

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3  
4 August Term 2011

5 (Argued: September 23, 2011 Decided: September 24, 2012)

6 Docket No. 10-3634-cv

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9 FORTRESS BIBLE CHURCH, REVEREND DENNIS G. KARAMAN,

10  
11 Plaintiffs-Appellees,

12  
13 -- v. --

14  
15 PAUL J. FEINER, individually & in his official capacity as the  
16 Supervisor of the Town of Greenburgh, SONJA BROWN, in her  
17 official capacity as Councilwoman for the Town of Greenburgh,  
18 KEVIN MORGAN, in his official capacity as Councilman for the Town  
19 of Greenburgh, DIANA JUETTNER, in her official capacity as  
20 Councilwoman for the Town of Greenburgh, FRANCIS SHEEHAN, in his  
21 official capacity as Councilman for the Town of Greenburgh, TOWN  
22 BOARD OF GREENBURGH, THE TOWN BOARD OF THE TOWN OF GREENBURGH,  
23 TOWN OF GREENBURGH, THE TOWN OF GREENBURGH,

24  
25 Defendants-Appellants.

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27  
28 -----x

29  
30 B e f o r e : WALKER, CHIN and LOHIER, Circuit Judges.

31 Defendants-appellants Paul J. Feiner, Sonja Brown, Kevin  
32 Morgan, Diana Juettner, Francis Sheehan, Town Board of  
33 Greenburgh, the Town Board of the Town of Greenburgh, and the  
34 Town of Greenburgh, appeal from a judgment of the United States  
35 District Court for the Southern District of New York (Stephen C.

1 Robinson, Judge), holding that they had violated plaintiffs-  
2 appellees' rights under the Religious Land Use and  
3 Institutionalized Persons Act as well as the First Amendment, the  
4 Equal Protection Clause, and New York constitutional and  
5 statutory law. We conclude that the district court correctly  
6 applied the law and discern no clear error in its factual  
7 findings. AFFIRMED.

8 ROBERT A. SPOLZINO (Joanna Topping,  
9 Cathleen Giannetta, on the brief),  
10 Wilson, Elser, Moskowitz, Edelman &  
11 Dicker LLP, White Plains, New York,  
12 for Defendants-Appellants.

13  
14 DONNA E. FROSCO, Keane & Beane,  
15 P.C., White Plains, New York, for  
16 Plaintiffs-Appellees.

17  
18  
19 JOHN M. WALKER, JR., Circuit Judge:

20 This appeal concerns a longstanding land-use dispute between  
21 plaintiff-appellee Fortress Bible Church ("the Church") and  
22 defendant-appellant Town of Greenburgh, New York ("the Town")  
23 over the Church's plan to build a worship facility and school on  
24 land that it owned within the Town. After a series of  
25 contentious administrative proceedings effectively preventing the  
26 Church's project from going forward, the Church, along with its  
27 pastor, plaintiff-appellee Reverend Dennis G. Karaman  
28 ("Karaman"), sued the Town, its Town Board ("the Board"), and  
29 several Board members (collectively "the Town defendants") in the

1 United States District Court for the Southern District of New  
2 York (Stephen C. Robinson, Judge). The Church alleged violations  
3 of the Religious Land Use and Institutionalized Persons Act of  
4 2000 ("RLUIPA"), 42 U.S.C. § 2000cc et seq., as well as of its  
5 constitutional Free Exercise and Equal Protection rights, and  
6 Article 78 of New York's Civil Procedure Law. After a 26-day  
7 bench trial, the district court entered judgment for the  
8 plaintiffs on all counts. On appeal, the Town makes six  
9 contentions: (1) RLUIPA is by its terms inapplicable to the  
10 environmental quality review process employed by the Town to  
11 reject the proposal, (2) there was insufficient evidence that the  
12 defendants had imposed a substantial burden on plaintiffs'  
13 religious exercise under RLUIPA, (3) plaintiffs' class-of-one  
14 Equal Protection claim is not viable because they have not  
15 alleged a single comparator similarly situated in all respects,  
16 (4) plaintiffs' Free Exercise rights were not violated, (5) the  
17 Town did not violate Article 78, and (6) the district court  
18 lacked the authority to order the Town Zoning Board, a non-party,  
19 to take any action with regard to the Church. We find all of  
20 these contentions to be without merit and therefore AFFIRM the  
21 decision of the district court.

1 **BACKGROUND**

2 **Facts**

3 In reviewing a judgment after a bench trial, we accept the  
4 district court's factual findings unless they are clearly  
5 erroneous. See Arch Ins. Co. v. Precision Stone, Inc., 584 F.3d  
6 33, 38-39 (2d Cir. 2009). Because we do not identify error in  
7 any of the district court's findings that are pertinent to this  
8 appeal, we set forth the relevant facts as found by the district  
9 court.<sup>1</sup>

10 **I. The Church's Proposal**

11 Plaintiff Fortress Bible Church is a Pentecostal church  
12 established in the 1940s. It is a tax-exempt religious  
13 organization with approximately 175 members. In addition to its  
14 worship activities, the Church runs Fortress Christian Academy  
15 ("the School"), a private Christian school. Plaintiff Dennis G.  
16 Karaman is the Church's pastor.

17 The Church is currently located in Mount Vernon, New York.  
18 Its Mount Vernon facilities, however, are not adequate to  
19 accommodate its religious practice. In 1998, the Church  
20 purchased a parcel of land on Pomander Drive in the Town of  
21 Greenburgh, New York, with the intention of building a larger  
22 facility. This parcel ("the Pomander Drive property") was vacant

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<sup>1</sup> A more comprehensive accounting of the facts can be found in the district court's thorough opinion. Fortress Bible Church v. Feiner, 734 F. Supp. 2d 409 (S.D.N.Y. 2010).

1     except for a small residence on one edge. The surrounding  
2     neighborhood includes residences, business offices, churches, and  
3     major roads. Prior to purchasing the property, Karaman advised  
4     the Town of his intent to build a church and school on the  
5     grounds, and stated that if the property was not suitable for  
6     this purpose, he would not purchase it.

7             The Church sought to build a single structure on the  
8     Pomander Drive property that would house a worship facility and a  
9     school. The proposed church would accommodate 500 people and the  
10    school would accommodate 150 students. The structure would have  
11    125 parking spaces and occupy 1.45 acres of the 6.53 acre plot.  
12    To construct its proposed building, the Church required three  
13    discretionary land use approvals from the Town: (1) site plan  
14    approval from the Board, (2) a waiver of the landscaped parking  
15    island requirement, and (3) a variance from the Town's Zoning  
16    Board of Appeals ("the Zoning Board") to allow the building to be  
17    located closer to one side of the property. Because the Church's  
18    proposal required discretionary government approval, it triggered  
19    New York's State Environmental Quality Review Act ("SEQRA"), N.Y.  
20    Comp. Codes R. & Regs. Tit. 6, §§ 617.2(b), 617.3(a) (requiring  
21    environmental review process whenever government takes certain  
22    discretionary action).

23

1     **II. The SEQRA Review Process**

2             The SEQRA review process entails several stages. First, the  
3     "lead agency" (in this case, the Board) must make an initial  
4     determination of environmental significance. 6 N.Y.C.R.R. §  
5     617.6. If the environmental impact of the proposal is small, the  
6     lead agency can issue a negative declaration, meaning there is no  
7     potential for significant adverse environmental impact, or a  
8     conditioned negative declaration, meaning that the potential for  
9     adverse environmental impact can be mitigated by the agency. §  
10    617.7. Alternately, if the lead agency determines that the  
11    proposal has the potential for at least one significant adverse  
12    environmental impact, the lead agency must issue a "positive  
13    declaration" and require the applicant to submit an Environmental  
14    Impact Statement ("EIS") evaluating the environmental impact of  
15    the project. § 617.7. Preparation of an EIS involves several  
16    steps. The applicant prepares a scoping document (outlining the  
17    scope of the environmental impact), a draft EIS ("DEIS"), and a  
18    final EIS ("FEIS"), and must seek feedback at each stage from the  
19    public and approval from the lead agency. §§ 617.8, 617.9.

20            The Church submitted its initial proposal on or about  
21    November 24, 1998. On January 27, 1999, the Church and its  
22    consultants appeared at a Board work session to discuss the  
23    application. The Board requested that the Church examine the  
24    project's impact on local traffic and access to the property. In

1 response, the Church hired consultants to perform a traffic study  
2 of the area. It also sought feedback from the New York State  
3 Department of Transportation ("NYSDOT") and nearby residents. On  
4 or about January 17, 2000, the Church submitted a revised  
5 proposal which included a comprehensive traffic study and  
6 additional information about potential environmental impacts.  
7 After reviewing the proposal, Anthony Russo ("Russo"), the Town  
8 Planning Commissioner, believed that the Church had adequately  
9 mitigated the Town's traffic concerns and advised the Board that  
10 it could issue a Conditioned Negative Declaration.

11 On July 11, 2000, Karaman and other Church representatives  
12 attended a work session with the Board. At the meeting,  
13 defendant Town Supervisor Paul Feiner ("Feiner") stated that he  
14 was concerned with the Church's tax-exempt status and asked it to  
15 donate a fire truck or make some other payment in lieu of taxes.  
16 Other Board members commented to the effect that they did not  
17 want the property to be used as a church. The Church declined to  
18 donate a fire truck or make any other payment in lieu of taxes.  
19 On July 19, 2000, the Board issued a positive declaration,  
20 triggering the full SEQRA review process.

21 Over the next several years, the Church provided all of the  
22 information required by the SEQRA process. It produced a scoping  
23 document followed by a DEIS, which the Town accepted as complete  
24 on October 24, 2001. The Town held hearings on the proposal on

1 December 12, 2001, and January 9, 2002. During this comment  
2 period, NYSDOT submitted comments indicating its approval of the  
3 Church's traffic study. Despite the Church's efforts, however,  
4 the Town continued to resist the project. On May 3, 2001,  
5 Karaman met with Feiner to discuss the review process. Karaman  
6 asked what he could do to move the process along, and Feiner  
7 responded that the Church could agree to make yearly financial  
8 contributions to the fire department. Another Board member  
9 suggested to Russo on multiple occasions that he should "stop" or  
10 "kill" the project. In early 2002, the Town replaced Russo with  
11 a new Planning Commissioner and retained consultants to analyze  
12 the Church's proposal.

13 On April 5, 2002, after further consultation with Town  
14 officials, the Church submitted a proposed FEIS. The Town  
15 refused to discuss the project with the Church and refused to  
16 move forward with the review process. Despite having accepted  
17 the DEIS and scoping document as complete, which would normally  
18 finalize the universe of issues relevant to SEQRA review, the  
19 Town began to request new information and raise new issues for  
20 the Church to address. The Church provided the requested  
21 information and attempted to meet the Town's demands. During the  
22 summer of 2002, the Town stopped the review process altogether  
23 due to the Church's refusal to reimburse it for certain disputed  
24 fees the Town had incurred during the process. On January 17,



1 2003, the Church sent a letter to the Town summarizing its view  
2 that the Town had inappropriately delayed its building  
3 application despite its consistent efforts to meet the Town's  
4 requests.

5 On February 25, 2003, the Town took the unusual step of  
6 taking over preparation of the FEIS. It did not notify the  
7 Church that it had done so until March 17, 2003. The Town edited  
8 the FEIS to include a number of additional problems with the  
9 proposal, and did not consider the Church's input addressing  
10 those problems.

11 On June 11, 2003, the Church instituted this action. It  
12 alleged violations of RLUIPA and its rights under the First and  
13 Fourteenth Amendments, as well as New York law, and sought an  
14 order compelling the Town to complete SEQRA review and approve  
15 the project.

16 On April 14, 2004, the Town denied the Church's  
17 application.<sup>2</sup> In its findings statement the town stated its  
18 primary reasons for rejecting the application as: (1) violation  
19 of a recently enacted "steep slope" zoning ordinance; (2) stress  
20 on the police and fire departments; (3) retaining walls that  
21 constituted an attractive nuisance; and (4) traffic and parking  
22 problems.

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<sup>2</sup> The Town initially tried to adopt this findings statement on January 6, 2004, but the district court declared that statement void because it violated New York's Open Meetings Law.

1     **III. The District Court Decision**

2             The district court conducted a bench trial over 26 non-  
3 consecutive days between October 2006 and March 2007. On August  
4 11, 2010, in a lengthy opinion containing 622 factual findings,  
5 the district court found that the Town had violated the Church's  
6 rights under RLUIPA, the Free Exercise Clauses of the First  
7 Amendment and New York Constitution, the Equal Protection Clauses  
8 of the Fourteenth Amendment and New York Constitution, and  
9 Article 78 of New York's Civil Procedure Law. Fortress Bible  
10 Church v. Feiner, 734 F. Supp. 2d 409, 522-23 (S.D.N.Y. 2010).  
11 It found that the Town had acted in bad faith and had used the  
12 SEQRA review process illegitimately as a way to block the  
13 Church's proposal. It therefore concluded that the Town had  
14 substantially burdened the Church by preventing it from moving to  
15 an adequate facility, resulting in a violation of RLUIPA and the  
16 Free Exercise Clause. Id. at 496-508, 511-12. The district  
17 court also found an Equal Protection violation based on a class-  
18 of-one theory. Id. at 513-17. While acknowledging that the  
19 Church had not presented a single comparator similarly situated  
20 in all respects, it found the Church's comparators to be  
21 sufficient with regard to each of the discrete issues cited by  
22 the Town. Additionally, the district court found that Town  
23 staff, including at least one Board member, had intentionally

1 destroyed discoverable evidence despite specific instructions not  
2 to do so.

3 The district court ordered broad relief: (1) it annulled  
4 the positive declaration and findings statement; (2) it ordered  
5 that the Church's 2000 site plan be deemed approved for SEQRA  
6 purposes and enjoined any further SEQRA review; (3) it ordered  
7 the Board to grant the Church a waiver from the landscaped  
8 parking island requirement; (4) it ordered the Zoning Board to  
9 grant a variance permitting a side building location; (5) it  
10 ordered the Town to issue a building permit for the 2000 site  
11 plan; (6) it enjoined the Town from taking any action that  
12 unreasonably interferes with the Church's project; and (7) it  
13 imposed \$10,000 in sanctions for spoliation of evidence. Id. at  
14 520-22. The district court directed the parties to submit  
15 additional information with regard to compensatory damages. Id.  
16 at 520-21. Judgment was entered on August 12, 2010. The Town  
17 appeals.

### 19 DISCUSSION

20 On appeal, the Town challenges the district court's holding  
21 that it violated the Church's rights under RLUIPA, the First and  
22 Fourteenth Amendments, the New York Constitution, and Article 78.  
23 It also contends that the district court lacked any authority  
24 over the Zoning Board, a non-party to this litigation.

1 We review a district court's conclusions of law after a  
2 bench trial de novo and its findings of fact for clear error.  
3 Reynolds v. Giuliani, 506 F.3d 183, 189 (2d Cir. 2007). We may  
4 affirm on any ground appearing in the record. Freedom Holdings,  
5 Inc., v. Cuomo, 624 F.3d 38, 49 (2d Cir. 2010). The district  
6 court's grant of injunctive relief is reviewed for abuse of  
7 discretion. Third Church of Christ, Scientist, of N.Y.C. v. City  
8 of New York, 626 F.3d 667, 669 (2d Cir. 2010).

9  
10 **RLUIPA**

11 A. Applicability

12 RLUIPA bars states from imposing or implementing a "land use  
13 regulation" in a manner that imposes a substantial burden on a  
14 person or institution's religious exercise unless it is the least  
15 restrictive means of furthering a compelling state interest. 42  
16 U.S.C. § 2000cc(a)(1). A "land use regulation" is defined as "a  
17 zoning or landmarking law, or the application of such a law, that  
18 limits or restricts a claimant's use or development of land." §  
19 2000cc-5(5). Appellants contend that RLUIPA is entirely  
20 inapplicable because SEQRA is not a land use regulation within  
21 the meaning of the statute.<sup>3</sup> Though we agree that SEQRA itself

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<sup>3</sup> The Church contends that the Town has waived this argument by not raising it during trial. The issue was raised before the district court in a post-trial brief, and was considered by the district court. It is therefore proper to consider this argument on appeal. See Quest Med., Inc. v. Apprill, 90 F.3d 1080, 1087 (5th Cir. 1996).

1 is not a zoning or landmarking law for purposes of RLUIPA, we  
2 hold that when a government uses a statutory environmental review  
3 process as the primary vehicle for making zoning decisions, those  
4 decisions constitute the application of a zoning law and are  
5 within the purview of RLUIPA.<sup>4</sup>

6 Environmental quality laws are designed to inject  
7 environmental considerations into government decisionmaking and  
8 minimize the adverse environmental impact of regulated actions.  
9 See City Council of Watervliet v. Town Bd. of Colonie, 3 N.Y.3d  
10 508, 515, 520 n.10 (2004). This approach was first adopted by  
11 the federal government with the National Environmental Policy Act  
12 of 1969 ("NEPA"), Pub. L. 91-190, 83 Stat. 852 (1970) (codified  
13 as amended at 42 U.S.C. § 4321 et seq.). See, Caleb W.  
14 Christopher, Success by a Thousand Cuts: The Use of  
15 Environmental Impact Assessment in Addressing Climate Change, 9  
16 Vt. J. Envtl. L. 549, 552-53 (2008). A number of states,  
17 including New York, have enacted state government review laws  
18 patterned after NEPA. See, e.g., California Environmental  
19 Quality Act, Cal. Pub. Res. Code § 21002.1 et seq.

20 No court of appeals has yet addressed whether an  
21 environmental quality statute may constitute a zoning law under

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<sup>4</sup> The parties agree that no landmarking law was involved in this dispute. We therefore need only decide whether the SEQRA review process, as employed here, constituted the application of a zoning law.

1 RLUIPA.<sup>5</sup> Although the purview of "zoning" is hard to delineate  
2 precisely, at its core it involves the division of a community  
3 into zones based on like land use. See City of Renton v.  
4 Playtime Theatres, Inc., 475 U.S. 41, 54-55 (1986); Daniel R.  
5 Mandelker, Land Use Law, §§ 4.02-4.15 (5th ed. 2003); Patricia E.  
6 Salkin, American Law of Zoning § 9.2 (5th ed. 2008). We have  
7 little difficulty concluding that SEQRA itself is not a zoning  
8 law within the meaning of RLUIPA. SEQRA is not concerned with  
9 the division of land into zones based on use. It is focused on  
10 minimizing the adverse environmental impact of a wide range of  
11 discretionary government actions, many of which are totally  
12 unrelated to zoning or land use.<sup>6</sup> See N.Y. Eenvtl. Conserv. Law §  
13 8-0105(4). Thus, the Town's use of the SEQRA process did not  
14 automatically implicate RLUIPA.

15 By its terms, however, RLUIPA also applies to "the  
16 application of" a zoning law. 42 U.S.C. § 2000cc-5(5). Although

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<sup>5</sup> The Ninth Circuit noted the question but declined to reach it in San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1036 (9th Cir. 2004).

<sup>6</sup> "Actions" that trigger SEQRA include "(i) projects or activities directly undertaken by any agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies; [and] (ii) policy, regulations, and procedure-making." N.Y. Eenvtl. Conserv. Law § 8-0105(4).

1 SEQRA by itself is not a zoning law, in this case the Town used  
2 the SEQRA review process as its vehicle for determining the  
3 zoning issues related to the Church's land use proposal. The  
4 fact that these issues were addressed during the SEQRA review  
5 process rather than the Town's normal zoning process does not  
6 transform them into environmental quality issues. We therefore  
7 conclude that, in these circumstances, the Town's actions during  
8 the review process and its denial of the Church's proposal  
9 constituted an application of its zoning laws sufficient to  
10 implicate RLUIPA for a number of reasons.

11 First, the SEQRA review process was triggered because the  
12 Church required three discretionary land use approvals from the  
13 Town: (1) site plan approval, (2) a waiver of the landscaped  
14 parking island requirement, and (3) a variance to allow the  
15 building to be located closer to one side of the property. These  
16 approvals all relate to zoning and land use rather than  
17 traditional environmental concerns. See Midrash Sephardi, Inc.  
18 v. Town of Surfside, 366 F.3d 1214, 1235 n.17 (11th Cir. 2004)  
19 (citing regulations about building size and parking as "run of  
20 the mill" zoning laws); cf. 6 N.Y.C.R.R. § 617.7(c)(1) (providing  
21 examples of adverse environmental impacts under SEQRA). If the  
22 Town had issued a Negative Declaration and foregone SEQRA review,  
23 these three issues would have been treated by the Town as zoning

1 questions and their outcome would have been subject to challenge  
2 under RLUIPA.

3         Second, in its Town Code, the Town has intertwined the SEQRA  
4 process with its zoning regulations.<sup>7</sup> The regulations relating  
5 to SEQRA are contained in Part II of the Town Code, titled "Land  
6 Use." Section 200-6 of the Town Code states that "[n]o action .  
7 . . shall be carried out, approved or funded by [a Town agency]  
8 unless it has complied with [SEQRA]." Under § 285-55, site plan  
9 approval is required for a building permit. Since site plan  
10 approval is a discretionary approval that triggers SEQRA, any  
11 construction project will involve some level of SEQRA review. If  
12 a positive declaration is issued, the applicant will have to  
13 proceed through the SEQRA process before addressing any zoning  
14 issues, or resolve those issues during the SEQRA process. 6  
15 N.Y.C.R.R. § 617.3(a); Town Code §§ 200-8 - 200-11 (describing  
16 SEQRA review process that must be completed).

17         Third, once the review process was underway, the Town  
18 focused on zoning issues rather than traditional environmental  
19 issues. The Town's primary stated concern was increased traffic.  
20 Although increased car traffic potentially raises environmental  
21 concerns due to increased emissions, the district court's factual  
22 findings make clear that the Town was concerned with the common

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<sup>7</sup> The Town Code is available at <http://www.ecode360.com/GR0237>.



1 everyday annoyances associated with traffic, not with its  
2 environmental impact. The Town's FEIS emphasized concerns about  
3 line of sight for cars turning into the proposed property and the  
4 adequacy of the Church's parking. The Town also based denial of  
5 the project on the height of proposed retaining walls and the  
6 alleged failure to comply with a steep slope ordinance. These  
7 are standard land use issues.

8 Finally, to hold that RLUIPA is inapplicable to what amounts  
9 to zoning actions taken in the context of a statutorily mandated  
10 environmental quality review would allow towns to insulate zoning  
11 decisions from RLUIPA review. A town could negotiate all of a  
12 project's zoning details during a SEQRA review and completely  
13 preempt its normal zoning process. These decisions would then be  
14 immune to RLUIPA challenge. We decline to endorse a process that  
15 would allow a town to evade RLUIPA by what essentially amounts to  
16 a re-characterization of its zoning decisions.

17 Indeed, the Town's actions were to that effect  
18 notwithstanding that RLUIPA was enacted while the SEQRA review  
19 process was underway. The district court's comprehensive  
20 findings demonstrate that the Town disingenuously used SEQRA to  
21 obstruct and ultimately deny the Church's project. The Town's  
22 own Planning Commissioner (subsequently replaced by the Town)  
23 believed that the alleged environmental impacts did not warrant a

1 positive declaration, but the Town initiated the SEQRA review  
2 process anyway after the Church refused to accede to the Town's  
3 demand that it donate a fire truck or provide some other payment  
4 in lieu of taxes. The Town then manipulated its SEQRA findings  
5 statement to "kill" the project on the basis of zoning concerns  
6 despite the fact that there were no serious environmental  
7 impacts. We decline to insulate the Town from liability with  
8 regard to its decisions on zoning issues simply because it  
9 decided them under the rubric of an environmental quality review  
10 process.

11 To recap, in no sense do we believe that ordinary  
12 environmental review considerations are subject to RLUIPA.  
13 However, when a statutorily mandated environmental quality review  
14 process serves as a vehicle to resolve zoning and land use  
15 issues, the decision issued constitutes the imposition of a land  
16 use regulation as that term is defined in RLUIPA. See 42 U.S.C.  
17 § 2000cc(a)(1); 2000cc-5(5).

#### 18 B. Substantial Burden

19 The Town also argues that, if RLUIPA does apply, the Church  
20 was not substantially burdened within the meaning of the statute  
21 because the Church had alternative means of building a new  
22 facility. The Town contends that the only harm the Church  
23 suffered was an inability to build the exact structure it

1 desired, which does not rise to the level of a substantial  
2 burden. We find sufficient evidence in the record to support the  
3 district court's finding that the Church's current facilities  
4 were inadequate to accommodate its religious practice and that  
5 the Town was acting in bad faith and in hostility to the project  
6 such that it would not have allowed the Church to build any  
7 worship facility and school on the Pomander Drive Property.  
8 Accordingly, we affirm the district court's holding that the  
9 Town's actions during the SEQRA process substantially burdened  
10 the Church's religious practice.

11 RLUIPA prohibits a government from imposing a land use  
12 regulation in a way that creates a substantial burden on the  
13 religious exercise of an institution.<sup>8</sup> 42 U.S.C. § 2000cc(a)(1).  
14 A substantial burden is one that "directly coerces the religious  
15 institution to change its behavior." Westchester Day Sch. v.  
16 Vill. of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007) (emphasis  
17 omitted). The burden must have more than a minimal impact on  
18 religious exercise, and there must be a close nexus between the  
19 two. Id.

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<sup>8</sup> 42 U.S.C. § 2000cc(b) also bars discrimination against a religious entity or treatment on unequal terms with nonreligious entities. The district court found a substantial burden and therefore did not reach the plaintiffs' equal terms or discrimination RLUIPA claims. Fortress Bible Church, 734 F. Supp. 2d 409, 508-09. Since we affirm on the substantial burden claim, we too need not reach the claims for discrimination or unequal terms.

1           A denial of a religious institution's building application  
2 is likely not a substantial burden if it leaves open the  
3 possibility of modification and resubmission. Id. However, if  
4 the town's stated willingness to consider another proposal is  
5 disingenuous, a conditional denial may rise to the level of a  
6 substantial burden. Id. Moreover, when the town's actions are  
7 arbitrary, capricious, unlawful, or taken in bad faith, a  
8 substantial burden may be imposed because it appears that the  
9 applicant may have been discriminated against on the basis of its  
10 status as a religious institution. Id. at 350-51; see also  
11 Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of  
12 New Berlin, 396 F.3d 895, 900 (7th Cir. 2005).

13           The district court credited Karaman's testimony that the  
14 Church's Mount Vernon facility was not adequate to accommodate  
15 its religious practice. Fortress Bible Church, 734 F. Supp. 2d  
16 at 488-90. Specifically, Karaman stated that the Church was  
17 unable to expand its membership, which it believes is a God-given  
18 mission, host missionaries, perform full-immersion baptisms, or  
19 perform "altar calls," in which members of the congregation pray  
20 at the altar. Id. at 488-89. Karaman also testified that the  
21 Church was unable to adequately run a Christian school because  
22 the School's present facilities did not have enough space to  
23 accommodate handicapped students or higher-level subjects. Id.

1 at 490-91. We identify no error in the district court's finding  
2 that the Church was substantially burdened by its inability to  
3 construct an adequate facility.

4 Similarly, we find no error in the district court's finding  
5 that the "Defendants' purported willingness to consider a  
6 modified plan [was] wholly disingenuous." Id. at 502. The  
7 district court identified ample evidence that the Town wanted to  
8 derail the Church's project after it refused to accede to its  
9 demand for a payment in lieu of taxes, and that it had  
10 manipulated the SEQRA process to that end. Additionally, the  
11 Town continually rejected the Church's attempts to accommodate  
12 its stated concerns. The record easily supports the district  
13 court's finding that the Town's actions amounted to a complete  
14 denial of the Church's ability to construct an adequate facility  
15 rather than a rejection of a specific building proposal. See  
16 Westchester Day Sch., 504 F.3d at 349.

17 Finally, we conclude, as the district court found based upon  
18 ample evidence, that the burden on the Church was more than  
19 minimal and that there was a close nexus between the Town's  
20 denial of the project and the Church's inability to construct an  
21 adequate facility. Fortress Bible Church, 734 F. Supp. 2d at  
22 501-08. Because, as the district court found, the Town's stated  
23 compelling interests were disingenuous, its actions violated

1 RLUIPA. Id. at 502-05, 508. Our conclusion that the Church was  
2 substantially burdened is bolstered by the arbitrary, capricious,  
3 and discriminatory nature of the Town's actions, taken in bad  
4 faith. Westchester Day Sch., 504 F.3d at 350-51. The Town  
5 attempted to extort from the Church a payment in lieu of taxes,  
6 it ignored and then replaced its Planning Commissioner when he  
7 advocated on the Church's behalf, and Town staff intentionally  
8 destroyed relevant evidence. Further, the district court's  
9 finding regarding the Town's open hostility to the Church qua  
10 church was not clear error; the record reflects comments from  
11 members of the Board indicating that they were opposed to the  
12 project because it was "another church." The Town's desire to  
13 prevent the Church from building on its property relegated it to  
14 facilities that were wholly inadequate to accommodate its  
15 religious practice. We affirm the district court's finding that  
16 the Town violated the Church's rights under RLUIPA.

17  
18 **Free Exercise**

19 The Town also challenges the district court's holding that  
20 it violated the Church's First Amendment right to the Free  
21 Exercise of Religion. The First Amendment generally prohibits  
22 government actions that "substantially burden the exercise of  
23 sincerely held religious beliefs" unless those actions are

1 narrowly tailored to advance a compelling government interest.  
2 Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570,  
3 574 (2d Cir. 2002). In other words, such actions are subject to  
4 strict scrutiny by reviewing courts. However, “[w]here the  
5 government seeks to enforce a law that is neutral and of general  
6 applicability, . . . it need only demonstrate a rational basis  
7 for its enforcement.” Id.; see also Employment Div. v. Smith,  
8 494 U.S. 872, 879 (1990).

9 In this case, the district court applied strict scrutiny  
10 and, referencing its RLUIPA analysis, concluded that the Town had  
11 substantially burdened the Church’s religious exercise and lacked  
12 a compelling interest. On appeal, the Town contends that  
13 rational basis review, rather than strict scrutiny, is the  
14 correct standard in this context because SEQRA is a neutral law  
15 of general applicability. The Church maintains that strict  
16 scrutiny is appropriate because SEQRA review involves an  
17 individualized assessment, thus placing it outside the purview of  
18 Smith. See Church of the Lukumi Babalu Aye, Inc. v. City of  
19 Hialeah, 508 U.S. 520, 537 (1993).

20 The Second Circuit has not specifically addressed whether  
21 zoning decisions trigger rational basis review or strict  
22 scrutiny. Although some scattered district court decisions have  
23 held that zoning laws by their nature involve individualized

1 assessments and trigger strict scrutiny, see Cottonwood Christian  
2 Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1222-  
3 23 (C.D. Cal. 2002); Freedom Baptist Church of Del. Cnty. v. Twp.  
4 of Middletown, 204 F. Supp. 2d 857, 868 (E.D. Pa. 2002), the  
5 majority of circuits that have addressed this question have  
6 concluded that zoning laws with the opportunity for  
7 individualized variances are neutral laws of general  
8 applicability. See Civil Liberties for Urban Believers v. City  
9 of Chicago, 342 F.3d 752, 764 (7th Cir. 2003); Cornerstone Bible  
10 Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir. 1991);  
11 Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643,  
12 651-55 (10th Cir. 2006); First Assembly of God of Naples, Fla.,  
13 Inc. v. Collier Cnty., 20 F.3d 419, 423-24 (11th Cir. 1994).  
14 Similarly, this circuit has found a landmarking law to be  
15 facially neutral despite the fact that it gave the government the  
16 ability to designate "historical districts," and therefore  
17 entailed some measure of individual assessment. Rector, Wardens,  
18 & Members of Vestry of St. Bartholomew's Church v. City of New  
19 York, 914 F.2d 348, 354-56 (2d Cir. 1990).

20 We need not resolve here whether zoning variance decisions  
21 challenged under the Free Exercise Clause are subject to strict  
22 scrutiny or rational basis review because we conclude that on the  
23 record before us there was no rational basis for the Town's



1 actions. The district court's holding was premised on its  
2 finding that the Town had acted in bad faith and disingenuously  
3 misused the SEQRA process to block the Church's project. The  
4 district court found as a factual matter that the reasons offered  
5 by the Town for delaying and denying the project were pretextual  
6 and concluded that the Town's witnesses were not credible. See  
7 Fortress Bible Church, 734 F. Supp. 2d at 491-94 (providing a  
8 "mere sampling" of examples of non-credible testimony by Town  
9 witnesses), 505-08 (explaining how each of the Town's stated  
10 reasons was pretextual). The record supports this conclusion.  
11 There is no basis to distrust the district court's finding that  
12 the Town's proffered rational bases were not sincere and that it  
13 was instead motivated solely by hostility toward the Church qua  
14 church. Accordingly, we conclude that the Town lacked a rational  
15 basis for delaying and denying the Church's project and therefore  
16 violated the Church's Free Exercise rights.<sup>9</sup>

17 The Town also presses the argument that the Free Exercise  
18 Clause is inapplicable to land use regulations. It points to  
19 decisions from several circuits holding that religious

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<sup>9</sup> Appellants also challenge the district court's conclusion that they violated the parallel Free Exercise Clause in the New York Constitution. Under that clause, courts employ a balancing test to determine if the interference with religious exercise was unreasonable. Catholic Charities of Diocese of Albany v. Serio, 7 N.Y.3d 510, 525 (2006). For the reasons stated above, we conclude that the Town's interference with the Church's project was not reasonable and violated the New York Constitution.

1 institutions do not have a constitutional right to build wherever  
2 they like. See, e.g., Lighthouse Inst. for Evangelism, Inc. v.  
3 City of Long Branch, 510 F.3d 253, 273-74 (3d Cir. 2007);  
4 Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City  
5 of Lakewood, 699 F.2d 303, 306-07 (6th Cir. 1983). The cases  
6 cited by the Town are inapposite. In those cases, the proposed  
7 building was directly barred by town ordinance and the religious  
8 institution sought individual relief from the general rule. The  
9 burden in this case resulted from the Town's disingenuous bad  
10 faith efforts to stall and frustrate this particular Church's  
11 construction plan, which was not itself barred by the Town's  
12 zoning code. The lengthy SEQRA review process was costly to the  
13 Church, and the Church was forced to remain in an inadequate  
14 facility for its duration.

15 For these reasons, we affirm the district court's holding  
16 that the Town violated the Church's First Amendment right to the  
17 free exercise of religion.

#### 18 19 **Equal Protection**

20 The Town argues on appeal that the district court erred in  
21 finding a violation of the Fourteenth Amendment's Equal  
22 Protection Clause because the Church's class-of-one theory is  
23 barred by Engquist v. Ore. Dep't of Agric., 553 U.S. 591 (2008),

1 and because the Church has not provided a single comparator  
2 situated similarly to it in all respects.

3 The Equal Protection Clause has traditionally been applied  
4 to governmental classifications that treat certain groups of  
5 citizens differently than others. Id. at 601. In Village of  
6 Willowbrook v. Olech, 528 U.S. 562, 564 (2000), however, the  
7 Supreme Court affirmed the existence of a class-of-one theory for  
8 equal protection claims, under which a single individual can  
9 claim a violation of her Equal Protection rights based on  
10 arbitrary disparate treatment. In Olech, a property owner sought  
11 to connect her property to the municipal water supply. The  
12 village had required a 15-foot easement from other property  
13 owners who had sought to connect to the water supply, but  
14 demanded a 33-foot easement from Olech. The Supreme Court  
15 recognized an Equal Protection claim "where the plaintiff alleges  
16 that she has been intentionally treated differently from others  
17 similarly situated and that there is no rational basis for the  
18 difference in treatment." Id. at 564.

19 Eight years later, in Engquist, the Court clarified that a  
20 class-of-one claim is not available in the public employment  
21 context. It based its holding primarily on the government's  
22 status in that context as a proprietor rather than a sovereign,  
23 and the corresponding decrease in constitutional protections for

1 its employees. 553 U.S. at 598-99, 605-09. The Court also noted  
2 that certain governmental functions that involve discretionary  
3 decisionmaking are not suitable for class-of-one claims. Id. at  
4 603-04.

5 We have since held that Engquist does not bar all class-of-  
6 one claims involving discretionary state action. In Analytical  
7 Diagnostic Labs, Inc. v. Kusel, 626 F.3d 135 (2d Cir. 2010), we  
8 recognized a class-of-one claim in the context of a state system  
9 for issuing clinical testing laboratory permits. We noted that  
10 the state was acting as a sovereign rather than a proprietor, and  
11 further observed that the licensing panel did not have complete  
12 discretion because it operated within a regulatory framework,  
13 held a mandatory hearing, and its decision could be challenged  
14 under New York Civil Procedure Law Article 78.

15 Like Analytical Diagnostic Labs, this case presents a clear  
16 standard against which departures can be easily assessed. See  
17 Engquist, 553 U.S. at 602-03. The SEQRA review process is guided  
18 by regulation and the result can be challenged under Article 78.  
19 Additionally, the Town was acting in its regulatory capacity as a  
20 sovereign rather than as a proprietor; it was making decisions  
21 about the ways in which property owners could use their land.  
22 The evidence provided by the Church illustrates a disparity in

1 treatment that cannot fairly be attributed to discretion. A  
2 class-of-one claim is thus cognizable in this context.

3 The Town argues that, even if a class-of-one claim is  
4 viable, the Church's evidence was not sufficient to establish  
5 such a claim because it did not provide a single comparator  
6 similarly situated in all respects, but instead presented  
7 evidence of multiple projects that were each treated differently  
8 with regard to a discrete issue. We have held that a class-of-  
9 one claim requires a plaintiff to show an extremely high degree  
10 of similarity between itself and its comparators. Ruston v. Town  
11 Bd. for Skaneateles, 610 F.3d 55, 59-60 (2d Cir. 2010). The  
12 Church must establish that "(i) no rational person could regard  
13 the circumstances of the plaintiff to differ from those of a  
14 comparator to a degree that would justify the differential  
15 treatment on the basis of a legitimate government policy; and  
16 (ii) the similarity in circumstances and difference in treatment  
17 are sufficient to exclude the possibility that the defendants  
18 acted on the basis of a mistake." Id. at 60 (quotation marks  
19 omitted).

20 The Church's use of multiple comparators is unusual, and  
21 presents us with a matter of first impression. We conclude,  
22 however, that the Church's evidence of several other projects  
23 treated differently with regard to discrete issues is sufficient

1 in this case to support a class-of-one claim. The purpose of  
2 requiring sufficient similarity is to make sure that no  
3 legitimate factor could explain the disparate treatment. See  
4 Neilson v. D'Angelis, 409 F.3d 100, 105 (2d Cir. 2005) (noting  
5 that purpose of comparator requirement is to "provide an  
6 inference that the plaintiff was intentionally singled out for  
7 reasons that so lack any reasonable nexus with a legitimate  
8 governmental policy that an improper purpose . . . is all but  
9 certain"), overruled on other grounds, Appel v. Spiridon, 531  
10 F.3d 138, 139-40 (2d Cir. 2008). Where, as here, the issues  
11 compared are discrete and not cumulative or affected by the  
12 character of the project as a whole, multiple comparators are  
13 sufficient so long as the issues being compared are so similar  
14 that differential treatment with regard to them cannot be  
15 explained by anything other than discrimination. We conclude  
16 that there is sufficient evidence in the record to support the  
17 Church's class-of-one claim.

18 The principal reasons for denying the Church's application  
19 cited in the Town's FEIS were violation of a recently enacted  
20 "steep slope" zoning ordinance, stress on the police and fire  
21 departments, retaining walls that constituted an attractive  
22 nuisance, and traffic and parking problems. A proposal by the  
23 Hackley School, located in a mixed-use neighborhood, to double

1 its size, involved the same steep slope concerns as the Church's  
2 proposal. The Hackley School proposal was submitted in 2001,  
3 almost three years after the Church's proposal, and at that time,  
4 the Town had yet to enact its steep slope ordinance. While  
5 considering the ordinance, the Town ordered a moratorium on steep  
6 slope construction. It issued the Hackley School a waiver from  
7 this moratorium, however, and then expedited review of the  
8 proposal so that it was approved prior to adoption of the steep  
9 slope ordinance. Despite the fact that the Church's proposal was  
10 submitted years earlier than the Hackley School's, the Town cited  
11 the Church's failure to comply with the steep slope ordinance as  
12 a basis for denying its proposal and never provided it with a  
13 waiver or the option of expedited consideration.

14 The Hackley School proposal also involved retaining walls  
15 comparable to those proposed by the Church. Although the Town  
16 did not raise retaining walls as a concern with the Hackley  
17 School's application, it relied on the Church's proposed  
18 retaining walls as a basis for denying the Church's application,  
19 and did so even after the Church had offered to construct a fence  
20 on top of its walls to eliminate any danger.

21 Proposals by Union Baptist Church and the Solomon Schechter  
22 School both failed to provide the amount of parking required by  
23 Town ordinance. In both instances, however, the Town

1 accommodated the proposals by allowing the use of on-street  
2 parking and approved the projects without requiring the mandated  
3 number of spaces. The Church's proposal contained the required  
4 number of spaces, but the Town still cited parking concerns as a  
5 reason for denying it and failed to offer any accommodation.

6 Finally, the Town's primary stated reason for issuing a  
7 positive declaration was increased traffic. However, a proposal  
8 by LDC Properties, Inc., to build a commercial office building  
9 near the same major intersection as the Church's proposal ("the  
10 LOSCO proposal") received a conditioned negative declaration even  
11 though, according to the Town's own traffic consultant, it raised  
12 the same traffic concerns as the Church's proposal.<sup>10</sup> The Town  
13 did not require the LOSCO proposers to take any steps to mitigate  
14 these traffic concerns. Similarly, the Solomon Schechter School  
15 proposal was located close to the Pomander Drive property and  
16 created similar vehicle and pedestrian traffic concerns. The

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<sup>10</sup> In fact, the Town appears to have been acutely aware of the overlapping traffic issues. The Deputy Town Attorney advised the Town Planning Commissioner that because of "the comparisons that may be drawn" between the Church and LOSCO, "please be careful and conscious of potential issues in drafting . . . the determination of significance. . . . Remember that they have the same traffic consultant and be wary." Fortress Bible Church, 734 F. Supp. 2d at 476.



1 Town approved this application without requiring any steps from  
2 the applicant to mitigate traffic.<sup>11</sup>

3 In short, the Church has presented overwhelming evidence  
4 that its application was singled out by the Town for disparate  
5 treatment. Though each of the comparator projects involved  
6 features unique to that proposal, the Town has not explained how  
7 those other features could have influenced discrete issues like  
8 the adequacy of parking, the safety of retaining walls, or  
9 increased traffic. We recognize that, where multiple reasons are  
10 cited in support of a state actor's decision, it will usually be  
11 difficult to establish a class-of-one claim. However, where, as  
12 here, a decision is based on several discrete concerns, and a  
13 claimant presents evidence that comparators were treated  
14 differently with regard to those specific concerns without any  
15 plausible explanation for the disparity, such a claim can  
16 succeed. Further, such a claim is bolstered where, as here, the  
17 evidence demonstrates that the government's stated concerns were  
18 pretextual. We affirm the district court's conclusion that the  
19 Church has adequately established a class-of-one Equal Protection  
20 claim.

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<sup>11</sup> Additionally, for both LOSCO and the Solomon Schechter School, the Town analyzed the impact on traffic under the assumption that the Church's proposal had already been completed and was generating traffic. Yet it still approved the proposals without requiring any traffic mitigation.

1     **Article 78**

2             Under Article 78 of New York’s Civil Procedure Law, a town’s  
3     SEQRA determination may be set aside when it is “arbitrary,  
4     capricious or unsupported by the evidence.” Riverkeeper, Inc. v.  
5     Planning Bd. of Southeast, 9 N.Y.3d 219, 232 (2007). The  
6     district court held that the Town’s determination was not  
7     supported by substantial evidence because the Town’s stated  
8     concerns were either “unsupported” or “wholly fabricated.”  
9     Fortress Bible Church, 734 F. Supp. 2d at 519. The Town contends  
10    that its findings were rationally based on the findings of its  
11    traffic consultant, and that the district court’s decision was  
12    therefore in error.

13            As we have previously discussed, the record contains ample  
14    evidence to support the district court’s conclusion that the  
15    Town’s actions were wholly disingenuous. Accordingly, we  
16    identify no error with the district court’s decision to set aside  
17    the Town’s SEQRA determination.

18

19     **The District Court’s Injunction**

20            Finally, the Town argues that the district court abused its  
21    discretion in crafting its injunction because it was not  
22    permitted to enjoin “governmental determinations that have not  
23    yet been made,” Appellant’s Br. at 37, and because it had no

1 authority to bind the Zoning Board, which was not a party to the  
2 litigation.

3 We review a district court's grant of injunctive relief for  
4 abuse of discretion. See Etuk v. Slattery, 936 F.2d 1433, 1443  
5 (2d Cir. 1991). A district court has substantial freedom in  
6 framing an injunction. Id. The district court's injunction: (1)  
7 ordered that the Church's 2000 site plan be deemed approved for  
8 SEQRA purposes and enjoined any further SEQRA review; (2) ordered  
9 the Board to grant the Church a waiver from the landscaped  
10 parking island requirement; (3) ordered the Zoning Board to grant  
11 a variance permitting a side building location; (4) ordered the  
12 Town to issue a building permit for the 2000 site plan; and (5)  
13 enjoined the Town from taking any action that unreasonably  
14 interferes with the Church's project.

15 With regard to its first argument, the Town relies on  
16 Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010).  
17 Geertson involved a suit against the Animal and Plant Health  
18 Inspection Service ("APHIS"). APHIS had decided to completely  
19 deregulate a certain species of genetically modified alfalfa.  
20 The district court enjoined APHIS from fully deregulating the  
21 alfalfa, and further issued an injunction preemptively barring  
22 APHIS from implementing any partial deregulation plan. The  
23 Supreme Court held that the latter portion of the injunction was

1 an abuse of the district court's discretion because the  
2 plaintiffs could file a new suit if APHIS actually attempted  
3 partial deregulation and there was no evidence that partial  
4 deregulation would cause the same irreparable harm as full  
5 deregulation. Id. at 2760-61. Geertson has no bearing on the  
6 present case. The district court's injunction was specifically  
7 tailored to the injury the Church had suffered and did not exceed  
8 the district court's discretion.

9 The Town also argues that the portion of the injunction  
10 compelling the Zoning Board to grant a variance permitting a side  
11 building location exceeded the district court's authority  
12 because, under New York law, the Zoning Board is a separate  
13 entity from the Town over which the district court had no  
14 jurisdiction. See Commco, Inc. v. Amelkin, 62 N.Y.2d 260, 265-68  
15 (1984) (town board has no authority to bind the town's zoning  
16 board to a consent decree to which the zoning board was not a  
17 party). We need not reach this question, however, because the  
18 Town did not raise this objection before the district court and  
19 has therefore waived it on appeal. See In re Nortel Networks  
20 Corp. Sec. Litig., 539 F.3d 129, 132 (2d Cir. 2008).

21  
22  
23

1 **CONCLUSION**

2 For the reasons described above, the Town's arguments on  
3 appeal are without merit and we conclude that the relief ordered  
4 by the district court was within its discretion. The judgment of  
5 the district court is AFFIRMED.