UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAI CENTER FOR LIVING JUDAISM, INC., et al., ***Plaintiffs*,** **v.** **TOWNSHIP OF MILLBURN, NEW JERSEY, et al.,** ***Defendants.***	**Civil Action No. 23-1833** **ORDER**

THIS MATTER comes before the Court on Defendants Township of Millburn, New Jersey ("Millburn") and Township of Millburn, New Jersey Zoning Board of Adjustment, Inc.'s (the "ZBA" and together with Millburn, "Defendants"), Motion for Judgment on the Pleadings (the "Motion"), ECF No. 24;[1]

and it appearing that Plaintiffs Chai Center for Living Judaism, Inc. (the "Chai Center") and Rivkah Bogomilsky (together, "Plaintiffs") oppose the Motion, ECF No. 31;

and it appearing that this matter arises from ZBA's denial of a variance that Plaintiffs requested to build a house of worship in Millburn, New Jersey, see generally Compl., ECF No. 1;[2]

and it appearing that the Chai Center, a Chabad-Lubavitch is a religious group led by Rabbi Mendel Bogomilsky and his wife, Rivkah Bogomilsky, id. ¶¶ 13–16;

[1] Defendants also sought a stay of discovery pending resolution of the Motion. Given that this Order resolves the Motion and that the Honorable Michael A. Hammer previously granted a stay of discovery pending mediation, see ECF No. 42, the Court denies the request for a stay as moot.

[2] On a motion for judgment on the pleadings, the Court "must accept all of the allegations in the pleadings of the party against whom the motion is addressed as true and draw all reasonable inferences in favor of the non-moving party." Bibbs v. Trans Union LLC, 43 F.4th 331, 339 (3d Cir. 2022).

and it appearing that Plaintiffs own land located at 437 and 439 Millburn Avenue, Millburn, New Jersey (the "Property"), id. ¶¶ 74–75;

and it appearing that the Property is located within a residential zoning district that does not allow houses of worship unless they satisfy certain conditional use requirements, including a minimum acreage of three acres, certain parking requirements, and various setback requirements, id. ¶¶ 88–97;

and it appearing that on February 7, 2000, the Chai Center, seeking to build a house of worship on the Property, filed an application seeking a variance from these and other conditional use requirements (the "First Application"), id. ¶¶ 143, 148;

and it appearing that the ZBA denied the First Application, id. ¶ 162;

and it appearing that on July 31, 2021, the Chai Center filed a second application for a conditional use variance (the "Second Application" and together with the First Application, the "Applications"), id. ¶ 217;

and it appearing that the Second Application differed from the First Application in many ways, including, but not limited to, (1) construction of a new, singular house of worship (as opposed to dual residential and religious use under the First Application); (2) more parking spaces; (3) increased setbacks; (4) removal of a retaining wall; (5) landscaping and drainage improvements; and (6) different placement of access and driveways, id. ¶¶ 217–24;

and it appearing that after six hearings, during which the ZBA allowed extensive and allegedly improper questioning by neighbors opposed to the Second Application, the ZBA, referring to their denial of the First Application, denied the Second Application on res judicata grounds, id. ¶¶ 230–80;

and it appearing that Plaintiffs assert seven causes of action: (1) four claims of violations of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc, et seq. (Counts 1–4); (2) two claims of civil rights violations under 42 U.S.C. § 1983 (Counts 5–6); and (3) one state-law claim of arbitrary, capricious, and unreasonable denial of land use application (Count 7) (the "Arbitrary Denial Claim"), id. ¶¶ 356–73;[3]

and it appearing that Defendants now move for judgment on the pleadings under Rule 12(c), arguing that (1) the Complaint does not adequately allege that the ZBA's res judicata determination was arbitrary, capricious, or unreasonable and (2) Plaintiffs' as-applied claims are unripe, see Defs.' Br. at 9–23;

and it appearing that a court will not grant judgment under Rule 12(c) if the "complaint contains 'sufficient factual matter to show that the claim is facially plausible, thus enabling the court to draw the reasonable inference that the defendant is liable for [the] misconduct alleged'" Bibbs, 43 F.4th at 339 (alteration in original) (quoting Warren Gen. Hosp. v. Amgen Inc., 643 F.3d 77, 84 (3d Cir. 2011));

and it appearing that Defendants first argue that Plaintiffs' Arbitrary Denial Claim fails because (1) the ZBA properly considered that the Second Application was larger and more extensive than the First Application and (2) the changes in law, the neighborhood, and the Second Application are not enough to preclude a finding a res judicata, Defs.' Br. at 14–20;

[3] Plaintiffs assert both facial and as-applied claims to Millburn land use regulations. See Compl. ¶¶ 331–55 (alleging that Millburn's land use regulations are facially discriminatory); id. ¶¶ 356–73 (alleging that Defendants' application of the land use regulations in denying the Second Application violated Plaintiffs' civil rights). Defendants only object to these facial challenges in their reply. See generally Defs.' Br., ECF No. 24.1; see also Defs.' Reply, ECF No. 34 at 2–4. "A moving party may not raise new issues and present new factual materials in a reply brief that it should have raised in its initial brief." Ballas v. Tedesco, 41 F. Supp. 2d 531, 533 n.2 (D.N.J. 1999) (citing International Raw Materials, Ltd. v. Stauffer Chem. Co., 978 F.2d 1318, 1327 n.11 (3d Cir. 1992). Therefore, the Court will only entertain the as-applied claims for purposes of this Motion.

and it appearing that as to the Arbitrary Denial Claim, "the question is not whether [the Court] would have reached a different conclusion if it had initially decided the matter, but whether the [ZBA] was arbitrary, capricious, or unreasonable in concluding that" Plaintiffs' Second Application was not sufficiently different to justify denying it on res judicata grounds, see Bressman v. Gash, 131 N.J. 517, 527 (1993) (internal citations omitted); see also Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 33 (2013) ("A board acts arbitrarily, capriciously, or unreasonably if its findings of fact in support of a grant or denial of a variance are not supported by the record . . .");

and it appearing that res judicata may not bar subsequent conditional use applications when there are substantial changes in the subsequent application and the subsequent application does not seek the same relief, Ten Stary Dom P'ship, 216 N.J. at 39;

and it appearing that Plaintiffs adequately allege that the Second Application "represented a substantial change to the [First Application]," Compl. ¶ 281; see also id. ¶¶ 283–302 (listing over 15 differences between the First Application and Second Application, including overall land use, building size, parking allotments, setbacks, required variances, lot coverage, driveway and sidewalk access placement, slope disturbance, retaining wall, and stormwater management);

and it appearing that for purposes of res judicata, New Jersey courts look to, among other things, "whether the evidence involves application of the same rule of law," First Union Nat. Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 353 (2007);[4] see also Keyes v. Lynch, 214 F. Supp. 3d 267, 277 (M.D. Pa. 2016) (citing State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154, 162 (1945)) (noting that an intervening change of law between first and second judgments can create a narrow exception to res judicata, especially when the underlying issue involves a constitutional right);

[4] Plaintiffs' Arbitrary Denial Claim is a state-law claim, and the Parties do not disagree that New Jersey law applies. See Defs.' Br. at 12–20 (applying New Jersey law); Pls.' Opp'n, ECF No. 31 at 22–34 (same).

and it appearing that Plaintiffs also allege that there was a relevant intervening change in the zoning regulations, Compl. ¶¶ 213–16, and that the standard by which the ZBA should have evaluated conditional use applications changed from the First Application to the Second Application, id. ¶¶ 305–10 (alleging that the ZBA was required to use a more relaxed "inherently beneficial" test for the Second Application than the "conditional use" test it used in evaluating the First Application);[5]

and it appearing that res judicata may not bar subsequent conditional use applications when there are substantial changes in the conditions surrounding the subject property, Ten Stary Dom P'ship, 216 N.J. at 39;

and it appearing that Plaintiffs also allege that the neighborhood surrounding the Property experienced a significant transformation in the 20 years separating the two Applications, id. ¶¶ 78–79, 312–20 (alleging that the neighborhood became "less residential in character and more accommodating to a house of worship like the Chai Center," including a significant expansion of the high school across the street from the Property, an abundance of non-residential real estate within one-half of a mile of the Property, and significant upcoming residential and retail development within one-third of a mile of the Property);

and it appearing that Plaintiffs allege that they presented the Second Application—which received no significant concerns from the Township Police Department, Township Fire Department, Township Engineer, and Township Planner—and all of the intervening changes to the ZBA at six hearings, id. ¶¶ 225–31;

[5] Although Defendants argue that the "inherently beneficial" test existed at the time of the First Application, Plaintiffs do not allege that the formulation of the test is the intervening change. See Defs.' Br. at 18–19. Rather, Plaintiffs allege that (1) the ZBA was free to choose between the "inherently beneficial" and "conditional use" tests at the time of the First Application, (2) they chose the more stringent "conditional use" test, and (3) House of Fire Christian Church v. Zoning Bd. of Adjustment of Clifton, 379 N.J. Super. 526 (App. Div. 2005)—a case that followed the denial of the First Application—required the ZBA to use the less stringent "inherently beneficial" test for the Second Application. See Compl. ¶¶ 305–10.

and it appearing that Plaintiffs allege that many of the questions and public comments at the hearings were either inappropriate or involved the application of res judicata but did not adequately address the merits of the Second Application, id. ¶¶ 232–60;

and it appearing that nonetheless, the ZBA denied the Second Application on res judicata grounds, id. ¶ 280;

and it appearing that the Court, therefore, finds that Plaintiffs adequately plead the Arbitrary Denial Claim;

and it appearing that Defendants also argue that Plaintiffs' as-applied claims are unripe because the ZBA's denial on res judicata grounds is not a "final, definitive position" on the Second Application, see Defs.' Br. at 21 (quoting Hansen Found., Inc. v. City of Atl. City, 504 F.Supp.3d 327, 342 (D.N.J. 2020));

and it appearing that land uses claims are ripe if (1) "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," and (2) the decision "inflicts an actual, concrete injury," Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 193 (1985), overruled on other grounds by Knick v. Twp. of Scott, 588 U.S. 180 (2019);

and it appearing that the denial of the Second Application on res judicata grounds necessarily constitutes a "final decision" because res judicata "is a salutary rule that respects the finality of the initial decision," Ten Stary Dom P'ship, 216 N.J. at 39 (emphasis added); see also id. at 39–40 (emphasis added) (noting that the zoning board should have had the opportunity to make the res judicata determination in the first instance because a trial court usurping that decision would "deprive[] all parties of the benefits of a final decision");

and it appearing that Plaintiffs also adequately allege that the denial of the Second Application inflicted an actual, concrete injury, Compl. ¶¶ 47–73 (noting the ways in which the lack of a house of worship impedes on Plaintiffs' ability to worship in furtherance of their religious beliefs);

and it appearing that the Court, therefore, finds that Plaintiffs' as-applied claims are ripe;

IT IS on this 23rd day of May, 2024;

ORDERED that Defendants' Motion for Judgment on the Pleadings, ECF No. 24, is **DENIED**.

s/ Madeline Cox Arleo
HON. MADELINE COX ARLEO
UNITED STATES DISTRICT JUDGE