UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. THE VILLAGE OF SUFFERN, Defendant.	:	06 Civ. 7713 (SCR)
BIKUR CHOLIM, INC., RABBI SIMON LAUBER, FELLOWSHIP HOUSE OF SUFFERN, INC., MALKA STERN, SARA HALPERIN, MICHAEL LIPPMAN, ABRAHAM LANGSAM and JACOB LEVITA, Plaintiffs, v. THE VILLAGE OF SUFFERN, Defendant.	:	05 Civ. 10759 (SCR)

UNITED STATES OF AMERICA'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

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Plaintiff United States of America (the "Government") respectfully submits this memorandum of law in opposition to defendant's motion to dismiss the complaint.

PRELIMINARY STATEMENT

"Bikur cholim" means to visit the sick. In the Village of Suffern, New York, Bikur Cholim, Inc. ("Bikur Cholim"), rents a house (a "Shabbos House") directly across the street from Good Samaritan Hospital (the "Hospital"). The Shabbos House provides free meals and lodging to a small number of Orthodox Jews on the Sabbath or other Holy Days (collectively, the "Sabbath") to allow Orthodox Jews to visit their sick family members and friends at the Hospital without violating the prohibitions of the Sabbath, when Orthodox Jews cannot drive a car, use electricity, or exchange money. Because the Shabbos House is located in a district of the Village zoned for single-family houses, Bikur Cholim applied to the Suffern Zoning Board of Appeals ("ZBA") for a variance to operate the Shabbos House in that zone. In November 2005, following a hearing on the merits, the ZBA denied Bikur Cholim's application.

Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") for precisely this type of case. RLUIPA prohibits local governments from imposing land use regulations in a manner that substantially burdens religious exercise where the government cannot demonstrate that the imposition of that burden furthers a compelling government interest and is the least restrictive means of furthering that interest. That is exactly the situation presented here. The Village's denial of Bikur Cholim's application burdens the religious exercise of Orthodox Jews visiting relatives at the Hospital, forcing them to choose between violating the rules of the Sabbath or neglecting their religious obligation to visit the sick. Yet Suffern has offered no good reason – much less a "compelling" one – to preclude this plainly religious use of the property.

The Village now moves to dismiss the Government's Complaint. But the facts alleged in the Complaint easily state a claim under RLUIPA. Visiting the sick is a religious belief of Orthodox Jews, and the Complaint alleges that the Shabbos House allows Orthodox Jews to engage in this religious practice without violating the Sabbath rules. The Complaint also alleges that the religious exercise of Orthodox Jews is substantially burdened by the denial of the variance request because there is no location outside the single-family zone from where they can safely walk to the Hospital. Finally, the Complaint alleges that the Village has no compelling reason to deny Bikur Cholim's application to engage in their religious exercise in the single-family zone. These allegations plainly satisfy the statutory prerequisites for a RLUIPA "substantial burden" claim.

Although Bikur Cholim has exhausted its efforts to seek a variance, the Village argues that the Government's RLUIPA claim somehow is not ripe. But the Complaint alleges -- and the Village itself concedes -- that Bikur Cholim applied for and was denied a variance from the Zoning Board of Appeals ("ZBA"), the entity in charge of implementing the zoning regulations of the Village. Furthermore, the record shows that Bikur Cholim received notices of its violation of the zoning law, was sued in the Village Justice Court, appealed to the ZBA for a variance, and received a final, definitive decision from the ZBA denying that request and detailing the bases for that denial.

The Village's arguments on the merits are more appropriately raised in the context of a motion for summary judgment; they are simply out of place in a Rule 12(b)6) motion such as this. For instance, it argues that Bikur Cholim's religious exercise is not "substantially burdened" because the location of the Shabbos House merely provides a convenience. This argument disregards the Complaint's allegation that the location of the Shabbos House is critical because there are no other alternative locations available in Suffern. Moreover, the Village asserts disputed factual matters that

are not relevant to an analysis under Rule 12(b)(6). Unsurprisingly, the cases that defendant cites in support of its substantial burden argument were decided in the context of motions for summary judgment or preliminary injunction. In any event, even if the Court were to consider factual matters at this early stage, the "alternative locations" proposed by the Village are not viable alternatives because, among other reasons, they are not within safe walking distance of the Hospital and require the payment of money -- an activity that is prohibited on the Sabbath.

Similarly, the Village argues that the Complaint should be dismissed because it has a "compelling interest" in enforcing its zoning laws. But the issue of whether the asserted interests of the Village are "compelling" is again a factual one, which cannot be resolved in the context of a motion to dismiss. Even if it could be resolved at this preliminary stage, defendant's argument begs the question: the issue is not whether the Village has a compelling interest in maintaining zoning laws generally, but whether the application of those laws to deny Bikur Cholim's application serves a compelling interest. In this regard, the Complaint alleges that the Shabbos House is located adjacent to a medical office complex, across the street from the Hospital, and perpendicular to a major Suffern thoroughfare. Moreover, while the Suffern zoning law permits single-family homes in this district as of right, it also permits houses of worship as of right, and schools, clubs, dormitories, and day-care centers by special permission. Thus, even if maintaining the character of a single-family neighborhood could serve a "compelling" interest as an abstract matter, simply permitting just fourteen Orthodox Jews to stay overnight once or twice a week, free of charge, at this particular location in Suffern, across the street from a major Hospital, would not undermine the Village's asserted interests. For all these reasons, defendant's motion should be denied.

FACTUAL BACKGROUND

1. Bikur Cholim's Shabbos House

Bikur Cholim is a non-profit organization that has operated a Shabbos House in Suffern, from 1988 to the present. Compl. ¶ 9. A Shabbos House is a facility that provides meals, lodging and other religious accommodations to Orthodox Jews on the Sabbath to allow them to observe their religious beliefs and practices, which include visiting the sick and complying with the Sabbath rules to refrain from driving, using electricity, and exchanging money. Id. ¶¶ 7-8.

The Shabbos House is located directly across the street from the parking lot entrance to the Hospital. Id. ¶ 9. It provides meals and lodging, free of charge, for religious observance on the Sabbath to Orthodox Jews who visit or take patients to the Hospital. The location, which is within safe walking distance of the Hospital, is the only location in Suffern that allows Orthodox Jews to engage in the religious activity of visiting the sick without engaging in activities forbidden on the Sabbath. Id. ¶¶ 10, 20. It further provides a location for Orthodox Jews to engage in religious practices, such as engaging in Sabbath prayer and the taking of Sabbath meals. Id. ¶¶ 7, 8, and 20.

2. Zoning District of the Shabbos House

The Shabbos House is located at the border of a "R-10" zoning district on Hillcrest Road, which is immediately perpendicular to a main Suffern artery, Route 59. Id. ¶¶ 13, 17. The Shabbos House is directly across the street from the Hospital's parking lot and is adjacent to an office building, which comprises fourteen separate offices and a parking lot that can accommodate fifty-six cars. Id. ¶ 12. Residential houses are located on the other side of the Shabbos House. Id. ¶ 13.

3. Suffern Zoning Law

The Suffern Zoning Law (the "Zoning Law") provides that one-family detached dwellings

and places of worship are "permitted uses" within the R-10 zoning district. Zoning Law § 266-22(A) (adopting Schedule of Village General Use Requirements, attached as Ex. A to the Declaration of Rebecca C. Martin ("Martin Decl.")). The Zoning Law also provides that, by special permit, other uses are also permitted in the R-10 zoning district, including: (1) private membership clubs, (2) dormitories, (3) private and public schools and colleges, and day-care centers, and (4) home occupations. Id. There is no provision for a motel or hotel-type use anywhere in Suffern, including in zoning district R-10. See id. See also Compl. ¶ 19.

4. Enforcement of the Zoning Law Against Bikur Cholim

A. Orders to Remove Violations and Proceedings Before the Justice Court

On April 27, 2005 and May 8, 2005, the Code Enforcement Officer of Suffern issued two notices, termed "Order to Remove Violation" ("Orders to Remove" or "Orders"), to Bikur Cholim.[1] Martin Decl., Ex. B (Orders and related documents). In particular, the Officer issued Order Nos. 5-197 and 5-215 ("Use Violations") on the ground that the Zoning Law did not permit Bikur Cholim's use of the Shabbos House. Id. Subsequently, the Officer initiated proceedings in the Justice Court of Suffern, alleging that Bikur Cholim committed the violations set forth in the Orders and issued an "Appearance Ticket," ordering Bikur Cholim to appear before the Justice Court to answer the charges. See id.

[1] The Orders and related documents reference "Fellowship House, Inc.," rather than Bikur Cholim. Fellowship House purchased the property from the original builder and leased the property to Bikur Cholim. See Bikur Cholim v. Village of Suffern, No. 05-10758, Compl. ¶ 9. For consistency of reference, the Government will refer to Bikur Cholim rather than Fellowship House.

B. Proceedings Before the Zoning Board of Appeals

To stay the proceedings in the Justice Court with respect to the Use Violations, Bikur Cholim applied to the ZBA and requested a use variance to continue operating the Shabbos House. See Compl. ¶ 22; Martin Decl., Ex. D (excerpt of draft of Minutes of ZBA Nov. 17, 2005 meeting) at 3-4; Rice Decl., Ex. 3 ("Appeal by Fellowship House of Suffern, Inc./Bikur Cholim-Partners in Health") at 1.[2] The application requested a variance to permit the "use and occupancy of a one family residence for overnight occupancy" of up to fourteen people,[3] "who are family members of the patients" of the Hospital. Martin Decl., Ex. C at 5. The application stated that the Shabbos House "is an integral part of our work and mission" and provides food and accommodations for visitors of the Hospital who "are constrained by Jewish law preventing them from traveling to and from the hospital on [the Sabbath]." Id.

The ZBA heard the appeal and request for a use variance on November 17, 2005. During the hearing, Bikur Cholim's attorney discussed the religious function of the Shabbos House, noting, inter alia, that "the organization allows family members and patients to live in the house on the Sabbath when they cannot drive." See id., Ex. D at 1.

C. Denial of the Request for a Variance

The ZBA denied the request for a variance, Compl. ¶ 26, and found that the Shabbos House is a "transient motel/use," which is not permitted in the R-10 zoning district. Rice Decl., Ex. 3 at 1. Although the ZBA acknowledged that the Shabbos House provides "a place for members of a

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[2] In its Motion to Dismiss, Suffern proffers an undated and unsigned document purporting to be the decision of the ZBA denying the variance. See Rice Decl., Ex. 3.

[3] The variance application requested that the property be approved for the use of up to seventeen people. See Martin Decl., Ex. C. At the ZBA hearing, Bikur Cholim modified that request to fourteen people. See Rice Decl., Ex. 3 at 2.

religious community to lodge overnight," id. at 2, it rejected Bikur Cholim's claim that the proposed use was a "religious use." Id. at 7. Rather, the ZBA found that "[i]t is not a tenet of the religion to visit patents in a hospital" and, accordingly, found that the proposed use would be a mere "convenience." Id. The ZBA concluded that Bikur Cholim "has failed to establish that enforcement of the Code on this property imposes a substantial burden on its religious exercise." Id. The ZBA did not identify any compelling interest for denying Bikur Cholim's application. Compl. ¶ 27.

LEGAL STANDARDS

Defendant moves to dismiss the Complaint under Rule 12(b)(1) for lack of subject matter jurisdiction on the ground that the claim is not ripe, and under Rule 12(b)(6) for failure to state a claim. On a Rule 12(b)(1) challenge, plaintiff bears the burden of demonstrating jurisdiction, and the Court may resolve disputed jurisdictional facts by reference to evidence outside the pleadings. See Kamen v. Am. Tel. & Tel. Co., 791 F.2d 1006, 1011 (2d Cir. 1986).

Under Rule 12(b)(6), a "court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Fortress Bible Church v. Feiner, No. 03 Civ. 4235, 2004 WL 1179307, at *1 (S.D.N.Y. Mar. 29, 2004) (Robinson, J.). When deciding a motion to dismiss, "the court must accept as true the facts alleged in the Complaint" and all "reasonable inferences are to be drawn in the plaintiff's favor." Id. (citations omitted); McEachin v. McGunnis, 357 F.3d 197, 200 (2d Cir. 2004). This standard is applied "with particular strictness" where, as here, the plaintiff "complains of a civil rights violation." Cleavland v. Caplaw Enters., 448 F.3d 518, 521 (2d Cir. 2006) (quotation omitted).

ARGUMENT

POINT I

THE GOVERNMENT'S RLUIPA CLAIM IS RIPE

A. Governing Legal Standards

The ripeness requirement prevents courts "through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 347 (2d Cir. 2006) (internal citation omitted). Constitutional ripeness "prevents courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it." Simmonds v. INS, 326 F.3d 351, 357 (2d Cir. 2003). The purpose of the ripeness requirement is to ensure that a dispute has generated injury significant enough to satisfy the case or controversy requirement of Article III. Dougherty v. Town of North Hempstead ZBA, 282 F.3d 83, 90 (2d Cir. 2002).

In the First Amendment context, "the ripeness doctrine is somewhat relaxed." id. at 90; see also Murphy, 402 F.3d at 350-51 (applying Dougherty "relaxed" test to RLUIPA and free exercise claims), and the Government need only show that Bikur Cholim "experienced an immediate injury as a result of [the Village's] actions" and that "additional administrative remedies" would not "further define their alleged injuries." Murphy, 402 F.3d at 351. Alternatively, the Government can establish ripeness by showing that Bikur Cholim "obtain[ed] a final, definitive decision as to how it could use the property from the entity charged with implementing the zoning regulations." Id. at 348 (citing Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 105 S. Ct. 3108 (1985)).

B. The Government's RLUIPA Claim is Ripe

The Government's RLUIPA claim is ripe because Bikur Cholim obtained a "final, definitive decision" from the "entity charged with implementing the zoning regulations." Murphy, 402 F.3d at 348. The Village issued an order for Bikur Cholim to remove its use violation and sued Bikur Cholim in Justice Court for that violation. Martin Decl., Ex. B. Bikur Cholim then applied to the ZBA for a variance. Id., Ex. C. The ZBA conducted a hearing on the merits and denied the application. Rice Decl., Ex. 3. The Village itself has submitted the formal, written decision of the ZBA, which sets forth numerous, detailed findings to support the denial. Id. In its decision, the ZBA made clear that Bikur Cholim may use the Shabbos House only as a single-family dwelling and may not use the property for the religious purpose that Bikur Cholim clearly explained to the ZBA. See id. at 5-8 (finding, among other things, that Bikur Cholim's purpose is not a "religious use," but, rather, is a "transient/motel use," and denying the variance from use as a single-family dwelling). Accordingly, the ZBA's decision shows how Bikur Cholim may use the property and the basis for that decision; thus, the decision constitutes a "final, definitive decision" from the Village regarding the use of the Shabbos House. See Murphy, 402 F.3d at 347 (to find a land use claim ripe, court must be able to "look to a final, definitive position from a local authority to assess precisely how [claimants] can use their property").

The Second Circuit's decision in Murphy, from which the Village quotes at length (see Def. Br. at 8-9), is not to the contrary, indeed, its reasoning actually supports the Government's argument that the claim is ripe. In Murphy, the plaintiffs had received a cease and desist order from the town. 402 F.3d at 345. But in that case, it appears that the town never sued the plaintiffs or took steps to enforce the cease and desist order, id. at 351, and the plaintiffs never requested a variance or took

any administrative action with the entity implementing the zoning regulation, id. at 345. The Court found it "[c]ritical to our decision" that the Murphys did not "appeal the cease and desist order to the Zoning Board of Appeals, where they could have sought a variance." Id. Thus, the Court found the claim not ripe, noting that "[h]ad the Murphys appealed the cease and desist order to the Zoning Board of Appeals and requested variance relief from that body . . . things may very well have been different." Id. at 352. Here, Bikur Cholim did precisely that and, further, obtained the "final, definitive" decision from the ZBA. Therefore, this Court's decision will not be made in a vacuum, but will be based on a full record of the local land use authority's proceedings and final, detailed decision of the ZBA.

C. The Village's Remaining Ripeness Arguments Are Meritless

The Village asserts three additional reasons why the Government's claim is not ripe -- each of which is meritless. First, the Village asserts that Bikur Cholim's variance request was "perfunctory," and failed to provide evidence supporting a variance consistent with the terms of the Zoning Law. Def Br. at 9-10. As an initial matter, the Village's argument goes to the ultimate merits of the variance application; but the question for ripeness purposes is whether the ZBA made a final, definitive decision on the application. Notably, the application was denied by the ZBA on its merits, not because it was considered "perfunctory" by the Village. In any event, Bikur Cholim's application was hardly "perfunctory." The variance application set forth the type of use Bikur Cholim desired and the reasons for such use. Specifically, the application requested the "use and occupancy of a one family residence for overnight occupancy" of up to fourteen people, "who are family members of the patients at Good Samaritan Hospital. Overnight occupancy will be limited to Fridays and approximately 10 Jewish Holiday days, when travel is not permitted. There is no

charge[,] for the accommodations are offered, without charge as a community service." Martin Decl., Ex. C at 5. The application also stated that the Shabbos House "is an integral part of our work and mission" and provides food and accommodations for visitors of the Hospital who "are constrained by Jewish law preventing them from traveling to and from the hospital on [the Sabbath]." Id. Although the Village faults Bikur Cholim for failing to demonstrate an entitlement to a variance on the basis of the Zoning Law's variance criteria, Bikur Cholim requested a variance on the ground that its use of the property was for a religious purpose. See, e.g., Martin Decl., Ex. C at 5.

In the same breath, the Village inconsistently -- and remarkably -- asserts that Bikur Cholim "failed to claim or demonstrate a religious basis for the variance application." Def. Br. at 10. This assertion is belied by Bikur Cholim's application for a variance, unequivocal statements made at the November 17, 2005 hearing, and the ZBA's decision itself. First, the application plainly stated that the Shabbos House is to be used to "provide food and accommodations for families of patients in the hospital on the Sabbath and Jewish holidays who want to be close to their loved ones but are constrained by Jewish law preventing them from traveling to and from the hospital on those days." Martin Decl., Ex. C at 5. Second, the minutes of the ZBA hearing are replete with mention of the religious purpose of the Shabbos House. See id., Ex. D at 1 (Paul Savad), 2 (Michael Lippe), 5 (Mr. Tuscano), and 6 (Steven Tuckman). Indeed, the ZBA decision states that Bikur Cholim explained that it "provide[s] food and accommodations for families of patients in the hospital on the Sabbath and Jewish holidays who want to be close to their loved ones but are constrained by Jewish law preventing them from traveling to and from the hospital on those days," and that the use of the Shabbos House is "in furtherance of the religious beliefs of the users of the residence." Rice Decl.,

Ex. 3 at 2. Finally, the ZBA decision expressly considered and rejected on the merits Bikur Cholim's request to use the property for a "religious use," finding that "it is not a tenet of the religion to visit patients in a hospital or to have a place to walk to after a visit or stay in the hospital." Id. at 7. The ZBA further found that Bikur Cholim "has failed to establish that enforcement of the Code on this property imposes a substantial burden on its religious exercise." Id. Accordingly, the issue of the religious purpose of the Shabbos House was squarely presented to the ZBA.

The Village also asserts that "Bikur Cholim failed and neglected to appeal the violation notice that the use of the property was impermissible." Def. Br. at 11. Again, the Village's assertion is belied by the record. Bikur Cholim's application to the Zoning Board plainly stated: "Appeal is hereby taken and application is made for . . . variance from the requirements of [Zoning Law §] 266-22 . . . [t]o permit construction, maintenance and use of a one family residence per attached statement." Martin Decl., Ex. C at 1. The Application specifically referenced Order to Remove Violation No. 5-197, which determined that Bikur Cholim's use was not permitted by the Zoning Law's schedule of permitted uses. See id., Ex. B. The Application also requested that the ZBA "permit the use and occupancy of a one family residence for overnight occupancy for up to 17 people, who are family members of the patients at Good Samaritan Hospital." Id., Ex. C at 2, 5. Whether Bikur Cholim's application to the ZBA is construed as an "appeal" or solely as a variance request is immaterial. The point here is that the ZBA issued a final decision on the merits, refusing to allow Bikur Cholim to use the property for its proposed religious use. There was no further administrative appeal available to Bikur Cholim.

Finally, even if there was any further administrative avenue for relief that Bikur Cholim could have pursued (and the Village identifies none), such a pursuit would have been pointless, given the

stated grounds of the ZBA's decision on the merits. See Murphy, at 402 F.3d at 349 ("A property owner . . . will be excused from obtaining a final decision if pursing an appeal to a zoning board of appeals or seeking a variance would be futile."); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1012, n.3 (1992) (variance application not required when it would be "pointless").

POINT II

THE COMPLAINT STATES A CLAIM UNDER RLUIPA

The Government's Complaint undeniably states a claim. RLUIPA provides, in relevant part, that no government "shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise . . . unless the government demonstrates that imposition of the burden . . . is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1). As set forth below, the Government's Complaint states a claim under this provision.

A. The Complaint Adequately Alleges "Religious Exercise"

Under RLUIPA, a "religious exercise" includes "any exercise of religion" and need not be "compelled by or [even] central, to a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). RLUIPA expressly states that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." Id. § 2000cc-5(7)(B). Finally, RLUIPA provides that the Act is to be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [the Act] and the Constitution." Id. § 2000cc-3(g).

Here, the Complaint adequately alleges "religious exercise." The Complaint specifically alleges that the Shabbos House provides "meals and lodging to Orthodox Jews on the Sabbath and

other Holy Days in order to allow them to observe their religious beliefs and practices on those days." Compl. ¶ 8. The Complaint further alleges that the location of the Shabbos House allows "Orthodox Jews to engage in these activities while refraining from activities forbidden on the Sabbath by their religion." Id. ¶ 10. Finally, the Complaint alleges that "[t]here is no other location within reasonable and safe walking distance of the Hospital that could accommodate Orthodox Jews on the Sabbath or Holy Day, and afford those guests the opportunity to exercise their religious belief by visiting the sick and observing the laws of the Sabbath." Id. ¶ 20. Thus, the Government has adequately pled that the Shabbos House is used "for the purpose of religious exercise." 42 U.S.C. § 2000cc-5(7)(B).

The Village contends, however, that visiting the sick is not, in fact, a "tenet" of Judaism. Def. Br. at 13-14. As noted above, however, RLUIPA does not require that "religious exercise" be "compelled by, or central to, a system of religious beliefs." 42 U.S.C. § 2000cc-5(7)(A). Moreover, the Second Circuit has held that "courts are not permitted to inquire into the centrality of a professed belief to the adherent's religion or to question its validity in determining whether a religious practice exists." Fifth Avenue Presbyterian Church v. City of New York, 293 F.3d 570, 574 (2d Cir. 2002) (internal quotation marks omitted). An individual "claiming violation of free exercise rights need only demonstrate that the beliefs professed are sincerely held and in the individual's own scheme of things, religious." Id. at 574 (citation omitted). Here, the Complaint adequately alleges that visiting the sick is a religious belief of those Orthodox Jews using the Shabbos House. Compl. ¶ 20. The Village's factual dispute over the "tenets" of Orthodox Judaism is not appropriate -- on a motion to dismiss or otherwise. Fifth Avenue Presbyterian Church, 293 F.3d at 574.

B. The Complaint Adequately Alleges the Imposition of a "Substantial Burden"

The Complaint also adequately alleges that the Village imposed a "substantial burden" on religious exercise when, by denying the variance application, it completely precluded Bikur Cholim's proposed use of the property. RLUIPA does not define the term "substantial burden," and courts interpreting RLUIPA have not settled upon a uniform definition for that term. However, when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." Lorillard v. Pons, 434 U.S. 575, 581, 98 S. Ct. 866 (1978). Accordingly, courts should be guided in defining "substantial burden" by prior cases under the Free Exercise Clause and RFRA. The legislative history of RLUIPA further demonstrates that Congress intended for the term "substantial burden" to be given the same definition as in Free Exercise Clause cases. See 146 Cong. Rec. S7776 ("The Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence.").

The Supreme Court has not adopted a single definition of the term "substantial burden" under the Free Exercise Clause. In Sherbert v. Vener, 374 U.S. 398, 404 (1963), the Court found a substantial burden where an individual was "pressure[d]" by being forced "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." See also Thomas v. Rev. Bd. of the Indiana Employ. Sec. Div., 450 U.S. 707, 718 (1981) (State could not deny unemployment compensation to a person who quit his job to avoid work that would violate his religious beliefs).

In the context of a Free Exercise challenge, the Second Circuit ruled that "a substantial burden exists where the state put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." Jolly v. Coughlin, 76 F.3d 468, 477 (2d Cir. 1996) (citation omitted).

In interpreting RLUIPA, courts have sought to apply the definitions of "substantial burden" in a new context. The Eleventh Circuit ruled in Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004), that a "substantial burden" under RLUIPA means more than an inconvenience to religious exercise, and is "akin to significant pressure . . . that tends to force adherents to forego religious precepts." The Ninth Circuit has defined "substantial burden" under RLUIPA as a "significantly great restriction or onus" on religious exercise. San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004); accord Guru Nanak Sikh Soc'y v. County of Sutter, 456 F.3d 978, 988 (9th Cir. 2006). The Seventh Circuit has found that the burden need not be "insuperable" to be deemed "substantial." Sts. Constantine & Helen Greek Orthodox Church v. City of New Berlin, 396 F.3d 895, 900-901 (7th Cir. 2005) (finding denial of application constituted "substantial burden").[4] Consistent with these principles, a court recently found that a village's denial of an application for a special permit to construct a building on the campus of a

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[4] Citing Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003) ("CLUB"), defendant argues for a more stringent standard. There, ruling in the context of a facial challenge to Chicago's zoning ordinance under RLUIPA, the court held that a "substantial burden" must bear "direct, primary, and fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impracticable." In facial challenges, the "challenger must establish that no set of circumstances exists under which the [law] would be valid." City of Chicago v. Morales, 527 U.S. 41, 78-79, 119 S.Ct 1849 (1999). This case, in contrast, involves a challenge to a single zoning decision regarding a specific property. Thus, the standard set forth in CLUB is inapposite. Indeed, the Seventh Circuit's more recent decision in Sts. Constantine, discussed above, applied a more flexible approach outside of the context of a facial challenge. In any event, the Government's claim satisfies either standard because the Village's denial of the variance application here completely precluded Bikur Cholim from using its property for its proffered religious purpose.

private religious school constituted a "substantial burden" on religious exercise by "seriously imped[ing]" that exercise. Westchester Day Sch. v. Vill. of Mamaroneck, 417 F. Supp. 2d 477, 547 (S.D.N.Y. 2006), appeal docketed, 06-1464-cv (2d Cir.) .

Consistent with these principles, courts have held that forcing Orthodox Jews to modify their behavior on the Sabbath impermissibly burdens religious exercise. For example, in Kadin v. Kadin, 515 N.Y.S.2d 868, 870, 131 A.D.2d 437 (2d Dep't 1987), the court held that requiring an a Jewish father to transport his child by automobile during the first two days of Holidays pursuant to a visitation order would result in the father being "forced to violate these laws of Orthodox Judaism." Similarly, in Guterman v. Schweiker, a court held that forcing a plaintiff to choose between $60 in "SSI benefits and his religious duty to walk to services on the Sabbath" imposed an impermissible burden on plaintiff's religious practice. 520 F. Supp. 91, 92 (E.D. Mich. 1981).

Here, the Village's denial of Bikur Cholim's variance request imposed a "substantial burden" on religious exercise. The Complaint alleges that on the Sabbath, Orthodox Jews engage in prayer and refrain from many activities, including driving, using electricity, exchanging money, and carrying objects. Compl. ¶ 7. The Complaint further alleges that the Shabbos House is the only location within safe and reasonable walking distance that allows Orthodox Jews who are visiting the sick to comply with the religious requirements of the Sabbath. Id. ¶¶ 8, 10-11, 20. The Shabbos House also provides meals and lodging to those Orthodox Jews who arrive at the Hospital before sundown on the Sabbath, but are required to stay at the Hospital after sundown to be with a sick patient. Thus, without the Shabbos House, Orthodox Jews are faced with choosing between violating their religious obligations to visit the sick and observing the Sabbath. Presenting Orthodox Jews with this choice violates RLUIPA because it pressures Orthodox Jews to modify their behavior

or violate their religious beliefs. See, e.g., Thomas, 450 U.S. at 718, 101 S. Ct. 32. The challenged conduct here – denial of the variance application – completely precludes Bikur Cholim from using its property for this religious purpose.

The Village asserts that Bikur Cholim's religious exercise is not burdened because the location of the Shabbos House is a matter of "convenience." Def. Br. at 13-17. The Village's argument, however, disregards the Complaint, which states that the Shabbos House is the "only location" in Suffern where Orthodox Jews can both visit the sick and comply with Sabbath restrictions. Compl. ¶¶ 8, 10-11, 20. At best, the Village's argument of "convenience" raises a factual dispute, which is not properly before the Court on a motion to dismiss. See Twinlab Corp. v. Signature Media Servs., Inc., No. 99 Civ. 169, 1999 WL 1115237, at *6 (S.D.N.Y. Dec. 7 1999) ("it is premature to consider a factual dispute . . . on a motion to dismiss"); Potomac Capital Mkts. Corp. v. Prudential-Bache, 726 F. Supp. 87, 94 (S.D.N.Y. 1989) (where "[t]here has been no discovery, [r]esolution of the factual dispute at this point would be premature"). Indeed, the cases cited by the Village in support of its argument that the location of the Shabbos House is a matter of convenience, Def. Br. at 17-21, were decided on motions for summary judgment or preliminary injunction.[5]

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[5] To the extent the Shabbos House also provides certain "conveniences" for its Orthodox Jewish residents is of no import because "where a building is to be used for the purpose of 'religious exercise,' the building is not denied protection under RLUIPA merely because it includes certain facilities that are not at all times themselves devoted to" religious exercise – as long as those facilities are "inextricably integrated with and reasonably necessary to facilitate" such religious exercise." Westchester Day Sch., 417 F. Supp. 2d at 544; see also Living Water Church of God v. Charter Tp. of Meridian, 384 F. Supp. 2d 1123, 1133 (W.D. Mich. 2005) (finding substantial burden on religious exercise in denial of permit to construct facility including classrooms, sanctuary, gymnasium, offices, and meeting rooms); Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1224, 1232 (C.D. Cal. 2002) (application for 300,000 foot complex including worship center, multiple classrooms, study rooms, multi-purpose room, youth activity

In addition, defendant's rely on the statement in Midrash Sephardi, 366 F.3d at 1228, that "walking a few extra blocks is [not] 'substantial,' as the term is used in RLUIPA." Def. Br. at 14-16. But its reliance on that case is profoundly misplaced. In that case, the town of Surfside, Florida, denied the application of a synagogue to operate within the boundaries of the town's business district, which did not permit such uses. 366 F.3d at 1219-20. In finding that the plaintiffs had not demonstrated a "substantial burden," the Eleventh Circuit observed that although the synagogue was denied the right to locate their synagogue in the business district specifically, the congregation had the "alternative of applying for a permit to operate only a few blocks from their current location" in another district of the same town. Id. at 1228. Here, in contrast, the Complaint alleges that Suffern considers the Shabbos House to be a "transient/motel" use under its Zoning Law and that "[t]here is no zoning district within Suffern that permits transient/motel uses." Compl. ¶¶ 18-19. Thus, unlike in Midrash Sephardi, Bikur Cholim did not have the alternative of applying to operate in another district within Suffern: according to Suffern, its proposed use was completely precluded by law in the entire Village.

Furthermore, the hotels referenced in defendant's brief are 1.5 miles from the Hospital, not a "few extra blocks," see Def. Br. at 17, and indeed are not even within Suffern itself. Moreover, the few extra blocks in Midrash Sephardi were measured from the congregant's homes. Here, the distance is being measured from a hotel, which creates additional burdens on the ability of Orthodox Jews to follow the Sabbath. As set forth in the Complaint, Orthodox Jews are forbidden from carrying any objects, using electricity, or using cash on the Sabbath. Compl. ¶¶ 8, 10. Therefore,

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center, gymnasium, child daycare facility, and space for community service programs implicated "religious exercise" under RLUIPA). Accordingly, Bikur Cholim's use of the Shabbos House constitutes "religious exercise."

the "option" defendant proposes, see Def. Br. at 16-17 (e.g., proposing that the Orthodox Jews stay at a hotel), would require driving and the exchange of money on the Sabbath. Thus, it is not an adequate substitute for the Shabbos House.[6] Accordingly, Midrash Sephardi -- which in any event was decided in the context of a summary judgment motion, and not a motion to dismiss -- hardly compels a contrary result here.

C. The Complaint Adequately Alleges the Absence of a Compelling Interest

Defendant spills considerable ink (Def. Br. 17-25) arguing that the Village, in fact, has a "compelling governmental interest" in enforcing its zoning regulations, and that its denial of Bikur Cholim's variance application was, in fact, the "least restrictive" means of furthering that interest. Defendant's argument here misses the point of its own motion, however, because these are quintessentially fact issues on which the defendant -- not the Government -- bears the burden of proof. Accordingly, defendant's argument has no place in a motion directed at the sufficiency of the Government's pleading.

To establish a prima facie case under RLUIPA, the plaintiff must allege facts sufficient to show that the challenged land use regulation imposes a "substantial burden" on a person's "religious exercise." 42 U.S.C. § 2000cc(a)(1) & cc-2(b). See Westchester Day Sch., 379 F. Supp. 2d at 555.

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[6] Defendant's remaining cases, Def. Br. at 14-16, are inapposite. In those cases, the courts held that there was no substantial burden where, unlike here, the plaintiffs were able to relocate in a suitable place in the village. For example, in CLUB, 342 F.3d at 761, the Seventh Circuit held that there was no substantial burden in upholding the denial of a special use permit for five Chicago churches because all five churches were able to find suitable locations within the city limits. See also Petra Presbyterian Church v. Vil. of Northbrook, No. 03 Civ. 1936, 2003 WL 22048089, at *11-12 (N.D. Ill Aug. 29, 2003) (denying preliminary injunction because plaintiffs could engage in their religious activity in 70% of the village); Grosz v. City of Miami Beach, 721 F.2d 729, 739 (11th Cir. 1983) (pre-RLUIPA decision granting summary judgment because the only burden was expense or inconvenience, and the location was not essential because plaintiffs could pray in different homes).

Once the plaintiff establishes those elements, the plaintiff is entitled to relief "unless the [Village] demonstrates that imposition of the burden . . . (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000cc(a)(1)(A) & (B) (emphasis added). In other words, the burden of demonstrating both a "compelling governmental interest" and the "least restrictive means" rests with the Village. See 42 U.S.C. § 2000cc-2(b).

Here, the Government's Complaint alleges the essential elements of its RLUIPA claim by alleging that Suffern's denial of Bikur Cholim's variance application imposed a "substantial burden" on the "religious exercise" of Orthodox Jews visiting the sick in Suffern. Compl. ¶ 29. Under the liberal notice pleading standards of Rule 8, the Government was not required to allege facts beyond those necessary to succeed on the merits of its claim. See, e.g., Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 511-12 (2002) ("It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts that he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered."). That said, the Complaint nevertheless also specifically alleged that "Suffern's denial of the variance does not further a compelling government interest, or even if it does, it is not the least restrictive means of furthering any compelling governmental interest." Compl. ¶ 31; see also id. ¶ 27. While Suffern obviously disputes that allegation, the question at the pleading stage is only whether the Complaint provides fair notice of the claim to the defendant, not whether the defendant will ultimately carry its burden of persuasion at trial.[7] See Swierkiewicz, 534 U.S. at 511-12; see also Schuer v. Rhodes, 416 U.S. 232, 236 (1974)

[7] Thus, a court may not dismiss a complaint under Rule 12(b)(6) on the basis of a potential defense unless the facts supporting that defense themselves appear within the four corners of the complaint. See McKenna v. Wright, 386 F.3d 432 (2d Cir. 2004).

("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence in support of its claims."). Moreover, where the underlying facts are in dispute, the determination of whether the asserted governmental interests are sufficiently "compelling" under RLUIPA is not susceptible to resolution as a matter of law. See Westchester Day Sch. v. Vill. of Mamaroneck, 386 F.3d 183, 192 (2d Cir. 2004) (district court erred in granting summary judgment on whether asserted governmental interests were "compelling"); Fortress, 2004 WL 1179307, at *1 ("It appears as though this argument was included in the Defendants' objection to the preliminary injunction and was mistakenly copied into their Motion to Dismiss. In any event, this Court does not find these arguments persuasive on the Defendants' motion; particularly in light of the standard of review for a motion to dismiss.").

In any event, even if the Court were permitted to look outside the Complaint and assess the merits of the Village's asserted interests, the interests asserted by the Village here are in no sense "compelling." Suffern argues only that it has a compelling interest in the enforcement of its zoning regulations, both generally and as they relate to single-family development. Def. Br. at 17. But the Village's argument only begs the question. The Government's Complaint does not challenge the Village's right to maintain zoning regulations; rather, it challenges only the specific application of those zoning regulations to Bikur Cholim and, specifically, the Village's refusal to grant a variance from those zoning regulations. It is no answer, then, that those zoning regulations themselves constitute the "compelling governmental interest." See Gonzales v. O Centro Espirata Beneficente Unia Do Vegetal, 126 S. Ct. 1211, 1220 (2006) (courts must look beyond "broadly formulated interests justifying the general applicability of government mandates [and] scrutinize [] the asserted

harms of granting specific exemptions to particular religious claimants").[8]

Such misguided reasoning, if accepted, would eviscerate RLUIPA, which expressly contemplates that plaintiffs may challenge the "imposition" or "implementation" of a "land use regulation" when that imposition substantially burdens religious exercise. See Midrash Sephardi, 366 F.3d at 1226 ("challenges to zoning ordinances are expressly contemplated by the statute"). Suffern offers no reason, compelling or otherwise, to support the specific application of these land use regulations to Bikur Cholim at this particular location. Indeed, if the interest at stake here were the purported inviolability of single-family development in the R-10 district, then the Zoning Law itself undermines that interest by expressly allowing places of worship, private clubs, day care centers, schools, colleges, and dormitories within the same district (see Martin Decl., Ex. A); these uses are certainly more inconsistent with the "character" of single family homes than Bikur Cholim's proposed use, which would preserve intact the particular single family home at issue. Similarly, the actual location of the Shabbos House -- which is adjacent to medical offices and a large parking lot, and across the street from the Hospital parking lot -- undermines any argument that Bikur Cholim's

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[8] Almost as an afterthought, defendant argues that reading RLUIPA to require the Village to grant the requested variance would violate the Establishment Clause. Def. Br. at 23-24. But every court that has considered the issue has concluded that RLUIPA's land-use provisions fully comply with the Establishment Clause. See, e.g., Westchester Day Sch., 417 F. Supp. 2d at 557 (ruling that the land use provisions of RLUIPA do not violate the Establishment Clause.) There, the court based its decision, in part, on Cutter v. Wilkinson, 544 U.S. 709, 719-720, 125 S. Ct. 2113 (2005), where the Court unanimously held that RLUIPA's provisions relating to prisoners did not violate the Establishment Clause. 417 F. Supp. 2d at 557. See also Midrash Sephardi, 366 F.3d at 1240-42; United States v. Maui County, 298 F. Supp. 2d 1010, 1014-15 (D. Haw. 2003); Murphy v. Zoning Comm'n of Town of New Milford, 289 F. Supp. 2d 87 (D. Conn. 2003), vacated on other grounds, 402 F.3d 342 (2d Cir. 2005). Granting a variance on the facts of this case would not give "preferential treatment" on the basis of religion. Rather, "in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." Freedom Baptist Church of Del. County v. Township of Middletown, 204 F. Supp. 2d 857, 865, n.9 (E.D. Pa. 2002) (citation omitted).

use violates this purported interest.

The plethora of cases cited in defendant's brief, see Def. Br. at 17-22, do not alter this conclusion. None of the cases cited support the proposition that enforcement of zoning laws is a "compelling interest" under RLUIPA. The majority of the cases involve application of a rational relationship test, which has no bearing on a "compelling interest" analysis required here.[9] The only cases cited by defendant that concern religion do not involve findings that the location was important for the religious exercise.[10]

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[9] See Fox Meadow Estates, Inc. v. Culley, 252 N.Y.S. 178, 178, 233 A.D. 250, 251 (App. 1931) (denial of a variance to build apartment building instead of single family home was "reasonable" when sole reason for request was "profit"), aff'd 261 N.Y. 506 (1933); Albright v. Town of Manlius, 28 N.Y.2d 108, 320 N.Y.S.2d 50 (1971) (upholding denial that was "for benefit" of the community); Town of Huntington v. Park Shore Day Camp, 47 N.Y.2d 61, 69, 416 N.Y.S.2d 774 (1979) (ordinance prohibiting opening of tennis camp was "rationally related" to fostering values of a residential district); United States v. Carolene Prods. Co., 304 U.S. 144, 154, 58 S. Ct. 778 (1938) (ordinance under the "Filled Milk Act" had a "rational basis"); Vill. of Belle Terre v. Borass, 416 U.S. 1, 8 (1974) (single-family home zoning "[bore] a rational relationship" to town's values of tranquil life); Baddour v. City of Long Beach, 279 N.Y. 167, 173, 18 N.E.2d 18 (1938) (same); Rodgers v. Vill. of Tarrytown, 302 N.Y. 115, 121, 96 N.E.2d 731 (1951) (same); McMinn v. Town of Oyster Bay, 66 N.Y.2d 544, 549, 498 N.Y.S.2d 128, 131 (1985) (zoning ordinance restricting single-family housing to any number of blood related relatives was not "reasonably related" to a "legitimate governmental purpose"); Headley v. Fennell, 210 N.Y.S. 102, 104 (Sup. Ct. 1924) (excluding multiple family dwellings was not "unreasonable or unnecessary"), aff'd 214 A.D. 810 (4th Dept. 1925); ; Berman v. Parker, 348 U.S. 26, 33, 75 S. Ct. 98 (1954) (Fifth Amendment does not prohibit Congressional legislation to beautify the capital); Marcus Assocs. v. Town of Huntington, 45 N.Y.2d 501, 506, 410 N.Y.S.2d 546, 548 (1978) (preservation of "residential character" had "reasonable relationship to legitimate governmental objective"); Wulfsohn v. Burden, 241 N.Y. 288, 290, 150 N.E.120, 123 (1925) (preservation of "residential character" was "reasonable exercise" of State's power); Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 132, 531 N.Y.S.2d 782, 788 (1988) (ordinance affecting low-income families was "adopted for a legitimate government purpose" and had a "reasonable relation" to City's goals).

[10] The only two cases cited by defendant that concern religion are in apposite. In Christian Gospel Church v. City of San Francisco, 896 F.2d 1221, 1224-25 (9th Cir. 1990), a pre-RLUIPA decision, the court upheld the denial of a permit to a church, where, unlike here, the church "made no showing of why it is important for the Church to worship in this particular home." Here, the Complaint alleges that the location of the Shabbos is critical to Bikur Cholim. Similarly, in Int'l

D. The Complaint Adequately Alleges that Suffern Failed to Enforce its Zoning Code by the Least Restrictive Means Possible

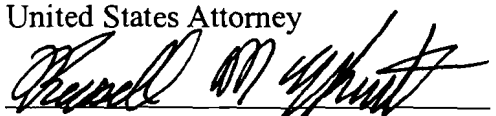
Finally, defendant argues that the denial of the variance here was the "least restrictive" means available to the ZBA because the ZBA possessed "no legal alternative other than to deny the use variance." Def. Br. at 25.[11] But again, while the Government was not obligated to plead the absence of an available defense, the Complaint expressly alleges that Suffern "failed to enforce its zoning code in the least restrictive means possible." Compl. ¶ 27; see also ¶ 31. Suffern's factual disagreement with this allegation may not be resolved on the basis of the pleadings.

CONCLUSION

For the reasons stated above, the Court should deny Suffern's motion to dismiss.

Dated: November 27, 2006
New York, New York

MICHAEL J. GARCIA
United States Attorney

By: 
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Church of Foursquare Gospel v. City of Chicago Heights, 955 F. Supp. 878, 880-881 (N.D. Ill. 1996), a pre-RLUIPA decision, the court denied a permit to a church because the location of the church was not important to the plaintiffs. Moreover, subsequent cases have called this case into question. See Midrash Sephardi, 366 F.3d at 1225-1226 ("Past cases have held that zoning decisions do not generally impose a substantial burden on religious exercise. See Grosz v. City of Miami Beach, 721 F.2d 729, 739 (11th Cir.1983) (footnote, supra 2); see also Christian Gospel Church, Inc. v. City and County of San Francisco, ... These cases all considered whether the "religious exercise" implicated by zoning decisions was integral to a believer's faith. RLUIPA obviates the need for such analysis by providing a statutory definition of "religious exercise.").

[11] In this section, defendant repeats its remarkable assertion that Bikur Cholim "did not contend before the [ZBA] that the use in question was a religious use." Def. Br. at 24-25. Again, this argument ignores that Bikur Cholim plainly explained the religious use of the Shabbos House to the ZBA. Rice Decl., Ex. 3.

CERTIFICATE OF SERVICE

I, Rebecca C. Martin, an Assistant United States Attorney for the Southern District of New York, hereby certify that on November 27, 2006, I caused a copy of the foregoing Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint of the United States and Declaration of Rebecca C. Martin (and accompanying exhibits) to be served by Federal Express upon defendant's counsel at the following address:

Terry Rice, Esq.
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Dated: New York, New York
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