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August 1, 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:

Verizon[1] and LIPA, Plaintiffs in the above referenced action, write in response to Quogue's July 25, 2014 letter regarding the Court's authority to interpret whether the Quogue Village Code (the "Code") applies to lechis.[2] We respectfully submit that the arguments advanced by Quogue are without merit, and that the Court should rule that it has authority to decide the applicability of the Code to the lechis.

As an initial matter, Quogue's opposition relies heavily upon its argument that the issues to be decided by the Court are more appropriately resolved in an Article 78 proceeding. But Quogue admits that the Court has already rejected Quogue's precise same argument regarding an Article 78 proceeding. *See* 2/4/2013 Hr'g Tr. at 14:5–15:6. Although Quogue suggests that the Court can reconsider its prior decision, Local Civil Rule 6.3 provides that a party moving for reconsideration must "set[ ] forth concisely the matters or controlling decisions which [the party] believes the court has overlooked." "The standard for granting [a motion for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked . . . ." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *see Medoy v. Warnaco Emps. Long Term Disability Ins. Plan,* 97 CV 6612(SJ), 2006 WL 355137, at *1 (E.D.N.Y. Feb. 15, 2006) ("The standard . . . is strict in order to dissuade repetitive arguments on issues that have already been considered fully by the Court."). Quogue fails, however, to point to any "controlling decision or data" that was overlooked by the Court when it first ruled on this issue.[3]

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[1] Capitalized terms used herein have the meanings ascribed to them in the Utilities' July 11, 2014 letter brief to the Court. (ECF No. 132).

[2] The Utilities join in the arguments advanced in the EEEA's reply letter to the Court, submitted today regarding the same issue.

[3] Under E.D.N.Y. Local Civil Rule 6.3, a motion for reconsideration must be made within fourteen (14) days of the Court's initial determination. The ruling from which Quogue seeks relief was issued on February 4, 2013.

Even assuming the Court reaches the merits of Quogue's arguments, Quogue's contentions are readily dispatched. Quogue asserts that the Court does not have authority to address whether the Code applies to lechis because the claims asserted by the Utilities are not facial challenges to the constitutionality of the Quogue Village Code. However, this contention is without merit. Federal courts regularly maintain jurisdiction over as-applied challenges to local laws and municipal bodies' decisions regarding such laws. *See, e.g., Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 388, 352-53 (2d Cir. 2007); *Coe v. Town of Blooming* Grove, 429 Fed. App'x 55, 57-58 (2d Cir. 2011); *Roman Catholic Diocese of Rockville Center, N.Y. v. Inc. Vill. of Old Westbury,* 2012 WL 1392365, at *13 (E.D.N.Y. Apr. 23, 2012); *Nichols v. Planning & Zoning Comm'n of Town of Stratford*, 667 F. Supp. 72, 78-79 (D. Conn. 1987); *Fortress Bible Church v. Feiner,* 734 F. Supp. 2d 409, 496-99, 512 (S.D.N.Y. 2010).

Moreover, Quogue's assertion that the Court lacks jurisdiction under the Declaratory Judgment Act misses the mark. *GNB Battery Technologies, Inc. v. Gould, Inc.*, cited by Quogue, specifically acknowledged that a district court has federal jurisdiction over a request for declaratory relief where, as here, federal question jurisdiction and an actual controversy exist. 65 F.3d 615, 619-20 (7th Cir. 1995). Quogue also erroneously suggests that supplemental jurisdiction "regarding code interpretation" may only be predicated off of an underlying claim regarding the constitutionality of the provisions or off of state-law claims in the pleadings. Not so. Courts in this Circuit have held that the Court may retain jurisdiction over state law claims and issues concerning the interpretation of local laws where (as here) viable federal causes of action, including a request for relief pursuant to the Declaratory Judgment Act, exist. *See Goldberg v. Cablevision Sys. Corp.*, 193 F. Supp. 2d 588, 597 (E.D.N.Y. 2002) ("Due to the existence of viable federal causes of action [including a Section 1983 claim and request for relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201], the Court will retain jurisdiction over the state-law causes of action against Cablevision.").

Quogue's remaining arguments on state law grounds also fail. Quogue's assertion that the Court should not exercise supplemental jurisdiction to determine this issue because it is "in effect, an untimely Article 78 request" fails to recognize the unique nature of the Utilities' action, which neither seeks review of any decision by the Village Board nor asserts any causes of action that would be reviewable in an Article 78 proceeding. Instead, the Utilities seek a clarification of their rights and resolution of the various *federal constitutional and statutory issues* raised by their position[4] The *Verizon* Action

[4]Quogue's assertions also ignore that federal courts regularly interpret similar statutes without remand to state court. *See*, *e.g.*, *Coastal Distrib., LLC v. Town of Babylon*, 216 Fed. App'x 97, 102-103 (2d Cir. 2007) (applying Town zoning law and concluding zoning board's factual determinations were not entitled to issue-preclusive effect); *Bikur Cholim, Inc. v. Village of Suffern*, 664 F. Supp. 2d 267, 287 (S.D.N.Y. 2009) (construing Town zoning law as part of discussion regarding whether zoning board of appeals should be named as a defendant); *Stuchin v. Town of Huntington*, 71 F. Supp. 2d 76, 102-103 (E.D.N.Y. 1999)

presents issues and claims that are not predicated upon the EEEA's application to the Quogue Board of Trustees, and 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.[5]

If Quogue's position were to be adopted, no plaintiff could ever challenge a municipality's zoning decisions in federal court pursuant to the Free Exercise Clause and pendent state law issues or claims. This is clearly not the law. Instead, under these circumstances, this federal Court's responsibility is to "interpret the Village Code under its plain meaning and the applicable case law." *See Hispanic Counseling Center, Inc. v. Incorporated Village of Hempstead*, 237 F. Supp. 2d 284 (E.D.N.Y. 2002) ("the defendants cite no authority that a court must defer to the Village's legal counsel when interpreting its zoning code. Indeed, it was Judge Wall's responsibility to interpret the Village Code under its plain meaning and the applicable case law. This he did.").

The Utilities respectfully submit that for these reasons stated above and those contained in our July 11 letter to the Court, the Court has the authority to rule on whether the Quogue Village Code applies to the lechis.

Respectfully submitted,

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(interpreting municipal zoning ordinance to determine whether municipality acted in an arbitrary or irrational manner in connection with due process claims, and collecting cases doing same).

[5] Quogue also fails to address entirely the Utilities' argument that 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).