UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BERGEN ROCKLAND ERUV ASSOCIATION, YISROEL FRIEDMAN, S. MOSHE PINKASOVITS, SARAH BERGER, MOSES BERGER, CHAIM BREUER, YOSEF ROSEN, and TZVI SCHONFELD, Plaintiffs, vs. THE BOROUGH OF UPPER SADDLE RIVER, Defendant.	Civil No.: 2:17-CV-05512-JMV-CLW

DEFENDANT BOROUGH OF UPPER SADDLE RIVER'S MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS NOTICE OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT PURSUANT TO FED.R.CIV.P 12(b)(1)

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PRELIMINARY STATEMENT IN REPLY

There is no absolute right to establish *eruvin* whenever and wherever a party deems fit. While posting these religious demarcations cannot be denied discriminatorily if secular postings are permitted, that does not equate to a right to *eruvin* without reference to local law. Both Employment Div. v. Smith, 494 U.S. 872 (1990), and Tenafly Eruv. Ass'n. v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002), dispel any notion to the contrary. Both cases stand for the proposition that there are rules that must be abided by — even if doing so results in an incidental burden to the free exercise of religion — to maintain order in a civilized society. Plaintiffs conveniently ignore this well-established law and never come to grips with the consequences that flow from it here. Under Smith and Tenafly, parties may not unilaterally declare neutrally-worded and neutrally-applied state and local ordinances unconstitutional or flatly disregard the laws that apply to everyone else, as Plaintiffs have done here.

Much of what Plaintiffs have presented to this Court in opposition to Upper Saddle River's ("USR") Motion to Dismiss is irrelevant. Plaintiffs say *eruvin* are ubiquitous around the country and, therefore, Plaintiffs have an absolute right to establish *eruvin* without reference to the law. Further, that anyone who requires them to follow laws that have been applied and enforced equally as to everyone else is necessarily anti-Semitic. The law, however, does not support Plaintiffs' approach. No matter how many times Plaintiffs repeat that "every Plaintiff to have brought an *eruv* challenge has won," it does not change the fact that cases such as Tenafly recognize that *eruvin* cannot be built if they are prohibited by "a law [that] is 'neutral' and 'generally applicable,' and burdens religious conduct only incidentally." Tenafly, 309 F.3d at 165. That is precisely the case here. The ordinance at issue in Tenafly was found to be neutrally-worded but not neutrally-applied, and, as a result, the Court found for the plaintiffs. But the ordinance here — which is

virtually identical to the neutrally-worded ordinance in Tenafly — is also neutrally enforced. Because there is no unfettered right to install *lechis* (here white PVC pipe strapped onto the USR's utility poles) if a neutral and constitutional ordinance prohibits their installation, Plaintiffs' claims and objections crumble like a house of cards.

This Court should dismiss Plaintiffs' Complaint and require them to comport with the mechanisms in place at the municipal level for a resolution *before* they seek federal court intervention. Only then — and only if USR's governing body, the Borough Council, declines their request — may Plaintiffs' claims become ripe and only then might they have standing to properly raise a constitutional challenge to USR Ordinance § 16-15 ("the Ordinance").

I. PLAINTIFFS' CLAIMS ARE NOT RIPE FOR ADJUDICATION.

Plaintiffs intentionally violated the Ordinance, which makes it unlawful to post any matter to a utility pole in USR unless authorized or required by law, because they failed to seek consent from the USR governing body to install *lechis* on USR utility poles. Instead of seeking such consent directly, or even writing to ask how to proceed for such consent, Plaintiffs engaged in a mixture of chicanery and *ad hoc* visits to municipal employees, who, unfamiliar with what Plaintiffs were requesting, were unsure how to proceed without additional guidance from the Council and/or its attorney. Given that these employees, who are indisputably *not* authorized to singly act on behalf of the municipality, indicated the need for actual authority, the only logical conclusion is that they — alone — *didn't* have the authority to consent to the installation of the *lechis*.

While there are a lot of factual disputes about who said what to whom, none of them are material because it is undisputed that Plaintiffs never once *asked* for municipal consent before proceeding with the installation of the *lechis*. Even Plaintiffs concede that (1) they installed *lechis* in 2015 without asking for permission from the Council to do so; (2) in their communications with the USR Police Department ("USRPD"), Plaintiffs never asked for permission to install the *lechis*

but rather told the police they were utility contractors who were doing some work; and (3) the written record shows not a single writing in which Plaintiffs asked for municipal consent before installing *lechis*. The factual record could not be any clearer: Plaintiffs did not ask for or receive municipal consent to install *lechis* in USR.

Plaintiffs' evidence of municipal "consent" is unconvincing for several reasons. First, Plaintiffs, through their alleged representative, Rabbi Steinmetz, represent that they sought and received telephone approval from the USRPD to perform "utility work" as contractor for Orange and Rockland Utilities, Inc.[1] See Declaration of Robert Hyman ("Hyman Decl."), ¶¶ 3-11, Ex. A. Even if Plaintiffs' version of the facts were credited, however, Plaintiffs cannot be said to have been seeking consent from USR through this exchange to install *lechis* on utility poles. Even on their own account, Plaintiffs did not ask anyone from USR for *permission* to install *lechis*. (Plaintiffs' descriptions of the communications suggest they were *informing* USR of work that was going to proceed no matter what, not asking if they could do it.)[2] They did not explain clearly what they were doing. And they proceeded to install *lechis* to USR utility poles without any such consent. Not surprisingly, Rabbi Steinmetz and members of the Vaad HaEruv were stopped, both because they were not performing utility work and they had not received permission from USR to attach *lechis* to utility poles. See Declaration of James Dougherty ("Dougherty Decl."), ¶ 14-20. Rabbi Steinmetz and Plaintiff Pinkasovits then met with USR representatives, all of whom lacked policy making authority. See Dougherty Decl., ¶ 23; Declaration of Theodore Preusch ("Preusch Decl."), ¶¶ 39-48, 55-56; Hyman Decl. ¶ 12; USR Code § 3-28.3).

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[1] Contrary to Rabbi Steinmetz's claims, he is no more a contractor for the utility company than one would be a NASA employee by virtue of looking through a telescope.

[2] See Reply Declaration of Steinmetz ("Steinmetz Reply Decl.") ¶ 12; Steinmetz Declaration to Preliminary Injunction Motion ("Steinmetz Decl.") ¶ 9; Complaint ¶ 35; Steinmetz Declaration to Temporary Restraining Order Motion ¶ 8; Opp. Br. at 10, 18.

The Vaad HaEruv was told, based upon a misunderstanding of two USR employees lacking in authority, that it could *temporarily* proceed to install *lechis* if it met with the Police Department to discuss traffic safety issues. See Preusch Decl. ¶¶ 52-57; Dougherty Decl. ¶¶ 21-24; Declaration of Steven Forbes ("Forbes Decl.") ¶¶ 8-11; Supplemental Declaration of Theodore Preusch ("Preusch Supp. Decl.") ¶ 10. Here, Plaintiffs have admitted they understood Dougherty and Forbes were not policy makers, since they erroneously assumed Dougherty spoke to and received instructions from the Mayor during the June 15, 2017 meeting. See Steinmetz Decl., ¶ 13; Pinkasovits, ¶ 11.

Despite having not spoken to *any* policy makers, having received at best a *temporary* "authority" (although USR denies there existed any authority, implied, apparent, or otherwise) and knowing full well that even any *temporary* "authority" they received was based on their own assumptions, the Vaad HaEruv chose to nonetheless move ahead with the installation of *lechis*. Subsequently, USR determined that the *lechis* violated the Ordinance and demanded that Plaintiffs remove all *lechis* installed without USR's formal consent. See Declaration of Yehudah L. Buchweitz, Ex. C.

Given how weak the evidence of municipal consent is, Plaintiffs now argue that they did not need to seek municipal consent at all — that they could just ignore the Ordinance and proceed with reckless abandon, as they have done. See Opp. Br. at 17-21. Consent was required, not only by the Ordinance, which made their activities explicitly unlawful unless *authorized*, but also by state statute, N.J.S.A. 48:3-19, which requires municipal consent to use the utility poles, regardless of any agreements with the utility companies. Moreover, case law requires a determination from the municipality before such claims can be ripe for adjudication. See e.g., Williamson Cty. Reg'l Planning Comm. v. Hamilton Bank, 473 U.S. 172, 186-90 (1985). Putting their argument into

perspective, Plaintiffs effectively allege that they can unilaterally determine what laws apply to them and ignore those that are inconvenient, without recourse. See Opp. Br. at 17-18. Plaintiffs' calculated disregard of established process[3] requires dismissal on ripeness grounds, as Plaintiffs have not even sought USR's consent to install the *lechis* and cannot say what the result would be if they followed the proper procedures.

A. *Eruvin* Are Not Automatically Authorized or Required by Law.

Despite the clear precedent set by Smith and Tenafly, Plaintiffs continue to boldly assert and behave as if they have an unfettered right to establish an *eruv* whenever and wherever they deem fit. See Opp. Br. at 17-21. This assertion is demonstrably false. Rather, if a facially neutral and generally applied law, such as the Ordinance, prohibits the installation of an *eruv*, then pursuant to Smith, as subsequently confirmed by Tenafly, constitutional or otherwise, for Plaintiffs to do so. Plaintiffs cannot unilaterally determine that an ordinance is unconstitutional because of purported discriminatory intent and then simply disregard it. There is no basis, under any law, for Plaintiffs to assert that their actions are authorized or justified by law.

B. USR Consent is Required to Install *Lechis* on USR's Poles.

1. The Ordinance Requires Consent in its Express Language

Plaintiffs assert that the Ordinance does not require municipal consent because it does *not* include language expressly requiring or explaining the process for obtaining such consent, Opp. Br., at 18, all the while recognizing that the Ordinance expressly makes unlawful the affixation of

[3] Here, the process is clear and unmistakable, Plaintiffs were obligated to comport with settled municipal default procedure and seek exception, waiver or revision to the Ordinance from USR's Council and Mayor. See Supplemental Declaration of Robert T. Regan, Esq., dated December 12, 2017 ("Regan Supp. Decl."), ¶¶ 24, 26-27.

materials to utility poles unless *authorized or required by law*. Common sense alone refutes Plaintiffs' reading of the Ordinance. If an activity is deemed unlawful unless it is authorized, then, conversely, it would not be unlawful if it were authorized. Since the Ordinance is USR's, the rudimentary conclusion could only be that USR's authorization is required to proceed with an activity otherwise deemed unlawful.

In fact, in New Jersey, the process by which a person may seek waiver from a municipal ordinance is not generally set forth in most ordinances. See Regan Supp. Decl., ¶¶ 2-4, 24, 26-27. Rather, the custom and practice in New Jersey is that, if an ordinance is silent about how to obtain consent, the default is that it requires a waiver or exception from the governing body or Mayor. Id.[4] By way of example, N.J.S.A. 48:3-19 does not proscribe the administrative procedure for obtaining municipal consent for the use of poles of another person authorized to maintain poles in a municipality's streets, highways, or other public places, though there is no dispute that it requires such consent.

Plaintiffs' alternate argument that *eruvin* are "required by law" and therefore never require municipal consent is equally unsupported by law. See Pl. Br. at 18. While courts have determined that installation of *lechis* are not unconstitutional and in certain circumstances a reasonable accommodation, the law is equally clear that, "if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." See Smith, 494 U.S. at 878; see also Tenafly, 309

[4] Here, the Ordinance was validly enacted in an effort to address a proliferation of political signs and public safety concerns. See Preusch Decl. ¶¶ 19-32; Supplemental Declaration of Theodore Preusch, dated December 12, 2017 ("Preusch Supp. Decl."), ¶¶ 2-5; Regan Decl., ¶¶ 10-23; Regan Supp. Decl., ¶¶ 2-5. Political signs were the inciting force which caused USR to recognize much larger issues which it was, and is, empowered to address through its police powers. Id.

F.3d at 165. In other words, no reasonable accommodation is required if the ordinance that prohibits the activity is constitutional as written and as applied and Plaintiffs' assertions to the contrary ring hollow.

2. N.J.S.A. 48:3-19 Also Requires USR's Consent for Use of its Poles.

Even if, *arguendo*, the Ordinance did not require municipal consent (despite its express language requiring authorization to do so), Plaintiffs were still legally required to obtain USR's consent by N.J.S.A. 48:3-19, which requires municipal consent before Plaintiffs may install *lechis* on USR's utility poles. Though Plaintiffs attempt to distract the Court's attention by focusing on the preceding statute, N.J.S.A. 48:3-18 (which allows for parties to enter into agreements for the joint use of poles), this statute does not negate or otherwise undermine the requirement of municipal consent set forth in N.J.S.A. 48:3-19. While parties may be free to enter into agreements amongst themselves, the use of utility poles by persons not previously authorized to use them nonetheless requires consent of the municipality in which they exist.

Plaintiffs' inventive interpretation of the interplay between these two statutes, N.J.S.A. 48:3-18 and N.J.S.A. 48:3-19, is that once Plaintiffs had a "written agreement" from "another person using poles under municipal consent," pursuant to N.J.S.A. 48:3-18, they are then necessarily deemed as a "ha[ving] a lawful right to maintain such poles," pursuant to N.J.S.A. 48:3-19, and, therefore, do not require municipal consent.[5] However, N.J.S.A. 48:3-19, itself, negates this conclusion. It provides:

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[5] Even if there were some basis for this interpretation, Plaintiffs did not make the agreement, Vaad HaEruv did, well before the Bergen Rockland Eruv Association was created or most Plaintiffs joined the lawsuit. And even so, it could not have been valid as applied to the current installation, because, as set forth more fully in USR's moving papers (1) the Vaad HaEruv failed to obtain permission to install *lechis* on most poles in USR upon which they have been already installed (see Preusch Decl., ¶¶ 58-82; Preusch Supp. Decl. ¶¶ 22-29; Forbes Decl. ¶¶ 12-7) and (2) O & R was not authorized to enter into an agreement without the consent of Verizon Communications, Inc.

> The consent of the municipality shall be obtained for the use by a person of the poles of another person *unless each person has a lawful right to maintain poles in such street, highway or other public place.*

N.J.S.A. 48:3-19 (emphasis added). Plaintiffs do not maintain that they have a lawful right to *maintain* the poles. Their limited agreement with O & R does not confer that right on them, and there has been no assertion that Plaintiffs hold the easements upon which the poles were installed. Because Plaintiffs indisputably do not have a right to *maintain* the poles at issue, municipal consent is required by N.J.S.A. 48:3-19.

While Plaintiffs argue that USR's position with respect to the consent required by N.J.S.A. 48:3-19 is "unprecedented," citing off-the-cuff statements from officials in neighboring towns as if they are dispositive on the issue in USR, the public utility companies indisputably understand this requirement. See Supplemental Declaration of Bruce S. Rosen, Esq., ("Rosen Supp. Decl.") dated December 12, 2017, at Exs. J – P (sampling of public documents that recognize N.J.S.A. 48:3-19 requirement for municipal consent for the use of utility poles). These documents demonstrate that Verizon and other municipalities have interpreted the statute as USR has by noting, in these agreements, that municipal consent is required before Verizon can authorize permission for joint use of its pole.

Plaintiffs implausibly assert that "the Third Circuit in Tenafly did not find that N.J.[S.A.] § 48:3-19 posed any bar to granting full relief to the *eruv* proponents, despite a lack of municipal consent." See Opp. Br. at 23. However, Tenafly did not even address the issue of municipal consent. Moreover, while Plaintiffs are correct that the statutes were enacted "to encourage and provide a reduction for the number of poles located in the streets, highways and other public places

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("Verizon") under a 1963 Joint Use Agreement. See Declaration of David Gudino, Esq., 6-10, Ex. B; see also Preusch Supp. Decl., ¶¶ 23 (Verizon's consent was not sought until well after the Vaad HaEruv's agreement and endorsements were entered into).

of this state," see Opp. Br. at 24, and to provide *utility companies* with the freedom to contract amongst each other for the joint use of poles, those entities must nonetheless have a "lawful right to maintain the poles in the streets" to avoid the need for municipal consent. Either way, the true purpose of these statutes is to allow municipalities to make the determinations with respect to the use of their right-of-ways and to regulate the number of poles and their uses.

3. Legal Precedent Requires USR's Consent

For all of Plaintiffs' misguided assertions of legal precedent to establish that they have an unfettered right to establish an *eruv*, they do not even bother to address the well-established body of law that requires, at a minimum, a "meaningful application" to the local government before a party's claims are ripe for consideration by the courts. See Williamson Cty. Reg'l Planning Comm. v. Hamilton Bank, 473 U.S. 172, 186-90 (1985) (claim is not "ripe" without a final decision from the local authority as to the nature and extent of the request); see also Abbott Labs v. Gardner, 387 U.S. 136, 149 (1967) (in its determination of whether a matter is ripe for adjudication, Courts must consider "whether the issues presented are fit for review").

As set forth in USR's moving papers, E. End Eruv Ass'n v. Westhampton Beach, 828 F. Supp. 2d 526 (S.D.N.Y. 2011), fits four square with the case at bar, regarding the final decision requirement prior to a matter being ripe for Court consideration. Much as the case with Plaintiffs here, the E. End Eruv Ass'n Plaintiffs never sought consent from the municipality to install *lechis*, though they had an agreement with the utility company to use the poles. Id. at 537. In the face of First Amendment claims remarkably similar to those here, the Court dismissed the claims as unripe determining that "whether the sign ordinance applies to the attachment of *lechis* to utility poles in Southampton should be an issue for Southampton in the first instance." Id.

While Plaintiffs assert that any attempts they would be forced to make would be "futile," it is important to note that "[t]he doctrines of ripeness for adjudication and of exhaustion of administrative remedies are distinct and not interchangeable." United States ex rel. Ricketts v. Lightcap, 567 F.2d 1226, 1232 (3d Cir. 1977). "Determining whether a question is fit for judicial review requires the Court to consider 'whether the agency action is final; whether the issue presented for decision is one of law which requires no additional factual development; and whether further administrative action is needed to clarify the agency's position . . . .'" Felmeister v. Office of Attorney Ethics, 856 F.2d 529, 535-36 (3d Cir. 1988) (citations omitted). That USR has rejected Plaintiffs' improper attempts to sidestep the law and build an *eruv* without obtaining the requisite legal consent from USR, does not mean that a proper application for consent would not be given due consideration. In fact, the evidence in the record is all to the contrary. See Preusch Decl. ¶ 82.

Plaintiffs' suggestion that § 1983 claims do not require exhaustion is misguided. This is not simply a question of exhaustion of administrative remedies. Rather, there can be no actual case-and-controversy here under Article III because Plaintiffs have sidestepped the municipal consent requirements of the law. Having never even gone through the appropriate processes for consent, Plaintiffs (and this Court) cannot know whether there would even be a dispute if Plaintiffs sought municipal consent, as they are required to do under the law.[6]

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[6] Unlike a § 1983 claim, where the plaintiff has already been deprived of a constitutional right by a governmental authority, Plaintiffs' real claim – despite having alleged a violation of § 1983 – is more akin to a land use dispute for which no futility exception applies. See Holland Transp., Inc. v. Upper Chichester Twp., 75 Fed. Appx. 876, 878 (3d Cir. 2003). Plaintiffs, here, brought these claims upon themselves by first proceeding, without ever seeking permission - even when it comes to evaluating safety concerns, such as the wire illegal strung to complete the *eruv*, see Rotella Decl., ¶¶ 38, 45; Supplemental Declaration of Steven Forbes, ¶¶ 3-4, Plaintiffs choose the path of insisting on post hoc forgiveness rather than seeking permission. Municipal preapproval is fundamentally connected to the municipality's police power. A municipality is responsible for protecting the health and safety of it constituents, accordingly, Plaintiffs, as prospective applicants, have

C. Plaintiffs Have Not Obtained the Requisite Consent from USR

Plaintiffs' assertions, on one hand, that they didn't need to seek consent are directly undermined by their assertions, on the other hand, that they have obtained "multiple consents from multiple officials." See Opp. Br. at 24. Rather, despite the inaccuracy of describing these communications as "consent" from the municipality, required under the Ordinance, state law, and legal precedent, these actions taken by Plaintiffs are a tacit admission that municipal consent was required for their actions.

Again, Plaintiffs' arguments that they did obtain consent necessarily fall flat. First, the recorded conversation between Rabbi Steinmetz and the police department indicate that Steinmetz misrepresented himself as performing "utility work." Hyman Decl., ¶¶ 3-12, Ex. A. Certainly, an *eruv* is not a public utility (otherwise, Plaintiffs would be seeking relief from the New Jersey Board of Public Utilities); accordingly, by no stretch of the imagination was Rabbi Steinmetz performing "utility work." Second, the meetings and conversations with USR administrators confirm their respective limited authority because they indicated to Plaintiffs' representatives that they would need to address the requests with their higher-ups. See Preusch Decl., ¶¶ 19-32; Preusch Supp. Decl., ¶¶ 2-5; Regan Decl., ¶¶ 10-23; Regan Supp. Decl., ¶¶ 2-5. Third, even if Plaintiffs somehow believed they were given permission to proceed, it resulted from Rabbi Steinmetz's misrepresentations – purposefully or not – that O & R had granted permission to place *lechis* on all of the poles in question, which is simply not so, nor was the underlying license valid because Verizon had failed to approve it. See Hyman Decl., ¶¶ 3-11, Ex. A; Dougherty Decl., ¶¶ 21-4; Forbes Decl.,

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the obligation to present USR the opportunity to consider Plaintiffs' planned construction and evaluate safety concerns, if necessary. As such, "land use-related" factors are implicated by Plaintiffs' failure to seek municipal consent, thereby necessarily distinguishing Plaintiffs' claims from those that are truly § 1983 deprivation of rights claims.

¶¶ 9-11; Preusch Decl., ¶¶ 58-82; Preusch Supp. Decl., ¶¶ 10-20, 22-9. Therefore, it is plainly unreasonable for Plaintiffs to suggest that in either of these instances valid consent was given.

Moreover, that these discussions with employees do not constitute *municipal* authority has been widely accepted. By way of analogy, in the context of § 1983 cases, Court's seeking to determine the "final policy-making authority" which "can thus bind the municipality by its conduct, a court must determine (1) whether, as a matter of state law, the official is responsible for making policy in the particular area of municipal business in question and (2) whether the official's authority to make policy in that area is final and unreviewable." Hill v. Borough of Kutztown, 455 F.3d 225, 245 (3d Cir. 2006) (internal citations omitted). Neither the USRPD nor any of the officials with whom Plaintiffs conferred "make policy in the particular area of municipal business in question" and, therefore, had no authority to provide municipal consent. USR's ordinances confirm this conclusion: only the Borough Council and Mayor have the authority to pass ordinances. See USR Code §§ 3-16 and 3-18. The Borough Administrator, in this case Preusch, and other "department heads," such as Chief Rotella and Boroughf Attorney Regan, only have authority from the Council (and Mayor). See USR Code §§3-28.3 and 3-30. As such, by virtue of these express authorities, there can have been no "apparent authority" conferred on the various USR officials – such authority can only be conferred by the affirmative actions of the principal. See Jennings v. Reed, 381 N.J. Super. 217, 231 (App. Div. 2005) (quoting Restatement (Second) of Agency § 27 (1958)) ("'apparent authority . . . is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.'"); see also E. End. Eruv. Ass'n, 828 F. Supp. 2d. at 537 ("The Town attorneys determination and the supervisor's email are not decisions of the "Town" on the issue, because

enforcement of the ordinance lies with Southampton's Building Department and ZBA"); Lost Trail LLC v. Town of Weston, 289 Fed. Appx. 443, 445 (2d. Cir. 2008)(claim found unripe where developer obtained determination from town attorney, who was not authority for subdivision decisions); Hailey v. City of Camden, 631 F. Supp. 2d 528, 530 (D.N.J. 2009) ("Municipal liability under 42 U.S.C. § 1983 may not be proven under the respondeat superior doctrine, but must be founded upon evidence that the government unit itself supported a violation of constitutional rights").[7]

Because Plaintiffs did not obtain consent from USR, their claims are not ripe for judicial determination and, therefore, must be dismissed. Since, as set forth in length in USR's moving papers, Plaintiffs do not have valid consents from all appropriate utility companies for all poles encompassed, their claims are, too, necessarily unripe.

II. PLAINTIFFS LACK STANDING TO ASSERT THEIR CLAIMS

In addition to not being ripe for adjudication, Plaintiffs lack standing to assert their claims against USR. Plaintiffs' have no injury attributable to the actions of USR, but rather solely through their own self-inflicted actions. Moreover, Plaintiffs' claims are not redressable by this Court solely through a resolution with USR; Plaintiffs are without consent to install their *eruv* in adjoining municipalities and they do not have appropriate approvals from all of the utility companies whose pole they currently use or intend to use. As such, Plaintiffs lack standing to assert their claims against USR.

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[7] Plaintiffs' reliance on Borough of Emerson v. Emerson Police Benevolent Ass'n Local 206, 2006 WL 1161564 (N.J. Super. Ct. Ch. Div. Apr. 28, 2006) a non-precedential unreported trial court decision, is misplaced. In Emerson, the Borough was found to be bound by a police chief's salary representations because: (1) he was involved in the initial policy decision and (2) his salary statements occurred in front of the borough administrator who responsible for human resource matters and budgetary concerns. In the instant matter, however, Chief Rotella did not grant permission to Plaintiffs to attach lechis and the Borough Administrator and Building Department were *not* the final decision makers for policies concerning the Ordinance.

A. Plaintiffs Have no Injury-in-Fact

Plaintiffs' assertions of injury-in-fact ignore two crucial facts. First, five plaintiffs do not live within the confines of an *eruv* and never have. Accordingly, there can be no injury because they never had the benefit of an *eruv*. Contrast Tenafly, 309 F.3d at 178 (finding harm if the *eruv* was *removed*). Second, the two remaining Plaintiffs can suffer no harm because the *lechis* installed on the north-west border of USR, adjacent to Mahwah, were installed *without any authority*, as they are not even encompassed by Plaintiffs' invalid O & R License, and, therefore, necessarily constitute illegal trespass. Preusch Supp. Decl., ¶¶ 25-34. In other words, Plaintiffs have no legal injury.

B. There is No Traceability to USR's Conduct

As set forth in USR's moving papers, Plaintiffs' "injuries" do not arise directly because of USR's actions, but rather out of their own. Plaintiffs' opposition provides nothing to dispute this obvious conclusion. As set forth at length above, Plaintiffs unilaterally disregarded an ordinance, failed to seek municipal consent, failed to make sure they had proper approvals from all relevant utilities, and nevertheless proceeded with the installations, without regard for whether their actions were legal or not. They misrepresented the work they sought to perform, see Hyman Decl., ¶¶ 3-12, Ex. A, and then, not surprisingly, the Vaad HaEruv was stopped for attaching unknown objects to utility poles (now known to be *lechis*). See Dougherty Decl., ¶ 14-20. Then, days later, the Vaad HaEruv returned to USR to speak with employees of the Building Department, all of whom lacked policy-making authority. See Dougherty Decl., ¶ 23; Preusch Decl., ¶¶ 39-48, 55-56; Hyman Decl. ¶ 12; USR Code § 3-28.3.

Here, Plaintiffs have admitted they understood Dougherty and Forbes were not policy makers, as they erroneously assumed Dougherty spoke to the Mayor during the June 15, 2017 meeting. Steinmetz Decl., ¶ 13; Pinkasovits, ¶ 11. Despite having not spoken to policy makers, receiving a

temporary decision and knowing full well that any such authority was contingent upon the policy-makers' authorization, the Vaad HaEruv nonetheless proceeded to install *lechis* in USR. USR had nothing to do with Plaintiffs affirmative, intentional conduct that created the controversy at bar. Remarkably, the best Plaintiffs have to offer by way of opposition and as authority is a quote from USR's counsel that "standing knows no state boundaries. . . ." This statement, taken out of context and made only within days of being retained and with the caveat that counsel had not yet completed factual and legal research, does not change the fact *Plaintiffs* brought this to USR's doorstep, and not the other way around.

C. Plaintiffs' Claims are Not Redressable

Again, Plaintiffs have submitted no substantive response to demonstrate that their issue is redressable. As set forth in USR's moving papers, the matter cannot be redressed by this Court through resolution of Plaintiffs' Complaint against USR, given the pending actions against adjacent municipalities. While Plaintiffs allege that, if construction of the *eruv* in USR were completed, at least some Plaintiffs would be then encompassed in an *eruv*, the argument entirely ignores the fact that their purported "License Agreement" with O & R only encompasses ***55 of the 109*** utility poles that have *lechis* in USR, ignores that Plaintiffs are proceeding without permission of the other "Joint Use Agreement" holders, and ignores that, regardless of the Ordinance, N.J.S.A. 48:3-19 requires municipal consent for the use poles by these Plaintiffs anyway. Preusch Decl., ¶¶ 59-82; Preusch Supp. Decl. ¶¶ 22-32; Forbes Decl., ¶¶ 12-7, Exs. A-B; Rosen Decl., Ex. H; Steinmetz Decl., Ex. G; Steinmetz Reply Decl., Ex. J; Rosen Supp. Decl., Exs. J-P. As to this latter point, Plaintiffs do not challenge the constitutionality of N.J.S.A. 48:3-19.

Even if this Court were to determine for some reason that the Ordinance is unconstitutional, that still would not resolve the matter.

CONCLUSION

For the reasons set forth above and in USR's previous filings, Plaintiffs' Complaint should be dismissed as their claims are not ripe for adjudication and Plaintiffs lack standing to assert them.

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