UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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BIKUR CHOLIM, INC., RABBI SIMON LAUBER, FELLOWSHIP HOUSE OF SUFFERN, INC., MALKA STERN, MICHALE LIPPMAN, SARA HALPERN, ABRAHAM LANGSAN and **JACOB LEVITA**,

05 CV 10759 (SCR)

Plaintiffs,

-against-

VILLAGE OF SUFFERN,

Defendants.
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DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COMPLAINT AND FOR PRELIMINARY INJUCNTION IN FAVOR OF DEFENDANT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMIARY INJUNCTION

Terry Rice
Attorney for Defendant
61 Washington Avenue
Suffern, New York 10901
(845) 357-2600

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INTRODUCTION

Although the property which is the subject of the instant action is zoned for and improved with a single-family dwelling, Fellowship House purchased the property and Bikur Cholim began to utilize the property for overnight sleeping on Friday evenings (and apparently other days) for up to 17-20 Orthodox Jews visiting people at near-by Good Samaritan Hospital. In addition to the existing three bedrooms in the house, the den and dining room have been converted to use for sleeping purposes.

The only permissible use for the property is as a single-family dwelling. The property has been zoned in the identical manner for more than 50 years. The use of the structure for a changing body of unrelated persons is not a "family" as defined by the Zoning Law and New York State case law. Consequently, the use is clearly contrary to the Zoning Law.

Bikur Cholim was permitted to continue to utilize the property while it applied for a use variance. Bikur Cholim did not provide evidence with respect to the necessary prerequisite criteria mandated by State statute for obtaining a use variance. Thereafter, rather than complying with the decision of the Zoning Board of Appeals, Plaintiffs instituted the instant action and sought a preliminary injunction. For the reasons set forth herein, it is respectfully submitted that: the complaint fails to state any cognizable claim as a matter of law and, as a result, the complaint should be dismissed; that Plaintiffs' application for a preliminary injunction should be denied; and that the Village's motion for a preliminary injunction should be granted.

FACTS

The property which is the subject of the instant action is located in an R-10 zoning district pursuant to the Zoning Law and Zoning Map of the Village of Suffern and is

improved with a single-family dwelling on a lot consisting of 9,286 square feet and with a lot width of 75 feet. Single-family residences exist of two sides of the property.

Only single-family residences and houses of worship are permitted by right in the R-10 zoning district. The minimum lot size required for a single family dwelling is 10,000 square feet and width required is 90 feet. Hotels or any form of transient sleeping facilities are not allowed in the Village and have not been permitted since the adoption of the 1993 Zoning Law. Prior thereto, hotels were permitted only in the C-1, Central Business District, subject to various restrictions.

In or about May 12, 2004, 2004, Sean Keenan, a former owner of the subject property, applied for area variances to permit the construction of a single family dwelling on the subject property. He sought an area variance from the minimum lot size requirement of 10,000 square feet to permit development of a single-family dwelling on a lot of 9,286 square feet and an area variance from the lot with requirement of 90 feet to permit said development on a lot with 75 feet lot width. The lot was vacant at the time. On July 22, 2005 the Zoning Board of Appeals granted said area variances for "[a] single family dwelling." Thereafter, on February 2, 2005, a certificate of occupancy was issued to Mr. Keenan for the subject property. The certificate of occupancy reflects that the "intended use" was for a "single family dwelling." The certificate of occupancy further mandated that the "use and designation for the structure and land and nature of work for which the C.O. is issued" is to "erect single family dwelling per ZBA decision #Z 2004-13 dated 7/22/2004."

Fellowship House apparently purchased the subject property on or about February 10, 2005 and it and/or Bikur Cholim began to use the property as aforementioned without seeking approval from the Village or ascertaining whether the use was permissible. On or

about July 26, 2005, subsequent to the Plaintiffs having received violation notices and appearance tickets, Bikor Cholin applied to the Zoning Board of Appeals of the Village of Suffern for a use variance to permit of the premises "for overnight occupancy for up to 17 people." The use variance application did not appeal any of the violation notices but only sought a use variance. Accompanying the application was a Short Environmental Assessment Form which was singed by Bikor Cholim's attorney but was not filled in or completed. In addition, the application forms were not signed by the applicant but were singed by the applicant's attorney and the "Applicant's Signature and Certification" was not signed by anyone.

The application was referred to the Rockland County Department of Planning as required by General Municipal Law §§ 239-l and m and by letter dated September 19, 2005, the Commissioner of Planning recommended denial of the application, concluding that:

- the use was incompatible with the single-family use that is predominant in the R-10 zoning district;
- the use is not consistent with the community character of the surrounding residential neighborhood;
- a three-bedroom, single-family residence cannot accommodate seventeen overnight guests;
- the applicant does not meet the criteria necessary for granting a use variance.

At the hearing on the use variance application, the applicant did not provide any testimony or evidence to substantiate compliance with the prerequisite standards for obtaining a use variance pursuant to State statute, Village Law § 7-712-b(2)(b). Nor did the applicant assert that the use of the property was for a house of worship or for a religious use.

The Zoning Board of Appeals thereafter denied the requested use variance.

The decision of the Zoning Board of Appeals determined that:

- The property is located in an R-10 zoning district which permits one-family detached dwellings as of right.
- A "dwelling unit" is defined in the Zoning Law as “One or more rooms with provisions for living, cooking, sanitary and sleeping facilities arranged for the use of one (1) family.”
- A "detached dwelling" is defined in the code as “A single dwelling located in its own separate building which does not abut any other dwelling.”
- A "dwelling" is defined in the code as “A building containing one (1) or more dwelling units.”
- A "building" is defined in the code as “Any structure having a roof, self-supporting of supported by columns, air pressure or walls and intended for the shelter, housing or enclosure of persons, animals, or chattels.”
- The applicant’s attorney conceded at the public hearing that the use of the residence was not for "one family" but rather for members of many different families who had relatives or friends staying at Good Samaritan Hospital.
- Pursuant to General Municipal Law §§ 239-l and m, the application was required to be referred to the Rockland County Department of Planning. By letter dated September 19, 2005, the Department of Planning disapproved the use variance requested. The Department of Planning found that the proposed use "is not consistent with the single-family use that is predominant in the zoning district and is not consistent with the community character of the

surrounding residential neighborhood". The report further found that "A three bedroom, single family residence cannot accommodate seventeen overnight guests." The Department of Planning further opined that the appellant failed to meet the criteria necessary for granting a use variance.

As a result of the testimony provided, the Zoning Board of Appeals adopted the following findings:

- The applicant offered no financial evidence to indicate that it could not realize a reasonable return on the property as a one-family residence pursuant to the Zoning Law. The applicant offered no evidence as to the original purchase price of the property as a one-family residence or how much the property could sell for as a one family residence.
- The applicant did not demonstrate that the alleged hardship, namely the enforcement of the Zoning Law for this property to remain a one-family dwelling, was unique to this property and did not apply to a substantial portion of the district or neighborhood.
- The dwelling is consistent with the surrounding homes on Hillcrest Avenue which are one-family dwellings and is capable of being utilized as a one-family dwelling.
- The applicant failed to demonstrate how permitting 14 unrelated overnight guests would not alter the essential character of the neighborhood, which consists primarily of one-family detached dwellings. Based upon the evidence presented, the Board finds there are no other transient uses among the one-family dwellings in the neighborhood.

- The appellant acknowledged that the hardship was self-created. At the time of the purchase of the property, the Code did not permit a use as a transient hotel. The hardship alleged by the appellant's attorney was based upon the use proposed, not a hardship based upon enforcement of the Code requiring a one-family dwelling. When the appellant came before the board prior to the construction of the residence for area variances in 2004, the appellant made no indication that the residence would be used for anything other than as a one-family dwelling and did not seek a use variance at that time.
- The use proposed is out of character with other homes in the district.
- Although the appellant contends the use is "in furtherance of religious beliefs" that does not make the proposed use a "religious use". It is not a tenet of the religion to visit patients in a hospital or to have a place to walk to after a visit or stay in the hospital. The proposed use would be a convenience to people who wished to do that but the use in and of itself is not for religious purposes.
- The proposed use is not as a place of worship. It is a place for persons of a particular religious faith to lodge overnight. The practitioners of that faith are not from a particular synagogue or affiliated group. The proposed use is not for the exercise of their religion but to accommodate persons for lodging purposes while family members are in the hospital.
- The appellant has failed to establish that enforcement of the Code on this property imposes a substantial burden on its religious exercise, particularly given that the appellant contends the property is still to be used as a "one-family" dwelling that is consistent with the surrounding neighborhood. A

one-family dwelling unit by definition does not include unrelated overnight lodgers. Although the application for a variance requests permission for use as a one family residence, the proposed use as set forth above is actually a transient/motel use.

- In order to accommodate 14 people, rooms other than what would commonly be used for bedrooms would be utilized as "bedrooms", such as a living room and dining room, which is not typical for a one family dwelling.
- The appellant did not prepare the SEQRA short form EAF and presented no evidence upon which this Board could make a SEQRA determination.
- The occupancy by overnight guests as proposed is not permitted pursuant to New York State PMC 404.41.

Bikur Cholim continues to permit, cause or allow:

- the subject property to be utilized for short-term, overnight habitation by up to 17-20 persons;
- the single-family dwelling located on the subject property to be overcrowded with sleeping facilities;
- rooms which are not permitted by law to be utilized for sleeping facilities to be utilized for sleeping.

As is related in Mr. Lowiewski's affidavit, the original floor plan for the single-family dwelling on the subject property contained three bedrooms, a den and a dining room. On an inspection conducted with the permission of an occupant on May 6, 2005, Mr. Lowiewski observed that the den and dining room also were being utilized as bedrooms.

During the May 16, 2005 inspection, he observed that:

- the master bedroom contained six beds;
- A second bedroom (bedroom # 2) contained four beds;
- a third bedroom (bedroom # 3) contained four beds;
- the former den contained three beds;
- the former dining room contained three beds.

The total number of beds observed were 20.

A subsequent inspection on July 12, 2005 revealed that:

- the master bedroom contained six beds;
- bedroom # 2 contained two beds;
- bedroom # 3 contained three beds;
- the former den contained three beds;
- the former dining room contained three beds.

The total number of beds observed were 14.

On August 1, 2005, Mr. Lowiewski observed fire safety violations and issued violations to Bikor Cholim. Section R317.1 of the New York State Residential Code, a portion of the New York State Uniform Fire Prevention and Building Code, requires smoke alarms to be installed in each bed room or sleeping area and outside of each separate sleeping area in the immediate vicinity of all bedrooms. When more than one smoke alarm is required to be installed in a dwelling unit, the alarms must be interconnected so that actuation of one alarm will activate all alarms. That provision was not complied with.

In addition, as is related in the annexed affidavit of Mr. Lowiewski, an automatic sprinkler system was required to be installed in the structure as a consequence of its classification as a dwelling where the occupants are primarily transient in nature pursuant to

the New York State Uniform Fire Prevention and Building Code. The structure does not have an automatic sprinkler system.

The records indicate that 63 percent of use variances sought for two-family or more intensive residential uses during the period of 1992 to the present were denied by the Zoning Board of Appeals.

The Village records demonstrate the commitment of the Village and Code Enforcement Officer to enforcing zoning and other code restrictions with respect to residential overcrowding and impermissible residential use throughout the Village.

POINT I

PLAINTIFFS' CLAIMS ARE NOT RIPE

Among the mandatory prerequisites for asserting an as applied challenge to municipal actions, the governmental entity charged with enforcing the regulations must first have "reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985). A plaintiff possesses "a high burden of proving that a final decision has been reached by the agency" before a claim is ripe for adjudication. *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989); *see also Acierno v. Mitchell*, 6 F.3d 970, 975 (3d Cir. 1993).

"The meaningful application requirement … mandates that the claimants pursue the application thoroughly and not abandon it at an early stage." *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir. 1990), *cert. denied*, 502 U.S 943 (1991). Consistent with the final decision requirement, a property owner must seek variances or whatever administrative relief would permit the proposed development of his property. *See Williamson*, 473 U.S. at 186; *Carson Harbor Village*,

Ltd. v. City of Carson, 37 F.3d 468 (9th Cir. 1994). "The term 'variance is not definitive or talismanic; if other types of permits or actions are available or could provide similar relief, they must be sought." *Southern Pacific Transportation*, 922 F.2d at 503.

> Those who have not followed available routes of appeal cannot claim to have obtained a 'final' decision, particularly if they have foregone an opportunity to bring their proposal before a decision making body with broad authority to grant different forms of relief or to make policy decisions which might abate the alleged taking.

Id. Consequently, a plaintiff must pursue "all avenues of relief" before making a taking claim. *Lai v. City and County of Honolulu*, 841 F.2d 301, 303 (9th Cir.), *cert. denied*, 488 U.S. 994 (1988). *Shelter Creek Development Corp v. City of Oxnard*, 838 F.2d 375, 378-79 (9th Cir.), *cert. denied*, 488 U.S. 851 (1988); *see also Traweek v. City and County of San Francisco*, 920 F.2d 589, 595 (9th Cir. 1990); *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 876 (9th Cir), *cert. denied*, 488 U.S. 827 (1988); *Amwest Investments, Ltd. v. City of Aurora*, 701 F.Supp. 1508, 1514 (D.Colo. 1988).

In addition to constitutional claims, the final decision requirement also applies to RLUIPA claims. "[RLUIPA] does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations where available without discrimination and unfair delay." 146 Cong. Rec. S7774, 7776 (July 27, 2000).

The Second Circuit has confirmed that the final decision requirement is applicable to RLUIPA and Free Exercise claims. *See Murphy v. New Milford Zoning Commission*, 402 F.3d 342 (2d Cir. 2005); *see also Smith v. Township of Union*, 2005 WL 1607012 (D.N.J. 2005). The Second Circuit determined that:

> Had the Murphys appealed the cease and desist order to the Zoning Board of Appeals and requested variance relief from that body (citation omitted) things may very well have been different. The Zoning Board of Appeals possessed the authority to review the cease and desist order *de novo* to determine whether the zoning regulations were properly applied. * * * In the event that the Murphys were dissatisfied with the Zoning Board of Appeals' interpretation and application of the zoning regulations they still could have sought a variance from those regulations.

Id. at 352-53.

The Court further noted that:

> We are particularly cognizant of the fact that this case stems from a zoning dispute implicating matters of local concern. *See Harlen Assocs. v. Incorporated Vill. of Mineola*, 273 F.3d 494, 505 (2d Cir.2001); *see also Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 135 (3d Cir.2002). Thus, should the Murphys pursue a zoning board appeal and be dissatisfied with its disposition, an appeal to the Connecticut Superior Court, as contemplated by Connecticut General Statutes section 8-9, might be pursued. In addition, before the state courts the Murphys may wish to raise their CACRF claim, while expressly reserving their federal claims for later presentation in federal court should the need arise. *See generally Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir.2003). *But see generally San Remo Hotel v. San Francisco City & County*, 364 F.3d 1088 (9th Cir.), [*aff'd*, 125 S.Ct. 2491 (2005)].

Id. at 354 n. 8.

Similarly, the Eleventh Circuit determined in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1224-25 (11th Cir.), *rehearing and rehearing en banc denied*, 116 Fed.Appx. (11th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005), that:

> The congregations' CUP [conditional use permit] challenge fails the prudential, or 'fitness,' prong of the ripeness inquiry. Because the congregations have not received a final decision on a CUP application--indeed, neither party has seriously applied for a CUP--the

> congregations do not raise a purely legal issue which we can decide in the abstract without further factual development. … Instead, the congregations' allegations amount to mere speculation about contingent future events. We cannot determine from the record how the CUP will be applied and whether Surfside will use the CUP process to deny the plaintiffs permits to operate their synagogues. The record contains no significant evidence of Surfside's having denied CUPs in the past, and thus, the impact of the CUP requirement is not sufficiently direct and immediate as to render the issue appropriate for judicial review. Such inquiry is better postponed until the issues are presented in the more concrete circumstance of a challenge to § 90-41 as applied.

Similarly, the Eleventh Circuit has confirmed in the context of a RLUIPA claim that "When a plaintiff brings an as-applied challenge to a zoning ordinance, we require that the plaintiff prove simply that the ordinance has been 'finally applied to the property at issue.'" *Konikov v. Orange* County, 410 F.3d 1317, 1322 (11th Cir. 2005) (*quoting Eide v. Sarasota County*, 908 F.2d 716, 725 (11th Cir.1990)).

Although Plaintiffs applied for a use variance, their presentation and proof was perfunctory and Plaintiffs completely failed to offer any evidence to satisfy the elements necessary to receive a use variance. As is described in the accompanying Declaration and in the minutes and transcript of the hearing (Exhibits "F" and "G" to Plaintiffs' motion for a preliminary injunction), no evidence whatsoever was provided to suggest, let alone demonstrate, by competent financial evidence that a reasonable return could not be obtained if the property was not used for one of the uses permitted in the Zoning Law. The statute as well as case law requires dollars and cents proof that a reasonable return cannot be achieved for each use in the zoning district, a showing that requires appraisal testimony. *See Village Board of Village of Fayetteville v. Jarrold*, 53 N.Y.2d 254, 440 N.Y.S.2d 908, 423 N.E.2d 385 (1981); *Forrest v. Evershed*, 7 N.Y.2d 256, 196 N.Y.S.2d

958, 164 N.E.2d 841 (1959); *Crossroads Recreation, Inc. v. Broz*, 4 N.Y.2d 39, 172 N.Y.S.2d 129, 149 N.E.2d 65 (1958); *Howes v. Langendorfer*, 137 A.D.2d 960, 525 N.Y.S.2d 382 (3d Dept. 1988); *Khanuja v. Denison*, 203 A.D.2d 679, 610 N.Y.S.2d 364 (3d Dept. 1994). The applicant failed to provide any testimony or evidence to substantiate that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood. No evidence or testimony was provided to demonstrate that the requested use variance, if granted, will not alter the essential character of the neighborhood. Lastly, the applicant also failed to provide any evidence with respect to the final condition precedent to obtaining a use variance, that is, that the alleged hardship has not been self-created which precludes the granting of a use variance. *See Clark v. Board of Zoning Appeals of the Town of Hempstead*, 301 N.Y. 86, 89, 92 N.E.2d 903, 903 (1950), *cert. denied*, 340 U.S. 933 (1951). A hardship is self-created where an applicant acquired property subject to the restrictions from which relief is sought. *See First National Bank of Downsville v. City of Albany Board of Zoning Appeals*, 216 A.D.2d 680, 628 N.Y.S.2d 199 (3d Dept. 1995); *Tharp v. Zoning Board of Appeals of the City of Saratoga Springs*, 138 A.D.2d 906, 526 N.Y.S.2d 646 (3d Dept. 1988). Actual knowledge of zoning restrictions precludes the granting of relief as a matter of law. *See Khanuja v. Denison*, 203 A.D.2d 679, 610 N.Y.S.2d 364 (3d Dept. 1994); *Holy Sepulchre Cemetery v. Board of Appeals of the Town of Greece*, 271 A.D. 33, 60 N.Y.S.2d 750 (4th Dept. 1946). However, actual knowledge of the existence of restrictive zoning provisions is not necessary. “Even if a prospective purchaser of property does not have the actual knowledge of the applicable provisions of an ordinance, he is bound by them and by the facts and circumstances concerning the use of the

property which he may learn by exercising reasonable diligence." *Tharp*, 138 A.D.2d at 907, 526 N.Y.S.2d at 647.

Bikur Cholim provided no evidence or testimony whatsoever to attempt to substantiate any of the foregoing requirements.

It must, of course, be remembered that the foregoing criteria relate to the land which is the subject of a use variance application and to the personal hardship of an applicant. *See Eck v. City of Kingston Zoning Board of Appeals*, 302 A.D.2d 831, 755 N.Y.S.2d 508 (3d Dept. 2003); *Conte v. Town of Norfolk Zoning Board of Appeals*, 261 A.D.2d 734, 689 N.Y.S.2d 735 (3d Dept. 1999) ("a use variance runs with the land and thus the hardship must relate to the land, and a variance may not be granted merely to ease the personal difficulties of the current landowner." *Id*. at 736, 689 N.Y.S.2d at 738); *Belgrade v. Kocher*, 215 A.D.2d 1002, 627 N.Y.S.2d 128 (3d Dept. 1995); *Governale v. Board of Appeals of the Town of Brookhaven*, 121 A.D.2d 539, 503 N.Y.S.2d 597 (2d Dept. 1986).

Bikur Cholim wholly defaulted in providing evidence of entitlement to a use variance. Moreover, despite now claiming a religious basis for their request, the applicant failed to demonstrate a religious basis for the variance application and did not request any type of accommodation on such basis. It is submitted that the perfunctory and patently insufficient presentation made by Plaintiff constitutes a complete default and cannot be characterized as having obtained a final decision. Under such circumstances, the instant action must be dismissed because of the failure to seek in good faith or to obtain a final decision.

Moreover, Plaintiffs failed and neglected to appeal the violation notice that the use of the property was impermissible. Pursuant to Village Law § 7-712-a(4), a zoning board of appeals is authorized to hear appeals from "any order, requirement, decision, interpretation, or determination of the administrative official charged with the enforcement of such local law by filing a notice of appeal … specifying the grounds thereof and the relief sought." Pursuant to Village Law § 7-712-b(1), a zoning board of appeals:

> may reverse, or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and shall make such order, requirement, decision, interpretation, or determination as in its opinion ought to have been made in the matter by the administrative official charged with enforcement of such local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination is taken.

Plaintiffs now assert that they possess the right to utilize the subject property as a Shabbos house in the guise of a single-family dwelling. However, Plaintiffs failed and neglected to appeal to the Zoning Board of Appeals the Code Enforcement Officer's determination that the use was not permissible. Had they utilized such available means of obtaining a final decision, the instant litigation conceivably may have been rendered moot. However, instead of appealing the notice of violation, Plaintiffs sought a use variance and provided nothing more than a perfunctory presentation. As the *Murphy* Court noted "Bypassing the Zoning Board of Appeals and its hearing processes, which were statutorily designed for exploration and development of these sorts of issues, leaves the [Plaintiff's] alleged injuries ill-defined." *Id*. at 352. As a result, as in the instant matter, until the "variance and appeal process is exhausted and a final, definitive decision

from the local zoning authorities is rendered, this dispute remains a matter of unique local import over which we lack jurisdiction." *Id*. at 354.

As a result, it is respectfully submitted that the instant action should be dismissed as a consequence of the failure to obtain a final decision.

POINT II

NO FREE EXERCISE CLAIM STATED

A. Religious Exercise

The Constitution provides that government "shall make no law … **prohibiting** the free exercise" of religion. (emphasis added). "The protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). "While the First Amendment provides absolute protection to religious thoughts and beliefs, the free exercise clause does not prohibit Congress and local governments from validly regulating religious conduct." *Grace United Methodist Church v. City of Cheyenne*, 427 F.3d 775, 782 (10th Cir. 2005); *see also Love Church v. City of Evanston*, 671 F.Supp. 508, 512 (N.D.Ill. 1987) ("A state may, however, regulate religious conduct. Evanston's ordinance regulates conduct--where and how one can lease property as a church--and therefore passes the first tier of analysis."). Moreover, it is clear that "[t]he First Amendment simply does not entitle [a] Church to special treatment so that it may operate … exactly where it pleases while no one else can do the same." *Grace United Methodist Church*, 427 F.3d at 788. Consequently, in the context of a Free Exercise challenge, a plaintiff must first establish that his or her right to practice religion was burdened in a significant

way. *See Kaufman v. McCaughtry*, 419 F.3d 678, 683 (7th Cir. 2005); *Vision Church v. Village of Long Grove*, 397 F.Supp.2d 917, 927 (N.D.Ill. 2005).[1]

As is related below, the actions challenged herein do not significantly burden the practice of religion and, as a result, a Free Exercise Claim is not stated as a matter of law.

B. Applicable Standard – No Claim Stated

"[C]urrent Supreme Court jurisprudence on the Free Exercise Clause does not require a court to apply strict scrutiny simply because a religious actor is involved." *St. John's United Church of Christ v. City of Chicago*, 401 F.Supp.2d 887, 897 (N.D.Ill. 2005) (*citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Div. Dept. Res. Of Oregon v. Smith*, 494 U.S. 872, 878 (1990)). It is well-settled that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531; *see also Employment Div. v. Smith*, 494 U.S. 872, 879 (1990); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004) (" If the zoning law is of general application and is not targeted at religions, it is subject only to rational basis scrutiny, even through it may have an incidental effect of burdening religion."); *Petra Presbyterian Church v. Village of Northbrook*, 2003 WL 22048089 (N.D.Ill. 2003), *report and recommendation adopted*, 2004 WL 442630 (N.D.Ill. 2004). It is only if a law is not neutral or not of general applicability that the courts apply the "compelling governmental interest" and "narrowly tailored" prongs of the inquiry. *See Lukumi*, 508 U.S. at 531; *San Jose Christian College*, 360 F.3d at 1030. "Accordingly, 'a free exercise violation hinges on showing that the

[1] "[T]he Free Exercise Clause is less protective of religious freedom than the RLUIPA." *See Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 406 F.Supp.2d 507, 518 (D.N.J. 2005).

challenged law is either not neutral or not generally applicable.'" *Id*. (*quoting American Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1123 (9th Cir.), *cert. denied*, 537 U.S. 886 (2002)).

"Neutral laws of general applicability normally do not raise free exercise concerns even if they incidentally burden a particular religious practice or belief." *Grace United Methodist Church*, 427 F.3d at 782. The Supreme Court has determined that the free exercise clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S at 879. As a result, the rational basis test applies in ascertaining whether a neutral law of general applicability violates the right to free exercise of a religion even though the law incidentally burdens a particular religious belief or practice. *See San Jose Christian College*, 360 F.3d at 1031; *Guam v. Guerrero*, 290 F.3d 1210, 1215 (9th Cir. 2002); *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999); *Grace Methodist Church*, 427 F.3d at 782-83.

As is related below, the applicable provisions of the Zoning Law and their application are both neutral and of general applicability.

A law is one of neutrality and general applicability if it does not aim to "infringe upon or restrict practices because of their religious motivation," and if it does not "in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 533; *San Jose Christian College*, 360 F.3d at 1031. A law is neutral if its object is something other than infringement or restriction of religious practices. *See Lukumi*, 508 U.S. at 546; *Grace United Methodist Church*, 427 F.3d at 783. "Absent

evidence of the City's intent to regulate religious worship, the ordinance is properly viewed as a neutral law of general applicability." *Cornestone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991)

"Thus, a law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *Grace United Methodist Church*, 427 F.3d at 783; *see also City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) ("[W]here a general prohibition ... is at issue, the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [compelling interest] test inapplicable to[free exercise] challenges."); *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990); *San Jose Christian College*, 360 F.3d at 1031 ("[i]f the zoning law is of general application and is not targeted at religion, it is subject only to rational basis scrutiny, even though it may have an incidental effect of burdening religion."); *United States v. Hardman*, 297 U.S. 1116, 1126 (10th Cir. 2002); *Guam v. Guerrero*, 290 F.3d 1210, 1215 (9th Cir. 2002); *Miller*, 176 F.3d at 1206 (the rational basis test applies in ascertaining whether a neutral law of general applicability "violate[s] the right to free exercise of religion even though the law incidentally burdens a particular religious belief or practice." (citations omitted)). No claim can be stated if, as herein, [e]very restriction … is evenly applied to all and only falls upon the particular behavior in the way it falls on everyone else." *Goering v. Brophy*, 94 F.3d 1294, 1307 (9th Cir. 1996) (Fernandez, J., concurring), *cert. denied*, 520 U.S. 1156 (1997).

Numerous decisions have rejected Free Exercise challenges to routine land use decisions based on facially neutral laws. *See DiLaura v. Ann Arbor Charter Township*, 30

Fed.Appx 501 (6th Cir. 2001); *Christian Gospel Church, Inc. v. City of San Francisco*, 896 F.2d 1221 (9th Cir.1990), *cert. denied*, 498 U.S. 999 (1990) (holding that denying a permit to establish a church in a residential area did not violate the Free Exercise Clause because the zoning system protected government interests, nor did it violate the Equal Protection Clause because there was no discrimination against appellant); *Mount Elliot Cemetery Assoc. v. City of Troy*, 171 F.3d 398 (6th Cir. 1999); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820 (10th Cir.1988), *cert. denied*, 490 U.S. 1005 (1989) (holding that denial of a permit to build a church was not a violation of the Free Exercise Clause); *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir.1983), *cert. denied*, 469 U.S. 827 (1984) (holding that a zoning law affecting ability to conduct religious services in a home was not a violation of the Free Exercise Clause); *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983) (holding that denial of a variance to build a church in a residential area was not a violation of the Free Exercise Clause because it was a legitimate exercise of the city's police power); *Lighthouse Institute for Evangelism*, 406 F.Supp.2d at 519 (a valid rational for its exclusion of certain types of businesses, assemblies, and institutions, including churches, from the area defeats a free exercise claim). In fact, the Third Circuit dismissed a free exercise claim based on the denial of a variance where the zoning law was facially neutral and there was no evidence of religious animus in the enactment or interpretation of the law in *DiLaura, supra*.

In *Mount Elliot Cemetery Ass'n v. City of Troy*, 171 F.3d 398 (6th Cir. 1999), the City's refusal to rezone a property to accommodate a Catholic-only cemetery was sustained against a free exercise challenge after the Court concluded that the applicable

City ordinances were neutral laws of general applicability and that there was no showing that the City denied the rezoning request for reasons of religious discrimination. *See id*. at 405, 407. Similarly, in *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991), the refusal to rezone land to accommodate a church was sustained because it was "a general law that applies to all land-use.…" and that there was no showing of an "anti-religious purpose in enforcing the ordinance." *See also First Assembly of God v. Collier County*, 20 F.3d 419 (11th Cir. 1994), *cert. denied*, 513 U.S. 1080 (1995) (zoning ordinance neutral and generally applicable); *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990) (landmarks ordinance a neutral law of general applicability, notwithstanding exercise of discretion as to individual applications).

As is related in the accompanying affidavits and Declaration, the Village adopted an entirely new Zoning Law in 1993. Hotels and any type of transient accommodations were eliminated from the Zoning Law as a consequence of the problems associated with the use and in an effort to improve and protect the residential neighborhoods in the Village and the central business district. The law, on its face, is neutral and applies to all properties and users, without any classification or reference to religious or any other groups. The law clearly serves a legitimate governmental interest as a matter of law.[2] Moreover, the 1993 Zoning Law, which had, in fact, been under review for many years prior to its adoption, is not aimed at any religious group was drafted and adopted long-before any issue of Plaintiffs' Shabbos house arose.

[2] Although the compelling interest test does not apply herein, the basis for the elimination of hotels and transient occupancy clearly satisfies the compelling interest test and, is accomplished in the least restrictive and, in fact, only rational means that could be employed.

The scenario alleged is similar to the Free Exercise claim rejected in *DiLaura*, 30 Fed.Appx 501 (6th Cir. 2001), in which it was contended that the denial of a variance for a retreat house for prayer and fellowship violated the free exercise clause. The Court dismissed the claim and concluded that, like the Zoning Law herein, "[t]he zoning ordinance at issue in this case is facially neutral (a bed-and-breakfast would be treated in the same way), and there is no evidence offered of any animus against religion involved in either the passage or interpretation of the law." *Id*. at 508.

Moreover, the determination of the Zoning Board of Appeals, finding that Plaintiffs wholly failed to substantiate their burden of demonstrating compliance with the prerequisites for a use variance also does not offend the Free Exercise Clause. As is related above, Plaintiffs wholly failed to provide any evidence which would permit the Zoning Board of Appeals to grant a use variance. Given Plaintiffs default in providing the necessary evidence, denial was required and a Free Exercise challenge based thereon is nothing short of frivolous.

It should be noted that the denial of the Bikur Cholim use variance application was consistent with the Zoning Board of Appeals' proper and legally-mandated insistence that applicants for use variance provide evidence to prove compliance with the statutory standards necessary to obtaining relief. As the annexed affidavit of John Lonewski, formerly chairman of the Zoning Board of Appeals for 10 years, demonstrates, 63 percent of the use variance applications for two-family or more residential use were denied by the Zoning Board of Appeals.

Moreover, Plaintiffs are wholly incorrect in asserting selective language that they contend would have permitted the Zoning Board of Appeals to grant a use variance

despite the complete failure on the part of Bikur Cholim to provide any evidence to substantiate the mandatory prerequisite requirements set forth in Village Law § 7-712-b(2)(b).

Village Law § 7-712-b(2)(b) provides that:

> No such use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located,
>
> (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;
>
> (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;
>
> (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and
>
> (4) that the alleged hardship has not been self-created.

That criteria is the mandatory and exclusive standard that must be satisfied throughout the State of New York or a use variance cannot be granted. In *Cohen v. Board of Appeals of the Village of Saddle Rock*, 100 N.Y.2d 395, 764 N.Y.S.2d 64, 795 N.E.2d 619 (2003), the Court of Appeals affirmed the decisions reached by the Appellate Division and Supreme Court in two cases, *Cohen*, 297 A.D.2d 38, 746 N.Y.S.2d 506 (2d Dept. 2002), *aff'g*, NYLJ, Nov. 30, 2000, p. 34, col. 4 (Sup. Ct. Nassau Co. 2000) and *Russo v. Black*, 297 A.D.2d 381, 746 N.Y.S.2d 605 (2d Dept. 2002), *aff'g*, NYLJ, Feb. 14, 2001, p. 32, col. 1 (Sup. Ct. Nassau Co. 2001) and determined that the considerations set forth in Village Law § 7-712-b preempt inconsistent local variance standards. The

Court concluded that the Legislature intended to occupy the field and to preempt local suppression authority pursuant to the Municipal Home Rule Law. Consequently, the foregoing criterion is mandatory and no other criteria of can or was intended to apply to use variance applications throughout the State of New York.[3]

The Zoning Law herein is a general law that applies to all land-use in the Village. There is no evidence that the Village has an anti-religious purpose in enacting or enforcing the ordinance. Indeed, the affidavit of John Lonewski demonstrates the consistent and long-standing policy of the Village and Code Enforcement Officer in enforcing the Zoning Law and Code to combat overcrowding throughout the Village. Absent evidence of the Village' intent to regulate religious worship, the Zoning Law is properly viewed as a neutral law of general applicability. *See Cornerstone Bible Church*, 958 F.2d at 472

Regardless of the standard employed, the Zoning Law and the denial of a use variance by the Zoning Board of Appeals was proper and do not represent a violation of the Free Exercise Clause. As a result, the complaint fails to state a viable claim and the moving papers do not present a basis for preliminary injunctive relief.

POINT III

NO RLUIPA CLAIM STATED

A. INTRODUCTION

The Religious Land Use and Institutionalized Persons Act "does not provide religious institutions with immunity from land use regulation, nor does it relieve religious

[3] Plaintiffs' citation to language which provides that the Zoning Board of Appeals can "vary or modify the strict letter of this Zoning Law where its literal interpretation would cause practical difficulties or unnecessary hardship" was not intended to impose an alternative standard and, pursuant to the *Cohen* decision could not impose a different standard for use variances.

institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay." 146 Cong. Rec. S7776. The proposition that religious land uses automatically "get a preference in the land use context … would pose a significant problem." *Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 139 (3d Cir. 2002)).

> The federal courts have given states and local communities broad latitude to determine their zoning plans. Indeed, land use law is one of the bastions of local control, largely free of federal intervention. As the Supreme Court stated in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), '[t]he power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities.... [T]he courts generally have emphasized the breadth of municipal power to control land use....' *See also FERC v. Mississippi*, 456 U.S. 742, 768 n. 30, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) ('[R]egulation of land use is perhaps the quintessential state activity.'); *Izzo v. River Edge*, 843 F.2d 765, 769 (3d Cir.1988) ('Land use policy customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong.').

Id. at 135-36.

Municipalities have "a 'strong interest' in establishing and implementing zoning systems, as zoning systems 'protect the zones' inhabitants from problems of traffic, noise and litter, avoid spot zoning, and preserve a coherent land use zoning plan.'" *San Jose Christian College v. City of Morgan Hill*, 2001 WL 1862224 at *3 (N.D.Cal. 2001).

Indeed, "RLUIPA does not guarantee that a religious organization may build a complex as large as that organization desires. A municipality can control growth and expansion within its city limits." *Vision Church*, 397 F.Supp.2d at 929.

B. RELIGIOUS EXERCISE

The legislative history of RLUIPA directs that "not every activity carried out by a religious entity or individual constitutes 'religious exercise.'" 146 Cong. Rec. S7774-01 (July 27, 2000); *see also Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183, 190 n.4 (2d Cir. 2004); *Cathedral Church of the Intercessor v. Village of Malverne*, 353 F.Supp.2d 375, 390 (E.D.N.Y. 2005). "In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution … this alone does not automatically bring these activities or facilities within the bill's definition or [sic] "religious exercise.'" *Westchester Day School*, 386 F.3d at 190 n.4 (*citing* 146 Cong. Rec. S7774-01, S7776 (July 27, 2000)).

The impermissible use of the subject single-family dwelling for occupancy by a changing group of unrelated persons does not constitute a religious exercise. Bikur Cholim is neither a religious assembly nor institution and does not seek to utilize the subject property as a house of worship, school or for any religious use. Instead, Bikur Cholim, a not-for-profit organization, utilizes the subject property for sleeping arrangements for an ever-changing group of 14 unrelated people (having used it for as many as 17-20) while visiting people at Good Samaritan Hospital on the Sabbath. It may well be that the use of the single-family dwelling as a hotel or for transient sleeping arrangements is a convenience for people visiting relatives at the hospital. However, staying at this location or in this single-family residence unquestionably does not constitute a religious exercise.

C. NO SUBSTANTIAL BURDEN

In order to assert a claim pursuant to the substantial burden provision, a plaintiff must first demonstrate that the regulation at issue actually imposes a substantial burden on religious exercise. *See Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 760 (7th Cir. 2003), *cert. denied*, 541 U.S 1096 (2004). "[A] land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise … effectively impractical." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d at 761; *see also Petra Presbyterian Church*, 2003 WL 22048089 at 4. In *Midrash Sephardi*, 366 F.3d at 1277, the Eleventh Circuit determined that "an individual's exercise of religion is 'substantially burdened' if a regulation completely prevents the individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion."

Significantly, a "'substantial burden' requires something more than an incidental effect on religious exercise." *Midrash Sephardi*, 366 F.3d at 1227; *see also Konikov v. Orange County*, 410 F.3d 1323 (11th Cir. 2005). "[F]or a land use regulation to be a 'substantial burden' under RLUIPA, it must be 'oppressive' to a 'significantly great' extent." *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004). "[M]ere inconvenience to the religious institution or adherent is insufficient." *Westchester Day School v. Village of Mamaroneck*, 379 F.Supp.2d 550, 557 (S.D.N.Y. 2005). A substantial burden is one that is significantly more than either expense or inconvenience. *See Grosz*, 721 F.2d at 739.

The Seventh Circuit determined that "the meaning of 'substantial burden on religious exercise' could be read to include the effect of any regulation that 'inhibits or constrains the use, building, or conversion or real property for the purpose of religious exercise.… [T]his cannot be the correct construction of 'substantial burden on religious exercise'.… [because it] would render meaningless the word 'substantial.…'" *Civil Liberties for Urban Believers*, 342 F.3d at 761.

RLUIPA does not entitle a religious institution to locate a house of worship or school wherever it wishes. *See Petra Presbyterian Church v. Village of Northbrook*, 409 F.Supp.2d 1001, 1007 (N.D.Ill 2006). Moreover, "'the costs, procedural requirements, and inherent political aspects' of the permit approval process [are] 'incidental to any high-density urban land use' and thus '[do] not amount to a substantial burden on religious exercise.'" *San Jose Christian College*, 360 F.3d at 1035 (*quoting Civil Liberties for Urban Believers*, 342 F.3d at 761).

> That the congregants may be unable to find suitable alternative space does not create a substantial burden within the meaning of RLUIPA. As the Seventh Circuit noted, 'whatever specific difficulties [the plaintiff church] claims to have encountered, they are the same ones that face all [land users], not merely churches. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them.

Midrash Sephardi, 366 F.3d at 1227 n. 11 (*quoting Love Church v. City of Evanston*, 896 F.2d 1082, 1086 (7th Cir. 1990)).

The Eleventh Circuit further determined in *Midrash Sephardi* that because the location of a synagogue itself did not possess religious significance, "the relevant inquiry is whether and to what extent this particular requirement burdens the congregants' religious exercise." *Id*. at 1228. The Court concluded that:

> [w]hile walking may be burdensome and 'walking farther' may be even more so, we cannot say that walking a few extra blocks is 'substantial,' as the term is used in RLUIPA.…" *Id.* * * * In any given congregation, some members will necessarily walk farther than others, and, inevitably, some congregants will have greater difficulty walking than others. While we certainly sympathize with those congregants who endure Floridian heat and humidity to walk to services, the burden of walking a few extra blocks, made greater by Mother Nature's occasional incorrigibility, is not 'substantial' within the meaning of RLUIPA.

Id.

Confirming the absence of a substantial burden, the Eleventh Circuit noted that "[w]ere we to adopt the synagogue's reasoning, it would be virtually impossible for a municipality to ensure that no individual will be burdened by the walk to a temple of choice." *Id.*

Again, use of the property for sleeping may be more convenient than, like many do, staying in the same room with an individual being visited in the hospital. Regardless, individuals staying in the hospital can be visited six days a week without any impediment. In addition, a Holiday Inn exists approximately 1.7 miles from the hospital at a local in the Town of Ramapo zoned for such use. While that location may not be as convenient as the subject property, not being able to use the subject property as a Shabbos house does not substantially burden anyone's religious exercise.

The decisions cited by Plaintiffs for the contention that the zoning provision herein and denial of an unproved use variance application constitute a substantial burden are not accurately related. Contrary to Plaintiffs' representation, the decision in *Havurah v. Zoning Board of Appeals of the Town of Norfolk*, 418 A.2d 82, 177 Conn. 440 (1979), did not conclude that the rejection of a claim of entitlement for sleeping quarters at a

synagogue on nights other than the Sabbath constituted a Fee Exercise violation. Instead, the issue was exclusively one of state land use law. More precisely, the issue was whether a synagogue's "proposed unrestricted overnight use of its premises was an accessory use 'customary with and subordinate to (a place of worship) and located on the same lot with the principal use." *Id*. at 85, 177 Conn. at 445. The religious organization in *Havurah* was "a religious society that provides a place for devout persons to spend several days together for the purpose of prayer, celebration of festivals and religious events, Jewish study and meals satisfying religious requirements." *Id*. at 84 n.1, 177 Conn. at 442 n.1. Significantly, the Zoning Board of Appeals had previously determined that pursuant to the local zoning law, Beit Havurah was a place of worship and that sleeping accommodations in its building was a permitted accessory use on certain designated nights. Consequently, the decision does not stand for the proposition for which is represented by Plaintiffs and merely dealt with whether the sleeping accommodations were a permissible accessory use to a house of worship pursuant to the local zoning law. No Free Exercise implications or issues were raised.

Similarly, the decision in *Greentree at Murray Hill Condominium v. Good Shepherd Episcopal Church*, 146 Misc.2d 500, 550 N.Y.S.2d 981 (Sup. Ct. New York Co. 1989), also dealt not with whether the contested use was a permitted principal use but, instead, whether under the provisions of the local zoning regulations, the provision of temporary housing for homeless persons was a permissible use accessory to an existing church. *See id*. at 507, 550 N.Y.S.2d at 986. Again, contrary to Plaintiffs' implication, the decision has nothing to do with the Free Exercise Clause nor with whether Plaintiffs'

hotel/transient occupancy use is a permissible principal use pursuant to the Suffern Zoning Law.[4]

The decisions cited by Plaintiffs primarily relate to whether certain uses are permissible accessory uses to a house of worship pursuant to a local zoning law. By and large, they have no relevance to RLUIPA or Plaintiffs' constitutional claims.

Instead, what is presented herein is the impermissible conversion of a single-family dwelling, on an undersized lot, for use by unrelated persons for a night at a time. The building serves as a convenience to individuals visiting others at the nearby hospital. However, staying at this location is not contended to be a tenet of on Plaintiffs' religion. Plaintiffs can visit relatives six days a week without any problems. Plaintiffs also have the ability to stay with ill patients in their hospital rooms. Moreover, a Holdiay Inn is located less than two miles from the hospital. True, it may by more convenient to stay at the subject property. However, the enforcement of the provisions of the Zoning Law do not inflict a substantial burden on Plaintiffs. On the other hand, acceptance of Plaintiffs contention would, in essence, permit RLUIPA and Plaintiffs amorphous consititional claims to trump all local zoning regulations. Such a result clearly is contrary to RLUIPA's legislative intent and would, if implemented, as is discussed below, represent an Establishment Clause violation.

D. THE VILLAGE HAS A COMPELLING INTEREST IN

[4] The administrative opinion in *Use of State College Facilities for Religious Activities*, 60 Pa. D. & C.2d 306 (1973), did not deal with a Free Exercise issue, but instead, whether the use of state college facilities for religious activities violated the Establishment Clause.

IMPLEMENTING AND ENFORCING ITS ZONING REGULATIONS

It has long been recognized by the courts that local legislative and administrative bodies are most familiar with the circumstances and needs of each community. *See Albright v. Town of Manlius*, 34 A.D.2d 419, 312 N.Y.S.2d 13 (4th Dept. 1970), *aff'd*, 28 N.Y.2d 108, 320 N.Y.S.2d 50, 268 N.E.2d 785 (1971). As a result, "[t]he power of a municipality to determine for itself what plans are necessary to promote the public health, morals, safety, and the welfare, convenience, and general prosperity of its people is a legislative question, which may not be interfered with by the courts, except in rare circumstances." *Fox Meadow Estates, Inc. v. Culley*, 233 App.Div. 250, 252 N.Y.S.2d 178, 179-180 (2d Dept. 1931), *aff'd*, 261 N.Y. 506, 186 N.E.2d 714 (1933). As a result, as a general proposition, the power and basis of a municipality to establish and enforce zoning regulations in a manner reasonably aimed to promote the general welfare cannot be questioned. *See Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 121, 96 N.E.2d 731, 733 (1951).

Indeed, the local legislative judgment must be supported by the courts if there is "any state of facts either known or which could reasonably be assumed" to support or justify the enactment. *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). With respect to land use, "the classification scheme devised by the local legislature would have to be sustained if it could be said to be 'reasonably related to some manifest evil which, however, need only be reasonably apprehended." *Town of Huntington v. Park Shore Country Day Camp*, 47 N.Y.2d 61, 66-65, 416 N.Y.S.2d 774, 776, 390 N.E.2d 282, 284 (1979). "[Z]oning is an important and complex function [and] may indeed be the most essential function performed by local government, for it is one of the primary

means by which we protect that sometimes difficult to define concept of quality of life." *Village of Belle Terre v. Borass*, 416 U.S. 1, 13 (1974) (Marshall, J. dissenting).

Moreover, the courts have applauded the laudatory purpose underlying zoning regulations enacted for the betterment or preservation of communities and nieghborhoods. The Supreme Court has recognized that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced.…" *Berman v. Parker*, 348 U.S. 26, 33 (1954). Accordingly, the preservation of the residential character of any area has long been recognized as a permissible and salutary goal in enacting zoning regulations. *See Marcus Associates v. Town of Huntington*, 45 N.Y.2d 505, 507, 410 N.Y.S.2d 546, 548, 382 N.E.2d 1323, 1325 (1978); *Wulfsohn v. Burden*, 241 N.Y. 288, 150 N.E.2d 120 (1925).

In the most cogent statement of the commendable goal of zoning Justice Douglas related:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. … The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of seclusion and clean air make the area a sanctuary for people.

Village of Belle Terre, 416 U.S. at 9.

Similarly, the New York Court of Appeals has recognized that legitimate governmental purposes are furthered by a zoning ordinance which fosters "the preservation of the character of traditional single-family neighborhoods, reduction of traffic and parking problems, control of population density and prevention of nosie and

disturbance." *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 550, 549, 498 N.Y.S.2d 128, 131, 488 N.E.2d 1240, 1243 (1985).

In order to promote these important and legitimate aims, the courts have sustained use regulations which have excluded multi-family dwellings from residential neighborhoods. *See Baddour v. City of Long Beach*, 279 N.Y. 167, 18 N.E.2d 18 (1938), *reh. den.*, 279 N.Y. 794, 19 N.E.2d 90, *app. dism.*, 308 U.S. 503 (1939); *Wulfson,* 241 N.Y. at 301, 150 N.E. at 123 ("zoning authorities shall have the right in a residential district to promote these purposes [of safe, healthful and comfortable family life] and to protect the people desiring to enjoy these conditions by excusing big apartment housies.…"); *Headley v. Fennell*, 124 Misc. 886, 210 N.Y.S. 102 (Sup. Ct. Monroe Co. 1924, *aff'd*, 214 App.Div. 810, 210 N.Y.S.2d 861 (4th Dept. 1925). These decisions recognize that it is within the province of local legislative bodies to conclude that multifamily or multi-occupancy units and single-family residences are not complimentary or compatible. If a local zoning law permits the construction of multi-family dwellings, a zoning law may legitimately determine that such uses are not conducive to fostering the atmosphere that is sought to be promoted in single-family residential districts.

Indeed, the delegation of zoning authority to villages, Village Law § 7-704, provides that:

> **Such [zoning] regulations shall be made in accordance with a comprehensive plan** and **designed to lessen congestion in the streets**; to secure safety from fire, panic, floods and other dangers; to promote health and the general welfare; to **provide adequate light and air**; to **prevent the overcrowding of land**; to **avoid undue concentration of population**; to make provision for, so far as conditions may permit, the accommodation of solar energy systems and equipment and access to sunlight necessary therefor; to facilitate the adequate provision of transportation, water,

> sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality. (emphasis added).

Zoning regulations are not a mere means to an end but are intended to implement a community's rational zoning plan and philosophy. "The enactment or amendment of zoning regulations is intended to implement the planning and development goals of a community. It is the means to accomplish rational community planning rather than an end unto itself." MCKINNEY'S PRACTICE COMMENTARIES, Village Law § 7-722 (p. 26) (*citing Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 131, 531 N.Y.S.2d 782, 787, 527 N.E.2d 265, 270 (1988)). A community's comprehensive plan, the planning basis for zoning enactments, "connotes a full consideration of the problems presented and reasonable and uniform provisions to deal with them, which tend to promote the general community welfare." *Albright v. Town of Manlius*, 34 A.D.2d 419, 423, 312 N.Y.S.2d 13, 18 (4th Dept. 1970), *aff'd*, 28 N.Y.2d 108, 320 N.Y.S.2d 50, 268 N.E.2d 785 (1971). As a result, "some form of rational planning must precede any zoning enactment.…" MCKINNEY'S PRACTICE COMMENTARIES, Village Law § 7-722 (p. 26).

As is related in accompanying affidavits, the consistent planning policy of the Village has been to provide stable single-family development in the Village's residential distrcits. The subject property has been zoned for single-family use on a 10,000 square foot lot since at least 1948. The consistent planning philosophy of the Village has been to maintain the area for single-family use.

Moreover, as is related in accompanying affidavit of John Lonewski, the Village has consistently enforced its zoning and housing laws to endeavor to eliminate overcrowding and illegal residential use throughout the Village. Quite obviously, the Village has a compelling interest in ensuring that overcrowding and illegal occupancy of residences is minimized, if not eliminated.

The permitted use for the subject property is as a one-family detached dwellings. A "Dwelling, One-Family" is defined by § 266-5 of the Zoning Law as "[a] building containing a single dwelling unit." A "Dwelling Unit" is defined therein as "[o]ne (1) or more rooms with provisions for living, cooking, sanitary and sleeping facilities arranged for one (1) family." Consistent with New York State case law, a "Family" is defined by § 266-5 of the Zoning Law as "[o]ne (1) or more persons related by blood, marriage or adoption living and cooking together as a single, nonprofit housekeeping unit; or, one (1) or more persons living together as a nonprofit housekeeping unit which is the functional and factual equivalent of a traditional family." Unquestionably, the use of the subject property as described in the complaint and herein is not of a "family" and is impermissible pursuant to the Zoning Law.

The definition of "family" and its enforcement in the Village serves a compelling governmental interest. As is related in the accompanying affidavits, the Village has a compelling interest and long-standing history of enforcing its residential restrictions. One cannot reasonably, legally or rationally vigorously enforce zoning and other restrictions against overcrowding throughout a municipality but grant an exemption for a use which

does not comply with the zoning law and has failed to satisfy the statutory requirements for a use variance.[5]

Moreover, the Village, like all municipalities, has a compelling governmental interest in making zoning and planning decisions based on complete and accurate information and proof which satisfies the applicable statutory standards. Municipalities also possesses a legal obligation, obviously equating to a compelling governmental interest, to ensure that an applicant for any land use permit, particularly a use variance, satisfy all of the requirements for obtaining such an approval. Moreover, municipalities also must receive the appropriate information from an applicant in order to fully comply with the State Environmental Quality Review Act ("SEQRA") (Environmental Conservation Law Article 7) and the applicable regulations (6 NYCRR Part 617) and to conduct a proper environmental review of the impacts from the project as required SEQRA. Plaintiffs failed to provide any information to substantiate the statutory requisites for a use variance and did not even fill out the Environmental Assessment Form, a necessary prerequisite for compliance with SEQRA.

The few RLUIPA cases that have discussed the issue find that the foregoing legitimate interests are compelling. For example, *Christian Gospel Church* confirms as a general principle that a municipality has a strong interest in maintaining the integrity of its zoning plan. 896 F.2d at 1224-25. *See also Murphy*, 148 F. Supp. 2d at 190 (acknowledging a compelling state interest in protecting the health and safety of communities through enforcement of local zoning regulations); *International Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F. Supp. 878, 881 (N.D. Ill.

[5] A use variance is a substantial and drastic land use remedy because a use variance allows “the use of land for a purpose which is otherwise not allowed or prohibited by the applicable zoning regulations.” Village Law § 7-712(1)(a).

1996) (City zoning plan to preserve a particular site for a particular use identified as important in the City's plan was a compelling interest and the least restrictive means of furthering a compelling governmental interest.).

Further, it is submitted that any other determination would offend the Establishment Clause. Plaintiff purchased a site that, under the neutral zoning in effect, a secular entity would have no right to use for its intended purpose. Plaintiff now demands that the Village be compelled to change its non-discriminatory local zoning plan to accommodate a purportedly religiously-motivated desire to provide hotel-type housing accommodations at that site - a demand that no secular entity could legally sustain. Were RLUIPA to be interpreted as requiring the Village to jettison its land-standing land use plan for the Plaintiffs' benefit, it would transgress the limits set by the Establishment Clause of the United States Constitution. "[G]overnment runs afoul of the endorsement test and violates the Establishment Clause when it affirmatively supports religion on preferential terms." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 175-76 (3d Cir. 2002), *cert. denied*, 539 U.S. 942 (2003) (*citing Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000)); *see also City of Bourne v. Flores*, 521 U.S. 507, 536-537 (1997) (Stevens, J., concurring) (claim of religious entitlement to exemption from a generally applicable, neutral civil law is precluded by the Establishment Clause).

The legislative history indicates that Congress considered this concern and designed RLUIPA with the intent that its free exercise protections not be interpreted to extend so far as to violate the Establishment Clause. *See* 146 Cong. Rec. S7776 (joint statement of Senators Hatch and Kennedy (2000)). Had the Village ignored its own planning objectives and Plaintiffs' failure to provide the requisite proof for a use variance

and to follow the requirements of SEQRA and acceded to Plaintiffs' demand, it would have upset this delicate balance, a result that would have impermissibly "place[d] religion in an exalted position, exempt from the ordinary land use decision-making process." *Boyajian v. Gatzitnis*, 212 F.3d 1, 34 (1st Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) (Toruella, C.J., dissenting); *see also Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. 439 (1988); *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*, 224 F.3d 283, 292-93 (4th Cir. 2000) (Murnhaghan, J., dissenting), *cert. denied*, 531 U.S. 1192 (2001) (exemption from generally applicable zoning requirements for schools on property owned or leased by religious institutions crosses the line from a permissible accommodation of religion to "ordinary favoritism for religious property owners" forbidden by the Establishment Clause.) By contrast, the reasoned decision that Plaintiffs did not establish entitlement to a use variance and not to permit the transient housing proposed furthered the Village's legitimate land use policies in a religion-neutral manner, violated no rights of the Plaintiffs, and, in accord with Congress' intent in adopting RLUIPA, protected the rights of its citizens under the Establishment Clause to be insulated from government endorsement of and entanglement with religion.

E. LEAST RESTRICTIVE MEANS UTILIZED

In any event, as is related herein, the subject area is zoned for single-family residential use, the Village has consistently sought to uphold the single-family quality of its residential neighborhoods and has fought overcrowding and illegal use of residential dwellings. Moreover, Plaintiffs failed to provide any evidence to substantiate the requirements for a use variance and did not contend before the Zoning Board of Appeals that the use in question was a religious use. The Zoning Board of Appeals possessed no

legal alternative other than to deny the use variance for a transient use of the single-family dwelling.

Although the instant use is not a comparable to the house of worship involved in *Konikov*, the Court in *Konikov* observed that:

> Gatherings for organized religious services produce, as do other substantial gatherings of people, crowds, noise, and disturbance. In fact, the parties' stipulations reveal that the City was acting pursuant to neighbors' complaints to end the disturbances caused by Appellee's conduct. Given this total inconsistency between the accomplishment of the City's policy objectives and the continuance of Appellee's conduct, the government action in this case easily passes the least restrictive means test.

302 F.Supp.2d at 1340.

Clearly, no other action was permissible and, as a result, the actions were the least restrictive – and only – action possible.

F. NO EXCLUSION CLAIM STATED

42 U.S.C. § 2000cc(b) provides that "No government shall impose or implement a land use regulation that: (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."

In the first instance, Plaintiffs do not allege and, in fact, cannot substantiate that the use of the subject property as alleged is as a "religious assembl[y]." The use of the property is as hotel or transient facility which may be convenient for religious individuals. That circumstance does not convert what is essentially a hotel or transient facility into a religious assembly. Indeed, there is no allegation that the individuals who stay there are members of the same synagogue or religious assembly. Instead, the facility

is owned or operated by a not-for-profit corporation, not a religious organization, in order to provide sleeping facilities to whomever Orthodox Jews wish to stay there. As a result, the provision is inapplicable herein.

Secondly, the use in question, a hotel or transient facility, is excluded from the Village -- both for alleged religious and non-religious circumstances alike. The Village unquestionably possesses the authority and basis to exclude any such commercial use from its boundaries. *See, e.g. Mindel v. Village of Thomaston*, 150 A.D.2d 652, 541 N.Y.S.2d 526 (2d Dept. 1989); *see also Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226 (1996); *McGann v. Village of Old Westbury*, 256 N.Y.S.2d 556, 682 N.Y.S.2d 433 (2d Dept. 1998). As is related in the annexed affidavit of Robert Geneslaw, the elimination of such use in the 1993 Zoning Law was done for a good, valid and rational reason. The fact that a particular commercial use has been excluded from the municipality and from its residential zones, provides no basis for a RLUIPA claim merely because the existence of a hotel or similar facility in close proximity to Good Samaritan would be convenient to Plaintiffs.[6]

As a result, it is respectfully submitted that no exclusion claim is stated as a matter of law.

G. EQUAL TREATMENT/FAVORITISM OF NONRELIGIOUS ASSEMBLIES

42 U.S.C. § 2000cc(b)(1) provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." The equal treatment

[6] Plaintiffs' comparison of the scenario herein with the allowance of adult uses in a portion of the general business district by special permit is entirely disingenuous. Municipalities cannot exclude adult uses from their community. Rather than permitting the operator of an adult use to select where in the business areas it might wish to locate, consistent with Supreme Court precedent, the Village permitted such uses in a select area.

and exclusion provisions codify existing Equal Protection Clause and Free Exercise Clause jurisprudence. *See Petra Presbyterian Church*, 2003 WL 22048089 at * 11; *Freedom Baptist Church of Delaware County v. Township of Middletown*, 204 F.Supp.2d 857, 869 (E.D.Pa.2002); *Ventura County Christian High School v. City of San Buenaventura*, 233 F.Supp.2d 1241, 1246 (C.D.Cal.2002).

Again, as is related above, this provision is inapplicable herein because the use of the land for the subject impermissible use does not relate to a "religious assembly or institution." The hotel-like arrangement is operated not by a religious assembly or organization, but by a not-for-profit organization which seeks to serve Orthodox Jews of various unrelated religious affiliation while visiting the hospital. Such an operation is not within the covered terms of § 2000cc(b)(1).

"[I]n evaluating … claims under either RLUIPA or the Equal Protection Clause of the Fourteenth Amendment, the Court must first inquire as to whether defendants have treated plaintiffs in an unequal manner to similarly situated entities." *Ventura County Christian High School v. City of San Buenaventure.*, 233 F.Supp.2d at 1246-47. "By requiring equal treatment of secular and religious assemblies, RLUIPA allows courts to determine whether a particular system of classifications adopted by a city subtly or covertly departs from requirements of neutrality and general applicability. A zoning law is not neutral or generally applicable if it treats similarly situated secular and religious assemblies differently because such unequal treatment indicates the ordinance improperly targets the religious character of an assembly." *Midrash Sephardi*, 366 F.3d at 1232.

The failure to plead any facts to establish that Plaintiffs were treated differently from purportedly similarly situated assemblies requires rejection of the claim under both

the equal treatment provision of RLUIPA and the equal protection clause. *See Second Baptist Church of Leechburg v. Gilpin Township*, 118 Fed.Appx. 615, 618 (3d Cir. 2004). The complaint is simply devoid of any similarly situated uses.

Moreover, as is related at length in the accompanying affidavit of Robert Geneslaw, the uses allowed by special permit to which Plaintiffs compare their transient, high density occupancy to are not similarly situated in any respect.

Moreover, each of those uses requires significantly larger minimum lot sizes in order to obtain a special permit. For example, pursuant to § 266-33(M)(1) of the Zoning Law, a private membership club requires twice the minimum lot size, in the case of the R-10 district, at least 20,000 square feet and twice the minimum setbacks. Section 266-33(M) provides additional requirements permitting the agency reviewing a special permit application to ensure that the use will not be disturbing to neighbors. It should also be noted that the definition of "private membership club" set forth in § 266-5 of the Zoning Law requires that "[t]he members of the organization shall have a financial interest in and method of control of the assets of the private membership club" in order to ensure that, as owners, they have an interest in ensuring that the property is properly maintained and does not cause a nuisance or disturbance to neighbors.

Because the location of public schools is preempted, they must be allowed in any zoning district. *See Board of Education v. City of Buffalo*, 32 A.D.2d 98, 100, 302 N.Y.S.2d 71, 74 (4th Dept. 1969); *County of Westchester v. Village of Mamaroneck*, 41 Misc. 2d 811, 246 N.Y.S.2d 770 (Sup. Ct. Westchester County 1964), *aff'd*, 22 A.D.2d 143, 255 N.Y.S.2d 290 (2d Dept. 1964), *aff'd*, 16 N.Y.2d 940, 264 N.Y.S.2d 925, 212 N.E.2d 442 (1965); *Board of Cooperative Educational Services v. Gaynor*, 33 A.D.2d

701, 701, 306 N.Y.S.2d 216, 218 (2d Dept. 1969); *Union Free School Dist. v. Village of Hewlett Bay Park*, 198 Misc. 932, 934, 102 N.Y.S.2d 81, 83 (Sup. Ct. Nassau County 1950), *aff'd*, 279 A.D. 618, 107 N.Y.S.2d 858 (2d Dept. 1951); N. Y. Education Law §§ 401, 407, 408.

Private educational facilities require a minimum lot size of 60,000 square feet and, as is related above, bear no similarities to the use at issue herein.

Plaintiffs compare their use to a dormitory in a most superficial and disingenuous manner. Pursuant to § 266-33(F), "[d]ormitories are permitted only as accessory uses to schools of general or religious instruction." Consequently, in the first instance, dormitories are not permitted as a principal use of property but may only be associated with a bona fide school on the same lot. Secondly, the lot size is substantially larger, requiring "a minimum lot area of three thousand six hundred (3,600) square feet … per dormitory bed, exclusive of the lot area allocated and devoted to the principal and other accessory buildings on any site, including the required yards and/or setbacks, buffers and parking facilities for said buildings." § 266-33(F)(1). Although Plaintiffs' facility is not a "dormitory" pursuant to the Zoning Law for numerous reasons, the bulk requirements for the purported maximum occupancy of 14 individuals would require a minimum lot size of 50,400 square feet, that is, more than one acre. The subject property is less than 10,000 square feet. In addition to other protections set forth in the Zoning Law, the minimum distance from a permissible dormitory to any property line is required to be at least 100 feet pursuant to § 266-33(F)(7) of the Zoning Law. By comparison, the width of the entire subject property is only 75 feet and the structure is located 26 and 18 feet from the respective side property lines.

Lastly, a dormitory is an entirely different type of structural use than the single-family home being used herein. A "dormitory" is defined, in part, by § 266-5 of the Zoning Law as:

> A building or part of a building containing private or semiprivate rooms which open to a common hallway, which rooms are sleeping quarters for administrative staff, faculty or students, along with bathroom, dining, cooking, laundry, lounge and recreation facilities, as required. * * * Single-family, two-family and/or other multiple residential facilities, other than described above, are not to be considered as 'dormitories.' Private rooms may be occupied by no more than one (1) person, and semiprivate rooms may be occupied by no more than two (2) persons.

Plaintiffs are using the three existing bed rooms, the den and dining room in the single-family dwelling for sleeping of more than two persons per room in each instance. Clearly, Plaintiffs' use of the subject property clearly is not similar to or similarly situated with a "dormitory."

Nursery schools,[7] day-care centers[8] and home occupations are not even remotely similarly situated to Plaintiffs' use of the existing single-family dwelling for transient hotel-type occupancy by unrelated and ever-changing individuals. Plaintiffs are incorrect in asserting that a day-care center could operate on the Bikur Cholim property (p. 27) because, the minimum lot size for all uses in the R-10 zoning district, except single-family residences, is 60,000 square feet. The owner of the property might be able satisfy the requisite standards for a special permit for a day care center if the lot was six and one-

[7] Pursuant to the Zoning Law (§ 266-5), a "nursery school" is "Any private school designed to provide daytime care or instruction for children three (3) years of age and older, for less than three (3) hours a day per session, and no more than two (2) sessions per day."

[8] Pursuant to the Zoning Law (§ 266-5), a "day-care center" is "A facility with an individual and required number of assistants providing care for seven (7) or more children, depending on age, in accordance with a strict staff/child ratio, for more than three (3) hours a day but less than twenty-four (24) hours a day. Centers may be established as the sole use in a church, school or other building and may be run by an individual, association, corporation or institution licensed by the New York State Department of Social Services."

half larger than the 9,286 square foot lot. Clearly, the lot is profoundly deficient and no analogy exists.

Plaintiffs also compare the use at issue to hospitals convalescence and nursing homes. However, Plaintiffs are mistaken in claiming that such use is permitted in a R-10 zoning district. A review of the Schedule of General Use Requirements demonstrates that such uses are permitted in the R-15 zoning district by special permit (No. 2 in Special Permit Uses column). The list of permitted special permit uses in the R-10 provides that the permissible special permit uses are as follows: "Special permit uses Nos. 1, 3, 4, 5, 6, 7 and 8." In other words, the special permit uses allowable in the R-15 zoning district are permissible by special permit in the R-10 zoning district except special permit uses number 2 – "Public and private hospitals and sanitariums; convalescent an nursing homes." Those uses are not permitted in the R-10 zoning district.

In any event, a hospital or convalescence or nursing home requires a minimum lot size of five acres; a fifty foot buffer area adjacent to residential areas.[9] Moreover, Good Samaritan Hospital is the only hospital or convalescence or nursing home in the Village and is located on a 40-acre campus parcel. No other parcel exists in the Village which would be large enough for such use. Moreover, the Village has for many years believed that the hospital should not be in a residential zoning district and that it should have a district tailored to its unique uses and functions. The Hospital agreed a number of years ago to work with the Village's planner and to implement such a specific zoning district.

[9] A "buffer" is defined by § 266-5 of the Zoning Law as "An area of specified dimension extending between the property line and a required yard which shall remain in its natural state or be improved with landscape materials as may be required by the approving authority. The 'buffer' shall not be used or otherwise encroached upon by any activities, including parking or driveway aisles … so as to provide for adequate separation and protection from otherwise inharmonious or incompatible uses. Because a minimum of 50 foot rear yards and 25 foot side yards is required for all uses except single-family dwellings in the R-15 (as well as the R-10) zone, all aspects of a hospital use must be located at least 75 feet from a residential lot line.

The process was recently initiated by the Hospital's planner and the Village planner reviewing the Hospital's future plans and beginning to draft a proposal.

In *Petra Presbyterian Church v. Village of Northbrook*, 2003 WL 22048089 at 12 (N.D. Ill.2003), the Court rejected an "equal treatment" claim because "the zoning code treats religious and non-religious membership organizations on equal terms by excluding both from the I-1 district."

Because no comparison exists between Plaintiff's high-density, transient sleeping facility and any analogous facility, no viable equal treatment claim is stated as a matter of law. *See Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 100 Fed.Appx. 70, 77 (3d Cir. 2004).[10]

POINT III

COMPLAINT FAILS TO STATE A FREEDOM OF SPEECH/ASSOCIATION CLAIM

The complaint fails to state a viable a Freedom of Speech/Association claim. The terms of the First Amendment prohibits government decision makers from "abridging the freedom of speech, ... or the right of the people peaceably to assemble." "'Content-based restrictions on speech, those which suppress, disadvantage, or impose differential burdens upon speech because of its content are subject to the most exacting scrutiny,'" *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 686 (10th Cir.), *cert. denied*, 525 U.S. 868 (1998) (internal citations and quotations omitted), while content neutral regulations that only incidentally burden speech are subject to intermediate scrutiny." *Grace United Methodist Church*, 427 F.3d at 790 (*citing Clark v. Cmty. for Creative Non-Violence*, 468

[10] In any event, even were one to assert that the decision not to permit hotels or transient housing in the Village in some manner offended the "equal treatment" provision, the provision, nevertheless, satisfies the applicable strict scrutiny test as is related above.

U.S. 288, 293 (1984); *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). However, "the right of association is no more absolute than the right of free speech or any other right; consequently there may be countervailing principles that prevail over the right of association." *Walker v. City of Kansas City*, 911 F.2d 80, 89 n. 11 (8th Cir.), *rehearing denied*, 919 F.2d 1339 (8th Cir. 1990), *cert. denied*, 500 U.S 941 (1991). A bona fide religious use "has no constitutional right to be free from reasonable zoning regulations nor does a church have a constitutional right to build its house of worship where it pleases." *Messiah Baptist Church*, 859 F.2d at 826.

In addition to freedom of speech, the First Amendment also implicitly protects the corresponding freedom to expressive association. *See Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). However, "the right of association is no more absolute than the right of free speech or any other right; consequently there may be countervailing principles that prevail over the right of association." *Walker*, 911 F.2d at 89 n. 11.

Because the Village's Zoning Law is neutral and generally applicable Plaintiffs are placed on an equal footing with other religious and non-religious entities seeking to build and operate similar facilities in the Village. The Zoning Law plainly does not regulate any form of speech on its face. In fact, the Zoning Law, which does not permit any form of hotel or transient living arrangement in the Village was adopted in 1993, long before any mention of a Shaabos house and does not regulate in accordance with content. As such, the amendment unquestionably is content neutral. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (regulation which "serves purposes unrelated to the content of expression" is considered neutral "even if it has an incidental effect on some speakers or messages but not others"); *Grace United Methodist Church*, 427 F.3d at

790; *Gascoe, Ltd. v. Newtown Township*, 699 F.Supp. 1092, 1095 (E.D.Pa.1988) ("municipality's right to use its zoning power in the public interest is perhaps the paradigm of [a content neutral] restriction").

Because the challenged Zoning Law is content neutral, it survives intermediate scrutiny so long as the Village can demonstrate that the regulation "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 189 (1997) (*citing United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Clark v. Committee for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

As previously related, the Zoning Law is content neutral and Plaintiffs have provided no evidence that the challenged regulations were motivated by a desire to curtail protected speech or associational rights. Instead, as is demonstrated by the annexed affidavit of Robert Geneslaw and accompanying Declaration, the Zoning Law was passed for the purpose of regulating traffic, density, noise and pollution in a residential zone and to eliminate problems caused by the transient nature of hotels and similar uses. The Zoning Law does not interfere with the Plaintiffs' right to speak openly and freely or to associate with one another in appropriate locations. Clearly, the Zoning Law is unrelated to the suppression of speech or assembly and does not burden any more speech or associational rights than necessary to further the Village's substantial interest in regulating traffic, population density, noise and pollution in a residential zone. *See Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 406 F.Supp.2d 507, 522 (D.N.J. 2005).

Moreover, "the courts have uniformly held that no First Amendment claim arises from the denial of a special use permit that is not 'based on the content of [the] proposed speech, but [is] an attempt to promote legitimate content-neutral interests.'" *Bosscher v. Township of Alboma*, 246 F.Supp.2d 791, 799 (W.D. Mich. 2003) (*quoting Williams v. City of Columbia*, 906 F.2d 994, 999 (4th Cir.1990)); *see also Howard v. City of Burlingame*, 937 F.2d 1376, 1381 (9th Cir.1991); *Guschke v. City of Oklahoma City*, 763 F.2d 379, 385 (10th Cir.1985). Bikur Cholim utterly failed to provide any basis which would have even arguably permitted the Zoning Board of Appeals to grant its requested use variance. Particularly given the complete default to provide evidence to substantiate the prerequisite criteria, any claim of a First Amendment claim is utterly frivolous.

Plaintiffs have no right to a transient occupancy of a single-family home in a single-family residential zone at a density far in excess of what is permitted any other group of individuals. In fact, the residents of the Shabbos house are not members of any distinct organization and, despite the purported common coincidence of their use of the premises for sleeping, are not at the location to assemble for the purpose of exercising any First Amendment right.

There is no question that the Village has a substantial interest in regulating the use of land within the Village and that its zoning regulations promote that interest. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) ("a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect,'" (*quoting Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976)). Further, the Zoning Law does not burden speech at all, let alone more than necessary to further those substantial interests. *See, e.g., Grace United Methodist Church*, 427 F.3d at 790.

As a result, the Village possesses an important governmental interest in regulating land use. Because its zoning regulations are unrelated to the suppression of speech and do not burden any more speech than necessary, the challenged amendment and Zoning Law survive intermediate scrutiny.

POINT IV

THE COMPLAINT FAILS TO STATE AN EQUAL PROTECTION CLAIM

The complaint alleges that the Zoning Law treats Plaintiffs' land use differently than other secular uses of land in violation of the Fourteenth Amendment.

In the first place, Courts have expressed their "extreme reluctance to entertain equal protection challenges to local planning decisions." *Macone v. Town of Wakefield*, 277 F.3d 1, 10 (1st Cir. 2002). "Because equal protection can no more become another general overseer of local land-use determinations than substantive due process, the standards must be applied with the same 'rigor.'" *Bower Associates v. Town of Mount Pleasant*, 2 N.Y.2d 617, 630, 781 N.Y.S.2d 240, 248, 814 N.E.2d 410, 418 (2004) (*citing RRI Realty Corp. v. Village of Southampton*, 870 F.2d 911, 918 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989)).

In order to assert an equal protection claim, a litigant must, at least, allege and identify the actual existence of similarly situated persons who have been treated differently and that the government has singled out plaintiffs alone for different treatment. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Gagliardi v. Village of Pawling*, 18 F.3d 188 (2d Cir. 1994); *Brady v. Town of Colchester*, 863 F.2d 205, 216 (2d Cir. 1988); *Sylvia Development Corp. v. Calvert County*, 842 F.Supp. 183, 185 (D. My. 1994), *aff'd*, 48 F.3d 810 (4th Cir. 1995). A

plaintiff "must first identify and relate specific instances where persons similarly situated in all respects were treated differently, instances which have the capacity to demonstrate that [plaintiffs] were singled … out for unlawful oppression." *Rubinovitz v. Rogato*, 60 F.3d 906, 910 (1st Cir. 1995) (*quoting Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19 (1st Cir. 1989)) (internal quotation marks omitted); *see also Crider v. Board of County Commissioners of the County of Bolder*, 246 F.3d 1285, 1288 (10th Cir.), *cert. denied*, 534 U.S. 890 (2001). Bald allegations that the interests of one party were preferred over those of another are insufficient. *See Gagliardi*, 18 F.3d at 193.

One to whom an equal protection plaintiff compares itself must be similarly situated in all material respects. *See Campbell v. Rainbow City*, 434 F.3d 1306, 1314 (11th Cir. 2006). The persons or entities with whom plaintiff compares himself must be "someone who is *prima facie* identical in all relevant respects." *Purze v. Village of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002) (*citing Indiana State Teachers Assoc. v. Board of School Commissioners*, 101 F.3d 1179, 1181-82 (7th Cir. 1996)). Bald allegations that the interests of one party were preferred over those of another are insufficient. *See Gagliardi*, 18 F.3d at 193. Instead, a complaint is sufficient only if it identifies "others similarly situated in all relevant respects save for that which furnishes the basis for the claimed discrimination." *303 West 42nd Street Corp. v. Klein*, 46 N.Y.2d 686, 695, 416 N.Y.S.2d 219, 224, 389 N.E.2d 815, 820 (1979).

The complaint is utterly devoid of any cognizable allegation of disparate treatment. Although Plaintiffs assert that they were treated differently than others, they have not provided even one relevant example of such disparate treatment. Consequently, the Zoning Law and use variance denial need only be rationally related to a legitimate

government purpose to pass muster under the equal protection clause. *See Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1213 (10th Cir.), *cert. denied*, 537 U.S. 814 (2002); *Greene v. Town of Blooming Grove*, 879 F.2d 1061 (2d Cir. 1989). A decision can be considered irrational only when an official or board acts with no legitimate reason for its decision. *See Crowley v. Courville*, 76 F.3d 47, 52 (2d Cir. 1996); *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84, 102 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *Harlen Associates v. Village of Mineola*, 273 F.3d 494, 500 (2d Cir 2001). As is apparent from the complaint and as is related in the accompanying motion papers, the actions alleged herein cannot be characterized as irrational as a matter of law.

"Municipal zoning has been a common and accepted exercise of the police power to protect city residents from the effects of urbanization, overcrowding, and encroachment of commercial business for over three-quarters of a century." *Grace United Methodist Church*, 235 F.Supp.2d at 1207. As is related more fully above and in the accompanying affidavits and Declaration, there can be no doubt that the Zoning Law is rationally related to a legitimate government purpose: the promotion of public health, safety, and general welfare of the citizens of Suffern via the control of population density, traffic, noise and consistency with its long-standing rational zoning plan and commitment to combat overcrowding and impermissible residential uses. Truly, Plaintiffs are seeking equal treatment; they are seeking preferential treatment at the expense of the other landowners in the R-10 zone and in the adjoining residential areas. As a result Plaintiffs failed to state a cognizable equal protection claim.

As a result, it is respectfully submitted that the complaint fails to state an equal protection claim as a matter of law.

POINT V

NO BASIS FOR ARTICLE 78 RELIEF

Plaintiffs also assert a claim seeking to overturn the proper decision of the Zoning Board of Appeals pursuant to CPLR Article 78. Once again, there is no basis for the claim.

A decision of a zoning board of appeals is presumptively correct and the Court may not substitute its own judgment for that of the Board unless it is demonstrated that its decision was not reasonable based upon substantial evidence contained in the record of proceedings before the Board. *See Ifrah v. Utschig*, 98 N.Y.2d 304, 746 N.Y.S.2d 667. 774 N.E.2d 732 (2002); *Cowan v. Kern*, 42 N.Y.2d 591, 394 N.Y.S.2d 579, N.E.2d (1977); *Corter v. Zoning Board of Appeals*, 46 A.D.2d 184, 361 N.Y.S. 2d 444 (1974); *Fisher v. Markowitz*, 166 A.D.2d 44, 560 N.Y.S.2d 496 (2nd Dept. 1990); *Finger v. Levenson*, 163 A.D. 2d 477, 558 N.Y.S.2d 163 (2nd Dept. 1990).

As is related above, Village Law § 7-712-b(2)(b) sets forth the mandatory criteria an applicant for a use variance must prove. The record demonstrates a complete default on the part of Bikur Cholim in satisfying any, let alone all, of the prerequisites for such relief. Consequently, the decision of the Zoning Board of Appeals was proper and cannot be overturned. Indeed, given Bikur Cholim's complete default of proof, it would clearly have been contrary to law for the Zoning Board of Appeals to grant the relief requested.

It should initially be noted that, contrary to Plaintiffs' implication, a religious institution does not enjoy a "conclusive presumption of an entitlement to an exemption from zoning ordinances" *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 594, 510 N.Y.S.2d 861, 866, 503 N.E.2d 509, 594 (1986).

Although Plaintiff refer to a number of New York decision that require more flexibility in the application of zoning laws to religious uses, those decisions are not applicable herein for a number of reasons.

Of course, the initial fatal flaw in Plaintiffs' argument is that *Bagnardi* and the other decisions referred to by Plaintiffs apply only to "churches (or houses of worship) and schools." As is related herein, the use of the subject property does not even arguably fall within that scope. For example, *Islamic Society of Westchester and Rockland v. Foley*, 96 A.D.2d 536, 464 N.Y.S.2d 844 (2d Dept. 1983), *lv. denied*, 64 N.Y.2d 608, 478 N.E.2d 209, 489 N.Y.S.2d 1025 (1985), dealt with an area (not use) variance for a house of worship. *Harrison Orthodox Minyan v. Town Board of the Town of Harrison*, 159 A.D.2d 572, 552 N.Y.S.2d 434 (2d Dept. 1990), dealt with a special permit application for a synagogue.

Plaintiffs do not accurately represent the state of the law when they assert that "[r]eligious uses other than formal churches or synagogues are also entitled to such protection, as long as the specific use is religious." (p. 34). The parish house reviewed in *First Westminster Presbyterian Church v. City Council of the City of Yonkers*, 57 A.D.2d 556, 393 N.Y.S.2d 180 (2d Dept. 1977), was permitted in the particular zoning district by special permit use. The decision relates solely to whether the applicable special permit criteria was satisfied and does not mention any aspect of religious use at all. The drug

counseling program reviewed in *Slevin v. Long Island Jewish Medical Center*, 66 Misc.2d 312, 319 N.Y.S.2d 937 (Sup. Ct. Nassau Co. 1971), was run in connection with a chapel building, parish house, and other structures which occupied the church property in a zoning district which authorized churches or other buildings used exclusively for religious purposes. The parish house also provided approximately 3,000 square feet of class and music rooms, as well as a gymnasium, kitchen, and bowling alley. The counseling program was not a principal use of the property, unassociated with any other structure or house of worship, but, instead, was a minor, accessory use of the permissible principal religious facilities on the property.

Moreover, Plaintiffs' quotation from *Community Synagogue v. Bates*, 1 N.Y.2d 445, 154 N.Y.S.2d 15, 136 N.E.2d 488 (1956), also provides no support for classification of a Shabbos house as a "religious use" pursuant to New York law (p. 34-35).[11] The quotation referred to by Plaintiffs in *Community Synagogue* discussed uses that were permissible accessory uses to a bona fide house of worship, not accessory uses as being principle stand-alone uses. The court noted that "To limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation." *Id*. at 453, 154 N.Y.S.2d at 22, 136 N.E.2d at 493. Indeed, Plaintiffs' misapplication of the rationale of *Community Synagogue* would allow any use sponsored by a purportedly religious organization to locate in a residential neighborhood as a principal use of property. Clearly, no such meaning can be imputed to the decision. Indeed, the Appellate Division, Second Department determined in *Yeshiva & Mesivta Toras Chaim v. Rose*,

[11] As is related above, the New York decisions speak in terms of houses of worship and schools and not to "religious uses" as being entitled to flexibility in application of zoning requirements as principal uses.

136 A.D.2d 710, 711, 523 N.Y.S.2d 907, 908 (2d Dept. 1988), that "While recognizing that the courts of this State have been very flexible in their interpretation of religious uses under local zoning ordinances (citations omitted), the flexibility has been directed to ancillary or accessory functions of religious institutions whose principal use is a place of worship."[12]

Consequently, the decisions cited by Plaintiffs do not support the proposition that any purportedly religiously motivated or helpful use is entitled to preferential treatment pursuant to New York law. As the Village has demonstrated, what would otherwise be potentially permissible accessory uses to a house of worship located on the same lot as a house of worship is not a permissible principal use in its own right. As a result, the decisions cited by Plaintiffs have no application to the hotel/transient facility at issue herein.

Moreover, just because Bikur Cholim, a not-for-profit organization, purports to assist a religious function, it has no right pursuant to New York case law, to trump local zoning regulations. "[I]t is the proposed use of the land, not the religious nature of the organization, which must control." *Bright Horizon House, Inc. v. Zoning Board of Appeals of the Town of Henrietta*, 121 Misc.2d 703, 709, 469 N.Y.S.2d 851, 855 (Sup. Ct. Monroe Co. 1983). The *Bright Horizon House* decision reiterates that "[t]he constitutional protection afforded all religions and religious beliefs is not hindered by the law's refusal to mandate zoning approval of every institution solely because it is sponsored or operated by a religious organization in accordance with its beliefs." *Id*. Although the sponsor and operator herein may be well-intentioned, they are, in the first

[12] Moreover, the applicant's failure to complete an Environmental Assessment form as required by SEQRA also precluded the Board from granting relief. *See, e.g., Suplis v. Town of Sand Lake Zoning Board of Appeals*, 227 A.D.2d 779, 642 N.Y.S.2d 374 (3d Dept. 1996).

place, not-for-profit, charitable organizations -- not religious organizations which might be entitled to preferential treatment pursuant to New York law. Moreover, as the decision reflects, even if considered to be religious organizations, that does not mandate preferential treatment to what is otherwise akin to a transient housing facility. The *Bright Horizon House* Court concluded "Nor … does the spiritual foundation of the facility make it a church, any more than a boarding house operated according to the beliefs and discipline of a particular faith.…" *Id.*

Moreover, a review of the record before the Zoning Board of Appeals reveals that Bikur Cholim did not represent that it was a house of worship or an educational use, nor that the use of the property was "religious." No accommodation based on the purported nature of the sponsor or use was sought. Having made no such claim or sought any such favorable treatment, Plaintiffs are in no position to argue for it now.

Bikur Cholim failed to provide any evidence whatsoever to demonstrate compliance with the statutorily-mandated elements required to obtain a use variance. It also failed to provide a completed Environmental Assessment Form. Bikur Cholim did not claim before the Zoning Board of Appeals that it was entitled to preferential treatment pursuant to New York case law and, as is apparently from the decisions above, the use in question is not, in any event, entitled to any preferential treatment. As a result, the Zoning Board of Appeals properly denied the deficient use variance application.

POINT VI

VILLAGE ENTITLED TO PRELIMINARY INJUNCTION

It is respectfully submitted that the Village has demonstrated entitlement to a preliminary injunction enjoining Plaintiffs from utilizing the subject property for any use

other than as a singe-family dwelling for occupancy in accordance with the definition of "family" and in compliance with all other applicable provisions of the Zoning Law, Village Code and State laws and regulations.

A private litigant seeking a preliminary injunction is required to demonstrate a likelihood of success on the merits, irreparable harm in the absence of relief and a balancing of equities in favor of granting relief. *See Town of East Hampton v. Buffa*, 157 A.D.2d 714, 549 N.Y.S.2d 813 (2d Dept. 1990). However, "[a] municipality has authority to obtain a temporary restraining order and preliminary injunction strictly enforcing its zoning ordinances without application of the three-pronged test for injunctive relief." *Village of Freeport v. Jefferson Indoor Marina*, 162 A.D.2d 434, 436, 556 N.Y.S.2d 150, 152 (2d Dept. 1990). Village Law § 7-714 authorizes a village to institute an injunctive action to enforce its zoning laws. "Such a statutory provision requires no showing of special damage or injury to the public or the nonexistence of an adequate remedy at law as a condition to injunctive relief, commission of the prohibited acts being sufficient." *Town of Islip v. Clark*, 90 A.D.2d 500, 501, 454 N.Y.S.2d 893 (2d Dept. 1982); *see also Village of Freeport v. Jefferson Indoor Marina*, 162 A.D.2d 434, 556 N.Y.S.2d 150 (2d Dept. 1990). If violation of a zoning law is demonstrated, it is not necessary to show irreparable harm. *See Village of Williston Park v. Argano*, 197 A.D.2d 670, 602 N.Y.S.2d 878 (2d Dept. 1993).

As is related herein and in the accompanying Declaration and affidavit of John Loniewski, Plaintiffs have utilized the subject property for overnight accommodations of an ever-changing, unrelated group of people and a density of 14 to 17 persons. As is related in the Village's papers, such use clearly is impermissible pursuant to the Village

Zoning Law. Moreover, Plaintiffs began to utilize the property for such impermissible use without consulting the Village or seeking approval from the Building Inspector or any other agency and in violation of applicable State and local fire and safety regulations.

It is, therefore, respectfully submitted that the Village is entitled to a preliminary injunction enjoining the use of the house as aforementioned and for any use other than a single-family dwelling as defined in the Zoning Law.

POINT VI

PRELIINARY INJUNCTION IN FAVOR OF PLAINTIFFS UNJUSTIFIED

It is respectfully submitted that, in the first instance, Plaintiffs' motion for a preliminary injunction should be denied in that they do not possess a likelihood of success on the merits. In fact, as is related above, it is submitted that the complaint fails to state any viable claim as a matter of law. Moreover, the annexed affidavits further demonstrate that Plaintiffs are not entitled to relief and cannot demonstrate a likelihood of success. Moreover, Bikur Cholim does not, as it alleges have a fair ground for litigation and a balancing of hardship in its favor. As is related above, the case law refutes Plaintiffs' claims. Moreover, as is related herein, Orthodox Jews can continue to visit the sick without violating their Sabbath beliefs by staying in an ill person's room or by staying in the Holiday Inn. Moreover, there clearly is no impediment to visiting the ill under any circumstances the other six days of each week.

Moreover, it is submitted that the equities weigh against granting relief to Plaintiffs. Fellowship House purchased the subject property without undertaking the least due diligence to ascertain if the use was permissible. Bikur Cholim instituted the clearly impermissible use also without seeking to ascertain if the use was permissible and

jammed the former single-family dwelling with virtually as many beds as it could fit. Moreover, they neglected to provide adequate fire safety measures and, to this date, still do not have fire sprinklers. When permitted to seek a use variance, Bikur Cholim defaulted in providing any of the requisite evidence and when the Zoning Board of Appeals was required to deny the application, instituted the instant heavy-handed action in an attempt to intimate Village officials from adhering to the applicable State law and neutral local Zoning Law.

As a result, it is respectfully submitted that Plaintiffs are not entitled to a preliminary injunction in their favor.

CONCLUSION

The Village respectfully submits that it is entitled to an order dismissing the complaint herein, granting a preliminary injunction in its favor and denying Plaintiffs' motion for a preliminary injunction.

Dated: Suffern, New York
April 18, 2006

/S_____
Terry Rice (TR 1022)
Attorney for Defendant
Village of Suffern
61 Washington Avenue
Suffern, New York 10901
(845) 357-2600