Suffern's motion to dismiss private plaintiffs' complaint and for a preliminary injunction (Doc. #23); (4) defendant's motion to dismiss the United States' complaint (Doc. #88; 7:06-cv-7713, Doc. #3); (5) the United States' motion for summary judgment or, in the alternative, for a preliminary injunction (Doc. #133); (6) defendant's motion for summary judgment (Doc. #142); and (7) private plaintiffs' motion to strike (Doc. #151).

Plaintiffs have brought this action pursuant to the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq. ("RLUIPA"). The Court has jurisdiction over the federal claims pursuant to 28 U.S.C. § 1331 and the pendent state claims pursuant to 28 U.S.C. § 1367. The United States is authorized to bring claims pursuant to 42 U.S.C. § 2000cc-2(f).

Because the relevant factual background is different for the motions to dismiss and the motions for summary judgment, the Court will review the facts and allegations pertinent to each separately.

I. Motions to Dismiss

A. Background on Motions to Dismiss

For purposes of ruling on a motion to dismiss, the Court accepts all factual allegations of the complaint as true.

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[2] Unless otherwise stated, all citations to a docket entry are in case 7:05-cv-10759.

1. Private Plaintiffs' Amended Complaint (Doc. #22)

Plaintiff Bikur Cholim, Inc. is a New York not-for-profit corporation. Since 1988, it has sought to accommodate the religious exercise of Jewish families of patients at three hospitals, including Good Samaritan Hospital in Suffern. Plaintiff Rabbi Simon Lauber is the Founder and Executive Director of Bikur Cholim, Inc. Plaintiff Fellowship House of Suffern, Inc. owns the facility in Suffern and leases it to Bikur Cholim for ten dollars per month. The facility ("Shabbos House") is located at 5 Hillcrest Road in Suffern. Plaintiffs Malka Stern, Sara Halperin, Michael Lippman, Abraham Langsam and Jacob Levita are observant Jews who have used, currently use or expect to use the Shabbos House.

Jewish law prohibits travel on the Sabbath – from sunset on Friday to sunset on Saturday. This prohibition includes a prohibition from operating, driving or riding in a motor vehicle. In addition, Jewish law prohibits using electricity or spending money on the Sabbath. These restrictions also apply to the approximately ten holy days throughout the Jewish year which have similar restrictions as the Sabbath.

Bikur cholim is a Jewish commandment to visit the sick. Observant Jews believe that bikur cholim is one of the most important commandments.

The Shabbos House provides overnight accommodations for those unable to travel on the Sabbath to visit patients at Good Samaritan Hospital. Its use is limited to Friday nights and the ten holy days. Bikur Cholim does not charge its guests for stays. Rabbi Lauber claims that the operation of this house is a fundamentally important aspect of his religious exercise and is motivated by his sincere religious beliefs. He further alleges that forcing him to discontinue his administration of the Shabbos House

would substantially burden his religious exercise.

Private plaintiffs contend that some patients would not seek treatment were it not for Bikur Cholim's accommodation of their family members and visitors. Sabbath, holiday and daily prayers are held at the Shabbos House.

From 1998 until 2000, the Shabbos House was located at a different site in a residential neighborhood. It was then housed inside Good Samaritan Hospital until 2005 when it moved to its current location. On April 26, 2005, Village Code Enforcement Officer John Loniewski issued violation notices under Suffern's Building and Zoning Code section 205-3(A)(3) citing the presence of "cardboard boxes, garbage, pizza boxes, fast food wrappers and construction debris" on the porch. Loniewski also issued a notice violation under section 266-22(B) of the Building and Zoning Code for a "use not in compliance with the certificate of Occupancy on File," which certificate was issued for an "erect single family dwelling." On May 9, an Order to Remove Violation was issued for a May 6 use violation.

On July 7, 2005, Loniewski issued a violation under Building and Zoning Code section 205-3(A)(4) citing "old wood slats, paper bags, broken ceramic tiles and garbage," which, private plaintiffs contend, were being stored under the house's back porch. Loniewski also issued a violation notice under section 205-3(A)(5) for "overgrown bushes and shrubs" and "the lawn not ... mowed and many dead tree limbs." Private plaintiffs assert that the bushes were not overgrown and that the grass was newly planted and could not yet be mowed.

Private plaintiffs allege that while the Shabbos House was receiving property maintenance violations, the property at 7 Hillcrest Road was littered with debris and

garbage and no violations were issued.

On July 12, Loniewski entered the Shabbos House by following a staff member. He issued a violation under section 404.4.1 of the New York Property Maintenance Code because there were too many beds in the master bedroom given the square footage of the room. On August 1, Loniewski issued a violation notice under section R317.1 of the New York Residential Code citing "no smoke alarms in the sleeping rooms formerly designated as the den and the dining room." All fines except for the one for the improper use violation were resolved in August 2005 by correction of the problem and payment of $2,500 in fines. The improper use violation was held in abeyance conditional upon the Shabbos House applying for a use variance before the Zoning Board of Appeals, which application occurred on August 1, 2005.

The Shabbos House is located in an "R-10" zoning district. Such zoning allows use by right of the property for one-family detached dwellings and places of worship. By special permit, the following are allowed in an R-10 district: public utility building substations, utility lines and poles serving 25 or more kilowatts; standpipes and water towers; public and private hospitals and sanitariums; convalescent and nursing homes; private membership clubs; public schools; colleges; dormitories accessory to schools; private and public elementary or secondary schools; nursery schools; daycare centers; and home occupations. Sections 266-2 and 266-33(F) permit dormitories in the R-10 zoning district "only as accessory uses to schools of general or religious instruction...." Bikur Cholim's use was not considered a "dormitory." There is no zoning district within Suffern that permits "transient/motel uses" or temporary accommodations. Private plaintiffs assert there is no other location within reasonable and safe walking distance

that could house Good Samaritan Hospital patients or their family members and that there are no available alternate locations in Suffern where Bikur Cholim may locate the Shabbos House.

On August 2, 2005, Bikur Cholim submitted an application for a use variance to continue operating the Shabbos House in the R-10 zone. The application sought a variance from Suffern Zoning Law section 266-22(B) which states that "[o]nly those uses listed for each district as being permitted shall be permitted. Any use not specifically listed as being permitted shall be deemed to be prohibited." The application requested use of:

> a one family residence for overnight occupancy for up to 17 people, who are family members of the patients at Good Samaritan Hospital. Overnight occupancy will be limited to Fridays and approximately 10 Jewish Holiday days, when travel is not permitted. There is no charge for cover.... The accommodations are offered, without charge as a community service. This service is offered in conjunction with Good Samaritan Hospital....

Bikur Cholim asserts that it is willing to limit the occupancy of the Shabbos House to fourteen individuals. The application claims that the variance was necessary for a "community hardship."

Suffern defined Bikur Cholim's use as a "transient/motel use." There is no definition for "transient/motel use" in Suffern's Zoning Law. Under Zoning Law section 266-54(D)(3), the Village Board of Appeals may grant a use variance upon "a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship." To show such hardship under section 266-54(D)(3)(a), the applicant must demonstrate that: (1) it cannot realize a reasonable return, provided that

the lack of return is substantial as demonstrated by competent financial evidence; (2) the alleged hardship relating to the property in question is unique and does not apply to a substantial portion of the district or neighborhood in which it is located; (3) the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) the alleged hardship has not been self-created." Section 266-54(D)(1) provides that the "Board of Appeals is authorized to vary or modify the strict letter of this Zoning Law where its literal interpretation would cause practical difficulties or unnecessary hardships in such manner as to observe the spirit of the law, secure public safety and welfare and do substantial justice." The Zoning Board of Appeals unanimously denied Bikur Cholim's application on November 17, 2005, which decision was filed with the Village Clerk on November 29.

Private plaintiffs bring claims under RLUIPA for substantial burden on religious exercise, 42 U.S.C. § 2000cc(a); for nondiscrimination, 42 U.S.C. § 2000cc(b)(2); for "equal terms," 42 U.S.C. § 2000cc(b)(1); and for "exclusion and limits," 42 U.S.C. § 2000cc(b)(3). They also assert that their rights under the Free Exercise and Free Association Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution were violated, and they assert claims under 42 U.S.C. § 1983. Finally, they allege that their rights under the New York State Constitution were violated. They seek declaratory and injunctive relief.

In its answer to private plaintiffs' amended complaint, defendant asserts a counterclaim that private plaintiffs' use of the property is an illegal use and a violation of Suffern Village Code chapters 162 and 205.

2. The United States' Complaint (7:06-cv-7713, Doc. #1)

The United States' complaint alleges that the Zoning Board's denial of Bikur Cholim's variance application and Suffern's enforcement of such denial constitute an imposition or implementation of a land use regulation within the meaning of RLUIPA, 42 U.S.C. § 2000cc(a)(1), and that such denial and enforcement substantially burden the religious exercise of Orthodox Jews who need to visit the sick at Good Samaritan hospital while observing religious proscriptions against driving on the Sabbath and other Holy Days. The United States further claims that such denial and enforcement of the Zoning Law do not further a compelling government interest, and even if they did, they are not the least restrictive means of doing so.

B. Discussion

The function of a motion to dismiss is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Ryder Energy Distribution v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). When deciding a motion to dismiss, the court must accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the pleader. Hishon v. King, 467 U.S. 69, 73 (1984). The complaint must contain the grounds upon which the claim rests through factual allegations sufficient "to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). A plaintiff is obliged to amplify a claim with some factual allegations in those contexts

where such amplification is needed to render the claim plausible. Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007) (applying flexible "plausibility standard" to Rule 8 pleading), rev'd on other grounds sub nom., Ashcroft v. Iqbal, 129 S. Ct. 1937.

For purposes of ruling on the motions to dismiss, the Court only reviews the pleadings and the exhibits to them. Samuels v. Air Transport Local 504, 992 F.2d 12, 15 (2d Cir. 1993). Additional facts submitted in a motion to dismiss, or exhibits thereto, are not reviewed by the Court at this stage. Further, the Court accepts as true all allegations of fact, but not conclusory statements of law. Ashcroft v. Iqbal, 129 S. Ct. at 1949 ("[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.").

1. Motion to Dismiss Private Plaintiffs' Amended Complaint

a. Whether Private Plaintiffs' Claims are Ripe

Defendant first argues that private plaintiffs' claim under RLUIPA is not ripe because Bikur Cholim's application for a variance before the Zoning Board offered perfunctory and insufficient evidence. Defendant also asserts that Bikur Cholim failed to appeal the Code Enforcement Officer's determination that its use was not permissible to the Zoning Board of Appeals. Instead, Bikur Cholim sought a use variance. Private plaintiffs argue in response that (1) their facial challenge to the zoning law has no finality requirement; (2) Bikur Cholim's citation for improper use became final once it did not appeal the citation to the Zoning Board of Appeals; (3) the Zoning Board of Appeals' denial of Bikur Cholim's use variance constitutes a final decision that

may be challenged before this Court; (4) its proposed use would not meet a stated exception to the zoning law; (5) the adequacy of Bikur Cholim's variance application is irrelevant to the ripeness analysis; and (6) by seeking a preliminary injunction, defendant has made these issues ripe for adjudication.

The question of ripeness raises issues of Article III's case or controversy requirement as well as prudential limitations on the exercise of judicial authority. See Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 733 n.7 (1997). It requires a determination of whether the Court should defer until such time as the claims have matured into a more appropriate form before the Court. Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967).

In a land use case like this one, four factors are relevant to the ripeness analysis. Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985).[3] As the Court explained in Murphy v. New Milford Zoning Comm'n, 402 F.3d 342 (2d Cir. 2005):

> First, ... requiring a claimant to obtain a final decision from a local land use authority aids in the development of a full record. Second, and relatedly, only if a property owner has exhausted the variance process will a court know precisely how a regulation will be applied to a particular parcel. Third, a variance might provide the relief the property owner seeks without requiring judicial entanglement in constitutional disputes. Thus, requiring a meaningful variance application as a prerequisite to federal litigation enforces the long-standing principle that disputes should be decided on non-constitutional grounds whenever possible. Finally..., federalism principles also buttress the finality requirement. Requiring a property

[3] The Supreme Court in Williamson addressed the ripeness requirement in a Takings context. The Takings analysis is not relevant here, even though the remainder of the Supreme Court's analysis related to land use challenges is.

> owner to obtain a final, definitive position from zoning authorities evinces the judiciary's appreciation that land use disputes are uniquely matters of local concern more aptly suited for local resolution.

Murphy, 402 F.3d at 347.

There are, however, exceptions to the rule of ripeness. Where an appeal to a zoning board would be futile, the plaintiff need not appeal to that board. Southview Assoc., Ltd. v. Bongartz, 980 F.2d 84, 98 (2d Cir. 1992); see also Murphy, 402 F.3d at 349 ("[A] property owner need not pursue such applications when a zoning agency ... has dug in its heels and made clear that all such applications will be denied."). In general, however, failure to seek a variance prevents a zoning decision from becoming ripe. Williamson, 473 U.S. at 190.

As to defendant's first argument in support of its claim that this controversy is not yet ripe – that Bikur Cholim's application for a variance was perfunctory – the merits of the Zoning Board's rejection of the application is not properly before the Court on a motion to dismiss. Whether the application was inadequate and properly dismissed on its merits or was adequate and was rejected in violation of RLUIPA is a fact-based question better suited for summary judgment. What matters at this stage is whether private plaintiffs adequately pleaded that their variance was denied. That, they did. See Amended Complaint ¶ 62.

The crux of defendant's claim that this case is not yet ripe is that Bikur Cholim did not appeal Loniewski's violation notice under Building and Zoning Code section 266-22(B) issued on April 26, 2005. The Court disagrees and finds Bikur Cholim's failure in this regard to be irrelevant. First, private plaintiffs claim that the violation was

held in abeyance pending the application for a use variance. Second, and more importantly, after this violation, Bikur Cholim sought a use variance from the Zoning Board of Appeals, which was denied.

A case is ripe when the court "can look to a final, definitive position from a local authority to assess precisely how they can use their property." Murphy, 402 F.3d at 347. The Court can look at the Zoning Board of Appeals' decision as a definitive ruling on how Bikur Cholim can use its property. It is the denial of the application that serves as the basis for jurisdiction before the Court.

b. Whether Private Plaintiffs Have Sufficiently Alleged a Violation of RLUIPA

Defendant next moves for dismissal arguing that private plaintiffs have failed to allege a prima facie case of a violation under RLUIPA. RLUIPA prohibits a government from "impos[ing] or implement[ing] a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person ... or institution, unless the government demonstrates that imposition of the burden on that person ... or institution is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1); Westchester Day Sch. v. Vill. of Mamaroneck, 386 F.3d 183, 186 (2d Cir. 2004) ("Westchester Day Sch. I"). "Religious exercise" is defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). "The use, building, or conversion of real property for the purpose of religious exercise shall be considered ... religious exercise." 42 U.S.C. § 2000cc-5(7)(B). "Religious exercise" under RLUIPA is to be defined broadly and "to the

maximum extent permitted by the terms of this chapter and the Constitution." Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 347 (2d Cir. 2007) ("Westchester Day Sch. III"); 42 U.S.C. § 2000cc-3(g).

To state a claim for violation of RLUIPA, plaintiffs must present evidence that the land use regulation at issue as implemented: (1) imposes a substantial burden (2) on the "religious exercise" (3) of a person, institution, or assembly. 42 U.S.C. § 2000cc(a)(1); Westchester Day Sch. v. Vill. of Mamaroneck, 379 F. Supp. 2d 550, 555 (S.D.N.Y. 2005) ("Westchester Day Sch. II"); Murphy v. Zoning Comm'n of the Town of New Milford, 148 F.Supp. 2d 173, 187 (D. Conn. 2001). If plaintiffs are successful in making that prima facie showing, the burden shifts to the government to demonstrate that the regulation furthers a compelling governmental interest and is the least restrictive means of furthering that compelling interest. 42 U.S.C. § 2000cc(a)(1)(A-B).

Accepting the factual allegations of the amended complaint as true, the Court must conclude that private plaintiffs have established a prima facie claim under RLUIPA. First, they have sufficiently alleged that the denial of a use variance is a substantial burden to their practice of Orthodox Judaism. They claim that the inability to operate the Shabbos House burdens their religion in two ways. As to Rabbi Lauber, they claim that the commandment of bikur cholim requires him to operate the house. As to plaintiffs Stern, Lippman, Halpern, Langsam and Levita, private plaintiffs assert that their religion is substantially burdened by being forced to choose between observing the Sabbath and holidays and visiting the sick at Good Samaritan Hospital. They further allege that they are being discouraged from seeking treatment at Good

Samaritan Hospital by the inability to find nearby accommodations.[4]

As to the religious exercise prong, the Court of Appeals in Westchester Day Sch. III commented that the district court must examine whether a particular use by a religious organization was for a religious purpose, such as prayer, or a secular purpose, such as a gymnasium in a religious school. See Westchester Day Sch. III, 504 F.3d at 347-48. If the improvement or building is to be used for religious education or practice, land use regulations related to it could affect the land users' religious exercise. See id. at 348.

Here, private plaintiffs have sufficiently alleged that the Zoning Board's rejection of Bikur Cholim's use variance and defendant's enforcement of the Zoning Law served as burdens to their religious exercise as defined under RLUIPA. The allegations related to Rabbi Lauber's religious obligation to operate a facility to enable observant individuals to visit the sick on the Sabbath and holidays as well as the other individual plaintiff's obligations to observe the Sabbath while being able to visit their family members at Good Samaritan Hospital implicate their religious exercise. See Cathedral Church of the Intercessor v. Incorporated Vill. of Malverne, 2006 U.S. Dist. LEXIS 12842, *25-26 (E.D.N.Y. Mar. 6, 2006).

Finally, there is no dispute that private plaintiffs are persons and institutions under the law. Therefore, private plaintiffs have met their burden of showing a prima

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[4] In their response to the motion to dismiss, private plaintiffs claim that they cannot go to the hospital on the Sabbath because they cannot secure accommodations for their family. This allegation was not included in the amended complaint, and, therefore, the Court is not relying on it. The United States' complaint is similarly silent on this allegation.

facie case under RLUIPA.

The Court notes defendant's argument that private plaintiff's proposed use is analogous to a group of individuals sharing a communal home. At this juncture, the Court only reviews the pleadings and takes factual allegations at their word. Whether defendant's actions support plaintiff's contention that the enforcement of the Zoning Law would constitute a substantial burden on private plaintiffs' religious exercise is not a question to be answered on a rule 12(b) motion to dismiss.

In addition, defendant argues that it has a compelling interest in enforcing its zoning regulations and in prohibiting transient uses such as private plaintiffs', it has used the least restrictive means of enforcing such regulations. This defense to a RLUIPA claim is not before the Court as the Court determines whether private plaintiffs have pleaded a prima facie case. The Court will address it below, when it analyzes the parties' summary judgment papers. Dismissal at this stage is inappropriate as to private plaintiffs' RLUIPA claim.

c. Private Plaintiffs' Free Association Claim

Defendant next moves to dismiss private plaintiffs' claim for a violation of their First Amendment rights to free association. The First Amendment provides that the government "shall make no law ... abridging ... the right of the people peaceably to assemble...." This protection embraces two types of associational rights: (1) intimate human relationships, and (2) association for purposes of engaging in protected speech. Roberts v. United States Jaycees, 468 U.S. 609, 617-618 (1984). It also includes the right to assemble for religious exercise. See Sanitation & Recycling Indus. v. City of New York, 107 F.3d 985, 996-997 (2d Cir. 1997).

Private plaintiffs adequately allege that they have been denied the right to assemble at the Shabbos House for religious exercises. The Court will therefore leave these plaintiffs to their proof and deny dismissal on this count. Again, whether the zoning regulations are neutral is not a question for this motion.

d. Private Plaintiffs' Equal Protection Claim

Defendant argues that private plaintiffs have failed to allege a claim under the Equal Protection Clause of the Fourteenth Amendment. In order to state such a claim, private plaintiffs must allege that they are (1) similarly situated to an entity (2) that was treated differently. Congregation Kol Ami v. Abington Twp., 309 F.3d 120, 137 (3d Cir. 2002); see also City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). To meet the first prong, plaintiffs must allege that they were similarly situated to property owners that sought a similar variance for a similar plot of land. Burke v. Town of E. Hampton, 2001 U.S. Dist. LEXIS 22505, *21-22 (E.D.N.Y. Mar. 16, 2001).

Private plaintiffs have made no allegations of similarly situated property owners to survive dismissal on this claim.[5] Economic Opportunity Comm'n of Nassau County, Inc. v. County of Nassau, 47 F. Supp. 2d 353, 370 (E.D.N.Y. 1999). Dismissal would thus be appropriate but for private plaintiffs' argument that the zoning law treats religious organizations unequally because it allows dormitories and nursery homes to operate through special permits, which are similar uses to Bikur Cholim's. Private plaintiffs' claim that the zoning law on its face violates their rights under the Equal

[5] To the extent that private plaintiffs allege that the house at 7 Hillcrest Road also had debris in its yard but did not receive a violation, this allegation of uneven enforcement is not relevant to the challenge to the Zoning Law preventing the existence of the Shabbos House.

Protection Clause is unsupported by any citation to case law. Nor do private plaintiffs point in their amended complaint to any nursing homes or dormitories existing within the Village of Suffern.

This facial challenge to the law is purely hypothetical. Private plaintiffs, in essence, suggest that, although there are not comparators, a secular comparator would receive better treatment than private plaintiffs did. In this sense, this claim is not a Fourteenth Amendment claim. Instead, it is either a free exercise claim under the First Amendment or under RLUIPA. See Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."); 42 U.S.C. § 2000cc(b)(1) ("No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."); see also Third Church of Christ v. City of New York, 2008 U.S. Dist. LEXIS 99822 (S.D.N.Y. Dec. 2, 2008). Without any comparators pleaded in the amended complaint for the Court to examine, private plaintiffs' claim under the Equal Protection Clause cannot stand. Therefore, it will be dismissed.

e. Claim for Article 78 Relief

Private plaintiffs assert a claim for relief under Article 78 of the New York Civil Practice Law and Rules. Defendant seeks dismissal of this claim, contending that Bikur Cholim's application for a variance was insufficient. As the Court discussed above, the adequacy of Bikur Cholim's variance application should not be reviewed based on the

amended complaint, but based on the full record as developed through discovery. Therefore, the Court will not dismiss this claim under rule 12(b)(6).

f. Conclusion as to the Motion to Dismiss Private Plaintiffs' Amended Complaint

For the reasons discussed above, the Court will grant defendant's motion to dismiss private plaintiffs' amended complaint only as to the claim for relief under the Equal Protection Clause of the Fourteenth Amendment. As to all other claims, the motion will be denied.

2. Motion to Dismiss United States' Complaint

Defendant moves to dismiss the United States' complaint under rule 12(b)(6) of the Federal Rules of Civil Procedure arguing that (1) the United States' claim is not yet ripe; (2) the United States has not alleged that the Shabbos House constitutes a religious exercise; (3) the United States has failed to allege that there has been a substantial burden on Orthodox Jews' religious exercise; (4) Suffern has a compelling interest in implementing and enforcing its zoning regulations; and (5) the United States has failed to allege that Suffern did not use the least restrictive means in enforcing its zoning regulations.

The analysis applicable to the private plaintiffs' amended complaint applies also to the United States' complaint. Because the United States has sufficiently alleged in its complaint a violation of RLUIPA as it relates to the Shabbos House, the motion to dismiss its complaint will be denied. The United States adequately pleaded that the denial of the variance constituted a substantial burden on Orthodox Jews, and the United States is able to bring this action pursuant to 42 U.S.C. § 2000cc-2(f), which

provides that the "United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act."

Accordingly, the Court will deny defendant's motion to dismiss the United States' complaint.

II. Motions for Summary Judgment

The United States has filed for summary judgment related to its action (7:06-cv-7713), while the Village of Suffern has filed a cross motion related to both actions.

A. Background on Summary Judgment

The parties have submitted briefs, a stipulation of facts and supporting exhibits which reflect the following factual background.[6]

The Shabbos House is located directly across the street from the entrance to Good Samaritan Hospital at 5 Hillcrest Road in the Village of Suffern. It is between a commercial office building with a parking lot and residential homes. It is located in an R-10 zoning district.

The emergency room of Good Samaritan Hospital treats approximately 36,000 patients per year, approximately five to ten percent of whom are observant Jews.

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[6] Several of defendant's statements of fact are not supported with citations to admissible evidence. Where appropriate, the Court has disregarded such statements. In addition, to several of plaintiffs' statements of fact, defendant denied the allegation without citation to the support for its denial. Plaintiffs' statements, in these instances, will be accepted as true. See Local Rule of Civil Procedure 56.1(d). Additionally, defendant offers the affidavit of Robert Geneslaw, a land use expert. Although Geneslaw was sworn, much of his testimony does not appear to be made on the basis of personal knowledge, and he does not aver that it was. Therefore, this testimony will be disregarded by the Court, as appropriate. See Fed. R. Civ. P. 56(e)(1) ("A supporting ... affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.").

1. Background on Suffern Zoning Law and Shabbos House Placement

According to the Village of Suffern Zoning Law, one-family detached dwellings and places of worship are both permitted uses in an R-10 district. By special permit, the zoning law allows public utility buildings and substations (subject to certain limitations); hospitals, sanitariums and convalescence and nursing homes; private membership clubs; dormitories accessory to schools; nursery, elementary and secondary schools; home occupations; hospital heliports; and medical office buildings on the campus of a hospital. There is no provision in the zoning law for transient-use hotels or motels. The minimum lot size required for a single family dwelling is 10,000 square feet with a minimum width of 90 feet.

Rabbi Lauber is an Orthodox Rabbi. After his own hospitalization in 1981, he established Bikur Cholim, Inc. as a nonprofit organization to observe the religious obligation of bikur cholim. He believes it his religious mission to bring comfort and ease the anxiety and pain of patients and their families. Bikur Cholim, Inc. operates the Shabbos House to further this goal.

From 1988 until 2001, the Shabbos House was located at 1 Campbell Avenue, on Good Samaritan Hospital's grounds in Suffern. From 2001 until 2005, the Shabbos House was located within Good Samaritan Hospital. Because of certain developments in 2004, Bikur Cholim was no longer able to operate out of the hospital.

On May 12, 2004, a developer unrelated to Bikur Cholim applied for area variances to permit the construction of a single family house at 5 Hillcrest Road. The developer had to obtain a variance to build such house because the lot did not meet the

minimum lot size or width requirement under the Zoning Law. While the minimum lot size for a single-family dwelling is 10,000 square feet, the lot at 5 Hillcrest Road is 9,286 square feet. The minimum width requirement is 90 feet, but the lot at 5 Hillcrest Road is 75 feet. The variances were approved by the Zoning Board of Appeals on July 22, 2004. The house was built in 2005, and the developer was issued a certificate of occupancy on February 2, 2005. The certificate of occupancy stated that the "intended use" was for a "single family dwelling."

Fellowship House purchased the house and now leases it to Bikur Cholim for ten dollars per annum. Good Samaritan Hospital provides parking for guests of the Shabbos House, and Rabbi Lauber averred that there would likely be no more than two cars parked in front of the Shabbos House at any time.

As of July 12, 2005, the Shabbos House was set up with six beds in the master bedroom, two beds in bedroom no. 2, three beds in bedroom no. 3, three beds in the former den and three beds in the former dining room. The Shabbos House does not have an automatic sprinkler system.

2. Relevant Jewish Law

Observant Jews observe the Sabbath from sundown Friday to sundown Saturday. In addition, there are six holidays comprising ten to eleven days per year. Together, there can be sixty-three such Sabbath and Holy Days. On certain occasions, the Sabbath can immediately precede or follow such Holy Days, creating a three day "holiday."

On the Sabbath and these Holy Days, observant Jews are obligated to abstain from certain conduct. Specifically, they refrain from using electricity, using combustion

engines (e.g., driving), carrying objects in public areas and walking outside a certain radius. These restrictions may be relaxed when there are life-threatening circumstances. When there is a even a remote threat to life, Jewish laws requires individuals to engage in otherwise forbidden acts, such as driving a car to seek medical attention. Once the danger has passed, however, these acts become forbidden again. Because of the restrictions, an observant Jew could not register at or pay for a hotel or carry money, keys or identification.

On the Sabbath and Holy Days, observant Jews are obligated to follow certain rituals. For example, they must wash their hands before meals, consume a minimum quantity of bread during each of three meals, recite certain prayers over a cup of wine and pray three times per day.

The Jewish obligation to visit the sick includes providing for the comfort and emotional tranquility of the patient. It also requires children to perform personal services on behalf of a parent, such as assistance with feeding, even where assistance from others is available.

The Shabbos House provides lodging, meals and a place to pray for observant Jews who are at Good Samaritan Hospital on the Sabbath or Holy Days. Plaintiffs also claim that it encourages those people needing medical care on the Sabbath or Holy Days to seek it by allowing them a place to stay if the medical needs, and thus the exigent circumstances, abate on the Sabbath or Holy Days. In such scenarios, patients will not be left without sleeping accommodations or kosher food. The Shabbos House thus eliminates the difficulties of complying with the Sabbath rules and the requirement

to seek medical care where there is even a remote threat to life.[7] Plaintiffs contend that observant patients may also terminate treatment in the absence of the Shabbos House so that they may reach home before the onset of the Sabbath. They assert that when such observant individuals visit the emergency room on Friday afternoons, they will request quick treatment so as to be able to return home before the Sabbath begins.

The Shabbos House encourages family members to fulfill their Jewish obligation to give personal care and assistance to the sick and one's parents. Although plaintiffs term this an "obligation," several private plaintiffs testified that the obligation of bikur cholim is secondary to the laws of the Sabbath. That is, they could not violate the Sabbath to visit or care for the sick on that day if they did not have accommodations to make it possible. How they approach this dilemma, they testified, turns on the proximity of the sick person and their personal relationship.[8] The Shabbos House further enables family members to be near patients who may have a language barrier with hospital staff and allows family members to be physically present at the hospital when medical decisions must be made during the Sabbath.

3. Private Plaintiffs

Private plaintiffs Malka Stern, Michael Lippman, Sara Halperin and Jacob Levita are observant Jews who have stayed at the Shabbos House on the Sabbath to visit an ill relative or spouse. Each private plaintiff lives outside walking distance from Good

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[7] None of the private plaintiffs claim to be patients or potential patients of Good Samaritan Hospital for whom these circumstances are likely to occur.

[8] Although, as discussed below, the Court should not and cannot question the importance of a religious obligation, the absoluteness of the obligation is relevant to whether a burden on its observation is substantial under the law.

Samaritan Hospital and has stayed at the Shabbos House when they could no longer visit at the Hospital. They each used the Shabbos House to sleep, eat and pray. They also assert that without the Shabbos House, they would be forced to choose between observing the Sabbath and visiting their family members. Stern attended to her husband daily for six weeks when he was hospitalized with Alzheimer's disease and unable to speak. Levita visited his father each Sabbath. Lippman and Halperin are brother and sister who attended to their mother on a daily basis when she was being treated for a blood fungus infection.

Each private plaintiff observes the laws of the Sabbath and believes that they have a religious obligation to visit the sick. Each testified, however, that this obligation is secondary to the laws of the Sabbath and need not be followed on the Sabbath when distance or other factors make visits impractical.

4. Enforcement of the Zoning Law Against Bikur Cholim

On April 27, 2005 and May 8, 2005, Bikur Cholim was issued two notices, titled "Order to Remove Violation" by Suffern's Code Enforcement Officer John Loniewski. The notices alleged that the Shabbos House constituted an impermissible use of the property. Loniewski initiated proceedings in the Suffern Justice Court alleging the violations set forth in the notices and also issued an appearance ticket to Bikur Cholim. On August 1, 2005, Loniewski observed fire safety violations under the New York State Residential Code concerning smoke alarms in and just outside of all sleeping areas.

Thereafter, Bikur Cholim applied to the Zoning Board of Appeals, requesting a use variance to continue operating the Shabbos House. This application stayed the proceedings in the Justice Court. In the application, Bikur Cholim requested a variance

to allow the use of the house for overnight occupancy for up to seventeen people who are family members of patients at Good Samaritan Hospital. The application stated that overnight occupancy would be limited to Friday night and approximately ten Jewish holidays and that there would be no charge for staying at the House. The appeal was based on "community hardship." Bikur Cholim's request for up to seventeen guests was later reduced to fourteen guests. In this case, plaintiffs state that they wish to use the house for up to fourteen guests.

The Zoning Law requires zoning decisions to be based on the four criteria set forth in section 266-54(D)(3)(a). These factors require that the applicant demonstrate that: (1) it cannot receive a reasonable return on the property as shown by "competent financial evidence;" (2) the hardship is unique and does not apply to a substantial portion of the neighborhood; (3) the applicant's use would not alter the essential character of the neighborhood; and (4) the alleged hardship has not been self-created.

The Rockland County Commissioner of Planning recommended against granting the variance. In a letter to the Zoning Board of Appeals, he wrote:

> [Bikur Cholim's proposed] use is incompatible with the single-family use that is predominant in the R-10 zoning district and is not consistent with the community character of the surrounding residential neighborhood. A three-bedroom, single family residence cannot accommodate seventeen overnight guests.... [I]t seems unlikely that adequate on-site parking can be provided.

The Zoning Board of Appeals held a hearing on November 17, 2005 on Bikur Cholim's application. The notice of the hearing stated that Bikur Cholim was appealing the violation notices so as "to permit maintenance and use of a conversion of a single family dwelling to a transient/motel use...." Although between five and forty residents

typically attend Zoning Board meetings, over one hundred people attended the hearing. At the hearing, Dr. Michael Lippe, Director of Emergency Room Services at Good Samaritan Hospital, spoke on behalf of Bikur Cholim, noting some of the issues that arise with observant patients concerning the Sabbath. Bikur Cholim's attorney also spoke. In addition, several community members spoke against the variance application.

The Zoning Board denied Bikur Cholim's application. As reflected in the minutes of the hearing, the Zoning Board found the following: (1) Bikur Cholim had "offered no evidence, financial or otherwise, that the appellant cannot realize a reasonable rate of return as a one-family residence;" (2) Bikur Cholim "failed to demonstrate enforcement of the Code for one-family residences in that zoning district created a unique hardship to his property;" and (3) "the hardship was self-created." The Zoning Board also stated that Bikur Cholim contended that the Shabbos House would not alter the essential character of the neighborhood. In addition, the Board noted at the hearing that:

> [I]t was decided that there was a credibility issue.... There are safety and fire issues. The short form SEQR[9] was not completed. [Applicants] did not demonstrate any of the criteria for a use variance. [The Board] believes a reasonable return could be had, the character of the neighborhood would be affected (safety of the children), and the hardship was self created.

Therefore, the Board voted unanimously to deny the application. In his deposition, Michael Holden, a member of the Zoning Board and defendant's rule 30(b)(6) deponent, disavowed the Zoning Board's reliance on the issues of fire safety, the failure

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[9] A "SEQR" or "SEQRA" is a "Short Environmental Quality Review."

to complete a SEQR, the number of guests at the Shabbos House and the Rockland County GML review.

The Zoning Board later issued a document entitled "Appeal by Fellowship House of Suffern, Inc./Bikur Cholim-Partners In Health." In the document, the Zoning Board made the following findings of fact:

> 1. The appellant does not intend to use the property as a "one-family dwelling unit...."
>
> 2. The appellant offered no financial evidence to indicate that it could not realize a reasonable return on the property as a one-family residence pursuant to the Code....
>
> 3. The appellant did not demonstrate the alleged hardship, namely the enforcement of the Code for this property to remain a one-family dwelling, was unique to this property and did not apply to a substantial portion of the district or neighborhood....
>
> 4. The appellant failed to demonstrate how permitting 14 unrelated overnight guests would not alter the essential character of the neighborhood, which consists primarily of one-family detached dwellings. Based upon the evidence presented, the Board finds there are no other transient uses among the one-family dwellings in the neighborhood.
>
> 5. The appellant acknowledged that the hardship was self-created....
>
> * * *
>
> 7. The use proposed is out of character with other homes in the district.... Given the nature of the proposed use, [the Shabbos House would] ... consequently create a negative impact on traffic in this neighborhood.
>
> 8. ... No evidence was offered as to how occupancy would be limited to 14 people.

9. Although the appellant contends the use is "in furtherance of religious beliefs" that does not make the proposed use a "religious use." It is not a tenet of the religion to visit patients in a hospital or to have a place to walk to after a visit or stay in the hospital. The proposed use would be a convenience to people who wished to do that but the use in and of itself is not for religious purposes.

10. The proposed use is not a place of worship. It is a place for persons of a particular religious faith to lodge overnight.... The proposed use is not for the exercise of their religion but to accommodate persons for lodging purposes while family members are in the hospital.

11. The appellant has failed to establish that enforcement of the Code on this property imposes a substantial burden on its religious exercise, particularly given that the appellant contends the property is still to be used as a "one-family" dwelling that is consistent with the surrounding neighborhood.... Although the application for a variance requests permission for use as a one family residence, the proposed use ... is actually a transient/motel use.

* * *

13. The appellant did not prepare the SEQRA short form EAF and presented no evidence upon which this Board could make a SEQRA determination.

Holden was unable to identify this document or state what it was. He further stated that certain explanations for the denial of the application included in the document were not the actual reasons for the Zoning Board's decision. Specially, he denied that the following were concerns for the Zoning Board: (1) garbage issues; (2) concerns over the number of guests; (3) that Bikur Cholim's use was religious; (4) whether bikur cholim is a tenet of the Jewish religion; (5) the Shabbos House's use as a place of worship; (6) whether guests were from a particular synagogue or affiliated group; and (7) whether

the purpose of the Shabbos House was to allow Jewish people to exercise their religion.

Suffern asserts now that the application was denied because (1) Bikur Cholim has not shown that it could not obtain a reasonable return on its investment; (2) the hardship was self-created; and (3) Bikur Cholim failed to show that the proposed use would not alter the essential character of the neighborhood. Holden testified that he believed that, given the use proposed by Bikur Cholim, any future application would likely be futile. Specifically, he stated that "based on what I know today, the answer would be no, I can't see [Bikur Cholim being granted a variance] there." Certain Zoning Board members testified in their depositions that the Zoning Board could place some restrictions upon the operations of the Shabbos House that would lead to it receiving a variance.

5. Other Applications for Variances in the Village of Suffern

The Zoning Board has granted a use variance to the Knights of Columbus for the construction and use of a private membership club. The building is used as a meeting hall and gathering place for members of the club. The application was submitted prior to the purchase of the property. Holden admitted in his deposition that none of the four factors for giving a variance were addressed in the application. He further stated that because the Knights had yet to purchase the property, he did not believe that it could show that the hardship was not self-created. Despite this, the application was granted.

Nextel Communications, a public utility, applied for a use variance to mount a wireless communication facility atop an existing apartment building. In granting the application, the Zoning Board made no findings relating to the four factors.

The Zoning Board also granted a use variance to John DeNino to convert an office into a space to accommodate a children's party facility. The applicant made no showing related to the four factors.

6. Alternatives to the Shabbos House

There are no hotels or other places of lodging in the Village of Suffern. The nearest such hotel is a Holiday Inn Hotel in Montebello, New York. It is located 1.8 miles from Good Samaritan Hospital. Many of the guests of the Shabbos House, including the elderly, the infirm and nursing mothers, would likely have a difficult time walking between the Hotel and the Hospital. In addition, observant Jews often wear traditional black clothing and cannot carry flashlights or wear reflective tape on the Sabbath. This would make it difficult for motorists to see them at night.

To reach the Holiday Inn from the Hospital, the most direct route is for a pedestrian to walk along Route 59. The parties agree that Route 59 has poorly developed pedestrian facilities and sidewalks and does not meet widely recognized design standards for pedestrians. In addition, areas of the road lack sidewalks, forcing pedestrians to walk on the shoulder.

B. Discussion on Summary Judgment

A motion for summary judgment must be granted if the pleadings, discovery materials before the court and any affidavits show that there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

A dispute regarding a material fact is genuine if there is sufficient evidence that a

reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. Am. Int'l Group, Inc. v. London Am. Int'l Corp., 664 F. 2d 348, 351 (2d Cir. 1981).

If a nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, then summary judgment is appropriate. Celotex Corp., 477 U.S. at 323. If the nonmoving party submits evidence which is "merely colorable," legally sufficient opposition to the motion for summary judgment is not met. Liberty Lobby, 477 U.S. at 24. The mere existence of a scintilla of evidence in support of the nonmoving party's position is insufficient; there must be evidence on which the jury could reasonably find for the party. See Dawson v. County of Westchester, 373 F.3d 265, 272 (2d Cir. 2004).

On summary judgment, the court resolves all ambiguities and draws all permissible factual inferences in favor of the nonmoving party. See Patterson v. County of Oneida, 375 F.3d 206, 218 (2d Cir. 2004). If there is any evidence in the record from which a reasonable inference could be drawn in favor of the opposing party on the issue on which summary judgment is sought, summary judgment is improper. See Security Ins. Co. of Hartford v. Old Dominion Freight Line Inc., 391 F.3d 77, 83 (2d Cir. 2004).

The United States has moved for summary judgment on its claim that the Village of Suffern violated RLUIPA. Defendant's motion is addressed to the RLUIPA claims of all plaintiffs.

The Court will first address defendant's procedural arguments in support of

summary judgment before turning to the substantive issues under RLUIPA covered by both motions.

1. Whether Plaintiffs' Claims are Ripe

Defendant first moves for summary judgment on the grounds that plaintiffs' claims are not yet ripe because (1) Bikur Cholim did not appeal the notice of use violation and (2) Bikur Cholim's application for a use variance was allegedly perfunctory and lacking in necessary evidence. The Court addressed these arguments above and, now with the benefit of a full record, adheres to its previous holding.

Private plaintiffs' case is a challenge to the Zoning Board's denial of Bikur Cholim's application for a use variance, not an appeal of the violation notice issued by Loniewski. In addition, Bikur Cholim applied for a use variance as a means of defending against the violation notice. Defendant's argument that private plaintiffs' claims are not yet ripe because of the lack of appeal of the violation is therefore misplaced.

RLUIPA does not excuse a landowner from local land use regulations. See 146 Cong. Rec. S7774, 7776 (2000) (statement of Sens. Hatch & Kennedy) ("This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay."). In Murphy, the Second Circuit Court of Appeals confirmed that local land use procedures are applicable to land to be used for a religious purpose. In that case, the Court of Appeals vacated the decision of the district court and instructed that the case be dismissed for plaintiffs' failure to appeal their land

use violation to the local zoning board of appeals. See Murphy, 402 F.3d 342.

Even if Bikur Cholim had appealed the violation to the Zoning Board, the Court finds that such an appeal would have been futile. The Zoning Board denied the variance, finding that the Shabbos House did not meet the criteria for a use variance in an R-10 zone. On what basis could Bikur Cholim have successfully appealed the violation notice; how could it have raised different issues than the variance application did? Defendant's argument that such an appeal would have had any likelihood of success is misplaced considering the denial of the variance.

The concerns of the Court of Appeals in Murphy about the development of a full record of the facts and standards underlying the operations of the Shabbos House and the relevant zoning provisions are mitigated in this case by the Zoning Board's decision on the variance application. See Murphy, 402 F.3d at 352 ("[B]efore the Zoning Board of Appeals the Murphys would have had the opportunity to challenge and develop a record on the standards (or lack thereof) underlying New Milford's determination.... In addition, the availability of alternative restrictions ... may have been explored."). In this case, plaintiffs' injuries are not ill-defined as they were in Murphy. The Zoning Board addressed the merits of Bikur Cholim's use, albeit in a different context than an appeal, as distinguished from Murphy where the zoning board did not address the cease and desist order.

Similarly, the Court cannot find that Bikur Cholim's application was perfunctory and not reviewed. Although the Zoning Board's decision referred to Bikur Cholim's failure to proffer evidence to meet the four criteria under section 266-54(D)(3)(a) of the Zoning Law, the minutes of the Zoning Board hearing indicate that these issues were

addressed. In addition, the Zoning Board previously had granted variances without a full discussion of the four criteria. In light of this, the Court believes that Bikur Cholim made a strategic decision to address the strong points of its application and ignore the weaknesses. The application was denied on its merits despite Bikur Cholim's presentation. While defendant contends Bikur Cholim's application may have been weak, there is no reason to believe that it was not a sincere and forthright application. Therefore, the Court finds that plaintiffs' claims are ripe for review.

2. Whether the United States Has Failed to Name and Serve a Necessary Party

Defendant next argues that the United States has failed to name and serve a necessary party. Specifically, defendant contends that because, under New York law, only a zoning board of appeals, and not the town or village, has the authority to grant or deny a variance, the United States' failure to name the Zoning Board as a defendant means that this case is jurisdictionally deficient and must be dismissed. This argument is limited to the United States' complaint as the heading of point II of defendant's memorandum of law in support of summary judgment is entitled: "The Government Failed to Name and Serve a Necessary Party." Further, defendant did not address private plaintiffs' action in this section of its memorandum of law.

The United States' complaint seeks (1) a declaration that the denial of the variance violated RLUIPA and (2) an injunction enjoining the Village of Suffern from applying Suffern's zoning laws that would substantially burden individuals' religious exercise related to Bikur Cholim or in a matter that would violate RLUIPA. Private plaintiffs' amended complaint seeks similar relief. They also seek relief under Article 78

of the New York Civil Procedure Law and Rules, which, if successful, would have the Court overturn the denial of the variance. Only private plaintiffs' complaint seeks a variance.

Under New York law, the authority to grant variances lies exclusively with the local zoning board of appeals, which enforces the zoning scheme created by the local legislature. Commco, Inc. v. Amelkin, 62 N.Y.2d 260, 267 (1984); N.Y. Town Law § 267. A zoning board is a distinct and separate legal entity whose members serve pursuant to the authority granted by the New York law. Commco, 62 N.Y.2d at 266-67; Town Law § 267.

In addressing Article 78 proceedings, courts have been very mindful that the town or village is not the proper defendant or respondent. See, e.g., Commco, 62 N.Y.2d at 265-66; Emmett v. Town of Edmeston, 3 A.D.3d 816, 819 (3d Dep't), aff'd, 2 N.Y.3d 817 (2004). On the other hand, where a plaintiff seeks to enjoin enforcement of a zoning decision, courts have upheld the naming of only the town as defendant and not the appropriate zoning board. See, e.g., Leblanc-Sternberg v. Fletcher, 104 F.3d 355, 1996 U.S. App. LEXIS 31800 (2d Cir. Dec. 6, 1996) (affirming injunction enjoining village from denying equal protection of laws by enforcing its zoning code and requiring village to revise zoning code; zoning board was not named as defendant); cf. Congregation Mischknois Lavier Yakov, Inc. v. Bd. of Trs. for Vill. of Airmont, 301 Fed. Appx. 14, 15 (2d Cir. 2008) (affirming judgment of district court where court "so ordered" stipulation between plaintiffs and village that would allow plaintiffs to construct a

residential school and local zoning board was not a party to action).[10]

This Court thus concludes that it has the power and authority, if appropriate, to enjoin defendant from enforcing its Zoning Law and requiring it to revise the Zoning Law to comply with RLUIPA and relevant constitutional provisions pursuant to the allegations of the United States' complaint. "[T]he power of the federal courts to remedy constitutional violations is broad and flexible." Leblanc-Sternberg, 1996 U.S. App. LEXIS 31800, *6. An exercise of such power in this case is permissible.

Because defendant did not move for summary judgment against private plaintiffs' amended complaint on the basis of their failure to name the Zoning Board as a defendant, the Court will not making any rulings on the sufficiency of private plaintiffs' complaint and the availability of the requested relief. The Court, however, questions whether it has the authority to issue relief under Article 78 without the Zoning Board being named as a defendant. The Court will reserve judgment on this issue until such time as it raised, on a motion, by the parties.

3. Claims Under RLUIPA

Defendant moved for summary judgment on private plaintiffs' and the United States' RLUIPA claims, arguing that plaintiffs have failed to establish that Bikur Cholim's use of the property is a "religious exercise," and that, even if it was a religious exercise, plaintiffs have failed to show that it was substantially burdened by the denial of the variance. In support of its motion for summary judgment, the United States

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[10] The Court also notes that in Westchester Day Sch., it ordered the local zoning board to issue a special permit for construction. In that case, the zoning board was named as a defendant, as was the village itself. See Westchester Day Sch. v. Vill. of Mamaroneck, 417 F. Supp. 2d 477, 572 (S.D.N.Y. 2006).

contends that defendant has failed to demonstrate that it has a compelling interest and used the least restrictive means to further that interest in denying the variance and enforcing its zoning law. Each party further asserts that it has met its burden of persuasion as to the various elements required under RLUIPA.

As discussed above, RLUIPA requires that a municipality's land use regulations be structured and applied in a manner that does not impose a "substantial burden on the religious exercise of a person ... or institution, unless the government demonstrates that imposition of the burden on that person ... or institution is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1). To demonstrate a claim under RLUIPA, plaintiffs must show that the land use regulation (1) imposes a substantial burden (2) on the "religious exercise" (3) of a person, institution, or assembly. 42 U.S.C. § 2000cc(a)(1); Westchester Day Sch. II, 379 F. Supp. 2d at 555. Even if it substantially burdens religious exercise, a land use provision does not violate RLUIPA when it furthers a compelling state interest and does so using the least restrictive means. Defendant bears the burden of proof on this issue.

a. Religious Exercise Analysis

RLUIPA requires plaintiffs to prove that bikur cholim is a "religious exercise" under the law. RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). "The use, building, or conversion of real property for the purpose of religious exercise shall be considered ... religious exercise." 42 U.S.C. § 2000cc-5(7)(B). "Religious exercise" under RLUIPA is to be defined broadly and "to the

maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g); Westchester Day Sch. III, 504 F.3d at 347.

"Religious exercise" as used in RLUIPA "covers most any activity that is tied to a religious group's mission." Living Water Church of God v. Charter Twp. Meridian, 258 Fed. Appx. 729, 736 (6th Cir. 2007). Plaintiffs must show that the activity is a "sincere exercise of religion" even if the activity is not compelled by the religion. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 663 (10th Cir. 2006). Not every activity carried out by a religious institution, however, is a "religious exercise." 146 Cong. Rec. S7774, S7776 (2000) (noting that when religious institutions use property in ways comparable to secular institutions, such activity may not necessarily constitute "religious exercise").

The law "bars inquiry into whether a particular belief or practice is 'central' to [an individual's] religion." Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005) (inmate's RLUIPA action). In addition, the Court may not judge the merits of various religious practices. As the Second Circuit Court of Appeals has stated:

> Because the free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires, courts are not permitted to inquire into the centrality of a professed belief to the adherent's religion or to question its validity in determining whether a religious practice exists. As such, religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. An individual claiming violation of free exercise rights need only demonstrate that the beliefs professed are sincerely held and in the individual's own scheme of things, religious.

Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570, 574 (2d Cir. 2002).

In light of this, the evidence clearly demonstrates that Rabbi Lauber is motivated

by the religious obligation of bikur cholim. He testified that he believes it is his religious duty to help the sick and their family. Running the Shabbos House is his exercise of this duty. Whether the Shabbos House is an absolute obligation – that is, whether it is secondary to any other religious precepts – does not affect its status as a "religious exercise" under the law.[11]

The conclusion as to the individual plaintiffs is not as clear. On the one hand, they testified that they used the Shabbos House to fulfill the obligation of bikur cholim in visiting their family members at Good Samaritan Hospital. On the other hand, a reasonable jury may find that it is not a religious motivation, but a familial motivation that encourages them to visit their family members. In other words, many children with sick parents or spouses with sick partners visit their loved ones in hospitals for non-religious reasons.

Fifth Ave. Presbyterian Church, however, answers this question. There, a church argued that it had a free exercise right to use several outdoor staircases on its property for homeless persons to sleep. Almost two years later, New York City informed the church that the city would no longer allow the homeless to sleep on the stairs and proceeded to remove the homeless from the church's stairs. The city argued that the homeless were a public nuisance. After the Court issued a preliminary

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[11] The Court does not agree with defendant that the importance of the religious obligation is affected by Rabbi Lauber's receipt of a salary for his actions. There is no reason for the Court to discount Rabbi Lauber's testimony that he administers the Shabbos House out of a religious obligation and not a financial desire. In addition, defendant cites no case to suggest that these are mutually exclusive motivations or that the presence of a financial interest defeats a religious motive in determining whether an activity is a religious exercise.

injunction allowing the church to operate a de facto homeless shelter on its stairs, but not on its property adjacent to the public sidewalk, the city appealed. The Court of Appeals for the Second Circuit upheld the preliminary injunction, finding that when the church allowed homeless people to sleep on its stairs, that constituted a religious exercise under the First Amendment. Fifth Ave. Presbyterian Church, 293 F.3d 570.

The church's program can be seen from two perspectives. The first is as a religiously-motivated program for the welfare of the community. The second is as a secular program aimed at improving the community. In finding the church's activities to be religiously motivated, the Court of Appeals implied that even if a religious exercise has a corresponding secular purpose that may be otherwise met by secular organizations, that exercise may still constitute a religious exercise to the religious institution. See also Grace United Methodist Church, 451 F.3d at 662-63 (observing that activity need not be mandatory to be a "religious exercise").

So too here. While individual plaintiffs' actions may be partly motivated by their obligations as family members, their testimony that they are also obligated by the tenets of their faith and the Court's reluctance to question those feelings leads the Court to conclude that the obligation to engage in bikur cholim is a religious activity. This activity, however, means taking care of the sick. In this case, it is visiting them at the hospital.

b. Substantial Burden Analysis

The phrase "substantial burden" is a term of art in Supreme Court jurisprudence, defined previously in numerous cases on the Free Exercise Clause. See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988); Hobbie v.

Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981); Sherbert v. Verner, 374 U.S. 398, 404 (1963). In enacting RLUIPA, Congress did not intend to depart from the traditional definition provided by previous cases. Indeed, RLUIPA's legislative history indicates that Congress meant for the term "substantial burden" to be interpreted "by reference to Supreme Court jurisprudence." 146 Cong. Rec. S7774, S7776 (2000).

In general Supreme Court jurisprudence, a substantial burden exists when an individual is forced to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion ... on the other hand." Sherbert, 374 U.S. at 404. In the context of land use regulations, however, the Court of Appeals has defined a substantial burden as where "government action ... directly coerces the religious institution to change its behavior." Westchester Day Sch. III, 504 F.3d at 349; see also Vision Church v. Vill. of Long Grove, 468 F.3d 975, 997 (7th Cir. 2006) ("[A] land use regulation imposes a 'substantial burden' on religious exercise if it necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impracticable."); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004) ("[A] 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."); San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004) ("[F]or a land use regulation to impose a 'substantial burden,' it must be oppressive to a significantly great

extent.").

If the denial of an application for a variance has a minimal impact on the institution's religious exercise, the denial is not a substantial burden. Westchester Day Sch. III, 504 F.3d at 349. But a complete denial of the enjoyment of the property is not required to show a substantial burden. Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 900 (7th Cir. 2005). Where an organization has no realistic alternatives to its desired use, a temporary or incomplete denial may constitute a substantial burden. Westchester Day Sch. III, 504 F.3d at 349.

It would be inappropriate to look only at the effects of a denial to determine whether there is a substantial burden. As the Supreme Court has cautioned, "[t]he freedom asserted by [some may] bring them into collision with [the] rights asserted by" others and that "[i]t is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin." Braunfeld v. Brown, 366 U.S. 599, 604 (1961). Therefore, generally applicable regulations, imposed a neutral manner, are not substantial burdens. Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 389-91 (1990).

Private plaintiffs testified that the commandment of bikur cholim could become secondary to the observation of the Sabbath where bikur cholim is made impractical by distance or weather. Furthermore, Rabbi Lauber testified that the religious obligation of bikur cholim depends on the conditions, distance and safety concerns.

This case is not about visiting family members at the hospital. It is about whether the enforcement of a zoning code against a communal home operated to accommodate certain individuals' religious practices constitutes a substantial burden on

religious exercise. The cases presented by the parties are inapposite to this point. The Court is not addressing the expansion of a religious school or the placement of a church or synagogue. Instead, the Court is analyzing a house maintained to allow individuals to exercise their religion conveniently.

The Court questions whether the denial of a variance and the absence of the Shabbos House substantially burdens the observance of bikur cholim if the weather can equally interfere with its observance and prevent the practice of bikur cholim. No doubt, a religious practice that is aspirational may be substantially burdened. Further, the Court recognizes that it is outside its province to question Jewish law and private plaintiffs' religious beliefs. Given that (1) the commandments are to visit the sick and to observe the Sabbath, (2) the commandment to visit the sick may take a back seat to the observance of the Sabbath and (3) this case concerns accommodations to observe those commandments, it is a question for the factfinder as to whether private plaintiffs' religious observance is substantially burdened. Summary judgment will be denied as to the individual plaintiffs as the Court cannot conclude that this is a substantial burden. See Bey v. Douglas County Corr. Facility, 2008 U.S. Dist. LEXIS 54703, *10 (D. Kan. July 15, 2008) (whether an action is a "substantial burden" is a question of fact for jury; RLUIPA prisoner case).

Because the Court finds that there is a question of fact as to whether private plaintiffs' religious exercise was substantially burdened, it will not address the significance of the Holiday Inn and how its presence affects the substantial burden analysis.

c. Compelling State Interest

The United States argues that the Village lacks a compelling interest in enforcing its Zoning Code so as to bar the Shabbos House. In response, defendant argues that it has a compelling interest in upholding its zoning laws and the neighborhood characteristics that are at the heart of the zoning laws.

A compelling interest is an "interest[ ] of the highest order." Westchester Day Sch. III, 504 F.3d at 353. As the Supreme Court stated in the context of free exercise claims, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." Sherbert, 374 U.S. at 406.

While upholding zoning laws may be considered a compelling interest, the Village must demonstrate that the enforcement in those zoning laws is compelling in this particular instance, not in the general scheme of things. See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 432 (2006) ("Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general characteristics of Schedule I substances ... cannot carry the day.... [T]here is no indication that Congress ... considered the harms posed by the particular use at issue here....").

Bikur Cholim's variance application was denied, on its merits, because the Zoning Board was not satisfied that the use of Shabbos House would fit into community of single-family homes. Specifically, the Zoning Board found that the Shabbos House would affect the character of the neighborhood and endanger neighborhood children. According to the Zoning Law, the burden of demonstrating a right to a variance lies with the applicant.

The Court will not take a position on whether there was substantial evidence to support this conclusion. Nor will the Court comment on whether these concerns are compelling. Instead, the Court finds that there are disputed issues of material fact precluding it from granting summary judgment on this issue. Therefore, the Court will address whether the denial of the variance was the least restrictive means of furthering the interest.

d. Least Restrictive Means

Under the least restrictive means test, the Village must show that there are "no alternative forms of regulation" that would further the compelling interest. Sherbert, 374 U.S. at 407. Further, "if a less restrictive means is available for the Government to achieve its goals, the Government must use it." United States v. Playboy Entm't Group, 529 U.S. 803, 815 (2000). The village must prove that any "plausible, less restrictive alternative would be ineffective" in achieving its goals. Id. at 816.

In Westchester Day Sch. III, the Court of Appeals affirmed the district court's finding that the zoning board's complete denial of a construction permit when it had the authority to authorize the permit with conditions was not the least restrictive means of further the village's interest. Westchester Day Sch. III, 504 F.3d at 353.

Here, the members of the Zoning Board testified, as did Holden on behalf of the Village, that they could have granted the use variance subject to various restrictions. Therefore, because a reasonable factfinder could find that there are less restrictive alternatives to further the Village's interests, the Court will deny summary judgment on this issue.

e. Whether the Zoning Law was Neutrally Applied

Courts have previously held that a neutrally-applicable zoning law cannot pose a substantial burden under RLUIPA. See, e.g., Midrash Sephardi, 366 F.3d at 1227-28 & n.11; Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 763 (7th Cir. 2003) ("[N]o Free Exercise Clause violation results where a burden on religious exercise is the incidental effect of a neutral, generally applicable, and otherwise valid regulation, in which case such regulation need not be justified by a compelling governmental interest."). In this case, there are questions of fact as to whether defendant applied its Zoning Law in a neutral, general manner given the grants by the Zoning Board of variances to the Knights of Columbus, Nextel Communications and John DeNino. While these situations may be distinguishable, they are significantly similar to Bikur Cholim's as to present a question for the factfinder.

4. Private Plaintiffs' Other Claims

Private plaintiffs also assert claims under the equal terms and discriminations provisions of RLUIPA. See 42 U.S.C. §§ 2000cc(b)(1), (2). Defendant did not raise or address these issues in its motion for summary judgment. In addition, these claims have different elements than a claim under 42 U.S.C. § 2000cc(a). See, e.g., Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 261-69 (3d Cir. 2007). The Court has not reviewed the merits of such claims on summary judgment but finds that there are disputes issues of fact as to these other claims. Therefore, these claims will be left for trial.

III. Motion to Strike

Private plaintiffs have filed a motion (Doc. #151) to strike the affidavit of Robert Magrino, the Assistant Village Attorney of the Village of Suffern, or, in the alternative, for permission to depose Magrino. Magrino's affidavit was offered in support of defendant's motion for summary judgment. The Court is inclined to grant private plaintiffs' motion and allow them to depose Magrino. But because the Court will deny defendant's motion for summary judgment, the Court will instead deny private plaintiffs' motion to strike as moot.[12]

IV. Motions for Preliminary Injunction

Plaintiffs and defendant have together filed three motions for preliminary injunctions. Plaintiffs' motions seek the maintenance of the status quo with the Shabbos House operating, while defendant's motion seeks a preliminary injunction against the operations of the House. The parties have represented to the Court and defendant has stated in its memorandum of law in support of its motion for summary judgment that the parties have consented to the maintenance of the status quo during the pendency of these proceedings. The Court applauds the parties for agreeing to this freeze of proceedings.

In light of this informal stay, the Court will not rule on the motions for preliminary injunction, but will instead take them under advisement through trial. Counsel should contact the Court if circumstances change that would require the Court to act upon these motions.

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[12] This conclusion is without prejudice to plaintiffs filing motions in limine as to Magrino's testimony prior to trial, as appropriate, or deposing Magrino prior to trial.

V. Summary

To summarize the Court's ruling, private plaintiffs' claim for a violation of the Fourteenth Amendment Equal Protection Clause will be dismissed under rule 12(b)(6). As to plaintiffs' RLUIPA claims, the Court concluded that Rabbi Lauber's administration of the Shabbos House and private plaintiffs' utilizing the Shabbos House constitute "religious exercise" under RLUIPA. As to all other elements of the RLUIPA claims, these remain for the factfinder.

Further, the Court will deny the motion to strike as moot in light of the fact that Magrino's testimony would not have affected the Court's decision or analysis. Even if Magrino had testified to improprieties in the Zoning Board's decision making, this would not have helped plaintiffs' show a substantial burden on a religious exercise or a lack of a compelling interest. Magrino's testimony could only have bolstered defendant's arguments, which the Court found was insufficient to warrant summary judgment.

The motions for preliminary injunctions will remain pending before the Court through trial.

CONCLUSION

For the foregoing reasons, the Court GRANTS defendant's motion to dismiss private plaintiffs' complaint (Doc. #23) only as to the equal protection claim; DENIES defendant's motion to dismiss against the United States (7:06-cv-7713, Doc. #3; Doc. #88); DENIES the parties' motions for summary judgment (Docs. #133, 142) except as to plaintiffs' claims that the Shabbos House constitutes "religious exercise;" and DENIES as moot private plaintiffs' motion to strike (Doc. #151). The Court takes no action on the motions for preliminary injunctions.

Dated at White Plains, New York, this 24 TH day of June, 2009.

Warren W. Eginton
Senior United States District Judge