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To be argued by:
Richard F. Bellman
Time requested:
30 minutes

Supreme Court of the State of New York

APPELLATE DIVISION—SECOND DEPARTMENT

SUFFOLK INTERRELIGIOUS COALITION ON HOUSING
and RENEE COLEMAN,
Plaintiffs-Appellants/Cross-Respondents,

-against-

Appellate Division
No. 91-01363

THE TOWN OF BROOKHAVEN,
HENRIETTA ACAMPORA, Town Supervisor,
GEORGE DAVIS, EUGENE T. DOOLEY, EUGENE GERRARD,
ANTHONY LOSQUADRO, JOSEPH MACCHIA
and DONALD ZIMMER,
Defendants-Respondents/Cross-Appellants.

PLAINTIFFS-APPELLANTS/CROSS-RESPONDENTS REPLY BRIEF ON APPEAL AND RESPONDING BRIEF TO CROSS APPEAL

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PRELIMINARY STATEMENT

Plaintiffs in this brief respond to the defendants' cross appeal challenging the trial court's determination to nullify the Brookhaven Town Board's denial of SICOH's second East Patchogue rezoning application. Plaintiffs also reply to defendants' arguments that the Town Board's denials of SICOH's Setauket and East Patchogue applications did not constitute exclusionary zoning under State law and did not violate the federal Fair Housing Act. In addition, plaintiffs respond to defendants' claim that plaintiffs' State law action is time barred.

I.

THE TRIAL COURT'S INVALIDATION OF THE TOWN BOARD'S REFUSAL TO REZONE THE EAST PATCHOGUE PARCEL SHOULD BE UPHELD

The trial court correctly held that the Town Board's denial of SICOH's second East Patchogue application was not supported by the record. As the trial court pointed out, "the Town Board did not, when it denied the East Patchogue application, state any reason why the proposed change would not benefit the community generally or any compelling reason for denying the application" (A33). The court relied especially on the fact that the only reason given for denying the application was Town Supervisor Acampora's statement that the application was denied because of community opposition. Id. As the trial court pointed out, that statement was "a clear indication of an improper motivation disclosed on the face of the legislative action which eliminates the presumption of validity which normally attaches to such a legislative action." Id. The court also observed that the record itself did not contain any evidence that the site was not suitable for the proposed multi-family development.[1]

None of the defendants' arguments on appeal provide any basis for reversing the trial court's conclusions. These arguments, at best, constitute after-the-fact justifications raised for the first time either at trial or in defendants' brief to this Court. At trial, not a single public official was called to testify concerning why the SICOH application was rejected by the

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[1] The court also noted that the Town Planning Board recommended that the East Patchogue application be approved (A33).

Town Board. Even in their brief to this Court, the defendants do not claim that the Board rejected the SICOH application in order to further any particular policy. Rather, facts are pointed to in the record or arguments are suggested which could, in retrospect, explain the Town's action. There is no record reference, however, to any evidence showing that the Board was actually motivated by any concern other than the need to pacify community opposition.

The defendants contend for the first time on appeal that rezoning the East Patchogue parcel to MF-1 would have violated §85-76 of the Brookhaven Code because the East Patchogue site is allegedly not in a "residential area." Because this claim was not presented to the trial court, it should not be considered on appeal. Moreover, the testimony of defendants' own expert, David Portman, contradicts this argument. He stated that the East Patchogue parcel was in proximity to residential uses, including a single family subdivision (A1056) and a multi-family development (A1057). In addition, the designation of the site as residential in the 1975 master plan and the proposed new plan, as well as the decision of the Town Planning Board to approve the rezoning, compel the conclusion that the site is in a residential area and therefore appropriate for MF-1 zoning.

Defendants also contend that the denial of the SICOH application could be justified on the basis of an alleged "nursing home crisis" and because the Board may have wanted to keep the land as part of a "medical complex." However, the trial court found, that at the time the Town Board denied the East Patchogue

application, the Town Board did not state any reason why the rezoning application would not benefit the community (A33). Acampora's explanation for the Town Board's decision certainly makes no reference to any "nursing home crisis." Moreover, both the Town's 1975 and new proposed master plans call for zoning of the site for residential rather than for nursing home use. See Osiecki v. Town of Huntington, N.Y.L.J., Feb. 19, 1991, at 27 (2d Dept.) (zoning decision which deviated from master plan held to be arbitrary).

In support of its assertion that the Town Board made its decision in response to a "nursing home crisis" the defendants rely only on the fact that a single speaker in the audience at the September 15, 1983 public hearing, an otherwise unidentified Mr. Brucia, referred to an alleged need for nursing homes in the Town of Brookhaven and that Mr. Brucia sent two letters to the Board to this effect. There is not even any evidence that the Board read or considered Mr. Brucia's statements. They are hardly adequate evidence of a crisis or evidence that the alleged crisis motivated the Town Board's action.

The only other "evidence" concerning the so-called "nursing home crisis" came at trial from defense witness Marvin Burton, Executive Director of the Nassau-Suffolk Health Services Agency. Burton, who had no personal knowledge of the SICOH site or of the Town Board's action on the SICOH application, simply testified that at time of trial the estimated need in the overall Nassau-Suffolk region was for 1,000 nursing home beds. Burton had no knowledge as to the extent of need for nursing home beds in the

early 1980s when the SICOH applications were considered. Moreover, Burton testified only about the need for nursing homes in Nassau County and about the extent of nursing home development in Nassau County (A1378). Assuming, for purposes of argument, that the extent of nursing home development in Nassau County is relevant to SICOH's application, the defendants did not prove that the Brookhaven Town Board relied on the Nassau County nursing home situation or that the Town Board was even aware of it.

The only evidence concerning the so-called "medical complex" was Portman's testimony that in 1975 there was a rezoning application for the East Patchogue site by a private developer who was seeking to build garden apartments or condominiums and that that application was denied by the Town Board (A1067). Portman had no personal knowledge concerning the 1975 application nor the reason for the denial of the zoning. This testimony does not support defendants' assertion that the Town denied the 1975 application because it wanted to retain the NH zone as an integral part of a medical complex area. All that the defendants proved was that for some unexplained reason the 1975 application was rejected.

Defendants also rely on statements by a number of speakers at the public hearing who "strongly opposed the rezoning due to the oversaturation of the East Patchogue area with multi-family housing" (Def. Br. at 16). It is significant that Portman did not support this theory during his testimony. In fact, it is precisely plaintiffs' view that the Town Board members responded to the exclusionary desires of the local residents in rejecting

the SICOH projects. Supervisor Acampora, in a letter to a local rabbi, noted that the SICOH projects were adamantly opposed by residents and "whether or not their arguments against the applications would ever come to pass, they were real to them" (Pl. Ex. 43). In other words, the Town Board, in denying SICOH's application was reacting to the concerns of local residents, whether or not these concerns had any merit.[2]

Finally, defendants attempt to suggest that the trial court applied the wrong legal standard in nullifying the Town Board's determination. According to defendants, the trial court's decision should be overturned because the court did not apply an "arbitrary and capricious" standard to the Town Board's determination.

The trial court held that the level of scrutiny which should be applied to the determination of the instant applications "falls between that generally applied to a change of zone and that applied to a special permit" (A32). The court applied this intermediate level of scrutiny because under Brookhaven's zoning ordinance, no multi-family housing can be constructed unless an application for change of zone is granted. The court held that

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[2] Defendants' brief (p. 17) also refers to Def. Ex. W, number 98, a form dated November 10, 1982, apparently filled out by a Thomas Cramer, with the title "Director." There is no further identification of this indidivual in the record. The form recommends denial of the SICOH application because, in the writer's opinion, it would require SEQRA review. There was no testimony that the Town Board considered this form in making its determination. Moreover, the Town Planning Board determination approving the proposed change of zoning occurred after the date of the Cramer recommendation and would appear to supersede it. Other than its inclusion in Def. Ex. W, a massive compilation of documents inserted in the record by defendants, this document was never mentioned at trial.

implicit in the Town's classification of multi-family uses as floating zones is the determination that any parcel of property in the Town may conceivably be rezoned for multi-family uses. Id. The court, therefore, held the Town Board's denial of the change of zone to multi-family should be subjected to greater scrutiny than other change of zone applications. Id. On the other hand, the court held that:

> [I]t is still for the Town Board to decide, in the exercise of reasonable discretion, whether the grant of such a change accords with a comprehensive plan and benefits the town as a whole. Nevertheless the defendants' actions must, in all cases, be reasonable and the court must correct an arbitrary or capricious determination. Id., (citations omitted).

In the present case, for the reasons set forth in the trial court's opinion, the intermediate level of scrutiny applied by the trial court is entirely appropriate. However, even if an "arbitrary and capricious" standard is applied in the present case, the trial court's decision must be upheld. In De Sena v. Gulde, 24 A.D.2d 165, 171 (2d Dept. 1965), this Court held that a village board of trustees' zoning decision made to pacify community opposition was arbitrary and discriminatory. The Court of Appeals has confirmed this holding:

> In exercising their zoning powers, the local authorities must act for the benefit of the community as a whole following a calm and deliberate consideration of the alternatives and not because of the whims of an articulate minority or even majority of the community.

Udell v. Haas, 21 N.Y.2d 463, 469 (1988).

In this matter, the only stated reason given by the Town Board for denying SICOH's application was pacification of community opposition.

The absence of any explanation in this record for the Town's decision to deviate from its master plan by denying SICOH's rezoning application also establishes that the denial was arbitrary and capricious. In its recent holding in Osiecki v. Town of Huntington, supra, this Court concluded that in the absence of an explanation, deviation from a master plan would violate the requirement that a Town zone in accordance with a comprehensive plan. In the present case, as in Osiecki,

> [T]he Town makes no attempt to justify its "determination" that disregarding the Town's specific master plan is not inconsistent with a comprehensive zoning plan for the area rather than an entirely ad hoc decision (Cf. Town of Bedford v. Village of Mount Kisco, supra). To accept the Town's contention that it is free to determine that the master plan should no longer be followed, without articulating a reason for that determination, would invite the kind of ad hoc and arbitrary application of zoning power that the comprehensive planning requirement was designed to avoid . . .. Id. at 27.

Based on this record, there can be no doubt that the Town Board's determination was arbitrary and capricious, and the decision of the trial court with respect to the East Patchogue site must be upheld.

II.

DEFENDANTS MISSTATE THE LAW WITH REGARD TO EXCLUSIONARY ZONING AND THE FACTS OF THIS CASE

In their brief, defendants present a series of arguments in response to plaintiffs' exclusionary zoning claim. First, defendants contend, without any legal support, that exclusionary zoning cases must involve challenges to the facial validity of zoning ordinances rather than to the implementation of such ordinances with regard to individual parcels. Second, defendants erroneously argue that SICOH's proposed projects would not benefit low income residents of Brookhaven. Third, defendants argue that the existence of a supply of multi-family housing and some undeveloped land zoned for multi-family use precludes plaintiffs' challenge. Fourth, defendants apparently rely on the small number of subsidized units for families which have been constructed in the Town in the past. Finally, defendants continue to press various after-the-fact justifications for the Town's actions, which were raised for the first time at trial by the Town's outside planner. Plaintiffs will address these contentions in this section.

a. There is No Authority to Support Defendants' Argument That Exclusionary Zoning Challenges Cannot Involve Particular Housing Developments

Defendants in their brief repeat the trial court's incorrect assumption that "a claim of exclusionary zoning is inappropriate on a parcel by parcel basis, i.e., the zoning of a single parcel

cannot be exclusionary" (Def. Br. at 23). Defendants make this argument notwithstanding the fact that Brookhaven has established a discretionary parcel-by-parcel application procedure as the only means for land to be zoned multi-family. Moreover, the record shows that Brookhaven faces an enormous need for low cost housing for families and has permitted construction of only several hundred subsidized housing units for families, most of which are located in Gordon Heights, a minority community in deteriorating condition. Finally, SICOH specifically sought rezonings in order to build desperately needed lower cost housing and its applications were denied, according to Town Supervisor Acampora, precisely because of the type of housing SICOH was proposing.

According to the defendants' argument, despite the clear exclusionary effect of the zoning denials, the Town Board's actions should be immune from judicial challenge simply because the court is being asked to consider the propriety of rejections of individual applications for individual parcels. It is not surprising that defendants cite to no authority for this incredible proposition: no such authority exists.

Defendants also fail to respond to the determination by the Court of Appeals in Suffolk Housing Services v. Town of Brookhaven, 70 N.Y.2d 122 (1987), that an exclusionary zoning claim challenging the implementation of an ordinance is cognizable when it involves a "particularized claim directed at a specific parcel of land." Id. at 131. This conclusion is consistent with the abundance of examples of zoning decisions regarding individual

parcels of land which were held to be discriminatory. See, e.g., Udell v. Haas, 21 N.Y.2d 463 (1968); Rodgers v. Village of Tarrytown, 302 N.Y. 115 (1951). There is simply no legal basis for applying the prohibition on exclusionary zoning only to broad challenges to the facial validity of zoning ordinances and not to the implementation of those ordinances.

As part and parcel of Brookhaven's erroneous contention, defendants persist in urging this Court to apply Berenson v. Town of New Castle, 38 N.Y.2d 102 (1975), supra, in a manner to bar plaintiffs' claim. According to defendants, under Berenson, plaintiffs must show that all actions of the Town Board in implementing the zoning ordinance and regulations have failed to provide a properly balanced and well ordered plan for the community, considering the needs of the town and region. In the absence of such a showing, according to defendants, no exclusionary zoning claim can be brought. Under this view, notwithstanding a substantial need for low cost housing in a town, a decision to prohibit a developer from constructing a particular low cost housing project would be immunized from challenge.

Contrary to defendants' Berenson argument, the Court of Appeals has specifically held in Suffolk Housing Services v. Brookhaven that exclusionary zoning challenges can be brought to zoning decisions involving particular parcels. The Court of Appeals stated that the Berenson test applies to challenges to the facial validity of zoning ordinances, not to challenges to the implementation of ordinances with regard to specific parcels. 70 N.Y.2d at 130.

The defendants' reliance on Asian Americans for Equality v. Koch, 72 N.Y.2d 121 (1988), is also misplaced. Relying heavily on the Berenson doctrine, the plaintiffs in Asian Americans challenged an amendment to the City's zoning ordinance creating a special zoning district within the Chinatown area of Manhattan on the ground that the plan for the district did not include a sufficient amount of low cost housing. Plaintiffs therefore unsuccessfully sought an order compelling the City to construct low cost housing in the district. By contrast, the present case involves a claim of governmental interference with private efforts to build low cost housing.[3] Cf., Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977), cert. den., 434 U.S. 1025 (1978).

Blitz v. Town of New Castle, 94 A.D.2d 92 (2d Dept. 1983), on which defendants also rely, is similarly inapposite. In Blitz, the plaintiff, who sought to build market rate multi-family housing, challenged the amended zoning ordinance of the Town of New Castle, holding that it failed to comply with the ruling in Berenson by not facilitating the development of enough multi-family housing. The Court concluded that the revised ordinance, which allowed construction of multi-family housing in

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[3] The defendants' reliance on Akpan v. Koch, 75 N.Y.2d 561 (1990), is equally misplaced. In that case, the City of New York entered into an agreement with a private developer to develop an urban renewal site and amended the zoning map accordingly. Plaintiffs contended that the proposed project should have provided for low cost housing. The court held that the development had been carefully studied, prepared and considered, and citing Asian-Americans, supra, held that there was no requirement that a particular development project sponsored by the City include low income housing. Id. at 576.

several designated areas of the Town, met the requirements of Berenson, 94 A.D.2d at 96. Blitz has no bearing on the present case which involves the rejection of a plan to build low cost housing on particular parcels. Blitz simply involved the question of whether New Castle's revised ordinance complied with Berenson, and the Court held that it did. The Blitz holding therefore is irrelevant to this case.[4]

b. The Record is Clear That SICOH Proposes to Build Lower Cost Housing Responsive to the Growing Need in Brookhaven

Defendants press on appeal an argument they presented for the first time in their post-trial brief below: that SICOH's proposed projects would not provide housing for low income persons. This argument is simply contrary to the facts of the case. The record could not be clearer that SICOH proposed to build lower cost housing, and the defendants' claims to the contrary are without any credible evidentiary foundation. These claims are based solely on statements in management plans drawn

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[4] North Shore Unitarian-Universalist Society, Inc. v. Upper Brookville, 110 A.D.2d 123 (2d Dept. 1985), is similarly inapposite. Plaintiff in that case sought to build a 100 unit project in an "open rural woodland community" which did not zone for multi-family use. Id. at 124. The court relied on the fact that numerous comprehensive regional plans identified the village as "an integral part of a low density zone on the North Shore of Long Island for the preservation of scarce open space and finite water resources." Id. at 124. Plaintiffs brought a Berenson type challenge to the facial validity of the ordinance as a whole on the ground that it did not provide for multi-unit development. The court found that the area encompassed by Upper Brookville was of critical importance to regional needs for open space and water preservation. The court therefore held that plaintiffs did not meet the Berenson test because the ordinance was enacted for a statutorily permitted purpose giving proper regard to local and regional housing needs. Id. at 125.

up by the Halandia Management Corporation, a consultant retained by SICOH. The consultant's plans refer generally to tenants with a "range" or "mix" of incomes (Def. Ex. W, Nos. 63 and 120).

The evidence at trial was overwhelming that SICOH intended to build low income housing at its sites and that the Planning Board and Town Board were well aware of this fact. For example, when SICOH's first proposal for a 160 unit project in East Patchogue was before the Town Board, SICOH applied for United States Department of Housing & Urban Development (HUD) Section 8 funding for the project and the Town received a copy of this application from HUD (Def. Ex. W, item 138). There is no dispute that a Section 8 project is, by definition, housing for low income people. Moreover, at the Town Board hearing on June 3, 1981 at which the first East Patchogue application was considered, the speakers supporting SICOH uniformly referred to the housing need among lower income people and the fact that the project was responsive to that need (Pl. Ex. 16, pp. 292, 296).

When the availability of Section 8 funding for the projects became questionable in 1983, SICOH's Executive Director, Kenneth Anderson, testifying before the Planning Board on the second East Patchogue application, specifically noted the lack of availability of Section 8 new construction funds and confirmed SICOH's intention of providing low cost housing (Pl. Ex. 20, p. 11). At the same hearing, Steven DeGotte, vice president of The Halandia Group, also emphasized SICOH's goal of producing low cost housing and outlined Halandia's long experience in managing low cost housing projects. No question was raised at that hearing con-

cerning the management proposal upon which defendants now rely (Pl. Ex. 20, pp. 18-20).

At the Town Board meeting concerning the second East Patchogue proposal, SICOH's housing consultant, Alan Mallach, specifically addressed the issue of affordability of units in the project. Mallach set forth similar testimony at the Planning Board hearing concerning the Setauket project, stating that the proposed rents:

> . . . put these apartments . . . within the reach of families earning at and below the median income in the Town of Brookhaven and Suffolk County. Families earning between $15,000 and $25,000, gross family income, families who cannot realistically afford to buy a house in the Three Village district under current circumstances (Pl. Ex. 11, p. 101).

Moreover, the community response to SICOH's proposals made it overwhelmingly clear that the public understood that housing for low income persons was at issue. For example, the petition circulated by SICOH's opponents in East Patchogue noted that the proposed project would "open the floodgates to welfare recipients from metropolitan and other areas . . ." (Def. Ex. W, item 116).

Finally, plaintiffs' witnesses testified consistently at trial that SICOH was proposing lower cost subsidized housing, and their testimony went unchallenged. See, e.g., testimony of Alan Mallach (A393, 398-400, 458-463) and Reginald Tuggle (A655).

In conclusion, there is no basis for defendants' claim that SICOH did not intend to build housing for low to moderate income families. Throughout the Planning Board process, the Town Board

process and the trial of this matter, no one expressed any doubt as to SICOH's intentions. Defendants' post-trial contention that this was not the case, based solely on vague language in a consultant's proposed plan, was not mentioned in the trial court's opinion and should be rejected by this Court as well.

c. The Existence of Costly Multi-Family Housing and Some Vacant Multi-Family Zoned Land Does Not Justify the Rejection of SICOH's Applications

Defendants also contest plaintiffs' exclusionary zoning claims by relying on the fact that Brookhaven has granted some applications for rezoning for multi-family housing development (see Def. Br., pp. 25-31). The Town's actions with respect to market rate housing and housing for the elderly have no bearing on the question whether the Town engaged in exclusionary zoning with regard to housing for low income persons.

Thus, Portman's testimony concerning the number of condominium units that exist in Brookhaven, the number of units in 281 cluster developments and the number of units in standard multi-family developments is all irrelevant (Def. Br. 24-30). The critical point is that Portman had no data regarding the cost of any of the housing about which he testified, whether for sale or rental (A1238-1243, 1269). Portman confirmed, however, that developers in Brookhaven were building housing only for upper middle class and upper income households (A1275). As plaintiffs argued in their principal brief, it does not follow that because Brookhaven has permitted construction of multi-family units at

market rate, that the Town does not exclude housing for low income persons.

The existence of vacant land already zoned multi-family is also irrelevant. There was no showing at trial that there was any plan to construct any low income housing on this land, nor that any of this land was even available or suitable for such housing. As plaintiffs set forth in their main brief, the testimony is uncontroverted that before SICOH obtained its parcels, Planning Board Chairman Luchsinger advised SICOH that it would be unlikely that SICOH would find an appropriate vacant parcel which had already been zoned multi-family (A415-417, 615). While defendants' brief refers to 13 sites which, according to Portman, had been rezoned for multi-family use or approved for cluster development under Town Law §281, Portman did not know the cost of this vacant acreage, the size of the parcels, whether the owners were willing to sell, or the feasibility of developing this land for low cost housing (A1316-1317).

The Town's position also implies that developers of low cost housing, unlike other developers, must select sites that have already been rezoned multi-family and do not have the right to use Brookhaven's usual procedure of locating appropriate sites and then requesting rezoning. As a practical matter, sites which have already been rezoned multi-family are often too expensive to be obtained by developers of low cost housing (Pl. Main Brief at 30).

d. The Existence of a Small Number of Subsidized Units Previously Constructed in Brookhaven Does Not Justify the Denial of SICOH's Applications

In their brief, defendants attempt to justify their actions by pointing to figures showing the number of subsidized housing units in Brookhaven as compared to the number in Suffolk County as a whole (Def. Br. at 30). These figures are meaningless in light of the dearth of low cost housing for families both in Brookhaven and in Suffolk County, and the overwhelming need for such housing. The uncontroverted evidence is that Brookhaven, with a population of about 365,000 in 1980, has only 402 subsidized units for families, while it has an unmet need for more than 6,000 such units. Similarly, a task force looking into the housing shortage for the Suffolk County Legislature, reported in 1985 that more than 37,000 lower income households in Suffolk were in need of rental housing (Pl. Main Brief at 8).

Defendants also point to their "affordable housing" program as part of their alleged response to the enormous need for low cost housing in Brookhaven. However, at trial, Robert Reutzel, Commissioner of Brookhaven's Department of Housing, Community Development and Intergovernmental Affairs, testified that the Town classified as "affordable" housing units costing up to $100,000 (A951). Reutzel admitted that housing at this price was "a far cry" from low income housing. Id. For example, purchasers of "affordable housing" in Selden paid $73,500 (excluding closing costs) for their homes and needed to have over $12,000 in hand in order to participate (A945).

e. Defendants' After-the-Fact Justifications for the Town Board's Actions Do Not Support the Denials of SICOH's Zoning Applications

On appeal, as at trial, defendants have no choice but to rely on the post hoc justifications for the Town's actions as set forth in the testimony of their trial expert, David Portman. With regard to the East Patchogue application, the trial court found that the record contains no evidence that SICOH's site was not suitable for the proposed multi-family development (A33). The trial court also found that "the Town's own Planning Board recommended that the East Patchogue application be approved" and that when it denied the East Patchogue application, the Town Board did not "state any reason why the proposed change would not benefit the community generally or any compelling reason for denying the application." Id. The court further found that Supervisor Acampora's statement concerning the reason for the justification "is a clear indication of an improper motivation disclosed on the face of the legislative action which eliminates the presumption of validity which normally attaches to such legislative action." Id. As discussed above, the trial court did not accept defendants' after-the-fact attempt to justify their denial of the East Patchogue application by alluding to an alleged plan for a medical complex and the specter of a so-called "nursing home crisis."

The Town's post hoc justifications for denying the Setauket application are equally artificial and do not justify the exclusionary effect of the Town's actions. For example, defendants

rely heavily on the Suffolk County Planning Commission's recommendation against SICOH's rezoning application, despite the fact that no one from the Planning Commission testified at trial and there is no evidence that the Town Board was aware of or relied on this recommendation.

The Planning Commission recommendation asserted that rezoning SICOH's parcel would be inconsistent with the 1975 Brookhaven master plan, would constitute "unwarranted fragmentation of the existing pattern of industrial zoning in the locale" and would be incongruous with the industrial development in the surrounding area. The Planning Commission also stated that the site had few amenities for multi-family housing (Def. Ex. A). There is no evidence that the Town Board relied on any of these claims when it denied SICOH's application and none of them can withstand close scrutiny.

With regard to the inconsistency between the rezoning application and the 1975 master plan, plaintiffs presented uncontroverted testimony that, with few exceptions, every rezoning for multi-family use after 1975 was inconsistent with that plan. This occurred simply because the 1975 plan did not designate, except in a very few situations, multi-family uses in any areas other than those where multi-family zoning already existed in 1975 (A625-626). To deny SICOH's application because it would be inconsistent with the 1975 master plan, while allowing rezoning for market rate units despite this inconsistency is, per se, discriminatory. Moreover, as plaintiffs argued in their main brief, Brookhaven's own master planner concluded that in the new

proposed master plan, SICOH's parcel should be planned for residential use, rather than light industry. Because litigation was pending, SICOH's parcel was represented by a blank space on the new master plan map, the only such space on the whole plan (Pl. Br. at 16).

The Planning Commission's recommendation was also based on a statement that the rezoning would constitute "unwarranted fragmentation of the existing pattern of industrial zoning in the locale." In fact, the Town's master planners made an effort to eliminate industrial uses along Route 25A in order to reduce traffic congestion and Brookhaven's expert acknowledged at trial that even before adopting the new master plan, the Town has been eliminating industrial uses along 25A in favor of residential ones (A1221-1222, 1228-1230). Moreover, the SICOH property, as initially purchased, was an isolated industrial parcel of 43 acres surrounded either by residential, business or commercial uses. There were no other industrial zoned lands for some considerable distance in any direction and plaintiffs' expert presented unrebutted testimony that there simply is no overall pattern of industrial zoning in the area (A627).

Finally, the Planning Commission objected to the application on the ground that the premises "possess few amenities designed for multi-family housing." Since no one from the Planning Commission testified at trial, there was no testimony as to what amenities the Planning Commission was referring to. Plaintiffs' expert described the site's access to public transportation, shopping facilities and employers.

At trial, defense expert Portman added to the list of alleged problems with the site. While there is no evidence that the Town Board had any problem with the proposed mixed use of the property as a residential development and office development, Portman objected, stating that he "had never heard of industrial parks which contain residential developments within them" (Def. Br. at 61). However, plaintiffs' expert testified that such mixed uses have been encouraged by governmental planning authorities and in extensive planning literature (A1465-1466). Plaintiffs also showed there are numerous local examples of multi-family housing adjacent to office buildings, many of them in the Port Jefferson area, not far from SICOH's Setauket site (A1514-1517). For example, the Heatherwood Apartments in Port Jefferson are "surrounded by industrial zoning" and lie on the same proposed Route 25A as the SICOH parcel (A1515).[5]

Defendants' brief also presents this Court with a disordered medley of other apparently random objections to the Setauket project, but points to no evidence that the Town Board was even aware of any of these issues. For example, defendants argue that the site is located in hydro-geological zone 1, a supposedly environmentally sensitive area in terms of ground water levels (Def. Br. at 62). Although Portman testified that he did not consider this issue a justification for voting down the SICOH

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[5] Defendants' assumption that SICOH's project would be "surrounded on three sides by office buildings" (Def. Br. at 61) is simply incorrect. The office developments are slated for construction only on two sides of the development (Pl. Ex. 3). The site is bordered on the third side by railroad tracks separating the parcel from residential development and on the fourth side by Route 25A. Id.

application (A1157-1158), defendants now claim that an office building might not require a waste treatment facility, unlike a proposed multi-family housing project. As with the other myriad after-the-fact objections raised by the Town, there is no showing whatsoever that the Town Board even considered the potential need for a waste treatment facility as grounds for rejecting SICOH's application. Moreover, there is no proof that inclusion of a waste treatment facility would be problematic in any way.[6]

At the time of trial, the Town apparently realized for the first time that the only road abutting SICOH's proposed project was Route 25A (Def. Br. at 63). Portman therefore testified that the project would violate the zoning ordinance requiring a 200 foot road frontage because the State had acquired some of the land fronting the road.[7] This technical problem could easily have been resolved by obtaining a variance, which any development on this parcel would have required. There is no evidence that the Town denied SICOH's application for this reason. Even if there were, such evidence would establish that the Town discriminated against SICOH because of the controversial nature of its

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[6] The attempt to raise the specter of an environmental problem because of the need to construct a sewage treatment facility apparently is a favorite Portman ploy. Portman, whose testimony has always been against low cost housing developments (A1151), opposed the subsidized project in Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988), aff'd, 109 S.Ct. 276 (1988) on the identical ground. The Second Circuit noted that "the sewage concern could hardly have been significant if municipal officials only thought of it after the litigation began." Id. at 940.

[7] Portman testified that SICOH's East Patchogue site also had inadequate frontage (A1059-1060). However, this alleged problem did not deter the Planning Board from recommending that the Town grant SICOH's East Patchogue application.

project, since Portman acknowledged that when the site was rezoned from residential to light industry by the prior owner, the same frontage situation existed, and did not deter Brookhaven from rezoning the parcel (A1198-1201).[8]

Defendants also make the misleading assertion that a HUD appraiser, James Taylor, recommended against the rezoning of the site (Def. Ex. W, item 1). In fact, Taylor merely inspected three sites on which SICOH was focusing, including the Setauket site, and opined that he preferred one of the other sites over Setauket. Moreover, defendants fail to inform the Court that Taylor based his opinion primarily on the community opposition to locating low income housing at the Setauket location. Taylor's comment apparently so embarrassed his superiors at HUD, that HUD's area director, Alan Wiener, issued a letter to SICOH emphasizing that Taylor's report did not constitute HUD's official position (Def. Ex. W, item 82).

Finally, defendants rely on correspondence between a planning consultant Norman Gerber and the Town of Brookhaven Planning Board. Defendants, however, presented no evidence that any Town Board member read this correspondence and Gerber himself did not testify at trial. The one item raised in the Gerber correspondence which has not been discussed above is his observation that there is no sidewalk on the undeveloped site. Plaintiffs'

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[8] Brookhaven's statement to the Court that the site is "landlocked" is also specious (Def. Br. at 63). When it applied for rezoning, SICOH told the Town that the State promised to allow access to Route 25A across the State's land (Ex. 10). By the time of trial, a formal access agreement had been executed (Pl. Ex. 49).

expert, Alan Mallach, pointed out that "it would be absolutely amazing if [the site] did have a sidewalk because generally it's outside of an already built village. Sidewalks, . . . are put in . . . when the site is developed" (A620).

Defendants also fail to note that subsequent to Gerber's correspondence, SICOH responded to all of the issues he raised (see Def. Ex. W, items 20, 22, 23, 26, 27, 27a, 27b, 28, 29, 30, 31, 32 and 34). Because Gerber was not called to testify, there is no evidence that his objections were not satisfied by SICOH's response. It is clear therefore that Gerber's concerns alone cannot serve to justify the Town's actions, and no Town Board member testified as to whether the Board was even aware of Gerber's opinions.[9]

What is most notable about defendants' scattershot attack on the suitability of the Setauket parcel for low income housing is that there was no evidence at trial that the Town Board relied on any of these so-called reasons for disapproving SICOH's rezoning application. Defendants' counsel and their expert, after the decision was challenged, simply synthesized the objections described above from bits and pieces of correspondence and documents taken out of context. The only legally significant fact is that, at the time the decision was made, Town Supervisor Acampora gave a single, accurate explanation for the Town Board's actions: the Board wished to pacify community opposition to

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[9] Defendants also fail to point out that Gerber noted that SICOH's proposal was responsive to the low cost housing need in the Town and that there "remains a great need and demand for low and moderate income housing for both senior citizens and families in the Town . . ." (Def. Ex. W, item 77).

building low cost housing. As the trial court held with regard to the East Patchogue application, this explanation strips the Town's action of any presumption of legitimacy and makes clear that the denial of SICOH's application constituted illegal exclusionary zoning.

III.

DEFENDANTS HAVE FAILED TO REBUT THE PLAINTIFFS' SHOWING THAT THE TRIAL COURT IMPOSED INCORRECT STANDARDS IN REVIEWING PLAINTIFFS' TITLE VIII CLAIMS

In Point III of their brief, defendants purport to address plaintiffs' argument that the trial court imposed incorrect standards in applying Title VIII law to the plaintiffs' claims. In so doing, defendants present a morass of contentions set forth under 22 separate subheadings. Plaintiffs will demonstrate that none of these arguments undercuts the validity of plaintiffs' Title VIII action.

a. Plaintiffs Made Out a Prima Facie Case Under Any Appropriate Legal Standard

Plaintiffs in their principal brief showed that the trial court imposed an incorrect legal standard in analyzing plaintiffs' Title VIII claim. The court concluded that because the Brookhaven zoning ordinance on its face did not foreclose the possibility of low cost multi-family housing, a Title VIII violation could not be established. Plaintiffs argued that this analysis was incorrect because a Title VIII violation may relate not only to the facial validity of an ordinance, but to the denial of rezoning for a particular housing project and the disciminatory impact of that denial. Defendants apparently do not disagree with plaintiffs' position, because in their brief they do not support the trial court's analysis.

Instead, defendants take issue with the trial court's view that it was bound by the decision in Huntington Branch, NAACP v.

Town of Huntington, 844 F.2d 926 (2d Cir.), aff'd, 109 S.Ct. 276 (1988). Defendants prefer the 1977 decision by the Seventh Circuit in Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), cert. den., 434 U.S. 1025 (1978). There clearly is no difference between the Huntington ruling and the Arlington Heights ruling as to what constitutes a prima facie Title VIII violation in a disparate impact case. Both cases require a plaintiff to show that the challenged action or decision has a greater adverse impact on one racial group than another or that the action or decision harms a community generally by perpetuating residential segregation.[10] As plaintiffs show in their main brief, they clearly meet both tests.

1. Adverse Impact

In response to plaintiffs' overwhelming showing that the denial of SICOH's application had a discriminatory effect, defendants continue to press their argument that SICOH's proposed projects were really not for low income families. As described above, there can be no doubt that SICOH was proposing to build integrated, low cost housing and that the Town Board and those

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[10] Defendants in their brief misstate the Arlington Heights standard with respect to establishing a prima facie case. Defendants state (pp. 50-51) that "plaintiffs must show that the effects of the municipal action would foreclose the possibility of ending racial segregation in housing within the municipality or area." In fact, the Arlington Heights merely requires plaintiffs to show that the challenged action will perpetuate segregation, not foreclose the possibility of ending it. Arlington Heights, supra, 558 F.2d at 1290.

attending the Town Board hearings were well aware of this fact.[11] Defendants rely only on the vague language of the Halandia Consultant's plan (along with an unexplained mathematical calculation) to support their contention that the project's tenancy would be "overwhelmingly white." There is simply no factual basis for this assertion in the record. Furthermore, Reginald Tuggle, who is black and who served as the first Chairman of SICOH's Board, testified that SICOH's goal always was to build affordable integrated housing in Brookhaven in conformity with HUD guidelines for low cost housing (A655). SICOH's goal of promoting racial integration is also evidenced by the makeup of its Board, which consisted of a variety of civic and religious leaders, including a representative of the NAACP, Elsie Owens (A654).

Defendants also do not attempt to respond to plaintiffs' overwhelming showing that a disproportionately large percentage of Brookhaven residents who need low cost or subsidized rental housing are minority.[12] The disproportionate number of minority households in Brookhaven receiving Section 8 certificates and the disproportionate number of minorities occupying Brookhaven's

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[11] It is uncontroverted that SICOH's goal was for the project to consist of 25-35% minority families with low to moderate incomes.

[12] In support of its argument that denial of SICOH's application did not disparately affect minorities, defendants rely on the housing assistance plans submitted by the Suffolk County Consortium for the proposition that minorities do not disproportionately need low cost housing. However, the housing assistance plans on which defendants rely contain data for the entire Suffolk County Consortium and do not contain separate data on the housing need among minorities in the Town of Brookhaven (Def. Ex. V).

subsidized family housing developments attest to this fact. Moreover, as the trial court found, in 1980 approximately seven percent of Brookhaven's white households had incomes below poverty level, while approximately 20 percent of Brookhaven's black households had incomes below poverty level (A25). There can be no question that denying SICOH's applications therefore had a discriminatory effect on Brookhaven's minority residents.

2. The Perpetuation of Racial Segregation

As plaintiffs set forth in their main brief, the denial of SICOH's applications clearly will perpetuate the racial segregation existing in the Town. The East Patchogue and Setauket sites were located in census tracts which were overwhelmingly white (99.6 percent and 98.3 percent, respectively). Because SICOH has committed itself to a goal of at least 25 to 35 percent minority tenants in its developments, these developments would clearly alleviate segregation. Moreover, plaintiffs proved that Brookhaven as a whole, like Huntington, is racially segregated, with its small black population (3.3 percent of the total) largely concentrated in and around two small enclaves, Gordon Heights and North Bellport. About half of the Town's black population lives in only seven census tracts which encompass the Gordon Heights and North Bellport neighborhoods.

In response to this showing, defendants present a jumble of confusing and sometimes misleading statistics. For example, defendants place great weight on the existence of other parcels zoned multi-family, both developed and vacant, in the East

Patchogue and Setauket areas. There is no evidence concerning the racial makeup of any existing or proposed developments on these sites, so the mere existence of these parcels is irrelevant.

Defendants also represent that the racially impacted census tract which includes Gordon Heights contains no multi-family zoned sites. This ignores the fact that Homestead Village, by far the larger of the two subsidized housing projects for families in Brookhaven, is located in Gordon Heights. Defendants admit that Homestead Village is 36.5 percent black (compared to the Town's 3.3 percent black population) and is located in a census tract which is 24 percent black (Def. Br. at 48).[13] Defense expert Portman, in fact, admitted that under current site selection criteria, HUD would not have approved locating Homestead Village in Gordon Heights because of the neighborhood's large minority concentration (A1295). In any event, the amount of multi-family zoned sites in Gordon Heights and North Bellport is irrelevant, since it is undisputed that SICOH's sites were located in predominantly white areas and would therefore promote integration.

Defendants also attempt to prove that Brookhaven is not a segregated community by pointing to the fact that 54 percent of

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[13] Defendants also rely on the fact that the smaller subsidized housing project in Ridgehaven is located in a census tract which is sparsely populated by minorities. Ridgehaven contains 52 family units, 41 of which are occupied by whites, eight by blacks and three by Hispanics. Defendants fail to mention that the original plans for Ridgehaven called for 240 units of subsidized housing for families and that overwhelming community opposition forced the developer to drastically reduce the number of family units (Pl. Main Br. at 21-22).

Brookhaven's black population resides in areas where the black population is less than 10 percent. This simply means that 54 percent of the black population (6,450 people), manage to be dispersed among 365,000 residents of a town comprising about 270 square miles (Pl. Ex. 50, pp. 21, 31). This statistic is actually striking testimony to the segregated nature of the Town; the other 46 percent of the black population resides in areas where the black population is greater than 10 percent, in a town where only 3.3 percent of the population is black. It is not surprising that viewing the evidence as a whole, the trial court concluded that "Brookhaven's population distribution by race was similar to that of Huntington with comparable but less pronounced racial divisions" (A25).[14]

b. Defendants Fail to Rebut Plaintiffs' Prima Facie Case

Under the procedure set forth in Huntington Branch NAACP v. Town of Huntington, supra, 844 F.2d 926, after a plaintiff makes out a prima facie case of a violation of Title VIII, the defendant must present bona fide and legitimate justifications for its

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[14] Defendants continue to use statistics concerning school districts to support their argument that Brookhaven is not segregated. As plaintiffs pointed out in their main brief, using school districts to measure the level of segregation is essentially meaningless because there are only 20 school districts in Brookhaven with populations ranging from 161 to 50,472 persons (Pl. Br. at 42). Defense expert Portman conceded that HUD relied on census tract data to determine whether an area is racially impacted (A1291-1292, 1295). Alan Mallach's testimony concerning the fact that the Patchogue site is not in North Bellport's school district in no way supports defendants' argument that school district data should be relied on instead of census tract data. Mallach was simply stressing that SICOH wished to locate its project so that school integration as well as residential integration would result (A437-438, 596).

actions. Huntington, 844 F.2d at 936.[15] In the present case, as plaintiffs argued in their main brief, the record is devoid of any evidence from which the Court can ascertain Brookhaven's reasons for turning down SICOH's petitions other than the overwhelming community opposition to the projects. At trial, the defendants did not call a single witness to challenge Acampora's statement that the Town Board denied SICOH's petitions because of community opposition. Instead, at trial, defendants' expert David Portman noted various alleged problems with the project which the Town had never before advanced as reasons for the rezoning denials. Similar testimony by Portman in the Huntington case led the Second Circuit to hold that post hoc rationalizations by public officials or their hired expert witnesses should be awarded little deference. Huntington, 844 F.2d at 940.

In their brief to this Court, defendants argue that Supreme Court decisions in Watson v. Fort Worth Bank & Trust Co., __ U.S. __, 108 S.Ct. 2777 (1988) and Wards Cove Packing Co. v. Atonio, __ U.S. __, 109 S.Ct. 2115 (1989) somehow undercut the Huntington

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[15] Arlington Heights describes four factors which a court should consider in determining whether a defendant's actions violated the Fair Housing Act: the strength of plaintiff's showing of discriminatory effect; whether any evidence of discriminatory intent exists; the defendant's interest in taking the action complained of; and whether the plaintiff seeks to compel the defendant to affirmatively provide housing for minorities or merely to restrain the defendant from interfering with a property owner who wishes to provide such housing. 558 F.2d at 1290. Plaintifffs should prevail under this test as well. They have presented an overwhelming showing of discriminatory effect and some evidence of discriminatory intent in the form of Acampora's statement. Most significantly, defendants did not present evidence of any legitimate governmental reason for their actions and plaintiffs seek merely to restrain the defendants from interfering with their wish to provide integrated housing.

decision because of the Court's statement in Watson that the ultimate burden of proving discrimination remains with the plaintiff at all times. 108 S.Ct. at 2790. However, those cases still require defendants to produce evidence of a legitimate purpose justifying their actions. Watson, 108 S.Ct. at 2780; Wards Cove, 109 S.Ct. at 2126. In the present case, defendants put forth at trial no evidence as to any such purpose. The record contains only Acampora's statement that the SICOH petitions were denied because of community opposition. The Town remained silent concerning any other contemporaneous reason for denying the applications, relying instead at trial on the testimony of an outside expert who was able only to give his own opinions concerning the projects. Under these circumstances, even if the Court accepts defendants' argument that Watson and Wards Cove modify the Huntington analysis, defendants have failed to rebut plaintiffs' prima facie case.

IV.

THERE IS NO LEGAL BASIS FOR DEFENDANTS' ARGUMENT THAT THE TENTH AMENDMENT BARS APPLICATION OF THE FEDERAL FAIR HOUSING ACT TO LAND USE PRACTICES

The trial court, while acknowledging that it was bound to follow the standards set forth in Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir.), aff'd, 109 S.Ct. 276 (1988), commented that in the court's own view, Huntington was incorrectly decided because Title VIII should not apply to the land use practices of municipalities. The court's view in this matter completely contradicts more than 15 years of federal appellate and district court case law interpreting Title VIII. See, e.g., United States v. City of Parma, 494 F.Supp. 1049, 1053 (N.D. Ohio 1980), aff'd in relevant part, 661 F.2d 562 (6th Cir. 1981), cert. den., 456 U.S. 1012 (1982); Resident Advisory Board v. Rizzo, 564 F.2d 126 (3d Cir. 1977), cert. den., 435 U.S. 108 (1978); Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (2d Cir. 1977), cert. den., 434 U.S. 1025 (1978); United States v. City of Black Jack, Missouri, 508 F.2d 1179 (8th Cir. 1974), cert. den., 422 U.S. 1042, reh'g den., 423 U.S. 884 (1975).

In their brief to this Court, defendants take the trial court's unsupported view of federal housing law one step further. They argue that the Tenth Amendment to the federal Constitution somehow bars application of the federal Fair Housing Act to local land use decisions. Of course, there is no legal authority for this proposition. Defendants cite only Garcia v. San Antonio

Metropolitan Transit Authority, 469 U.S. 528 (1985), reh'g den., 471 U.S. 1049 (1985) in which the Supreme Court held that the Tenth Amendment should not be used to "dictate a sacred province of state autonomy" and therefore concluded that Congress had the power under the Commerce Clause to regulate the wages of state workers. Id. at 554. Thus, the holding of Garcia contradicts rather than supports defendants' argument.

The law could not be clearer that under the Fair Housing Act a municipality cannot use its zoning power to discriminatorily interfere with a private organization's efforts to construct low income housing. See, e.g., Smith v. Town of Clarkton, 682 F.2d 1055, 1068 (4th Cir. 1982), citing Metropolitan Housing Development Corporation v. Village of Arlington Heights, 616 F.2d 1006 (7th Cir. 1980); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. den., 401 U.S. 1010 (1971). The Town of Brookhaven cannot take refuge in the Tenth Amendment in an attempt to avoid this mandate.

V.

PLAINTIFFS' ACTION IS NOT TIME BARRED

Defendants argue that plaintiffs' action could have been brought as an Article 78 proceeding, which has a four month limitations period. Defendants therefore argue that plaintiffs' action is time barred. The trial court opinion does not support defendants' incorrect assertion, and it should be rejected.

It is well settled that town board decisions regarding how a community shall be zoned or rezoned constitute legislative rather than administrative acts. Williamsville Southeast Amherst Homeowners Ass'n v. Sharpe, 77 A.D.2d 812 (4th Dept. 1980); Sloane v. Weber, 44 A.D.2d 1036 (4th Dept. 1973); Jacinto v. Barraud, 60 Misc.2d 570 (Sup.Ct. Suffolk Co. 1969). Legislative acts are not subject to review in Article 78 proceedings. Matter of Mandis v. Gorski, 24 A.D.2d 181 (4th Dept. 1965). When petitioners challenge a town board's decision to deny rezoning of a parcel of property, the appropriate procedure for review is a declaratory judgment action, which is governed by a six year period of limitations. Todd Mart, Inc. v. Town Board of the Town of Webster, 49 A.D.2d 12 (4th Dept. 1975), CPLR §213. The present action was brought well within that time period.

Lenihan v. City of New York, 58 N.Y.2d 679 (1982) and Press v. County of Monroe, 50 N.Y.2d 695 (1980), the cases cited by defendants, are completely inapposite, as neither involved a town board decision regarding zoning.[16] There is simply no support

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[16] Lenihan involved the implementation of a resolution of the New York City Department of Personnel and Press involved the

for defendants' argument that plaintiffs' action is barred by the statute of limitations.

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assessment rolls of a sewer district.

CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's order that the denial of SICOH's second East Patchogue application is null and void. This Court should also hold that by denying SICOH's petitions with regard to both parcels, the defendants engaged in exclusionary zoning and violated the federal Fair Housing Act. Moreover, this Court should conclude that SICOH did not waive its right to challenge the denial of the first East Patchogue application. Finally, plaintiffs are entitled to an award of attorneys' fees with respect to the second East Patchogue application as prevailing parties under 42 U.S.C. §1988.

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Respectfully submitted,

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