UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

**UNITED STATES OF AMERICA'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION**

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Plaintiff United States of America respectfully submits this memorandum of law in support of its motion for summary judgment or, in the alternative, a preliminary injunction.

## PRELIMINARY STATEMENT

Bikur cholim refers to the Jewish religious obligation to visit and give comfort to the sick. In the Village of Suffern, New York ("Suffern"), Bikur Cholim, Inc. ("Bikur Cholim"), rents a house (a "Shabbos House") directly across the street from Good Samaritan Hospital ("GSH"). The Shabbos House provides free kosher meals and lodging to a small number of observant Jews on the Sabbath or other Holy Days (collectively, the "Sabbath") to allow observant Jews to visit sick family and friends at GSH without violating the prohibitions of the Sabbath, when observant Jews cannot drive a car, use electricity, or exchange money. Because the Shabbos House is located in a single family district, 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. The record shows that this is precisely what happened here. The ZBA's decision to deny Bikur Cholim's variance effectively precludes Bikur Cholim's religious exercise of helping observant Jews visit and care for the sick at GSH on the Sabbath. Indeed, it is undisputed that absent a variance, there is no location in Suffern where the Shabbos House could exist. Based on these undisputed facts alone, this Court should find that Suffern has substantially burdened religious exercise.

In addition, the denial of Bikur Cholim's application also burdens the religious exercise of observant Jews visiting the sick at GSH, forcing them to choose between violating the rules of the Sabbath or neglecting their religious obligation to attend the sick. Moreover, no "quick" or "reliable" alternatives exist for the guests of the Shabbos House as there are no hotels or places of lodging permitted in Suffern. Westchester Day Sch. v. Vill. of Mamaroneck, – F.3d –, 2007 WL 3011061, at *9 (2d Cir. Oct. 17, 2007) ("WDS II"). The single alternative offered by Suffern throughout this litigation is the Holiday Inn outside of Suffern, in the Village of Montebello. Suffern cannot, as a matter of law, rely on accommodations in other jurisdictions to excuse the burden that it imposes on religion. Further, the record is undisputed that the Holiday Inn is not a "quick" or "reliable" alternative under recent Second Circuit authority because it is 1.8 miles away from GSH and, for the majority of the distance, requires pedestrians to traverse a major commercial artery with only intermittent sidewalks. Furthermore, Sabbath restrictions would prevent observant Jews from being able to register or pay on the Sabbath and thus would preclude the use Holiday Inn in many circumstances. Suffern's only reason for denying this plainly religious and plainly harmless use of property is its asserted interest in enforcing its zoning law – a generalized interest that WDS II dismissed as an insufficient basis for precluding religious use of the property. Moreover, Suffern itself has admitted to inconsistent enforcement of its own zoning law, belying even this insufficient justification.

The record shows there is no genuine dispute that Suffern has substantially burdened religious exercise and that it has no compelling interest in doing so. While the record is thus clear that summary judgment is appropriate, there is no question that the facts of this case warrant, as a bare minimum, a preliminary injunction permitting the Shabbos House to continue operation until a final merits disposition is made. In short, the Shabbos House, located adjacent

to a medical office complex, across the street from GSH, and perpendicular to a major Suffern thoroughfare, implicates no compelling government interest, but greatly serves the religious needs of the observant Jewish community.

## STATEMENT OF FACTS

### A. The Shabbos House

The Shabbos House is located at the border of a "R-10" zoning district on Hillcrest Road, perpendicular to a main artery, Route 59, in Suffern, New York. Admission No. 1.[1] It is directly across the street from the parking lot entrance to GSH, and is between a commercial office building, with a parking lot that can accommodate more than forty cars, id. Nos. 2-4, and a residential house, id. No. 5.

The Shabbos House provides sleeping and other religious accommodations to observant Jews who are visiting and caring for the sick on the Sabbath and other Jewish Holy Days.[2] Lauber (2005) Aff. ¶ 10.[3] The Sabbath rules prohibit, among other things, driving and engaging in commercial transactions, thus, the Shabbos House allows observant Jews to discharge both their religious obligations to the sick and to observe the Sabbath rules when they are required to be at GSH over the Sabbath. Lauber (2005) Aff. ¶ 10; Bleich Rep. at 1, 3-6. Because these

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[1] Pursuant to the Court's July 3, 2007 scheduling order, responses to Requests For Admission ("Requests") were to be served by October 16, 2007. Suffern failed to provide any responses. Accordingly, the Requests are deemed admitted. See Fed. R. Civ. P. 36(a). The Government's Requests are attached as Ex.12 to the Declaration of Russell M. Yankwitt ("Yankwitt Decl.")

[2] There are five major Jewish days that encompass eleven days each year during which the Sabbath restrictions apply. Lauber Aff. (2005) ¶ 3, 13; Yankwitt Decl. Ex. 13 (attaching Jewish calendar).

[3] All affidavits, deposition transcripts, and expert reports are attached to the Declaration of Rebecca C. Martin ("Martin Decl.") in alphabetical order.

prohibitions prevent observant Jews from, among other things, returning home and make it difficult, if not impossible, to stay in a hotel, the Shabbos House provides lodging, food and space to pray on each of those days when family members, and patients who have been discharged from GSH, are unable to return home due to the prohibition on driving. Lauber (2005) Aff. ¶¶ 10, 28-32. It also provides a place for observant Jews to engage in religious practices, such as prayer and meals. Id. ¶¶ 11-12. The Shabbos House, like other shabbos houses in New York, is free of charge and is funded and serviced by the Jewish community. Bleich Rep. at 2.[4]

## B. Jewish Law Requirements

### 1. Restrictions on the Jewish Sabbath and Holy Days

The Sabbath occurs weekly from sundown Friday to sundown Saturday. See Twerski Rep. at 2. The Holy Days during which the Sabbath rules apply, encompass eleven days each year. See Lauber (2005) Aff. ¶ 3; Yankwitt Decl. Ex. 13. Together, the Sabbath and Holy Days can comprise sixty-three days each year. Id. Certain Holy Days extend over the course of three days; thus, when they immediately precede or follow the Sabbath, Sabbath rules apply on four consecutive days. See id. For example, during 2007, Rosh Hashanah began at sundown on Wednesday, and continued to sundown on Friday, at which time the Sabbath began. Id.

The Sabbath rules require observant Jews to comply with numerous restrictions. See, e.g., Bleich Rep. at 5. Except in life-threatening circumstances, Jewish law forbids acts involving combustion (e.g., electricity), or the transportation of objects in public areas. See id. Thus,

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[4] Shabbos houses exist in the vicinity of many hospitals throughout the New York metropolitan region. Bleich Rep. at 2. There are at least ten shabbos houses in New York City. Twerski Aff. ¶ 12. Indeed, plaintiff Bikur Cholim operates shabbos houses near Nyack Hospital in Nyack New York, and Westchester Medical Center in Valhalla, New York. Lauber (2005) Aff. ¶ 10. Each of these shabbos houses offers, free of charge, the same type of accommodation offered at the Shabbos House. Id.

the Sabbath restrictions preclude riding in a car, activating a light switch, pressing a call button in a hospital, answering a telephone, or engaging in commercial transactions. See id. at 4-5; Lauber (2006) Rep. ¶ 10. In addition, observant Jews are obligated to follow certain rituals on the Sabbath, e.g., ritual hand-washing, consuming a minimum quantity of bread during three meals, recitation of prayers over a cup of wine, and praying three times daily. Bleich Rep. at 6.

**2. Care and Assistance for the Sick**

Under Jewish law, observant Jews are also required to seek necessary medical attention. Id. at 3. Where there is even a remote threat to life, Jewish law allows observant Jews to engage in acts otherwise forbidden; e.g., driving a car. Id. Once the danger has passed, however, such acts remain forbidden. Id.

"Bikur cholim" refers to the Jewish obligation to visit the sick. Lauber (2005) Aff. ¶ 7. Jewish law requires personal involvement in the care of the sick. Bleich Rep. at 4. Personal involvement in the care of the sick includes not only the provision of medical care, but also providing for the comfort and emotional tranquility of the patient. Id.; see also Lauber (2005) Aff. ¶ 7. It also requires children to perform personal services on behalf of a parent, such as assistance with feeding, even where assistance from others is available. Bleich Rep. at 5.

**C. The Religious Purpose of the Shabbos House**

The Shabbos House is designed to allow and encourage the observance of Jewish law, including observance of the Sabbath rules and requirements regarding the care and visiting of the sick. See Bleich Rep. at 3-6.

**1. The Shabbos House Provides a Means to Observe Sabbath Rules**

The Shabbos House provides lodging, Sabbath meals and a place to pray for observant

Jews who are required to be at GSH on the Sabbath.[5] See, e.g., Lauber (2005) Aff. ¶¶ 10-12, 28-32. Because the Sabbath and Holy Days can extend over the course of two to four consecutive days, observant Jews are unable to return home for that period of time. See Yankwitt Decl. Ex. 13. The Shabbos House provides a way for these observant Jews to comply with the Sabbath restrictions during that time. See Lauber (2005) Aff. ¶¶ 10-12, 28-32; Bleich Rep. at 3-6.[6]

**2. The Shabbos House Encourages Use of Health Care Facilities**

The existence of Shabbos House encourages observant Jews to seek needed medical care on the Sabbath. See Bleich Rep. at 3. Although Jewish Law permits observant Jews to seek urgent medical care, and to travel with patients when medically necessary on the Sabbath, once the medical threat has passed, such acts remain forbidden. Id. Thus, both patient and companion are likely to be concerned about being stranded at GSH without sleeping accommodations or kosher food and may, albeit erroneously, convince himself or herself that no medical assistance is necessary. Id.; see also Dr. Lippe Dep. at 38-40 (testifying about observant Jews who have delayed needed medical care for such conditions as a broken hip, and possible pneumonia, because of Sabbath concerns). The availability of a Shabbos House eliminates these concerns and, thus, the difficulties of both complying with the Sabbath rules and the requirement to seek medical care when there is even a remote threat to life. See Lauber (2005) Aff. ¶ 29.

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[5] More than half of the Shabbos House guests use the house because of unanticipated medical needs arising on the Sabbath. See Lauber (2006) Aff. ¶ 10; see also Levita Dep. at 27 (father was brought to GSH by Mr. Levita's brother-in-law over the Holy Day of Sukkot).

[6] The Shabbos House also provides a means for observant Jews to observe Sabbath rituals. Bleich Rep. at 6. It also provides a prayer room for observant Jews to pray three times – obligations that are often not possible to fulfill in a hospital setting. Id.

### 3. The Shabbos House Encourages Visiting and Personal Service to the Sick

By providing a means of following Sabbath rules, the Shabbos House encourages family members to fulfill the Jewish law obligation of giving personal care and assistance to the sick and to one's parents. Bleich Rep. at 4-5. Personal assistance provided by family members on the Sabbath is particularly necessary on behalf of patients who are observant Jews and who are not suffering from life-threatening illnesses and thus would not be permitted to activate an electric switch to summon help from GSH staff. See id. In addition, for foreign-born patients, there may be a language barrier and assistance is required to facilitate communication between the patient and medical personnel. Id. Family members may also need to be physically present if medical decision-making must occur over the course of the Sabbath when observant Jews are not permitted to answer the telephone. Id. Thus, the Shabbos House allows family members to fulfill their religious obligation both to be personally involved in the care of their loved one or parent and observe the Sabbath rules. See id.

## D. Founding of the Shabbos House

Rabbi Lauber founded Bikur Cholim in 1981 as a nonprofit organization to observe the religious obligation of bikur cholim after his own extensive hospitalization. Lauber (2005) Aff. ¶ 7-9. After this experience, bikur cholim became a very important part of Rabbi Lauber's religious beliefs, and he dedicated his life to bringing comfort and easing the anxiety and pain of patients and their families. Id. ¶¶ 7-8. To achieve this religious goal, Bikur Cholim, among other things, operates the Shabbos House. Id. ¶ 9.

Bikur Cholim has run the Shabbos House in Suffern for nearly twenty years. Lauber Aff. (2005) ¶ 16. From 1988 to 2001, the Shabbos House was located at 1 Campbell Avenue, on GSH property located on a residential street in Suffern. Id. From 2001 to 2005, the Shabbos

House operated in various locations within GSH. Id. ¶¶ 17-18. In 2004, GSH informed Bikur Cholim that it could no longer provide space to the Shabbos House due to the expansion of its cardiovascular department. Id. ¶ 20; Cassidy Dep. at 9. In 2005, a developer, unrelated to Bikur Cholim, constructed a single family house at 5 Hillcrest. Lauber (2005) Aff. ¶ 22. An organization called Fellowship House purchased the house and leases it to Bikur Cholim for $10 annually. Id. ¶ 23. *GSH supported the relocation and provided,* inter alia, parking for Shabbos House guests. Id.

**E. 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. See Zoning Law § 266-22(A) and Schedule of Vill. Gen. Use Requirements (Yankwitt Decl. Ex. 7). 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 in the Zoning Law for a motel or hotel-type use anywhere in Suffern, including in zoning district R-10. See id.; see also Admission No. 42. Robert Geneslaw, offered by Suffern as an expert on land use, testified that the Zoning Law does not permit Bikur Cholim's use anywhere in Suffern. See Geneslaw Dep. II at 202-03; Admission Nos. 42, 59.

**F. *Religious Exercise of the Individual Plaintiffs***

The individual plaintiffs, Malka Stern, Michael Lipman, Sara Halperin, and Jacob Levita (collectively, the "Individual Plaintiffs" or the "Individuals") are observant Jews, who have stayed at the Shabbos House on the Sabbath to visit a critically ill relative or spouse. Mrs. Stern attended her husband, stricken with Alzheimer's and unable to speak, daily for six weeks. Stern

Aff. ¶¶ 1, 3-4. Mr. Levita visited his father, who had a debilitating condition, each Sabbath at GSH. Levita Aff. ¶¶ 2-4; Levita Dep. at 17. Sara Halperin and her brother Michael Lipman attended their mother, who had a blood fungus infection, on a daily basis. Halperin Aff. ¶¶ 1-4; Halperin Dep. at 17-18; Lipman Aff. ¶¶ 2-3; Lipman Dep. at 21. The Individuals also believe that they must observe the Sabbath rules. See Stern Aff. ¶ 1; Stern Dep. at 16, 22-23; Levita Aff. ¶ 2; Levita Dep. at 25, 29, 32; Halperin Aff. ¶¶ 4, 6; Halperin Dep. at 26, 32-37; Lipman Aff. ¶¶ 3, 5; Lipman Dep. at 25, 36-38.

Further, the Individuals each believe that it is a "mitzvah," a religious obligation, to visit and care for the sick, and they fulfill this obligation. See Lipman Dep. at 24 (visits people because it is a "mitzvah, commandment for visiting the sick, which I do . . . every weekend . . ."); Levita Dep. at 36 (same); Halperin Dep. at 26-28 (part of her religion to visit the sick); Stern Aff. ¶ 6 (same). The Individual Plaintiffs live substantial distances from GSH and are not able to walk home from GSH. See Stern Aff. ¶ 1 (lives in Monsey, New York, 5.1 miles from GSH); Halperin Aff. ¶ 1 (same); Levita Aff. ¶ 1 (lives in Brooklyn, New York); and Lipman Aff. ¶ 1 (same). As a result, they each used the Shabbos House as a place to rest and sleep after the closing time of GSH. See Halperin Dep. at 22-23; Lipman Dep. at 22-23. The Shabbos House is also used to engage in prayer and to eat kosher meals. See Stern Dep. at 22-23; Lipman Dep. at 22, 31; Levita Dep. at 20-21. Without the Shabbos House, these Individuals would be forced to choose between violating the Sabbath prohibitions or violating their religious obligation to care for the sick. See Levita Aff. ¶¶ 5-6; Stern Aff. ¶¶ 6-7; Halperin Aff. ¶¶ 7-9; Lipman Aff. ¶ 3.

**G. Closing the Shabbos House Will Negatively Impact Observant Jews' Healthcare**

The emergency room of GSH treats approximately 36,000 patients per year. Lippe Dep.

at 8. Approximately 5-10 percent of the patients are observant Jews. Id. When observant Jews come to GSH for emergency room treatment on Friday afternoons, they will make requests to have everything completed so that they can leave the hospital and get home before the sun sets. Id. at 30. "[W]hen it closer to Shabbos, [observant Jewish patients] become concerned that they're not going to be able to get home, and they become anxious," which can be injuries to a patient's health. Id. at 32-34. The patients and family express great relief when they learn of the Shabbos House and understand that they have a place to go if they are unable to return home after sundown. Id. at 34. Not having a place to stay during the Sabbath can also negatively affect the healthcare of observant Jews because patients may terminate treatment to reach home before the onset of the Sabbath. Id. at 31-33.[7]

## H. Enforcement of the Zoning Law Against Bikur Cholim

### 1. 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.[8] Yankwitt Decl. Ex. 1 (Orders to Remove 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

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[7] In one instance, an observant Jew came in to GSH just before the Sabbath, with symptoms suggestive of a heart problem. Lippe Dep. at 38-40. GSH staff began to run laboratory studies, but the patient signed himself out of GSH against medical advice because he could not wait for the test results. Id. In another case, one patient fell and broke his hip, and, rather than seeking treatment immediately, he remained in bed until the Sabbath ended. Id.

[8] The Orders and related documents reference "Fellowship House, Inc.," rather than Bikur Cholim. As noted supra, Fellowship House purchased the property from the original builder and leased the property to Bikur Cholim. See Lauber (2005) Aff. ¶ 23. For consistency, the Government will refer to Bikur Cholim rather than Fellowship House.

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.

2. **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 Yankwitt Decl. Ex. 2 (Bikur Cholim Use Variance Application). The application requested a variance to permit the "use and occupancy of a one family residence for overnight occupancy" of up to fourteen people,[9] "who were visiting patients at GSH." Id. The application stated that the Shabbos House "is an integral part of our work and mission" and provides food and accommodations for visitors of GSH who "are constrained by Jewish law preventing them from traveling to and from the hospital on [the Sabbath]." Id.

Suffern issued a public notice announcing that the ZBA would be considering Bikur Cholim's application for a variance to permit it to convert a single family residence to a "transient/motel use." See Yankwitt Decl. Ex. 3 (Notice of Public Hearing). On November 17, 2005, the ZBA heard the request for a use variance. Id. Ex. 5 (Minutes of Nov. 17, 2005 Hearing). Although an average meeting of the ZBA attracts 5 to 40 Suffern residents, the hearing for Bikur Cholim's application drew more than 100 people, filling the "whole auditorium." Rule 30(b)(6) Dep. I at 83-84. The minutes of the hearing reflect that twenty Suffern residents spoke against Bikur Cholim's application. See, e.g., Yankwitt Decl. Ex. 5 at D54-55 (Orthodox Jews should

[9] The variance application requested that the property be approved for the use of up to seventeen people. See Yankwitt Decl. Ex. 2. At the ZBA hearing, Bikur Cholim modified that request to fourteen people. See id. Ex. 5.

go to Nyack hospital instead of GSH; Orthodox Jews should get a "dispensation" to avoid their Sabbath obligations; GSH should not accommodate the religious beliefs of Orthodox Jews). Dr. Lippe spoke about the medical need for the Shabbos House. Id. at 51-52. 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." Id. at D50. The ZBA denied the request for a variance. Ex. 4 (Notification of Decision).

## I. Suffern's Varying Reasons for Denying the Variance Application

### 1. Reasons for Denial Stated at the November 17, 2005 Hearing

According to the hearing minutes, the ZBA denied Bikur Cholim's application on the following grounds: (1) "a reasonable return could be had," (2) the "character of the neighborhood would be affected (safety of children)," and (3) "the hardship was self-created." Yankwitt Decl. Ex. 5 at D58. The minutes also listed four additional reasons for the denial. See id. (listing fire safety, failure to complete a Short Environmental Quality Review ("SEQR"), which was attached to the Bikur Cholim's application packet, number of guests actually staying at the Shabbos House, and a negative Rockland County GML Review[10]). However, Suffern's Rule 30(b)(6) witness disavowed each of the four additional reasons as a basis for the ZBA's denial of the variance. See Rule 30(b)(6) Dep. I at 79, 97-99, 119. Specifically, he testified that the ZBA did not deny the variance because of fire and safety issues (id. 78-79); or failure to complete the SEQR form (id. at 99); or whether guests were staying on days other than the Sabbath (id. at 97-

[10] This recommendation is referred to as the "GML review." See Yankwitt Decl. Ex. 5 at D58. The ZBA is not bound by the GML review, but must vote unanimously to deviate from its recommendation. See, e.g., Rule 30(b)(6) Dep. I at 119.

98); or the Rockland County GML recommendation to deny the variance (id. at 119).

2. **Reasons Set Forth in an Alleged Written Decision of the ZBA**

Suffern has also proffered a document entitled "Appeal by Fellowship House of Suffern, Inc./Bikur Cholim-Partners in Health" ("Alleged Decision"), purporting to represent the ZBA's reasons for denying the variance. See Yankwitt Decl. Ex. 15 (Alleged Decision). The Alleged Decision provided yet another set of reasons for the denial, including some, but not all, of the reasons enumerated at the November 17, 2005 hearing and adding additional reasons as well.[11]

Suffern's Rule 30(b)(6) witness, however, was unable to identify this document or to state what kind of document it was. Rule 30(b)(6) Dep. I at 146-47. Further, except for reasons relating to the use variance factors of the Zoning Law, the Rule 30(b)(6) witness admitted that the reasons set forth in the Alleged Decision were not in fact the reasons for the ZBA's denial. See id. at 78-79, 86-87, 93-99, 119. Specifically, the Rule 30(b)(6) witness admitted that the following reasons were not the basis for the ZBA's denial of the variance: citations for garbage (id. at 78); adequate parking for overnight guests (id. at 86-87); negative impact of guests on neighborhood traffic (id. at 87); concern that more than 14 guests might stay on a given night (id. at 87); whether Bikur Cholim's use was religious (id. at 93); whether visiting patients in a hospital was a tenet of their religion (id. at 93-94); whether it was used as a place of worship (id. at 95); whether guests are from a particular synagogue or affiliated group (id.); whether the

[11] Specifically, the Alleged Decision added the following as additional grounds: there was not "adequate parking"; guests would "create a negative impact on traffic in this neighborhood"; a possibility that more than fourteen guests would want to sleep at the Shabbos House on a given holiday; the proposed use was not for "religious use"; it was not a tenet of the Jewish religion "to visit patients in a hospital or have a place to walk to after a visit or stay in the Hospital"; the proposed use would be for mere "convenience"; it was not a place of worship; the people who stayed there were not "from a particular synagogue or an affiliated group." Yankwitt Decl. Ex. 6.

purpose was to allow Jewish people to exercise their religion. (id.).

3. **Reasons Now Articulated by Suffern as the Basis for the Variance Denial**

In determining whether to grant use variance applications, Suffern now asserts that the ZBA applies the four factors or criteria set forth in § 266-54(D)(3)(a) of the Zoning Law. See Rule 30(b)(6) Dep. I at 12-14, 154-55. The factors set forth in the Zoning Law are whether:

1. The applicant cannot realize a reasonable [financial] return, provided that the lack of return is substantial as demonstrated by competent financial evidence.
2. The alleged hardship relating to the property in question is unique and does not apply to a substantial portion of the district or neighborhood in which it is located.
3. The requested use variance, if granted, will not alter the essential character of the neighborhood.
4. The alleged hardship has not been self-created.

See Zoning Law § 266-54(D)(3)(a); Yankwitt Decl. Ex. 8 (ZBA "Applicant Guideline Sheet").[12] Suffern now asserts that the ZBA requires an applicant to satisfy each of the four factors to obtain a variance. See Rule 30(b)(6) Dep. I at 57. Suffern does not, however, assert that the ZBA has always required every applicant to do so. See, e.g., id. at 17-18.

Suffern now asserts that the ZBA denied Bikur Cholim's variance application because it did not meet three of the four factors of § 266-54(D)(3)(a). See id. at 92 ("The basis for the Zoning Board's decision is based on meeting the four criteria"), 76 ("they needed to satisfy the criteria and they didn't"). Specifically, Suffern asserts that Bikur Cholim had not demonstrated that it could not obtain a reasonable return on its investment because "if you think about it – it was bought as a single family home," id. at 107, and "you can sell it as a single family home," id. at 109; see also id. at 110 ("The only discussion I recall was the statement made that it was

[12] The Rule 30(b)(6) witness explained that the "reasonable return" requirement of § 266-54 means that the applicant "couldn't sell the house and property have a reasonable return for it." Rule 30(b)(6) Dep. II at 52.

bought as a single family home and it could be sold as a single family home").

Suffern also asserts that Bikur Cholim did not refute that the hardship was"self-created" because the house "was purchased as a single family house and it was a choice to move in 14 to 17 beds and use it as a transient place of staying." Id. at 114. The ZBA was not influenced by testimony that GSH's expansion plans forced Bikur Cholim to relocate. Id. at 115-16.

According to Suffern, Bikur Cholim failed to show that the proposed use would not alter the essential character of the neighborhood because Bikur Cholim's use involved "non-family members on a recurring basis living in there, staying there, not living." Id. at 116-17. In making its determination regarding whether the Shabbos House altered the essential character of the neighborhood, the ZBA did not consider that the Shabbos House is located across from GSH, is adjacent to a commercial office building, or that it is near Route 59. Id. at 117-18.

In making its determination, Suffern also admits that the ZBA did not consider whether the Shabbos House would be able to exist anywhere else in Suffern, id. at 120, and it would deny any future application from Bikur Cholim to use the property as a Shabbos House, id. at 172-73. Finally, although the ZBA unquestionably has the authority to impose conditions to lessen any potential negative effects caused by the Shabbos House, see Zoning Law § 266-54(F) (Yankwitt Decl. Ex. 8), Suffern admits that the ZBA did not consider imposing any conditions to lessen any potential negative impacts caused by the Shabbos House. See Rule 30(b)(6) Dep. I at 141-45.

**J. Suffern's Articulation of Governmental Interests Underlying Denial**

Suffern has admitted that no compelling interest would be undermined if Bikur Cholim was allowed to operate a Shabbos House at 5 Hillcrest in Suffern. Rule 30(b)(6) Dep. I at 147. Suffern further admits that the only governmental interest served by the denial of Bikur Cholim's variance request is the general interest in preserving "the integrity of the zoning code." See

Geneslaw Dep. I at 149-50, 153-54. Specifically, Suffern asserts that denial of Bikur Cholim's variance was needed because "the operation of 5 Hillcrest is not consistent with single-family occupancy." Id. at 154.

**K. Suffern's Inconsistent Application of the Four Use Variance Factors**

The ZBA has granted variance applications either (1) where all four use variance factors were not met or (2) without determining whether the four use variance factors were met. For example, the ZBA granted a use variance application from the Knights of Columbus for the construction, maintenance and use of a private membership club in a residential zone (Zone 2R-5). Yankwitt Decl. Ex. 9 (Knights of Columbus Use Variance Application). The building was to be used as a meeting hall and gathering place for the members of the club and to host charitable and fund raising events. Id. The applicant submitted the application prior to the purchase of the property on which it intended to construct the club building. Rule 30(b)(6) Dep. II at 46. Suffern admitted that none of the four use variance factors were addressed in the application, and that there was no hardship – self-created or otherwise – because the applicant had not purchased the property. Id. at 46-49. The Rule 30(b)(6) witness further admitted that given that the applicant had not yet purchased the property, he could not think of any way the applicant could show that the hardship had not been self-created. Id. at 49. Similarly, the witness admitted that he did not know of any way that an applicant who had not yet purchased the property could show that no reasonable return on the property was possible. Id. at 52-54.

Similarly, the ZBA granted a use variance application submitted by Nextel Communications, to mount a wireless communication facility onto an existing apartment building for wireless communication. Rule 30(b)(6) Dep. II at 12-13; Yankwitt Decl. Ex. 10 (Nextel Communications Use Variance Application). In granting the application, the ZBA made no findings relating

to whether (1) Nextel could obtain a reasonable return on the property, (2) the hardship was not self-created, (3) the hardship was unique, or (4) the variance would alter the essential character of the neighborhood. Yankwitt Decl. Ex. 10.

The ZBA also granted a use variance application from John DeNino, who requested a use variance to permit the conversion of an office space to accommodate a children's party room and enrichment center. See Rule 30(b)(6) Dep. II at 69-70; Yankwitt Decl. Ex. 11 (DeNino Use Variance Application). Suffern admitted that the applicant could not show that (1) the hardship was not self-created, (2) a reasonable return on the property could not be obtained, or (3) hardship was unique to the property. Rule 30(b)(6) Dep. II at 72-73.

## L. The Holiday Inn

Suffern has asserted in prior briefing that the Individual Plaintiffs can, in lieu of staying at the Shabbos House, use a Holiday Inn hotel. See Def.'s Mem. of Law in Supp. of Mot. to Dismiss at 29. There are no hotels or other places of lodging in Suffern. Admission No. 42. The Holiday Inn is located in Montebello, New York, 1.8 miles from GSH. Id. No. 41; Galante Rep. at 1. The entrance to the Hotel is located on Executive Boulevard. Admission No. 47. To reach the Hotel from GSH, a pedestrian must walk 1.8 miles from Executive Boulevard to Airmont Road to Hillcrest Road along Route 59 (the "Study Area"). Id. No. 47; Galante Rep. at 2.

Observant Jews cannot carry objects in public places and thus cannot carry a wallet, money, credit cards, keys, or any forms of identification. Lauber (2006) Aff. ¶ 10. Thus, Observant Jews could not register or pay at the Holiday Inn. Id.; see also Halperin Aff. ¶ 6.

### 1. The Holiday Inn Is Not Within Reasonable or Safe Walking Distance

The Holiday Inn is not within reasonable walking distance of GSH. Admission No. 55. Although the Holiday Inn is 1.8 miles from GSH, the majority of pedestrian trips end at .25 mile

or less. Admission No. 49; Galante Rep. at 4. The limit that most people are willing to travel on foot is 1.0 miles. Admission No. 50; Galante Rep. at 4. Thus, the Holiday Inn is nearly twice the distance that most people are willing to walk. See Admission No. 56, Galante Rep. at 4. Further, guests of the Shabbos House include the elderly, who are often too frail to walk significant distances, and nursing mothers of newborns, whose presence may be required for frequent feedings. See Lauber (2005) Aff. ¶ 32. Walking from GSH to the Holiday Inn and back for 3.6 miles is not possible for such people. See id.; see also Lippe Dep. at 21-24 (discharged patient with sprained ankle, elderly patient, and/or patient with a heart condition precluded from walking to the Holiday Inn).

Further, Route 59, which is the great majority of the route pedestrians must walk to reach the Holiday Inn, see Chamberlin Rep. at 1 (Figure 1 of Study Area), has poorly developed pedestrian facilities, such as sidewalks, and is unsafe for pedestrians, see id. at 1-2. Pedestrian facilities along Route 59 do not meet widely recognized design standards for such facilities. Id. 1-2. Route 59 is classified as an urban principal arterial, and carries approximately 18,000-20,000 vehicles per day. Id. at 3. Land development along Route 59 in the Study Area consists of commercial use, such as shopping plazas, residential land uses, and institutional land uses (such as a seminary and medical center). Id. at 2-3.

Engineering and planning sources indicate that sidewalks are important for pedestrian safety. See id. at 3.[13] The regional Bicycle and Pedestrian Master Plan for the area specifically identifies the need to complete the sidewalk network along Route 59, Suffern to Nyack. Id. at 3.

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[13] Citing "A Policy on the Geometric Design of Highways and Streets" (American Assoc. of State Highway Transportation Officials); "Highway Design Manual" (New York State Department of Transportation (2005) ("NYSDOT Manual"); "Design and Safety of Pedestrian facilities" (Institute of Transportation Engineers March 1998).

Only 30.2 percent of the Study Area has sidewalks. Id. at 4; see also Admission No. 48. Pedestrians walking along Route 59 in the Study Area are forced to walk on highway shoulders, see Chamberlin Rep. at 4, which "are not usually considered public walkways and they are not a substitute for a well designed pedestrian facility when one is needed." id. at 7 (citing NYSDOT Manual). Shoulders are only suitable in "extreme conditions"[14] or in rural conditions – neither of which are present in the study area. Id. at 6.

Crash reports for the Study Area show that along Route 59 in the Study Area, there are five "High Crash Locations," i.e., locations that have an abnormally high crash rate when compared to other similar locations. Id. at 11-13. From January 1, 2004 to December 31, 2006, there were a total of 238 crashes in the Study Area. Id. at 11. Six of these crashes involved pedestrians or bicycles within the Study Area. Admission No. 51; Chamberlin Rep. at 11. This analysis indicates that general travel in the area is unsafe. Id.

2. **Traditional Dark Clothing Exacerbates the Risk of Walking Along Route 59**

Observant Jews wear traditional black clothing and on the Sabbath cannot carry flashlights or attach reflective material to their clothing. Lipman Aff. ¶ 5; Halperin Aff. ¶ 6. Recent research has measured the effect of pedestrian clothing on pedestrian visibility. Chamberlin Rep. at 13. More than 60% of darkly clad pedestrians are not recognized by drivers. Id. Walking at night, in dark clothing, without a flashlight – or identification, money or credit cards – is unsafe. See id.; Admission No. 57 (the Holiday Inn is not within safe walking distance of GSH).

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[14] "Extreme conditions" is defined as cases where: (1) pedestrians are prohibited by law from using the roadway, as in the case of interstate highway, (2) the cost of establishing walkways would be excessively disproportionate (more than 20% of the total project cost) to the need or probable use, or (3) there is a scarcity of population. Id. at 6.

## ARGUMENT

## SUFFERN VIOLATED THE "SUBSTANTIAL BURDEN" PROVISION OF RLUIPA

### A. Standards To Be Applied

#### 1. Summary Judgment Standard

In deciding a motion for summary judgment, a court shall render judgment "forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

#### 2. Preliminary Injunction Standard

This action seeks statutorily authorized injunctive relief under 42 U.S.C. § 2000cc-2(f), in which the burden of proof differs dramatically from that in a traditional injunction action between private parties. See United States v. Diapulse Corp. of Am., 457 F.2d 25, 27 (2d Cir. 1972). As such, the government is required to demonstrate only "reasonable cause" to believe that a violation of the statute has occurred or is about to occur. Id. As the Second Circuit has held:

> Traditionally and generally, '[a] preliminary injunction may issue if the plaintiff demonstrates irreparable harm, and either a likelihood of success on the merits, or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor.' . . . However, a [plaintiff] seeking statutorily authorized injunctive relief . . . is not governed by these equitable criteria. . . . For such a statutory injunction, a [plaintiff] need only demonstrate that there is 'reasonable cause' to believe that a violation of the [statute] has occurred or is about to occur.

Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 478-79 (2d Cir. 1995) (citations omitted); see also Diapulse, 457 F.2d at 28 ( "The passage of the statute is, in a sense, an implied

finding that violations will harm the public . . . No specific or immediate showing of the precise way in which violation of the law will result in public harm is required.") (citations omitted).

**B. Suffern Has Violated RLUIPA's Substantial Burden Provision**

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).

**1. Plaintiffs' Religious Exercise Is Substantially Burdened**

As detailed below, each of the plaintiffs uses the Shabbos House to engage in religious exercise. Further, the record is clear that denial of the variance to operate the Shabbos House will substantially burden such religious exercise.

a. Plaintiffs Are Engaged in "Religious Exercise"

The operation and use of the Shabbos House constitute "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).[15] 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

[15] 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 Ave. 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).

that it 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).

The record is replete with undisputed evidence of the religious exercise of the plaintiffs. Bikur Cholim and Rabbi Lauber engage in the religious exercise of bikur cholim by providing the Shabbos House itself. Rabbi Lauber founded Bikur Cholim after his own experience with extensive hospitalization. Lauber (2005) Aff. ¶ 8. As a result of that experience, the religious obligation of bikur cholim, to visit and care for the sick, became a highly important part of his religious beliefs, and he made the decision to dedicate his life to fulfilling that obligation. Id. at ¶¶ 7-8. Rabbi Lauber and Bikur Cholim operate the Shabbos House to *fulfill* the religious obligation to bring comfort and to ease the difficulty of patients and their families. Id. ¶¶ 7-9. Providing lodging, Sabbath meals and a place to pray for observant Jews on the Sabbath provides the comfort mandated by bikur cholim. By providing these services, Bikur Cholim also encourages observant Jews to visit the sick by easing the sometimes conflicting religious requirements of observing the Sabbath and other religious obligations, such as the obligation to seek needed medical care, and the obligation to care personally for the sick and to assist one's parents. Id. ¶ 29; Lauber (2006) Aff. ¶¶ 10-12; Bleich Rep. at 3-6; see also Fifth Ave. Presbyterian Church, 293 F.3d at 574 (providing shelter to homeless on steps of church was religious belief protected under First Amendment free exercise clause).

The Individual Plaintiffs also use the Shabbos House to engage in religious exercise. The Individuals believe that they should both observe the Sabbath rules and care for the sick as required by bikur cholim. See Levita Aff. ¶ 2; Levita Dep. at 29-32, 36; Halperin Dep. at 26-30, 32-37; Lipman Dep. at 24-28, 31, 37; Stern Aff. ¶ 6; Stern Dep. at 16, 22-23. Each of the Individual Plaintiffs has visited a sick spouse or parent on the Sabbath. Stern Aff. ¶ 4; Levita

Aff. ¶ 4; Halperin Aff. ¶ 2; Lipman Aff. ¶ 2. Each Individual was unable to return home and stayed at the Shabbos House to observe the Sabbath rules, including the prohibition on driving. See, e.g., Stern Aff. ¶ 1, 6; Levita Aff. ¶¶ 4-5; Halperin Aff. ¶¶ 5-6; Lipman Aff. ¶¶ 3-4. Certain of the Individual Plaintiffs have also used the Shabbos House to pray and/or eat Sabbath meals. Stern Dep. at 22-23; Levita Dep. at 20-21; Lipman Dep. at 22, 31.

The Individuals also use the Shabbos House on the Sabbath so that they are able to fulfill their religious obligation to visit and personally care for the sick and for one's parent. Both Sara Halperin and her brother, Michael Lipman, together ensured that their mother was visited daily while in the hospital, including on the Sabbath. Halperin Aff. ¶ 3; Lipman Aff. ¶ 2. Their mother spoke poor English and was unable to communicate with doctors, nurses and hospital staff. Halperin Aff. ¶ 3; Lipman Aff. ¶ 2. Mrs. Halperin and Mr. Lipman believe that their religious duty to care for their sick mother required them to be there daily to assist her. Halperin Aff. ¶ 3; Lipman Aff. ¶ 3; see also Bleich Rep. at 4-5 (it is a religious obligation personally to care for the sick and to attend to the needs of one's parent).

Similarly, Mrs. Stern's husband suffered from Alzheimer's and had not spoken for approximately four years. Stern Dep. at 16. Mrs. Stern attended to her husband daily over the course of a six-week hospitalization, "[n]ot only because I love him, but my religion mandates that I care for the sick, 'Bikur Cholim.'" Stern Aff. ¶ 6. Finally, the father of Jacob Levita was hospitalized at GSH for approximately three months. Levita Dep. at 16-18; Levita Aff. ¶ 3. Mr. Levita visited his father every Sabbath during those months. Id. Mr. Levita observes the religious obligation of bikur cholim, and believes that he should offer comfort and assistance to the sick. Levita Aff. ¶ 2; see also Levita Dep. at 29 (visiting the sick is a "commandment or a mitzvah"). He further believes that he has a religious obligation not to leave his father alone in

the hospital on the Sabbath. See Levita Aff. ¶ 5.

b. Closing the Shabbos House Will Substantially Burden Religious Exercise

Suffern imposed a "substantial burden" on religious exercise when it denied Bikur Cholim's variance application. In doing so, it completely precluded Bikur Cholim's proposed use of the property and, further, will prevent the Shabbos House from operating anywhere in Suffern.

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 (1978). Accordingly, courts should be guided in defining "substantial burden" by prior cases under the Free Exercise Clause and RFRA. See, e.g., WDS II, 2007 WL 3011061, at *5.

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). The Second Circuit has 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).

Consistent with these principles, courts have held that forcing observant 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 (2d Dep't 1987), the court held that requiring 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, 520 F. Supp. 91, 92 (E.D. Mich. 1981), 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 a religious practice.

In interpreting RLUIPA, courts have sought to apply the definitions of "substantial burden" in a new context. The Second Circuit recently held that in the RLUIPA context, "courts appropriately speak of government action that directly coerces the religious institution to change its behavior, rather than government action that forces a religious entity to choose between religious precepts and government benefits." WDS II, 2007 WL 3011061, at *6 (citing Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004)). Similarly, in Midrash Sephardi, 366 F.3d at 1227, the Eleventh Circuit held 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." See also San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004) ("substantial burden" under RLUIPA as a "significantly great restriction or onus" on religious exercise); accord Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 456 F.3d 978, 988 (9th Cir. 2006).

It is clear, however, that the burden need not be "insuperable" to be deemed "substantial." WDS II, 2007 WL 3011061, at *7; Sts. Constantine & Helen Greek Orthodox Church v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005). Thus, where there are "no ready alternatives" or

where "the alternatives require substantial 'delay, uncertainty, and expense,'" a complete denial of a religious entity's land use application "might be indicative of a substantial burden." WDS II, 2007 WL 3011061, at *7; see also Sts. Constantine, 396 F.3d at 901 (finding denial of application constituted "substantial burden").

Thus, the Second Circuit has ruled that in determining whether a religious exercise is "substantially burdened," courts must consider (1) "whether there are quick, reliable, and financially feasible alternatives [the religious entity] may utilize to meet its religious needs" and (ii) "whether the denial was conditional." WDS II, 2007 WL 3011061, at *9.[16] Consistent with these principles, the court recently found that a village's denial of an application for a special permit to construct a building on the campus of a private religious school to expand its religious educational facilities constituted a "substantial burden" on religious exercise. See id. at *8-10.

i. Variance Denial Substantially Burdens Bikur Cholim and Rabbi Lauber's Religious Exercise of Operating the Shabbos House

Suffern's denial of Bikur Cholim's variance request imposed a "substantial burden" on religious exercise. *First*, Bikur Cholim and Rabbi Lauber have no "quick or reliable," or indeed any, alternative to operating the Shabbos House at 5 Hillcrest. Suffern admits that there is no location in Suffern where the Shabbos House can operate in compliance with the Zoning Law. See Admission Nos. 58-59; Geneslaw Dep. II at 202-03. Suffern further admits that any future application by Bikur Cholim would be denied. See Rule 30(b)(6) Dep. I at 172-73. Thus, there are simply no alternatives, "quick" or "reliable" or otherwise, that Bikur Cholim or Rabbi Lauber

[16] The court noted that the zoning board's arbitrary and capricious denial of the application also supported a finding that plaintiff's religious exercise had been substantially burdened. It is clear, however, that the court did not require plaintiff to demonstrate an arbitrary and capricious denial to show substantial burden; rather, the court simply "deem[ed] it relevant to the evaluation of [plaintiff's] particular substantial burden claim." Id. at *8.

can avail themselves of to meet their religious needs. See WDS II, 2007 WL 3011061, at*9. Second, it is undisputed that the ZBA's denial of the variance was final. See Rule 30(b)(6) Dep. I at 170 (denial of application was final), 172-73 (any future applications would be denied).

Thus, without question, the denial of the variance means that Bikur Cholim and Rabbi Lauber will be unable to pursue the religious exercise of providing a Shabbos House for observant Jews using GSH in Suffern. Accordingly, their religious exercise will be substantially burdened. See Fifth Ave. Presbyterian Church v. City of New York, No. 01 Civ. 11493 (LMM), 2004 WL 2471406, at *3 (S.D.N.Y. Oct. 29, 2004), aff'd, but criticized on other grounds, 177 Fed. Appx. 198 (2d Cir. 2006) ( "it is hard to see" how defendants could "dispute that the Church's expression of its religious belief in allowing homeless persons to sleep out-of-doors on its property would be substantially burdened by police removing those persons from the Church's premises.")[17]

ii. Closing the Shabbos House Burdens the Individual Plaintiffs' Religious Exercise

The religious exercise of the Individuals will be substantially burdened by the closing of the Shabbos House. Because none of these Individuals are able to return home on the Sabbath, each of them would be forced to choose between their religious belief that they should (1) care for the sick and for their parents on the Sabbath and (2) observe the Sabbath rules. See Stern Aff. ¶ 6; Levita Aff. ¶ 5; Halperin ¶¶ 4, 6; Lipman Aff. ¶ 3. Without the Shabbos House, the Individuals would have nowhere to lodge on the Sabbath after closing hours at GSH because of Sabbath

[17] This is in sharp contrast to such cases as Midrash Sephardi, 366 F.3d at 1228, where the court held that the congregation had not established a "substantial burden" on its religious exercise because 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. Here, there is no alternative location available in Suffern.

restrictions. See Halperin Dep. at 22-23; Lipman Dep. at 23. Indeed, without the Shabbos House, the Individuals could be without lodging for days at a time: for instance, Mrs. Stern would have been required over Rosh Hashanah in 2005 to choose between either violating the Sabbath prohibition on driving or ignoring the serious needs of her husband for nearly three days. See Stern. Aff. ¶ 4. Similarly, in 2007, when Rosh Hashanah immediately preceded the Sabbath, an individual such as Mrs. Stern would have faced an even starker choice of not attending to the needs of the sick for nearly four days. See Yankwitt Decl. Ex. 13. Presenting observant Jews with this choice violates RLUIPA because it pressures observant Jews to modify their behavior or violate their religious beliefs. See, e.g., Thomas, 450 U.S. at 718.

Suffern wrongly asserts that the Holiday Inn – located outside Suffern, in Montebello, New York, can be used as an alternative to the Shabbos House. See Def.'s Mem. of Law in Supp. of Mot. to Dismiss at 29. As a threshold matter, it is incorrect that under RLUIPA the jurisdiction responsible for the challenged land use decision can, as Suffern suggests, shirk its obligation to comply with RLUIPA so long as a neighboring jurisdiction can provide the needed accommodation. Indeed, the very purpose of RLUIPA is to provide a remedy for discretionary individualized assessments that are made pursuant to land use regulations, which by their nature only encompass the jurisdiction of the enacting government. See 146 Cong. Rec. at S7775 (July 27, 2000) (demonstrates "a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes"); H.R. Rep. No. 106-219, at 20 (1999) (regulators "typically have virtually unlimited discretion in granting or denying permits for land use and in other aspects of implementing zoning laws"). Indeed, the need to confine the substantial burden analysis to the jurisdiction at issue has been implicitly recognized by courts adjudicating actions arising under RLUIPA. See, e.g., Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003) (land use regulation that bears "direct, primary, and funda-

mental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impracticable.") (emphasis added). See also Grosz v. Miami Beach Fl., 721 F.2d 729, 739 (11th Cir. 1983) (holding no "substantial burden" because city's zoning requirements allowed plaintiff's religious exercise in "one half of the City's territory") (emphasis added).

In any event, it is clear that for at least three reasons, the Holiday Inn is not a "quick, reliable or financially feasible" alternative, see WDS II, 2007 WL 3011061, at *9, to the Shabbos House. First, it is undisputed that observant Jews are not permitted to pay for lodging on the Sabbath. Bleich Rep. at 4. On the Sabbath, observant Jews are unable to carry objects, including wallets or identification. Id. Accordingly, observant Jews would not be able to register at the Holiday Inn on the Sabbath without violating these prohibitions. Lauber (2006) Aff. ¶ 10; see also Halperin Dep. at 32.

Second, the Holiday Inn is not a quick or reliable alternative to the Shabbos House for the Individual Plaintiffs because it is not within reasonable walking distance of the GSH. The majority of pedestrian trips end at .25 mile or less. Admission No. 49; Galante Rep. at 4. The limit that most people are willing to travel on foot is 1.0 miles. Admission No. 50; Galante Rep. at 4. Suffern admits that the Holiday Inn, at 1.8 miles away from GSH, is beyond the distance that most people are willing to walk. See Admission No. 56; Galante Rep. at 4. Clearly, the Holiday Inn is not within reasonable walking distance of GSH. See Admission No. 55. Furthermore, Malka Stern is currently 74 years old. See Stern Aff. ¶ 1. Like Mrs. Stern, many of the guests of the Shabbos House are elderly or are unable to walk long distances because of medical conditions, e.g., nursing mothers of newborns. Lauber (2006) Aff. ¶ 13; Lauber (2005) Aff. ¶ 32; see also Lippe Dep. at 21-24 (discharged patient with a sprained ankle, elderly patient, and/or patient with a heart condition precluded from walking to the Holiday Inn). Further,

inclement weather, such as rain, snow or icy conditions, will make walking 1.8 miles impossible even for healthy individuals. No reasonable fact finder would conclude that requiring a 74 year-old-woman, a woman who has recently given birth or other infirm individuals, to walk 1.8 miles – each way – to the Holiday Inn is a "quick, reliable" alternative to staying at the Shabbos House.

Third, the Holiday Inn is not a "quick" or "reliable" alternative because it is not within safe walking distance of the GSH. See Admission No. 57. Although the regional Bicycle and Pedestrian Master Plan for the area specifically identifies the need to complete the sidewalk network of along Route 59 from Suffern to Nyack, only 30.2% of the Study Area has sidewalks. Chamberlin at 3-4; see also Admission No. 48. Thus, pedestrians walking along Route 59 in the Study Area are forced to walk a portion of that distance on highway shoulders, which are not suitable for pedestrians along Route 59. See Chamberlin Rep. at 4, 6 (citing NYSDOT Manual).

In addition, crash reports for the Study Area show that along Route 59 in Study Area, there are five "High Crash Locations," i.e., locations that have an abnormally high crash rate when compared to other similar locations. Chamberlin Rep. at 11-13. From January 1, 2004 to December 31, 2006, there were a total of 238 crashes in Study Area. Id. at 11. Six of these crashes involved pedestrians or bicycles within the Study Area. Admission No. 51; Chamberlin Rep. at 11. This analysis indicates that general travel in the area is unsafe. Chamberlin Rep. at 11. Admission No. 57 (the Holiday Inn is not within safe walking distance of GSH).

Further, because more than 60 percent of darkly clad pedestrians are not recognized by drivers, the risk of being involved in a crash is increased for observant Jews because they wear traditional black clothing and cannot carry or attach reflective material to their clothing. See Chamberlin Rep. at 13-14; Halperin Aff. ¶ 6; Lipman Aff. ¶ 5.

iii. Plaintiffs' Religious Exercise Is Also Substantially Burdened Because of the ZBA's Inconsistent Application of the Zoning Law

Although WDS II does not require a religious entity to demonstrate that the zoning board decision was "arbitrary and capricious" or that the board applied the provisions of the zoning law inconsistently, the Second Circuit has made clear that such conduct could be "deem[ed] relevant" to the issue of substantial burden. See WDS, 2007 WL 3011061, at *8. Here, the ZBA inconsistently applied the four factors relating to the granting of a use variance. Despite the testimony of the Rule 30(b)(6) witness that the ZBA was required to grant use variances only where all four factors were met, see Rule 30(b)(6) Dep. I at 57, in at least three cases, the ZBA failed to do just that. Indeed, the ZBA granted use variances where it was impossible for all four factors to have been satisfied by the applicant. See Rule 30(b)(6) Dep. II at 46, 48-49, 52-54, Yankwitt Decl. Ex. 9 (*Knights of Columbus* Use Variance Application); Rule 30(b)(6) Dep. II at 12-13; Yankwitt Decl. Ex. 10 (Nextel Use Variance Application); Rule 30(b)(6) II at 69-70, 72-73; Yankwitt Decl. Ex. 11 (*John DiNino* Use Variance Application). This kind of inconsistent application of criteria supports a finding of substantial burden. See, e.g., Guru Nanak, 456 F.3d at 990-91 (substantial burden where, inter alia, zoning entity had inconsistently applied the "leapfrog development" concern in denying religious entity's application; noting that "[a]t the very least, such inconsistent decision-making establishes that any future [] application . . . would be fraught with uncertainty").

**2. Suffern Lacks a Compelling Governmental Interest**

Under RLUIPA, once Bikur Cholim demonstrates that Suffern substantially burdened its religious exercise, the burden of proof shifts to Suffern to prove it acted in furtherance of a compelling governmental interest and that its action was the least restrictive means of furthering that interest. 42 U.S.C. § 2000cc-2(b). As the Second Circuit recently held "[c]ompelling state

interests are 'interests of the highest order.'" WDS, 2007 WL 3011061, at *10 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)).

Here, Suffern assets that it has a compelling interest in enforcing the Zoning code. See Geneslaw Dep. I at 149-150, 154. Such an interest, however, is not sufficient under RLUIPA. See WDS II, 2007 WL 3011061, at *10 ("The Village claims that it has a compelling interest in enforcing zoning regulations and ensuring residents' safety through traffic regulations. However, it must show a compelling interest in imposing the burden on religious exercise in the particular case at hand, not a compelling interest in general.") (citing Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 432 (2006) ("Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general characteristics" is not sufficient). In WDS II, the court upheld the district court's finding that the "application was denied not because of a compelling governmental interest that would adversely impact public health, safety, or welfare." 2007 WL 3011061, at *11.

Under this standard, the interests asserted by Suffern are not "compelling." First, Suffern admits it would undermine no governmental interest if it allowed Bikur Cholim to operate a Shabbos House. Geneslaw Dep. I at 147. Suffern further admits that by denying Bikur Cholim's variance request, the only governmental interest it serves is the general interest in preserving "the integrity of the zoning code." See id. at 149-50, 154; see also Rule 30(b)(6) Dep. I at 76, 94-95, 107. Suffern admits that the only reason it denied Bikur Cholim's variance because "the operation of 5 Hillcrest is not consistent with single-family occupancy." Geneslaw Dep. I at 154. In addition, Suffern denied that any issues relating to fire and safety formed the basis of its decision to deny Bikur Cholim's application. See Rule 30(b)(6) Dep. I at 78-79.[18]

[18] The Government does not challenge Suffern's right to maintain zoning regulations; rather, it challenges only the specific application of those zoning regulations to Bikur Cholim

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 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 Zoning Law § 266-22(A), *Schedule of Gen. Use Requirements* (Yankwitt Decl. Ex. 7). These uses are 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, see Rule 30(b)(6) Dep. I at 117-18, undermines any argument that Bikur Cholim's use violates this purported interest. Further, the fact that Suffern has inconsistently applied the Zoning Law and has granted variance applications that did not meet all four factors of Zoning Law § 266-54 (see supra, at Sec. B(1)(b)(iii)), further undermines its argument that enforcement of its zoning code could be a compelling governmental interest denying Bikur Cholim's variance. See WDS II, 2007 WL 3011061, at * 11.

**3. Suffern Failed to Employ the Least Restrictive Means**

Assuming, arguendo, Suffern was able to prove a compelling governmental interest solely in enforcing its zoning laws, the Government should still be entitled to summary judgment on the

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and, specifically, Suffern'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 O Centro Espirata Beneficente Unia Do Vegetal, 546 U.S. at 438-39. 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, Inc., 366 F.3d at 1226 ("challenges to zoning ordinances are expressly contemplated by the statute").

grounds that Suffern failed to use the least restrictive means to achieve that interest. See WDS II, 2007 WL 3011061, at *11 ("Further, even were we to determine that there was a compelling state interest involved, the Village did not use the least restrictive means available to achieve that interest."). See also Westchester Day School v. Vill. of Mamaroneck ("WDS I"), 417 F. Supp. 2d 477, 551-553 (S.D.N.Y. 2006) (holding that "defendants' outright denial of the special permit was not the least restrictive means of addressing that interest because measures existed to mitigate any potential increase in traffic caused by the Project"), aff'd, 2007 WL 3011061.

Here, as in WDS II, "[t]he ZBA had the opportunity to approve the application subject to conditions," 2007 WL 3011061, at *3. See Zoning Law, § 266-54(F) (ZBA "may prescribe such conditions or restrictions applying to the grant of a variance as it may deem necessary in each specific case, in order to minimize the adverse effects of such variance upon other property in the neighborhood and to protect the public heath, safety and welfare"); Rule 30(b)(6) Dep. I at 57-59 (ZBA had the authority to grant a variance application subject to conditions). Suffern, however, admits that it chose not exercise this authority. See id. at 142-44. In particular, Suffern admits that the ZBA did not consider imposing any conditions, which could have alleviated the ZBA's alleged concerns, including: routine inspections on the property, constructing a fence, requiring food deliveries to occur before a certain time of day, hiring a maintenance worker or a landscaper, limiting the number of cars that could park in its parking lot, requiring a representative to be present during each Sabbath, keeping a log book of people who stayed at the Shabbos House, limiting the number of people who would stay at the Shabbos House, or restrictions to mitigate any fire or safety concerns. Id. at 142-44. Simply put, Suffern admits that the ZBA did not consider imposing any conditions to lessen any negative impacts that may have been caused by the Shabbos House on the neighborhood. See id. at 141-45. Accordingly, it is undisputed that Suffern did not use the least restrictive means to achieve its interest.

## CONCLUSION

For the reasons stated above, the Court should grant the United States of America's motion for summary judgment or, in the alternative, grant a preliminary injunction until a final merits determination can be made.

Dated: November 8, 2007
New York, New York

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