UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOST LAKE HOLDINGS, LLC, *et al*.,	:	
Plaintiffs,	:	
- against -	:	22 Civ. 10656 (VB)
THE TOWN OF FORESTBURGH, *et al*.,	:	
Defendant.	:	

STATEMENT OF INTEREST
OF THE UNITED STATES OF AMERICA

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STATUTES AND REGULATIONS

The United States, by its attorney Matthew Podolsky, Acting United States Attorney for the Southern District of New York, with the concurrence of Mac Warner, Deputy Assistant Attorney General for Civil Rights for the United States Department of Justice, respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517, to address the motion of defendant the Town of Forestburgh ("Forestburgh" or the "Town") to dismiss the claims of Plaintiffs Lost Lake Holdings, LLC, *et al*. ("Plaintiffs"), under the Fair Housing Act, 42 U.S.C. § 3601 *et seq*. (the "FHA"), as unripe and therefore nonjusticiable.

PRELIMINARY STATEMENT

The Amended Complaint alleges that the developer Plaintiffs, who are Orthodox Jews, purchased a "shovel-ready" housing development—previously approved by Forestburgh—but that Forestburgh discriminatorily obstructed and delayed the development when it learned that the homes could be purchased and lived in by Orthodox Jews. Am. Compl. ¶¶ 4-10, ECF No. 60. Forestburgh increased tax assessments, denied building permits, and issued violation notices and stop work orders to stop the project. *Id*. Plaintiffs appealed the building permit denials to the Zoning Board of Appeals ("ZBA"), where the ZBA allegedly continued the discriminatory plan to delay and stop the development by deviating from normal procedures and ultimately denying Plaintiffs' appeal for pretextual reasons. *Id.* ¶¶ 6, 313-432. Forestburgh then allegedly reopened proceedings under the New York State Environmental Quality Review Act ("SEQRA") against the Plaintiffs, creating a potentially indeterminate delay of the project. *Id*. ¶¶ 444-449. The Amended Complaint alleges violations of the FHA, among other claims.

In its motion to dismiss, Forestburgh renews the prudential ripeness arguments previously rejected by this Court in *Lost Lake Holdings LLC v. Town of Forestburgh*, 22 Civ. 10656 (VB), 2023 WL 8947154, at *4 (S.D.N.Y. Dec. 28, 2023) (the "December 2023 Ruling"), claiming that

the Second Circuit's recent decision in *BMG Monroe I, LLC v Vill. of Monroe*, 93 F.4th 595 (2d Cir. 2024), should alter the Court's ruling. *Monroe*, however, did not alter the prudential ripeness framework correctly applied by this Court in its December 2023 Ruling or limit the "futility" exception to the ripeness doctrine. Further, the facts of *Monroe* are inapt and do not reflect the situation alleged by Plaintiffs—that Forestburgh's course of conduct is motivated by anti-Semitism. *See, e.g.*, Am. Compl. ¶¶ 11, 37, 84-133, 423, 447. Moreover, Plaintiffs' allegation that Forestburgh has wielded the land use process itself in a discriminatory fashion to delay the Plaintiffs from ever developing Lost Lake is sufficient at this stage of the litigation to allege an injury for which "pursuit of a further administrative decision would do nothing to further define [the] injury." *Sunrise Detox V, LLC v. City of White Plains*, 769 F.3d 118, 123 (2d Cir. 2014). Accordingly, the Plaintiffs' claims are ripe even in the absence of further land use proceedings, and the Court should deny Defendants' motion.

INTEREST OF THE UNITED STATES

The United States' authority to file this statement of interest stems from 28 U.S.C. § 517, which provides:

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

Id.[1] Forestburgh's motion raises a significant question regarding the application of prudential ripeness to FHA claims. The Department of Justice shares with the Department of Housing and Urban Development the responsibility for the enforcement of the FHA. *See, e.g.*, 42 U.S.C. §§ 3610, 3612, 3614. The United States frequently files Statements of Interest in cases concerning the applicability and interpretation of federal law in which it has enforcement interests. *See, e.g.*, *Koumoin v. Ki-Moon*, 16 Civ. 2111 (AJN), 2016 WL 7243551, at *3 (S.D.N.Y. Dec. 14, 2016) (noting filing of Statement of interest by the United States); *Brooklyn Center for Independence of the Disabled v. Bloomberg*, 980 F. Supp. 2d 588, 641 n.9 (S.D.N.Y. 2013) (noting statement of interest filed in Americans with Disabilities Act challenge to municipal emergency planning procedures); *see also Disabled in Action v. Board of Elections of the City of New York*, 752 F.3d 189, 194-95 (2d Cir. 2014) (noting appearance of United States to propose remedial plan to address lack of accessible election facilities in Americans with Disabilities Act case). The United States further has an enforcement interest arising from the President's January 29, 2025 Executive Order on Combating Anti-Semitism, Section 2 of which

[1] The Government is cognizant of the Court's disposition of the Government's previously filed statement of interest (ECF Nos. 53-55) but respectfully submits that its unique interest in litigating the scope of the statutes at issue here, as described below, supports the Court's consideration of the instant filing.

provides: "It shall be the policy of the United States to combat anti-Semitism vigorously, using all available and appropriate legal tools, to prosecute, remove, or otherwise hold to account the perpetrators of unlawful anti-Semitic harassment and violence." Exec. Order No. 14188, 90 Fed. Reg. 8847 (Jan. 29, 2025).

Specifically, the authority of the Attorney General in civil rights matters, including in "housing" matters, is delegated to the Assistant Attorney General for Civil Rights (the "AAG"). 28 C.F.R. § 0.50(a) ("[E]nforcement of all Federal statutes affecting civil rights, including . . . housing . . ." is "assigned to, and shall be conducted, handled, or supervised by, the Assistant Attorney General, Civil Rights Division."); *see also United States v. City of Philadelphia*, 838 F. Supp. 223, 228 (E.D. Pa. 1993) (noting that the Attorney General has "delegated authority to enforce the Fair Housing Act" to the "Assistant Attorney General for Civil Rights") (citing 28 C.F.R. §§ 0.13 and 0.50), *aff'd*, 30 F.3d 1488 (3d Cir. 1994). The Justice Manual further delineates that authority at Section 8-2.170(C), which provides that: "The Department of Justice is authorized under 28 U.S.C. §§ 516 and 517 to file statements of interest in federal court cases in which the United States has an interest. The Assistant Attorney General for the Civil Rights Division, or his or her designee, may approve the filing of a statement of interest."[2] As the Civil Rights Division does not yet have a confirmed Assistant Attorney General, this authority is presently vested in Mac Warner, who in his role as Deputy Assistant Attorney General is the supervisory official for the Division and has approved the filing of this Statement of Interest.

The Justice Manual also provides that amicus participation may be appropriate in cases "which involve the interpretation of a civil rights statute" or "which raise issues that could

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[2] *See* https://www.justice.gov/jm/jm-8-2000-enforcement-civil-rights-civil-statutes#8-2.170 .

significantly affect private enforcement of the statutes the Civil Rights Division enforces," *id.* ¶ A, both of which apply in this circumstance. Attorneys from both the Civil Rights Division and the U.S. Attorney's Office identified this lawsuit as raising allegations of discrimination upon the basis of religion similar to those previously litigated by the Department under the FHA and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-2 ("RLUIPA"). *See, e.g.*, *United States v. Village of Airmont*, 20 Civ. 10121 (NSR) (AEK) (Consent Decree entered October 20, 2023); *United States v. Village of Suffern*, 06 Civ. 7713 (WWE) (RLUIPA Consent Decree entered June 16, 2010); *United States v. Village of Airmont*, 05 Civ. 5520 (LAK) (FHA Consent Decree entered May 9, 2011); *LeBlanc-Sternberg v. Fletcher*, 104 F.3d 355 (2d Cir. 1996) (FHA judgment). The Government has a strong interest in robust enforcement of the FHA and RLUIPA, both in ensuring that standing under them is as broad as the courts have recognized, and in ensuring that unmeritorious ripeness arguments do not obstruct the Government's own enforcement efforts.

Section 517 "plainly confers upon the Attorney General broad discretion in his decision to dispatch government lawyers 'to attend to *any* . . . interest of the United States.' 28 U.S.C. § 517 (emphasis added)." *Hall v. Clinton*, 285 F.3d 74, 80 (D.C. Cir. 2002); *see City of New York v. Permanent Mission of India to the United Nations*, 446 F.3d 365, 377 n.17 (2d Cir. 2006) ("We note that the United States did not on its own initiative file a statement of interest, as it might have done, pursuant to 28 U.S.C. § 517."), *aff'd and remanded*, 551 U.S. 193 (2007); *In re Terrorist Attacks on Sept. 11, 2001*, 122 F. Supp. 3d 181, 187 n.8 (S.D.N.Y. 2015) ("The Executive Branch is authorized to submit a statement of interest in state or federal court. See 28 U.S.C. § 517."); *Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 895 F. Supp. 660, 667 (S.D.N.Y. 1995) ("It is the prerogative of the executive branch to intervene, pursuant to 28

U.S.C. § 517, when significant United States interests may be affected by the outcome of a particular action."), *aff'd*, 109 F.3d 850 (2d Cir. 1997).[3]

[3] As the United States' submission of March 29, 2023, noted, judges in this district routinely accept submissions from the United States under such circumstances, even when the United States is not a party and the Court has not solicited the views of the United States. *See, e.g.*, *Nat'l Coalition on Black Civic Participation v. Wohl*, 661 F. Supp. 3d 78, 96–97 (S.D.N.Y. 2023) (noting filing of statement of interest pursuant to § 517; statement was filed in conjunction with the Voting Rights Section of the Civil Rights Division and not solicited by the Court); *The City of New York v. Arm or Ally, LLC*, 22 Civ. 5525 (JMF) (S.D.N.Y. ECF No. 64) (statement of interest filed October 6, 2022, pursuant to § 517; statement was filed in conjunction with multiple sections of the Department of Justice and the Eastern District of New York; submission was not solicited by the Court but the Court approved the scheduling of the filing); *Disability Rights New York v. City of New York*, 22 Civ. 4493 (ER) (S.D.N.Y. ECF No. 53) (statement of interest filed October 5, 2022, pursuant to § 517; statement was filed in conjunction with the Disability Rights Section of the Civil Rights Division and not solicited by the Court); *John Does 1 through 7 v. The Taliban, et al*., 20 Misc. 740 (KPF), 03 Civ. 9848 (GBD) (S.D.N.Y. ECF No. 563) (statement of interest filed February 11, 2022, pursuant to § 517; statement was filed in conjunction with the Federal Programs Branch and not solicited by the Court); *FG Hemisphere Associates LLC v. Democratic Republic of the Congo*, 19 MC 232 (JPO) (S.D.N.Y. ECF No. 41) (statement of interest filed December 17, 2021, pursuant to § 517; statement was filed in case implicating United States foreign policy interests and while statement was not solicited, leave to submit statement with an extension for more time was requested and approved by the Court); *Fantasia v. Montefiore New Rochelle*, 19 Civ. 11054 (VB) (S.D.N.Y. ECF No. 57) (statement of interest filed September 10, 2021, pursuant to § 517; statement was filed in conjunction with the Disability Rights Section of the Civil Rights Division and not solicited by the Court); *Am. Council of the Blind of New York v. City of New York*, 18 Civ. 5792 (PAE) (S.D.N.Y. ECF No. 150) (statement of interest filed April 23, 2021, pursuant to § 517; statement was filed in conjunction with the Disability Rights Section of the Civil Rights Division and not solicited by the Court); *M.G. v. Cuomo*, 19 Civ. 639 (CS) (AEK) (S.D.N.Y. ECF No. 161) (statement of interest filed February 12, 2021, pursuant to § 517; statement was filed in conjunction with the Disability Rights Section of the Civil Rights Division and not solicited by the Court); *National Fair Housing Alliance et al. v. Facebook*, 18 Civ. 2689 (JGK) (S.D.N.Y. ECF No. 48) (statement of interest filed August 17, 2018, pursuant to § 517; statement was filed in conjunction with the Housing and Civil Enforcement Section of the Civil Rights Division and not solicited by the Court).

BACKGROUND[4]

In 2008, a developer purchased the property at issue and sought the Town Board's approval to rezone the site as a Planned Development District ("PDD"). Am. Compl. ¶ 42. The Town Board approved the rezoning in 2011 and approved a project consisting of 2,627 residential units to proceed in seven phases. *Id*. ¶¶ 42-69. In 2012 and 2013, the Board granted all necessary approvals to proceed with Phase 1. *Id.* ¶¶ 70-74.

The original developer struggled to develop the property. *Id*. ¶¶ 114-115. In July 2020, Plaintiffs purchased the property, prompting anti-Hasidic comments on social media, including that "Dirty money" from the "jewish [sic] mafia" was involved and "you wonder why Germans did what they say they did." *Id.* ¶¶ 117(A), (C). The principals of both Plaintiff corporations are Hasidic Orthodox Jews, *id.* ¶ 2, a fact known to nearby residents and Town officials. *Id*. ¶¶ 167-184.

Shortly after the Town and its residents learned that Hasidic Jews might purchase homes on the property, the Defendants engaged in a "series of violations . . . in order to prevent the Developer Plaintiffs from ever developing Lost Lake and selling homes to Hasidic Orthodox Jewish buyers," *id*. ¶ 7, and "unnecessarily delay the Project by years, causing significant harm

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[4] A court must, on a motion to dismiss, assume the truth of the well-pleaded allegations of a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Co. v. Twombly*, 550 U.S. 544, 555 (2007)). In considering whether a claim is prudentially ripe on a motion to dismiss, the same standard applies, and the court must accept the complaint's plausible allegations. *Ateres Bais Yaakov Acad. of Rockland v. Town of Clarkstown*, 88 F.4th 344, 351 (2d Cir. 2023) (rejecting prudential ripeness challenge and finding that the plaintiff "plausibly alleges that the ZBA issued a final decision by choosing not to adjudicate ABY's appeal of this denial."). The United States limits its analysis to Counts I, II, and III of the Amended Complaint, under FHA §§ 3604(a), 3604(b), and 3617 respectively, and expresses no view as to the other claims in the Amended Complaint.

to the Plaintiffs." *Id*. ¶ 10. For example, Defendants allegedly misused escrow funds deposited by the original developer to fund consultants and outside legal expenses. *Id*. ¶¶ 281-310. Defendants also denied Plaintiffs' applications for building permits for pretextual reasons, which completely halted the project. *Id*. ¶¶ 185-272. Plaintiffs appealed these denials to the ZBA in January 2022. *Id.* ¶ 272.

On November 16, 2022, after "sham" proceedings, the ZBA denied Plaintiffs' applications for building permits because "offering reasonably priced and affordable units to Hasidic Jewish families" was "inconsistent with the project approvals." *Id.* ¶¶ 407, 411. Plaintiffs allege a host of procedural and discriminatory irregularities during the ZBA proceedings, *id*. ¶¶ 313-377, including a refusal by the ZBA to issue subpoenas requested by Plaintiffs, *id*. ¶¶ 347-352; conflicting representation and collusion by attorneys from the same law firm representing both the ZBA and Forestburgh Building Department, *id*. ¶¶ 325-335; accepting amici briefs from opponents of the development but not from supporters, *id*. ¶¶ 356-365; excluding from the record documents submitted by Plaintiffs, *id*. ¶¶ 366-367; and discussing and circulating a pre-prepared denial memorandum outside of the ZBA proceedings. *Id*. ¶¶ 370-376. Plaintiffs allege that their building applications are, in fact, consistent with the initial approvals for the PDD and that the ZBA's reasons for the denial are discriminatory. *Id.* ¶¶ 6, 313-432. Plaintiffs allege that Defendants' actions were part of a plan to discriminatorily delay the development and drive up Plaintiffs' costs. *See, e.g.*, *id.* ¶¶ 10, 154, 220, 234, 246, 257, 347, 466-67, 480, 483, 524.

Forestburgh's alleged obstruction continued even after this suit was filed. In January 2023, Forestburgh issued a "Stop Work and Compliance Order," followed by another "Notice of Violation, Stop Work Order, and Compliance Order" in February 2023, that ordered a halt to all

construction work on the project; the February order cited a number of alleged violations of provisions of the Town Code that no longer exist. *Id.* ¶¶ 433-441. At a Town Board meeting on February 2, 2023, the Town voted to reopen the SEQRA environmental review process that had already been completed, back when a private non-Hasidic developer was developing the site, *id.* ¶¶ 444-449, as part of an attempt to "delay" and "block" the project. *Id*. ¶ 466-67. Forestburgh also filed suit in state court, seeking an injunction halting any further development. *Id.* ¶ 450.

Plaintiffs allege that, as a result of Forestburgh's discriminatory actions, they have suffered significant financial damages, substantial delay, loss of use of the project site, and lost profits. *Id.* ¶¶ 517-532.

ARGUMENT

PLAINTIFFS' FAIR HOUSING ACT CLAIMS AGAINST FORESTBURGH ARE RIPE FOR ADJUDICATION

A. The Legal Framework

Under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), *overruled in part on other grounds by Knick v. Twp. of Scott*, 588 U.S. 180 (2019), a land use claim is ripe when "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," *id.* at 186, that "inflict[s] an actual, concrete injury." *Village Green at Sayville, LLC v. Town of Islip*, 43 F.4th 287, 298 (2d Cir. 2022) (quoting *Williamson*, 473 U.S. at 186, 193). The purpose of the finality doctrine is "to avoid entangling [the Court] in abstract disagreements over matters that are premature for review because the injury is merely speculative and may never occur." *Id*. at 293 (citation omitted).

The "finality" requirement ordinarily obliges plaintiffs to "submit[] at least one meaningful application to the relevant municipal entity." *Sayville*, 43 F.4th at 296 (quoting *Murphy v. New Milford Zoning Comm*., 402 F.3d 342, 348 (2d Cir. 2005)). In *Murphy*, the court found ripeness wanting because the plaintiffs, after receiving a letter from the town's zoning commission informing them that their religious gatherings violated the local zoning ordinance, went next to federal court rather than "appeal[ing] to a zoning board of appeals or seeking a variance." *Murphy*, 402 F.3d at 349. Without either an appeal or a variance application, the court was "depriv[ed] . . . of any certainty as to what use of the Murphys' property would be permitted." *Id.* at 353. The Second Circuit's decision in *Monroe* reiterated that requirement and found that a developer whose building permit applications "departed from the proposed layout and architectural designs attached to" a SEQRA approval by the Village "was required to seek a

second variance from the Village's zoning restrictions before proceeding to federal court" on a claim challenging the denial of building permits. *Monroe*, 93 F.4th at 603.

In *Monroe*, however, the Second Circuit also affirmed the "futility exception," explaining that "a property owner is excused from obtaining a final decision if pursuing an appeal to a zoning board of appeals or seeking a variance would be futile . . . . for example, when a zoning agency lacks discretion to grant variances or has dug in its heels and made clear that all such applications will be denied." *Monroe*, 93 F.4th at 601 (cleaned up) (quoting *Murphy*, 402 F.3d at 349). The determination as to whether a jurisdiction has "dug in its heels," moreover, cautions against the view that the finality requirement is to be "mechanically applied," *Murphy*, 402 F.3d at 349, and instead obliges the Court to make a "fact-specific" determination as to whether there is any realistic possibility that permitting local zoning processes to continue to play out would result in anything other than delay. *Lost Lake Holdings*, 2023 WL 8947154, at *5.

"Additionally, 'government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision.'" *Sherman v. Town of Chester*, 752 F.3d 554, 561 (2d Cir. 2014) (cleaned up) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001)). A "plaintiff alleging discrimination in the context of a land-use dispute is not subject to the final-decision requirement" if "he can show that he suffered some injury independent of the challenged land-use decision." *Sunrise Detox V, LLC v. City of White Plains*, 769 F.3d 118, 123 (2d Cir. 2014). Thus, "a plaintiff need not await a final decision to challenge . . . the manipulation of a zoning process out of discriminatory animus to avoid a final decision." *Id*. (citing *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 199–200 (5th Cir. 2000)); *see also Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach, Fla*., 727 F.3d 1349, 1357

(11th Cir. 2013) (declining to apply *Williamson* finality to land use claim alleging that city's historic property designation was "motivated by discriminatory animus").

B. The Court's Prior Decision on Ripeness

In its December 2023 Ruling, the Court denied the Plaintiffs' application for a preliminary injunction but, as relevant here, rejected Forestburgh's argument that Plaintiffs' claims were not yet prudentially ripe. The Court carefully applied the relevant precedent in the Second Circuit, and noted the well-established principle that "a plaintiff need not appeal a zoning agency's decision when to do so would be futile." *Lost Lake Holdings*, 2023 WL 8947154, at *4 (citing *Sayville*, 43 F.4th at 296).

The Court first rejected Forestburgh's demand that it "mechanically apply" *Murphy* and dismiss Plaintiffs' suit because they had not sought a variance from the ZBA's final decision. *See Lost Lake Holdings*, 2023 WL 8947154, at *5 (citing *Murphy*, 402 F.3d at 348-49). This Court specifically cited the principle that "'nothing more than *de facto* finality is necessary.'" *Ateres Bais Yaakov Acad. of Rockland v. Town of Clarkstown*, 88 F.4th 344, 352 (2d Cir. 2023) (quoting *Pakdel v. City & Cnty. of San Francisco*, 594 U.S. 474, 479 (2021)). This conclusion was correct, and the Court should adhere to it. Plaintiffs have alleged what the court in *Murphy* found lacking: an appeal to the ZBA, which issued a final decision that Plaintiffs could not develop the land. After numerous hearings and testimony, the ZBA issued a lengthy opinion denying Plaintiffs' appeal, finding that their building permit applications and plan to "offer[] reasonably priced and affordable units to Hasidic Jewish families" was inconsistent with the PDD. Am. Comp. ¶¶ 378-425. The ZBA's denial is a "conclusive determination" from a local authority that Plaintiffs may not "develop the subdivision in the manner [they] proposed." *Williamson*, 473 U.S. at 193; *see also Bikur Cholim, Inc. v. Vill. of Suffern*, 664 F. Supp. 2d 267,

275 (S.D.N.Y. 2009) ("The Court can look at the Zoning Board of Appeals' decision as a definitive ruling on how Bikur Cholim can use its property."). Plaintiffs have, therefore, submitted "at least one meaningful application to the relevant municipal entity," *Sayville*, 43 F.4th at 296, and their FHA claims are ripe.

Second, and consistent with its obligation to avoid "mechanically apply[ing]" the variance requirement, the Court reviewed the record and concluded that "there is no practical or logical reason to require plaintiffs to apply for a variance, further appeal the ZBA's decision, or seek project approval modifications from the Town Board." *Lost Lake Holdings*, 2023 WL 8947154, at *5. As the Court explained:

> [T]he parties have clearly staked out their positions. Accordingly, for plaintiffs to seek a variance, return to the Town Board, or apply for project modifications at this stage would be a useless and perfunctory exercise that would not aid the Court in adjudicating their claims.

Id. As this Court held, there are no "abstract disagreement[s]," *Sayville*, 43 F.4th at 293; Plaintiffs alleged that the Town's decision-making body, the ZBA, has rendered a "final decision" on their application, "prevent[ing] them from building sorely needed homes" and causing "significant financial damages" including "lost profits and asset value" and "lost homes sales," thus inflicting a "concrete injury." Am. Comp. ¶¶ 517-526.

C. *Monroe* Does Not Alter the Court's Prior Analysis

Contrary to Forestburgh's argument that *Monroe* "requires immediate dismissal," Memorandum of Law in Support of Defendants' Motion, ECF No. 163 ("Defs.' Br.") at 1, *Monroe* simply restated the same familiar principles of ripeness, finality, and futility from *Murphy* and its progeny that this Court articulated in its December 2023 Ruling. *Monroe* did not change the Second Circuit's application of *Williamson* finality nor alter the availability of the

futility exception. Moreover, the dramatic differences between the facts of *Monroe* and this case highlight why *Monroe* has no application here.

First, in *Monroe*, the court found that the plaintiffs had not achieved finality, because their building applications "departed from the proposed layout and architectural designs attached to the SEQRA Findings," and as a result were "required to seek a second variance from the Village's zoning restrictions before proceeding to federal court." *Monroe*, 93 F.4th at 603. Here, in contrast, Plaintiffs provide detailed allegations that their building permit applications *were* consistent with the prior approvals. *See, e.g.*, Am. Compl. ¶ 396 ("Therefore, the building permit applications *did* adhere to the Declaration of Covenants and Restrictions and Design Guidelines, as referenced by the SEQRA Findings Statement and PDD approval resolution."); *id*. ¶ 401 ("[T]he building permit applications do in fact comply with each of the provisions of the draft Design Guidelines and 2013 Declaration of Covenants and Restrictions listed in the relevant section 6.12 of the Findings Statement."); *see also id*. ¶¶ 380-432.[5]

Second, and missing from the *Monroe* decision, Plaintiffs have plausibly alleged that the *land use process itself* was rife with discriminatory animus and procedural irregularities, including discriminatory comments, emails, and social media posts by residents and town officials, *id.* ¶¶ 84-133; a refusal by the ZBA to issue subpoenas, *id*. ¶¶ 347-352; conflicting

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[5] Whether the Plaintiffs' building permit applications were within the parameters of the prior approvals given by Forestburgh is a question of material fact central to this case. Although not required at this stage, Plaintiffs have produced evidence supporting their allegations on this score, and have created a question of fact on this issue. *See* Decl. of Yehuda Miller at ¶¶ 58-59, 95, 99-100, ECF 100; *see also* Decl. of Steven Barshov at ¶ 29, ECF No. 99; *see also* ECF No. 99-26 at 2. Accordingly, disposition of this case on *Williamson* finality grounds at this stage would be inappropriate. *See, e.g.*, *W.J.F. Realty Corp. v. Town of Southampton*, 351 F. Supp. 2d 18, 24 (E.D.N.Y. 2004) (declining to grant summary judgement on *Williamson* finality grounds because the "conflicting positions raise genuine issues of material facts.").

representations by attorneys for the ZBA and Forestburgh Building Department, *id*. ¶¶ 325-335; acceptance of amici briefs from opponents of the development but not from supporters, *id*. ¶¶ 356-365; exclusion from the record of documents submitted by Plaintiffs, *id*. ¶¶ 366-367; and discussions by the ZBA outside the ZBA proceedings. *Id*. ¶¶ 370-376.[6] *Monroe* does not answer or even address what finality requires with respect to challenging a discriminatory land use *process*.

Finally, *Monroe* did not alter the principle that "a property owner need not pursue such applications when a zoning agency lacks discretion to grant variances." *Murphy*, 402 F.3d at 349. Under Forestburgh's town code and New York Law, only the ZBA is authorized to grant a variance. *See* Forestburgh Code, Chapter 180-3 (definition of "variance") and 180-38(A) (authorization for ZBA to hear variances); N.Y. Town L. § 267–b. But in its denial, the ZBA

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[6] Plaintiffs have put forth evidence supporting the claim that Forestburgh has truly "dug in its heels" on discriminatory grounds. In one email, the Chairman of Forestburgh's Town Planning Board states: "Please don't be scared about the [H]asidic threat — we're energized and have the cash to fight and make their lives miserable….. Bloomingberg [sic] was asleep: we're on amphetamines." ECF No. 177-8. In another email, several town officials (including the Town Supervisor and Deputy Supervisor, Town Clerk, Code Enforcement Officer, and Town Planning Board Chair) were advised by a private citizen that, "I hope you'll ask for help and circle the wagons." ECF No. 177-10 at 3. The private citizen explained: "I have no qualms with their religion, but I would note that their sect is notorious for mysogyny [sic] and child abuse. I do fear their wanton destruction of the towns and school districts . . . they take over, like locusts – killing everything they encounter, draining every last resource, bleeding the beast (as they say internally regarding welfare), and destroying Forestburgh as we know and love it today." *Id*. After receiving the email, instead of deleting the email or replying that he rejects this characterization of Hasidic Orthodox Jews, the Town Board Planning Chair [Robbins] *forwarded* the email to unknown recipients, stating "I too have been thinking strategy about how to prevent Lost Lake from overwhelming the town . . . ." *Id*. at 2. This anti-Semitic opposition contrasts sharply with *Monroe*, where the board merely expressed "doubts" about a variance application, not an objection to the religion of the applicants: "While the Village Planning Board might have expressed doubts about BMG's prospects for receiving a variance, 'mere doubt that [a variance] application would be [granted] is insufficient to establish futility.'" *Monroe*, 93 F.4th at 603-04 (quoting *Dreher v. Doherty*, 531 F. App'x 82, 83 (2d Cir. 2013) (further citations omitted)).

took the position that "because the terms, restrictions and conditions incorporated into the PDD have the force and effect of law, *no one other than the municipal corporation* . . . may modify or amend the terms, restrictions, and conditions in the PDD." *See* ZBA Denial at 30, ECF 46-2 (emphasis added). As the ZBA itself believes that it lacks jurisdiction to grant a variance, any such application would be futile. *See Murphy*, 402 F.3d at 349. And Plaintiffs cannot go back to amend the PDD because Forestburgh has "repeal[ed] the existing Planned Development District law in its entirety." Am. Comp. ¶ 106. Accordingly, neither the ZBA nor Forestburgh have discretion to grant variances of amendments. Plaintiffs' FHA claims are therefore prudentially ripe. *Murphy*, 402 F.3d at 349.

D. Plaintiffs Need Not Await a Final Decision to Challenge a Discriminatory Land Use Process

The Second Circuit has repeatedly recognized that a final decision may not be required when the land use process *itself* is used as a delay tactic. *See, e.g.*, *Sunrise Detox,* 769 F.3d at 123 ("[A] plaintiff need not await a final decision to challenge . . . the manipulation of a zoning process out of discriminatory animus to avoid a final decision."); *Sherman v. Town of Chester*, 752 F.3d 554, 563 (2d Cir. 2014) ("Seeking a final decision would be futile because the Town used—and will in all likelihood continue to use—repetitive and unfair procedures, thereby avoiding a final decision. Sherman is therefore not required to satisfy the first prong of *Williamson County*.").

Here, as discussed above, a central component of Plaintiffs' allegations is that Forestburgh, "motivated by anti-Semitic religious and racial animus," discriminated in the land use process itself to "prevent the Developer Plaintiffs from performing any work on the Project" and "unnecessarily delay the Project by years." *See* Am. Compl. ¶¶ 10-11. For example, in addition to the discriminatory ZBA appeal process, *after* Plaintiffs filed their initial complaint,

Forestburgh reopened the SEQRA process—a process resolved nearly 14 years ago, *id*. ¶ 51—in order to prevent any further development of the project. *Id*. ¶¶ 445-467. "Reopening SEQRA review of the Lost Lake Project will add years of unnecessary review and substantial expenditure of funds." *Id*. ¶ 466. According to Plaintiffs' allegations, indefinite delay is Forestburgh's goal. *See, e.g.*, *id.* ¶¶ 10, 154, 220, 234, 246, 257, 347, 466-67, 480, 483, 524.

Here, Plaintiffs have alleged facts that were not alleged and therefore unaddressed in *Sunrise Detox*, that Forestburgh has discriminatorily manipulated the zoning process to delay Plaintiff's project indefinitely. *Sunrise Detox*, 769 F.3d at 123-24; *see Sherman*, 752 F.3d at 563; *see also Groome Res. Ltd*., 234 F.3d at 199–200 (finding that parish's "indeterminate delay" in considering plaintiffs' accommodation request to zoning code satisfied ripeness concerns); *Temple B'Nai Zion, Inc.,* 727 F.3d at 1357 (declining to apply *Williamson* finality to land use claim alleging that city's historic property designation was "motivated by discriminatory animus"). Accordingly, Plaintiffs' FHA are prudentially ripe.

E. Plaintiffs' Claims for Damages Under the FHA Are Ripe Because Plaintiffs Allege That They Have Already Been Injured by Discrimination

Forestburgh asserts that reraising its ripeness argument is in the interest of judicial economy because "it will eliminate the need for (figuratively) 99% of discovery and speed the case to resolution." Defs.' Br. at 2. Not so. Plaintiffs allege that they have already suffered cognizable harm under the FHA because of the discrimination that they have faced. Indeed, as this Court appropriately noted in the December 2023 Ruling, "the Court does not doubt discrimination of the kind alleged here works a deeply painful dignitary harm on its targets." *Lost Lake Holdings*, 2023 WL 8947154, at *7. While this Court ruled that such harm was insufficient to justify entry of a preliminary injunction, Forestburgh cannot somehow cure this dignitary harm by revisiting or revising a ZBA decision or granting a variance. "It is axiomatic

that civil rights plaintiffs may recover compensatory damages for emotional distress." *Ragin v. Harry Macklowe Real Est. Co.*, 6 F.3d 898, 907 (2d Cir. 1993); *see also United States v. Hylton*, 944 F. Supp. 2d 176, 196 (D. Conn. 2013) (quoting *Ragin*), *aff'd*, 590 F. App'x 13 (2d Cir. 2014). Assuming the allegations of the Amended Complaint to be true, the land use process has itself inflicted harms upon Plaintiffs in the form of subjecting them to anti-Semitism. There is no amount of additional review that Forestburgh can offer now, whether from the ZBA or the Town Board, whether in the form of a variance request or something else, that undoes this harm.

These dignitary damages are in addition to the economic damages that Plaintiffs allege that they have already sustained and that no amount of additional zoning review can cure. Housing developers such as Plaintiffs qualify as "aggrieved persons" under the FHA. *See, e.g.*, *Anderson Group LLC v. City of Saratoga Springs*, 805 F.3d 34, 46 (2d Cir. 2015) (holding that developer's "lost up-front economic expenditures on a detailed development proposal for a specific piece of property, coupled with the denial of a necessary special use permit, constitute injuries-in-fact that are fairly traceable to the City's actions, thus affording [them] standing"); *Bloomingburg Jewish Educ. Ctr. v. Village of Bloomingburg*, 111 F. Supp. 3d 459, 490 (S.D.N.Y. 2015) ("[C]ourts have granted standing to, among others, developers asserting challenges under the FHA against municipal decisions that present a barrier to developments") (citation and quotation marks omitted); *Lynn v. Village of Pomona*, 373 F. Supp. 2d 418, 426-28 (S.D.N.Y. 2005) (finding that real estate developer has standing where it "suffered economic losses and other hardships as a result of defendant [village's] allegedly discriminatory application of [a local zoning ordinance]").

Thus, even if Plaintiffs do not obtain declaratory and injunctive relief in the future, they have alleged that they have already suffered a significant injury and are entitled to damages.

Plaintiffs' claims for damages as a result of the discrimination they suffered during the process, *see* Am. Comp. Prayer for Relief ¶ N, are distinct from their claims for declaratory and injunctive relief (*see* Am. Comp. Prayer for Relief ¶¶ A-H (declaratory relief), ¶¶ I-M (injunctive relief)). In *Ateres Bais Yaakov Academy*, for example, the Second Circuit noted that once the zoning board of appeals' decision was clearly final, "it was no longer possible that its claims could take on 'a more concrete and final form.' Because these events amount at a minimum to *de facto* finality, which is all that is required, we conclude that the district court improperly dismissed ABY's religious discrimination and civil rights claims." *Ateres Bais Yaakov Academy*, 88 F.4th at 351–52 (quoting *Murphy*, 402 F.3d at 347); *see also Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002) ("Dougherty's First Amendment claim of retaliation is based upon an immediate injury. Dougherty suffered an injury at the moment the defendants revoked his permit, and Dougherty's pursuit of a further administrative decision would do nothing to further define his injury."), *abrogated on other grounds by Knick*, 588 U.S. 180. Plaintiffs' claims all arise from the same set of facts. Contrary to Forestburgh's claims of judicial economy, dismissing Plaintiffs' declaratory and injunctive claims would result in further proceedings before the zoning authorities over the disposition of the property, in addition to continued litigation in federal court over the dignitary and economic damages already suffered by Plaintiffs.

CONCLUSION

The Government respectfully suggests that Plaintiffs' claims are ripe for adjudication.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.1(c) and this Court's Individual Rule of Practice 2(C), the undersigned hereby certifies that, measured by the word processing program used to prepare this brief, that this brief complies the word-count limitation of the rule, which is a maximum of 8,750. Excluding the caption, any index, table of contents, table of authorities, signature blocks, or any required certificates, but including material contained in footnotes or endnotes, there are 6,113 words in this brief.

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