UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHABAD LUBAVICH OF LITCHFIELD COUNTY, INC. and RABBI JOSEPH EISENBACH *Plaintiff* VS. BOROUGH OF LITCHFIELD, CONNECTICUT; HISTORIC DISTRICT COMMISSION OF THE BOROUGH OF LITCHFIELD; WENDY KUHNE, GLENN HILLMAN And KATHLEEN CRAWFORD *Defendants*	:	CIVIL ACTION NO. 3:09 cv 01419 (JCH) MAY 14, 2011

DEFENDANTS BOROUGH OF LITCHFIELD AND HISTORIC DISTRICT COMMISSION'S MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Defendants Borough of Litchfield (hereinafter, the "Borough") and the Historic District Commission of the Borough of Litchfield (hereinafter, the "Commission" or "HDC"), by and through its undersigned attorneys, respectfully submit this Memorandum of Law in Support of their Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56(b) on all claims asserted by plaintiffs Chabad Lubavitch of Litchfield County, Inc. and Rabbi Joseph Eisenbach (collectively, the "Chabad").

I. Introduction

This case results from the plaintiffs' attempt to make a physical change to an historic house in the long-established Historic District of the Borough of Litchfield which would result in

a quadrupling of its size. The plaintiffs are challenging of the determination by the Defendant HDC which would have allowed a doubling in size.

The Commission acted upon the Chabad's application for a certificate of appropriateness by applying neutral regulations that are generally applied to all properties located in the Historic District. The Commission held three public hearings, allowed the Chabad and other interested parties a full and fair opportunity to present witnesses and express their views, and rendered its decision based upon the evidence presented.

Although the plaintiffs took no administrative appeal from the HDC's decision, they now ask this Court to construe the United States Constitution and the Religious Land Use and Institutionalized Persons Act (hereinafter, "RLUIPA") as directing the federal courts to serve as special, appellate land use boards for dissatisfied religious landowners. The law, however, clearly establishes that a religious entity does not enjoy immunity from local regulations, which are neutrally and generally applied.

II. Relevant Facts

A. The Plaintiffs

The Plaintiff Rabbi Joseph Eisenbach is an ordained Hasidic Rabbi and is the President of the Plaintiff, Chabad Lubavitch of Litchfield County Inc. (L.R. Statement of Facts ("SOF") No. 1) a Connecticut, not for profit, membership corporation, which, according to its Articles of Incorporation, has one class of members: ordained Hasidic Rabbis (SOF No. 3). Rabbi Eisenbach is the only member that has been identified to date (SOF No. 2). Rabbi Eisenbach is one of three persons on the Board of Directors. (SOF No. 3).

Since 2007, Chabad has leased a space in a local shopping center at 7 Village Green in Litchfield, where it conducts its religious services and various associated meetings (SOF No. 4) Chabad alleges that this space is inadequate "to carry out the faith and practice required by their religion" or for conducting children's preschool or youth activities. (SOF No. 5) There are no allegations as to how or why the space is inadequate, although presumably Rabbi Eisenbach believes the space to be too small.

It should be emphasized that the pleadings do not allege that the Plaintiffs are unable to practice their religion in their present location. On the contrary, religious services are held there weekly. (SOF No. 6) Rather, the Chabad asserts that the location is inadequate to house all of their activities in one place. The Chabad's complaints are grounded in convenience, not in an inability to practice their religion.

Although the Chabad also alleges that the location and environment of the space has caused it to lose "parishioners" Third Amended Complaint, ¶ 25 and does not have classrooms for religious instruction, Id. ¶ 25 the Chabad keeps no records of attendance. (SOF No. 7)

The Chabad alleges, that, in order to communicate and accomplish its mission, it purchased real estate at 85 West Street, Litchfield, Connecticut. Third Amended Complaint. at ¶ 32. It further alleges that after it purchased the property, it required modifications to the property and filed an application for a Certificate of Appropriateness with the Defendant, HDC, requesting restoration and rehabilitation of the existing structure. Third Amended Complaint at ¶ 34.

B. The Defendants, the Borough of Litchfield and its Historic District Commission

The Borough of Litchfield is an independent municipal corporation whose boundaries are wholly within the Town of Litchfield. It is approximately 1.4 square miles in size and in the 2000 census had 1328 residents. It was incorporated by the state legislature in 1915 and is now governed pursuant to a municipal charter adopted by the electors of the Borough in 1989 as allowed by the Connecticut General Statutes. (SOF No. 10)

The Borough of Litchfield's Historic District Commission (HDC) was established in 1989 to govern aspects of the construction and modification of buildings within the Litchfield Historic District according to the provisions of Chapter 97a of the Connecticut General Statutes (CGS), ' 7-147a et seq. (SOF No. 11).

C. A Brief History of the Borough

When the Borough of Litchfield[1] was designated a National Historic Landmark by the Department of Interior in 1978 App. D., attachment 5, the Department issued a Statement of Significance which stated that Litchfield is "Probably the finest surviving example of a typical late 18th century New England town." (Appendix D, attachment 6). And the architecture that survived embodies a history rich by any standard.

On South Street, one of the four main axis around which the Borough is organized, is situated the house and law school of Tapping Reeves, the first law school in the United States.

[1] The Borough of Litchfield is an independent municipality located within the Town of Litchfield. The boundaries of the Borough of Litchfield lies completely within the Town of Litchfield. Citizens of the Borough of Litchfield are also citizens of the Town of Litchfield, but not vice versa. Property owners in the Borough of Litchfield pay separate property tax bills to both the Borough of Litchfield and to the Town of Litchfield, property owners outside of the Borough of Litchfield do not pay the Borough taxes, but only to the Town.

Tapping Reeves began his law school in 1774 with his first student and brother-in-law Aaron Burr, and operated it until 1833. The list of students who attended Tapping Reeve's law school was national in scope and includes two Vice Presidents of the United States (Aaron Burr and John C. Calhoun), two Secretaries of the Treasury, three United States Supreme Court Justices and six Governors. (Appendix I., Carol Bramley Affidavit dated 1/13/11). Numerous other graduates served in Congress and other political offices throughout the nation including seventeen United States Senators.

Within minutes of this one-room, law school, one can walk past the homes of notable national figures of the early 19th Century including Oliver Wolcott, a signer of the Declaration of Independence. (Appendix I., Carol Bramley Affidavit dated 1/13/11)

While the time encompassed by the Tapping Reeves law school arguably includes the most historically significant and prosperous period of Litchfield's history, East and West Streets preserve an accurate record of the commercial and residential growth of the town in the latter part of the 19th Century as well. Extending from the green, each of these streets is lined by parallel rows of more modest homes built during that period which house residential life in the village today. (Appendix I., Carol Bramley Affidavit dated 1/13/11; Appendix J., Rachel Carley Affidavit dated 1/19/11)

Sixty years ago Yale's first architectural historian, Carroll Meeks, compared Litchfield to Williamsburg and lauded it as preserving a living example of architectural and historic heritage. Writing in the Journal of the Society of Architectural Historians, he concluded:

> "We have been comparing two physical manifestations of that eighteenth-century standard of civility which spread across all the oceans and found fair embodiment

> in such diverse climates and *polis* as Litchfield and Williamsburg. Whereas, today, the Southern capital gives us an illusion of charm and serene order, it has, like all phoenixes, a mythological aspect; it is not wholly real. It's enjoyable make-believe suffers by comparison with the genuine natural effect of Litchfield which bears in its churches and public buildings the record of life, its wrinkles and its greying hair; which are accompanied by signs of youth and the imprint of succeeding tastes and fancies, each of them believed in by their creators with all heartiness. (App. I., attachment 3).

Preserving the past while remaining a vibrant village does not just happen and cannot happen without a citizenry invested in that preservation.

E. The Regulation of Architecture in the Borough of Litchfield

Since at least 1875, the Litchfield community, first privately and then by use of local government, has worked to keep its historic character while providing a rural village lifestyle for its residents. (SOF No. 17)

In 1875 residents of the Town formed the Litchfield Village Improvement Society. Then the Litchfield Architectural Improvement Society was formed in 1913. The primary focus of these groups was to re-establish and preserve the colonial character of the Borough. (SOF No. 18)

During this time period the colonial revival movement swept through the village. The Architectural Society hired the planning firm of Frederick Law Olmstead to "colonialize" the green. Perhaps the scope of this movement is best exemplified by the actions of the local Congregational Church. In 1869 the Congregational church had moved an 1828 church off of the green to be replaced by a wooden neo-gothic church. In 1929 that Victorian church was razed and the original colonial church was returned to the green to complete restoration of the green. Id. and App. I.

In 1938 the Borough passed an ordinance that required that any new construction or modification of existing structures in the Borough be allowed only by permission of the Board of Warden and Burgesses. (SOF No. 20)

Twenty years later, in 1959, the State Legislature passed a special act that established the present Historic District[2] and provided that any new construction or modification would be allowed only upon the granting of Certificates of Appropriateness by the Board of Warden and Burgesses. (SOF No. 21)

Finally, in 1989, the Borough approved a charter which placed the Historic District under the jurisdiction of a Historic District Commission which would administer the granting of certificates of appropriateness pursuant to the provisions of the Connecticut General Statutes. (SOF No. 22)

One of the most significant differences between the provisions of the special act of 1959 and Chapter 97a of the Connecticut General Statutes are the factors allowed to be considered by the HDC when judging whether to grant a certificate of appropriateness. Under the special act, the Board of Warden and Burgesses were directed not to consider relative size of buildings. Nor was scale one of the factors listed to be considered. (SOF No. 23) However, the general statutory scheme, set forth in Chapter 97a, §7-147f, under which the HDC now operates, specifically provides that an HDC may consider scale of the architectural features and how they relate to other buildings in the immediate neighborhood.

C. The Regulatory Framework.

[2] The Historic District of Litchfield was, in fact, the first historic district established in the State of Connecticut.

Chapter 97a of the Connecticut General Statues provides that no building within a Historic District may be modified unless the HDC grants it a certificate of appropriateness. CGS §7-147d. The HDC is empowered by statute to establish regulations consistent with Chapter 97a concerning the factors that will be used to determine the granting of such certificates (CGS §7-147c); and is empowered to adjudge applications for a certificate according to provisions of CGS §7-147f. The statute provides criteria to be used for decisions, requires notices to parties, a hearing before a decision is made, and a post hearing means of appealing an HDC decision.

The criteria that §7-177f sets forth include "architectural style, scale, general design, arrangement, texture and material of the architectural features involved and the relationship thereof to the exterior architectural style and pertinent features of other buildings and structures in the immediate neighborhood." This statute specifically provides that the Commission "shall not consider interior arrangement or use" [3]of the property.

The regulatory scheme set forth in Chapter 97a further provides for public notice, public hearings and written notice of its decisions to the applicants. The written decisions must give reasons for any denial and can contain conditions and stipulations. CGS §7-147e.

The chapter also provides the applicant a process of appealing a denial from an HDC to the Superior Court. §7-147i. Such appeal, by statute, would be taken on the record.

It is quite clear from the face of the statutes just cited that Connecticut law does not grant a property owner within a Historic District any proprietary entitlement to a Certificate of

[3] The HDC does not regulate the use of land. It deals with the appropriateness of the construction or renovation of building exteriors only.

Appropriateness. Rather, the granting of a certificate of appropriateness is determined by a quasi-judicial act of discretion by a Historic District Commission.

Pursuant to authority granted to it by CGS §7-147c(e) the HDC adopted regulations setting forth the criteria by which it would judge applications. Included in the criteria were the massing, size and scale of additions to existing structures and how the addition would affect the immediate neighborhood and surrounding buildings. Appendix G, Regulations of the Borough of Litchfield's Historic District Commission [hereinafter App. "G"]. The regulations also adopted the criteria set forth in the United States Secretary of the Interior's Standards for Rehabilitating Historic Buildings (hereinafter, "Secretary's Standards"). (SOF No 12-13). These standards address criteria for new exterior additions including that the addition be "compatible with the historic character of the site and which preserve the historic relationship between a building or buildings, landscape features and open space. (SOF 15).

The standards specifically list as being "Not Recommended" "introducing new construction onto the building site which is visually incompatible in terms of size, scale…..and texture or which destroys historic relationships on the site." (SOF 16).

It is important to note that the regulations are generally applied to all structures in the historic district. The regulations at Section 1 broadly state:

> "Within the Borough of Litchfield the demolition, moving, construction, alteration or repair of an existing building or structure cannot be started or undertaken without the issuance of a certificate of appropriateness. Similarly, new construction also requires a certificate….."

There are no buildings in the Borough that are exempt from this requirement. There are no exemptions based on the type of building. There no exemptions based on ownership.

F. The Chabad's Real Estate and Application for a Certificate of Appropriateness

The Chabad's property, known as 85 West Street, is a two-story stick-style[5] Victorian residential house dated to the late 1870's and consisting of approximately 2600 square feet plus a basement. (SOF No. 24) Prior to the Chabad's purchase of the property it was used for a retail store. It is known and often referred to as "the Deming house." (SOF No. 25) It was built by Julius Deming the grandson and namesake of the Julius Deming who played an important role in the American Revolution and was one the town's most prominent citizens from the late 18th Century. (SOF No. 25).

The Chabad submitted plans to the HDC that would add a three-story, 17,000 square-foot addition to the residential structure. The plans modified the original house by incorporating a clock tower with a Star of David. The addition included a 4,635 square-foot residence for the Rabbi and his family, a large indoor swimming pool, visitor's quarters, a sanctuary, two kosher kitchens, a coffee bar, and a ritual bath. (SOF 26)

The plans were first submitted to an informal pre-hearing on September 6, 2007 for comments before the application was filed. Defendants Kathleen Crawford and Wendy Kuhne were in attendance. Defendant Glenn Hillman did not attend this meeting. At this meeting

[5] "Stick style. Late-C19 style of domestic architecture in the USA, partially evolved from Carpenter's Gothic. While many examples were timber-framed, the name of the style was also given to buildings in which thin struts or 'sticks' were fixed (sometimes over clap-boarding) to suggest a timber-framed structure. The elements were often very hard, jagged, and angular, and overhanging eaves and wide verandahs were frequently employed. It was more influenced by French and Swiss than by English timber buildings. Hunt's Griswold House, Newport, RI (1861–3), is a good example. " James Stevens Curl, *A Dictionary of Architecture and Landscape Architecture* 2000, originally published by Oxford University Press, 2000.

Wendy Kuhne commented that "a steeple with a monitor and clock tower, topped by a Star of David is a grouping that would be inappropriate on a residential structure in the historic district." (SOF No. 27). There is nothing to indicate that any animus or prejudice was attached to this comment. It was simply a statement of opinion based on her knowledge of the district. (At no time did the applicant ever present any evidence for the record that any house in the district had or ever had a steeple attached to it.)

During the meeting Kathleen Crawford remarked that it would be a beautiful building in a different location because of its proposed size, which was the scale of a factory building. (SOF No. 28). No animus can be attached to that statement. The addition more than quadrupled the size of the original building and dwarfed it and all other proximal buildings, in scale.

The next, and last, prehearing was held on October 18 2007. The applicants brought three attorneys to represent their interests. At this pre-hearing the borough's attorney asked the applicant's counsel if his clients had any objections concerning the proceedings to date or to the commissioners who were sitting. Counsel conferred with their clients and said that they did not. (SOF No. 29)

Later, before commencement of the public hearings, the applicants requested that the Chairman, Wendy Kuhne, recuse herself from further proceedings, which she did.

The HDC held three public hearings on the Chabad's application. At no time during the formal hearings did the Chabad or its representatives claim that any of the commissioners were acting or acted with any type of prejudice on the application. At no time did the applicant

request that Kathleen Crawford recuse herself because of her comments concerning the size of the proposed addition.

The commission held the hearings in accordance with an opinion letter it received from counsel at the first public hearing. (SOF No. 30) Following the attorney's advice, the hearings were bifurcated. The first part of the hearings concerned only those matters related directly to the granting of a certificate of appropriateness. The second part of the hearing concerned claims made by Plaintiff that the denial of the claim would constitute a "substantial burden" on the Chabad's practice of religion. (SOF No. 31).

Although representatives of the Chabad claimed that the Chabad needed a large structure, the Chabad never disclosed its number of members or the number of parishioners that regularly attended its meetings. (SOF No. 32) Nor did it disclose the number of children attending its religious classes. (SOF No. 33)

Most importantly the plaintiffs never claimed that they were unable to practice their religion at their location at 7 Willage Green (SOF No. 34). Nor did they claim that their property at 85 West Street was the only local site where they might construct a synagogue. (SOF No. 35)

G. The Decision

Upon conclusion of the public hearings, the Commission's clerk, Glen Hillman, moved that the application be denied *without prejudice* and invited the Plaintiffs to submit a new application with an addition no larger than the original house. His motion was discussed, amended and then passed unanimously on a roll call vote. (SOF No. 36). The voting Commissioners were Montebello, Sansing, Crist, Acerbi and Hillman. (SOF No. 37).

The decision reviewed in detail the house, its architectural features and its relation to its immediate neighborhood. The decision also reviewed RLUIPA and Connecticut's Religious Freedom Act as well as the Federal and State Constitutions. With respect to the Federal law and Constitution, the decision cited and followed a then recent Second Circuit opinion, Westchester Day School v. Village of Mamaroneck, 504 f3d 338 (2nd Cir., 2007). (SOF No. 38)

Finally, the decision applied the Secretary of Interior's standards for modification of historical structures to the plans. (SOF No. 38). These are standards that were not only well known by Plaintiffs' counsel but Plaintiff's architect was told by their counsel that the HDC should apply them and that they should have "a formal role in the process". Appendix V., Email from Attorney Gillian Bearns to Michael Boe dated 10/18/07.

The HDC approved all but two of the stylistic modifications that were proposed. The Commission, in fact, lauded the applicant for many of its restorations. However, applying the Secretary of Interior's Standards for rehabilitation, the HDC required that a single door be used instead of a double door and that a monitor-like clock tower be replaced with iron work similar to that used on a sister house in the district. (SOF No. 39). The Plaintiffs were allowed to incorporate into the windows of the door any religious symbols or insignia they might choose (SOF No. 40) [6]; and, as a further accommodation to the religious adaptive use of the property, the applicant was permitted to place a finial topped with a Star of David on the roof. (SOF No. 41).

[6] "Though not original to the house or door, the Commission would approve as an accommodation to the building's proposed religious use, a substitution of the plain glass panels presently in the door with stained glass panels of a design and with motifs of the Applicant's choosing. "

The HDC denied the application without prejudice, as submitted, because the immense addition would destroy the historic scale of the original residential structure as well as be inappropriate in scale to the other residential structures of the immediate neighborhood. (SOF No. 42). The Commission stated:

> 'The Applicant's plan for the addition is over five times as large and dominates the original house in every aspect. For practical purposes the huge addition destroys any architectural and historical significance of the Deming house. The Deming house visually dissolves and a massive institutional building several times larger is put into its place. A building of this magnitude and placement would destroy any sense of historic residential character of the building and immediate neighborhood. It renders the addition incongruous with the residential aspects of the District in which it is situated.' See Appendix K

However, as instructed by the Second Circuit, the Commission set forth criteria that it would accept if the applicant resubmitted a revised application. (SOF No. 43)

During the hearing, the Chabad's attorney, Peter Herbst, had referred the HDC to an addition which had been earlier approved to a residential structure located across the street from the Property (SOF No. 44). The addition was roughly the same size as the original structure. In its decision, the HDC agreed with Attorney Herbst, that the scale of such an addition was historically appropriate and invited the Chabad to resubmit an application with an addition similar in scale to the building referred by its attorney. (SOF No. 44) The HDC stated that it "would approve an addition equal in square footage to the Deming house." (SOF No. 45)

This standard would allow the Chabad to resubmit an application with a two story main structure of approximately 5,200 square feet and a lower level of approximately another 2,600 square feet, for a building with an approximate total of 7,800 usable square feet.

Indeed the Plaintiffs alleged damage to its constitutional rights is nothing more than a claim that it has a constitutional right to build a structure larger than 7,800 square feet. To place this restriction in perspective, the Chabad located in West Hartford has an attendance "twenty times" that of Litchfield's Chabad and has a synagogue of 6,522 square feet. (SOF No. 46). The Chabads of two of Connecticut's major cities are of the following sizes: Hartford 5,837 square feet; New Haven 6,797. The Chabad of The Town of Simsbury is 4,906 square feet. (SOF No. 47) Under the HDC's decision the Plaintiff's could build a building substantially larger than any of those cities mentioned.

The HDC's decision acknowledged that such a building would, not only be a needed restoration of the Deming house, but would "enhance the historical character of the immediate neighborhood" and be "a welcomed improvement to the Town of Litchfield and its Historic District." Appendix. K. These are hardly words of animus.

The Chabad never challenged the propriety of the HDC's decision on appeal as allowed by Connecticut General Statutes. (SOF No. 48)

Nor has the Chabad ever resubmitted an application as invited by the HDC although it could still do so at any time. (SOF No. 49)

Rather the Chabad has chosen to conduct a collateral attack on the HDC's decision, and in so doing, asks this Federal Court to, effectively, grant a certificate of appropriateness and award "damages" to fund the construction of their building.

III. Summary Judgment Standard

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of [his] pleading, but [his] response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). In determining when a party has raised a genuine issue of material fact, the Supreme Court has stated, "there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986) (citations omitted). Indeed, a plaintiff may not get to a jury without "any significant probative evidence tending to support the complaint." Anderson, 477 U.S. at 249 (quoting, First Nat'l Bank of Arizona v. Cities Servs. Co., 391 U.S. 253, 290 (1968)). The moving party's burden may be fulfilled by "pointing out to the District Court - that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

The Second Circuit has stated that the "mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." Yerdon v. Henry, 91 F.3d 370, 374 (2d Cir. 1996), quoting, Anderson, 477 U.S. at 252; see also, Bickerstaff v. Vassar College, 196 F.3d 435, 448 (2d Cir. 1999), cert. denied, 530 U.S. 1242 (2000) ("An inference is not a suspicion or guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact that is known to exist."). Further, the Second Circuit has stated that the non-movant

"cannot rely on inadmissible hearsay in opposing a motion for summary judgment." Burlington Coat Factory Warehouse Corp. v. Espirit de Corp., 769 F.2d 919, 924 (2d Cir. 1985). Thus, "even in the discrimination context, a plaintiff must provide more than conclusory allegations of discrimination to defeat a motion for summary judgment." Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir.), cert. denied, 474 U.S. 829 (1985). In fact, the plaintiff's evidence must be precise and specific, and may not be based on conjecture and surmise. Bickerstaff, 196 F.3d at 451 ("affidavits must be based upon 'concrete particulars,' not conclusory allegations."); Lisa's Party City, Inc. v. Town of Henrietta, 185 F.3d 12, 17 (2d Cir. 1999); see also, McLee v. Chrysler Corp., 109 F.3d 130, 135 (2d Cir. 1997) (plaintiff's rationalizations are insufficient to create genuine issues of material fact).

As the Court of Appeals for the Second Circuit has recognized, "[g]iven the ease with which [law]suits may be brought and the energy and expense required to defend such actions," the use of summary judgment is an integral part of the litigation process. Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir.), cert. denied, 474 U.S. 829 (1985); see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Indeed, "[s]ummary judgment must be entered 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.' " Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144, 149 (2d Cir. 1998) (*citing* Celotex Corp., 477 U.S. at 322). The non-moving party must "offer 'concrete evidence from which a reasonable juror could return a verdict in his favor' . . . and is not entitled to a trial simply because the determinative issue focuses upon the [moving party's] state of mind." Balut v. Loral Elec. Sys., 988 F. Supp. 339, 343 (S.D.N.Y. 1997). The party opposing the motion cannot simply rely upon speculation,

unsupported assertions or conclusory statements. *Id.*; Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995).

IV. Law and Argument

A. The Religious Land Use and Institutionalized Persons Act

1. **The Commission's December 20, 2007 Decision Did Not** Burden The Chabad or Cause the Chabad to Violate Its Beliefs

As discussed above, the decision of the HDC did not limit or restrict how the Plaintiff's property was to be used. Rather, it explicitly permitted the Plaintiffs to build a synagogue larger than those enjoyed by the Chabads of West Hartford, Simsbury, Hartford or New Haven. The HDC did, however, apply neutral, generally applicable laws that are applied to every applicant in the Historic District, which mandated a limitation on the size and scale of the requested addition. The issue before this court is not whether that decision was the administratively proper one; the Plaintiffs could have taken an administrative appeal to so challenge the decision pursuant to §7-147i. Rather, it is this court's role to determine whether that decision was based upon a non-neutral or discriminatory application of the Borough's Historic District Regulations, which would then trigger application of RLUIPA. Neutral, generally applicable land use laws apply to all applicants, religious or not, despite RLUIPA. Westchester 504 F. 3d at 350; Grace United Methodist Church v. City Of Cheyenne 451 F.3d 643 (10th Cir.2006.).

RLUIPA was not intended to "relieve religious institutions from applying for variances, special permits or exceptions, ... where available without discrimination or unfair delay." 146

CONG. REC. S7774-01, S7776 (daily ed. July 27, 2000) (Joint Statement of Sen. Orrin Hatch and Sen. Edward Kennedy). Thus, RLUIPA has not elevated federal courts into appellate land use boards. See Murphy, 402 F.3d at 348-49.

The Borough however adopted regulations specifically authorized by state statute and further formulated by the Secretary of the Department of the Interior. These are standards which are close to identical to those which our Second Circuit Court of Appeals found to be "both content neutral and sufficiently 'narrow' and 'definite'" Lusk v Village of Cold Spring 475 F .3d 480, 494-495 (2nd Cir. 2007) . (See also 475 F. 3d at 484 where the court notes that the regulations also referred the Village to the Secretary of the Interior's Standards for Historic Rehabilitation.)

RLUIPA was not intended, nor has it been applied, as a blanket immunity from land use regulations. See, e.g., San Jose Christian College v. City of Morgan Hill, 2002 WL 971779 (N.D.Cal.) ("RLUIPA does not grant religious institutions immunity from land use regulations"). The Commission's rules and regulations apply equally to all landowners in the Historic District, and RLUIPA does not require municipalities "to favor [congregants] in the form of an outright exemption from land-use regulations." Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).

The Chabad asks this court to exempt it from considerations of scale that apply to every other application before the Commission. Granting this request would effectively immunize the Chabad from any restrictions on the size of the property. However, "no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise." Civil Liberties for Urban Believers v. City of Chicago 342 F.3d 752, 761.

b. The "Substantial Burden" Test

Our Second Circuit Court of Appeals has ruled that the phrase "substantial burden" has the same meaning in the context of RLUIPA as it does in general First Amendment analysis of constitutional harm. Westchester Day School v Village of Mamaroneck, 504 F. 3d 338, 349 (2nd Cir. 2007).

The Second Circuit held it must be shown that the municipality acted arbitrarily and illegally because a legal and neutral application of zoning laws does not constitute an impermissible burden on religious practices.

> "The same reasoning that precludes a religious organization from demonstrating substantial burden in the neutral application of legitimate land use restrictions may, in fact, support a substantial burden claim where land use restrictions are imposed on the religious institution arbitrarily, capriciously, or unlawfully." Westchester 504 F. 3d at 350.

The Plaintiffs have alleged no specific arbitrary or illegal application of the laws and regulations applied by the Commission in rendering its decision. Indeed, the HDC extensively explained the basis and rationale for its decisions, as related to the Secretary's Standards and C.G.S § 147f, in their memorandum and there is nothing in the record from which one can infer any animus or bigotry by any member who voted. While the Plaintiffs advance allegations in their pleadings suggesting that several HDC members made comments which evidence animus towards the Plaintiffs' religion (*Third Amended Complaint* at ¶ 57 (a)-(c)), Rabbi Eisenbach, at his deposition, clarified to the contrary:

Q. Hold on. Let me ask my question. You're saying that those remarks you would take as hate directed towards your religion? Is that your testimony today?
A. No.

(SOF No. 78 - Eisenbach Deposition at page 110. Appendix A)

Moreover, the decision indicates that the HDC was sympathetic to the circumstances of the Chabad's location; approved the vast majority of the Chabad's requested improvements; used a standard of scale supplied by the Chabad's own attorney; and invited the Chabad to apply for a structure, still generous in size, that would be architecturally appropriate for the neighborhood. Ultimately, the Plaintiffs never challenged the substantive legitimacy of the decision by appealing pursuant to C.G.S. § 7-147i, although represented by two highly respected land use counsel, one of national reputation.

The Westchester court noted that the religious landowner must show that there are no practical alternatives to reach its goal, and that the decision of the municipality had to be final, not conditional, with the prospect of the applicant amending its plan. Westchester 504 F. 3d at 352. The Chabad plainly failed its burden of persuasion on this point, because the decision was not final, invited the Plaintiffs to submit a modified application up to 7,800 square feet in size, and failed to appeal the decision under ordinary land use law.

Because the decision was neither illegal nor arbitrary and has allowed the Chabad a viable opportunity to submit an application that would be appropriate for the house and

neighborhood, there is no legally recognized claim that the HDC's decision poses an undue burden on the practice of their religion.

Even if the Plaintiffs had met the threshold criteria for claiming a burden to their religion, two interrelated elements must be considered in determining whether a particular government action or regulation inflicts a "substantial burden" on religion. See Westchester Day School v. Village of Mamaroneck 504 F.3d 338, 348-350 (2nd Cir. 2007). The first issue is the impact on religious activity. The Second Circuit has made it clear that the impact must directly impinge upon the plaintiff's ability to practice religion and must truly be substantial. In this case, the HDC's decision allowing a synagogue of over 7,800 square feet would permit the Plaintiffs to substantially enhance the practice of their religion. Plaintiffs have made no showing that the large addition approved by the HDC would impose any burden on the free exercise of their religion. Plaintiffs have, in fact, never indicated the reason for a facility of the magnitude being demanded.

The decision of the HDC allows the Plaintiffs to build a synagogue in excess of 7,800 square feet. As discussed above, the Plaintiffs could build a synagogue larger than those enjoyed by the Chabads of New Haven, Hartford, West Hartford or Simsbury. Mr. Baruch Levy, one of the Chabad's three officers testified that the Chabad of West Hartford had an attendance "twenty times" larger than Litchfield's.[7] He testified that a synagogue of that size would give the Litchfield Chabad room to grow. [8] Considering that for years the Chabad has been practicing its religion in a 3,000 square-foot rented space, a 7,800+ square-foot facility would be

[7] SOF No 46 - Appendix M Deposition Baruch Levy.

[8] SOF No. 46 Appendix Deposition Baruch Levy. at pp. 43-44.

a major enhancement to its congregation, not a burden. It certainly would not constitute a burden as determined by our Second Circuit Court of Appeals.

"RLUIPA does not guarantee that a religious organization may build a complex as large as that organization desires." Vision Church v. Vill. of Long Grove, 397 F. Supp. 2d 917, 929 (N.D. Ill. 2005) *aff'd* 468 F.3d 975 (7th Cir.2006). The court in Vision Church held that the municipality "did not 'substantially burden' the church in the practice of its religion" where, as here, it "simply placed limitations on the size of a church that could be built on the 27.4 acre parcel." Vision Church, 397 F. Supp. 2d 917, 929. *aff'd* 468 F.3d 975 (7th Cir.2006). Nor does RLUIPA guarantee any particular location. Grace United Methodist Church v. City Of Cheyenne 451 F.3d 643 (10th Cir.2006.).

No court suggests that the Federal law or the Constitution guarantees anyone the right to have whatever one wishes, despite clear conflict with the community's historic preservation efforts. The religious landowner in this case is not being prevented from carrying out religious practices; the only restrictions apply to the scale of the project and not whether it can go forward. Because the Plaintiffs cannot carry their burden of proving that a substantial burden has been imposed on their religious practice, this Court may not apply strict scrutiny to the Historic District's neutral and generally applicable laws., Accordingly, summary judgment should enter for the defendants on the "substantial burden" claim..

i. The size of the Chabad's congregation does not require a place of worship 20,000 square feet.

As discussed, *supra*, the Chabad of West Hartford serves a congregation twenty times larger than Litchfield's in a synagogue of less than 7,000 square feet, a size sufficient to give the Plaintiffs room to grow. However, expectations for future dramatic growth has no relevance to the Court's present determination. See Living Water Church of God v. Charter Twp. of Meridian, 258 Fed. App'x 729, 738 (6th Cir. 2007) ("The question before us here is whether the Township's denial substantially burdens Living Water's religious exercise now – not five, ten or twenty years from now – based on the facts in the record"); see also Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 615 F. Supp. 2d 980, 992 (D. Az. 2009) (stating that "the desire for a larger facility does not justify excluding options that would meet the ordinary needs of the Church's current congregation").

The Sixth Circuit's decision in Living Water illustrates that the mere frustration of an applicant's preferences, as opposed to a religion's requirements, does not constitute a substantial burden. In Living Water, the district court held that a township's denial of an application for a special use permit to construct a 34,989 square foot building substantially burdened plaintiff's religious exercise. Living Water Church of God, 258 Fed. App'x at 732-33. The plaintiff asserted that the size of its current facility required the church to close its daycare ministry, constrained its ability to attract students to its school, caused a reduction in church membership due to insufficient space, and limited midweek worship services and other activities. Living Water Church of God, 258 Fed. App'x at 738.

While recognizing that these limitations imposed some burden on the church, the Sixth Circuit nevertheless reversed the trial court's decision and held that the inadequacy of the current facility "does not give the church free reign to construct on its lot a building of whatever size it chooses, regardless of the limitations imposed by the zoning ordinances." Living Water Church

of God, 258 Fed. App'x at 739. The Sixth Circuit concluded that while the township's actions burdened plaintiff to "some degree", the township did not impose a substantial burden where plaintiff "demonstrated only that it cannot operate its church on the scale it desires." Living Water Church of God, 258 Fed. App'x at 741. The de minimis burden imposed by the HDC's approval of a significant addition to the Deming House is an "incidental burden," Employment Div. v. Smith, 494 U.S.872, 892 (1990) , not a substantial burden.

ii. The Chabad Had No Reasonable Expectation That Its Proposal, to Expand the Property To 21,000 Square Feet, Would or Could Be Approved,

In Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846 (7th Cir. 2007), the Seventh Circuit held that the governmental zoning decision presented no substantial burden where an organization "decided to go ahead and purchase the property outright after it knew that the permit would be denied . . . ." Village of Northbrook, 489 F.3d at 851. As Judge Posner explained, the organization "had no reasonable expectation of obtaining a permit" and "assumed the risk of having to sell the property and find an alternative site for its church . . . ." Id. (noting that plaintiff had failed to present sufficient evidence concerning the availability of suitable land in other areas).

Considering that the Historic District Commission had never allowed an addition greater than the original building, the Plaintiffs were or should have been aware that it was extremely unlikely that they would be permitted to destroy the historical character of a house by adding an addition four times as large. The laws and regulations applied by the Commission existed when the Chabad purchased the property. The Chabad now claims that the Borough substantially burdened it by enforcing regulations about which plaintiffs had full knowledge when they

purchased the property. "Religious organizations would be better off if they could build churches anywhere, but denying them so unusual a privilege could not reasonably be thought to impose a substantial burden on them." Village of Northbrook, 489 F.3d at 851.

This Court should not construe the Commission's unwillingness to provide the Chabad the unusual privilege of unilaterally voiding the Historic District's rules and regulations which protected the land, its owners, its neighbors and the Borough forever as imposing a substantial burden, especially since the Chabad knew about Historic District when it purchased the property. (SOF at ¶)

c. "Religious Exercise"

The Second Circuit has observed that "not every activity carried out by a religious entity or individual constitutes a 'religious exercise.' " Westchester Day School v. Village of Mamaroneck 386 F.3d 183, 190 n. 4 (2d Cir.2004) (quoting 146 CONG. REC. S7774-01, S7776 (July 27, 2000)). Instead, RLUIPA requires inquiring "whether the facilities to be constructed [are] to be devoted to a religious purpose." Westchester Day School v. Village of Mamaroneck 386 F.3d 183, 189 (2d Cir. 2004). Such religious purpose need not implicate "core religious practice," Guru Nanak, 326 F.Supp.2d at 1151, or "an integral part of one's faith," Living Water Church of God v. Charter Township of Meridian, 384 F.Supp.2d 1123, 1129 (W.D.Mich.2005), rev'd on other grounds, 258 Fed.Appx. 729 (6th Cir.2007).

While the Second Circuit has not clarified the meaning of "devoted" in its Westchester opinion, courts within the Circuit have interpreted it to require a "careful, fact-sensitive balancing of secular purposes and religious purposes in relation to the spaces being constructed, as opposed to a strict requirement of exclusive use for religious purposes, which would be

inconsistent with the text and legislative history of RLUIPA." Westchester Day School v. Village of Mamaroneck, 417 F.Supp.2d 477, 544 (S.D.N.Y.2006).

In this case, it is clear that large portions of the building would be devoted to secular uses. The entire third and fourth floors of the addition are intended to be residential quarters for the Rabbi's family and visitors or staff. The majority of the basement would be used for a secular swimming pool (not to be confused with a Mikvah) and changing areas. And it is as to these areas that the Plaintiffs are seeking constitutional and federal statutory protection.

Accordingly, there has been no evidence of any burden, let alone a substantial burden and the Plaintiffs substantial burden claim, pursuant to RLUIPA, as well as claims pursuant to Connecticut Religious Freedom Act. Rweyemamu v. Commission on Human Rights and Opportunities, 98 Conn.App. 646, 659, 664 (Conn.App. 2006)[9] should be summarily dismissed.

2. Equal Terms Claims

Section 2(b) (1) of RLUIPA, the Equal Terms provision, provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or

[9] As noted in the Defendant Motion to Dismiss (Doc. No 101-1), at page 40, footnote eight, the Connecticut RFA, Conn. Gen. Stat. Ann. § 52-571b (1993) on its face, violates the Establishment Clause, because it permits a religious claimant to challenge any state law that poses a "burden" on religious conduct, as opposed to a "substantial burden." The language seems to indicate that any de minimis burden would suffice to initiate a state statutory free exercise claim, which would put religious entities in an extraordinarily privileged position in violation of the Establishment Clause. Lemon v. Kurtzman, 403 U.S. 602, 623-625 (1971). The Connecticut Supreme Court, however, has interpreted the CRFA in a way that forecloses this expansive interpretation. Cambodian Buddhist holds that "there is no indication in the legislative history of § 52-571b that the legislature harbored any special concerns about a statewide pattern of official discrimination against religious uses in the zoning and land use context, or that the legislature intended to provide heightened protection to religious land uses." Cambodian Buddhist, 941 A.2d at 896.

institution on less than equal terms with a nonreligious assembly or institution." See 42 U.S.C. § 2000cc(b)(1).

"Determining whether a municipality has treated a religious entity 'on less than equal terms' requires a comparison between that religious entity and a secular one." Third Church of Christ, Scientist, of New York City v. City of New York, 626 F.3d 667, 669 (2nd Cir. 2010). The Second Circuit, in determining what constitutes a valid comparator under RLUIPA's equal terms provision, has looked to decisions of the Third, Seventh and Eleventh Circuits. Id.

> The Eleventh Circuit, in Konikov v. Orange County, 410 F.3d 1317, 1327 (11th Cir.2005), explained that a secular comparator in an as-applied challenge should be selected by looking at "the evidence considered by" the governmental body imposing the restriction to ascertain the criteria it used in making its determination and then identifying a secular organization meeting those same criteria. In most zoning cases, because the government's focus is on the impact of the land use, the court should look for an organization "having comparable community impact" as the religious group. Id. In Konikov, the court compared a rabbi's use of his home for thrice-weekly prayer meetings, which the county wanted to prohibit, with a cub scout troop holding meetings of a similar size and frequency, which the county admitted it would allow. Id. at 1328. Because both meetings would impact the community similarly, the county's treatment of the rabbi violated RLUIPA. Id. at 1329.
>
> Along a similar line, though in evaluating a facial challenge, the Third Circuit held that **the proper analysis focuses on the "impact of the allowed and forbidden [uses] ... in light of the purpose of the regulation."** Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 265 (3d Cir.2007). In Lighthouse, the court examined two city zoning schemes, each of which was used by the city to deny the church a permit to use its property for religious meetings. The court struck down the use of the older of the two schemes because the "Ordinance's aims [were] not well documented" and it was unclear from the face of the rule how a church "would cause greater harm to regulatory objectives than an 'assembly hall,' " which was permitted. Id. at 272. The court, however, allowed the city to restrict the church's use under the newer "Plan," which had been enacted "to achieve redevelopment" of the area and create "a 'vibrant' and 'vital' downtown ... district," because state law prohibited the issuance of liquor licenses near houses of worship, so if churches were allowed in the area, the desired mix of retail and nightlife would become impossible to achieve. Id. at 270-71 (internal quotations omitted).
>
> Finally, the Seventh Circuit, in a recent en banc ruling addressing a facial challenge, adapted the Third Circuit's test, shifting the focus slightly from the government's subjective purpose in enacting the zoning law to the law's stated regulatory criteria,

> which it deemed more objective. River of Life Kingdom Ministries v. Village of Hazel Crest, Ill., 611 F.3d 367, 371 (7th Cir.2010) (en banc). The court then upheld a zoning ordinance that prohibited all noncommercial uses, including churches as well as secular assemblies like "exhibition halls, clubs, and homeless shelters," because it found that the ordinance's criterion-commercial use only-was reasonable and that it applied equally both to religious and to secular groups. Id. at 373.

Third Church of Christ, 626 F.3d at 670.

The point to be drawn from the Second Circuit's review of its sister circuit's decisions is that any alleged comparators need to be narrowly construed to closely identify with a subject applicant.

Chabad's Secular Comparators

The Chabad has specifically asserted that it has been treated differently than three other Applicants: The Oliver Wolcott Library, the Law firm of Cramer and Anderson and a nursing home known as Rose Haven.[10] None of these are relevant comparators to the Plaintiffs' application.

When granting its decision, the HDC was mindful of the permission previously granted to the library over fifty years earlier to build an addition to a colonial home on South Street. The HDC decision sets forth clear distinctions between the addition to the library and that proposed by the Chabad:

> "The library site is over three times larger than the Applicant's site. The library made fortunate use of a sloping rear yard. The addition is thus hidden below and behind the colonial house. The addition is narrower than the house and the top of the addition is well below even the second story of the house. The topography, size of the lot and design of the addition render it visually inconspicuous. Finally, the library addition is so situated that it is only visible from one public street, while the Deming house can be viewed from three hundred and sixty degrees via Meadow, Woodruff and West Streets."[11]

[10] Third Amended Complaint, Paragraphs 48-50.

[11] SOF No 50 -Appendix K

Further, it should be noted that the application of the Library was considered by a different board using different legal standards. The Library's application was granted by the Board of Warden and Burgesses acting pursuant to powers granted to it by special act of the Connecticut Legislature.[12] This act specifically prohibited the Board from considering size and scale of buildings.[13] See Defendants' Memorandum in Support of Motion to Dismiss (Doc No. 101-1) at Page 7.

In 1989, the Borough of Litchfield established by charter, the Historic District Commission which was empowered by the provisions of Chapter 97a of the Connecticut General Statutes.[14] Section 7-147f significantly expanded the scope of review to be employed by the Historic District Commission to include the scale of any portion of a building open to public view and its relation to other buildings in the immediate neighborhood.

With respect to the Cramer and Anderson building, that addition was used as the standard by which the Chabad's addition was judged.[15] In fact, as discussed above, the Chabad was invited to submit an application that would be similar in scale to that of the Cramer and Anderson offices.

Finally, with respect to the nursing home, Rose Haven, no public record could be found that allowed the house to be expanded although it appears from the assessor's card of the property that at some point there was a small addition added to the main house. [16]

[12] Appendix D, Attachment 2, House Substitute Bill 2138 of 159.
[13] Id. Section 7.
[14] Appendix D, attachment 3.
[15] SOF No. 44 - Appendix K.
[16] SOF 54 - Appendix L

The Chabad is not asking the court that it be treated as others have been treated. Rather the Chabad is requesting this court to impose upon the Historic District an entirely inappropriate structure that would never be granted to any applicant, religious or secular.

Other Houses of Worship

At paragraph 53 of their Third Amended Complaint the plaintiffs allege that "Christian religious facilities within the Historic District modified their structures in manners exceeding the modifications proposed by Plaintiff's Certificate of Appropriateness."

According to records kept by the Assessor's Office of the Town of Litchfield and other sources noted, this is not the case.

There are four religious organizations owning buildings in the District in addition to the Chabad: The United Methodist Church, The First Congregational Church of Litchfield, St. Michael's Parish (Anglican), and St. Anthony's of Padua Roman Catholic. All of the Churches were built, as church buildings, before the establishment of the Historic District.

None of them are modified historic houses. None of them have additions exceeding the size of the original structure. Each will be discussed in turn.

The United Methodist Church was built on or before 1900 according to the Assessor's records. A single building sits on .38 acres. No additions are noted on the card. [17]

The First Congregational Church has four buildings located on 2.92 acres, a lot over seven times larger than the Chabad's. The Meeting House was relocated to the site in 1929. The Meeting house is 3,793 square feet and an addition to the rear of the church, 3,392 square feet. The top of this addition is approximately half the height of the main structure. The

[17] SOF 57 -Appendix L, Certified copy of Assessor's card for 69 West St, page .

parsonage dates from 1787. A detached garage of 1276 square feet was built on or before 1960. A detached single story building of 7,634 square feet for use as a church school was built in 1966.[18]

St Michael's Parrish owns a stone church with a stone wing which were built on or before 1925, prior to any regulation of historic structures in the district. It is located on .92 acres. On a separate lot of 3.56 acres, the Parrish also owns a residential triplex built on or before 1780; another house of 3,158 feet built in 1971 and a garage with an apartment above it built on or before 1975 consisting of 3,056 feet and a garage of 702 feet built in 1920. Only the colonial building is located on the public road.[19]

St. Anthony's of Padua Roman Catholic owns, on 2.64 acres, a church which was dedicated in 1948[20] and a rectory built 1860[21]. On or before 1980 the Church built two detached garages, one of 660 square feet and one of 552 square feet. The garages are cannot be seen from a public road.[22]

Further, other than Oliver Wolcott Library, discussed above, there are no known instances of any entity, religious or secular, being allowed to place an addition on a historic residential structure larger than the original structure.

3. Nondiscrimination Claims

[18] SOF 58 Appendix L, Certified copy of Assessor's card for 15-23 East Street.
[19] SOF 59 -Appendix L, Certified copy of Assessor's cards for 23 and 39 South Street, page .
[20] SOF 60 - Appendix L Certified copy of Assessors card St Anthony's Church, South Street, list of 1958, card 81.
[21] SOF 60 - Appendix L Certified copy of Assessors card St Anthony's Church, South Street, list of 1958. card 82.
[22] SOF 60 - Appendix L Certified copy of Assessor's card for 49 South Street.

Section 2(b) (2) of RLUIPA, the Nondiscrimination provision, provides that "[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." See 42 U.S.C. § 2000cc(b)(2). In other words, a government cannot apply a land use provision to one religion differently than it might apply that provision to another. Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 262-264 (3rd Cir. 2007). However, there is only one church in the district that has an addition. As discussed above, the First Congregational Church has an addition that has square footage which is less than the main church building. (There is no evidence when this addition was built and under what permission, if any.)

Considering the immense size of the Chabad's proposed addition, it is not surprising that there are no comparators. The Plaintiff's are not seeking to be treated similarly to others; they are seeking to be treated as no other property owner in the district has ever been treated. If the law permits the Plaintiffs to build a building of any size they want, then, with one stroke, the rules and regulations of the HDC are cleanly eviscerated, and the constitutional implications of RLUIPA are brought front and center. See *Defendants' Memorandum in Support of Motion to Dismiss* (Doc No. 101-1) at Page 13 (discussing the federalism limitations imposed on federal intervention in local land use determination). For, in order to avoid violating the Establishment Clause, the HDC must allow all others, secular and religious alike, to do the same in the future.

B. Claims Pursuant to 42 U.S.C. § 1983

1. There is no evidence of policy or custom to support Plaintiffs' **claims against** the Borough of Litchfield and the Historic District Commission under 42 U.S.C. § 1983

To hold a municipality liable as a "person" within the meaning of 42 U.S.C. § 1983, a plaintiff must establish that the municipality itself was somehow at fault. Oklahoma City v. Tuttle, 471 U.S. 808 (1985); Monell v. Department of Social Services, 436 U.S. 658, 690-91 (1978). Our Supreme Court has clearly ruled that a municipality cannot be held liable under § 1983 for the actions of its employees or agents on the basis of respondeat superior. Monell 436 U.S. at 691.

Following Monell, the Second Circuit has held that "[t]he plaintiff must first prove the existence of a municipal policy or custom in order to show that the municipality took some action that caused his injuries ... Second, the plaintiff must establish a causal connection-an "affirmative link between the policy and deprivation of his constitutional rights." Vippolis v. Village of Haverstraw, 768 F.2d 40, 44 (2d Cir. 1985), (citing Tuttle, 471 U.S. at 824 n.8). Thus, in order to establish municipal liability, the plaintiff must establish that an identified municipal policy or practice was the "moving force [behind] the constitutional violation." Monell, 436 U.S. at 694. See also, Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397 (1997); City of Canton v. Harris, 489 U.S. 378 (1989).

To establish the existence of a policy or custom, plaintiff must show the following: (1) a "policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers" Monell, 436 U.S. at 690; and (2) that an official or officials responsible for establishing final policy with respect to the subject matter in question took action or made a specific decision which caused the alleged violation of plaintiff's constitutional rights, Pembaur v. City of Cincinnati, 475 U.S. 469, 483-84 (1986). Where there is no written policy or procedures, plaintiff must prove the existence of an unlawful practice by subordinate officials so

"permanent and well settled as to constitute a custom or usage with the force of law" Emblem v. Port Authority of New York and New Jersey, 2002 WL 498634 at *4 (S.D.N.Y. March 29, 2002), and that this practice was so manifest and widespread as to imply the constructive acquiescence of policy-making officials. City of St. Louis v. Praprotnik, 485 U.S. 112, 127-130 (1985).

Hence, a plaintiff asserting a § 1983 violation against a municipality must prove that he was deprived of a federally guaranteed right as a result of an established municipal custom or policy. Plaintiffs ability to prove the existence of a policy or custom is not enough. They must also show a "direct casual link between municipal policy or custom and the alleged deprivations." City of Canton v. Harris, 489 U.S. 378, 385, 109 S.Ct. 1197 (1989). Finally, a plaintiff must show that the municipality made a deliberate choice, implemented through this "policy" or "custom" which acted as "the moving force [behind] the constitutional violation." Monell, 436 U.S. at 694; see also, Polk County v. Dodson, 454 U.S. 312, 326 (1981); Dwares v. City of New York, 985 F.2d 94 (2d Cir. 1993); Bryant v. Maffucci, 923 F.2d 979 (2d Cir. 1991), cert. denied, 502 U.S. 849 (1991).

Plaintiffs in this case fail to even plead any facts that, if true, would establish an official Borough policy or custom that caused a violation of their constitutional rights. The § 1983 claim against the defendants appears to be based entirely on a variety of unsubstantiated allegations, among them, the allegation that the "Defendants' laws and actions deprived and continued to deprive the Plaintiffs of their right to" free exercise of religion (Third Amended Complaint at ¶ 68), free speech (TAC at ¶72), freedom of intimate association (TAC at ¶ 75), equal protection

(TAC at ¶ 79). In fact, the allegations in the Third Amended Complaint are merely recitations of legal conclusions and the amended complaint is devoid of facts regarding any such policy.

To the extent that there was any Borough policy it can be found in the State Statutes (CGS 7-147f et. seq) and the regulations which the Borough adopted pursuant to those Statutes. (Appendix G), these statutes and regulations are completely neutral, in fact silent, with respect to religious practices or entities.

Moreover, the HDC was given specific instruction by borough counsel as to how those statutes and regulations should be applied with respect to the Plaintiffs' application. (Appendix C, pp C6 to C16.) This opinion twice summarized the HDC's duties: at page 4 of the letter, the attorney stated: "In summary, the Commission is simply required to treat this, or any religious applicant, as it would any secular applicant. The same rules and regulations must be applied. If the applicant claims that a particular application of the Commission's regulations would substantially burden the practice of its religion, the Commission should consider such a claim in light of the constitutional and statutory law which applies and make it best judgment." (Appendix C. At C-9) After discussing with the HDC the applicable constitutional provisions and case law, the attorney advised: "For the reasons mentioned above, the Commission should be guided by neutrality, listen to any claims made by the applicant of burdens to its religious practice, and, if possible and reasonable, make some accommodations to religious claims, but not to the extent that the public would consider the Commission endorsing the applicant's religion." (Appendix C at C-11)

In this case, there is no evidence that a Borough policy or custom exists that result in a pattern and practice of intentional discrimination and disparate treatment against the Plaintiffs.

B. First Amendment Free Speech Claims

The Free Speech Clause of the First Amendment[23] provides that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. Amend. I. The general principle of the Free Speech Clause of the First Amendment is that it "forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

1. Standing

a. The Plaintiffs lack standing on their First Amendment Free Speech claims.

i. Summary judgment is the proper vehicle to test standing.

""Defendants may certainly test [a plaintiff's] standing as the litigation progresses by requesting an evidentiary hearing or by challenging [the plaintiff's] standing on summary judgment or even at trial.'' Blur v. Veneman, 352 F.3d 625, 642 (2d Cir.2003) citing, Fair Hous. in Huntington Comm., Inc. v. Town of Huntington, 316 F.3d 357, 361-62 (2d Cir.2003); see also, In re: Bennett Funding Group, Inc., 336 F.3d 94 (2d Cir.2003) (affirming summary judgment in favor of defendant based on plaintiff's lack of standing).

ii. The Plaintiffs lack standing to bring a First Amendment Free Speech claim.

[23] The Connecticut State Constitution, Article I, Secs 4, provides "Sec. 4. "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."; Section 5 provides "No law shall ever be passed to curtail or restrain the liberty of speech or of the press."

Plaintiffs, asserting a First Amendment claim lack standing, if they cannot demonstrate ”“an actual, non-speculative chilling effect‘’ on their allegedly protected right. Colombo v. O'Connell, 310 F.3d 115, 117 (2d Cir. 2002); also see Ricci v. DeStefano 554 F.Supp.2d 142, 162-163 (2008). While the fact that a plaintiff's speech has actually been chilled can establish an injury in fact, [a]llegations of a subjective “chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.... Rather, to establish standing in this manner, a plaintiff must proffer some objective evidence to substantiate his claim that the challenged conduct has deterred him from engaging in protected activity.” (Citation omitted; internal quotation marks omitted.) Bordell v. General Electric Company, 922 F.2d 1057, 1060-61 (2d Cir. 1991) citing, Laird v. Tatum, 408 U.S. 1, 13-14 (1972) and Meese v. Keene, 481 U.S. 465, 473-74 (1987).

Here, the plaintiffs do not even assert that their exercise of First Amendment rights have been chilled or prohibited in any way. In fact, the plaintiffs (i) assert that they continue to practice their religion in their current facilities at 7 Village Green Drive in Litchfield (App __) and, (ii) have displayed a sign in the front window of 85 West Street which reads “Future Home of Chabad-Lubavitch Community Center” and displays a Star of David. Furthermore, the Commission’s decision fully contemplates that the plaintiff’s religion will be observed and practiced at a new facility which the decision invites them to build.

Accordingly, as the plaintiffs do not have standing to bring their First Amendment claims, this Court should grant summary judgment in favor of the defendants as to all First Amendment claims.

Assuming, *arguendo*, the Chabad had standing to assert a First Amendment violation, such claim would fail.

2. First Amendment Free Speech – Standard

When conducting a First Amendment Free Speech Analysis, courts examine challenged governmental regulations to discern whether they are content based or content neutral since "the scope of protection of speech generally depends on whether the restrictions is imposed because of the content of speech." Universal City Studious, Inc. v. Corley, 273 F.3d 429, 450 (2d Cir. 2001); see also City of Los Angeles v. Alameda Books, Inc. 535 U.S. 425 454-455, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (noting the differences in the level of scrutiny between content neutral and content based laws); Turner Broadcasting Systems, Inc. v. FCC., 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed 2d 497 (1994).

Content neutral laws regulate matters unrelated to speech and only incidentally affect First Amendment rights. Turner Broadcasting Systems, Inc. 512 U.S. at 643 ("laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral"). The Supreme Court has applied intermediate scrutiny to these laws, requiring the regulation to "further an important or substantial governmental interest unrelated to the suppression of free speech, provided the incidental restrictions did not 'burden substantially more speech than is necessary to further' those interests." Turner Broadcasting Systems, Inc. v. FCC., 520 U.S. 180, 186 (1997) *quoting* Turner Broadcasting Systems, Inc. 512 U.S. at 662, 114 S.Ct., at 2469; Ward v. Rock Against Racism, 491 U.S. 781, 799, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989)). As previously discussed, the statutes

3. Freedom of Association

In addition to freedom of speech, the First Amendment also implicitly protects the corresponding freedom to expressive association[24]. 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.

Content neutral ordinances that only incidentally burden speech are subject to intermediate scrutiny. See Grace United Methodist Church v. City Of Cheyenne 451 F.3d 643, 657 (10th Cir.2006.) *citing* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)). An ordinance is content neutral where it does not regulate any form of speech on its face and was not passed for the purpose of curtailing the content of expression. Grace United Methodist Church v. City Of Cheyenne 451 F.3d 643, 657 (10th Cir.2006.) *citing* and *quoting*, in part, 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'"). As discussed above, the Commission's rules and regulations are content neutral and no evidence exists that the Borough adopted such rules for the purpose of curtailing any protected activities, speech, or beliefs. The Commission's rules and regulations advance an important governmental interest by preserving the district's historical character natural resources and landowners, and do "not burden substantially more speech than necessary to further those interests." Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997).

"There is no question that [a municipality] has a substantial interest in regulating

[24] Connecticut State Constitution, Article I, Sec. 14 provides "The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance."

the use of its land and that its zoning regulations promote that interest." City of Cheyenne, 451 F.3d 643, 657. The "operation of a house of worship does not equate with 'religious speech,' any more than the operation of a shoe store equates with commercial speech." Civil Liberties for Urban Believers v. City of Chicago, 157 F.Supp.2d, 903, 915 (N.D.Ill.2001)). (noting that the "First Amendment protections as to speech and assembly are not so all-encompassing as to include all activity in which an idea, goal or value is promoted").

Instead, where, as here, "the object of the law is unrelated to expression, *e.g.,* harmonious land use here, the free speech clause is not implicated, even if the law in question limits the ability to disseminate one's message." Civil Liberties for Urban Believers 157 F.Supp.2d, 903, 615-616. Because the Commission's rules and Regulations are content neutral, any incidental effect on the Chabad's ability to disseminate their message and practice their religion — and none exists— does not, as a matter of law, constitute a violation of their First Amendment rights. (SOF at ¶)

Because the Defendants' laws are neutral and generally applied, Chabad is placed on an equal footing with other religious and non-religious entities seeking to build similar facilities in the Borough. The Defendants' laws plainly do not regulate any form of speech on its face. 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 laws are content neutral, they survive intermediate scrutiny so long as the Defendants can demonstrate that the laws "advance[] 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 laws and regulations related to historical preservation are 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, the laws were passed for the purpose of promoting the educational, cultural, economic and general welfare of the public, through preservation and protection of the distinctive characteristics of the historic district which is significant to the history of Litchfield. Such laws and regulations do not interfere with the Plaintiffs' right to speak openly and freely or to associate with one another in appropriate locations. Clearly, the laws and regulations are unrelated to the suppression of speech or assembly and do not burden any more speech or associational rights than necessary to further the Borough's substantial interest in historical preservation. 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).

There is no question that the Defendants have a significant or substantial[25] government interest in preserving the District's history and aesthetics and that its HDC regulations promote that interest. The Supreme Court has held that aesthetics are a substantial governmental interest well within the police power of the state to regulate. Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984) ("It is well settled that the state may legitimately exercise its police powers to advance esthetic values."); Metromedia, Inc. v. San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (seven justices finding a ban on billboards for aesthetic purposes a substantial government interest); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 129, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) ("States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city ... and appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural or cultural significance is an entirely permissible governmental goal."); Berman v. Parker, 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed.2d 27 (1954) (noting that "[t]he concept of the public welfare is broad and inclusive" and includes the power of the state to legislate for the "spiritual as well as physical, aesthetic as well as monetary") (citation omitted).

Furthermore, lower courts have, in the context of First Amendment challenges to historic districts, also declared aesthetics a substantial government interest, See Globe Newspaper Co. v.

[25] "The term 'significant interest' is equivalent to the terms 'important interest' and 'substantial interest,' and these phrases are often used interchangeably." Globe Newspaper Co. v. Beacon Hill Architectural Com'n, 100 F.3d 175 (1st Cir.1996) *citing* Rodney A. Smolla & Melvin Nimmer, *A Treatise on The First Amendment*, § 3.02[3][A] at 3-36 & n.95 (1994) (noting that Ward, 491 U.S. at 796, 109 S.Ct. at 2756-57, uses "significant" and "substantial" in adjacent sentences).

Beacon Hill Architectural Com'n, 100 F.3d 175, 187 (1st Cir.1996). (noting in a First Amendment challenge to a historic district regulation that aesthetics is recognized "as [a] significant government interest[ ] legitimately furthered through ordinances regulating First Amendment expression in various contexts") (quoting Gold Coast Publications, Inc. v. Corrigan, 42 F.3d 1336, 1345 (11th Cir.1994) (internal quotations omitted)). The Eleventh Circuit has held that "government has a more significant interest in the aesthetics of designated historical areas than in other areas." Messer v. City of Douglasville, Ga., 975 F.2d 1505, 1510 (11th Cir.1992).

As a result, the defendants possess a significant governmental interest in regulating historic preservation and aesthetics of the district. Because it's the specific laws are unrelated to the suppression of speech and do not burden any more speech than necessary, the law survives intermediate scrutiny. The language of the Commission's rules and Regulations and the Commission's Decision, itself, refutes any contention that the Commission deprived the plaintiffs of their rights guaranteed by the First Amendment of the Constitution.

The historic preservation laws, and the Commission's application of same in ruling on the Chabad's application to expand a 2,600 square foot structure to a 21,000 square foot complex, in no manner violates the First Amendment's guarantee of the rights to free speech and assembly.

4. Free Exercise Clause

The Free Exercise Clause[26] of the First Amendment provides that "Congress shall make no law ... prohibiting the free exercise" of religion. U.S. Const. Amend. I. Neutral, generally

[26] The Connecticut State Constitution, Article I, Sec. 3, provides: "The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in the state; provided, that the

applicable laws are subject to rationality review. Employment Div. v. Smith, 494 U.S.872 (1990). For strict scrutiny to apply, a law must be non-neutral, or discriminatory, or it must not be generally applicable. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993). Thus, "[t]he 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).

More importantly, 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 substantially burdened, as discussed above in the context of RLUIPA.. See also 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).[27]

a. The Defendants have not Unconstitutionally Interfered with the **Chabad's Free Exercise of Religion.**

The Chabad's First Count seeks relief under the Free Exercise Clause of the First Amendment. The claim is based on the same legal premise as the Chabad's RLUIPA "substantial burden" claim and fails for the same reasons.

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right hereby declared and established, shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state.

[27] "[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).

In addition, the constitutional claims suffer from another threshold problem – Federal Courts have not recognized a First Amendment right to practice religion on any particular parcel of land, absent a showing that the proposed site itself possesses some special religious significance. Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 273-274 (3rd Cir.2007); Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 654-655 (10th Cir.2006); Lakewood Ohion Congregation of Jehovah's Witnesses, Inc. v City of Lakewood, Ohio, 699 F.2d 303, 306-307 (6th Cir 1983). Although the Chabad's claims are premised on the defendants' failure to grant a certificate of appropriateness for the Chabad's current plan, the plaintiff does not claim that the HDC has in any manner limited the property for religious use.

Nor is there any claim that the defendants have interfered with religious activities at the Chabad's current operations at their current facility. Neither the HDC's rules or regulations nor the Secretary's Standards or state law interfere with (i) the plaintiffs' religious beliefs, or (ii) the performance of any religious rituals or ceremonies of worship. The laws which guide the HDC in their determinations do not suppress any religion or religious conduct and neither encourages or discourages participation in religious life.

In fact, even if the Plaintiffs were to argue that the Defendant's regulations and actions reduced Plaintiffs' ability to finance the development of a new facility through fundraising, our Second Circuit Court has recognized that Supreme Court decisions "indicate that neutral regulations that diminish the income of a religious organization do not implicate the free exercise clause." Rector, Wardens, & Members of Vestry of St. Bartholemew's Church v New York, 914 F.2d 348, 355 (2d Cir.1990).

The Borough's historic district regulations do not impede the observance of Plaintiffs' religion or discriminate invidiously against that religion. Church of Lukumi Babalu Aye v City of Hialeah, 508 U.S. 520, 532 (1993) (citations omitted) (stating: "the protections of the Free Exercise Clause pertains to the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons"). The Free Exercise Clause is inapplicable in this case because laws and regulations followed by the Historic District Commission neither promote nor restrict religious beliefs.

> The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.... " The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status or lend its power to one or the other side in controversies over religious authority or dogma. Employment Div. v. Smith 494 U.S. 872, 876-77 (1990) (citations and internal quotations omitted).

In this case, there is no claim that the defendants are compelling affirmation "of a repugnant belief" or penalizing "against individuals or groups because they hold religious views abhorrent to the authorities"; or employing 'inhibit[ing] the dissemination of particular religious views." Sherbert v Verner, 374 U.S. 398, 402-03 (1963) (citations and footnote omitted). Nor do Plaintiffs plead that they have been subjected to substantial pressure to modify their behavior and violate their religious beliefs in order to comply with such regulations.

The Plaintiffs in this case have been granted much of what they have sought. The unlimited expansion of a building unfettered by historic district standards has never been a

constitutionally protected form of religious exercise because such governmental regulation does not pertain to religious beliefs. And, "a religious institution, no less than any other group, must comply with reasonable regulations designed to preserve a comfortable desirable community." Boyajian v Gatzunis, 212 F.3d 1, 6 (1st Cir, 2000).

i. Applicable Standard of Review

The appropriate standard of review for analyzing claims under the First Amendment's Free Exercise Clause depends upon the facts of the particular case. "Where the government seeks to enforce a law that is neutral and of general applicability…., then it need only demonstrate a rational basis for its enforcement, even if enforcement of the law incidentally burdens religious practices." Id. (citing Church of the Lukumi Babalu Aye, 508 U.S. at 531, 113 S.Ct. 2217, and Employment Div., Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 878-79, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990))

"[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." Church of Lukumi Babalu Aye, Inc, 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 though 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).

Numerous decisions have rejected Free Exercise challenges to routine land 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).

The Chabad asserts that its Free Exercise claim should be reviewed under strict scrutiny. (Third Amended Complaint at ¶ 68) However the Third Amended Complaint does not allege any facts suggesting that the regulations and standards affecting the Plaintiffs were are targeted at religious activity. The regulations are clearly neutral on their face; were enacted without reference to religious use; were enacted to support a legitimate government exercise; and the actions of the HDC were based on legitimate public policy considerations i.e. the need to preserve the historical character of the district. Nothing more is needed to survive scrutiny under the Free Exercise clause.

The constitutional protections for free exercise of religion do not exempt plaintiffs:

> From complying with reasonable civil requirements imposed by the state in the interest of public welfare and does not bar legislative control of acts inimical to the peace, good order, and morals of society. State legislatures may regulate conduct for the protection of

> society and to the extent that their regulations are directed towards the proper end and are not unreasonably discriminatory, they may indirectly affect religious activity without infringing the constitutional guarantee. 16 Am.Jur.2d Constitutional Law § 397 (footnotes omitted)

As stated, *supra*, the general proposition for addressing constitutional protection for free exercise of religion established by the Supreme Court is "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 531-32. The Borough's historic district was established to, *inter alia*, protect the distinctive characteristics of the historical land and structures. It is perfectly lawful to "enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." Penn Cent. Transp. Co. v New York City, 438 U.S. 104, 129 (1978) (citations omitted). The Supreme Court has noted:

> When a property owner challenges the application of a zoning ordinance to his property, the judicial inquiry focuses upon whether the challenged restriction can reasonably be deemed to promote the objectives of the community land-use plan, and will include consideration of the treatment of similar parcels. When a property owner challenges a landmark designation or restriction as arbitrary or discriminatory, a similar inquiry presumably will occur. Penn Cent. Transp. Co. v New York City, 438 U.S. 104, 133 f. 29 (1978) (citation omitted)

Protection of the Deming house from extraordinary alteration, as proposed by Plaintiffs, is justified due to the significance of the historic district. A community has a legitimate concern for preserving the significant historical features of its environment and, thus, the historic district and its [laws] were not created to infringe upon or restrict Plaintiffs religious practices. This is especially true in Litchfield, where its history is part of the history of the United States, well-documented, and distinctive.

The laws related to historic preservation, like their enabling legislation, regulate neutral criteria which are applied generally. Therefore the correct legal standard of review is whether the laws are rationally related to their stated goals. "In addressing the constitutional protections for free exercise of religion, our cases establish the general proposition 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. 520, 531 (1993).

As discussed nothing in the regulations or the application of the regulations to the Plaintiffs pertains to the exercise of their religion. Indeed the Commission's decision reflects its sensitivity to the applicant's religious practices and notes that an addition meeting its longstanding criteria would significantly enhance the Chabad's then current practices. The Decision concludes by stating:

> "The Commission is also mindful of the Applicant's presentation concerning its present religious practices and religious facilities. As presented by the Applicant, the Applicant is practicing its religion in a rented, commercial space of approximately 3,000 square feet. This space in a location and of a nature that is not only inconvenient but compromises the dignity of the regular religious services.
>
> This decision allows a building and addition that would substantially enhance the Applicant['s] current religious practices. A future plan by the Applicant, conforming to this decision, would also restore the Deming house and thereby enhance the historical character of the immediate neighborhood. It would be a welcomed improvement to the Town of Litchfield and its Historic District."

C. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment[28] provides that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). To prevail on an Equal Protection claim, a plaintiff must show (1) treatment different from similarly situated individuals; and (2) that "such differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778, 790 (2d Cir.2007) (quotations omitted). Muller v. Costello, 187 F.3d 298, 309 (2d Cir. 1999); Page v. Connecticut Department of Public Safety, 185 F. Supp.2d 149 (D. Conn. 2002).

With respect to the second element, "this Circuit has traditionally required that a plaintiff alleging selective treatment show an illicit motivation or animus on the part of the defendant." Zavatsky v. Anderson, No. Civ.3:00 CV 844(AVC), 2004 WL 936170, at *8 (D.Conn. Mar.9, 2004), citing Giordano v. City of New York, 274 F.3d 740, 751 (2d Cir.2001).[29] "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Village of Arlington Heights v. Metropolitan Housing Authority, 429 U.S. 256, 265, 97 S. Ct. 2040, 48 L. Ed. 2d 597 (1976); Patterson v. County of Oneida, 375 F.3d 206 (2d Cir. 2004).

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[28] The Connecticut State Constitution, Article I, Sec. 20, states: " No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."

[29] Alternatively, a plaintiff may establish an Equal Protection claim by showing that (1) "[it] has been intentionally treated differently from others similarly situated," and (2) "there is no rational basis for the difference in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000).

In order to prove a prima facie case of religious discrimination that violates equal protection, Chabad must demonstrate that it was treated differently from other similarly situated applicants because of their religion. See, Annis v. County of Westchester, 136 F.3d 239, 245 (2nd Cir. 1998), citing Sims v. Mulchay. 902 F.2d 524, 539 (7th Cir. 1990). As the Supreme Court has stated: The requirement of discriminatory intent or purpose" ... implies that the decision maker ... Selected or reaffirmed a particular course of action at least in part 'because,' not merely 'in spite of its adverse effects ... upon a member of a protected group." Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279, 99 S. Ct. 2282, 2296, 60 L.Ed.2d 870 (1979).

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).

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).

A plaintiff claiming the violation of equal protection must compare itself to another similarly situated in all material respects. See Campbell v. Rainbow City, 434 F.3d 1306, 1314 (11th Cir. 2006). The comparator 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.

As discussed in detail, *supra*, the Complaint has no examples of disparate treatment with true comparators.

D. Due Process

The plaintiff's Fifth Cause of Action alleges the Defendants denied the Chabad due process of law by denying the Chabad a Certificate of Appropriateness for the submitted plan.

The Due Process Clause of the Fourteenth Amendment protects individuals against governmental deprivations of "life, liberty or property," without due process of law. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570-71, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Mullins v. Oregon, 57 F.3d 789, 795 (9th Cir.1995).

The touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness (denial of procedural due process guarantees), or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective (denial of substantive due

process guarantees). See County of Sacramento v. Lewis, 523 U.S. 833, 845-46, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

Accordingly, to state a claim for a violation of substantive due process in the context of permits issued pursuant to zoning laws, a plaintiff must (1) establish a valid property interest in a benefit entitled to constitutional protection, and (2) show that arbitrary and irrational actions deprived plaintiff of that benefit. Brady v. Town of Colchester, 863 F.2d 205 (2d Cir.1988).

1. The Chabad Does Not Possess a Legitimate Property Interest

To state a due process claim, a plaintiff must allege the deprivation of some legally protected interest in life, liberty, or property. Roth, 408 U.S. at 570-72, 92 S.Ct. 2701. Here, Chabad has failed to establish the deprivation of a constitutionally protected liberty or property interest, and has also failed to establish that some process (which the Chabad did not receive) was due. The Chabad does not have a protected property or liberty interest in obtaining a certificate of appropriateness.

An interest in a particular land-use benefit may qualify as a property interest for the purposes of a substantive due process claim where a landowner shows a clear entitlement to that benefit. O'Mara v. Town of Wappinger, 485 F.3d 693, 700 (2d Cir.2007). Whether a clear entitlement exists ordinarily is an issue of law. Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir.1999). Uncertainty as to the meaning of the applicable law defeats a claim to a clear entitlement. See Clubside, Inc. v. Valentin, 468 F.3d 144, 153 (2d Cir.2006). Plaintiff ***"must show that, at the time the permit was denied, there was no uncertainty regarding his entitlement to it under applicable state or local law, and the issuing authority had no discretion to withhold it in his particular case.***" (emphasis added) Natale, 170 F.3d at 263 n. 1.

Plaintiffs had no legitimate claim of entitlement to a certificate of appropriateness. The members of the Historic District Commission plainly have discretion to deny such applications and such discretion defeats Plaintiffs' claim.

While the Chabad's pleadings fail to even allege the existence of any such property right or entitlement to a certificate of appropriateness, the Commission, in any event, has legal discretion to deny any application. See, e.g., C.G.S. § 7-147f(a) (granting to an historic district commission the power to issue a certificate of appropriateness "*[i]f the commission determines* that the proposed erection, alteration or parking will be appropriate") (emphasis added). An arguable claim of entitlement is not a "legitimate claim of entitlement." "[U]ncertainty as to the meaning of applicable law ... suffices to defeat a landowner's claim of entitlement." Clubside, 468 F.3d at 153 (internal quotation marks omitted). Also see Clubside, Inc. v. Valentin, 468 F.3d 144, 153-54 (2d Cir.2006) (only if the agency "lacks discretion to deny the permit" or "the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured" and "there was a strong likelihood of issuance," is a claim of entitlement legitimate).

2. **The Commission's Protocol and Decision Were Neither Arbitrary or Outrageous**

Even should the Court find that the Chabad does possess a property right the plaintiffs' due process argument still fails as the plaintiff has failed to demonstrate the Commission's decision, and grounds therefor, are arbitrary and outrageous. Specifically, to prevail on its claim for violation of substantive due process, the Chabad must prove that the Commission's protocol and decision were so "egregious, outrageous, or shocking to the contemporary conscience" that it

violated substantive due process. See Kuck v. Danaher, No. 3:07-cv-1390, 2008 WL 2902032, at *3 (D.Conn. July 25, 2008). Substantive due process protects against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against government action that is "incorrect or ill-advised." See Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir.1994). Generally, "[f]or state action to be taken in violation of the requirements of substantive due process, the denial must have occurred under circumstances warranting the labels 'arbitrary' and 'outrageous.' " Natale v. Town of Ridgefield, 170 F.3d 258, 262 (2d Cir.1999). Yet nothing in the Chabad's pleadings, concerning the Commission's decision "shocks the conscience" or suggests a "gross abuse of governmental authority." Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952), overruled on other grounds by Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Natale, 170 F.3d at 263 (2d Cir.1999).

"Substantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority." Natale, 170 F.3d at 263 (2d Cir. 1999). To succeed on their substantive due process claim, plaintiffs must show that defendants' conduct "shocks the conscience." County of Sacramento v. Lewis, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). Only the most egregious official conduct violates a party's substantive due process rights. Cusick v. City of New Haven, 2005 WL 1916364 (2d Cir.) (failure of officials to provide inculpatory information unearthed in murder investigation was not conscience shocking); see also Whitley v. Albers, 475 U.S. 312, 327, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986) (substantive due process doctrine bars official conduct that affords "brutality the cloak of law"). Even conduct considered to be reprehensible may not fall within the narrow range of conscience-shocking conduct that violates substantive due process. Cusick, 2005 WL

1916364. In the context of a land use or zoning action, arbitrary or irrational conduct occurs *only when the government acts with no legitimate reason for its decision*. Crowley v. Courville, 76 F.3d 47, 52 (2d Cir.1996).

As evidenced by the HDC's decision (Appendix _) the Commission went to great lengths to articulate a well-reasoned decision which rationally applies state law and the Secretary's Standard's to the Chabad's application and proposal. The Commission provided basis and justification for every allowance afforded to, and denial imposed upon, the Chabad plan for expansion. The defendants clearly had legitimate reason to reasonably limit the size of an expansion to a home in a district protected by historic preservation laws. To find otherwise would result in a failure of justice and misapplication of the Fourteenth Amendment.

X. DAMAGES

Because the Plaintiffs had neither the intent nor the ability to build their proposed addition, they suffered no compensatory damages and judgment should so enter for the Plaintiffs

All counts of the Plaintiffs' complaint are predicated on the assumption that the Plaintiffs had the intention and capacity to build their 21,000 square foot project. But that assumption is also subject to proof. During the deposition of Michael Boe, the Chabad's architect and the Plaintiff Rabbi Eisenbach, it became quite clear that the proposed renovation and addition to 85 West St. was based on aspiration rather than need, and upon hope rather than the financial capacity to start, much less complete, the project. Furthermore, the Second Circuit has yet to determine whether monetary damages may be awarded under RLUIPA.[30] Fortress Bible Church

[30] However, the United States Supreme Court's recent decision Sossamon v. Texas ___U.S.___, 131 S.Ct. 1651, ____L.Ed.2d ___ (Apr. 20, 2011) may be construed to mean that compensatory damages are not "appropriate relief" against municipal governmental bodies in the State of Connecticut. To wit. actions under RLUIPA must be

v. Feiner, 734 F.Supp.2d 409 (S.D.N.Y. 2010). The language does not support monetary damages, and the facts of this case do not, either.

As discussed, the size of the project had no basis in the needs of those who might attend. Congregations of Chabads in much larger Connecticut cities had facilities one third the size that proposed by the Plaintiffs. No doubt, the Rabbi's desire for a 4,500 square foot residence for his family, an indoor swimming pool large enough to accommodate a school, a coffee bar for attendees, and in-resident staff quarters all added to the size of the project, but even removing those items, the project was still immense for the 15 to 25 people who regularly attend the

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based on a limited class of specified administrative actions; the class of defendants is limited to "governments"; and the remedy is limited to "appropriate relief." In Sossamon, the Supreme Court has acknowledged that the term "appropriate relief" is open-endedly ambiguous and its meaning inherently depends on context. The Court asserted: "[t]he context here—where the defendant is a sovereign—suggests, if anything, that monetary damages are not 'suitable' or 'proper.'" Sossamon v. Texas ___U.S.___, 131 S.Ct. 1651, 1658, ____L.Ed.2d ___ (Apr. 20, 2011) (footnote omitted). Discussing the fundamental principles underlying sovereign immunity, the Court went so far as to raise the doctrine of sovereign immunity to a position of constitutional restraint on federal powers: "Sovereign immunity principles enforce an important constitutional limitation on the power of the federal courts. This Court has consistently made clear that "federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" (emphasis added) Sossaman 131 S.Ct. at 1654. The court went on to rule in Sossamon that while a state could waive its immunity from federal-court jurisdiction the test would be "a stringent one" and the consent to suit would have to be "unequivocally expressed" by a "clear declaration." Sossaman 131 S.Ct. at 1658. The Court summarized the foundation of its decision in Footnote 8 where it replied to the dissent by stating: "The essence of sovereign immunity, however, is that remedies against the government differ from 'general remedies principles' applicable to private litigants." Sossamon underscores the deference that our Supreme Court requires federal courts to give to our states when determining what "appropriate relief" against governments should entail. In Connecticut it has long been an expression of this State's sovereign power to accord its political subdivisions immunity from damages unless specifically allowed by statute. As a political subdivision and creation of the state (Connecticut Constitution, Article Tenth, Section1.; City Council v. Hall, 180 Conn. 243, 248, (1980)) a municipality is immune from liability unless that immunity is abrogated by the legislature. Spears v. Garcia, 263 Conn. 22, 28(2003); Pane v. City of Danbury, 267 Conn. 669, 677 (Conn. 2004). With respect to liability from the issuance of or failure to issue permits and certificates, the State Legislature has enacted a very clear state policy that municipalities are immune from claims for damages. C.G.S §52-557n(b)(7). In light of Sossamon, this court does not have the jurisdiction to impose compensatory damages on a subdivision of the State and, even if it did, it would be highly inappropriate to contravene a most basic state policy and do so.

Chabad's service. [31] Rather than being designed for need, it is much more likely that the proposal was built as large as it was because that was the largest foot print that would have been allowed by zoning.[32]

And size is not an issue when there is no ability to build.

It seems quite unusual that any person intent on building a 21,000 square foot facility would have no building budget nor know what the building would cost. However that is exactly what Michael Boe, the Plaintiff's architect testified.[33] He never did any cost estimate. The best estimate that the architect could give for the cost of the building was "expensive."[34] In fact nobody even asked the architect how much the building would cost:

21 Q. Nobody ever asked you how much you thought
22 the building was going to cost?
23 A. No.
24 Q. Cost was never a consideration in your
25 design?
0063
1 A. No.[35]

When questioned on this topic Rabbi Eisenbach first didn't remember whether he ever asked Mr. Boe for an estimate of cost:

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[31] SOF Nos 62-63 - Appendix M Levy Deposition at pages 17 to 18. This is a generous estimate. Another attendee, Peter Bogen estimates weekly attendance at seven to fifteen. Appendix P, Affidavit of Peter Bogen, pages 15 to 16.

[32] SOF 29 - Appendix Q, deposition of Michael Boe. Michael Boe the, Plaintiff's architect, testified that zoning would allow building coverage to be 25% of the site. The Plaintiffs' project was 24.2% of the site or 97% of the size allowed. Id at pp 21-22

[33] SOF 64 - Id at pages 59 to 63.

[34] SOF 64 - Id at 59.

[35] SOF 64 - at 62-63

Q. Okay. During the development of the plans, Michael Boe said that at no time did you ever discuss with him, up to the point that the plans were finalized and presented to the planning commission, the cost of construction, that there was no regard given at all to the cost of building that building. Is that your memory?
MR. NELSON: Object to the form.
A. I don't recall.[36]

Then he said that they did discuss cost, but that he didn't remember what Mr. Boe told him.

. Well, do you ever remember discussing, asking Mike Boe how much it would cost to build what he planned?
A. Yes.
Q. Okay. And at what point in time did you ask him, is it after the plans were finished or before the plans were finished?
A. His original sketch, where he went over the floors.
Q. Pardon?
A. His original sketch, when he went over the
0093
floors.
Q. Okay. It's at that point in time he gave you a sketch and you went over the floors that you asked him how much it would cost to build that?
A. (Nodding.)
Q. What did he say?
A. I don't recall exactly.[37]

Then Rabbi Eisenbach testified that there was a budget for $3,000,000 to $4,000,000 but it was never put into writing.

Q. I understand. Maybe I assumed something I shouldn't have. Was this budgeted three to four million

[36] Appendix N, Deposition of Rabbi Joseph Eisenbach, page 92.

[37] Id at 92-93

10 dollars ever put into writing?
11 A. We actually didn't put any -- we were
12 planning to put a book out once we got approved and put
13 that budget in writing to the community, but we were
14 waiting for approval at first.
15 Q. In any way, was that budget of three to
16 four million dollars put into writing?
17 A. I don't recall.[38]

In other words the Rabbi Eisenbach believes that he had an unwritten budget of $3,000,000 to $4,000,000 although he never remembers his architect giving him a cost on the project.

But, then, cost is not an issue if there is no intent or ability to construct.

When Rabbi Eisenbach was questioned how he was raising money for the project he testified that his plan was simply "schmoozing the community."[39] He had not received a single pledge in writing and remembered only person who had given a verbal pledge, an investor with Bernie Madoff who had left the area:

17 Q. Did you ask anybody for pledges prior to the
18 building, the construction of the building?
19 A. Certainly.
20 Q. Okay. Did anybody give you any written
21 pledges as to how much they would contribute to the
22 construction of the addition prior to the denial of your
23 application for a Certificate of Appropriateness?
24 A. I don't think there's a Chabad in the world
25 that built, if it was a $30 million building or a
0097
1 $100,000 building, that ever got a pledge in writing.
2 It's a shake of the hand, a look in the eye, a word.
3 Q. Okay. Can you give me names of any people
4 that gave you their word that they would pledge a sum
5 certain for the construction of the Chabad prior to the

[38] SOF 67 - Id at 94.

[39] Id at 94-95.

denial of the certificate of application?
A. Many; I just don't recall at this time.
Q. Can you give me the name of one?
A. Goodman, that's really one that comes to mind; a guy who was one of Madoff's top investors, who has since moved out of the area.
Q. Okay. So one of Mr. Madoff's top investors. Who was he and how much did he pledge?
A. His name was Len Mayor.
Q. Oh.
MR. NELSON: We have gave you this information.
BY MR. STEDRONSKY:
Q. You gave me the name. How much did pledge?
A. I forget the dollar amount, but it was supposed to be substantial.[40]

The only person who had "contributed" to the project was Mark Greenberg, a real estate developer and landlord, who had reduced the price of the building by $100,000 when he sold it to the Chabad in 2005 [41]. In fact Rabbi Eisenbach hadn't even asked, Baruch Levy, his only board member other than his wife, to make a pledge on the construction of the new building. [42] Nor had the Board of Directors passed any resolution for a fund drive.[43] Similarly two of his other regular attendees, Peter Bogen and Nathan Zimmerman, had never been asked to make a pledge for construction of the project.[44]

[40] Id at 96-97. As for Rabbi's testimony that there is not a "Chabad in the world that every took a pledge in writing", he was overlooking the Stamford Chabad in Ct. , which according to fund raising materials supplied by the Plaintiffs in discovery was doing exactly that. See Appendix R.

[41] Appendix Q, Deposition of Mark Greenberg page 22

[42] Appendix M at page 35.

[43] SOF 69 - Id.

[44] Appendix N, P. Bogen Deposition, page 14; and Appendix R, Deposition of Nathan Zimmerman at pp55-56, even though Mr. Zimmerman made other pledges to the Chabad throughout the year. Id at 12-13.

Mr. Greenberg was also the Chabad's landlord. At the time he was deposed, the Chabad could not pay its rent monthly rent of $1,500, much less build a 21,000 square foot synagogue. Mr. Greenberg testified at his deposition that the Chabad owed him 15 to 18 months back rent.[45] And, in addition, it still owed Michael Boe over $13,000 for architectural fees.[46]

But, it is not necessary to know the cost of construction, have a budget, do formal fundraising or pay your architect if there is no intention or ability to build.

Rabbi Eisenbach kept no records of attendance; his Chabad was behind 15-18 months on its rent; he owed money to the architect that formulated the plans; he had no reasonable idea what the building would cost to build; he had no budget for the construction; he had raised no pledges for the construction of the project other than an unknown verbal pledge from a Madoff investor who left the area. Whether the Plaintiff's would have the financial capacity to build the project is entirely speculative.

Accordingly the Plaintiffs' claims for compensatory damages for their not being allowed to build are one speculation built on the foundation of another speculation. In terms of statistics, the probability of the Plaintiffs being damaged is one speculation *multiplied* by another degree of speculation: speculation squared.

It is equally speculative to suggest, much less claim, that the Plaintiffs lost donations when he had none to lose. Or that they have incurred additional months of rent when there is no indication that they will ever pay their current rent or that they could afford the cost of

[45]SOF 70 - Appendix S. at page 12.

[46] SOF 71 -Appendix O, page 174.

maintaining a 21,000 square foot building and its swimming pool; or that they have lost income from attendance when they have no records of present attendance.

Finally, the plans did not meet the Zoning Regulations for the Town of Litchfield and could not have been built, even if approved by the HDC. The property is located in the Town's BH (business historic) zone. To use it as a synagogue would require a special exception[47] which, in turn, requires the filing of a site plan that meets all of the requirements of the Town's zoning regulations[48]. According to the zoning regulations the Chabad's proposal would require a total of 23 parking spaces, but the Chabad's site plan only provides for 14 spaces[49].

In order for the Plaintiffs to obtain approval of their special exception they would have to obtain a variance from the Town's Zoning Board of Appeals. However, in Connecticut, by law, a variance can only be granted when " 'because of some peculiar characteristic of [the] property, the strict application of the zoning regulation produces an unusual hardship, as opposed to the general impact which the regulation has on other properties in the zone.' Dolan v. Zoning Board of Appeals, supra, at 430, 242 A.2d 713." Bloom v. Zoning Bd. of Appeals of City of Norwalk, 233 Conn. 198, 201, 207 (Conn. 1995) It cannot be a hardship that is self-created by a proposed construction on the property. The Court stated:

> 'Proof of exceptional difficulty or unusual hardship is absolutely necessary as a condition precedent to the granting of a zoning variance. *Point O'Woods Assn., Inc. v. Zoning Board of Appeals,* 178 Conn. 364, 368, 423 A.2d 90 (1979); *Ward v. Zoning Board of Appeals,* supra, 143, 215 A.2d 104; *Kelly v. Zoning Board of Appeals,* supra, at 598, 575

[47] SOF 73 - Appendix S, Affidavit of Dennis McMorrow paragraph 6.

[48] SOF 74 - Id. at paragraph 7.

[49] SOF 75 -Id at paragraphs 10-12.

A.2d 249. A mere economic hardship or a hardship that was self-created, however, is insufficient to justify a variance…." Id. [Emphasis added.] At 207-208.

In Bloom a property owner was given a building permit in error by the local building official. During construction it was found that the proposed addition to the existing house violated required sidelines and the owner applied for a variance which was granted. A neighbor, Bloom, appealed the granting of the variance, arguing that the claimed hardship had nothing to do with the nature of the property but rather was self-created by the construction. The trial court agreed but then allowed the variance on an argument of estoppel. On appeal, the Supreme Court agreed with the trial court's determination that there was no hardship that would permit the granting of a variance but overturned the trial court's theory of estoppel and sustained the neighbor's appeal. The Supreme Court ruled:

> "In this case, the trial court found that the owners would not have been entitled to a variance Before (sic) the improvements were made pursuant to the improperly granted building permit. We agree. The owners have shown only that their building is located on an irregularly shaped lot and "limitations imposed by the shape of the lot do not in themselves create a hardship...." T. Tondro, Connecticut Land Use Regulation (2d Ed.1993 Sup.) p. 29. Furthermore, there was no evidence that if the variance were denied the owners' property would become worthless. On the contrary, as the trial court determined, the building housed a restaurant that was a viable business and a going concern….
>
> "The judgment is reversed and the case is remanded to the trial court with direction to sustain the plaintiffs' appeal." Id at 210-211

The Zoning Regulations of the Town of Litchfield reflect the law as stated in Bloom. A variance is permitted only "whereby reasons of exceptional slope, size or topography of the lot or

other exceptional situation or condition of the building or land, practical difficulty or unnecessary hardship would result to the owner of said property from literal enforcement of Regulations." [50] They further require the Board of Zoning Appeals to make a finding that the special circumstances constituting a hardship "do not result from the actions of the applicant."[51]

In the instant case, the Plaintiffs have a regularly sized and proportioned lot with a usable building on it. The hardship which the parking imposes on the Plaintiffs is directly due to their chosen size of construction. Under the law, as discussed in Bloom, they are not legally entitled to a variance. Nor are they entitled to a variance under the Town's Planning and Zoning Regulations. Therefore, even if the HDC had granted them a certificate of appropriateness they would not be allowed by the Town of Litchfield to build those plans. They have not been damaged by the HDC's decision. This denial would result from the application of additional, facially, neutral laws.

Summary judgment should enter for the defendants on the Plaintiffs' claim for compensatory damages. If Plaintiffs are allowed to proceed to trial, they should be allowed to claim only damages to intangible rights. Kerman v. City of New York, 374 F.3d 93, 125 (2nd Cir. 2004); and Raysor v. Port Authority of New York and New Jersey, 768 F.2d 34, 39 (2nd Cir. 1985).

[50] Id. Appendix S Attachment 2. Article X, Section 8, Power and Duties, paragraph 3.

[51] Id.

DEFENDANTS,
HISTORIC DISTRICT COMMISSION OF THE BOROUGH OF LITCHFIELD AND BOROUGH OF LITCHFIELD

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CERTIFICATION

The undersigned hereby certifies that on May 16, 2011, a copy of the foregoing was filed electronically and served by electronic service to those receiving notices through the Court's CM/ECF system.

_____/s/_____
C. Scott Schwefel