

DEBEVOISE & PLIMPTON LLP

919 Third Avenue
New York, NY 10022
Tel 212 909 6000
Fax 212 909 6836
www.debevoisc.com

July 11, 2014

Honorable A. Kathleen Tomlinson
District Court Magistrate Judge
Long Island Federal Courthouse
100 Federal Plaza
Central Islip, NY 11722

Re: *Verizon New York, Inc. and Long Island Lighting Company v. Village of Westhampton Beach*, et al., 11-cv-0252 (AKT)

Dear Judge Tomlinson:

We represent Verizon New York Inc. (“Verizon”) and Long Island Lighting Company d/b/a LIPA (“LIPA” and together with Verizon, “Utilities” or “Plaintiffs”), Plaintiffs in the above referenced action (the “*Verizon* Action”). We write in response to the Court’s invitation in its June 16, 2014 Findings of Fact and Conclusions of Law, to submit limited briefing regarding the issue of whether the Court “may properly address whether the Quogue Village Code applies to the lechis in light of the decision of the [Quogue] Board of Trustees.” Findings of Fact and Conclusions of Law at 59 (ECF No. 130). The Utilities respectfully submit that the Court may decide the applicability of Quogue’s Village Code to the lechis.¹

As an initial matter, Quogue’s argument regarding an Article 78 proceeding has already been rejected by this Court, per Judge Wexler, at the February 4, 2013 hearing:

MS. DEJONG: Your Honor, the Village of Quogue disagrees there is a final determination by the Village of Quogue.

THE COURT: The Village of Quogue has rendered a decision though.

MS. DEJONG: * * * Well, the plaintiff didn’t continue that application. There’s an appeal process, and that appeal process involves an Article 78 proceeding. . . . As we’ve argued all along, your Honor, this issue is more a local and state issue, and the plaintiff is trying to circumvent the administrative process by coming to this Court and saying it is a final decision. Your Honor, it’s a final decision in terms of case law.

THE COURT: Counsel, I disagree with you. I think it is a final decision. So now what do we do.

MS. DEJONG: So your Honor is saying that the plaintiff doesn’t believe they have to go to an Article 78 proceeding?

¹ Plaintiffs join in the arguments advanced in the East End Eruv Association’s (“EEEE’s”) letter to the Court regarding the same issue. See EEEA Letter, filed in *East End Eruv Assoc. v. Vill. of Westhampton Beach*, No. 11-cv-213 (AKT) (E.D.N.Y. June 30, 2014) (ECF No. 257) (the “EEEE Action”).

Honorable A. Kathleen Tomlinson
July 11, 2014
Page 2

THE COURT: That is correct.

2/4/2013 Hr'g Tr. at 14:5–15:6.

The nature of the *Verizon* Action further demonstrates why this issue is properly submitted to this Court. The Utilities filed the *Verizon* Action against the Village of Westhampton Beach (“WHB”), the Village of Quogue (“Quogue”), and the Town of Southampton (“Southampton”) (collectively, the “Municipalities”), seeking a declaration of the Utilities’ rights and obligations with respect to their contracts with the EEEA for the attachment of lechis to Verizon and LIPA’s utility poles in the Municipalities. Specifically, Verizon and LIPA’s complaint seeks a clarification of their rights and resolution of the various federal constitutional and statutory issues raised by the EEEA in the *EEEA* Action, because otherwise “Verizon New York and LIPA face potential legal liability, either from [the Municipalities] (which have threatened fines or other legal action in the event that Verizon New York and LIPA permit the installation of lechis) or from the EEEA (which has contractual rights to install the lechis and has threatened legal action).” *See Verizon* Action Compl. ¶ 47 (ECF No. 1).

The *Verizon* Action presents issues that are not tethered to the EEEA’s application to the Quogue Board of Trustees.² The *Verizon* Action seeks declaratory judgment relating to the Utilities’ rights and obligations. The Utilities’ claims exist separate and apart from any decision by the Quogue Board of Trustees, as neither Quogue nor the EEEA has changed its original position. Indeed, the parties briefed the issue of the applicability of the Quogue sign ordinance in detail before *this Court* – as part of the Stipulation and Proposed Conclusions of Law submitted to the Court on March 20, 2013, ten months after the Village Board decision. *See, e.g.*, Verizon New York, Inc.’s Proposed Conclusions of Law ¶¶ 26–34 (ECF No. 92); LIPA’s Proposed Conclusions of Law Regarding LIPA’s Authority to License Attachments to Its Utility Poles ¶¶ 66–75 (ECF No. 91). Accordingly, the Utilities respectfully submit that now that the authority issue has been resolved, this Court should rule on whether Section 158 of the Quogue Village Code applies to the lechis as a matter of law.

Moreover, whether a local law applies in a specific case is a proper subject for a declaratory judgment action, not for Article 78 review. *See, e.g., Supreme Industrial Catering Corp. v. Fuerst*, 30 Misc. 2d 394, 395 (N.Y. Sup. Ct., N.Y. Cnty. 1961) (request for declaration that petitioner’s business does not require a license, and that the ordinance with respect to peddling is unconstitutional, may not be granted in Article 78 proceeding following denial of application but should be sought in an action for a declaratory judgment (collecting cases)). Similarly, this federal declaratory action, which presents federal constitutional and statutory issues, is a proper vehicle to obtain an adjudication of the applicability of Quogue’s Code to the lechis.

² Indeed, while the EEEA’s application was pending, the Utilities and the Municipalities briefed the Municipalities’ motions to dismiss in the *Verizon* Action.

Honorable A. Kathleen Tomlinson
July 11, 2014
Page 3

Further, as addressed in the EEEA's letter, courts in this Circuit have routinely exercised supplemental jurisdiction in First Amendment actions incorporating claims that could have been brought under or are related to Article 78. *See, e.g., Fortress Bible Church v. Feiner*, 694 F.3d 208 (2d Cir. 2012) (considering and granting Article 78 claim along with federal claims on the merits); *Westchester Day Sch. v. Village of Mamaroneck*, 417 F. Supp. 2d 477, 560-61 (S.D.N.Y. 2006), *aff'd*, 504 F.3d 338 (2d Cir. 2007) (rejecting argument that state law claim would be more appropriately brought as Article 78 proceeding on the grounds that "judicial economy, convenience, fairness and comity all weigh in favor of retaining jurisdiction over the state claims"). It is also well-established that the findings of state municipal boards may be overturned upon a finding that they are, *inter alia*, arbitrary and capricious, an abuse of discretion, or not supported by substantial evidence. *See, e.g., Fortress Bible Church*, 694 F.3d at 224; *Westchester Day Sch.*, 417 F. Supp. 2d at 570.

As the Court has already ruled, the *Verizon* Action and the *EEEA* Action offer compelling reasons for the exercise of supplemental jurisdiction. The claims for relief under the First Amendment, Section 1983, and RLUIPA incorporate state law issues, including over the issue of whether Quogue's ordinance applies to the lechis: The federal and state law claims that are asserted by the Utilities and the EEEA arise out of the same facts, are predicated upon similar legal standards and theories of relief, and this Court has had jurisdiction over the related eruv cases for over three years and is most familiar with its facts.

While Southampton has filed a letter asserting arguments regarding supplemental jurisdiction, Southampton raises no new argument that it did not previously raise in its prior letter to the Court requesting that the Court abstain from deciding issues relating to the Utilities' authority to issue licenses for the attachment of lechis to their utility poles in Quogue and WHB. This Court properly rejected Southampton's arguments. *See* Order (June 16, 2014) (ECF No. 129). As noted in the Court's order, the decision whether to exercise supplemental jurisdiction is left to the exercise of the Court's discretion. Where, as here, the issue is not a matter of first impression, nor a statutory interpretation claim, the Court need not refrain from exercising supplemental jurisdiction. *Id.* at 6.³

Accordingly, the Utilities respectfully submit that the Court has the authority to rule on whether the Quogue Village Code applies to the lechis. Upon determination of this issue, Plaintiffs respectfully request that the Court decide the issue of whether the Quogue Village Code applies to the lechis, which Plaintiffs have already briefed for the Court.⁴

³ The Utilities incorporate by reference their arguments as asserted in their April 21, 2014 letter opposing Southampton's request. *See* Utilities' Letter to Magistrate Judge Tomlinson in Opposition to Southampton's Letter re: Abstention (ECF No. 128).

⁴ As discussed in *Verizon* and LIPA's proposed conclusions of law, the lechis do not fall within the applicability of the ordinance. *See* *Verizon New York Inc.'s Proposed Conclusions of Law* ¶¶ 26-34 (ECF No. 92); LIPA's

Honorable A. Kathleen Tomlinson
July 11, 2014
Page 4

Respectfully submitted,

/s/ Erica S. Weisgerber

Erica S. Weisgerber
Debevoise & Plimpton LLP
Counsel for Verizon New York Inc.

/s/ Zachary Murdock

Zachary Murdock
Lazer, Aptheker, Rosella & Yedid, P.C.
Counsel for Long Island Lighting Company d/b/a LIPA