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PRELIMINARY STATEMENT

Plaintiffs' Rivendell Winery, LLC and Susan L. Wine (hereinafter "plaintiffs") have brought this lawsuit against defendants Town of New Paltz, Zoning Board of Appeal of the Town of New Paltz, Linda Donovan, Gail Christman, Patricia Schwarts, Robert Hughes, Jeffrey Clock, Thomas Wiacek, Rodney Watrous (hereinafter "New Paltz defendants"), Kevin C. Harp (hereinafter "defendant Harp"), Susan Zimet (hereinafter "defendant Zimet"), and County of Ulster alleging violations of the federal and state constitutional rights. Plaintiffs' Complaint is brought pursuant to 42 U.S.C. §§1983, 1988 and the New York State Constitution.

Specifically, plaintiffs have filed a 75 page complaint asserting various violations of their First Amendment right to petition for redress of grievances, procedural and substantive due process rights, right to equal protection, and conspiracy to deprive them of their constitutional rights.

Defendants County of Ulster and Susan Zimet contend that plaintiffs Complaint fails to state a cause of action for these violations and, as such, should be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure. In particular, plaintiffs have failed to plead facts sufficient to establish municipal liability under 42 U.S.C. §1983, failed to allege a protected liberty interest in support of the substantive due process claim, fail to assert that they were deprived of procedural due process or the ability to petition for redress, and that they have inadequately pled a cause of action for conspiracy.

STATEMENT OF FACTS

_____ This action arises from the denial of plaintiffs' application for site-plan approval by Town of New Paltz defendants and the denial of their request for inclusion in agricultural district No. 2 by the County of Ulster. Plaintiffs' claim that these denials were in violation of their civil rights.

Plaintiffs operated a winery in Ulster County, New York. In 2007 plaintiffs acquired a two-acre parcel in the Town of New Paltz to use in the production and distribution of their wine. Part of the parcel was also to be used to hold private events and for the sale of food and wine of their own production and from New York State wineries in general. Following this acquisition, plaintiffs filed an application with the Town of New Paltz for site plan approval for the proposed use of the property. Upon inspection, the Town Building Inspector determined that a portion of the property would be used as a retail business which was not permitted under the Town's zoning law's definition of "agricultural" use. As such, plaintiffs application was denied.

Plaintiffs challenged this determination by filing an appeal with the Town of New Paltz Zoning Board of Appeals. The Zoning Board of Appeals evaluated the determination made by the building inspector, as well as the proposed site plan, and the statutory definition of agricultural use under the Town's Zoning Code and New York State Agriculture and Markets Law. In doing so, it upheld the denial of plaintiffs' application. See, Attorney Declaration of John W. Bailey, Exhibit "A".

Thereafter, plaintiffs filed an Article 78 action in New York State Supreme Court

challenging the Zoning Board of Appeal's decision alleging that it was arbitrary, capricious, an abuse of discretion, and a violation of Open Meeting Law. See, Attorney Declaration of John W. Bailey, Exhibit "B". Honorable Gerald W. Connolly, dismissed the Petition by Decision and Order dated November 25, 2008. See, Attorney Declaration of John W. Bailey, Exhibit "B". Therein, Judge Connolly upheld the Zoning Board of Appeals determination stating that "petitioner's argument is directly contradicted by the applicable statutes, pursuant to which land used for retail and production is not qualified by State Law for agricultural exemption". See, Attorney Declaration of John W. Bailey, Exhibit "B", p. 8.

While plaintiffs' Petition was pending in State Supreme Court, plaintiffs submitted a request for inclusion in the Ulster County Agricultural District No. 2. As required by New York's Agriculture and Market's Law, plaintiffs request was referred to the County's Agricultural and Farmland Protection Board for review. Thereafter a public hearing was held on June 4, 2008 to allow those interested in the requests a chance to be heard on the subject of their inclusion. See, Attorney Declaration of John W. Bailey, Exhibit "C". Following the public hearing, the County Legislature voted on the inclusion of all requests made. In doing so, County Representative Susan Zimet abstained from voting on the inclusion of plaintiffs' property in the district. See, Attorney Declaration of John W. Bailey, Exhibit "D". The Resolution was not adopted on a 19 to 9 vote. See, Attorney Declaration of John W. Bailey, Exhibit "D".

Plaintiffs now asserts that the denial of their application for inclusion in the

district was driven by political motivations. That unknown individuals met secretly in an attempt to thwart the inclusion of plaintiffs' property in the district. Plaintiffs claim that, had their request for inclusion been granted, they could have then sought redress against the Town of New Paltz zoning ordinance under the State's Agriculture and Markets Law. Plaintiffs allege that in denying their application for inclusion, the County of Ulster and defendant Zimet violated their right to petition the government for redress of grievances, denied them a fair hearing thereby violating their right to procedural due process, acted in a "insidious, spiteful, and malicious" manner thereby violating their right to substantive due process, and conspired against them with the Town of New Paltz defendants.¹ Plaintiffs assert liability under 42 U.S.C. §1983 and New York State's Constitution.

_____ Defendants Ulster County and Susan Zimet contend, as discussed below, that plaintiffs' Complaint fails to plead causes of action for any of the above allegations. Accordingly, defendants seek dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

¹ Plaintiffs Complaint also includes a cause of action for violation of their right to Equal Protection of the Laws. See, Dkt. No. 1, p. 62, ¶321-333. However, this cause of action does not name nor address Ulster County or defendant Susan Zimet.

ARGUMENT

POINT I

**PLAINTIFFS' COMPLAINT AGAINST SUSAN ZIMET
INDIVIDUALLY SHOULD BE DISMISSED.**

A. Plaintiffs' Complaint Fails to Allege Personal Involvement by Defendant Zimet in Violating Their Constitutional Rights.

In order to bring a claim against a defendant in their individual capacity for a violation of constitutional rights, plaintiffs must assert that the defendant violated their constitutional rights in the course of performing her duties on behalf of the County, and that the defendant, herself, was personally involved in perpetrating the specific violation. See, Gentile v. Republic Tobacco Co., 1995 U.S. Dist. LEXIS 18677 (N.D.N.Y. 1995).

A Complaint which fails to assert such personal involvement is "fatally defective on its face". Alfaro Motors Inc. v. Ward, 814 F.2d 883, 886 (2d Cir. 1987).

Throughout plaintiffs' 353 paragraph complaint, 5 paragraphs relate specifically to defendant Zimet. Dkt. No. 1, p. 26, ¶134-37, 144. Within these paragraphs, plaintiffs contend that defendant Zimet personally called a principal of plaintiffs suggesting that they withdraw their application for inclusion in the district. Plaintiffs contend that this suggestion was based upon personal and financial motivation. Dkt. No. 1, p. 26, ¶137. Thereafter, plaintiffs' Complaint alleges that they voluntarily withdrew their application. Dkt. No. 1, p. 26, ¶136. Plaintiffs then contend that they were damaged when, upon re-submission, their application for inclusion was denied by the County. Dkt. No. 1, p. 26, ¶134-37, 144. Plaintiffs do not allege any other conduct specifically attributable to

defendant Zimet nor do plaintiffs' allege that defendant Zimet made any promises that their application would later be granted. Furthermore, plaintiffs specifically assert that defendant Zimet abstained from voting on the inclusion of their property due to a potential conflict of interest.

Ultimately, plaintiffs allege only that defendant Zimet suggested that they withdraw their application. This allegation alone is not a violation of plaintiffs constitutional rights. Plaintiffs' allegations are vague and unspecific and should be dismissed against defendant Zimet individually. Alfaro Motors Inc. v. Ward, 814 F.2d 883, 886 (2d Cir. 1987).

B. Defendant Zimet's Actions as County Representative Are Cloaked in Legislative Immunity.

"Whether immunity attaches turns not on the official's identity, or even on the official's motive or intent, but on the nature of the act in question." Almonte v. City of Long Beach, 478 F.3d 100, 106 (2d Cir. 2007). Where the official acts "in the sphere of legitimate legislative activity" she will be entitled to absolute legislative immunity for those acts. Id. The immunity "is not limited to the casting of a vote on a resolution or bill; it covers all aspects of the legislative process, including the discussions held and alliances struck regarding a legislative matter in anticipation of a formal vote." Id. at 107. "The fact that meetings are politically motivated or conducted behind closed doors, does not take away from the legislative character of the process." Id. citing Tenney v. Brandhove, 341 U.S. 367 (1951).

Plaintiffs allegations rest mainly on the denial by the Ulster County Legislature of their application for inclusion in Agricultural District No. 2. See, Dkt. No. 1. In this respect, plaintiffs' claim that defendants² "communicated behind closed doors" thereby depriving them of any fair application procedure. See, Dkt No. 1. As an initial matter, plaintiffs have not asserted that they had a legal right to attend any of these alleged meetings. Additionally, individual members of a legislative body are permitted to speak outside of the public purview, meet with persons outside the legislature, and to caucus to "form a united position". Almonte, 478 F.3d at 107.

Furthermore, the Second Circuit has specifically held that agreements and discussions between members of a legislative body are cloaked in legislative immunity. See, Almonte, 478 F.3d at 107 (stating "that the discussions and agreements occurred in secret does not strip these activities of their legislative function). Here, the legislature was afforded discretionary power under New York State Agriculture and Markets Law to determine whether to extend an agricultural district. Agr & M L. §303-b(4). Plaintiffs conclusory statements that the unidentified members met behind closed doors to discuss their inclusion in the district does not change the fact that this is a legislative function that will effect the County's current agricultural district and potentially future applications brought by other winery businesses. As such, the County's denial of the application and discussions leading to this determination are immune from liability. See, Almonte, 478

² Plaintiffs do not specify which defendants.

F.3d at 107 (stating that the fact that meetings are politically motivated, or conducted behind closed doors, does not take away from the legislative character of the process) citing Tenney, 341 U.S. at 377 (“holding that the claim of an unworthy purpose does not destroy the privilege).

POINT II

PLAINTIFFS’ COMPLAINT FAILS TO STATE A CAUSE OF ACTION AND SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendants can move to have the Complaint dismissed if said Complaint fails to state a viable cause of action. FED R. CIV. PRO. R. 12(b)(6). In its assessment of such a motion, the Court must view all factual allegations in plaintiff’s Complaint as true, however, such allegations must still be sufficient to establish liability in order for plaintiff’s Complaint to survive.

Chesney v. Valley Stream Union Free Sch. Dist. et al., 2007 U.S. Dist. LEXIS 31644, *7 (E.D.N.Y. 2007) citing Amron v. Morgan Stanley Investment Advisors Inc., 464 F.3d 338, 344 (2d Cir. 2006), King v. Simpson, 189 F.3d 284, 287 (2d Cir. 1999).

“Conclusory statements unsupported by factual assertion or legal conclusions and characterizations couched as factual allegations” contained within plaintiff’s Complaint need not be given credit by the Court in its determination of a Rule 12(b)(6) motion.

Muzio Inc. v. Village of Bayville, 2006 U.S. Dist LEXIS 1886, *9 (E.D.N.Y. 2006) citing Papasan v. Allain, 478 U.S. 265, 268 (1986) and Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236, 240 (2d Cir. 2002). “While the pleading standard is a liberal one, bald

assertions and conclusions of law will not suffice.” Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir.1996).

A district court should grant a motion to dismiss for failure to state a claim under 12(b)(6) when it appears a certainty that a plaintiff can prove no set of facts entitling him to relief. Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). The test is not whether a plaintiff is ultimately likely to prevail, but whether the claimant is entitled to offer evidence to support the claims. Chance v. Armstrong, 143 F3d 698, 701 (2d Cir. 1998).

A. Plaintiffs’ Complaint Fails to State A Cause of Action for Municipal Liability Under 42 U.S.C. §1983.

42 U.S.C. §1983 is a vehicle under which an individual alleging a constitutional rights violation may bring a cause of action. In order for a claim pursuant to 42 U.S.C. §1983 to survive a motion to dismiss, plaintiff “must allege (1) that the challenged conduct was attributable at least in part to a person acting under color of state law, and (2) that such conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States.” Davis v. Reilly, 324 F.Supp.2d 361, 366 (E.D.N.Y. 2004) citing Dwares v. City of New York, 985 F.2d 94, 98 (2d Cir. 1993).

Where plaintiffs seek to hold a municipality liable pursuant to 42 U.S.C. §1983, they must plead a custom or policy on behalf of the municipality which evidences deliberate indifference to the constitutional rights of its citizens. Hazan v. City of New York, et al., 1999 U.S. Dist. LEXIS 10499, *5 (S.D.N.Y. 1999). Such custom or policy

can be established if plaintiff can show that a final policymaker committed or commanded the constitutional violation. Jeffes v. Barnes, 208 F.3d 49, 61 (2d Cir. 2000). “[The] mere assertion that a municipality has such a custom or policy is insufficient in the absence of allegations of fact tending to support such an inference”. Oparaji v. City of New York, 1998 U.S. App. LEXIS 14967, 3-4 (2d Cir. 1998).

Furthermore, a civil conspiracy complaint under §1983 against a municipality also requires allegations that constitutional rights were violated pursuant to an official policy or custom. Formica v. Town of Huntington, 1996 U.S. App. LEXIS 31031 (2d Cir. 1996).

Plaintiffs’ Complaint specifically addresses the policy/custom requirement of 42 U.S.C. §1983. Dkt. No. 1, p. 42, ¶218-22. In this respect, plaintiffs allege that defendants Town of New Paltz, Donovan, Christman, Schwartz, Hughes, Clock, Wiacek, and Watrous were policy making officials and acted pursuant to Town policy. Id. Plaintiffs do not allege that Ulster County acted pursuant to a policy or custom. Neither do plaintiffs allege that they were deprived of a fair opportunity to submit their application for inclusion in the agricultural district pursuant to a policy or custom of Ulster County. Furthermore, plaintiffs do not allege that defendant Zimet is a policy-making official or that she acted pursuant to a policy or custom of the County. In fact, defendant Zimet is only one County representative among thirty-three. She has no authority to create policy on behalf of the County on her own.

While plaintiffs name John Doe and Jane Doe and assert that they are officials

and/or employees of the Ulster County, they do not allege that they are policy-making officials or that they acted pursuant to policy/custom. Furthermore, plaintiffs' complaint does not make any factual allegations against the John and Jane Does. Ultimately, plaintiffs' complaint is devoid of any basis upon which they can assert municipal liability under 42 U.S.C. §1983. Hazan, 1999 U.S. Dist. LEXIS at *5.

B. Plaintiffs Have Failed to Plead a Cognizable Violation Right to Petition for Redress of Grievances

Plaintiffs' first and second causes of action alleges that their right to petition the government for redress of grievances was violated by County Defendants. Specifically, plaintiffs claim that they possessed a clearly established right to petition the County of Ulster for the inclusion of their premises within the County's agricultural district. Dkt. No. 1, p. 43, ¶225. Plaintiffs further allege that from Constitutional perspective, the filing of their application for inclusion in the district "falls squarely within the protection of plaintiffs' First Amendment right to petition government for redress of grievances". Dkt. No. 1, p. 44, ¶229-30. In this respect, plaintiffs claim that their First Amendment right to petition was violated when the County allegedly deprived them of a fair procedure in processing their application. Dkt. No. 1, p. 44, ¶231. Plaintiffs continue to allege that had their application been granted by the County they would have had a statutory right to request that the Commissioner of Agriculture order the Town of New Paltz to cease its alleged interference in its business operations. Dkt. No. 1, p. 45, ¶235.

The above allegations fail to state a cause of action for violations of plaintiffs right

to petition and should be dismissed as a matter of law. Ridgeview Partners LLC v. Entwhistle, 2007 U.S. App. LEXIS 15940, 2 (2d Cir. 2007). “The right to complain to public officials and to seek administrative and judicial relief from their actions is protected by the First Amendment.” Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 91 (2d Cir. 2002). However, this right does not “translate into a duty upon government to act”. Greene v. Town Bd. Warrensburg, 159 A.D.2d 781, 782 (3d Dep't 1990).

Here, the crux of plaintiffs’ claim is that the County denied its application for inclusion in the agricultural district. Despite plaintiffs’ assertions, an application for inclusion in an agricultural district is not the equivalent of a complaint to public officials or petition for administrative relief or judicial relief from official actions. Ridgeview Partners LLC, 2007 U.S. App. LEXIS at 2.

In Ridgeview Partners, plaintiff also asserted a violation of its First Amendment right to petition. 2007 U.S. App. LEXIS at 1-2. Specifically, plaintiff alleged that his right to petition the government for redress of grievances was violated by the Town of Greenville’s refusal to entertain a site-plan application. Id. at 2. The Second Circuit dismissed plaintiff’s claim holding that the submission of the application does not “purport to complain to public officials or to seek administrative or judicial relief from their actions”. Id. The Court held that, at most, plaintiff was alleging that the Town “refused to consider or act upon grievances” which was not a violation of its First

Amendment right to petition. Id.

Here, the Court faces the same situation. Plaintiffs' cause of action predicated on its right to petition rests solely on the denial of its application for inclusion in the agricultural district. The application, in and of itself, does not seek relief from government actions. Plaintiffs contend that if the application was granted *then* they would have the right to request such relief from the Commissioner of Agriculture. In making this contention plaintiffs evidence that they have not yet petitioned for redress of grievances, only that they would *intend* to do so.

New York State Agriculture and Markets Law does not afford plaintiffs the *right* to have their request for inclusion granted. Agr & M L. §303-b. It only requires that a County consider such requests during its review of the district. Id. The statute allows for the determination of inclusion to be adopted or rejected in the discretion of the County Legislature. Id. As such, there plaintiffs have no "right" of inclusion in the agricultural district. More to the point, however, is that an application for inclusion in an agricultural district is not a petition for redress of grievances and simply stating so does not create a cause of action for same. Ridgeview Partners LLC, 2007 U.S. App. LEXIS at 2.

C. Plaintiffs Have Failed to Plead a Cognizable Violation of Their Due Process Rights.

i. Plaintiffs' procedural due process allegations fails to state a cause of action

In order to allege a procedural due process claim, plaintiff must allege that "(1)

that [he] possessed a cognizable liberty interest, and (2) that the defendants deprived [him] of that same liberty without providing process adequate to justify their actions. Velez v. Levy, 401 F.3d 75, 87 (2d Cir. 2005) citing DiBlasio v. Novello, 344 F.3d 292, 302 (2d Cir. 2003). “At a minimum, due process requires that the government provide ‘notice reasonably calculated, under all circumstances,’ to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Id., citing Weinstein v. Albright, 261 F.3d 127, 134 (2d Cir. 2001). Where a complaint does not allege the above, a claim for procedural due process will not be inferred. Ferran v. Town of Nassau, 471 F.3d 363, 369 (2d Cir. 2006).

The Due Process Clause of the Fourteenth Amendment, which imposes the same restraints on the state that the corresponding clause of the Fifth Amendment imposes on the national government, prohibits "any State [from] depriving any person of life, liberty, or property, without due process of law . . ." No right to due process arises, under this language, except where a state undertakes to deprive a person of one or more of the three interests specified: life, liberty, or property. Inmates of the Orient Correctional Institute v. Ohio State Adult Parole Authority, 929 F.2d 233, 235 (6th Cir. 1991).

Plaintiffs claim that they were denied their alleged right to pursue its lawful business and develop their land to their own economic advantage. Dkt. No. 1, p. 52, ¶272-73. Plaintiffs claim that specifically they were denied a fair procedure in the application due to defendants interference with their application and engagement in “behind closed doors” conversations for “personal, economic and/or political reasons”.

Dkt. No. 1, p. 53, ¶276-78.

Pursuant to §303-b of the Agricultural and Markets Law, Ulster County was required to designate a 30-day period for land owners to submit requests for inclusion in a agricultural district. Agr & M L. §303-b. At the end of the 30-day period, the County refers the requests to its Agricultural and Farmland Protection Board. Id. The Board then, within 30-days of referral, reports it recommendations to the County and a notice of public hearing on the inclusion is published. Id. After the public hearing, the County must adopt or reject the request for inclusion. Id. The recommendations of the Board are entirely advisory and it is within the County Legislature's discretion to accept or reject them. Agr & M L. §§ 302, 303, 303-b

Plaintiffs' Complaint does not allege that the County did not follow the procedures outlined above and required by state statute. In fact, such cannot be alleged as defendant Ulster County did accept requests for inclusion in the districts, it did, by Resolution dated May 14, 2008, set a public hearing as required by statute, and following said public hearing, it voted to accept or reject the requests. See, Attorney Declaration of John W. Bailey, Ex "C". Plaintiffs' Complaint does not allege that they were not permitted to attend or speak at the requisite public hearings. Furthermore, as acknowledged by plaintiffs, the only County legislature named in this lawsuit and alleged to have any personal interest in plaintiffs' application, recused herself from voting on plaintiffs' application for inclusion in the district. See, Attorney Declaration of John W. Bailey Ex "D".

Plaintiffs' allegations rest solely on alleged closed-door discussions between unidentified individuals regarding their application. They claim that these alleged discussions resulted in an unfair denial of their application for inclusion. As noted in Point I(B) *supra*, any such discussions are cloaked by legislative immunity. If such discussions, when all statutory requirements have been met, could result in liability for municipalities and legislators, the entire legislative process would be brought to a halt. Plaintiffs simply make conclusory allegations that procedural due process rights were violated without actually alleging exactly what procedure, required by law, the County failed to comply with. Simply because plaintiffs are afforded the right to a public hearing does not mean that they are afforded the right to have their application granted. As noted above, Agriculture and Markets Law makes this decision discretionary. If the State Legislature wished to impose further structure or guidelines on the decision making process it would have done so. Furthermore, where a "pre-deprivation" hearing has been afforded, such as the public hearing in this case, and a post-deprivation Article 78 proceeding is available, courts have held that the requirements of due process are satisfied. Manbeck v. Town of Lewisboro, 2009 U.S. App. LEXIS 11524, 4 (2d Cir. 2009) citing Rivera-Powell v. New York City Bd of Elections, 470 F.3d 458 (2d Cir. 2006). Accordingly, plaintiffs claims for violation of their procedural due process rights fail as a matter of law. See, Manbeck, 2009 U.S. App. LEXIS at 4 (rejecting plaintiffs due process argument that defendant prejudged plaintiffs' claims, because the it had a "pecuniary interest in finding violations" as plaintiffs were afforded a "pre-deprivation"

hearing and entitled to file an Article 78 “post-deprivation” proceeding).

ii. Plaintiffs’ substantive due process allegations fails to state a cause of action

“Substantive due process’ prevents the government from engaging in conduct that ‘shocks the conscience,’ or interferes with rights ‘implicit in the concept of ordered liberty.” Siegel v. La Guardia Cmty. College, 2006 U.S. Dist. LEXIS 22931 (E.D.N.Y. 2006) citing United States v. Salerno, 481 U.S. 739, 746 (1987). In order to state a claim for a substantive due process violation, plaintiffs must allege that (1) they had a valid property interest and (2) that the County’s infringed that interest in an arbitrary and outrageous manner. O’Mara v. Town of Wappinger, 485 F.3d 693, 700 (2d Cir. 2007).

Where plaintiffs’ claim a violation based on an interest in a land-use benefit, plaintiffs must have a “clear entitlement” to the benefit. Id. In such situations, there must be “no uncertainty regarding [plaintiffs] entitlement to [the benefit] under applicable state or local law, and the issuing authority had no discretion to withhold it in [plaintiffs] particular case”. Id. citing Natale v. Town of Ridgefield, 170 F.3d 258 (2d Cir. 1999).

As the “proper focus for the entitlement analysis is on the degree of official discretion and not on the probability of its favorable exercise, the question of whether an applicant has a property interest will normally be a matter of law for the court.” Clubsides, Inc.v Valentin, 568 F.3d 144, 152-53 (2d Cir. 2006). “Even if in a particular case, objective observers would estimate that the probability of issuance was extremely high, the opportunity of the local agency to deny issuance suffices to defeat the existence of a

federally protected property interest.” Id. at 153.

Plaintiffs’ do not have a “clear entitlement” to inclusion in the Ulster County Agricultural District No. 2. As noted above, “clear entitlement” requires that the issuing authority have no discretion. O’Mara, 485 F.3d at 700. This is simply not the case in the expansion of agricultural districts. See, Agr & M. L. §303-b. First, as the statute is written, land owners only have a right to *request* inclusion in a district, not to be included. Agr & M. L. §303-b(1). Second, the statute then specifically affords the legislative body the right to “adopt or reject the inclusion of land requested”. Agr & M. L. §303-b(4). The statute does not provide that the legislative body must provide a reason for its rejection nor does the statute provide for any type of redress if the request is rejected. See generally, Agr & M. L. §303-b. The discretion of the legislature to adopt or reject plaintiffs application, in and of itself, defeats plaintiffs substantive due process claim as a matter of law. Clubsides, Inc. v Valentin, 568 F.3d 144, 152-53 (2d Cir. 2006).

D. Plaintiffs Have Failed to Plead a Cognizable Violation of Their Equal Protection Rights

To state a claim under the Equal Protection clause for selective enforcement, a plaintiff must allege that: (i) the person, compared with others similarly situated, was selectively treated; and (ii) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious bad faith intent to injure a person. Economic Opportunity Comm'n of Nassau County, Inc. v. County of Nassau, 106 F. Supp. 2d 433,

439 (E.D.N.Y. 2000) citing Crowley v. Courville, 76 F.3d 47, 52-53 (2d Cir. 1996); Zahra v. Town of Southold, 48 F.3d 674, 683-84 (2d Cir. 1995); LaTrieste Restaurant & Cabaret, Inc. v Village of Port Chester, 40 F.3d 587, 590 (2d Cir. 1994); Bower Assocs. v. Town of Pleasant Valley, 2 N.Y.3d 617, 632 (2004). “Without an allegation that other persons similarly situated were treated differently, the "equal" portion of the Equal Protection clause becomes meaningless”. Id.

Plaintiffs sixth and seventh causes of action allege that their rights to equal protection of the laws was violated. Dkt No. 1, pp. 62-65. These causes of action are devoid of any allegations against the Ulster County or defendant Zimet. Plaintiffs allegations state only that they were denied equal treatment under the Town Code of the Town of New Paltz. Dkt. No. 1., pp. 62-65. As such, plaintiffs do not state a cause of action against Ulster County or defendant Zimet for violation of their right to equal protection.

Furthermore, even if defendants were specifically named in these causes of action, plaintiffs have failed to allege how Ulster County and defendant Zimet treated them differently from other similarly situated land owners, particularly those operating retail businesses with a liquor license on their properties. While plaintiffs do list a series of properties they claim are similarly situated, they do so claiming that the Town’s zoning code was selective enforced against them. They do not state how these properties are alike for the purposes of the County’s agricultural district or that the County’s treatment of plaintiffs’ application was any different then that of the listed properties. Plaintiffs

failure to specifically outline such items requires dismissal of any cause of action that could have been implied against the Ulster County or defendant Zimet. Sound Aircraft Servs. v. Town of E. Hampton, 192 F.3d 329, 335 (2d Cir. 1999)(stating that generalized allegations are insufficient to state a cause of action under the equal protection clause).

E. Plaintiffs' Complaint Fails to State a Cause of Action for Conspiracy

To control frivolous conspiracy suits under §1983, federal courts require that the complaint state with specificity the facts that show the existence and scope of the alleged conspiracy. Slotnick v. Staviskey, 560 F.2d 31, 33 (1st Cir. 1977). In order to survive a motion to dismiss, a plaintiff's §1983 conspiracy claim must allege "(1) an agreement between a state actor and a private party; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." Robbins v. Cloutier, 2005 U.S. App. LEXIS 1962, 4-5 (2d Cir. 2005) citing Ciambriello v. County of Nassau, 292 F.3d 307, 324-25 (2d Cir. 2002).

A plaintiff "should make an effort to provide some details of time and place and the alleged effect of the conspiracy. Thus complaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct." Id citing Dwares v. City of New York, 985 F.2d 94, 99-100 (2d Cir. 1993).

Plaintiffs eighth cause of action is that the defendants conspired to violate their civil rights. See, Dkt. No. 1, p. 66, ¶346-353. Despite the fact that plaintiffs' complaint

is 76 pages long and 353 paragraphs deep, their allegations pertaining to claims of conspiracy are vague. Plaintiffs simply state that “each and all of the defendants conspired with and among each other in order to violate the plaintiffs’ rights...” Dkt. No. 1, p. 66, ¶347. Plaintiffs attempt to expand upon this by stating that “acting under the direction of, and in conspiracy with, defendant Harp, the remaining defendants conspired amongst and between each other to unlawfully deprive the plaintiffs, either directly or indirectly, of their [rights]”. Dkt. No. 1, p. 66, ¶348. While, the factual allegations in plaintiffs’ Complaint alleged closed-door meetings, it does not specify which defendants met with whom or when these meetings occurred. Overall, plaintiffs provide no specificity regarding their conspiracy claims and only make conclusory statements that defendants conspired to deprive them of their constitutional rights. Plaintiffs have not alleged an agreement between the parties nor have they specifically alleged any overt acts. See, Robbins, 2005 U.S. App. LEXIS at 4-5 (outlining the requisite elements for a cause of action for conspiracy). Plaintiffs’ vague and conclusory allegations are insufficient to state a cause of action for conspiracy and should be dismissed. Robbins v. Cloutier, 2005 U.S. App. LEXIS 1962, 4-5 (2d Cir. 2005); Flores v. Levy, 2008 U.S. Dist. LEXIS 72328, 23(E.D.N.Y. 2008) citing Ciambriello v. County of Nassau, 292 F.3d 307, 325 (2d Cir. 2005).

POINT III

**PLAINTIFFS DEMAND FOR INJUNCTIVE RELIEF
IS IMPROPER AND SHOULD BE DENIED**

Plaintiffs have demanded permanent injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure so as to compel Ulster County to include plaintiffs property in the County's Agricultural District No. 2 and enjoin defendants from interfering with plaintiffs efforts to secure "any form of approval or license" associated with the use of their property. While plaintiffs state they are seeking a permanent injunction, Rule 65 speaks to preliminary injunctions and temporary restraining orders. Fed.R.Civ.Pro. R. 65. In order to be awarded a permanent injunction plaintiff must succeed on the merits of their case and "show the absence of an adequate remedy at law and irreparable harm if relief is not granted". Roach v. Morse, 440 F.3d 53, 56 (2d Cir. 2006).

Here, plaintiffs do have an adequate remedy at law. Plaintiffs had the ability to bring an Article 78 action against the Ulster County under its arbitrary and capricious standard. NY CPLR Art. 78. Plaintiffs did so against the Town of New Paltz Zoning Board of Appeals but chose not to do so with respect to its application that was before the County legislature. Moreover, plaintiffs do not allege that they will suffer irreparable harm if they are not included in the agricultural district. See, Fisher Fisher Scientific Co. v. City of New York, 812 F. Supp. 22, 26 (S.D.N.Y. 1993)(denying plaintiffs demand for injunctive relief due to the failure to show irreparable harm). Accordingly, plaintiffs'

request for injunctive relief should be denied.

CONCLUSION

Based on the foregoing it is respectfully requested that the Court grant defendants' motion pursuant to F.R.C.P. 12(b)(2), dismissing plaintiff's Complaint in its entirety, with prejudice.