

STATEMENT OF FACTS

The operative facts applicable to the instant motion to dismiss are related in the Rice Declaration, dated July 2, 2009, and the Town respectfully refers the Court thereto. However, the Town wishes to comment on a number of erroneous or misleading representations made in the Plaintiffs' Statement of Facts.¹

Plaintiffs represent that the term "agriculture" is not specifically defined in § 140-4 of the Zoning Law (p. 4). However, as is related at length in the moving papers, § 140-4, the definitions section, explicitly provides that if a term is not specifically defined in the definition section, the definitions of words set forth in other parts of the Zoning Law applies. Sections 140-134 and 140-117.3 identically and explicitly define the term "agriculture." Hence, as was determined by Supreme Court in the Article 78 proceeding, the Building Inspector and Zoning Board of Appeals correctly applied those definitions to the subject property.

Plaintiffs also seek to imply that more than farming is permitted in stating that agriculture is a use permitted by right in the zoning district (p. 4). Although agriculture, that is, farming, is permitted on Plaintiffs' property, associated commercial uses are not.

In addition, although the purported statement of the Planning Board Chairman that the use, however it may have been described to him, was permissible (p. 4), appears to have scant relevance to Plaintiffs' arguments, the opinion of a Planning Board Chairman or, for that matter, of a Planning Board as a whole is legally irrelevant as to the interpretation of a zoning law. Such function is exclusively within the jurisdiction of the Building Inspector in the first instance and, on a subsequent appeal, the Zoning Board of Appeals. *See Swantz v. Planning Board of the Village of Cobleskill*, 34 A.D.3d 1159, 824 N.Y.S.2d 781 (3d Dept. 2006); *Jamil v. Village of*

¹ It should be noted that Plaintiffs' recitation of the history of its wineries is not germane on a motion to dismiss and, based on the record in the previous Article 78 proceeding and the Town's understanding, is not entirely accurate.

Scarsdale Planning Board, 24 A.D.3d 552, 808 N.Y.S.2d 260 (2d Dept. 2005); *Gershowitz v. Planning Board of the Town of Brookhaven*, 52 N.Y.2d 763, 765, 436 N.Y.S.2d 612, 613, 417 N.E.2d 1000, 1001 (1980); *J & R Esposito Builders v. Coffman*, 183 A.D.2d 828, 828-829, 584 N.Y.S.2d 73, 74 (2d Dept. 1992); *Rattner v. Planning Commission of the Village of Pleasantville*, 103 A.D.2d 826, 826, 478 N.Y.S.2d 63, 63 (2d Dept. 1984)); MCKINNEY'S PRACTICE COMMENTARIES, Town Law § 274-a (2006 Supplement), (2007 Supplement); *see also* Town Law §§ 267-a(4); 267-b(1).

As is related in the moving papers and below, Plaintiffs' selective quotation of only portions of Building Inspector Wiacek's two letters is misleading and inaccurate. Without any factual basis asserted therefor, Plaintiffs contend that Mr. Harp, who is not a Town official, influenced Mr. Wiacek in some unspecified matter (p. 5-6), for "strictly personal and economic reasons," to change his opinion in the second of his two letters. The contention is not entitled to any credence pursuant to *Twombly* and, as is related above and in the moving papers, has been demonstrated to be specious by a reading of the entirety of Mr. Wiacek's two letters.

Further, the term utilized by Plaintiffs, that is, a "farm winery," is not a term relevant to the Zoning Law but relates to State liquor licensing regulations.

Plaintiffs' reference to Agriculture & Markets Act § 301(11) (p. 6) also is not germane because that section, which defines the term "farm operations" is applicable only to lands included within an agricultural district. Again, the Building Inspector's determination was, as it was required to be, based on the unambiguous definitions in the Zoning Law. The definitions in the Agriculture & Markets were irrelevant. Moreover, Agriculture & Markets Act § 301(4)(i), provides that "land used in agricultural production: includes ""land of not less than seven acres used as a single operation for the production of orchard or vineyard crops when such land is used

solely for the purpose of planting a new orchard or vineyard....” The definition of “land used in agricultural production” further provides that “Land uses in agricultural production shall not include land or portions thereof used for processing or retail merchandising of such crops, livestock or livestock products.” Agriculture & Markets Act § 301(4). Rejecting Plaintiffs’ argument in the Article 78 proceeding that that provision mandated that the entire property is exempt from local zoning, including the processing and retail operations, Supreme Court determined that:

Petitioners’ argument is directly contradicted by the applicable statutes, pursuant to which land used (as their proposed primary initial use of the relevant property) for retail and production is not qualified by State Law for agricultural exemption. The Court further notes the requirement pursuant to § 301(4)(i) that such land be used ‘solely for the purpose of planting a new orchard or vineyard...’ The use of the term ‘solely’ is fully consistent with the overall statutory scheme excluding from the definition ‘...lands or portions thereof used for processing or retail merchandising...’ (*See also* § 301(9)(a)). (p. 8) (emphasis in original).

Similarly, the gratuitous opinion of the Commissioner of the Department of Agriculture and Markets also was not in point because it also related to lands that were within an agricultural district. It does not consider the exclusive governing regulations – the Town Zoning Law. Similarly, the “recommendation” of the County Department of Planning is premised on inapplicable terms of the Agriculture & Markets Act, reliance on a term, “farm winery,” that is irrelevant for purposes of the Zoning Law and intentional disregard for the unambiguous definitions of “agriculture” set forth in the Zoning Law. Indeed, Supreme Court determined that “Having correctly determined pursuant to the relevant statutory definitions that the zoning ordinance prohibits any portion of property in areas zoned for agriculture from being used for processing or retail merchandising of crops, livestock, or livestock products, [the Zoning Board of Appeals and Building Inspector] appropriately denied petitioners’ application for a permit to

use their building for processing grapes and retail merchandising of grape products.” (Exhibit “F” to Rice Declaration, p. 9).

Additionally, Plaintiffs contend that after the Zoning Board of Appeals received “confirmation that the premises would in fact qualify for an agriculture exemption, the defendants still set about to unlawfully prevent the plaintiffs from making as of right agricultural use of their premises.” (p. 13). In fact, as is acknowledged in Plaintiffs’ memorandum of law (p. 12), the Assessor determined that nine acres of the property would qualify for an agricultural exemption. No issue exists with respect to that portion of the property which is intended to be utilized for the growing of crops. Instead, the issue relates solely to the improved portion of the property intended to be used for processing and retail sales. In fact, Plaintiffs’ appeal to the Zoning Board of Appeals related only to the determination of the Building Inspector that the proposed use of the building on the two-acre parcel (86.1/37/12) constituted an impermissible business use and not a permissible agricultural use (ZBA decision p. 1). Despite obfuscation of the controversy, no issue exists with respect to Plaintiffs’ ability to farm, that is, grow grapes, on the other nine acres.

Although the purported improper conduct of the Town Defendants remains obscure with respect to Plaintiffs application for inclusion in the agricultural district, Plaintiffs’ assertion that “To secure these protections [pursuant to the Agriculture & Markets Law], which the respective sections of the Agriculture & Markets Law were explicitly intended to afford them, all the plaintiffs had to do was file an application for, and obtain inclusion in, the County’s existing Agricultural District.” (p. 15), is erroneous. As is related at length in the Town Defendants’ initial memorandum of law (p. 11-12) and confirmed by the decision in *Old St. George’s LLC v. Bianco*, slip op. 08 Civ. 5321 (S.D.N.Y. 2009) (Rice Declaration, Exhibit “G”), inclusion in an

agriculture district is far from a perfunctory, ministerial decision and requires the discretionary approval of numerous decision makers.

POINT I

STANDARD FOR SUFFICIENCY OF COMPLAINT

As was related in the Town Defendants' initial memorandum of law, in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561 (2007), the Supreme Court explicitly abrogated the previous standard of *Conley v. Gibson*, 355 U.S. 41 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (*quoting Conley*, 355 U.S. at 45-46). In *Aschroft v. Ibaqal*, 129 S.Ct. 1937, 1949-50, 1953 (2009), the Supreme Court reaffirmed the principles announced in *Bell Atlantic* and further confirmed that *Bell Atlantic* applies to all civil actions and proceedings.

Despite unambiguous Supreme Court precedent, all of the decisions relied upon by Plaintiffs predate *Twombly* and *Aschroft* in suggesting an erroneous standard of review for examining the sufficiency of a complaint. Moreover, contrary to Plaintiff's contention, consistent with the holding of *Aschroft* that the *Twombly* standard applies to all civil actions, the Second Circuit has specifically applied the *Twombly* pleading standard to claims pursuant to 42 U.S.C. § 1983. *See Ramos v. City of New York*, 298 Fed.Appx. 84, 86-87 (2d Cir. 2008); *see also Gaskins v. Santorum*, 324 Fed.Appx. 147, 149 (3d Cir. 2009); *Brown v. City of Pittsburgh*, 325 Fed.Appx. 57, 59 (3d Cir. 2009); *Dunn v. Prince*, 2009 WL 1024612 at 1 (5th Cir. 2009); *Freeman v. Guy*, 303 Fed.Appx. 358, 360-61 (7th Cir. 2008); *Williams v. Smallwood*, 301 Fed.Appx. 578, 579 (8th Cir. 2008); *Eidson v. State of Tennessee Dept. of Children's Services*, 510 F.3d 631 (6th Cir. 2007).

The complaint is devoid of any fact-based allegations with respect to the operative elements of each of the claims asserted. As compared to the elements of those claims, the complaint does not satisfy the plausibility standard and, it is submitted, must be dismissed.

POINT II

CLAIMS BARRED BY ISSUE PRECLUSION

However denominated, State Supreme Court has repudiated the underling basis for Plaintiffs' claims. Issue preclusion bars a subsequent action if the issue in question was actually and necessarily decided in a prior proceeding and the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding." *Phifer v. City of New York*, 289 F.3d 49, 56 (2d Cir. 2002). Because the underling factual predicate for the instant action was fully litigated, adversely to Plaintiff's claims, those issues are barred from relitigation. *See Dyno v. Village of Johnson City*, 240 Fed.Appx. 432 (2d Cir. 2007), *cert. denied*, 128 S.Ct. 1874 (2008); *Wachtmeister v. Swiesz*, 59 Fed.Appx. 428 (2d Cir.), *cert. denied*, 540 U.S. 860 (2003); *Garden City Center Associates v. Village of Garden City*, 189 F.3d 460 (Table), 1999 WL 642782 at 3 n.1 (2d Cir. 1999) ("individual issues actually and necessarily decided in the Article 78 proceeding may be precluded by collateral estoppel in subsequent § 1983 actions."); *Moccio v. New York State Office of Court Admin.*, 95 F.3d 195, 200 (2d Cir.1996). As is described in the initial memorandum of law, State Supreme Court ruled against Plaintiffs on every issue presented by them and Plaintiffs are not bound by those determinations.

POINT III

PLAINTIFFS' CLAIMS ARE NOT RIPE

As is related in the Town's initial memorandum of law, although Plaintiffs sought review of the determination of the Building Inspector that the commercial aspects of the proposed

winery was not a permitted use in the zoning district, they failed to appeal the other aspects of the Building Inspector's determination about which they now complain and failed to seek a variance from the Zoning Board of Appeals. Consequently, they did not obtain a "final decision" and their federal claims are not ripe.

Faced with this preclusive jurisdiction defect, Plaintiffs do not contend that they were not required to seek a variance, but argue that an application for a variance would have been futile because they would have to seek such relief from the same body that denied the basis for their appeal. The endeavor to rehabilitate their claim is specious as a matter of law.

The futility exception is rarely invoked and is characterized as being "narrow." *See Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022, 1035 (9th Cir.2005); *Ecogen, LLC v. Town of Italy*, 438 F.Supp.2d 149, 160 (W.D.N.Y. 2006). A property owner need not pursue such applications only when a zoning agency lacks discretion to grant variances or has dug in its heels and made clear that all such applications will be denied. *See Murphy v. New Milford Zoning Commission*, 402 F.3d 342, 349 (2d Cir. 2005) (citing *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 98-99 (2d Cir.1992), *cert. denied*, 507 U.S. 987 (1993); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 n. 3 (1992)). The Zoning Board of Appeals possesses the authority to grant variances pursuant to Town Law § 267-b. As a result, Plaintiff is relegated to a futility claim that the Zoning Board of Appeals "has dug in its heels and made clear that all such applications will be denied." The complaint fails to establish a futility exception on that basis as a matter of law.

Plaintiffs' futility claim essentially relies on its contention that the Zoning Board of Appeals was hostile to its application. However, "[c]ourts generally have construed this exception quite narrowly." *Tri-State Video Corp. v. Town of Stephentown*, 1998 WL 72331 at 4

(W.D.N.Y. 1998) (citing *Riverdale Realty v. Town of Orangetown*, 816 F.Supp. 937, 940 (S.D.N.Y. 1993)); *Homefront Organization, Inc. v. Motz*, 570 F.Supp.2d 398, 407 (E.D.N.Y. 2008). Although “the ripeness doctrine ‘does not require [plaintiff] to jump through a series of hoops, the last of which it is certain to find obstructed by a brick wall,’ ... the presence of that “brick wall” must be all but certain for the futility exception to apply. *Ecogen*, 438 F.Supp.2d at 160 (quoting *Triple G Landfills v. Board of Commissioners of Fountain County*, 977 F.2d 287, 291 (7th Cir.1992)). The contention that the availability of a permit or variance not sought may be “doubtful” or that a board is “hostile” to an application is insufficient to establish futility. See *Ecogen*, 438 F.Supp.2d at 161; *Manufactured Home Communities*, 420 F.3d at 1035; *Goldfine v. Kelly*, 80 F.Supp.2d 153, 160 (S.D.N.Y. 2000). “[A] sort of inevitability is required: the prospect of refusal must be certain.” *Goldfine*, 80 F.Supp.2d at 159 (quoting *Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (1st Cir.), cert. denied, 502 U.S. 866 (1991)); see also *S & R Development Estates, LLC v. Bass*, 588 F.Supp.2d 452, 463 (S.D.N.Y. 2008); *RKO Deleware, Inc. v. City of New York*, 2001 WL 1329060 (E.D.N.Y. 2001).

Further, unsupported conclusory allegations that a board is hostile to an application or position are insufficient to invoke the futility exception. See *Tri-State*, 1998 WL 72331 at 4 (citing *Xikis v. City of New York*, 1990 WL 156155 (E.D.N.Y. 1990)); *Goldfine*, 80 F.Supp.2d at 160-61; *Dix v. City of New York*, 2002 WL 31175251 at 8 (S.D.N.Y. 2002); *Country View 154 Estates @ Ridge LCC*, 452 F.Supp.2d 142, 154 (E.D.N.Y. 2006).

In *Country View 154 Estates @ Ridge LCC*, statements that “No project” of the plaintiff would happen in the town, “we are not like you people” and plaintiff should “move on,” were not sufficient to satisfy the futility exception. 452 F.Supp.2d at 154. In *Dix*, 2002 WL 31175251 at 8, allegations of disparate treatment and that the defendants issued a Stop Work order,

harassed and intimidated contractors at premises, interfered with the well-established process were inadequate to satisfy the futility exception. In *Homefront Organization, supra*, alleged hostile comments made by defendant evidencing his allegedly unlawful intent to ensure that the plaintiffs' projects were never approved, coupled with the defendants' actions surrounding the application of the SEQRA process, were insufficient to satisfy the futility exception.

Similar, to Plaintiffs' erroneous theory herein, the Court in *S & R Development Estates* determined that the fact that the Zoning Board of Appeals had ruled against the Plaintiff on an appeal did not mean that it would rule against it in a variance application. *See S & R Development Estates*, 588 F.Supp.2d at 463.

The decisions cited by Plaintiff (p. 21-22) provide no support for application of the futility exception herein. Contrary to Plaintiffs' implication, *S & R Development Estates, supra*, concluded that the futility exception was inapplicable in that case. As is related above, *S & R Development Estates*, confirmed that a matter is not ripe if an applicant has not sought a variance. The decision further related that futility was inapplicable unless it is demonstrated that denial of a variance would be "certain." *Id.* The decision in *Easter Seal Society of New Jersey, Inc. v. Township of North Bergen*, 798 F.Supp. 228 (D.N.J. 1992), is not in point and dealt with whether the plaintiff's failure to exhaust administrative remedies barred the granting of a preliminary injunction in the face of irreparable harm and an intransigent municipality. *Sammon v. New Jersey Board of Medical Examiners*, 66 F.3d 639 (3d Cir. 1995), also is not in point because the issue addressed was one of standing. *Reahard v. Lee County*, 30 F.3d 1412 (11th Cir. 1994), does not support Plaintiffs' contention that they have obtained a final decision herein. Unlike the instant Plaintiffs, the plaintiffs in *Reahard* had sought a variance and undertaken an administrative appeal that finally determined the permissible development on the property.

Similarly, *Lauderbaugh v. Hopewell Township*, 319 F.3d 568 (3d Cir. 2002), also confirms that Plaintiffs herein have not obtained a final decision. The Township in *Lauderbaugh* prohibited plaintiff from installing a HUD compliant manufactured mobile home that had been delivered to her property, refused to entertain her appeals and threatened to commence an enforcement action in state court to cause removal of the mobile home. The plaintiff had attempted to avail herself of the appeals process in appealing the revocation of her building permit to the Zoning Hearing Board and an order that she immediately remove her home. She commenced the action only after the Zoning Hearing Board had indefinitely continued her appeals and the Township had informed her that, despite those pending appeals, it would institute state court litigation to remove her home and assess any costs against her. “Thus, this is not a case, like *Sameric*, *Acierno*, and *Taylor*, where a plaintiff’s failure to take advantage of available, subsequent procedures foreclosed any chance that those procedures could resolve the controversy and obviate the need to address the constitutional issues. Instead, Hopewell’s decision to ignore the appeals and enforce its zoning decision by forcing *Lauderbaugh* to pay to move her home has created a justiciable controversy.” *Id.* at 574-75.²

Sections §§ 140-4, 140-117.3 and 140-134 of the Zoning Law (quoted at ¶¶ 36-38 of Rice July 2, 2009 Declaration) clearly dictate the appropriate conclusion reached by the Zoning Board of Appeals. The Zoning Board of Appeals could not have followed the recommendation of the County Department of Planning unless it impermissibly ignored the unambiguous provisions of the Zoning Law. Moreover, the fact that the Zoning Board of Appeals did not sustain Plaintiffs’ appeal does not provide any basis to imply that an application for a variance, governed by a far different standard, would be futile.

² The decision refers to *Sameric Corp. of Delaware v. Corporation of Delaware v. City of Philadelphia*, 142 F.3d 582 (3d Cir. 1998); *Acierno v. Cloutier*, 40 F.3d 597 (3d Cir. 1994) and *Taylor Investment, Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1290 (3d Cir.), *cert. denied*, 510 U.S. 914 (1993).

Moreover, Plaintiffs' endeavor to avoid the final decision requirement by contending that it would not have had to seek a variance if it had been approved for inclusion in the Agricultural District is legally specious. Plaintiffs were subject to the Zoning Law at all times herein. The Town and its officials were required to apply the law as it existed at the time. In any event, Plaintiffs have asserted no factual basis for alleging that Town officials improperly influenced the decision of the County Legislature with respect to Plaintiffs' inclusion in the agricultural district.

Having failed to appeal aspects of the Building Inspector's decision by which they claim to be aggrieved and having failed to seek a variance, Plaintiffs neglected to obtain a final decision. Further, Plaintiffs have not demonstrated any basis for application of the futility exception.

POINT IV

THE COMPLAINT FAILS TO STATE A CLAIM PURSUANT TO THE FIRST AMENDMENT RIGHT TO PETITION GOVERNMENT FOR THE REDRESS OF GRIEVANCES OR ARTICLE I, § 9 OF THE NEW YORK CONSTITUTION

It is submitted that the Town's memorandum of law demonstrates that the complaint fails to state a claim pursuant to the First Amendment Petition Clause or the New York State Constitution because such a claim must be premised on a matter of public concern and not vindication of a personal interest. Faced with preclusive case law, Plaintiffs assert that the "public concern" requirement is confined to public employment situations.

Contrary to Plaintiffs' contention, the "public concern" requirement is not confined to public employment cases and has been applied to land use disputes. In fact, the Second Circuit determined in *Ridgeview Partners, LLC v. Entwhistle*, 227 Fed.Appx. 80 (2d Cir.), *cert. denied*, 128 S.Ct. 668 (2007), that a site plan application was not protected by the Petition Clause. As is

related in the Town's initial memorandum of law (p. 8), the Third and Ninth Circuits have come to the same conclusion. In fact, in *Seymour's Boatyard, Inc. v. Town of Huntington*, 2009 WL 1514610 at 10 (E.D.N.Y. 2009), the Court specifically concluded that "the *right* to apply for a permit plainly does not constitute a *petition* seeking redress of grievances." (emphasis in original).³

Consequently, neither the land use applications made to the Town nor the application for inclusion in the Agricultural District are protected by the Petition Clause and the complaint fails to state a viable claim as a matter of law.

POINT V

PLAINTIFFS LACK A PROPERTY OR LIBERTY INTEREST

As is related in the Town's initial memorandum of law, a property interest cannot exist if a board or agency possesses discretion in reviewing an application for a permit or approval. To the extent Plaintiffs base any of their claims on unspecified actions of the Town Defendants regarding their application for inclusion in an agricultural district, Plaintiffs lack a cognizable property interest in obtaining approval. Moreover, Plaintiffs lack a cognizable property interest in the use of the property for the desired commercial uses or in obtaining site plan or in other Town approvals to do so.

Faced with the preclusive case law cited by the Town, Plaintiffs now contend that they have a property and liberty interest in the "right" to file such applications. The case law is to the

³ Although it is the Town's position that the public concern requirement applies to all species of First Amendment claims, that is, both Petition Clause and retaliation claims, as was noted by the Court in *Seymour's Boatyard*, 2009 WL 1514610 at 10 n.12, the claim in *Hampton Bays Connections, Inc. v. Duffy*, 127 F.Supp.2d 364 (E.D.N.Y. 2001), was not based on the Petition Clause, but was a retaliation claim. *Gagliardi v. Village of Pawling*, 18 F.3d 188 (2d Cir. 1994) and *Dougherty v. Town of North Hempstead Board of Zoning Appeals*, 282 F.3d 83 (2d Cir. 2002) were retaliation, not Petition Clause cases and the issue of "public concern" was not explored in either decision.

contrary.⁴ Repudiating Plaintiffs' argument, the Second Circuit determined in *Zahra v. Town of Southold*, 48 F.3d 674, 681 (2d Cir. 1995), that:

While we acknowledge that, in certain circumstances, a party may have a constitutionally protectible 'property interest' in a benefit that affects land use- i.e. a building permit, certificate of occupancy, zoning variance, excavation permit or business license- see, e.g., *Walz v. Town of Smithtown*, 46 F.3d 162, 168 [(2d Cir.), cert. denied, 515 U.S. 1131 (1995)]; *RRI Realty*, 870 F.2d at 917; *Brady v. Town of Colchester*, 863 F.2d [205] 212-13 [(2d Cir. 1988)]; *Sullivan v. Town of Salem*, 805 F.2d [81,] 84-85 [(2d Cir. 1986)], we do not recognize, at least on the facts of this case, the existence of such a 'property interest' in the procedures giving rise to such an interest.

The Court also determined that “[t]he mere existence of procedures for obtaining a permit ... do not, in and of themselves, create constitutional ‘property interests.’” *Id.* 48 F.3d at 681-82. The Court expressly “declin[ed] to announce a rule that would obligate federal courts to consider endless numbers of the alleged ‘property interests’ arising not from the benefits themselves, but as extensions of existing or sought property interests.” *Id.* at 682. In *Zahra*, the court assumed a protected property interest in a building permit, but did not find a constitutionally protected property right to an insulation inspection, even though the inspection was necessary to the continued use of the permit. The instant matter is far removed from the scenario in *Zahra* because Plaintiffs do not possess a property interest in the discretionary determinations of the Building Inspector in applying the Zoning Law to their property, the discretionary appellate authority of the Zoning Board of Appeals or, had they obtained such approvals, the clearly discretionary site plan review authority of the Planning Board. Not possessing a property interest

⁴ The selective reference to *RRI Realty Corp. v. Village of Southampton*, 870 F.2d 911 (2d Cir.), cert. denied, 493 U.S. 893 (1989) (p. 33), does not represent the unambiguous state of the law. In fact, the Court concluded that the plaintiff in *RRI Realty* did not possess a cognizable property interest in a building permit or the process. Moreover, the selected provisions of the dissent in *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976), being the dissent of two Justices, also clearly is not the state of the law and is not even relevant to the relevant issue in the case.

in the approvals sought, it is incomprehensible that they could possess a cognizable property interest in the process itself.

Similarly, in *Tara Circle, Inc. v. Bifano*, 1997 WL 399683 (S.D.N.Y. 1997), *aff'd*, 173 F.3d 846 (2d Cir. 1999), it was determined that the plaintiffs did not have a property interest in a special permit before it was issued or in the review process itself. *See also Brown v. City of Ecorse*, 322 Fed.Appx. 443, 446 n.7 (6th Cir. 2009); *Experimental Holdings, Inc. v. Farris*, 503 F.3d 514, 519 (6th Cir.2007); *Richardson v. Township of Brady*, 218 F.3d 508, 518 (6th Cir. 2000). Indeed, the universally applicable standard, that is, whether a board possesses discretion in reviewing a land use application, essentially would be rendered a nullity if Plaintiffs' proffered standard were to be accepted.

Additionally, Plaintiffs do not address the further preclusive concept that one cannot possess a property interest in an approval or a permit if the law with respect thereto is unsettled. Although it is submitted that it is clear that Plaintiffs lack any cognizable property interest, the most Plaintiffs can argue is that the law is unclear, a position that, in any event, is fatal to the existence of a property interest.

POINT VI

THE COMPLAINT DOES NOT STATE A PROCEDURAL DUE PROCESS CLAIM

As is related in the Town's initial memorandum of law, the availability of state court review precludes a procedural due process claim. "The availability of such an Article 78 proceeding does away with any alleged procedural due process claim." *Christian v. Town of Riga*, 2009 WL 2567818 at 9 (W.D.N.Y. 2009) (citing *Oblin Homes, Inc. v. Village of Dobbs Ferry*, 935 F.Supp. 497, 499-500 (S.D.N.Y.1996), *aff'd*, 133 F.3d 907 (2d Cir. 1997); *Orange Lake Assoc., Inc. v. Kirkpatrick*, 21 F.3d 1214, 1224 (2d Cir.1994)). Moreover, contrary to

Plaintiffs' unsupported assertion, as is related in the Town's initial memorandum of law (p. 20), courts "review the state process as a whole and do not look only to what happened in front of the Board." *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 328 (4th Cir. 2005), *cert. denied*, 547 U.S. 1039 (2006). Plaintiffs utilized available review in commencing an article 78 proceeding which repudiated their claims. Although, as is discussed below, the complaint is devoid of any adequately pleaded claim of procedural irregularities, the availability of such review precludes any viable procedural due process claim as a matter of law.

Factually, as is related in the moving papers, based upon the allegations of the complaint and the documentary evidence permissibly considered on a motion to dismiss, it is clear that Plaintiffs' theory of undue influence, although insufficient to state a claim, is specious as a matter of law. Plaintiffs place great reliance on the purported change of position by Building Inspector Wiacek. However, as is explained in the moving papers and a review of Mr. Wiacek's two letters (Exhibits B and C), Plaintiffs' characterization and conclusion is utterly repudiated by the terms of those letters. As was previously related, Mr. Wiacek's May 1, 2007 letter stated that:

I want to make it clear to the Board that this is the local zoning and not the State certified, agricultural district that Mr. Ransom has mentioned to the Board. There are some zoning problems that I can foresee. Winery is not specifically mentioned in our zoning [law] but I do agree it is agricultural which is allowed in A-1.5. However it is the additional proposed uses that Mr. Ransom has talked about which I am questioning.

First Mr. Ransom mentioned retail sale of wine from the house. In the zoning code there is a provision for 'Retail sale of agricultural produce grown on the same lot from a road stand' in the A-1.5 district. I would question this because there are no crops being grown on the property at this time and the building on the site does not meet the definition in our zoning for road stands. These are two areas I feel would require a variance from the Zoning Board of Appeals.

Subsequently, by letter dated July 26, 2007, Building Inspector Wiacek advised Wine and Ransom that:

As I stated in my original letter to the Town of New Paltz Planning Board dated May 1, 2007, a Winery or Farm Winery use is not specifically mentioned in the Town of New Paltz Zoning use table 140-8. Based on your project description to the Town of New Paltz Planning Board you state that Rivendell Winery is a 'business that operates under a Farm Winery license from the New York State Liquor Authority.' From this information I can make a determination based on the Town's zoning that it is a 'Retail business or service not otherwise specifically mentioned herein' per section 140-8 and not permitted within the A 1.5 zoning district. * * *

For a use to be classified as agricultural it must meet the definition of the Town of New Paltz Zoning Code. The definition of agriculture is listed in two areas of the Town Zoning code: first under Clearing and Grading Control section 140-117.3 and then under Steep Slopes Protection section 140-134. * * *

It is my understanding that from this definition the Town Assessor must be able to determine that the land on which a use will occur would qualify for an agricultural exemption in the Town in order for it to be called agricultural. I did speak to the Town Assessor and he stated to me that the land must meet the requirements of Ulster County and NYS law for agricultural exemptions and that those requirements are based on Agricultural and Markets law. As per your recommendation I spoke with Danielle Cordier a representative from Ruth Moore's office within the legal department at NYS Agricultural and Markets Department. She informed me that under Ag-Mkts Law section 301-4 which defines 'land used in agricultural production', 'Land used in agricultural production shall not include land or portions thereof used for processing or retail merchandising of such crops, livestock or livestock products.'

Since the Town of New Platz Zoning Code definition of Agriculture refers me to Agricultural and Markets Law then those requirements shall also apply. My understanding of this is that when a building or structure is used for purposes excluded by Ag-Mkts Law section 301-4, the specific portion of land the building is situated on does not qualify for the agricultural exemption because that is where the processing and retail is being performed.

Therefore, the use of the building is not considered an agricultural use by the Zoning Code even though the land around it may be.

In summary of the proposed *Farm Winery*:

- (a) This proposed use of the building is defined as business and not agricultural, and is therefore not permitted in the A 1.5 zone.
- (b) To the extent that the lands could qualify for the agricultural exemption then the lands may be used for agricultural purposes which are permitted in the A 1.5 zone (i.e. vineyards.)

Consequently, Plaintiffs' supposition that Mr. Wiacek changed his opinion based on vaguely implied improper influence is refuted by the documentary evidence. Moreover, Plaintiffs contention that Mr. Harp influenced Mr. Wiacek, in addition to being refuted by a reading of the letters, is utterly devoid of any fact-based allegations sufficient to even raise an issue.⁵

Plaintiffs' reliance on the non-binding "recommendation" of the County Department of Planning also is of no assistance in their endeavor to invent a claim. By its terms, the erroneous recommendation of the Department of Planning is premised on the Town ignoring the explicit terms of the Zoning Law. Moreover, the Building Inspector's correct interpretation was sustained by the Zoning Board of Appeals and Supreme Court.

With respect to Plaintiffs' application to the County for inclusion in the Agricultural District, the first application was voluntarily withdrawn by Plaintiffs, purportedly on the suggestion of Ms. Zimet, who is not a Town official. Further, the complaint is devoid of any fact-based allegation of illicit involvement by any Town official in the denial of Plaintiffs' second application. Indeed, the only allegation, vague as it is, is that Ms. Zimet "for her own personal, political and economic advantage, influenced her fellow legislators to vote against the

⁵ The provision of a draft decision to a zoning board of appeals is permissible and does not implicate any due process issues. See *Vreeland v. Zoning Board of Appeals*, 175 A.D.2d 552, 572 N.Y.S.2d 808 (2d Dept. 1991). In *Magee v. Town of Stony Point Zoning Board of Appeals*, NYLJ, May 10, 2000, p. 35, col. 3 (Sup. Ct. Rockland Co. 2000). In addition, State Supreme Court previously rejected Plaintiffs' claims of any violation of the Open Meetings Law.

plaintiffs' inclusion into the Agricultural District.” (§ 144). The complaint is devoid of any allegation of cognizable wrong-doing on the part of the Town Defendants.

Because of the availability of administrative and judicial review of the decisions by which Plaintiffs claim to be aggrieved, no due process claim exists as a matter of law. Nevertheless, it is submitted that the foregoing demonstrates that, contrary to Plaintiffs' factless, vague and speculative allegations, the Town Defendants did not act improperly in any respect with respect to their application and reviewed them fairly, objectively and correctly.

As a result, it is respectfully submitted that the procedural due process claim is deficient as a matter of law and that Plaintiffs few conclusory allegations are refuted by the complaint and cognizable documentary evidence.

POINT VII

THE COMPLAINT FAILS TO STATE A SUBSTANTIVE DUE PROCESS CLAIM

A. Equal Protection, First Amendment Claims Preclude Substantive Due Process Claim

Plaintiffs do not address the preclusive concept that because they have asserted a claim pursuant to the more specific provisions of the Equal Protection Clause and First Amendment, they may not also assert a substantive due process claim based on the same conduct. As a result, the substantive due process claim is barred.

B. The Complaint Fails to State a Substantive Due Process Claim

In attempting to rehabilitate their deficient complaint, Plaintiffs ignore the consistent case law that it is only conduct that shocks the conscience and is utterly irrational that may state a substantive due process claim. The complaint fails to allege conduct that rises to that exceptionally high level of misconduct. Instead, without reference to applicable case law,

Plaintiffs claim that a claim has been stated because the denial “their as-of-right, permitted use farming operation” was denied “[b]ased solely on personal, political and economic motives...” (p. 43). Of course, the complaint fails to provide any fact-based allegations with respect to the Town Defendants to rise to the level of being a plausible claim. In any event, the bald allegation is insufficient to satisfy the shocks the conscience standard as a matter of law.⁶

For example, in *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 393, 399, *rehearing denied*, 324 F.3d 133 (3d Cir. 2003), the Third Circuit joined the other Circuits who had addressed the issue and adopted the universally “shocks the conscience” standard. In arriving at that conclusion, the Court, announced that “the less demanding ‘improper motive’ test originated in *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988)...” is “no longer good law.” *Id.* at 394. Instead, those portions of prior decisions that utilized standards such as “bias, bad faith, or improper motive, such as partisan political reasons or personal reasons unrelated to the merits of the plaintiffs’ application” have been expressly abrogated by the *Universal Artists* decision. *See id.* Consequently, substantive due process “does not target government actions that are merely taken for an ‘improper purpose’ or in ‘bad faith.’” *Johnston v. Dauphin Borough*, 2006 WL 1410766 at 6 (M.D.Pa. 2006) (*citing United Artists*, 316 F.3d at 402; *Corneal v. Jackson Township*, 313 F.Supp.2d 457, 465-66 (M.D.Pa. 2003), *aff’d*, 94 Fed.Appx. 79 (3d Cir.), *cert. denied*, 543 U.S. 871 (2004)).

The Third Circuit, having fairly recently adopted the “shocks the conscience” standard in conformity with the vast majority of other circuits, has examined the perimeters of the “shocks

⁶ The cases cited by Plaintiffs (p. 43-44) are not to the contrary. *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983), was decided more than twenty-five years ago and *Brady v. Town of Colchester*, 863 F.2d 205 (2d Cir. 1988), was decided more than twenty years ago and the decisions do not comport with the present state of the law. Moreover, *Brady*, like *Scott*, is distinguishable. “*Brady* ... was decided before *Lewis* and under a different legal standard than the ‘shocks the conscience’ test.” *Ruston v. Town Board of the Town of Skaneateles*, 2008 WL 5423038 at 5 n.15 (N.D.N.Y. 2008) (*citing Eichenlaub v. Township of Indiana*, 385 F.3d 274, 285 n.8 (3d Cir. 2004)). In addition, *Brady* related to allegations of action based on “impermissible political animus,” a contention not present herein.

the conscience” standard.⁷ Consistent with that standard, land use decision-making cannot satisfy such a high standard unless, at least, the facts are typified by corruption, self-dealing, or a concomitant infringement on other fundamental liberties that cannot be rectified by pre- or post-deprivation proceedings. *See Eichenlaub v. Township of Indiana*, 385 F.3d 274, 285-86 (3d Cir. 2004); *see also Maple Properties, Inc. v. Township of Upper Providence*, 151 Fed.Appx. 174, 179 (3d Cir. 2005); *Spradlin v. Borough of Danville*, 2005 WL 3320788 at 8 (M.D.Pa. 2005), *aff’d*, 188 Fed.Appx. 149 (3d Cir. 2006); *Robinson v. Limerick Township*, 2005 WL 627880 at 2 (E.D.Pa. 2005), *aff’d*, 188 Fed.Appx. 149 (3d Cir. 2006) (“It has been suggested that only allegations of outright corruption and bribery by municipal officials are sufficient to meet this [shocks the conscience] standard.”).

For example, in *Eichenlaub, supra*, allegations that zoning officials applied subdivision requirements to plaintiffs’ property that were not applied to other parcels; pursued unannounced and unnecessary inspection and enforcement actions; improperly delayed permits and approvals; impermissibly increased tax assessments; and maligned and muzzled the plaintiffs – were insufficient to state a substantive due process claim because they were not conscience shocking. *See* 385 F.3d at 286. The Third Circuit characterized the complaints as “examples of the kind of disagreement that is frequent in planning disputes.” *Id.*

In *Thornbury Noble, Ltd. v. Thornbury Township*, 112 Fed.Appx. 185 (3d Cir. 2004), *cert. denied*, 544 U.S. 999 (2005), the Court found that although the Board granted a competitor’s request for a zone change instead of the plaintiff’s in exchange for a \$600,000 contribution to the Town for open space, a request rejected by the plaintiff, the conduct did not rise to the level of shocking the conscience. Further, since the contribution was to pursue a

⁷ In *Ruston*, 2008 WL 5423038 at 5, the Court approvingly relied on the substantive due process analysis of the Third Circuit.

legitimate municipal goal, the preservation of open space, neither the Board's motives nor their action were constitutionally improper.

In *Lindquist v. Buckingham Township*, 2003 WL 22757894 at 7 (E.D.Pa 2003), *aff'd*, 106 Fed.Appx. 768 (3d Cir. 2004), *cert. denied*, 543 U.S 1121 (2005), the Third Circuit affirmed the conclusion of the District Court that although the Township may have been negligent and may have acted with an improper motive with the intent of thwarting the development of plaintiff's property, the conduct did not shock the conscience. *See* 106 Fed.Appx. at 775. The Court of Appeals endorsed the holding of the First Circuit in *PFZ Properties v. Rodrigues*, 928 F.2d 28 (1st Cir. 1991), *cert. dismissed*, 503 U.S. 257 (1992), that "even assuming that [the agency] engaged in delaying tactics and refused to issue permits for the ... project based on considerations outside the scope of its jurisdiction under Puerto Rico law, such practices, without more, do not rise to the level of violations of the federal constitution." *Lindquist*, 106 Fed.Appx. at 774 (*quoting PFZ Properties*, 928 F.2d at 32). The Court reiterated therein that "without more, a violation of state law, even a bad faith violation of state law, will not support a substantive due process claim in a land-use dispute." *Id.*

It was determined in *Blain v. Twp. of Radnor*, 167 Fed.Appx 330, 333-34 (3d Cir.2006), that a town council's frivolous appeal, threat of condemnation, conflict of interest, and improper denial of a subdivision plan did not arise to level of substantive due process claim.

In *Corneal, supra*, it was alleged that the defendants acted in concert to frustrate the plaintiffs' effort to subdivide and develop their property, and improperly complicated and delayed their applications for permits and subdivision approval, thereby causing the cancellation of sales contracts. The Court of Appeals affirmed the conclusion that the defendants intentionally opposed the plaintiffs' development efforts, at least in part, because they did not

like them. In addition, it was alleged that one of the board members intentionally held up the subdivision process so that the plaintiffs would be unable to convey a portion of the property so that he or a relative could purchase the property. The Third Circuit affirmed summary judgment in favor of the defendants and concluded that:

unless the evidence indicates that a challenged decision is completely unrelated in any way to a rational land use goal, there is no violation of substantive due process. The corollary of that rule being that where the locality's decision is related in any way to some rational goal, then no due process violation occurs even if the locality may have exceeded the scope of its jurisdiction.

313 F.Supp.2d at 466.

The Court found that the facts viewed in the light most favorable to the plaintiffs only established that the defendants might have acted with mixed motives, that is, “one related to a legitimate land regulation purpose ... the other related to illegitimate personal animus.” *Id.* at 468. The court noted that “the plaintiff must demonstrate that the land use decision or regulation was so totally irrational that it could not possibly be the real reason for the locality's action, or alternatively, that the locality applied its decision selectively so that its land use concern could not have been legitimate despite the rational basis for it.” *Id.* at 469. In affirming the decision, the Court concluded that “unless the defendants’ actions were ‘completely unrelated in any way to a rational land use goal,’ there is no violation.” 94 Fed. Appx. 76, 78 (*citing Lewis, supra*).

In *Levin v. Upper Makefield Township*, 2003 WL 21652301 (E.D.Pa 2003), *aff'd*, 90 Fed.Appx. 653 (3d Cir.), *cert. denied*, 543 U.S. 1035 (2004), the Court found that the township had intentionally delayed the issuance of building permits even after the Pennsylvania Supreme Court had denied allocatur on the Township’s appeals and sought to approve an ordinance with the sole intent of restricting plaintiff from building on his lot. The Court determined that although the “chain of events strongly points to a bad motive and purposeful intention to delay

issuing the plaintiff a building permit, it does not foster a finding that defendants' behavior shocked the conscience." *Id.* at 9.

In *Robinson v. Limerick Township*, 2005 WL 17972 (E.D.Pa 2005), the plaintiffs alleged that various actions taken by the Township were motivated by bias, bad faith, and an intent to harass them, but as the Court observed, there were no allegations of self-dealing, or unjust enrichment. The Court reiterated that "[e]very appeal in a land use matter 'involves some claim of abuse of legal authority, but it is not enough simply to give these state law claims constitutional labels such as due process....'" *Id.* at 4 (*quoting United Artists*, 316 F.3d at 402) (*quoting Creative Environments v. Estabrook*, 680 F.2d 822, 833 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982)). The Court further observed that "[t]o the extent that the [plaintiffs] allege that the Township has taken action *ultra vires* in violation of state law, that remains a violation of state law and not a constitutional injury...." *Id.* In a subsequent decision in *Robinson*, the Court dismissed the amended complaint. 2005 WL 627880 (E.D.Pa 2005). The plaintiffs had asserted that the actions of the Board of Supervisors were intended to perpetuate their terms in office by making decisions to garner votes in an upcoming election. Such claims "are at best allegations of improper motive, which do not meet the high standard of egregiousness...." 2005 WL 627880 at 2.

The decisions demonstrate that Plaintiffs' allegations, albeit insufficiently vague, conclusory and hypothetical, are, in any event, insufficient to satisfy the "shocks the conscience" standard as a matter of law. Further, even if the determinations had not been correct pursuant to state law (and they have been found to be correct by State Supreme Court), it cannot even be suggested that they are utterly irrational and lack any no conceivable basis. The language of the Zoning Law (correctly) supports the determination and the introduction of commercial uses,

including 20-150 cars and other various commercial endeavors, results in the conclusion that the determinations are not utterly irrational.

C. Because of the Existence of Available Judicial Review, a Substantive Due Process Claim is Not Stated

Plaintiffs do not address the case law that provides that a substantive due process claim cannot be stated as a matter of law as a result of the availability of state judicial review procedures, remedies that Plaintiffs utilized albeit unsuccessfully.

POINT VIII

THE COMPLAINT FAILS TO STATE AN EQUAL PROTECTION CLAIM

A. A Class of One Equal Protection Claim Cannot be Premised on Discretionary Determination

The equal protection claim asserted against the Town Defendants is baseless as a matter of law, first, because it is based on discretionary governmental decisionmaking. Faced with this preclusive principle, Plaintiffs assert that the Town Defendants “did not possess discretion nor subjectivity in plaintiffs’ proposed *permitted* use of its property.” (p. 48). However, as is related throughout the Town’s papers, although the strictly farming use of the property has been recognized as being permissible, the commercial aspects of the use have been determined to be impermissible. Plaintiffs seek to ignore the terms of the Zoning Law, the detailed opinion of the Building Inspector, the meticulous decision of the Zoning Board of Appeals and the reasoned decision of State Supreme Court. All of the foregoing agreed that the definitions of “agriculture” set forth in the Zoning Law applied, that the use of the property for the growing of crops was permissible but that the commercial aspects of the use of the building were not permissible. Consequently, Plaintiffs’ contention that the Town Defendants did not have discretion to deny the commercial aspects of the use is contradicted by every official and agency that possessed

jurisdiction in the matter. Moreover, a building inspector and zoning board of appeals possess vast discretion in interpreting the provisions of a zoning law.⁸

Clearly, Plaintiffs' claims are premised on discretionary decisions of the Town officials and agencies and, as a result, a class-of-one equal protection claim is barred as a matter of law pursuant to *Engquist* and the other decisions cited by the Town Defendants applying *Engquist*.

**B. The Complaint Fails Sufficiently to Allege the Existence
of Similarly Situated Persons Treated Differently**

In addition, the complaint fails to adequately allege that Plaintiff was treated differently than similarly situated persons or entities. As is related in the Town Defendants' initial memorandum of law, a class-of-one plaintiff must show, among other things, an extremely high degree of similarity between themselves and the persons to whom they compare themselves. Although Plaintiffs relate the existence of purportedly similarly situated persons who, they claim, were treated differently (¶ 152) and superficial characteristics (¶ 153), they fail to provide any probative allegations to suggest that they are similarly situated in all relevant respects, including the applicability of the Zoning Law's definitions of agriculture to other agricultural uses. Plaintiffs do not relate the size of the properties, when the uses were instituted, the commercial aspects, the number of customers, or any detail that would even suggest that the properties are similarly situated in all relevant respects. It is not alleged that any of the other properties are, as characterized by Plaintiffs, a "farm winery." In addition, the complaint acknowledges that those properties are located in an agricultural district while Plaintiff is not. Certainly, particularly with

⁸ Plaintiffs unexplained reference to *Crippen v. Town of Hempstead*, 2009 WL 803117 (E.D.N.Y. 2009), for the apparent proposition that the actions herein are non-discretionary is obscure because the operative facts alleged therein are entirely different than those asserted herein.

respect to the Town approvals and actions, the properties are not similarly situated because of the different regulations applied to properties within and outside an agricultural district.⁹

It is submitted that the complaint fails to adequately allege the existence of similarly situated properties that were treated differently and, in fact, the allegations refute any such claim.

C. Intentional Discrimination

Plaintiffs do not address the fact that the equal protection claim is additionally deficient because the complaint is devoid of any allegations that the actions alleged were intentionally motivated by impermissible or discriminatory considerations.

D. Vindictive Action Necessary

As is related in the Town's initial memorandum of law, a class-of-one equal protection claim must be based on instances where the purportedly unequal treatment is based exclusively on "vindictive action," "illegitimate animus" or "ill will." Plaintiffs fail to refute that proposition or to address that deficiency in the pleading. The claim is insufficient for this additional reason.

E. Conclusion

It is respectfully submitted that the equal protection claim asserted herein is profoundly deficient because the claim is based on discretionary governmental decision-making, the complaint fails sufficiently to allege the existence of similarly situated properties and in fact refutes that any such properties are similarly situated, the complaint fails to allege the

⁹ Plaintiffs speciously seek to disregard the fact that other purportedly similar properties are located in an agricultural district but theirs is not because they claim "the defendants willfully prevented the plaintiffs from being included within the Agricultural District." (p. 46 n.10). First, the complaint is utterly devoid of any fact-based allegation of wrong-doing on the part of the Town Defendants with respect to the determination of the County Legislature regarding the property's inclusion in an agricultural district and the bald allegations clearly are insufficient pursuant to *Twombly*. Second, because the property was not in an agricultural district, the Town was required to apply the applicable provisions of the Zoning Law. Hence, the fact that their property is not in an agricultural district precludes the other properties from being similarly situated and provides no basis for excusing them from this fundamental requirement. Plaintiffs' further rationalization, that is, that "there several other relevant factors that demonstrate the plaintiffs' property being similarly situated..." is insufficient since, as related in the initial memorandum of law, properties must be similarly situated "in all relevant respects." Whether a property is located in an agricultural district is, under the facts alleged, a key, if not determinant factual distinction.

purportedly dissimilar treatment was the result of intentional discrimination and the complaint fails to allege that the actions alleged were undertaken for purely vindictive reasons.

POINT IX

**THE COMPLAINT FAILS TO ALLEGE A
CONSPIRACY CLAIM PURSUANT TO 42 U.S.C. § 1983**

As is related in the Town's initial memorandum of law, conclusory, vague, or general allegations that the defendants have engaged in a conspiracy are insufficient and details of time and place and the alleged conspiracy must be alleged (p. 33-34). The claim is insufficient for this additional reason. The complaint is devoid of any fact based allegation of conspiratorial actions on the part of any of the Town Defendants and is based exclusively on vague, hypothetical, bald, factless conclusions. In fact, the allegations of the complaint refute any contention of misconduct on the part of the Town Defendants, alleging only that certain County officials acted for what Plaintiffs consider to be improper motives.

Moreover, the allegations of the complaint, to the extent any vague specific assertions are have been made, relate solely to non-Town Defendants and, thereby, refute the viability of a conspiracy claim against the Town Defendants.

As such, the claim is deficient as a matter of law.

POINT X

**THE MEMBERS OF THE ZONING BOARD OF APPEALS, SUED IN THEIR
INDIVIDUAL CAPACITIES ARE ENTITLED TO DISMISSAL OF THE
ACTION AGAINST THEM BECAUSE OF ABSOLUTE QUASI-JUDICIAL IMMUNITY**

As is related in the Town's initial memorandum of law, the members of the Zoning Board of Appeals, sued in their individual capacity, are absolutely immune from suit as a matter of law because they undertook a quasi-judicial function in entertaining, reviewing and deciding

Plaintiffs' appeal of the determination of the Building Inspector. Plaintiffs' argument to the contrary (p. 52) is utterly specious.

As was previously discussed, absolute immunity is based on the function performed by an official and the motive attributed to individual is irrelevant (p. 34-35). Further, the function of a zoning board of appeals in entertaining an appeal or rendering an interpretation of a local zoning law is a quasi-judicial function (p. 36-37). Indeed, in comparing the considerations enumerated by the courts, a zoning board of appeals clearly is acting in a quasi-judicial function in entertaining an appeal or rendering an interpretation (p. 35-36).

Plaintiffs either misunderstand the ambit of quasi-judicial immunity or seek to misdirect the inquiry in arguing that denial of Plaintiffs' site plan on the grounds that it is a commercial or business use is an administrative or executive function (p. 52).¹⁰ While that characterization of the review function may be true correct with respect to the Building Inspector, quasi-judicial immunity is asserted on behalf of the members of the Zoning Board of Appeals, not the Building Inspector. Moreover, has been demonstrated, the actions of the Zoning Board of Appeals in entertaining such an appeal or request for an interpretation is unquestionably quasi-judicial.

The cases cited by Plaintiffs are inapposite. *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988), involved a determination by a city council to withhold a building permit. The Court denied the individual Defendants' assertion of absolute legislative, not quasi-judicial immunity, and determined that, pursuant to the applicable state law, the function was administrative. The decision has no application herein. *Haskel v. Washington Township*, 864 F.2d 1266 (6th Cir. 1988), also dealt with a claim of legislative immunity, in that instance, in the enactment of a

¹⁰ A site plan application was never denied by the Planning Board because the commercial aspects of the use of the property were determined not to be permissible, Plaintiffs' appeal of the Building Inspector's determination to that effect was not denied, Plaintiffs never sought a variance from the applicable zoning regulations and Supreme Court confirmed the foregoing decisions.

zoning ordinance. Lastly, *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159 (3d Cir. 2006), also related to a claim of legislative, not quasi-judicial immunity. Plaintiffs' arguments are entirely specious.

As a result, it is respectfully submitted that the complaint must be dismissed as against the members of the Zoning Board of Appeals, sued in their individual capacities, because of the quasi-judicial function they were performing.

POINT XI

EACH INDIVIDUAL DEFENDANT IS ENTITLED TO QUALIFIED IMMUNITY

It is respectfully submitted that given the allegations of the complaint, which are substantially identical to the repudiated contentions in the dismissed Article 78 proceeding, it cannot credibly be contended that the actions alleged with respect to the individual Defendants violated clearly established constitutional rights.

As he was required to, the Building Inspector applied the provisions of §§ 140-4, 140-117.3 and 140-134 of the Zoning Law and properly determined that the farming operations proposed on nine acres were permitted but that by the terms of the Zoning Law, the commercial uses were not. That determination was upheld by the Zoning Board of Appeals and by State Supreme Court. Other than bald conclusory allegations, the complaint is devoid of any objective wrong-doing on the part of the Building Inspector that would deprive him of qualified immunity.

Similarly, the members of the Zoning Board of Appeals considered all evidence provided and arrived at a reasoned decision that sustained the Building Inspector's decision. Again, the scant, conclusory allegations of the complaint assert nothing that would be sufficient to deprive them of qualified immunity.

In short, based on the allegations of the complaint and the few documents submitted by the parties which the Court consider on a 12(b)(6) motion, the individual Defendants are entitled to qualified immunity and the opposition papers provide no basis to withhold such immunity.

POINT XII

STATE CLAIMS BARRED

As is related in the moving papers, Plaintiffs' state law claims are barred by governmental immunity, the failure to allege or file a notice of claim, the absence of a direct action for violations of the New York State Constitution and the substantive lack of viable claims pursuant to the New York State Constitution. Plaintiffs have not addressed those preclusive concepts and, thereby, have acknowledged that such claims are deficient.

CONCLUSION

It is respectfully submitted that the complaint fails to state any viable claim as a matter of law and should be dismissed.

Dated: Suffern, New York
September 25, 2009

Rice & Amon

/s _____
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