UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WG WOODMERE LLC; SG BARICK LLC; and LH BARICK LLC, Plaintiffs, vs. TOWN OF HEMPSTEAD; THE INCORPORATED VILLAGE OF WOODSBURGH; and THE INCOPORATED VILLAGE OF LAWRENCE, Defendants.	)	Civil Action No.: 2:20-cv-03903-SJF-AYS

PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

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Rules

Plaintiffs WG Woodmere LLC, SG Barick LLC and LH Barick LLC (collectively "Plaintiffs") respectfully submit this memorandum of law in response to two separate objections to Magistrate Judge Shields' August 23, 2021 Report and Recommendation (the "R&R"): one by defendants the Town of Hempstead ("Hempstead" or the "Town") together with the Incorporated Village of Woodsburgh ("Woodsburgh"), and one by the Incorporated Village of Lawrence ("Lawrence," together with Woodsburgh, are referred to herein as the "Villages," and the Villages, together with Hempstead, are referred to as "Defendants" or the "Municipalities").[1] Specifically, Defendants object to the portion of the R&R which recommended that Defendants motions to dismiss[2] be denied as to Plaintiffs' First, Second, Third, Fourth, Fifth, and Sixth Causes of Action.

PRELIMINARY STATEMENT

In her thorough and well-reasoned 55-page R&R, Magistrate Judge Shields analyzed the applicable law and the extensive facts that Plaintiffs pleaded in their 69-page Complaint – which contains 386 separate paragraphs of detailed factual allegations and 73 pages of exhibits – and recommended that this Court deny Defendants' motions to dismiss, except as to Plaintiffs' Seventh Cause of Action, a state law-based claim under New York's State Environmental Quality Review Act, which the Magistrate Judge held was premature. Specifically, Magistrate Judge Shields held that Plaintiffs' claims are ripe and that Plaintiffs have pleaded plausible facts in support of their equal protection, takings, due process, and state law *ultra vires* claims.

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1 Hempstead's and Woodsburgh's Objection to the R&R dated October 20, 2021 (Dkt. No. 53) is cited herein as the "Joint Obj." or "Joint Objection." Lawrence's Objection to the R&R dated October 20, 2021 (Dkt. No. 54) is cited herein as the "Lawrence Obj." or "Lawrence Objection."

2 The moving brief submitted in support of Hempstead's and Woodsburgh's Motion to Dismiss (Dkt. No. 35) is cited herein as "Joint MTD" or "Joint Motion to Dismiss." The separate moving brief submitted in support of Lawrence's Motion to Dismiss (Dkt. No. 38) is cited herein as "Lawrence MTD or "Lawrence Motion to Dismiss." The reply brief submitted in further support of Hempstead's and Woodsburgh's Motion to Dismiss (Dkt. No. 37) is cited herein as "Joint MTD Reply" or "Joint Motion to Dismiss Reply." The separate reply brief submitted in further support of Lawrence's Motion to Dismiss (Dkt. No. 39) is cited herein as "Lawrence MTD Reply or "Lawrence Motion to Dismiss Reply."

Defendants now object in blunderbuss, general fashion to each and every one of the Magistrate Judge's holdings. Tellingly, they simply repeat in this Court the exact same arguments they already made below – most of which they simply cut-and-pasted **verbatim** from their papers on the underlying motions to dismiss – and they do so without bothering anywhere in their 107 pages of combined briefing to devote even a single word to this Court's applicable standard of review. That is because where, like here, Defendants' objections consist of nothing but regurgitations of the arguments already made to the Magistrate Judge, this Court is constrained to adopt the R&R if it is not "clearly erroneous." And nowhere in their voluminous papers do Defendants even attempt to show that any holding in the R&R was clear error.

Indeed, other than "strenuously" objecting, as Demi Moore's Lt. Commander Jane Galloway famously, and ineffectually, did in the 1992 film *A Few Good Men*, and asking this Court to revisit wholesale every portion of the R&R in which they were unsuccessful, Defendants have offered nothing in the form of a proper objection to any specific conclusion that Magistrate Judge Shields made. Nor have they proffered any legitimate reasons for this Court to reject any part of her R&R, which is correct in all respects. The District Courts in this Circuit have routinely held that such an approach by a party complaining about a magistrate's report and recommendation requires summary denial of the objections, which is what this Court should do here.

ARGUMENT

I. UNDER RULE 72 AND APPLICABLE LAW THIS COURT MUST REVIEW THE R&R ONLY FOR "CLEAR ERROR" BECAUSE DEFENDANTS HAVE FAILED TO MAKE PROPER OBJECTIONS

Although when a party objects to a magistrate judge's report and recommendation on a dispositive motion the district judge ordinarily conducts a *de novo* review, that is only as to the "part[s] of the magistrate judge's disposition that ha[ve] been properly objected to." Fed. R. Civ.

P. 72(b)(3). District judges review all portions of the report to which the objecting party has not properly objected, or not objected at all, only for clear error. *Zaza v. Am. Airlines*, No. 14-CV-4046(DLI)(ST), 2017 WL 1076327, at *2 (E.D.N.Y. Mar. 22, 2017). Thus, if in the district court "**a party simply relitigates his original arguments,** the Court reviews the Report and Recommendation only for clear error." *Riley v. Rivers*, No. 15-CV-5022(DLI)(RLM), 2017 WL 1093193, at *2 (E.D.N.Y. Mar. 23, 2017), aff'd, 710 F. App'x 503 (2d Cir. 2018) (citations omitted, emphasis added). *Accord, e.g., Faroque v. Park W. Exec. Servs.*, No. 15-CV-686(DLI)(CLP), 2017 WL 1214482, at *2 (E.D.N.Y. Mar. 31, 2017) ("[A] rehashing of the same arguments set forth in the original papers…would reduce the magistrate's work to something akin to a meaningless dress rehearsal.") (citation omitted); *Diapulse Corp. of Am. v. Sebelius*, No. 06-CV-2226(DLI)(SMG), 2010 WL 1752571, at *1 (E.D.N.Y. 2010) ("…even a cursory review of the table of contents of plaintiff's objections to the R & R reveals that it is virtually identical to that of its [underlying motion]…Accordingly, any objections to the recommendations concerning these arguments are deemed waived").

Clear error will not be established "simply because [the reviewing court] 'would have decided the case differently.'" *Easley v. Cromartie*, 532 U.S. 234, 242 (U.S. 2001). Rather, for a district judge to reverse a report and recommendation under the clearly erroneous standard the "decision must strike us as more than maybe or just probably wrong; **it must strike us as wrong with the force of a five-week-old unrefrigerated dead fish**." *Purisima v. Tiffany Entm't*, No. 09–CV–03502(NGG)(LB), 2013 WL 4500699, at *2 (E.D.N.Y. Aug. 20, 2013) (emphasis added) (plaintiff's objection to magistrate's report and recommendation overruled because plaintiff merely reargued his claims and made "no specific objection to [the report] other than to disagree with it"). Thus, a party – such as Defendants here – seeking to overturn a ruling under the clear

error standard bears an extraordinarily "heavy burden." *Sheppard v. Beerman*, No. 91-CV-1349(ILG), 1999 WL 1011940, at *2 (E.D.N.Y. Sept. 23, 1999).

Improper objections also include those that are not "specific and clearly aimed at particular findings in the magistrate's proposal." *Capital One, Nat'l Ass'n v. Halland Companies, LLC*, No. 15-CV-5664(SJF)(GRB), 2017 WL 3769229, *1 (E.D.N.Y. Aug. 28, 2017), appeal withdrawn, No. 17-3092, 2017 WL 8683848 (2d Cir. Nov. 27, 2017) (internal quotations and citations omitted). Where the objecting party makes general or conclusory objections to the report and recommendation without specifying which issues in the report she is objecting to, "a *de novo* review is unwarranted." *Gee Chan Choi v. Jeong-Wha Kim*, No. 04-CV-4693, 2006 WL 3535931, at *2 (E.D.N.Y. Dec. 7, 2006). *See also United States v. Drago*, No. 18-CR-394(GRB)(AYS), 2021 WL 2980699, at *1 (E.D.N.Y. July 15, 2021) ("Because Plaintiff's objections consist of general conclusory arguments and issues that were presented to Judge Shields, the undersigned reviews the Report and Recommendation for clear error.")

Defendants have not even bothered to address this Court's standard of review in their voluminous briefing. Indeed, it is that glaring *lacuna* – and not anything in Magistrate Judge Shields's R&R – that is the only thing as striking on this proceeding as the force of a "five-week-old unrefrigerated dead fish." *Purisima*, 2013 WL 4500699, at *2. Instead, Defendants have filed objections with this Court that are general and conclusory, not aimed at any particular findings in the R&R, and consist almost exclusively of rehashed and recycled material – the majority of which was transposed verbatim – from their underlying motion to dismiss papers. Accordingly, this Court must review the R&R for "clear error" and Defendants' objections must be summarily rejected.

A. Defendants' Verbatim Duplication of Their Arguments Before the Magistrate Must be Summarily Rejected

A party who proffers the same substantive arguments made in their report and recommendation objection that they already made below waives their right to *de novo* review. Indeed, "[c]lear error review is especially appropriate" where a party "merely copie[s] verbatim" from their original brief. *Hollaway v. Colvin*, No. 14-CV-5165(RA), 2016 WL 1275658, at *3 (S.D.N.Y. Mar. 31, 2016).

Where, in the District Court, the objection "brief is in fact identical – word for word – to the equivalent portion of the …Motion to Dismiss" heard below, the only appropriate standard of review – if any at all – is "clear error only." *King v. City of New York*, No. 12-CV-2344 NGG RER, 2014 WL 4954621, at *4 (E.D.N.Y. Sept. 30, 2014). *See also, e.g., Jemine v. Dennis*, 901 F. Supp. 2d 365, 371 (E.D.N.Y. 2012) (applying clear error where "it appear[ed] that defendants merely uploaded as objections the very document they submitted to the magistrate judge in opposition to plaintiff's motion"); *Gutman v. Klein*, No. 03 CIV. 1570BMC, 2009 WL 3296072, at *2 (E.D.N.Y. Oct. 13, 2009), aff'd, 515 F. App'x 8 (2d Cir. 2013) (where "much of the objection to the Recommendation is cut and pasted from defendants' original brief in opposition … [c]lear error is therefore the appropriate standard of review"); *E. Sav. Bank, v. Robinson*, No. 13CV7308ADSSIL, 2016 WL 3102021, at *4 (E.D.N.Y. June 2, 2016) ("a near-verbatim reproduction of the argument the Homeowners unsuccessfully submitted to Judge Locke [] is therefore insufficient to warrant *de novo* review").

Here, even a cursory review of the many pages of arguments in the objections Defendants filed in this Court reveals that Defendants have merely regurgitated here the exact same arguments they already made below. Moreover, as shown in detail in Exhibits A, B, C, and D attached to the accompanying Declaration of Jeffrey Schreiber ("Schreiber Decl."), which track, cross-reference,

and highlight the pages of Defendants' objections in this Court to the motion to dismiss papers they filed below, the vast majority of Defendants' R&R objections are simply cut-and-pasted from their briefing below. *See* Lawrence R&R Objection with highlights showing portions lifted from the Lawrence Motion to Dismiss and Lawrence Motion to Dismiss Reply ("Highlighted Lawrence Objection"), attached to the Schreiber Decl. as Exhibit A; side by side comparison of the Lawrence R&R Objection against the Lawrence Motion to Dismiss and Lawrence Motion to Dismiss Reply with highlights showing reused portions ("Lawrence Comparison Chart"), attached to the Schreiber Decl. as Exhibit B; Joint R&R Objection with highlights showing portions lifted from the Joint Motion to Dismiss and Joint Motion to Dismiss Reply ("Highlighted Joint Objection"), attached to Schreiber Decl. as Exhibit C; side by side comparison of the Joint R&R Objection against the Joint Motion to Dismiss and Joint Motion to Dismiss Reply with highlights showing reused portions ("Joint Comparison Chart"), attached to the Schreiber Decl. as Exhibit D.

Indeed, as the exhibits show, Defendants copied verbatim dozens of whole paragraphs and, in many cases, even whole pages from their motion to dismiss papers and dropped them into the objections they filed in this Court. As just a few of many examples of this, Lawrence took the first page of the preliminary statement in its Motion to Dismiss and made it the first page of the preliminary statement in its R&R objection. *See* Schreiber Decl. Ex. B at p. 1. Lawrence also took the entire first two pages of the equal protection argument in its Motion to Dismiss and made them the first two pages of the equal protection argument in its R&R objection. *See id*., at 3-4. Lawrence also lifted verbatim three pages from the takings argument in its Motion to Dismiss and pasted them into the equal protection argument in its R&R objection. *See id.,* at 10-12. The Hempstead-Woodsburgh objection contains many similar cut-and-paste transpositions from their

papers below. *See, e.g.,* Joint M2D pp. 13-14 *compare* Joint Obj pp. 37-38; Joint M2D Reply pp. 20- 21 *compare* Joint Obj. p. 34.

Because Defendants' R&R objections are almost entirely word-for-word regurgitations of the exact arguments presented to, and rejected by, the Magistrate Judge, in which they improperly seek to treat the last year of briefing below as a mere "dress rehearsal," this Court should summarily reject their objections for that reason alone. *Faroque*, 2017 WL 1214482, at *2.

B. Defendants' Objections Fail to Identify and Explain With Specificity The Portions of The R&R That Purportedly Contain Errors and Must Therefore Be Reviewed for Clear Error and Rejected

Defendants have also failed to make any specific objection to any individual finding or conclusion in the R&R that they claim were clearly erroneous. To the contrary, in most cases, Defendants simply copied into their objections large portions of their motion to dismiss briefing verbatim, and then just replaced the phrase "Plaintiffs fail to allege…" with "the Magistrate Judge erred in finding that Plaintiffs have sufficiently alleged," even when no such finding was ever actually made by the Magistrate.[3]

In other cases, Defendants leave it exactly how they phrased it in their motion to dismiss briefing and object to portions of Plaintiffs' Complaint instead of portions of the R&R. *See, e.g.,* Lawrence Comparison Chart, Ex. B at p. 3 ("Plaintiffs fail to state a "class of one" theory Equal Protection claim."); *Id.* at p. 6 ("…Plaintiffs do not allege the owners of any of these comparators are planning a large scale residential development."); Joint Obj. p. 15 ("Plaintiffs do not, and

[3] For example, Lawrence transposed an entire page from its motion to dismiss papers verbatim and simply replaced "Plaintiffs ignore these fundamental pleading principles" with "The Magistrate ignored these fundamental pleading principles" to make it look like it was responding to a finding by the Magistrate instead of just repeating its dismissal arguments. *See* Lawrence Comparison Chart, Ex. B at pp. 5-6.

cannot, allege that they have been subjected to repetitive and unfair procedures"); *Id*. p. 44 ("The Plaintiffs have not alleged facts to plausibly demonstrate…").

Finally, in some cases, Defendants simply say, "the Magistrate ignored…", "the Magistrate incorrectly focus[es]…on", or "[t]he Magistrate has incorrectly found merit in…" and then proceed to repeat their prior arguments. *See e.g.,* Lawrence Obj. pp. 3 and 10; Joint Obj. p. 14 and 38. This explains why of the dozens of times Defendants' reference the Magistrate's "findings" throughout their objections, only rarely do they provide a pin cite to the R&R. That is simply because no such findings were ever made.

Defendants have not even suggested, let alone established that "a mistake has been committed" here. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Instead, Defendants' objections are nothing more than an improper attempt to have this Court engage in a "do-over," a duplicative review of the very same issues presented to the Magistrate Judge below in the hopes of getting a different outcome (*Easley* 532 U.S. at 242), a strategy which is antithetical to both the Federal Magistrate's Act and the Rule 72 standard. *See McCarthy v. Manson,* 554 F.Supp. 1275, 1286 (D.Conn.1982) aff'd, 714 F.2d 234 (2d Cir.1983) (The "goal of the federal statute providing for the assignment of cases to Magistrate Judges is to 'increas[e] the overall efficiency of the federal judiciary.") (internal citations and quotations omitted); *Camardo v. Gen. Motors Hourly-Rate Employees Pension Plan*, 806 F. Supp. 380, 382 (W.D.N.Y. 1992) ("[t]he purposes of the Federal Magistrate's Act are, *inter alia*, to relieve courts of unnecessary work.") (internal citations and quotations omitted). Defendants' objections should therefore be summarily rejected by this Court for this reason as well.

II. THIS COURT SHOULD ADOPT THE MAGISTRATE'S REPORT AND RECOMMENDATION IN FULL

Having already thoroughly addressed both the legal and factual errors in Defendants' arguments in the extensive briefing below (Defendants' initial papers totaled 100 pages, Plaintiffs' opposition 96 pages, and Defendants' reply papers 70 pages), which is available to this Court on its electronic docket should the Court wish to review those arguments in depth, counsel will not further waste this Court's time by merely repeating those same arguments in detail here in response to the portions of Defendants' objections consisting solely of arguments they already made below – word for word – and to which Plaintiffs already responded in their papers below. Rather, Plaintiffs will respond only to the remaining portions of "new" material contained in Defendants' objections.[4] *See* unhighlighted portions of Defendants' highlighted objections, Exs. A and C. However, notwithstanding that the uncopied material depicted in Exhibits A and C is not a verbatim replica of material contained in Defendants' motion to dismiss papers, the arguments are substantively exactly the same, and therefore, should be rejected for a second time.

A. Defendants' Objections Regarding Finality, Ripeness, Standing, and Subject Matter Jurisdiction Must be Rejected Again

1. Defendants Arguments Regarding Finality, Ripeness, Standing, and Subject Matter Jurisdiction Are Rehashed Versions of Their Arguments Below, and Thus the R&R Is Reviewed for Clear Error

Defendants already extensively argued the points they make in their objections regarding finality, ripeness, standing, and subject matter jurisdiction in their motion to dismiss briefing, correspondence to the Magistrate, and at oral argument before the Magistrate and thus it cannot be

[4] Plaintiffs use the term "new" only in the sense that these arguments are not transposed verbatim from Defendants' motion to dismiss papers. As will be discussed herein, their substance, however, is far from original. In fact, most of these remaining arguments are *near* verbatim replicas, in which Defendants simply changed a single word, rearranged sentences, or swapped out a case citation in order to make it look like new material.

revisited by this Court unless the Magistrate's determination of it was clear error, which, as explained below, it was not. *Compare* Joint Obj. pp. 4-5 *with* Joint MTD pp. 7-9, Lawrence MTD Reply pp. 2-3, and Arg. Tr. pp. 107:2-115:11; *compare* Joint Obj. pp. 5-9 and Lawrence Obj. pp. 3-7 *with* Hempstead MTD pp. 2-6, Hempstead MTD Reply pp. 2-5, 7-8, Lawrence MTD pp. 2-5, Lawrence MTD Reply pp. 13-16, Defendants' Letter to Magistrate Judge Shields (Dkt. No. 45), and Arg. Tr. pp. 79:19-86:2, 116:1-117:8.[5]

2. The Magistrate's Determinations on Finality, Ripeness, Standing, and Subject Matter Jurisdiction Were Correct, and Certainly Not Clear Error

Defendants claim that because their motion to dismiss was brought under Rule 12(b)(1) in addition to Rule 12(b)(6), the Magistrate was required to, but did not, consider the exhibits and statement of facts that they appended to their motions to dismiss, in which they presented and argued their own versions of the facts, and instead improperly recommended that this Court limit its review to the allegations in the complaint. Joint Obj. pp. 2-4. However, the Joint Motion to Dismiss is not properly brought under 12(b)(1) because it is well settled that the "ripeness" issue in this context is prudential not jurisdictional. *See Horne v. Dep't of Agric.*, 569 U.S. 513, 526 (2013); *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 734-735 (1997). *Accord, e.g.*, *Sherman v. Town of Chester*, 752 F.3d 554, 561 (2d Cir. 2014) (holding that the ripeness inquiry under *Williamson County* is not jurisdictional, it is prudential); *Dean v. Town of Hempstead*, 163 F. Supp. 3d 59, 77 (E.D.N.Y. 2016) (same). Therefore, the Magistrate was not permitted to go outside of the pleadings, and, with respect to the ripeness facts alleged, must assume that the allegations in the Complaint are true and afford Plaintiffs the benefit of every favorable inference from them, as she properly concluded.

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5 The transcript from the August 12, 2021 argument before Magistrate Judge Anne Shields (Dkt. No. 48) is cited herein as the "Arg. Tr."

Next, without referencing any specific finding by the Magistrate to which they are objecting, Defendants contend that Plaintiffs' claims are "merely" as-applied challenges, not facial challenges, under the standard articulated in *United States v. Salerno,* 481 U.S. 739, 745 (1987), which states that a facial challenge can only succeed if there are "no set of circumstances" under which the regulation at issue could be constitutionally applied. Joint Obj. pp. 4-5. In any case, as stated in Plaintiffs' motion to dismiss opposition brief (Dkt. No. 36, at pp. 37-40), Plaintiffs have more than sufficiently pled facts showing that the "Coastal Conservation District - Woodmere Club" ("Woodmere Club Zoning") is unconstitutional both on its face and as-applied. Compl. ¶¶ 29, 271-72; 274-75, 283, 285-291, 293, 296-300. Indeed, Defendants made their intent clear on the face of the Woodmere Club Zoning as it is written, which by its very terms, targets Plaintiffs alone among all other similarly situated property owners in the Municipalities. It is no wonder Defendants go to great lengths in their respective objections to try and hide the full name of the ordinance by referring to it as the "CCD Zoning" or the "new zoning." Moreover, as Plaintiffs alleged in their Complaint, the Woodmere Club Zoning applies solely to Plaintiffs' Property and imposes significant restrictions on the Property that have stripped it of its economically productive use. Compl. ¶¶ 215-230. The restriction on the number of homes that can be built, coupled with the restrictions on how those few homes must be developed, coupled further with the exaction and maintenance of flood mitigation equipment for the benefit the surrounding properties, but not Plaintiffs' Property, and at Plaintiffs' sole expense, make any use economically unproductive. *Id.* There are therefore "no set of circumstances" under which the Woodmere Club Zoning could be constitutionally applied, and there is thus no analytical distinction here between an "as applied" or "facial" challenge. Plaintiffs' challenge is both facial and as-applied.

Defendants also claim that Magistrate Judge Shields allegedly erred in finding that Defendants made a final determination as to how Plaintiffs can develop their property because Plaintiffs did not make "one meaningful application" to the zoning boards under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). Joint Obj. pp. 5-9; Lawrence Obj. pp. 3-7. Defendants' tortured argument fails for a second time – the case law and the Magistrate's R&R make clear that "one meaningful application" is no longer required in order for a plaintiff's claims to ripen. Or, put another way, the Magistrate found that Plaintiffs plausibly alleged that no application here could be "meaningful," any such application would be futile, and that Defendants' argument would read the key concept of "meaningful" out of the rule.

The ripeness requirement from *Williamson County* is not ripeness in the conventional sense. It is, instead, based on the substance of the regulatory takings test from *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), which held that a regulation is a taking if it "goes too far." *Id.*, at 415. The Court in *Williamson County* reasoned, correctly, that a takings claim therefore cannot be adjudicated until it is reasonably clear how far the regulation has gone. *See Williamson County*, 473 U.S. at 199-200. In that case, the complex application of the zoning ordinance made it difficult to assess how much development the government would permit on the plaintiff's property, and so the Court insisted that plaintiff first submit variance applications to determine the allowable development. *Id.*, at 193-194, 200. That is not true here.

Magistrate Judge Shields properly concluded that the Supreme Court made clear in *Pakdel v. City & Cty. of San Francisco, California*, 141 S. Ct. 2226 (2021) that "the ripeness question is not properly answered by asking whether all (or any) state applications or variances have been made, but by determining whether the government position as to the plaintiff's property is clear"… and, therefore, "[b]ecause Defendants have made clear exactly the development that they will

allow on the Property, no application need be submitted to answer the question of what will be allowed." R&R p. 26. As the Court noted in *Pakdel*, a claim is only unripe "**if** avenues still remain for the government to clarify or change its decision" (141 S. Ct. at 2031), and here, Plaintiffs have adequately and plausibly pleaded that no such avenue remains.

First, Defendants' zoning boards lack the authority to grant a variance that ignores the terms of a legislative enactment (in this case, the Woodmere Club Zoning) in its entirety, which is what Defendants are suggesting Plaintiffs should have to apply to obtain, even knowing that such an application is doomed to failure and thus not "meaningful." *Van Deusen v. Jackson*, 35 A.D.2d 58, 60-61 (2d Dep't 1970); aff'd 28 N.Y.2d 608 (1971) ("[a] zoning board of appeals cannot under the semblance of a variance exercise legislative powers."); *Held v. Giuliano*, 46 A.D.2d 558, 559 (3d Dep't 1975) ("If the grant of a variance is destructive of the purposes to be achieved by the ordinance, there is a clear invasion of the legislative process.").

Second, even assuming *arguendo* that the zoning boards somehow did have the authority to grant a variance that could effectively void the Woodmere Club Zoning, which they do not, as stated in Plaintiffs' papers below (Dkt. No. 36, at pp. 26-30), in light of Defendants' years-long effort to stymie all development on the Property for as long as possible, Plaintiffs' efforts to apply for a variance would assuredly be futile. Compl. ¶¶ 101-165, 277-281. *See, e.g.*, *Sherman,* 752 F.3d at 561-562 (developer's claim that town prevented him from developing by employing a decade of unfair and repetitive procedures was ripe under *Williamson County*, even though town had not yet reached a decision concerning his application for subdivision approval). *Accord, e.g. East End Resources, LLC v. Town of Southold Planning Bd.*, 135 A.D.3d. 899 (2d Dep't) (court held plaintiff "raised a triable issue of fact as to whether the appellants would continue to use repetitive and unfair procedures so as to avoid making a final decision on the application."); *Matter*

of Friedman v. Rice, 30 N.Y.3d 461, 474-475 (2017) (futility established where agency demonstrated "unwavering position" regarding petitioner's requests). Indeed, as Magistrate Judge Shields noted in her R&R (at pp. 8-10), Defendants adopted the Woodmere Club Zoning, which reduced the density on the Property from 289 lots to 59, only after Defendants withdrew a plan to reduce the permitted density on the Property by 60% because it did not go far enough to satisfy the public, and the neighboring property owners made it abundantly clear that they would not tax themselves to provide the necessary funds to buy and preserve the Woodmere Club as an open space amenity. Compl. ¶¶ 132-135, 143, 148, 154-156, 163-164.

Defendants appear to suggest that merely because the plaintiffs in *Pakdel* filed an application that somehow means that an application – regardless of whether it would be "meaningful" – is a prerequisite to ripeness in all cases. *See* Joint Obj. p. 12; Lawrence Obj. p 5; Arg. Tr. p. 81:1-4. Defendants not only miss the point of *Pakdel* completely, but they also misconstrue the entire line of Supreme Court precedent on the issue, which makes clear that plaintiffs are not required, before seeking relief in this Court, to participate in a Kabuki theater exercise in which they must engage in a meaningless ritual of filing an application that everyone knows is doomed to failure. *See, e.g., Palazzolo v. Rhode Island,* 533 U.S. 606, 622 (2001) ("[r]ipeness doctrine does not require a landowner to submit applications for their own sake."). Indeed, contrary to what Defendants would have this Court believe, the "jurisdictional prerequisite condition[ing] federal review on an owner submitting at least one meaningful application for a variance," is "not mechanically applied." *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 348-49 (2d Cir. 2005).

The Eleventh Circuit confronted this precise question – holding that a zoning change that a municipality adopted to apply to one, and only one, property owner's property, is ripe by

definition, even without an application for a variance, because by adopting the new zone the government has made clear its position about the property at issue. *South Grande View Development Company, Inc. v. City of Alabaster, Alabama*, 1 F.4th 1299 (11th Cir. 2021). That, of course, is the precise and unique situation in this case, and why Defendants' arguments that Plaintiffs were required to apply for a variance ring particularly hollow, as Magistrate Judge Shields properly concluded.

In *South Grande View,* a real estate developer brought a § 1983 action against the city, alleging that the city's ordinance specifically targeting and rezoning the plaintiff's property ("Sector 16") constituted a regulatory taking without just compensation. *South Grande View*, 1 F.4th at 1302. After a jury trial, the federal district court held that the rezoning ordinance constituted an unlawful regulatory taking for which the developer was awarded $3,505,030.65, representing the difference in the value of the property before the rezoning ($3,532,849.19) and after ($500,000) plus prejudgment interest. *Id.* at 1302 and 1304. On appeal, the city argued, among other things, that the takings claim was not ripe for review because the developer never sought a variance from the new zoning ordinance before pursuing the case in court. *Id.,* at 1302. Drawing a distinction between *Williamson County*, where "there was a general plan for a large portion of the county that only coincidentally ended up affecting a discrete portion," and the case before it, where the city's zoning ordinance "targeted precisely and only Sector 16," the court found that notwithstanding the developer's failure to apply for a variance the claim was ripe for adjudication, because, given its targeted nature, the city's rezoning ordinance itself constituted a final decision. *Id.,* at 1306-1307. The court also held that even if the City's ordinance did not constitute a final decision, the case was still ripe for adjudication under the futility exception because no variance could undo the ordinance. The court concluded that "given that the

ordinance…was for only Sector 16, a variance for Sector 16 would plainly not be within 'the spirit of the ordinance.'" *Id.,* at FN12.

The facts of this case are precisely the same as those in *South Grande View*. Defendants adopted the Woodmere Club Zoning, which specifically and solely targets Plaintiffs' Property, both on its face and in its application. Magistrate Judge Shields correctly held that Plaintiffs thus plausibly alleged facts showing that Defendants' intentions for Plaintiffs' Property were clear enough to obviate the need for a meaningless variance application to the zoning boards.

As Magistrate Shields noted in the R&R, the court in *Pakdel* clarified, to the extent it was unclear previously – and it was not – that for ripeness purposes "the finality requirement is relatively modest. All a plaintiff must show is that 'there [is] no question ... about how the 'regulations at issue apply to the particular land in question.'" *Pakdel,* 141 S. Ct. at 2230 (citations omitted) (emphasis added). As she aptly put it in the R&R, *Pakdel* clarified that the analysis under the Supreme Court's "finality" jurisprudence is better "couched as 'clarity'" and "not properly answered by asking whether all (or any) state applications or variances have been made, but by determining whether the government position as to the plaintiff's property is clear." R&R at 26. *See also* Dkt. No. 43.

Thus, even if the conduct alleged by a plaintiff differs from that in *Pakdel*, it can still meet the standard necessary for the "finality" exception to apply and for a case to be ripe for review. If this were not the case, municipalities could mistreat real property owners with impunity. The law does not require the doing of the impossible, nor does the law allow a party to use its own wrongful acts to deny justice to the other party. Indeed, requiring Plaintiffs here to apply for a variance that is certain to be denied would create an exhaustion requirement analogous to what the Supreme

Court rejected in *Pakdel*, and before that in *Knick v Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019).

Defendants' reliance on several post-*Pakdel* cases, in support of their contention that the "one meaningful application" rule is still intact, is entirely misplaced. Joint Obj. pp. 12-13; Lawrence Obj. pp. 3-4.[6] To begin with, in most of the cases that Defendants cite, the courts apply *Pakdel*'s broader, real-world and practical ripeness/finality test, over the rote "one meaningful application must be filed" – irrespective of whether the application would or could be meaningful – approach. *See, e.g., N. Mill St.*, 6 F.4th at 1229-1230 (concluding claims not ripe because under *Pakdel* "avenues still remain for the government to clarify or change its decision"); *Ralston*, 2021 WL 3810269, at *8 (same); *Willan*, 2021 WL 4269922, at *3 (same); *Hoffman Bros.*, 2021 WL 4429465, at *6 (same); *Silex*, 2021 WL 4477326, at *4-5 (same, and acknowledging that a showing of finality "does not require landowners to exhaust administrative procedures, or to submit applications for their own sake…")[7].

Moreover, in all but one of the cases Defendants cited,[8] while the courts found that the plaintiffs' claims were not ripe at least in part because they failed to file an application or see a pending application through, unlike here, there was at least a possibility that the applications of

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6 *See N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216 (10th Cir. 2021); *Ralston v. County of San Mateo*, No. 21-CV-01880-EMC, 2021 WL 3810269 (N.D. Cal. Aug. 26, 2021); *Andrews v. City of Mentor,* 11 F.4th 462, 475 (6th Cir. 2021); *Willan v. Dane County.,* No. 21-1617, 2021 WL 4269922 (7th Cir. Sept. 20, 2021*); Gen. III, LLC v. City of Chicago*, No. 21-CV-2667, 2021 WL 2939982 (N.D. Ill. July 13, 2021); *Silex W., LLC v. Bd. of Cty. Commissioners of Summit Cty., Colorado*, No. 21-CV-00061-PAB-SKC, 2021 WL 4477326 (D. Colo. Sept. 30, 2021); *Hoffman Bros. Harvesting, Inc. v. Cty. of San Joaquin*, No. 2:20-CV-00660-TLN-AC, 2021 WL 4429465 (E.D. Cal. Sept. 27, 2021); *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, No. 20-CV-6158 (KMK), 2021 WL 4392489 (S.D.N.Y. Sept. 24, 2021).

7 The remaining two decisions cited by Defendants (*Andrews v. City of Mentor* and *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*) do not cite to *Pakdel* at all.

8 *Andrews v. City of Mentor* is entirely inapplicable – it does not involve a challenge to the validity of legislative acts, as is the case here, but rather a challenge to the denial of a specific application for use or development.

those plaintiffs would ultimately be granted. For example, in *Ralston*, the court found that the plaintiffs' takings claim was not ripe because they had yet to apply for coastal development permits with the county. *Id.*, 2021 WL 3810269 at *9. However, in that case, unlike here, the county had the power to "approve, deny, or condition" the plaintiffs' development application. *Id.*, at *8. Likewise, in *Gen. III, LLC*, where the city suspended the plaintiffs' application for a permit that would allow them to operate a recycling facility after receiving a request from the United States Environmental Protection Agency ("USEPA") asking the city to halt its review to allow for additional environmental analysis, the court found that the plaintiffs' takings claims were not yet ripe because the city's review of the application was still ongoing. 2021 WL 2939982 at *1 and *3. However, again, in that case, the city had the authority to grant the plaintiffs' permit, so there was at least a chance of that happening once the USEPA-requested review was completed. Finally, in *Silex*, the court ultimately concluded that the plaintiff's claim was unripe because he failed to avail himself of a process "that would give defendant the opportunity to grant a variance for a specific development plan." *Id.*, 2021 WL 4477326 at *6.

Here, unlike in those few cases, Magistrate Judge Shields properly found, and her finding was not clearly erroneous, that Plaintiffs plausibly alleged that it is not remotely possible that the zoning boards will approve any variance application they may file. R&R p. 26. Notably, none of the cases on which Defendants rely involved an application for a variance – like the one Defendants insist Plaintiffs must apply for here – that legally cannot be granted and therefore is certain to get denied. Moreover, none of the plaintiffs in the cases Defendants cited were subjected to such "unfair and repetitive procedures" by the government as those to which Plaintiffs have been subjected here – including a repeatedly extended moratorium that was seen as such a sham that it

was held unconstitutional by the New York Supreme Court (Compl. ¶¶ 120-123) – that make denial of any variance applications even more certain in this case.

Magistrate Judge Shields thus correctly concluded that Plaintiffs' claims are ripe, and Defendants cite no clear error in that recommendation. Accordingly, the Court should adopt the Magistrate's recommendations regarding ripeness in their entirety.

B. Defendants' Arguments Regarding Plaintiffs' Equal Protection Claim Must be Rejected Again

1. Defendants' Arguments Regarding Plaintiffs' Equal Protection Claim Are Rehashed Versions of Their Arguments Below, and Thus the R&R Is Reviewed for Clear Error

The Court should disregard Defendants' arguments regarding Plaintiffs' equal protection claim as they were already briefed *ad nauseum* in their papers below and argued before the Magistrate, making it insufficient to carry Defendants' burden under the applicable "clear error" standard. *Compare* Joint Obj. pp. 17-19 *with* Lawrence MTD pp. 11-12 and Lawrence MTD Reply pp. 18-19; *compare* Joint Obj. pp. 20-21 and Lawrence Obj. pp. 10-13 *with* Joint MTD pp. 19-20, Joint MTD Reply p. 11, Lawrence MTD pp. 12-1, and Lawrence MTD Reply pp. 18-20; *compare* Joint Obj. pp. 23-24, 41-42 and Lawrence Obj. pp. 11-14 *with* Joint MTD pp. 8-10 and 23, Joint MTD Reply pp. 10-11, 23, and Lawrence MTD Reply pp. 20-23.

2. The Magistrate's Determinations As To Plaintiffs' Equal Protection Claim Were Correct, and Certainly Not Clear Error

Again, without objecting to any specific findings by Magistrate Judge Shields (merely introducing this argument with their rote incantation that "Plaintiffs' claim…is baseless"), Defendants claim that Plaintiffs failed to plead the disparate treatment element of their equal protection claim since the allegation that Defendants had an animus against them that was rooted in antisemitism is "baseless." Joint Obj. pp. 17-19. However, the Magistrate's decision regarding

the sufficiency of Plaintiffs' equal protection claim does not even mention, let alone hinge, on Defendants' alleged anti-Semitism. Indeed, the assertions of disparate treatment that the Magistrate credited toward Plaintiffs' equal protection claim are the ones alleging that other similarly situated properties, including golf courses that, like Plaintiffs' Property, are located within flood zones, are not similarly subject to the Woodmere Club Zoning. R&R pp. 31-33.

Defendants next claim that the Magistrate Judge erred in finding Plaintiffs have met their burden of pleading similarly situated comparators for purposes of their equal protection claim. Joint Obj. pp. 20-21; Lawrence Obj. pp. 10-13. In other words, Defendants merely object to the fact that the Magistrate rejected their arguments, which is not a proper objection. *Purisima*, 2013 WL 4500699, at *2. The Magistrate correctly found that Plaintiffs adequately pled similarly situated comparators by alleging the existence of similar golf clubs located in flood zones. R&R p. 32. Just because Defendants do not agree with this finding does not make it a clear error on the part of the Magistrate.

Defendants also contend (once again, without any citation to the record) that the Magistrate was incorrect in "finding…that the question of whether comparators are similarly situated is a factual question for a jury to decide." Lawrence Obj. p. 10. First, the Magistrate made no such finding anywhere in the R&R. This is just one of many instances throughout Defendants' objections where Defendants fail to cite to the record and then claim that the Magistrate made a finding that she did not, in fact, make. Second, even if the Magistrate had made this finding, it would have been absolutely correct. *See, e.g., Graham v. Long Island R.R.*, 230 F.3d 34, 38 (2d Cir. 2000) (whether comparators are similarly situated is a question of fact for the jury); *Vaher v. Town of Orangetown, N.Y.*, 916 F. Supp. 2d 404, 434 (S.D.N.Y. 2013) ("a plaintiff is not required to proffer evidence of similarly situated individuals at the motion to dismiss stage"). On a motion

to dismiss, all a court must determine is whether a plaintiff's comparators are plausibly similarly situated, and that is exactly what the Magistrate properly and correctly did here. R&R p. 32.

Finally, Defendants claim that the Magistrate Judge's finding that Plaintiffs adequately plead lack of rational basis is simply wrong. Lawrence Obj. pp. 11-14 and Joint Obj. pp. 17-18, 23-24. Indeed, consistent with their pattern of not objecting specifically to any clear error of law or fact, Defendants simply complain that the Magistrate did not agree with the arguments they made to her, which they now repeat in the hopes that this Court will give them a second bite at this apple. This Court should reject their "objections". *Purisima*, 2013 WL 4500699, at *2. Magistrate Judge Shields properly found that Plaintiffs pleaded sufficient plausible facts showing that Defendants did not have a rational (as opposed to unlawful) basis for enacting the Woodmere Club Zoning, therefore recommending that this Court deny their motions to dismiss. R&R pp. 32-33. Indeed, as Plaintiffs argued in their brief below (Dkt. No. 36, at pp. 38-40) and specifically alleged in their Complaint (Compl. ¶¶ 236-37), there is no reasonable connection between Defendants' stated purpose for adopting the Woodmere Club Zoning and the constraints imposed by it. And Defendants' attempts to rebut Plaintiffs' detailed allegations regarding lack of rational basis, by stating in a conclusory fashion that the rationality of the Woodmere Club Zoning is "beyond reproach" or "self-evident," are unavailing. *See* Joint Obj. pp. 18, 29, 36, 41. In any event, as the Magistrate correctly acknowledged in her R&R, whether or not Plaintiffs can prove lack of rational basis is not a determination that can be made at the pleading stage. R&R p. 33. *See, e.g., Vil. Of Willowbrook v. Olech,* 528 U.S. 562, 565 (2000) (*per curiam*) (court affirmed denial of a 12(b)(6) motion where allegations in complaint were sufficient to state a "class of one" equal protection claim under rational basis review); *Progressive Credit Union v. City of New York*, 889 F.3d 40,

49-50 (2d Cir. 2018) (citing *Wroblewski v. Washburn*, 965 F.2d 452, 460 (7th Cir. 1992) (court found that well-pleaded rational basis challenges should not be dismissed prior to fact-finding)).

This Court should adopt the Magistrate's recommendation that this Court find that Plaintiffs have sufficiently alleged an equal protection claim, as Defendants fail to show that the Magistrate committed any error, let alone a clear error.

C. Defendants' Arguments Regarding Plaintiffs' Takings and Exaction Claims Must be Rejected Again

1. Defendants' Arguments Regarding Plaintiffs' Takings and Exaction Claims Are Rehashed Versions of Their Arguments Below, and Thus the R&R Is Reviewed for Clear Error

Defendants' arguments regarding Plaintiffs' takings and exaction claims were already presented in their dismissal papers and argued before the Magistrate, and thus they cannot be reconsidered by this Court unless the Magistrate committed clear error, which, as demonstrated below, she did not. *Compare* Joint Obj. pp. 30-34 and Lawrence Obj. pp. 16-17 *with* Joint MTD p. 28 and Lawrence MTD pp. 16-18; *compare* Joint Obj. p. 33 *with* Arg. Tr. pp. 58:10-60:20; *compare* Joint Obj. pp. 34-35; Lawrence Obj. pp. 17-18 *with* Joint MTD pp. 20-21; Joint MTD Reply pp. 20-21.

2. The Magistrate's Determinations As To Plaintiffs' Takings and Exaction Claims Were Correct, and Certainly Not Clear Error

Defendants argue that Plaintiffs did not adequately plead the economic impact prong of their *Penn Central* takings claims because the Woodmere Club Zoning purportedly does not deny Plaintiffs "substantially all" economically viable use of their land in that Plaintiffs "can still pursue residential development" on 59 of the 284 lots previously allocated. Joint Obj. pp. 30-34; Lawrence Obj. pp. 16-17. This argument was already considered and rejected by the Magistrate Judge – she clearly and correctly found that Plaintiffs sufficiently alleged that the limited number

of lots available for development, along with onerous building requirements, make it economically unfeasible for Plaintiffs to develop their land. R&R p. 35. Indeed, as set forth in Plaintiffs' brief below (Dkt. No. 36, at p. 5), Defendants' claim that Plaintiffs can develop the remaining 59 lots is illusory, given that they burdened those lots with nearly triple the development costs, thereby virtually eliminating their economic productivity. Compl. ¶¶ 215-230, 322-324.

Next, Hempstead and Woodsburgh state, without objecting to any specific findings by the Magistrate Judge, that Plaintiffs fail to detail whether they seek lost profits or loss in total value of the land and fail to state the value of the Property before and after new zoning and the percentage of alleged diminishment. Joint Obj. p. 33. Defendants already presented this argument before the Magistrate, and she properly rejected it after agreeing with Plaintiffs that the various provisions in the Complaint that Defendants erroneously claimed were missing were in fact clearly there. Arg. Tr. pp. 58:10-60:20 ("MR. SCHREIBER: -- Mr. Sullivan says it's not there, doesn't mean it's not there THE COURT: I didn't make it up. I saw it somewhere so --"). Indeed, as Plaintiffs documented in detail in their brief below (Dkt. No. 36, at p. 21), Plaintiffs have more than sufficiently pleaded that by adopting the Woodmere Club Zoning and radically restricting Plaintiffs' ability to develop their Property, Defendants decreased the Property's value by at least 80%, and potentially even 95% or more, when factoring in the tripled hard costs to develop the remaining parcels, as well as the installation and ongoing maintenance costs Defendants foisted on Plaintiffs for the flood mitigation equipment that Defendants required Plaintiffs to install and maintain on the open space/parkland areas of the Property. Compl. ¶¶ 215-230, 322-324, 337-342. As the Magistrate explicitly found, based on those facts alleged in the Complaint, "there is no question that Plaintiffs allege sufficiently that the zoning interferes with their investment-backed expectations." R&R p. 35.

Defendants' claim, that the extent to which Plaintiffs can realize a profit from their Property is "not the relevant measure[]" of their investment-backed expectations, is incorrect. Joint Obj. p. 30. The Supreme Court has repeatedly said that an appropriate takings analysis must include the property owner's ability to profit from the use. *See, e.g., Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 136 (1978) (regulations at issue did not constitute a taking of Penn Central's property because they permitted Penn Central "not only to profit from the Terminal, but also to obtain a 'reasonable return' on its investment."); *Williamson County*, 473 U.S. at 186 (court said that one indicator that a taking had occurred was if the regulation interfered with the owner's "investment-backed profit expectations."); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485, 496 (1987) (coal mining restrictions upheld because there was no indication that they inhibited the mine operators' ability to "profit" from their properties); *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1017 (1992) (court quoted Lord Coke's famous observation, "for what is the land but the profits thereof[?]"); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 14 (1984) (court held that "a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking…even if the Government has not physically intruded upon the premises or acquired a legal interest in the property."). In short, the existence of some theoretical "paper" use does not satisfy the Constitution. In *Lucas*, the property owner was still able to camp, picnic, or put a trailer on his property – theoretical "uses" that the dissent thought were sufficient – but the Supreme Court nonetheless held that a taking could have occurred. *Id.*, 505 U.S. at 1031, 1044. To be valid, it must be a real – *i.e.*, economically beneficial or productive – use. Merely that Plaintiffs here may have been left with some hypothetical ability to develop some small fraction of their property in some speculative way does not mean that there has not been a taking worthy of compensation.

Defendants also argue that the Magistrate was incorrect in determining that Plaintiffs' investment-backed expectations are reasonable because they purchased the Property six months after the Hempstead Moratorium was put in place and after Hempstead announced it was considering zoning amendments. Joint Obj. pp. 29-30; Lawrence Obj. p. 17. This is the exact same argument Defendants advanced in their dismissal papers, which the Magistrate **explicitly acknowledged and rejected** in the R&R. R&R p. 35 ("The mere fact that the first moratorium was in place at the time of purchase does not defeat the plausible claim that Plaintiffs' investment expectations were completely defeated by the current zoning.") This Court should adopt the Magistrate's findings on this point and disregard Defendants' attempt at having this Court give them "do-over" on their argument. This is particularly so given that their argument ignores:

- the Supreme Court's decisions in *Palazzolo* and its progeny (533 U.S. at 626-627);
- the factual history behind the adoption of the moratorium, including that Defendants themselves publicly stated at the time it was adopted that its purpose was to ensure that any development would be consistent with the character of the surrounding area, as Plaintiffs' have alleged their development would have been (Compl. ¶ 103);
- that the moratorium in place when Plaintiffs purchased the Property was only supposed to remain in effect for 6 months, but it was extended six times and the Supreme Court of the State of New York found it to be unconstitutional (Compl. ¶¶ 113, 120-123); and
- that the moratorium was not a zoning change or substantive ordinance; it was merely a pause on the issuance of building permits during a period of "study" (Compl. ¶¶ 4, 102-106) while the original zoning in place when Plaintiffs purchased

the Property remained in effect until the adoption of the Woodmere Club Zoning ordinance three years later (Compl. ¶¶ 4, 98-100).

Defendants next aver that the Magistrate Judge erred in finding that Plaintiffs plausibly alleged that the open space subdistrict portion of the Property has been taken for public use without compensation, because Plaintiffs are permitted to build a nine-hole private golf course. Joint Obj. pp. 34-35; Lawrence Obj. pp. 14-15. As to Plaintiffs' exaction claim, Defendants similarly argue that the Magistrate was incorrect in determining that the Woodmere Club Zoning requires the creation of a public park because Plaintiffs can use the designated open space as a golf club or golf course and retain their right to exclude the public. Joint Obj. pp. 34-35; Lawrence Obj. pp. 17-18. However, upon finding that Plaintiffs plausibly alleged a *per se* takings claim and exaction claim, the Magistrate plainly accepted, as she was obligated to do on these Rule 12(b) motions, "as a fact – **assumed to be true at this stage of the proceedings**," Plaintiffs' allegations that "70% of the Property must now be maintained and preserved for public use" and that Defendants' allowance of a nine-hole golf course in the open space subdistrict is "an illusory attempt to show economic viability when, in fact, this subdistrict is merely a disguise for creating a park out of privately held land." R&R pp. 16 and 34-35 (emphasis added). Defendants' suggestion that a nine-hole golf course would be lucrative is entirely disingenuous. As alleged, "Defendants admit in the [Woodmere Club Zoning] ordinance itself that golf courses are closing as a result of declining golf participation and memberships at golf clubs (and therefore are not economically feasible)." Compl. ¶ 218. Indeed, as also alleged, the golf club at issue here specifically had become uneconomic as a golf club, members were leaving, and one of the terms of the purchase by Plaintiffs (in order to ease the transition for existing members) was that they would continue to operate the club at a loss for several years. Compl. ¶¶ 92-97. Such a "use" has not been

economically productive for many years. It will not become so just because Defendants wish it would be so.

Conveniently, Defendants' objections ignore (with the exception of a mention in a footnote in the Joint Objection) that Plaintiffs have alleged in detail how the Woodmere Club Zoning is an exaction that mandates that at their own expense they dedicate and maintain in perpetuity on their Property flood protection devices solely for the benefit of the surrounding properties. Compl. ¶¶ 215-230, 337-339. That exaction is expressly made a condition to any development of any kind on the property. *Id.* Indeed, upon finding that Plaintiffs alleged a plausible exaction claim, the Magistrate correctly determined that "[t]he carving out of areas where development is not allowed as well as creation of the subdistrict that preserves the former golf club and amenities works to create such a public place at Plaintiffs' expense… Plaintiffs plausibly allege that Defendants are forcing Plaintiffs to 'alone to bear public burdens' referred to by the Supreme Court in *Palazzolo*." R&R pp. 35-36.

Finally, Defendants attempt to mislead the Court by restricting the application of *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) to cases involving the right to exclude, when in fact its holding has a far broader reach. Lawrence Obj. p. 15. *Cedar Point Nursery* involved a California law that required agricultural employers to allow union representatives entry onto to their property for a limited amount of time per year. In finding that the law constituted a *per se* taking, the court clarified that *per se* takings can be temporary and they need not consist of occupying the entire property all the time and to the exclusion of the owners as the lower courts had previously concluded. 141 S. Ct. at 2074-2075. Thus, the court noted that this is the case even if the government invades "only an easement," which is effectively what the challenged California law in *Ceder Point Nursery* did according to the court. *Id.* at 2073.

Here, as alleged in the Complaint (at ¶¶ 21, 26-28, 222-228, 337-339), and highlighted by the Magistrate in the R&R (at p. 17), under the Woodmere Club Zoning, Plaintiffs will have to expend vast quantities of money annually to maintain approximately 80 acres of parkland, drainage, and flood mitigation for the benefit of the surrounding neighbors, for an indefinite period, effectively exacting a conservation easement on Plaintiffs' Property for the benefit of the surrounding neighborhood, putting the financial responsibility for maintaining it solely on Plaintiffs.

The Court should adopt the Magistrate's recommendation that this Court find that Plaintiffs sufficiently alleged a takings claim and an exaction claim (*see* R&R pp. 34-35), and Defendants cite no error, let alone a clear one, that would warrant otherwise.

D. Defendants' Arguments Regarding Plaintiffs' Substantive Due Process Claim Must be Rejected Again

1. Defendants' Arguments Regarding Plaintiffs' Substantive Due Process Claim Are Rehashed Versions of Their Arguments Below, and Thus the R&R Is Reviewed for Clear Error

Defendants' arguments regarding Plaintiffs' substantive due process were already briefed nearly verbatim in their dismissal papers and at oral argument and they should therefore be rejected by this Court. *Compare* Joint Obj. pp. 25-26 and Lawrence Obj. pp. 18-20 *with* Joint MTD pp. 16-17, 23-24, Joint MTD Reply pp. 19, Lawrence MTD pp. 7-9, Lawrence MTD Reply pp. 16-17, and Arg. Tr. pp. 17:13-18:5, 55:22-57:21; *compare* Joint Obj. pp. 26-27; Lawrence Obj. p. 20 *with* Joint MTD pp. 24-25, Joint MTD Reply pp. 19-20, Lawrence MTD Reply p. 24, and Arg. Tr. p. 28:3-8; *compare* Joint Obj. pp. 18, 35-37, Lawrence Obj. pp. 21-22 *with* Lawrence M2D p. 10 and Lawrence M2D Reply p. 19.

2. The Magistrate's Determinations As To Plaintiffs' Substantive Due Process Claim Were Correct, and Certainly Not Clear Error

Defendants argue that the Magistrate erred in finding that Plaintiffs have plausibly pled a protected property interest in prior zoning classification because Defendants have broad discretion in determining whether to approve or deny subdivision applications. Joint Obj. pp. 25-26; Lawrence Obj. pp. 18-20. However, whether or not Defendants had broad discretion in subdivision approval is inconsequential because Magistrate Judge Shields properly found that Plaintiffs plausibly pled that their rights to existing zoning status vested by way of the special facts exception, which is sufficient to satisfy the "property interest" requirement of a substantive due process claim. R&R pp. 39-40.

Even so, Defendants misrepresent the nature and extent of Defendants' discretion in deciding on subdivision applications. As detailed in Plaintiffs' brief below (Dkt. No. 36, at pp. 70-71), under New York law, local municipalities enjoy a broad, **but not unlimited**, delegation of zoning authority from the State Legislature. In enacting a zoning ordinance, a municipality must abide by the limits on its statutory authority. *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 369-370 (1977). A zoning ordinance is only valid if it is adopted as part of a well-considered comprehensive land use plan that takes into account the needs of the community as a whole. This foundational requirement, embodied in the Town and Village Law, guards against the use of zoning to achieve improper ends. *Udell v. Haas*, 21 N.Y.2d 463, 469 (1968). A municipality must also comply with the State Constitution. New York's highest court has held that a zoning ordinance that deprives an owner of nearly all property rights, except "bare title" violates the due process requirements of the State Constitution. *Fred F. French Investing Co., Inc. v. City of New York*, 39 N.Y.2d 587, 597 (1977) (a city's "rezoning of buildable private parks exclusively as parks

open to the public, thereby prohibiting all reasonable income productive or other private use of the property," was a deprivation of property rights without due process).

Defendants next claim that the Magistrate's suggestion that Plaintiffs attained a vested right to proceed under the old zoning by reason of large expenses is incorrect. Joint Obj. pp. 26-27; Lawrence Obj. p. 20. In support of this claim, Defendants cite a series of cases that purportedly stand for the proposition that expenses incurred before the commencement of actual construction do not create a vested right. *See* Joint Obj. p. 26. However, as the court in *DLC Mgmt. Corp v. Town of Hyde Park,* 163 F.3d 124 (2d Cir. 1998) recognized, the "substantial construction" requirement is not absolute; *i.e.,* in certain circumstances a property owner can be deemed to have a vested right under New York law even if he or she has not commenced substantial construction. *Id.*, at 130-131. For example, courts have recognized that a landowner can have a vested right in pre-existing zoning even absent substantial construction where, as here, there is a statutory or regulatory requirement with which the property owner was required to comply before commencing substantial construction, provided that the landowner exercised reasonable diligence in acting to satisfy the requirement before the change in the zoning. *See, e.g., Pokiok v. Silsdorf*, 40 N.Y.2d 769, 773 (1976); *Faymor Dev. Co., Inc. v. Bd. of Standards and Appeals of City of New York*, 45 N.Y.2d 560, 565 (1978); *Soundview Associates v. Town of Riverhead*, 725 F. Supp. 2d 320, 336 (E.D.N.Y. 2010).

Here, as Plaintiffs alleged in their Complaint and detailed in their opposition brief below (Dkt. No. 36, at p. 67), Plaintiffs have a significant regulatory hurdle to overcome before they can even start construction; *i.e.,* they must receive subdivision approval from the relevant administrative bodies, most notably, the NCPC. As alleged, Plaintiffs have spent nearly two years and approximately $2 million doing everything required of them to obtain subdivision approval –

a process in which Defendants had a say at the NCPC – but they are still awaiting a decision on their application. Compl. ¶¶ 167-183. Accordingly, the Magistrate correctly found that the $2 million that Plaintiffs have expended thus far on their subdivision application process is the functional equivalent of commencing construction on a single piece of property subject to as-of-right zoning and is sufficient to satisfy the "vested right" requirement of Plaintiffs' substantive due process claim on a motion to dismiss. R&R pp. 39-40.

Finally, Defendants argue that Plaintiffs failed to plead conscious-shocking conduct (*see* Joint Obj. pp. 18, 35-37; Lawrence Obj. pp. 21-22), however, the Magistrate expressly and properly rejected that argument. R&R pp. 41-42 ("Defendants argue that Plaintiffs have failed to allege conduct that 'shocks the conscience…[h]owever…It is clear that accepting all of Plaintiffs' factual allegations as true and, again, construing them most favorably to Plaintiffs, that Plaintiffs have adequately stated a claim for denial of their substantive due process rights based upon alleged conduct that was 'arbitrary,' 'conscience shocking,' or 'oppressive in the constitutional sense,' not merely 'incorrect or ill-advised.'") (internal citations and quotations omitted). Defendants should not be afforded yet another chance to make exactly the same argument they made below in the hopes of getting a better outcome with a different judge, where Magistrate Judge Shields's determination, which was amply supported by the detailed facts pleaded in the Complaint, was absolutely correct, and certainly not clear error. *Easley*, 532 U.S. at 242. The Court should therefore adopt the Magistrate's recommendations regarding Plaintiffs' substantive due process claim in their entirety.

E. Defendants' Arguments Regarding Plaintiffs' Procedural Due Process Claim Must be Rejected Again

1. Defendants' Arguments Regarding Plaintiffs' Procedural Due Process Claim Are Rehashed Versions of Their Arguments Below, and Thus the R&R Is Reviewed for Clear Error

Every single one of Defendants' arguments regarding Plaintiffs' procedural due process claim are simply regurgitated versions of the arguments they made in their dismissal briefing and orally before the Magistrate and they should therefore be rejected by this Court on that basis alone. *Compare* Joint Obj. pp. 48-49 and Lawrence Obj. pp. 22-23 *with* Arg. Tr. pp 46:12-48:3; *compare* Lawrence Obj. p. 23 *with* Arg. Tr. pp. 45:22-46:6; *compare* Joint Obj. pp. 52-53 *with* Joint MTD p. 44.

2. The Magistrate's Determinations As To Plaintiffs' Procedural Due Process Claim Were Correct, and Certainly Not Clear Error

Defendants claim in their objections that Plaintiffs fail to plausibly allege that Defendants deprived them of their procedural due process rights because Plaintiffs do not have an interest in the continuation of the SEQRA process. Joint Obj. pp. 48-49; Lawrence Obj. pp. 22-23. But in doing so they mischaracterize the Magistrate's finding, that Plaintiffs plausibly pled a deprivation of a protected right for procedural due process purposes by alleging "that they were deprived from receiving a determination from the NCPC due to Defendants' abrupt change of zoning and adoption of the CCD Zoning." R&R p. 45. As the Magistrate correctly determined, at the pleading stage, that is sufficient to permit Plaintiffs' procedural due process claim to proceed.

In addition, Lawrence claims that Plaintiffs do not, and cannot, allege that they were entitled to some notice or opportunity to be heard which was denied. Lawrence Obj. p. 23. Should the Court decide to entertain this argument for a second time, Plaintiffs are not required to show

that they were denied an opportunity to be heard in order allege a plausible procedural due process claim, and Lawrence cites no law that says otherwise.

Hempstead and Woodsburgh also argue, for the very first time, that "Plaintiffs' conclusory allegation that the municipalities did not participate in the NCPC SEQRA process is a sham and demonstrably false and, indeed, a fraud on the Court," because, according to them, Hempstead and Woodsburgh did participate in the NCPC's SEQRA review of the proposed subdivision as "involved agencies," and they owed no further obligation to the public or to Plaintiffs. Joint Obj. pp. 50-51. First, this Court should follow established law and decline to consider Defendants' entirely new argument that could and should have been raised in their dismissal papers. *Illis v. Artus*, No. 06-CV-3077(SLT)(KAM), 2009 WL 2730870, at *1 (E.D.N.Y. Aug. 28, 2009) (". . . a district judge will not consider new arguments raised in objections to a magistrate judge's report and recommendation that could have been raised before the magistrate but were not.") (internal quotations and citations omitted); *Fossil Grp. Inc. v. Angel Seller, LLC*, No. 20CV2441WFKTAM, 2021 WL 4520030, at *2 (E.D.N.Y. Oct. 4, 2021) (same). If the Court is inclined to consider Defendants' new argument, which it should not, Defendants mischaracterize Plaintiffs' argument on this point. Plaintiffs allege not that Defendants failed to participate in the SEQRA process, but rather that Defendants intentionally declined to raise the supposed environmental concerns that they claim justify the Woodmere Club Zoning during the SEQRA process, which is specifically designed to address such concerns, holding all such supposed concerns in reserve and then, at the last minute – two years and $2 million into the process – used them as claimed bases for the zoning change. Compl. ¶¶ 181-85.

Finally, without citing to the R&R, Defendants contend that they disagree with the Magistrate's purported assertion "that the County's SEQRA review of the proposed subdivision

addresses all of the environmental concerns the new zoning at issue purports to address, thus requiring the municipalities to have explored their environmental concerns before the County, rather than to have pursued their own SEQRA review of a proposed zoning amendment." Joint Obj. pp. 52-53 (internal quotations omitted). The Court should disregard this argument as no such finding was ever made by the Magistrate in the R&R. Defendants are clearly objecting to an allegation set forth in Plaintiffs' Complaint. *See* Compl. ¶ 184 ("Instead of participating in the NCPC review of Plaintiffs' Subdivision through the SEQRA process (which addresses all the environmental concerns the new zoning at issue purports to address), the Municipalities instead elected to adopt the new 'Coastal Conservation District – Woodmere Club' zone in an effort to circumvent SEQRA and the subdivision process, and to impose their own new plan for a development scheme upon the Property.") Once again, Defendants want it to look like they are responding to a finding by the Magistrate when in fact they are just repeating their dismissal arguments. *See* Joint MTD p. 44.

The Court should adopt the Magistrate's recommendation that this Court find that Plaintiffs plausibly alleged a procedural due process claim, and Defendants cite no clear error that would warrant a different conclusion.

F. Defendants' Arguments Regarding Plaintiffs' *Ultra Vires* Claims Must be Rejected Again

1. Defendants' Arguments Regarding Plaintiffs' *Ultra Vires* Claims Are Rehashed Versions of Their Arguments Below, and Thus the R&R Is Reviewed for Clear Error

Yet again, Defendants' arguments in their objections regarding Plaintiffs' *ultra vires* claims are merely rearranged versions of arguments they already made below, and therefore they should be rejected this Court. *Compare* Joint Obj. pp. 38-48; Lawrence Obj. pp. 23-25 *with* Joint MTD pp. 37-40, Joint MTD Reply p. 24, Lawrence MTD pp. 21-23, and Arg. Tr. pp. 90:16-106:16.

2. The Magistrate's Determinations As To Plaintiffs' *Ultra Vires* Claims Were Correct, and Certainly Not Clear Error

Defendants claim that the Woodmere Club Zoning was a valid exercise of Defendants' zoning powers and made pursuant to a well-considered comprehensive plan. Joint Obj. pp. 38-48; Lawrence Obj. pp. 23-25. The Magistrate expressly considered these exact arguments by Defendants in the R&R (at p. 48 ["Defendants argue that there is no question but that the CCD Zoning is a valid exercise of their powers, and cannot therefore be deemed ultra vires"]) and properly concluded that Plaintiffs plausibly pled the opposite (*Id.* ["[t]he facts pleaded raise a plausible claim that Defendants exceeded their powers."]). Defendants are not entitled to a second opportunity on this point.

Moreover, the Second Department has held that where a defendant municipality purports to use its zoning power to adopt "zoning" that effectively pre-plans how a single specific property – as opposed to multiple properties – can be developed, that is an improper, *ultra vires* use of the zoning power, and thus void. *BLF Assoc. LLC v. Town of Hempstead*, 59 A.D.3d 51, 55 (2d Dep't 2008). Notably, Plaintiffs cited *BLF*, which is directly on point, in their Complaint as well as in their brief below. Not surprisingly, given that it is directly on point, Magistrate Judge Shields also cited *BLF* in her R&R (at pp. 46-47).

Yet, just as they never bothered to address *BLF* anywhere in their 100 pages of submissions below – again, obviously because it is directly on point and shows precisely how their adoption of the new so-called zoning was an improper, *ultra vires* act – Defendants have once again failed to do so in the 107 pages of briefing they submitted to this Court, even while they have the temerity to argue that the Magistrate was somehow wrong. (!) However, wishing away and ignoring controlling precedent does not make for a proper objection, and this Court should therefore reject

Defendants' arguments on this point because the Magistrate Judge was absolutely correct in her holding.

Defendants also claim that "the absence of a valid federal claim precludes the court from exercising supplemental jurisdiction over related state claims." Joint Obj. p. 38. As an initial matter, this argument is meaningless since the Magistrate correctly found that all of Plaintiffs' federal claims are plausibly pled and are not subject to dismissal. But even if the Magistrate had recommended that one or more of Plaintiffs' federal claims should be dismissed, Defendants' suggestion that under *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988) and *Kolari v. N. Y.-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006), the court is automatically required to then dismiss Plaintiffs' state claims completely misrepresents the law. Joint Obj. pp. 38 and 45. Supplemental jurisdiction "is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values." *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). Although some courts had interpreted *Gibbs* as establishing a categorical rule that a court must decline supplemental jurisdiction absent federal claims, the court in *Carnegie-Mellon* clarified that *Gibbs* did "not establish a mandatory rule to be applied inflexibly in all cases." 484 U.S. at 350 n.7; *see also Kolari*, 455 F.3d at 122 (stating a district court "**may** decline to exercise supplemental jurisdiction" if it "has dismissed all claims over which it has original jurisdiction.") (emphasis added). Indeed, "a district court is never required to relinquish jurisdiction over state law claims merely because the federal claims were dismissed before trial. The only requirement is that it makes a considered determination of whether it should hear the claims." *Sullivan v. Chappius*, 711 F. Supp. 2d 279, 286 (W.D.N.Y. 2010) (quoting *Miller v. Herman*, 600 F.3d 726, 738 (7th Cir. 2010)). In any event, because the federal claims will proceed, there is no basis to dismiss this claim.

Defendants fail to show any clear error in the R&R. Therefore, this Court should adopt the Magistrate's recommendation that this Court find that Plaintiffs have sufficiently alleged *Ultra Vires* claims.

CONCLUSION

For all the reasons stated herein, and in Plaintiffs' underlying briefing, this Court should overrule Defendants' objections, adopt the R&R in its entirety, and grant such other and further relief as the Court may deem appropriate.

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