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BY E-MAIL AND PRIORITY MAIL

November 26, 2018

Honorable Michael Queenan, Mayor
Mr. Dennis Lynch, Village Attorney
Honorable Desiree Potvin, Village Clerk & Treasurer
The Village of Woodbury Board of Trustees
Village of Woodbury
P.O. Box 546
Central Valley, New York 10917

Re: Introductory Local Law No. 9 of the Year 2018 – A Local Law Creating A New Chapter 270 of the Village Code, To Regulate Devices in Public Streets, Rights-of-Way and Easements (the "Local Law")

Dear Mayor Queenan, Mr. Lynch, Ms. Potvin, and the Village Board,

We represent the now-forming Woodbury Eruv Association ("WEA"), a not-for-profit organization, which has sought to expand an eruv in areas surrounding the Village of Woodbury ("Woodbury"). We write to address our significant concerns with the intent and content of the proposed Local Law, specifically as it relates to the eruv. It appears that the proposed Local Law was drafted with an invidious intent to target eruvin (the plural of "eruv"), and hence Orthodox Jews, specifically. Indeed, it is *nearly identical* to a draft local law that the Town of Orangetown proposed but abandoned following public comment from this law firm, Orange & Rockland, and others. As explained below, the Local Law, if enacted, would violate the First Amendment's Free Exercise Clause. We request that Woodbury postpone its public hearing on this Local Law and meet with us and our clients, who represent the Orthodox Jewish community in Woodbury.

For your reference, an eruv is a virtually invisible unbroken demarcation of an area which may be established by the attachment of wooden or plastic strips, called "lechis," to telephone or utility poles. Jewish law prohibits the carrying or pushing of objects from a private domain, such as a home, to the public domain on Sabbath and Yom Kippur. Based on the sincerely-held religious belief of certain observant Jews, without an eruv, they are unable to leave their homes on these days to attend services at synagogue or be with family and friends if they are, for example, pushing a baby stroller or wheelchair, or carrying things such as prayer books, keys, or medications. Thus, absent an eruv, certain observant

Jews are deprived of the opportunity to participate in mandatory communal prayers and observances. Accordingly, a multitude of eruvin have been established statewide and nationwide.[1]

Any legal question regarding eruvin has been conclusively settled, as *every* court to have considered the matter has determined that the creation of an eruv, including through the utilization of public utility poles for the attachment of lechis, is a reasonable accommodation of religious practice under the Free Exercise Clause. *See Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F. 3d 144, 176 (3d Cir. 2002);

[1] The first eruv in the United States was established in 1894 in the city of St. Louis, Missouri. Since then, *eruvin* have been created in each of the country's 10 biggest cities; in 23 of the country's 25 largest metropolitan areas; and in at least 28 states. These include, among many others: Westhampton Beach, Southampton, Quogue, Huntington, Stony Brook, Patchogue, East Northport, Merrick, Mineola, North Bellmore, Plainview, Great Neck, Valley Stream, West Hempstead, Long Beach, Atlantic Beach, Lido Beach, Roslyn, Searingtown, Forest Hills, Kew Gardens, Belle Harbor, Holliswood, Jamaica Estates, New Rochelle, Scarsdale, White Plains, Albany, and Manhattan, New York; Cherry Hill, East Brunswick, Englewood, Fort Lee, Maplewood, Paramus, Passaic-Clifton, Rutherford, Teaneck, Edison, West Orange, Long Branch, Tenafly, and Ventnor, New Jersey; Bridgeport, Hartford, Norwalk, Stamford, New Haven, and Waterbury, Connecticut; Boston, Cambridge, Springfield, and Worcester, Massachusetts; Providence, Rhode Island; Berkeley, La Jolla, Long Beach, Los Angeles, Palo Alto, San Diego, San Francisco, and San Jose, California; Pittsburgh, Philadelphia, and Lower Merion, Pennsylvania; Chicago, Buffalo Grove, Glenview-Northbrook, and Skokie, Illinois; Ann Arbor, Southfield, Oak Park, and West Bloomfield Township, Michigan; Baltimore, Potomac, and Silver Spring, Maryland; Charleston, South Carolina; Birmingham, Alabama; Atlanta, Georgia; Las Vegas, Nevada; Miami, Ft. Lauderdale, Boca Raton, Boyton Beach, Deerfield Beach, Delray Beach, and Jacksonville, Florida; Denver, Colorado; Cleveland, Cincinnati, and Columbus, Ohio; Portland, Oregon; Memphis and Nashville, Tennessee; New Orleans, Louisiana; Dallas, Houston, and San Antonio, Texas; Richmond, Virginia; Seattle, Washington; Phoenix, Arizona; and Washington, D.C. Most recently, eruvin have been established in San Jose, California; Plano and Austin, Texas; Scottsdale, Arizona; and Omaha, Nebraska.

Almost always, *eruvin* have been embraced as a welcome display of diversity and kinship. On the occasion of the inauguration of the first eruv in Washington, D.C., President George H.W. Bush wrote a letter to the Jewish community of Washington in which he stated: "there is a long tradition linking the establishment of eruvim with the secular authorities in the great political centers where Jewish communities have lived. . . . Now, you have built this eruv in Washington, and the territory it covers includes the Capitol, the White House, the Supreme Court, and many other federal buildings. By permitting Jewish families to spend more time together on the Sabbath, it will enable them to enjoy the Sabbath more and promote traditional family values, and it will lead to a fuller and better life for the entire Jewish community in Washington. I look upon this work as a favorable endeavor. G-d bless you." *See* 1990 Letter from George Bush to Congregation Kesher Israel, attached hereto as Exhibit A.

ACLU of N.J. v. City of Long Branch, 670 F. Supp. 1293, 1295 (D.N.J. 1987); *Smith v. Community Bd. No. 14*, 128 Misc.2d 944, 491 N.Y.S.2d 584, 586 (N.Y.Sup.Ct. 1985) aff'd 133 A.D.2d 79 (2d Dept. 1987).

The law in the Second Circuit is similarly settled. As you may know, following our success in *Tenafly*, our law firm represented, also on a *pro bono* basis, an eruv association in a multi-year litigation against the municipalities of Westhampton Beach, Quogue, and Southampton, NY. There, New York state and federal courts, including the Second Circuit Court of Appeals, repeatedly ruled in favor of the eruv association, finding, among other things, that municipal non-interference with the creation of an eruv is a constitutional exercise of religious freedoms and "[n]eutral accommodation of religious practice," (*see Jewish People for the Betterment of Westhampton Beach v. Vill. Of Westhampton Beach*, 778 F. 3d 390, 395 (2nd Cir. 2015)); that municipalities have affirmative duties to accommodate religious uses of utility poles (*see East End Eruv Ass'n v. Town of Southampton, et al.*, No. 14-21124, 2015 WL 4160461 (Sup. Ct. Suffolk Cty., June 30, 2015)); and that utility companies have the authority to enter into contracts for the attachment of lechis to poles (*see Verizon New York, Inc., et al. v. The Village of Westhampton Beach, et al.*, 11-cv-00252, 2014 WL 2711846 (E.D.N.Y. Jun. 16, 2014)). An eruv has now been up in these municipalities for over three years, without further dispute or controversy.

Moreover, the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, whose decisions are binding upon courts in Orange County, affirmed the lower court's holding in *Smith v. Community Bd. No. 14.* The Court determined that the actions of local officials in allowing the construction of an eruv were a valid accommodation of religion under the Free Exercise Clause. Not only were the city's actions fully compliant with the First Amendment's Establishment Clause, but were "mandated by the court" as a valid accommodation to religious practice. *Smith*, 128 Misc. 2d at 947.

As we noted at the outset, the Local Law is disturbingly similar to Orangetown's previously proposed (and tabled) discriminatory local law, "Proposed Local Law Amending Town Code Chapter 43, Entitled Zoning – Regulations of Devices in Public Right-of-Ways and Easements." Orangetown's version of the Local Law stemmed from its Supervisor Chris Day's "Preserving Orangetown" campaign – a political platform largely staked on anti-Orthodox Jewish sentiment, including establishing park fees for nonresidents, a no-knock registry to "prevent aggressive solicitation of home sales and 'blockbusting,'" lot size and parking requirements for private schools and houses of worship, reviewing and "resetting" zoning rules, and increasing fines for zoning and code violations.[2]

After Supervisor Day's receipt of a letter similar to this, as well as a meeting with our law firm and the affected entity, the Bergen Rockland Eruv Association ("BREA"), Orangetown appears to have ceased pursuing this effort. We are disappointed to learn, then, that Woodbury now seeks to bring new life to

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[2] Preserving Orangetown, *Day for Supervisor*, http://voteforday.com/preservingorangetown (last visited Nov. 20, 2018).

it: while Woodbury may have removed certain explicit references to lechis, the eruv, and religious establishment, it is nonetheless apparent that Woodbury's "copycat" legislation is similarly being driven by religious animus.[3] The Local Law's application to devices other than lechis does not change this analysis.[4]

Woodbury can look just across the border to assess the potential consequences of enacting its proposed Local Law. In 2017, after letters similar to this one went unheeded, our firm was forced to file federal lawsuits against the Borough of Upper Saddle River ("USR"), the Township of Mahwah, and the Borough of Montvale, each of which attempted to either enact or enforce ordinances that purportedly would prevent lechis from being affixed to utility poles.[5] BREA has now reached settlements with Mahwah and Montvale to preserve and protect the existing eruv in a small portion of Mahwah and to continue installation in a small portion of Montvale.[6] In each settlement, the municipalities paid portions of our legal costs.

USR forced BREA and the individual plaintiffs to bring a motion for a preliminary injunction, and to oppose a meritless motion to dismiss. In addressing those motions, Judge Vazquez of the District of New Jersey (who presided over all three cases) articulated his preliminary views – following his review of hundreds of pages of submissions – that Plaintiffs have raised "real concerns about a discriminatory

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[3] Mayor Queenan is reported to have "said the proposed law is meant to set rules and a degree of uniformity for eruvs as they become more common, and to address any potential safety concerns" – a clear indication that the underlying intent for the Local Law is to directly regulate religious conduct. *See* Chris McKenna, *Woodbury proposal would regulate religious markers in public areas*, TIMES HERALD-RECORD (Nov. 26, 2018, 1:02 PM), https://www.recordonline.com/news/20181125/woodbury-proposal-would-regulate-religious-markers-in-public-areas.

[4] It is of no consequence that the proposed Local Law is purportedly also designed to address other Non-Utility Devices besides lechis, such as private security cameras. S*ee Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-266 (1977) ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference [to the legislature's balancing of numerous competing considerations] is no longer justified"). If the goal of the Local Law is to regulate security cameras, then Woodbury should regulate security cameras and exclude lechis from those regulations.

[5] *See Friedman et al v. The Borough of Upper Saddle River et al*, 2:17-cv-05512-JMV-CLW (D.N.J.); *Bergen Rockland Eruv Association, Inc. et al v. The Township of Mahwah*, 2:17-cv-06054-JMV-CLW (D.N.J.); *Bergen Rockland Eruv Association, Inc. et al v. The Borough of Montvale*, 2:17-cv-08632-JMV-CLW (D.N.J.).

[6] Mahwah was also sued by the State of New Jersey's Attorney General. *See Porrino et al. v. Township of Mahwah and Mahwah Town Council* (N.J. Super. Ct., filed Oct. 24, 2017). In a statement addressing the lawsuit, which alleges, *inter alia*, that Mahwah's since-discarded sign ordinance "is without a legitimate purpose," then-Attorney General Christopher Porrino stated that the ordinance was "legally wrong" and was motivated by "some archaic, fear-driven and discriminatory mindset."

intent in invoking" Ordinance No. 16-15, which USR passed in 2015 (immediately after hearing about the eruv) and then relied upon in opposing the eruv. *See* Exhibit B (Jan. 8, 2018 Hearing Tr. at 11). While USR claimed that this law was enacted to address "political signage" following a heated election cycle in 2014, Judge Vazquez noted that USR presented no contemporaneous evidence that it was ever concerned about "sign pollution." Instead, Judge Vazquez focused correctly on the circumstances surrounding the enactment of the ordinance, noting that the proposed law was introduced two weeks after the Mayor said she heard that there had been an agreement between the Vaad HaEruv – Plaintiffs' agent – and Rockland Electric Company, and passed shortly thereafter. *Id.* at 12. As Judge Vazquez observed, "Timing can be extremely important in looking for reasonable inferences." *Id.*

The concerns of the federal courts in this Circuit about anti-Orthodox legislation are not limited to the eruv context. On December 7, 2017, the Southern District of New York held that the defendant village's ordinances preventing the plaintiffs from establishing a rabbinical college were enacted with discriminatory intent, and violated the First and Fourteenth Amendments of the U.S. Constitution, and certain provisions of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the Fair Housing Act, and the New York State Constitution. *See Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona, NY*, 280 F. Supp. 3d 426 (S.D.N.Y. 2017) (finding that facially neutral ordinances "were passed to infringe on religious practices because of their religious motivation," recognizing that "the temporal proximity between the [perceived religious activity] and the adoption of the regulation of that [activity]" is evidence of its purpose, and applying strict scrutiny). In determining that defendants passed laws with a discriminatory purpose, the Court looked to the timing of the laws, noting that one of the challenged laws was enacted in direct response to the Plaintiff's desire to build an Orthodox yeshiva on the property at issue. The Court also considered statements made by Village officials and members of the community indicative of defendants' prejudice against the Plaintiff and Orthodox/Hasidic Jews.

In addition to the discriminatory intent behind the proposed Local Law, we take issue with several provisions of the Local Law:

- Despite claiming in Section D(2)(a) that Non-Utility Device permit applications are "only for identification purposes," Section D(4)(a) then grants the Code Enforcement Officer with unfettered discretion to deny an otherwise lawful application for any reason whatsoever – an apparent under-the-radar attempt by Woodbury to maintain the unlawful power to quietly prevent expansion of the eruv.
- Section D(2) sets forth numerous onerous and unnecessary requirements for completing a permit application, which would send our clients on a fishing expedition for information and documentation that far exceeds mere notification of device installation to the Village.
- Section D(2)(xi) further grants the Building Department and/or reviewing Board with unfettered discretion to require additional unlisted information in a permit.
- Section D(2)(b) requires payment of a corresponding fee with a permit application, effectively requiring our clients to pay a fee for exercising their constitutional right free exercise of religion.

- Section D(3) unnecessarily requires additional application filings with three additional offices, and then imposes numerous additional unnecessary and significantly burdensome requirements – this burying of additional requirements beyond the enumerated list in Section D(2) suggests a legislative intent to overburden applicants and indefinitely delay the approval process.
- Despite already imposing numerous installation requirements, Section D(5) grants the Code Enforcement Officer even more unchecked discretion to impose additional unlisted requirements – a power that can easily be abused and cause significant hardship on our clients.
- Section D(9)(G)(2) of the proposed Local Law authorizes Woodbury to impose a penalty of $1,500, as well as a term of imprisonment of not more than ten days, for each and every violation of the proposed Local Law. This provision is both arbitrary and excessive, imposing penalties that far exceed the potential harm of any violation.

Despite the non-exhaustive list of troublesome provisions highlighted above, we recognize and acknowledge Woodbury's legitimate interest in keeping a record of devices attached in its rights-of-way. Accordingly, we refer you to our markup of Orangetown's proposed local law, attached as Exhibit A, which we believe is acceptable alternative legislation that accomplishes this goal in a more narrowly tailored way. We are happy to discuss and explain any concerns that Woodbury may have, and are committed to coming up with constructive ways to address them.

At bottom, like those ordinances already found constitutionally suspect by multiple federal and state courts, Woodbury's proposed Local Law faces the same unavoidable fate. If the proposed Local Law is adopted, Woodbury will become embroiled in the same costly, time-consuming, and ultimately unsuccessful litigation that has faced Tenafly, Westhampton Beach, Southampton, Quogue, Mahwah, Montvale, and USR. While we believe that the proposed Local Law is suspect on multiple levels, our clients remain open to discussing any questions or concerns that Woodbury may have. If Woodbury is truly seeking to craft a local law that requires notification to the town of all devices in public rights-of-way, with no burdensome permit process or discretionary authority to permit attachment of certain devices while denying others, we are amenable to meeting in good faith to assist with redesigning this Local Law to fit that purpose. Accordingly, we urge Woodbury to postpone its public hearing on the Local Law, currently scheduled for Tuesday, November 27th, and promptly schedule a meeting with us to pursue an amicable resolution. We, of course, reserve all of our client's legal rights in the event that Woodbury proceeds down its current path.

Very truly yours,

Yehudah L. Buchweitz

cc: Robert G. Sugarman, Esq.
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