UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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WG WOODMERE LLC; SG BARICK LLC; and LH BARICK LLC,

Plaintiffs,

-against-

INC. VILLAGE OF LAWRENCE OF HEMPSTEAD; THE INCORPORATED VILLAGE OF WOODSBURGH; and THE INCORPORATED VILLAGE OF LAWRENCE,

Defendants.

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Docket No: 20-cv-3903 (SJF)(AYS)

DEFENDANT VILLAGE OF LAWRENCE'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON DEFENDANTS' MOTIONS TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PRELIMINARY STATEMENT[1]

Six months *after* the Town of Hempstead announced it was considering comprehensive zoning amendments to limit residential development of golf course properties in the Town (including within the Village of Lawrence), Plaintiffs purchased a golf course property in the Town for planned residential development ("Property"). Following a thorough and community-oriented environmental review of their vulnerable, low-lying coastal areas, the Town and two of its incorporated villages—Lawrence and Woodsburgh—enacted the "Coastal Conservation District – Woodmere Club" ("CCD Zoning"). This new district was carefully designed "to regulate development in the environmentally sensitive coastal areas that span the municipal boundaries of the [three municipalities], including the area occupied by [Plaintiffs' property], allowing for the enhanced preservation and protection of the [municipalities'] environmental, coastal, open space, natural and cultural resources and the preservation of the residential neighborhoods."

Now, with this foreseeable zoning amendment in place, and having *never submitted any application* to any municipal defendant, Plaintiffs prematurely and baselessly ask this Court for relief from the new zoning. But unless and until Plaintiffs submit—and the Village denies—approval under and/or a variance from the new zoning, Plaintiffs' federal challenges to the law are not ripe for judicial review. And Plaintiffs' federal and state law claims all fail as a matter of law.

In recommending that the Court deny the Village's motion in part, the Magistrate Judge erred in several critical respects. The Magistrate Judge, among other errors:

- Misapplied *Pakdel v. City and County of San Francisco* and ignored years of deeply

[1] For a complete recitation of facts, the Village of Lawrence respectfully refers the Court to defendants' Joint Statement of Facts. Save for one claim (the Sixth Cause of Action), Plaintiffs assert the same claims against each municipal defendant. Accordingly, for the sake of judicial economy and to conserve resources, the Village incorporates all arguments by the Hempstead and Woodsburgh defendants as though fully submitted herein.

rooted Supreme Court and 2nd Circuit precedent which holds that, to ripen a land use claim, a plaintiff must make *at least one* meaningful application for relief, which Plaintiffs have not done;

- Misapplied the precedent for "class of one" equal protection claims, which requires a plaintiff to plausibly allege comparators that were similarly situated "in all material respects" and a lack of a rational basis as to the enactment of the CCD Zoning;
- Misconstrued the interpretation of a per se taking and the *Penn Central* test;
- Misapplied state law on "vested rights" to find Plaintiffs had a cognizable property interest in approvals under the prior zoning, even though Plaintiffs had never even applied to the municipalities for such approvals, much less expended substantial resources or completed substantial construction;
- Misapplied the strict "shocks the conscience" test for a substantive due process claim to find Plaintiffs plausibly alleged the claim;
- Erroneously found the Village plausibly pled a procedural due process claim even though the Village did not owe Plaintiffs any hearing and did not deprive them of process; and
- Erroneously found plausible the claim that the CCD Zoning was not a valid exercise of the Village's zoning.

Every one of the R&R's recommendations, except as to the seventh cause of action, is flawed and should be overruled as a matter of law. This Court, exercising its power of *de novo* review, should grant Defendants' motion in its entirety.

ARGUMENT

I. MAGISTRATE JUDGE ERRED IN FINDING PLAINTIFFS' FEDERAL CLAIMS ARE RIPE FOR ADJUDICATION—THEY ARE NOT AND MUST BE DISMISSED

The Magistrate Judge ignored years of Supreme Court and Second Circuit precedent and misapplied the Supreme Court's recent decision in *Pakdel v. City and County of San Francisco*, 141 S.Ct. 2226 (2021), to find that Plaintiff's federal land use claims are ripe for adjudication. Because Plaintiffs have never made even one application to the Village for land use approval and have not received a final decision, their federal takings, equal protection, and due process claims are all unripe and must be dismissed for lack of subject matter jurisdiction.

It is axiomatic that a land use applicant must make and obtain a final decision on at least one meaningful application before its land use claims can be ripe such that a federal court has jurisdiction to hear them. In *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172 (1985), the Supreme Court required the land developer to obtain a final, definitive position as to the application of the relevant zoning laws to the property from the municipal entity responsible for those laws. *Id.* at 186. Under *Williamson County*, the plaintiff cannot seek federal court review of a zoning ordinance or provision until it has submitted *at least one meaningful application for a variance*. *Id.* at 190; *see also Murphy v. New Milford Zoning Comm'n,* 402 F.3d 342, 348 (2d Cir. 2005) (same).

Less than a month ago, in *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, No. 20-CV-6158 (KMK), 2021 WL 4392489, at *6 (S.D.N.Y. Sept. 24, 2021), the Hon. Kenneth M. Karas, USDJ, dismissed a challenge to a zoning law by a plaintiff who—like the Plaintiffs here—never submitted an application that implicated the law. Judge Karas summarized several decades of Second Circuit ripeness law this way:

"A final decision exists when a development plan has been submitted, considered

and rejected by the governmental entity with the power to implement zoning regulations." *S&R Dev. Estates, LLC v. Bass*, 588 F. Supp. 2d 452, 461 (S.D.N.Y. 2008); *see also Ecogen, LLC v. Town of Italy*, 438 F. Supp. 2d 149, 155 (W.D.N.Y. 2006) (holding that the final decision rule generally requires "that the plaintiff ... have submitted at least one application for, and been denied, permission for the proposed structure or use of the subject property"); *Goldfine v. Kelly*, 80 F. Supp. 2d 153, 159 (S.D.N.Y. 2000) ("In order to have a final decision, a 'development plan must be submitted, considered, and rejected by the governmental entity.' " (quoting *Unity Ventures v. County of Lake*, 841 F.2d 770, 774 (7th Cir. 1988))); *accord Church of St. Paul & St. Andrew v. Barwick*, 496 N.E.2d 183, 190 (N.Y. 1986) (holding that decision was not final "until plaintiff has sought and the Commission has granted or denied a certificate of appropriateness or other approval ...." (citation omitted)); *Waterways Dev. Corp. v. Lavalle*, 813 N.Y.S.2d 485, 486 (App. Div. 2006) (holding that case was not ripe, because "[t]he plaintiff ha[d] not applied for a building permit for the residential units involving the variance at issue" and "[t]herefore, there [had] been no final determination as to the validity thereof"). Furthermore, generally, even if a plan has been submitted and rejected, a claim is not ripe until the "property owner submit[s] at least one meaningful application for a variance." *Murphy*, 402 F.3d at 348; *see also id.* at 353 ("[F]ailure to pursue a variance prevents a federal challenge to a local land use decision from becoming ripe." (citing *Williamson County*, 473 U.S. at 190)); *Bikur Cholim, Inc. v. Village of Suffern*, 664 F. Supp. 2d 267, 275 (S.D.N.Y. 2009) ("In general, ... failure to seek a variance prevents a zoning decision from becoming ripe."); *S&R Dev. Estates*, 588 F. Supp. 2d at 461–64 (dismissing claims on ripeness grounds, where the plaintiff had not applied for a variance); *Goldfine*, 80 F. Supp. 2d at 159 (same); *Korcz v. Elhage*, 767 N.Y.S.2d 737, 738–39 (App. Div. 2003) (same); *Dick's Quarry, Inc. v. Town of Warwick*, 739 N.Y.S.2d 464, 464–65 (App. Div. 2002) (same). In the end, "[a] case is ripe when the court 'can look to a final, definitive position from a local authority to assess precisely how [a property owner] can use [his or her] property.'" *Bikur Cholim*, 664 F. Supp. 2d at 275 (quoting *Murphy*, 402 F.3d at 347). And because "[r]ipeness is a jurisdictional inquiry," it is Plaintiffs' burden to establish that a final decision has been rendered. *Murphy*, 402 F.3d at 347. Thus, the Court "presume[s] that [it] cannot entertain [Plaintiffs'] claims 'unless the contrary appears affirmatively from the record.'" *Id*. (quoting *Renne v. Geary*, 501 U.S. 312, 316 (1991)).

The R&R ignores these decades of both binding and persuasive precedent under the apparent theory that recent Supreme Court decisions have loosened *Williamson County*'s finality requirement. But that is not the case—recent Supreme Court decisions make clear that *Williamson County*'s ripeness "one meaningful application" requirement is still very much the law.

In *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019), the Supreme Court overturned *Williamson*'s "first prong" requirement that a developer "seek compensation through the procedures the State has provided for doing so" before bringing a taking claim. However, *Knick* explicitly left undisturbed *Williamson County*'s "second prong" final decision requirement. *See id*. at 2169 ("*Knick* does not question the validity of this finality requirement, which is not at issue here."); *see also Sagaponack Realty, LLC v. Village of Sagaponack*, 778 F. App'x 63, 64 (2d Cir. 2019) (summary order) ("*Knick* leaves undisturbed the [requirement] that a state regulatory agency must render a final decision on a matter before a taking claim can proceed.").

The Supreme Court's recent decision in *Pakdel* similarly did not question the "one meaningful application" and "final decision" requirement—it simply applied the requirement to the facts of that case. In *Pakdel*—unlike here—plaintiffs *made* an application to the municipality for relief from the land use regulations in question, and their application was denied. The *Pakdel* Court, thus, never questioned whether plaintiffs must make *"at least one meaningful application."* The only question was whether plaintiffs were required to pursue further administrative relief from the initial decision. The Court held that, in denying plaintiffs' one application, the municipality had made its position clear, and no further applications were required. *Pakdel* called finality a "relatively modest" showing, but it never suggested it was so "modest" as to require no application all. The Magistrate Judge, thus, extended *Pakdel* well beyond its holding.

After *Pakdel*, the "relatively modest" requirement still requires—as courts have since *Williamson County*—that there be "no question about how the regulations at issue apply to the particular land in question." *Pakdel*, 141 S.Ct. at 2230. And *Pakdel* reiterates that, even after making one meaningful application as the *Pakdel* plaintiffs did, "[a] plaintiff's failure to properly pursue administrative procedures may render a claim unripe if avenues still remain for the

government to clarify or change its decision." *Pakdel*, 141 S.Ct. at 2231. Here, there is no question such avenues still remain through the Village's regular subdivision, site plan, and variance processes. The municipalities' planning boards and zoning boards of appeal have broad discretion to consider applications and grant variances.

The Magistrate Judge's finding of finality is based on one mistaken assumption: that because the CCD Zoning applies only to Plaintiff's property, there is no question how the zoning regulations would apply. R&R 26. But this can be said for *any* set of zoning regulations. If a piece of property is in a particular regulatory zone, there is no question which regulations apply to that property. But the fact that those regulations apply to the property does not mean we know *how* they will be applied to a particular proposal. For a complete and ripe record, a federal court must have both an application, and a decision for how regulations will apply to that particular application. Here, we have no application and no decision at all. If the courts adopted the Magistrate Judge's reasoning, the finality requirement would cease to exist in zoning cases—any developer could avoid it simply by arguing it is clear which regulations apply to their parcel.

The Magistrate Judge's reasoning finds no support in precedent. Neither the R&R nor any of Plaintiffs' papers have ever cited a case where—absent a showing a futility—a developer who has never made *any* application to a municipality was excused from "final decision" requirement.

As Judge Karas recently highlighted in *Tartikov,* 2021 WL 4392489, the overwhelming weight of precedent in this circuit demands at least one meaningful application and a final decision:

> *BT Holdings, LLC v. Vil. of Chester*, 15-CV-1986, 2016 WL 796866, at *4 (S.D.N.Y. Feb. 23, 2016), *aff'd*, 670 F. App'x. 17 (2d Cir. 2016) (quotation marks omitted); *Islamic Cmty. Ctr. for Mid Westchester v. City of Yonkers Landmark Pres. Bd.*, 742 F. App'x 521, 525 (2d Cir. 2018) (summary order) ("The final-decision rule is designed to aid courts in understanding exactly how a litigant is being harmed by a land use designation, and to prevent litigants from rushing into federal courts when the harm could be avoided through a local process."); *Sunrise Detox*, 769 F.3d at

123 ("[A] plaintiff alleging discrimination in the context of a land-use dispute is subject to the final-decision requirement unless he can show that he suffered some injury independent of the challenged land-use decision."); *Murphy*, 402 F.3d at 348 (noting that the final-decision requirement in a land-use context "conditions federal review on a property owner submitting at least one meaningful application for a variance."); *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002) ("The ripeness requirement prevents a federal court from entangling itself in abstract disagreements over the matters that are premature for review because the injury is merely speculative and may never occur, depending on the final administrative resolution."); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 95–99 (2d Cir. 1992) (noting that a federal court may review a land use decision by a municipal agency only if that agency has reached a "final decision"); *Osborne v. Fernandez*, No. 06-CV-4127, 2009 WL 884697, at *5 (S.D.N.Y. Mar. 31, 2009) *aff'd*, 414 F. App'x 350 (2d Cir. 2011) ("In a land use development context, a final decision requires that 'a development plan must be submitted, considered and rejected by the governmental entity. Even when the plaintiff applies for approval of a subdivision plan and is rejected, a claim is not ripe until plaintiff also seeks variances that would allow it to develop the property.' "); *S&R Dev. Estates*, 588 F. Supp. 2d at 461 (explaining that in the land use development context, a final decision requires that a development plan be "submitted, considered and rejected by the governmental entity with the power to implement zoning regulations."); *Goldfine*, 80 F. Supp. 2d at 160 ("Informal efforts to gain approval for land development are insufficient, by themselves, to constitute final government action."); *Tri–State Video Corp. v. Town of Stephentown*, No. 97-CV-965, 1998 WL 72331, at *3 (N.D.N.Y. Feb.13, 1998) ("It is well settled that federal courts should not act as municipal zoning boards of appeal ....").

Here, Plaintiffs have made no application to the Village, and the Village certainly has not reached a final decision regarding the application of any regulation to the subject property. Plaintiffs claim the CCD Zoning places various unconstitutional limitations on the Property, but these allegations are entirely speculative until Plaintiffs actually see the process through by seeking some sort of approval (and, if necessary, a variance). In their rush to the courthouse, Plaintiffs deprived the Court of the benefit of any record—much less a "full record"—of how the zoning law will be applied to the Subject Property. *Murphy*, 402 F.3d at 348. With no final decision to challenge, their federal claims are not ripe.

II. MAGISTRATE JUDGE ERRED IN FINDING PLAINTIFFS STATE A COGNIZABLE EQUAL PROTECTION CLAIM

The Magistrate Judge erred in finding Plaintiffs plausibly pled equal protection claims. Plaintiffs fail to state a "class of one" theory Equal Protection claim—the only theory available where a plaintiff has not alleged membership in a protected class or impermissible motive—because they do not identify "virtually identical" comparators who received better treatment.

A. No Equal Protection or Selective Enforcement Claim for Invidious Discrimination

The Magistrate Judge's first error was in failing to separate a "standard" equal protection claim and a "class of one" claim in its analysis. To state a "standard" equal protection claim, a plaintiff must allege differential treatment based on "membership in a specific protected class." *Massi v. Flynn*, 353 F. App'x 658, 660 (2d Cir. 2009). "A plaintiff … who does not claim to be a member of a constitutionally protected class may bring an Equal Protection claim on one of two theories: selective enforcement or 'class of one.'" *Dellutri v. Vill. of Elmsford*, 895 F. Supp. 2d 555, 572 (S.D.N.Y. 2012) (*citing Cobb v. Pozzi*, 363 F.3d 89, 109–10 (2d Cir.2004).

While the Magistrate Judge acknowledged they are different claims, it did not analyze them separately and did not recognize that the "standard" and "selective enforcement" Equal Protection theories do not apply here. Plaintiffs—three corporate entities (Compl. ¶¶ 46–48)—do not allege membership in any specific protected class. Nor do they allege the "*key issue* in an equal protection claim alleging selective enforcement—impermissible motive." *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 17 (2d Cir. 1999) (emphasis added); *see also LeClair v. Saunders*, 627 F.2d 606, 609–10 (2d Cir. 1980) (selective enforcement claims require, *inter alia*, allegations of disparate treatment "based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.").

The Village's alleged "favorable treatment" of other properties regarding its enforcement

of a noise ordinance (Compl. ¶¶ 296–300) is also insufficient to plausibly allege an impermissible motive. This allegation, even if proven true, would not "demonstrate that the Village … acted with malicious or bad faith intent to injure." *Missere v. Gross*, 826 F. Supp. 2d 542, 565 (S.D.N.Y. 2011) (internal quotation marks omitted.) And Plaintiffs do not explain how it would.

Moreover, to the extent the Magistrate Judge found Plaintiffs stated a claim as to these instances of "favorable treatment," this was also error. Plaintiffs have not pled any such claim with the requisite specificity as to how or when they were treated "less favorably," or by whom. In *Missere*, the court addressed an Equal Protection claim where the plaintiff landowner alleged "favoritism in the enforcement of the Village's zoning code," which he claimed "was enforced as to him but not as to others." *Id*. at 548, 564. In dismissing the claim for failure to allege an improper motive, the Court explained: "None of these allegations if proven true would demonstrate that the Village Defendants acted with 'malicious or bad faith intent to injure' [plaintiff]. The Complaint nowhere alleges any facts that would explain what motive the Village and Mayor might have had for trying to defeat [plaintiff]'s applications or why the ... Village Defendants would have sided with [a comparator] over [plaintiff]." *Id*. at 565. Like the plaintiff in *Missere*, Plaintiffs offer no factual allegations "that would explain" what improper motive the Village allegedly held. Even if their claims of "favorable treatment" were true, this "does not in and of itself plausibly establish anything regarding the [Village]'s intent." *Id*.; *see also 33 Seminary v. City of Binghamton LLC*, 2012 WL 12888394, at *18 (N.D.N.Y 2012) (dismissing selective enforcement claim where "plaintiffs fail to *explain* [defendants'] motive).

While Plaintiffs claim the true motive in enacting the new zoning, without any legitimate legislative purpose, was to prohibit as much development as possible and prevent Plaintiffs from adding any lots for single family homes to the area despite soaring demand, they failed to explain

how such motive, even if true, was discriminatory. Indeed, it is clear the Village acted out of a concern for its environmental resources, not specifically to punish the Plaintiffs.

B. No Similarly Situated Comparators to Support a Class of One Claim

The Magistrate Judge correctly recognized that Plaintiffs must plead the existence of similarly situated others, but did not recognize or apply the high pleading standard of "similarly situated" that applies to a "class of one" claim. R&R 30. And the Magistrate Judge erred in finding Plaintiffs have met their burden of pleading in this regard.

"[C]lass-of-one plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006). The comparators must be "virtually identical" to plaintiffs. *Aliberti v. Town of Brookhaven*, 876 F. Supp. 2d 153, 165 (E.D.N.Y. 2012). "Courts within this Circuit have held that individuals are similarly situated for purposes of selective enforcement claims when they are similarly situated in all material respects." *Wright v. Nypd Officer Michael Manetta*, No. 14-CV-8976 (KBF), 2016 WL 482973, at *3 (S.D.N.Y. Feb. 5, 2016). "[W]here a plaintiff claims to have been treated unfairly in a zoning/building context, he must plead specific examples of applications and hearings that were similar to plaintiff's application and demonstrative of the disparate treatment alleged." *Amid v. Vill. of Old Brookville*, No. CV 11-3800, 2013 WL 527772, at *6 (E.D.N.Y. Feb. 7, 2013).

The Magistrate Judge ignored these fundamental pleading principles, finding instead that whether a comparator is similarly situated is a factual issue for a jury to decide. Plaintiffs have not and cannot allege an "extremely high degree of similarity" between themselves and other properties. The law is clear: Plaintiffs "must *plead* specific" comparators. *Amid*, 2013 WL 527772 at *6 (emphasis added). And while they purport to identify other landowners whose properties were not affected by the new zoning, Plaintiffs make no effort to explain how the alleged

comparators were similarly situated in all material respects, much less "virtually identical," as is required to state a class-of-one theory claim. While they claim the CCD Zoning does not apply to other large tracts of land in the 100 and/or 500-year flood zones, including any of the other golf courses in the Municipalities, Plaintiffs offer no facts to suggest these other "large tracts of land" are "virtually identical" to the Property. Aside from claiming these properties are "located in flood zones," Plaintiffs do not claim they pose any of the same concerns that motivated the Village to enact the CCD Zoning, and Plaintiffs do not allege the owners of any of these comparators are planning a large-scale residential development. In addition to its location well within the Special Flood Hazard Area (100-year floodplain), the Property, *inter alia*: i) is impacted by shallow groundwater conditions; ii) contains "significant natural communities and rare plants and animals" identified by the New York State Department of Environmental Conservation; iii) and has been identified by the New York State Office of Parks, Recreation, and Historic Preservation as a potentially-archeologically sensitive area.

While Plaintiffs allege the Village of Lawrence is "considering" a proposed residential development on a four-acre parcel that lies within the same floodplain as the Property and is near a coastal evacuation route, Plaintiffs do not explain how this 4-acre parcel is in anyway similar to the 118-acre Property or poses similar environmental concerns. Indeed, this allegation presumes the Village is refusing to consider whether to allow Plaintiffs to pursue a residential development, but the Village cannot even consider whether to allow Plaintiffs to pursue a residential development, because Plaintiffs have never submitted any application to the Village.

C. No Lack of Rational Basis for Legislation

The Magistrate Judge also erred in finding Plaintiffs sufficiently alleged a lack of rational basis for the CCD Zoning regulations. The Village easily clears the rational basis bar.

"Courts, including the Second Circuit, have repeatedly cautioned about the danger of

ordinary disputes between a citizen and a municipality—whether it be about land use, licenses, inspections, or some other regulatory or investigative function of local governments—being transformed into federal lawsuits by an incorrect, overexpansive theory of class-of-one liability." *Crippen v. Town of Hempstead*, No. 07-CV-3478 JFB ARL, 2013 WL 1283402, at *7 (E.D.N.Y. Mar. 29, 2013) (*citing Bizzarro v. Miranda*, 394 F.3d 82, 88–89 (2d Cir.2005) ("Olech does not empower federal courts to review government actions for correctness. Rather, an Olech-type equal protection claim focuses on whether the official's conduct was rationally related to the accomplishment of the work of their agency."). "The injury involved in a class-of-one claim is intentional, arbitrary, and irrational discrimination, not a mere difference in outcomes." *Missere*, 826 F. Supp. 2d at 565–66.

Plaintiffs must plausibly plead that legislation fails to be "rationally related to a legitimate state interest." *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). A municipal regulation classification subject to rational basis review "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Connolly v. McCall*, 254 F.3d 36, 42 (2d Cir.2001) (quoting *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637 (1993)).

"Rational basis" is a low bar indeed—a court need only find that "there is any reasonably conceivable state of facts that could provide [a] rational basis" for the decision. *Bd. of Managers of Soho Int'l Arts Condo. v. City of New York,* WL 1982520, at *21 (S.D.N.Y. Sept. 8, 2004). Only when a land use board acts with "no legitimate reason for its decision" can a class-of-one claim proceed. *Harlen Assocs. v. Inc. Vill. of Mineola,* 273 F.3d 494, 500 (2d Cir. 2001). When examining a decision for the existence of a rational basis, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it ... whether or

not the basis has a solid foundation in the record." *Heller,* 509 U.S. at 320–21.

The Magistrate Judge bases its finding on one allegation by Plaintiffs: that the CCD Zoning "is arbitrary, capricious and unreasonably requires Plaintiffs to submit to controls not imposed on similarly situated properties." R&R at 32. But this one purely conclusory claim is hardly sufficient to plausibly show through specific factual allegations—as Plaintiffs must at this stage—that the zoning amendments lack a rational basis. On the contrary, as the Complaint itself makes clear, the Village's adoption of the CCD Zoning was a reasonable exercise of its police power to "regulate development in the environmentally sensitive coastal areas that span the municipal boundaries of the [three municipalities], including the area occupied by [Plaintiffs' property], allowing for the enhanced preservation and protection of the [municipalities'] environmental, coastal, open space, natural and cultural resources and the preservation of the residential neighborhoods." Compl. Ex. G at 2. "There is no dispute that the protection of … tidal wetlands is a legitimate governmental purpose and restrictions regarding the amount of setback from the edge of the wetlands for building are reasonably related to that purpose." *Gazza v. New York State Dep't of Env't. Conservation*, 89 N.Y.2d 603, 616 (1997).

Plaintiff's particular piece of land contains many environmental hazards. The Property is located in the 100-year floodplain, impacted by shallow groundwater conditions, contains significant natural communities and rare plants and animals identified by the New York State Department of Environmental Conservation, and has been identified by the New York State Office of Parks, Recreation, and Historic Preservation as a potentially-archeologically sensitive area. Plaintiffs claim applying a rational basis test will require development of a factual record, but they cannot abdicate their obligation at this juncture to "to negative every conceivable basis which might support it ... whether or not the basis has a solid foundation in the record." *Heller*, 509 U.S.

at 320–21. The low bar of rational basis is easily met.

III. MAGISTRATE JUDGE ERRED IN FINDING PLAINTIFFS STATE A COGNIZABLE TAKINGS CLAIM

Plaintiffs assert two separate Fifth Amendment claims, which they characterize as a takings claim (the Second Cause of Action) and an exaction claim (the Third Cause of Action). Both claims fail as a matter of law, and the Magistrate Judge erred in finding otherwise.

A per se taking can be found where government "appropriates for the enjoyment of third parties the owner's right to exclude." *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2072 (2021). In addition to a per se taking, a Constitutional taking occurs when the government imposes regulation on the use of property that "goes too far." *Id.* at 2071 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922)). To determine whether challenged zoning does, in fact, go too far, Courts apply the flexible test developed in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). This requires the court to consider factually specific issues such as "the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action." *Penn Central*, 438 U.S. at 124.

A. Not a Per Se Taking

The Magistrate Judge erred when it found Plaintiffs have plausibly alleged that a portion of the Property has been taken for public use without compensation. R&R 34. The Magistrate Judge based this finding on the allegation that, under the new zoning, 70% of the Property must be maintained and preserved for public use. *Id*. at 34-35. This is incorrect, factually and legally.

Factually, the Magistrate Judge's ruling is incorrect because the new zoning does *not* require Plaintiffs to maintain 70% of the Property for "public use." As the Magistrate Judge recognized in its R&R, the open space recreation district, which covers 83.3 acres of the Property,

permits Plaintiffs to develop golf clubs or a nine-hole golf course. R&R, pp. 16-17; Compl. ¶ 217-18. These can be private businesses, not open to the general public or available for public use. Plaintiffs admit they have not studied the golf business for "economic feasibility," so they cannot say the operation of such a business, to the exclusion of the public, would not be lucrative.

The R&R is also incorrect because it misconstrues the a per se taking. A per se taking occurs when the government "appropriates for the enjoyment of third parties the owner's right to exclude." *Cedar Point Nursery*, 141 S.Ct. at 2072. Where a plaintiff "is permitted to make an application for relief from the [challenged] Regulations … he cannot argue that the Regulations, on their face, or by their mere enactment, deprive him of the economic use of his property." *Kittay v. Giuliani*, 112 F. Supp. 2d 342, 351 (S.D.N.Y. 2000), *aff'd*, 252 F.3d 645 (2d Cir. 2001).

Here, Plaintiffs' alleged subdivision plans were always subject to the Village's discretionary approval process. Vill. Code § 182-3. Plaintiffs cannot allege the CCD Zoning effects a permanent and unconditional taking, *i.e.*, that it decrees a complete and permanent ban on residential development on the Property. And while Plaintiffs claim "[o]nly a tiny sliver of the Single-Family District is within Lawrence" and "therefore does not allow for the development of any single-family lot [solely] in that village," the Village Code permits Plaintiffs to apply for a variance. As such, Plaintiffs cannot plausibly allege the CCD Zoning constitutes a per se taking.

B. The CCD Zoning Does Not "Go Too Far"

Plaintiffs' *Penn Central* regulatory takings claim is equally specious. The Court in *Penn Central* rejected the exact takings theory Plaintiffs posit here. The Court made clear, "the submission that [a landowner] may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." *Penn Central*, 438 U.S. at 130. Moreover, while the

planning agency in *Penn Central* had denied the plaintiff's application to construct an office building in excess of 50 stories, the Court found plaintiff's failure to apply for construction of a smaller structure—which Plaintiffs here have not done—meant the Court could "not know that appellants will be denied any use of any portion of the airspace above the Terminal." *Id*. at 137.

The R&R misapplies the *Penn Central* test. The Magistrate Judge found Plaintiffs met *Penn Central*'s economic-impact prong simply by alleging that the limited number of lots available for development, along with onerous building requirements, make it economically unfeasible to develop their land. R&R 35. But these allegations fall *far* short of the "economic-impact" bar.

Although a *Penn Central* taking does not require complete elimination of property value, it does require a diminution in value which is "one step short of complete." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992). "Supreme Court decisions suggest that diminutions in value approaching 85 to 90 percent do not necessarily dictate the existence of a taking." *Brace v. U.S.*, 72 Fed. Cl. 337, 357 (2006) (collecting cases), *aff'd*, 250 F. App'x 359 (Fed. Cir. 2007). Supreme Court cases also "have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602, 645 (1993). Courts examine "not lost profits but the lost value of the taken property." *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1268 (Fed. Cir. 2009) ("When the Supreme Court has assessed the economic impact of a regulatory taking, it has talked almost exclusively in terms of lost value rather than lost profits.") (collecting cases), *cert. denied*, 130 S. Ct. 1501 (2010); *see also Sadowsky v. City of New York*, 732 F.2d 312, 317 (2d Cir. 1984) ("regarding economic impact, it is clear that prohibition of the most profitable or beneficial use of a property will not necessitate a finding that a taking has occurred."); *Elias v. Town of Brookhaven*, 783 F. Supp. 758, 761 (E.D.N.Y. 1992)

("Nor does the loss of profit or of the right to make the most profitable use of the property constitute a taking.")

Plaintiffs cannot claim the CCD Zoning results in "*no* productive or economically beneficial use" of the Property. Even under the new zoning, Plaintiffs can still pursue residential development in the Single-Family Residential Sub-District, which covers approximately 25% of the total land area of the Property, and then can pursue a golf club business on much of the remaining portion. Therefore, there is no basis to find, as the Magistrate Judge did, that the CCD Zoning makes it economically unfeasible for Plaintiffs to develop their Property.

With respect to *Penn Central*'s investment-backed expectations prong, the Magistrate Judge also got it wrong. The CCD Zoning could not have impacted any *reasonable* investment-backed expectations, since Plaintiffs purchased the Property six months *after* the Town announced it was considering comprehensive zoning amendments aimed at limiting residential development and while a moratorium was in effect. In any event, the law did not result in "one step short of" a complete diminution of the Property's value. As discussed, a quarter of the Property is still zoned for residential development. Development of this parcel will yield substantial value. Even if the new zoning completely prohibited residential development, Plaintiffs cannot plausibly allege that a 118-acre ocean-front golf course property has no economic value.

Nor can Plaintiffs claim to have suffered an unconstitutional "condition" or "exaction." "The law permits the government to put conditions on the grant of land use permits so long as the conditions have an essential nexus with legitimate public interests." *Didden v. Vill. of Port Chester*, 322 F. Supp. 2d 385, 389 (S.D.N.Y. 2004), *aff'd*, 173 F. App'x 931 (2d Cir. 2006) (*citing Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825 (1987)); *see also Dolan v. City of Tigard,* 512 U.S. 374 (1994). "The *Nollan-Dolan* framework applies when the government demands a private payment

in exchange for granting a land-use permit." *Apartment Ass'n of Greater Los Angeles v. City of Beverly Hills*, No. CV 18-6840 PSG (EX), 2019 WL 1930136, at *6 (C.D. Cal. Apr. 17, 2019). "Absent the pleading of facts sufficient to demonstrate a 'taking,' an unconstitutional conditions doctrine claim fails." *Singer v. City of New York*, 417 F. Supp. 3d 297, 327 (S.D.N.Y. 2019).

Here, Plaintiffs do not—and cannot—claim the Village has demanded any payment in exchange for granting a land-use permit. Plaintiffs have never submitted any application to Village. Until they do, any claim of an unconstitutional condition or exaction is entirely speculative. And it was error for the Magistrate Judge to find Plaintiffs plausibly alleged the new zoning requires the creation of a public park. R&R 35. It requires no such thing. True, the zoning allows the developer to create open public space—to create "a public park out of private property—but it also allows the developer to *exclude* the public and use the open space as a golf club and golf course.

IV. MAGISTARETE JUDGE ERRED IN FINDING PLAINTIFFS STATE A COGNIZABLE DUE PROCESSS CLAIM

The Magistrate Judge erred in finding that Plaintiffs can state a claim under 42 U.S.C. § 1983 for violations of substantive due process claim and procedural due process claim under the Fourteenth Amendment. Both fail for lack of a cognizable property interest or otherwise for failure to meet the elements of either claim.

A. No Cognizable Property Interest for Substantive or Procedural Due Process Claim

The Magistrate Judge erred in finding Plaintiffs have plausibly alleged a cognizable property interest. R&R 40.

In land use regulation cases, the Second Circuit applies "a strict 'entitlement test' to determine if the abridgement of an asserted property right is cognizable." *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 503–04 (2d Cir. 2001) (quoting *DLC Mgmt. Corp. v. Town of Hyde Park,* 163 F.3d 124, 130 (2d Cir. 1998)). "Where a local regulator has discretion with regard to the

benefit at issue, there normally is no entitlement to that benefit. An entitlement to a benefit arises 'only when the discretion of the issuing agency is so narrowly circumscribed" as to virtually assure conferral of the benefit.'" *Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994) (quoting *RRI Realty Corp. v. Inc. Vill. of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989)).

If Plaintiffs claim any property interest in this case, it is an alleged interest in Village approval to subdivide their property under the old Village zoning code, which allowed development of more units. But Plaintiffs do not have—and never had—a protected property interest in subdivision approval because the Village wields broad discretion in determining whether to approve or deny subdivision applications. New York State Village Law vests in local planning boards the authority to weigh evidence and exercise their discretion in approving or denying approval of a subdivision plat. Planning boards are to consider, *inter alia*, the prospective character of the development, whether a reservation of a parkland is necessary, and the suitability of the location, width and grade of streets and highways. *See* N.Y. Village Law § 7–730. The Village of Lawrence's Code provides additional discretionary considerations for subdivision approval, including "[w]hether the proposed subdivision is in keeping with the general character of the neighborhood in which the property is located," "[t]he effect of the proposed subdivision on adjacent properties," and "[w]hether the proposed subdivision will be in harmony with the provisions and purposes of Chapter 212, Zoning, and will preserve the spirit of said Chapter 212, Zoning, and secure public safety and welfare and do substantial justice." Ex. DD at 3 (Vill Code § 182-10(A)–(F)).

Given the Village Planning Board's broad discretion in this area, Plaintiffs have no protectable property interest in subdivision approval under the Village Code, current or former. *See e.g., Gagliardi*, 18 F.3d at 192 (no property interest where Village "had broad discretion in

determining whether to grant or deny" applications); *RRI Realty Corp.*, 870 F.2d at 919 (no property interest in approval of permit where "Village Code confers wide discretion"); *Deepwells Estates Inc. v. Inc. Vill. of Head of Harbor*, 973 F. Supp. 338, 349 (E.D.N.Y. 1997) ("Because the planning board has wide discretion in determining whether or not to approve the plaintiffs' subdivision plat, the Court finds that the plaintiffs' have no property right in such approval."). With no property interest, Plaintiffs' Due Process claim fails.

The Magistrate Judge's reference to the "vested rights" doctrine and "special facts exception" are misguided; these principles do not apply in a case like this, where Plaintiffs have never even submitted a plan for approval to the Village. "Under New York law, a property owner has no right to the existing zoning status of his land unless his right has become 'vested.'" *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 130 (2d Cir. 1998). "In order for a right in a particular zoning status to vest, a property owner must have undertaken substantial construction *and* must have made substantial expenditures prior to the enactment of the more restrictive zoning ordinance." *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 130 (2d Cir. 1998) (emphasis added). Plaintiffs may have expended resources on their application to *Nassau County*, but their claim here is not against Nassau, it is against the Village. "Vested rights" is, essentially, a detrimental reliance/estoppel theory of approval. To make out a vested rights claim against *the Village*, they must show they expended resources on a *Village* application, obtained approvals, and undertaken substantial construct in reliance on those approvals. Plaintiffs indisputably have *not* undertaken substantial construction *or* made substantial expenditures in pursuit of their development plan with the Village under the old zoning. They have no vested right in any approval from the Village, and, therefore, no property interest in any such approval.

Plaintiffs similarly cannot meet the requirements of the "special facts exception." "Under

the special facts exception, where the landowner establishes entitlement as a matter of right to the underlying land use application … the application is determined under the zoning law in effect at the time the application is submitted." *Rocky Point Drive-In, LLP v. Town of Brookhaven*, 21 N.Y.3d 729, 736, (2013). "In order for a landowner to establish entitlement to the request as a matter of right, the landowner must be in 'full compliance with the requirements at the time of the application,' such that 'proper action upon the permit would have given [the landowner] time to acquire a vested right.'" *Id*. (quoting *Pokoik v. Silsdorf*, 40 N.Y.2d 769, 773 (1976). In addition, the landowner must show "extensive delay [ ] indicative of bad faith," *Matter of Alscot Inv. Corp. v. Inc. Vil. of Rockville Ctr.*, 64 N.Y.2d 921, 922 (1985), "unjustifiable actions" by the municipal officials, *Pokoik*, 40 N.Y.2d at 773, or "abuse of administrative procedures," *id. See Rocky Point*, 21 N.Y.3d at 737. Here, since Plaintiffs never submitted an application for approval to the Village, must less shown established an entitlement to such approval, they cannot allege any entitlement "as a matter of right." *Pokoik*, 40 N.Y.2d at 773.

B. No Irrational or Conscience-Shocking Conduct to Support a Substantive Due Process

The Magistrate Judge erred in finding Plaintiffs have adequately stated a claim for denial of their substantive due process rights. R&R 42. Even if Plaintiffs could allege a property interest, their substantive due process claim fails because their allegations do not implicate the type of egregious, conscience-shocking conduct necessary to sustain this type of claim.

To plead a substantive due process violation, [after plaintiff demonstrates that it was denied a valid property interest,] a plaintiff must allege government action "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Pena v. DePrisco*, 432 F.3d 98, 112 (2d Cir. 2005) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)). Only "the most egregious official conduct" can be construed to violate the principles of substantive due

process. *Cnty. of Sacramento*, 523 U.S. at 846. "The Second Circuit has instructed that, in assessing substantive-due-process challenges against local land-use regulation, 'federal courts should not become zoning boards of appeal to review nonconstitutional land-use determinations by the Circuit's many local legislative and administrative agencies.'" *Weisenberg v. Town Bd. of Shelter Island*, 404 F. Supp. 3d 720, 733 (E.D.N.Y. 2019) (quoting *Crowley v. Courville*, 76 F.3d 47, 52 (2d Cir. 1996)). "The mere violation of state zoning laws is not sufficient to demonstrate conduct so outrageous as to violate the substantive component of the due process clause." *Vertical Broad, Inc. v. Town of Southampton*, 84 F. Supp. 2d 379, 391 (E.D.N.Y. 2000).

There are no plausible allegations of conscience-shocking action by the Village or any other municipal defendants. As the public records show, the Village enacted the CCD Zoning in accordance with its authority and obligation under state and local law to regulate health and safety. Plaintiffs apparent displeasure with the CCD Zoning and the impact they think it will have on the Property does not trigger the narrow protections of the substantive due process clause. And their conclusory allegations of a personal animus are insufficient to state a constitutional harm. *See, e.g., Scaccia v. Stamp*, 700 F. Supp. 2d 219, 240–41 (N.D.N.Y. 2010) (dismissing substantive due process claim where plaintiff provided only "vague and conclusory insinuations of defendants' personal animus."), *aff'd*, 447 F. App'x 267 (2d Cir. 2012).

C. No Deprivation of Procedural Due Process by the Village

The Magistrate Judge erred when she found Plaintiffs plausibly alleged the Village deprived them of their procedural due process rights. Even if Plaintiffs could show a cognizable property interest, Plaintiffs have not alleged they were entitled to some notice or opportunity to be heard before the Village, which the Village then denied them.

In order to assert a violation of procedural due process rights, a plaintiff must "first identify a property right, second show that the [government] has deprived him of that right, and third show

that the deprivation was effected without due process." *Local 342, Long Island Pub. Serv. Employees, UMD, ILA, AFL–CIO v. Town Bd. of Huntington*, 31 F.3d 1191, 1194 (2d Cir. 1994) (citation omitted). A plaintiff must prove that he or she was deprived of "'an opportunity ... granted at a meaningful time and in a meaningful manner' for [a] hearing appropriate to the nature of the case." *Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).

First, to the extent Plaintiffs assert some property interest in the continuation of the County SEQRA process, they have no such interest, and can base no claim on any such interest. *Hart v. Town of Guilderland*, No. 120CV475 (MAD) (DJS), 2020 WL 2838604, at *6 (N.D.N.Y. June 1, 2020).

Second, Plaintiffs do not have a due process claim because they do not—and cannot—allege that the Village was required to grant them any hearing or other opportunity to be heard. Plaintiffs never applied to the Village for subdivision approval or any other relief, so they were not entitled to any Village process and cannot claim to have been deprived of any such process.

And the Village could not have deprived Plaintiffs of any process before the NCPC because the Village *was not in control of that process*. This was a County proceeding for process that the *County* (arguably) owed to Plaintiffs. No law obligated the Village to provide Plaintiffs this County process, the Village was not in control of whether Plaintiffs did or did not receive this process, and the Village was not in control of how the process ended. The Village cannot have "deprived" Plaintiffs of a process it was not required to provide. The claim is meritless.

V. MAGISTRATE JUDGE ERRED IN FINDING PLAINTIFFS STATE A CLAIM FOR ULTRA VIRES EXERCISE OF ZONING POWER–THE CLAIM IS BASELESS

It is unquestionable that the CCD Zoning was a valid exercise of Defendants' zoning powers and made pursuant to a well-considered comprehensive plan.

As the Magistrate Judge correctly recognized, the New York Court of Appeals, the Supreme Court and trial level courts have long made clear the broad discretion afforded to municipalities when zoning pursuant to their police power. R&R 45. In short, zoning ordinances are valid so long as they bear a substantial relation to a police power objective of promoting the public health, safety, morals or general welfare. *Id*.; *see Tr. of Union Coll. v. Members of the Schenectady City Council*, 91 N.Y.2d 161 (1997).

Defendants enacted the CCD Zoning pursuant to well-established zoning powers, and Plaintiffs cannot plausibly claim otherwise. The CCD Zoning was enacted "[f]or the purpose of promoting the health, safety, morals, or the general welfare of the community," specifically by addressing significant environmental concerns unique to the area in which the Property is located. N.Y. Vill. Law § 7-700. It was the result of a coordinated effort between the Town and villages aimed at preserving the community's safety, health, and welfare against severe potential impacts on this unique and environmentally sensitive area. Vill. Code § 212-13.1.2(A). It followed extensive analysis by Cameron Engineering of the Property's regional significance, including its unique environmental attributes and functions and its contribution to local community character, and the threats posed to the area by overdevelopment. As the Village's CCD Zoning law provides:

> this large and mostly open coastal area, spanning the boundaries of these three contiguous municipalities, is vulnerable to residential and commercial development, seriously threatening both this environmentally-sensitive coastal area, and the wellbeing of the Town and Villages and the region as a whole, and which potential adverse impacts and loss of existing open space will not be adequately mitigated by existing and inconsistent zoning regulations in both the contiguous Town and Villages with respect to permissible development, lot size, lot coverage, density, building height and site-specific development regulations.

Based on Cameron's analysis, the municipalities determined that, "unless addressed, the loss of this existing open space to over-development in the Town's environmentally sensitive

coastal areas presents an immediate threat to the public health and safety of the Town, the adjacent Villages, and the region as a whole, and can best be mitigated, and the additional benefits accomplished, with the coordinated creation of matching complimentary Coastal Conservation District[s] in each municipality in conjunction with the adjacent contiguous Villages of Woodsburgh and Lawrence." Vill. Code § 212-13.1.2(A). The CCD Zoning "addresses current and future physical climate risk changes due to sea level rise, storm surge and flooding … in relation to the unique geographical setting of the property at the Woodmere Channel terminus, its historical and environmentally ecologically sensitive setting, and the anticipated flood impacts associated with this location." This law, and the concerns it addresses, falls squarely within the Village's zoning authority under New York state law.

CONCLUSION

For all the foregoing reasons, the Court should reject and overrule all portions of the Report and Recommendation that recommend against dismissal of Plaintiffs' claims and grant Defendant's motion to dismiss in its entirety, together with such other and further relief as this Court deems just, equitable, and proper.

Dated: Carle Place, New York
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