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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EAST HILL SYNAGOGUE, a New Jersey Not-for-Profit Corporation

Plaintiff,

-against

THE CITY OF ENGLEWOOD and THE PLANNING BOARD OF THE CITY OF ENGLEWOOD

Defendants.

CASE NUMBER: 03cv5228 (JAG)

MEMORANDUM OF LAW IN SUPPORT OF 138 BRAYTON STREET, LLC'S MOTION TO INTERVENE AND FOR OTHER RELIEF

On the Brief:

Bruce S. Rosen
James P. Spielberg

PRELIMINARY STATEMENT

This lawsuit is the culmination of more than three years of contentious planning board hearings and state court litigation initially brought by 138 Brayton Street, LLC ("Proposed Intervenors"), a group of neighbors who together own a home adjacent to East Hill Synagogue ("East Hill"), a growing Orthodox Jewish congregation in Englewood, New Jersey that has stretched the limited resources of its relatively small structure and property in a quiet residential neighborhood.

After the Planning Board of the City of Englewood ("Planning Board") approved East Hill's site plan in 2000, the Proposed Intervenors unsuccessfully challenged that approval but then obtained a state court order to have the Planning Board consider whether huge tents could be erected over East Hill's already inadequate parking areas. After five hearings, during which the Proposed Intervenors were the primary advocate against erection of the tents, the Planning Board set limits on how many times during the year these huge tents could be erected -- with their attendant noise, crowds and idling catering trucks -- in the midst of a quiet established neighborhood. Having been so limited by the Planning Board, East Hill now alleges federal constitutional and statutory violations against the Board and the City of Englewood ("City") for treating it differently than non-religious entities.

This litigation has nothing to do with religious discrimination and everything to do with East Hill's attempts to utilize an undersized property to host a growing number of catering activities that have outstripped the capacities of its facility and the surrounding tranquil residential neighborhood.

This motion is timely filed. Proposed Intervenors, whose shareholders, some of whom are also Jewish, reside adjacent to or within a block or so of the East Hill property, have interests directly related to this case and their ability to protect their interests could be impaired in the absence

of intervention. Moreover, the governmental defendants cannot adequately represent the interests of proposed intervenors.

It is uncontroverted that Proposed Intervenors have been at the center of the present dispute from is inception, ever since its members acted as objectors during the Planning Board hearings on East Hill's initial site plan application. Proposed Intervenors brought their action regarding the erection of huge tents covering up the East Hill parking area only after Englewood city officials and the Planning Board – a defendant in the state court action -- refused to enforce the city's zoning ordinance to prohibit the tents. Additionally it was the Proposed Intervenors' perseverance that pushed a Superior Court judge to have the matter of the tents remanded to the Planning Board.

After three years of an adversarial relationship, it would be arbitrary, unfair and unrealistic for this Court to conclude that the Planning Board would or could adopt Proposed Intervenors' interests and goals in this matter. In fact, in its Answer to East Hill's complaint, the Planning Board, asserted the following Separate Defense: "Failure to join an indispensable party to wit: 138 Brayton Street, LLC. [which] was a party to the Court proceedings and the remand that resulted in the resolution challenged."

Even more telling, the mayor of Englewood has already made his position known, telling a local Jewish newspaper that if he had his choice, the town would simply default because the planning board was "wrong" and defending the lawsuit was not worth the litigation cost. In fact, he said he plans to appoint more Planning Board members who saw things his way.

For the reasons set forth, the interest of the Proposed Intervenors is clear and these interests cannot be adequately represented by the governmental defendants; therefore the request of 138 Brayton Street, LLC for intervention should be granted.

STATEMENT OF FACTS[1]

East Hill Synagogue ("East Hill") is a modern Orthodox congregation located in an essentially large home converted for synagogue use. *See* Aronson Decl. at ¶ 2. East Hill's property sits on the corner of Walnut and Brayton Streets in Englewood, New Jersey. The immediate area surrounding the East Hill property is a fully-developed, quiet and friendly residential area. *See* Complaint filed by East Hill Synagogue, Case Number 03cv5228 (JAG), at ¶20, Exhibit A to Rosen Decl.; *See also* Aronson Decl. at ¶2.

138 Brayton Street, LLC ("Proposed Intervenors" or "138 Brayton") is a New Jersey Limited Liability Company whose shareholders reside adjacent to or within a block of the East Hill property. *See* Aronson Decl. at ¶1. Although the East Hill property has been utilized for non-residential activities in the past, Proposed Intervenors have been concerned from the outset about East Hill's proposed use -- not for any religious or discriminatory reasons -- but because East Hill is a young, active, growing congregation that would inevitably stretch the limited resources of a relatively small structure and property in order to function as a dynamic synagogue. *See* Aronson Decl. at ¶2. From the very beginning, Proposed Intervenors cited their concerns, which included parking, lighting, aesthetics, and the effect that East Hill's activities would have on the quality of life and the value of residences in the neighborhood. *See* Aronson Decl. at ¶2. Additionally, the use of the facility for catered affairs and ultimately the erection of tents on East Hill's parking lot for parties associated with Bar Mitzvahs have been at the center of Proposed Intervenor's concerns and complaints since the synagogue's inception. *See* Aronson Decl. at ¶2.

1 The facts supporting this application are set forth in the Declaration of Donald Aronson ("Aronson Decl."), and the Declaration of Bruce S. Rosen, Esq., and accompanying exhibits ("Rosen Decl."), submitted herewith.

Proposed Intervenors initially attempted to address their concerns individually and as a group with East Hill directly. *See* Aronson Decl. at ¶4. Representatives of the proposed synagogue initially promised that use of the East Hill property would be limited to "minyans" or small services that are closer in proximity to their homes than their previous house of worship. *See* Aronson Decl. at ¶4. Unfortunately, it soon became clear to Proposed Intervenors that these representations were not genuine. *See* Aronson Decl. at ¶4. When direct discussions with synagogue members did not resolve questions regarding the use of the East Hill property, Proposed Intervenors became embroiled in what turned into contentious litigation with East Hill and the Planning Board that lasted for approximately three years -- from early 2000 through September, 2003 -- first before the Planning Board as objectors, then in the Superior Court of New Jersey ("the State Court Litigation") and again before the Planning Board. *See* Aronson Decl. at ¶4. The instant litigation is simply an extension of the same issues, this time initiated by plaintiffs in a First Amendment context. *See* Aronson Decl. at ¶4.

In fact, this action would not be before this Court if it were not for Proposed Intervenors' actions as objectors before the Planning Board and as plaintiffs in the State Court Litigation. *See* Aronson Decl. at ¶4. On June 1, 2000, the Planning Board granted conditional site plan approval to East Hill. This approval provided that the parking lot on the East Hill Property would be used for automobiles only. *See* Resolution of Englewood Planning Board Amending A Site Plan Approval Granting A Temporary Parking Waiver To Accommodate An Accessory Use For Lot 8 In Block 1503 East Hill Synagogue ("Resolution"), Exhibit B to Rosen Decl. The original site plan approval was subsequently challenged by Proposed Intervenors in July of 2000 when they initiated an action against East Hill and the Planning Board in the Superior Court of New Jersey, Passaic County (because of conflict in Bergen County) seeking to nullify the Planning Board's original site plan

approval to East Hill. *See* Resolution at 1. The court ruled against Proposed Intervenors and upheld the original site plan approval. *Id.*

Subsequent to granting of site plan approval, the zoning officer of the City of Englewood granted East Hill permits to erect structures such as large tents on the parking area of East Hill. *See* Resolution at 1. Within the context of the lawsuit in Superior Court, Proposed Intervenors challenged the legality of the temporary structures by bringing two separate motions to enforce litigant's rights. *See* Resolution at 2. After court-ordered mediation, which was unsuccessful, the Superior Court, Law Division, ruled (1) that the site plan approval did not grant East Hill permission to erect temporary structures of the tents in the parking areas and (2) the erection of the tents in the parking areas and fire lanes constituted a zoning violation. *See* Resolution at 2. The court also remanded the matter back to the Planning Board to determine the permissible use of the parking lot. *See* Resolution at 2.

Among the many reasons the Planning Board ultimately limited the number of times that huge tents may be erected by East Hill over its parking lot is that they are noisy to erect and take down, they displace cars to the street that would ordinarily be parked in the synagogue lot, and they are set up to accommodate a far larger numbers of guests than the 123 maximum seating that the Planning Board has authorized East Hill to have in its main sanctuary. *See* Aronson Decl. at ¶3. Noise aside, these tents cause significant dislocations in the neighborhood and interfere with the neighbor's quiet enjoyment of their property. *See* Aronson Decl. at ¶3.

For example, in the State Court Litigation, Proposed Intervenors submitted a certification from a private investigator showing that in June, 2001, a bar mitzvah held at East Hill attracted 430 guests and resulted in 29 vehicles parking in and around the narrow residential streets; a far cry from

the informal luncheons that East Hill represented to the Planning Board would be limited by the synagogue's size. *See* Aronson Decl. at ¶3.

As a result of the remand by the Superior Court, the Planning Board held five public hearings on the issue concerning tents and in September of 2003, adopted a resolution to amend the original site plan approval by granting East Hill the right to use its parking lot for these so-called Kiddush events, although it limited the number of times that tents can be erected by East Hill over its parking lot to three annually. *See* the Resolution at 11.

The Planning Board, a defendant in the instant litigation, has been a reluctant participant in resolving the planning matters regarding the East Hill property and **was an adverse party against Proposed Intervenors throughout the duration of the State Court Litigation**. *See* Aronson Decl. at ¶5. Indeed, the **City of Englewood as well has consistently refused to enforce the Planning Board's actions and its own ordinances against East Hill on items such as landscaping buffers, seating, lighting and parking, forcing Proposed Intervenors to expend money for a lawyer to file motions in aid of litigants' rights to require the city to enforce its ordinances and protect its property owners**. *See* Aronson Decl. at ¶5. It was the failure of the City to enforce its ordinances regarding activities at East Hill that required Proposed Intervenors to move forward with its motions in state court. *See* Aronson Decl. at ¶5.

Proposed Intervenors' position may very well be that the Planning Board's action in this matter was illegal and that it had no authority to grant the waiver it granted to East Hill. *See* Aronson Decl. at ¶9. Moreover, there is no reason to assume that either municipal defendant will take a more aggressive stance in defense of the Proposed Intervenors or the other homeowners in the immediate vicinity, their right to quiet enjoyment of their property, and maintenance of their property values. *See* Aronson Decl. at ¶9. In fact, there is every reason to believe that the municipal

defendants, which have had tenuous relations with Proposed Intervenors in the past, will be driven in their litigation strategy by budgetary and political concerns, and will not be zealous advocates on behalf of 138 Brayton's privacy and property interests. *See* Aronson Decl. at ¶9. In the November 28, 2004 issue of the local *Jewish Standard* newspaper, then incoming Englewood Mayor Michael Wildes, an attorney who belongs to the same synagogue that East Hill's members came from originally, was interviewed about the dispute over the tents after the litigation was filed and made clear his position that the Planning Board was wrong; that the city should not defend the Board's actions aggressively; and that he will appoint people to the Board who would not limit religious activity:

> [Wildes] said that he asked the city attorney if the city "could default unresponding, because I don't want us to incur litigation costs, and because **I question the propriety of the planning board's decision to limit the tents to the number they did.**
>
> "I was told that we couldn't because they put in for damage claims, which could make the city vulnerable to litigation costs and damages.
>
> "While I don't blame some of the neighbors for not wanting a caterer's truck idling in the driveway during Shabbos to serve a Kiddush, we must figure out a way to ameliorate the situation," Wildes added. "When a new couple moves to Englewood, **the city actively works to expand the eruv, so that more people will move into the community and be able to expand its base.** Englewood has 58 houses of worship.
>
> I have spoken to leaders in both camps and I hope that this can work itself out without litigation," Wildes said. "**I'm seeking counsel in determining the validity of the claim, and how through the planning board I can effectively ameliorate this matter.**" He has asked family friend Nathan Lewin, a well known Washington lawyer who specializes in constitutional law and has done a great deal of work on Jewish issues for advice, he said. And, he added, "I'm going to be appointing people to the planning board; the council doesn't approve my appointees."

See November 28, 2003 *Jewish Standard* Article, Exhibit C to Rosen Decl. (emphasis added)

Wildes' candid comments make clear that he does not support the Planning Board decision and was seeking to figure a way to undercut it. It is striking that he turned to Nathan Lewin, who represented some of the appellants in nearby Tenafly in the eruv litigation -- arguing essentially the same position – that the town treated a religious entity differently from secular entities in violation of the free exercise clause.

Moreover, it is unlikely that either defendant municipal entity will aggressively raise or pursue the potential unconstitutionality of the Religious Land Use and Institutionalized Persons Act (42 USC §2000cc) ("RLUIPA"), which plaintiffs have alleged was violated by the Planning Board's actions. *See* Aronson Decl. at ¶10.

Finally, it should be noted that neither of the attorneys representing the municipal entities have specific experience litigating Free Exercise Clause and Establishment Clause claims involving municipal government. *See* Aronson Decl. at ¶10. Both Bruce S. Rosen, Esq. and his co-counsel, Professor Noah R. Feldman were most recently special counsel to the Borough of Tenafly in the recent litigation over the erection of an eruv. *Tenafly Eruv Association Inc. v. Tenafly*, 309 F.3d 144 (3d Cir. 2002), *cert. denied* 123 S.Ct. 2609 (2003). *See* Aronson Decl. at ¶10; *See also* Rosen Decl. at ¶2. Mr. Rosen has previous experience with other cases involving Free Exercise and Establishment Clause concerns including those on behalf of Orthodox Jewish entities, while Mr. Feldman is an assistant Professor of Law at New York University and a well-known scholar on religion and the law, who has written several law review articles on the religious clauses. *See* Aronson Decl. at ¶10; *See also* Rosen Decl. at ¶2.

ARGUMENT

Based on the facts set forth above and as further described below, Proposed Intervenors are entitled to intervene is this matter as both a matter of right as set forth in Rule 24(a) of the Federal Rules of Civil Procedure and as a matter of the Court's discretion pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

POINT I

138 BRAYTON STREET, LLC IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT

Federal Rule of Civil Procedure 24 provides in pertinent part:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Courts have long interpreted Rule 24(a) (2) to require a party seeking to intervene as of right to prove the following four elements: (1) a timely application for leave to intervene; (2) a sufficient interest in the litigation; (3) a threat that the interest will be impaired or affected, as a practical matter, by the disposition of the action; and (4) inadequate representation of the prospective intervenor's interest by existing parties to the litigation. *Kleisser v. United States Forest Service*, 157 F.3d 964 (3d Cir. 1998); *see also Mountain Top Condominium Association v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361 (3d. Cir. 1995).

Under Rule 24, the proposed intervenor bears the burden of demonstrating that it is entitled to intervene. *Michaels Stores, Inc. v. Castle Ridge Plaza Associates*, 6 F.Supp.2d 360, 364 (D.N.J. 1998) *quoting Petrol Stops Northwest v. Continental Oil Co.*, 647 F.2d 1005, 1010 (9th Cir.), *cert.*

denied, 454 U.S. 1098, 102 S.Ct. 672, 70 L.Ed.2d 639 (1981); *see also, In re Cendant Corporation Securities Litigation*, 109 F.Supp.2d 273, 276 (D.N.J. 2000).

In this case, 138 Brayton's motion to intervene should be granted as a matter of right because: (1) its motion is timely; (2) it has a sufficient interest in the litigation; (3) there is a tangible threat that its interests will be impaired or affected by the disposition of this action; and (4) its interests are not adequately represented by any of the current defendants in the action.

A. Timeliness of the Motion

The determination of whether an application to intervene is timely is "determined from all the circumstances." *Mountain Top*, 72 F.3d 361, 369 *citing In re Fine Paper Antitrust Litigation*, 695 F.2d 494, 500 (3d. Cir. 1982). Specifically, the courts have enumerated three factors: (1) the stage of the proceeding in which the motion to intervene is filed; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay. *Mountain Top*, 72 F.3d at 369 *citing In re Fine Paper Antitrust Litigation*, 695F.2d at 500.

Courts have found that where an application to intervene has been made when a case is in its preliminary stages, the original parties to the litigation cannot have suffered any prejudice as a result and the motion to intervene shall be considered timely. *Michaels Stores, Inc.* 6 F.Supp.2d at 364; *see also, Mountain Top*, 72 F.3d at 369-70 (holding that a motion to intervene is timely if filed prior to any substantive proceedings having taken place).

This case is certainly in its preliminary stages. East Hill filed its complaint on November 3, 2003. The Planning Board filed its answer on November 26, 2003 and the City of Englewood filed its answer on December 2, 2003. A scheduling conference was held on February 17, 2004 and a Scheduling Order was entered by the Court on February 18, 2004. The proposed intervention of 138 Brayton was, on information and belief, discussed at the Rule 16 conference and the Scheduling

Order states that all fact discovery shall be completed by May 17, 2004 and a status conference is scheduled for May 21, 2004. *See* Scheduling Order dated February 18, 2004, Exhibit D to Rosen Decl.

In *Michaels Stores, Inc. v. Castle Ridge Plaza Associates*, 6 F.Supp.2d, 360 (D.N.J. 1998), the Court, citing the fact that the case -- which was filed less than three months prior to the proposed intervention -- was only in its preliminary stages, held that the motion was certainly timely made. 6 F.Supp.2d, 360, 364. Furthermore, in *Michaels Stores, Inc.*, summary judgment motions were already filed. 6 F.Supp.2d, 360

At the time of the filing of this motion, this case was filed approximately four months ago and is still in its preliminary stages. Fact discovery is not due until May 17, 2004, and the parties to this action would not suffer any prejudice if 138 Brayton were permitted to intervene in this action. Accordingly, 138 Brayton's motion to intervene must be considered timely.

B. <u>Sufficient Interest in the Litigation</u>

To justify an intervention as a matter of right, the applicant must have an interest "relating to the property or transaction which is the subject of the action" that is "significantly protectable." *Kleissler*, 157 F.3d at 969 *citing Donaldson v. United States*, 400 U.S. 517, 531 (1971). While courts have not given specific definitions at to what constitutes a significantly protectable interest in an action, several guidelines have emerged. *Kleisser*, 157 F.3d 964. The primary inquiry is whether the proposed intervenor's interest is "direct or remote." *Id.* At 972.

Intervenors should have an interest that is "specific to them, is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought." *Id.* The applicant's interest must be "a legal interest as distinguished from interests of a general and indefinite character" and the applicant must demonstrate that there is a "tangible threat to a legally cognizable interest"

Mountain Top, 72 F.3d at 366. The interest may not be "remote or attenuated." *Kleisser* at 972. Additionally, intervention is not limited to only those parties who would be legally bound as a matter of *res judicata*. *Id.* at 970.

In this case, 138 Brayton's interest in the litigation is not only direct, but has been continuous since early 2000. In fact, this instant action would not even be before this Court if it were not for 138 Brayton's efforts to represent their legal interests before the Planning Boards and in the State Court Litigation.

138 Brayton is composed entirely of shareholders who live adjacent to or within a block of the East Hill property. Based on the shareholder's proximity to the East Hill property, they have a vested, tangible interest in the outcome of this litigation.

The decisions that are reached concerning the tent will affect the quality of life and the value of the shareholder's residences. Furthermore, 138 Brayton's concerns regarding East Hill are amplified because of the shareholders proximity to the East Hill property. For example, they are most affected by the noise created by the setting up and taking down of the tents and they are also most affected by the cars that are displaced to the street because of the tent in the parking area. East Hill's activities cause significant dislocations to the shareholders of 138 Brayton and interfere with their quiet enjoyment of their property.

Implicit in Rule 24(a) is that "interests in property are the most elementary type of right that Rule 24(a) is designed to protect." *Wright & Miller,* § 1909 at 272-274. 138 Brayton's interest in protecting their neighborhood and property, in particular, is exactly the type of interest contemplated to be protected by Rule 24 (a). Accordingly, 138 Brayton has a sufficient interest in this litigation to proceed.

C. The Impairment of Interest

The impairment of interest element of Rule 24(a) requires the court to assess the "practical consequences of the litigation." *Development Finance Corporation*, 54 F.3d 156, 162 (3d. Cir. 1995). "Incidental effects on legal interests are insufficient; rather there must be a tangible threat to the applicant's legal interest." *Id. citing Brody v. Spang*, 957 F.2d 1108, 1122-23 (3d. Cir. 1992). For example, this factor may be satisfied if "a determination of the action in the applicants' absence will have a significant stare decisis effect on their claims, or if the applicants' rights may be affected by a proposed remedy. *Brody* at 1123 *citing Harris v. Pernsley*, 820 F.2d 592, 601 (3d. Cir. 1987).

It is not necessary that an applicant prove that they would be "barred from bringing a later action or that intervention constitutes the only possible avenue of relief." *Brody* at 1123. Additionally, the possibility "of a subsequent collateral attack does not preclude an applicant from demonstrating that their interests would be impaired should intervention be denied." *Id.* Such a holding would reverse the court's policy preference which, as a matter of "judicial economy, favors intervention over subsequent collateral attacks." *Id.*

When a court has found that an applicant possesses a legal interest in an action, then it "naturally follows that such an interest would be affected by the litigation." *Id.* Accordingly, because 138 Brayton has a legal interest in the instant action, it naturally follows that their interest would be affected by this litigation. 138 Brayton's interest in this litigation is anything but incidental. As previously outlined, all of the shareholders of 138 Brayton live in close proximity to the East Hill property meaning they are most affected by the events and activities which take place at the East Hill property – events and activities that will be affected by any remedy fashioned by the Court in this litigation.

The Court should also take note that the case before it is directly a result of 138 Brayton's efforts before the Planning Board and in the State Court Litigation. It was the shareholders of 138 Brayton who initially challenged the Planning Board's site plan approval of East Hill in July of 2000 when they commenced their lawsuit in the Superior Court of New Jersey. Although the court upheld the Planning Boards original site plan approval, it was 138 Brayton – and not the Planning Board or the City of Englewood – that filed two motions to enforce litigant's rights to protect its interests. It was only after this matter was remanded to the Planning Board by the state court, did the Planning Board pass a resolution that is at issue in the instant litigation.

Because this case poses a tangible threat to 138 Brayton's legal interest, 138 Brayton meets the impairment of interest element of Rule 24(a).

D. Adequacy of Representation

The Supreme Court stated that "the requirement of the Rule is satisfied if the applicant shows that representation of his interest *may be* inadequate; and the burden of making that showing should be treated as *minimal*." *Mountain Top* at 368 *(emph. added) citing Trbovich v. United Mine Workers*, 404 U.S. 528 (1972). It has been noted as follows:

> The most important factor in determining adequacy of representation is how the interest of the absentee compares with the interest of the present parties. If the interest of the absentee is not represented at all, or if all existing parties are adverse to him, then he is not adequately represented. If his interest is identical to that of one of the present parties, or if there is a party charged by law with representing his interest, then a compelling showing should be required to demonstrate why this representation is not adequate.

Mountain Top at 368.

In circumstances where the government is the representative party, a proposed intervenor may carry a heavier burden, but the inquiry remains case specific. *Assoc. for Fairness in Business v. New Jersey, Inc.*, 193 F.R.D. 228, 231 (D.N.J. 2000). That presumption notwithstanding, "when an

agency's views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it, the burden is comparably light." *Kleissler,* 157 F.3d at 972. Rule 24 demands flexibility when dealing with the myriad situations in which claims for intervention arise." *Id.* In *Assoc. for Fairness in Business*, Judge Orlofsky wrestled with whether the beneficiaries of a state-sponsored minority set-aside program should be permitted to intervene as defendants in a lawsuit against the state by a group whose members supply goods and services. At the time the intervention motion was made, the state was considering whether to compromise its position by entering into a consent decree. While such a compromise would not necessarily mean the State failed to diligently pursue its case against the Association, Judge Orlofsky noted that state officials had publicly expressed reservations about defending the minority set-aside program. Judge Orlofsky noted, citing *Kleissler*, that governmental entities may have to make tactical decisions on individual cases to avoid rulings that would hold sweeping negative effects for these programs generally. He pointed to a newspaper article in which the state Attorney General was quoted as casting doubt on the wisdom of defending this particular program. 193 F.R.D. at 231-232.

Similarly in this case, sympathy for East Hill's position is likely to compromise the City's defense of the Planning Board decision. Michael Wildes, the mayor of Englewood, was quoted in the November 28, 2003 edition of the *Jewish Standard* -- a local Jewish newspaper -- as saying he had asked the city attorney if the city "could default unresponding, because I don't want us to incur litigation costs, and because I question the propriety of the planning board's decision to limit the number of tents to the number they did." *See* Exhibit C to Rosen Decl. While Wildes told the newspaper that the City counsel told him he could not abandon the claim, he made it clear that he did not like the Planning Board decision and would appoint more like-minded people to the Planning

Board who favored religious accommodation and that he would rely on the advice of Nathan Lewin, a well-known Washington D.C. litigator who advocates a more expansive interpretation of the free exercise clause, as he did in representing plaintiffs in the appeal of the recent Tenafly eruv litigation.

In the end, the nature of the government's interest is simply a possible factor in deciding whether the applicant's interest would be adequately represented by the governmental agency. *Cotter v. Mass. Assoc. of Minority Law Enf. Officers*, 219 F.3d 31 (1st Cir. 2000). It does not strain the imagination to conjure up situations in which the City and the Planning Board would face the irresistible temptation to work out settlements that are meant to benefit particular political constituencies, or to avoid the issues presented by the case so they do not surface again, at the expense of the Proposed Intervenors. *See Kleissler* 157 F.3d at 974.

The Court must therefore determine whether the applicants' interests are adequately represented by the defendants in the action by comparing their respective interests. *Mountain Top,* 72 F.3d 361.

Under this inquiry, 138 Brayton's interest is not and cannot be adequately represented in this matter. Notwithstanding the fact that the Planning Board, in its Answer to East Hill's complaint, named 138 Brayton as an indispensable party, 138 Brayton and the municipal defendants in this action – the Planning Board and the City of Englewood –have been adverse to each other since the inception of East Hill – initially as an objector to the Planning Board and then as an adverse party in a contentious litigation.

In light of the inherent conflict of interest, it would be arbitrary, unfair and unrealistic for this Court to assume that after three years of being an adverse party, the Planning Board and/or the City of Englewood, would or could adopt 138 Brayton's interests and goals in this matter. First, 138 Brayton may take the position that the Planning Board's action in this matter was illegal and that it

had no authority to grant the waiver it granted to East Hill. Second, in light of the fact that it was 138 Brayton that had to file motions to protect its rights and not either of the municipal defendants, there is no reason to assume that either municipal defendant will take a more aggressive stance in defense of the 138 Brayton or the other homeowners in the immediate vicinity of East Hill, their right to quiet enjoyment of their property, and maintenance of their property values. In fact, there is every reason to believe that the municipal entities, which have had tenuous relations with 138 Brayton in the past, will be driven in their litigation strategy by budgetary and political concerns, and will not be zealous advocates on behalf of 138 Brayton's privacy and property interests.

Furthermore, it is unlikely that either defendant municipal entity will aggressively raise or pursue the potential unconstitutionality of the Religious Land Use and Institutionalized Persons Act (42 USC §2000cc) ("RLUIPA"), which plaintiffs have alleged was violated by the Planning Board's actions, although the Planning Board has raised the issue as an affirmative defense. This tack may be very unpopular among religious constituents in the city who favor the federal law.

As a final note, neither of the attorneys representing the municipal entities has specific experience litigating Free Exercise Clause claims involving municipal government. Both Bruce S. Rosen, Esq. and his co-counsel, Professor Noah R. Feldman were most recently special counsel to the Borough of Tenafly in the recent litigation over the erection of an eruv. *Tenafly Eruv Association Inc. v. Tenafly,* 309 F.3d 144 (3d Cir. 2002), *cert. denied* 123 S.Ct. 2609 (2003). Mr. Rosen has previous experience with other cases involving Free Exercise concerns including those on behalf of Orthodox Jewish entities, while Mr. Feldman is an assistant Professor of Law at New York University and a well-known scholar on religion and the law

Clearly, 138 Brayton has satisfied the final element of the Rule 24(a) in that they have demonstrated that their interests and goals cannot be adequately represented by the two municipal defendants in this case.

Based on the fact that 138 Brayton has satisfied all four elements of Rule 24(a), they should be permitted to intervene in this matter as a matter of right.

POINT II

138 BRAYTON STREET, LLC IS ALSO ENTITLED TO INTERVENE AS A MATTER OF DISCRETION

Assuming arguendo that the Court finds that 138 Brayton does not factually meet the criteria to intervene as a matter of right pursuant to Rule 24(a), the Court may use its broad discretion in allowing 138 Brayton to intervene.

Federal Rule of Civil Procedure 24 provides in pertinent part:

"(b) **Permissive Intervention.** Upon timely application anyone shall be permitted to intervene in an action ... (2) when an applicant's claim or defense and the main action have a question of law of fact in common." "The determination to allow intervention is left to the court's broad discretion. *Cooper v. Borough of Wenonah*, 977 F.Supp. 305, 311 (D.N.J. 1997); *see also*, *Brody*, 957 F.2d 1108.

The criteria for permissive intervention are: (1) the motion is timely; (2) the main action has a question of fact or law in common with prospective intervenor's claim; and (3) the intervenor has an independent ground for federal jurisdiction. *In re Cendant Corporation Securities Litigation*, 109 F.Supp.2d 273 (D.N.J. 2000); *see also*, *Beckman Industries, Inc. v. International Insurance Company*, 966 F.2d 470 (9th Cir. 1992). "Permissive intervention is usually allowed by courts when adding the additional party or parties will be the most efficient method of handling the case." *Michaels Stores, Inc.*, 6 F.Supp.2d, 360, 364.

As discussed above, based on the timeliness of the motion and the fact that neither the plaintiff nor the two defendants will be prejudiced if 138 Brayton is permitted to intervene, 138 Brayton's motion must be considered timely.

With regard to the second inquiry, while 138 Brayton has adverse positions to both the plaintiff and municipal defendants, there are common questions of fact and law. The very questions of fact and law at issue in this litigation have been the same issues that 138 Brayton has argued to the Planning Board as objectors and to the state court as an adverse party. The facts and circumstances that give rise to the issues that 138 Brayton has been fighting for since 2000 are at the very core of the instant matter.

Finally, 138 Brayton does have an independent ground for federal jurisdiction. Even aside from the damage that removal of limits on tent erection set by the Planning Board would have on the surrounding properties, plaintiffs have alleged that the Planning Board's actions have violated the Religious Land Use and Institutionalized Persons Act (42 USC §2000cc) ("RLUIPA"). Thus, if plaintiffs prevail in this action under RLUIPA, 138 Brayton will be substantially harmed by a law that 138 Brayton believe unconstitutional.

In light of the fact that 138 Brayton has met the criteria set forth by statute and interpreted in case law for permissive intervention and because the inclusion of 138 Brayton in this matter at this stage of the case would result in the most efficient method of handling the case, 138 Brayton should also be permitted to intervene pursuant to Rule 24(b).

CONCLUSION

For the reasons set forth above, proposed intervenors 138 Brayton Street, LLC respectfully request that its Motion to Intervene be granted.

Dated:

Respectfully submitted,

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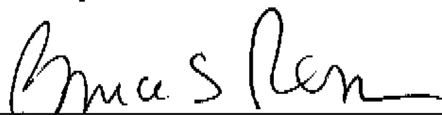

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