16-2540(L), 16-2549(CON)

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA, *ex rel*. ANTI-DISCRIMINATION CENTER OF METRO NEW YORK, INC.,

Plaintiff-Appellee,

– v. –

WESTCHESTER COUNTY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* THE TOWN OF NEW CASTLE IN SUPPORT OF APPELLANT

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I. Preliminary Statement

The Town of New Castle, New York (the "Town"), submits this brief *amicus curiae* in support of the appeal of Defendant-Appellant, the County of Westchester, New York (the "County"), from the Opinion and Order of the Honorable Denise Cote dated May 24, 2016 ("Opinion and Order"). In particular, this *amicus* brief focuses on the lower court's ruling that Town officials "hindered" the progress of the "Chappaqua Station" affordable housing project in the Town of New Castle, and that the County consequently breached the terms of its 2009 Stipulation and Order of Settlement and Dismissal (the "Settlement Agreement") with Plaintiff-Appellee, the United States of America (the "Government"), by failing to "use all available means as appropriate" including "legal action" to combat the actions taken by the Town.[1]

As discussed below, the actions which the lower court characterized as having "hindered" the Chappaqua Station project consisted of Town officials expressing unfavorable opinions about the location of the project site and engaging in other protected speech. None of this speech actually hindered the project in any discernable way – in fact, the Town's speech had absolutely no adverse effect upon the critical path of the project towards completion. Moreover, the Town's actions

[1] Appellant Westchester County consented to the filing of this brief. Counsel for Appellee United States of America advised the undersigned that the Government has no objection to the filing of this brief. Pursuant to Fed. R. App. P. Rule 29(b), the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

relating the Chappaqua Station – including expediting its review of the developer's building permit application,[2] accommodating the developer's preference for the issuance of phased building permits,[3] waiving certain Town fees,[4] extending the duration of the special permit approving the project,[5] defending the project against a legal challenge commenced in State court,[6] and expeditiously addressing and granting the developer's request to modify its original approval[7] – actually helped ensure that the project was not unreasonably delayed or hindered.

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[2] In 2015, the Town authorized certain staff to work overtime in order to expedite its review of the Chappaqua Station project. (JA 2287, n. 2). *See also, infra*, pp. 20-21.

[3] *See* JA 2290-2291, 2962-2966. In drafting the terms of the Settlement Agreement, the parties chose to use issuance of a "building permit" to track the County's performance. Such language is clear on its face and reflects a logical choice. Issuance of a building permit marks a major milestone for any development project, notwithstanding that complex projects may necessitate phasing of construction activities or other site-specific adaptations. *See generally Town of Orangetown v. Magee*, 88 N.Y.2d 41, 47-48, 643 N.Y.S2d 21, 24-25 (1996) (observing that vested rights may accrue from a legally issued building permit, coupled with substantial improvements and reliance thereon). Here, the building permit issued to Conifer on December 29, 2015 authorizes the commencement of site work that will cost an estimated $1.0 million. (JA 2268).

[4] *See* JA 2109-2111, 2286-2287.

[5] *See* JA 1278, 1351, 1265-1266, 2103-2108.

[6] On December 31, 2013, the Town was served with an Article 78 proceeding challenging the underlying project approval on procedural and substantive grounds. The Town successfully moved to dismiss the petition for failure to join a necessary party (the developer) (JA 1189-1199), and the petitioners' subsequent attempt to amend their pleading was denied as untimely. (JA 2093-2094). The litigation terminated when the petitioners abandoned their appeal in the Appellate Division, Second Department. (JA 2295).

[7] *See* JA 2292-2295, 2431-2433.

For the reasons set forth in the County's brief, as well as those discussed below, the Town submits that the lower court erred insofar as its interpretation of the terms of the Settlement Agreement. If permitted to stand, the lower court's ruling will expose municipal officials to potential liability for expressing legitimate planning, health and safety concerns about a proposed development whenever the project involves affordable housing. This Court should therefore reverse the Opinion and Order insofar as the lower court ruled that the County violated Paragraph 7(j) of the Settlement Agreement by failing to respond appropriately to Town actions which purportedly "hindered" the Chappaqua Station project.

II. Interest of *Amicus Curiae*

The lower court's ruling that the Town "hindered" the Chappaqua Station affordable housing project adversely impacts the Town's reputational and legal interests. With respect to the latter, the Town and its Building Inspector were named in a Complaint, filed on February 21, 2014, by the developer of the Chappaqua Station project, Conifer Realty, LLC ("Conifer"), with the United States Department of Housing and Urban Development ("HUD"). (JA 1285-1291). Conifer's HUD Complaint alleges that in 2013, the Town Building Inspector delayed the Chappaqua Station project by concluding that the proposed construction required variances from certain provisions of the New York State Uniform Fire Prevention and Building Code (the "Uniform Code"). HUD regulations require the agency to complete its

investigation of such matters within 100 days unless doing so is impracticable. *See* 24 C.F.R. § 103.225. Notwithstanding this regulatory directive, to date, HUD has yet to conclude its investigation of Conifer's Complaint (approximately 936 days after it was filed). The Town therefore remains subject to further legal proceedings in that matter, and is prejudiced by the lower court's ruling in the Opinion and Order that its public officials "hindered" the Chappaqua Station project.

III. Summary of Argument

The lower court determined that the Town had "hindered" the Chappaqua Station project within the meaning of Paragraph 7(j) of the Settlement Agreement in the following ways:

> (1) [Supervisor] Greenstein has repeatedly and publicly opposed the Development since becoming the Town Supervisor; (2) [Building Inspector] Maskiell indicated that he would delay the issuance of a building permit; (3) Town Board members continue to oppose the current location of the Development; and (4) Town officials testified against the Development before the State Board. This opposition continues to this day: as recently as February 9, the Town continued to implore Conifer to move the Development to a different site. In its submission of May 17, 2016, the Town continues to advocate for the relocation of the Development, all the while acknowledging that a predecessor Town Board had approved the site for the Development.

(SA 91).

Despite citing dictionary definitions of the term "hinder" as meaning "to hold back," "delay", "impede", "deter", "obstruct" and "prevent action", the lower court did not attempt to apply these definitions to the aforementioned actions taken by Town officials. (SA 93). In light of the record of the Town's actions, what the lower court's ruling ultimately condemns is the exercise of First Amendment rights by Town officials who expressed strong opinions about the Chappaqua Station project, but scrupulously avoided taking any action that could unjustifiably hinder its progress.

The source of the lower court's error was conflating what it characterized as the Town's "opposition" to a particular affordable housing project, which took the form of protected speech, with action or inaction undertaken to unreasonably "hinder" a project, and which actually has that effect.[8] Properly interpreted, the County's obligations under Paragraph 7(j) of the Settlement Agreement with respect to "hindering" can only be triggered by the latter. Indeed, Paragraph 7(j) uses the words "action" and "inaction" in the same sentence as "hinder", and links them casually. Yet, the Opinion and Order uses the terms "opposition" and "hinder" interchangeably (SA 49, 59, 75, 91-93), even though they do not necessarily have the

[8] The Monitor (JA 1424-1425) likewise used the term "opposition" interchangeably with "hinder", and thereby targeted protected speech that had no tangible effect on the project's advancement. The Magistrate Judge's Report and Recommendation was more precise insofar as parsing the operative language in Paragraph 7(j), but erred in concluding that speech which had no effect on the Chappaqua Station project nevertheless had "hindered" it within the meaning of the Settlement Agreement. (JA 2209).

same meaning, and the word "opposition" does not even appear in Paragraph 7(j).[9] A review of the record confirms that the Town never undertook any "action" or "inaction" that actually hindered the advancement of the Chappaqua Station project.

In sum, the Town submits that the lower court's interpretation of Paragraph 7(j) was legally erroneous and, worse, marginalized the First Amendment rights of Town officials to express their opinions about the Chappaqua Station project in both public forums and before the New York State regulatory board that was charged with ensuring that the development would be designed and built with adequate fire safety features. The Opinion and Order will have a chilling effect upon other similarly situated public officials who are responsible for ensuring compliance with local zoning, building and fire safety codes in other communities. For these reasons, the Town supports the County's appeal and respectfully submits that the Opinion and Order should be reversed with respect to the lower court's determination that the County breached Paragraph 7(j) of the Settlement Agreement.

[9] Merriam-Webster defines the word "opposition" as follows: "actions or opinions that show that you disagree with or disapprove of someone or something; action that is done to stop or defeat someone or something." The Oxford English Dictionary contains a similar definition: "resistance or dissent, expressed in action or argument."

IV. Argument

POINT I

THE LOWER COURT MISINTERPRETED PARAGRAPH 7(J) OF THE SETTLEMENT AGREEMENT AND ERRED IN HOLDING THAT TOWN OFFICIALS "HINDERED" THE CHAPPAQUA STATION PROJECT

A. The Chappaqua Station Project Is A Legitimate Topic Of Public Debate

On September 10, 2013, the Town Board of the Town of New Castle (the "Town Board") adopted a Resolution granting a Special Permit (the "Special Permit")[10] for the development of a new multi-family residential development known as "Chappaqua Station" pursuant to Town Code § 60-430(O)(15). The Resolution passed by a slim 3-2 margin amidst concerns that the project site, located at 54 Hunts Place in the Town of New Castle (the "Hunts Place site"), was unsuitable for residential development of any kind.

The Hunts Place site consists of a 1/3 acre parcel that directly abuts the right-of-way for the Metro-North Harlem Line railroad tracks, an off-ramp for the Saw Mill River Parkway, and a bridge overpass for N.Y.S. Route 120 (a/k/a Quaker Street). (JA 2045). The site is located in an industrial zoning district, and the property is contaminated with hazardous waste. After removing the contaminated soils from the

[10] Under New York law, a "special permit" allows property to be used in a manner expressly permitted by the local zoning ordinance, provided that certain conditions are met. *See generally* N.Y. Town Law § 274-b; *Sunrise Plaza Associates, L.P. v. Town Bd. of Town of Babylon*, 250 A.D.2d 690, 673 N.Y.S.2d 165, 169 (2d Dep't 1998).

property,[11] Conifer, plans to construct a 4-story residential building that will span from lot-line-to-lot line.

Approximately 14 months before the Town Board voted to approve the Special Permit for the project, the Federal Housing Monitor (the "Monitor") overseeing the settlement of the instant litigation expressed a highly unfavorable opinion about the Hunts Place site. Specifically, by letter dated July 12, 2012, the Monitor wrote in relevant part as follows:

> This letter sets forth my concern that this project, as currently designed, will not further the goals of the consent decree and raises the risk of significant stigmatization and isolation of residents. As a result, this project also raises the risk of having a negative impact on the community. This letter provides a process for addressing those concerns.
>
> . . . .
>
> As an initial matter, there is no question that this site has many of the indicia of isolation. It is bounded on three sides by, respectively, a railroad line, a bridge and a four-lane parkway. The only occupied property adjacent to the proposed development is a bus depot. The most viable pedestrian access to the site would be from a footbridge. Given those physical challenges, one could reasonably

[11] Conifer intends to remediate soil contamination on the project site under the New York State Brownfield Cleanup Program administered by the New York State Department of Environmental Conservation. Conifer's remediation plan contemplates the removal and disposal of approximately 3,400 cubic yards of contaminated soil, together with the removal of underground storage tanks. (JA 2112).

> conclude that the obstacles to integration with the community, and the stigma associated with the separation, cannot be overcome.

(JA 1189-1190).[12]

The Monitor subsequently reversed his stance on the suitability of the Hunts Place site, claiming (without elaboration) that Conifer had agreed to make certain design changes to the project that were sufficient to overcome what he had previously characterized as a "stigmatizing" location. (JA 1192-1193). Others, however, were not persuaded, as the location of the project never changed.

Town Supervisor Robert J. Greenstein and other members of the Town Board continued to believe that the Hunts Place site was fundamentally flawed, and they openly encouraged Conifer to consider a Town-owned area of land as an alternative location for the Chappaqua Station project. (JA 1197-1198, 1259, 1268, 3076-3077). The alternative site proposed by the Town is situated on Washington Avenue, a tree-lined residential street that runs adjacent to Town Hall (the "Washington Avenue site"). (JA 3182). The Washington Avenue site is substantially larger than the Chappaqua Station project site and undeveloped, except for an under-utilized commuter parking lot. When Conifer rebuffed that overture, the Town offered to

[12] Under the lower court's interpretation of Paragraph 7(j), one could argue that the Monitor's unfavorable opinion of the Chappaqua Station project site likewise "hindered" the development, and triggered the County's obligation to pursue "all available means" to address his negativity.

explore having Conifer build a mix of affordable and market rate housing at both locations, with the Hunts Place development being down-sized to better fit the project site. (JA 3050-3052). Conifer declined to seriously consider that proposal as well.

The Town Supervisor and Town Board members have also questioned the wisdom of the Chappaqua Station project from a fiscal standpoint. The County paid an astounding $1.275 million for the 1/3 acre Hunts Place site. (JA 2445). A less desirable location for residential development in the Town of New Castle is difficult to imagine. Conifer estimates that its total project costs for the Chappaqua Station project will exceed $19 million, much of which will be derived from public funding. (JA 2474, 2558). Consequently, each of the 28 rental units at Chappaqua Station will cost at least $679,000.00 to build. This is nearly twice the average cost of building affordable housing units in Westchester County. (JA 3045-3046).

As the lower court noted, the Town's advocacy for relocating the Chappaqua Station project continued into 2016. For example, on February 9, 2016, during a public hearing relating to the project, Town Board Member Hala Makowska advised Conifer's representatives as follows:

> MEMBER MAKOWSKA: The reputation of your firm actually precedes you and you do have a reputation of doing high quality affordable housing and people here recognize that you've done good work and we also know that providing affordable housing is not just making

> money, you know, good business but actually, it's more of a mission because these people really need the housing and that you are doing a good service to them.
>
> . . . .
>
> . . . [W]hile this application is in front of us and I've heard that you want to go forward, I think if there is an opportunity for you guys to come and perhaps work with the Town Board and work with the Town, either scale down the project where it is now or to perhaps make a bigger project in an alternate location,[13] I would just put that out there.
>
> We recognize the scope of what's being put in front of us as very, very narrow but I think all of us and I'm talking about the people that are responsible for affordable housing, I think everybody here on this Board wants the families that move into our community to have the best quality of life that they can and they want to make sure that not only the letter of the 2009 settlement is reached but the actual spirit of the 2009 settlement is reached.

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[13] The Town's hope that a larger project site might accommodate a greater number of affordable housing units, and perhaps allow for the development of an integrated mix of housing options at different price points, was based upon its success in achieving the same result at another project site. In December 2015, the Town Board unanimously voted to authorize the developer of the former Reader's Digest business campus to increase the number of affordable housing units it could build on the property from 20 to 28. As a result, the iconic "Cupola Building" on the 114-acre property is presently being redeveloped and repurposed to accommodate a mix of 28 affordable, 10 workforce and 26 market rate housing units.

The building permit issued for the Cupola Building redevelopment, which authorizes the demolition and renovation of the interior elements of the existing structure (subject to certain conditions), illustrates how such permits are tailored to specific projects.

> So with this, I just want to let you know that this, there is a hand reaching across the table to you to try and accomplish that.
>
> SUPERVISOR GREENSTEIN: Well said.

(JA 3055).

That same evening, in a unanimous vote, the Town Board approved a number of project changes that Conifer had requested to accommodate certain design and fire safety improvements that it wished to implement. (JA 3137-3144). These project changes required amendments to Conifer's Special Permit, which the Town Board swiftly approved. This is one of many examples of where the Town Board expressly avoided any action or inaction that might actually hinder the advancement of the Chappaqua Station project, while at the same time believing that neither the Monitor nor the Government had the authority to muzzle the Board's expression of opinions and ideas which they did not share or countenance.[14]

The Town submits that its elected officials had a First Amendment right to express their views about the wisdom of building a new, multi-story apartment building immediately adjacent to one of the busiest railway corridors in the United States, and to advocate for relocating the project to a superior site that it owned and

[14] In his Report for the 2014 calendar year, the Monitor admonished the Town for making reference to his July 12, 2012 letter, which expressed grave concerns about the viability of the Hunts Place site. (*See supra*, pp. 8-9). The Monitor purported to direct the Town to "cease and desist" from using his July 12, 2012 letter "as a shield." (JA 1129-1130).

controlled. It is well-established that the First Amendment allows the government to say what it wishes, and to select the views it wishes to express. *See, e.g., Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, __ U.S. __, 135 S.Ct. 2239, 2245 (2015) ("'[I]t is not easy to imagine how government could function if it lacked th[e] freedom' to select the messages it wishes to convey") (quoting *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468, 129 S.Ct. 1125, 1131 (2009)); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"). The Town further submits that the Government, whether acting under color of the Settlement Agreement or otherwise, had no authority to infringe this fundamental right, or demand that the County do so. *See Printz v. United States*, 521 U.S. 898, 920-21, 117 S.Ct. 2365, 2377 (1997) ("'[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.' This separation of the two spheres is one of the Constitution's structural protections of liberty.") (quoting Madison, *The Federalist No. 39*, at 245).[15]

[15] Notably, federal law explicitly prohibits HUD from conditioning its funding on the abolition of any state or local government law, policy, or practice that does not itself violate federal law. *See* 42 U.S.C.A. § 12711.

To the extent that the Government argues that the Settlement Agreement obligates the County to challenge the expression of municipal "opposition" to an affordable housing project, its contention should fail. As the Supreme Court stated in *Horne v. Flores*, 557 U.S. 433, 129 S.Ct. 2579 (2009), consent decrees that purport to bind state officials to the "policy preferences of their predecessors" pose a serious risk "improperly depriv[ing] future officials of their designated legislative and executive powers." *Horne*, 557 U.S. at 449, 129 S.Ct. at 2594 (2009). The Court further cautioned that consent decrees "exceed appropriate limits if they are aimed at eliminating a condition that does not violate federal law or does not flow from such a violation." *Id.*, 129 S.Ct. at 2594-95 (brackets, quotation marks and citation omitted). For this reason, Paragraph 7(j) of the Settlement Agreement cannot be reasonably interpreted to require the County to take "appropriate action" including "legal action" to eliminate protected speech and curtail public debate.

In sum, the Town submits that the lower court misconstrued the terms of Paragraph 7(j) and erroneously equated protected municipal speech, which it characterized as "opposition" to the Chappaqua Station project, with Town action or inaction that actually hindered the development.

B. The Building Inspector's Testimony At Public Hearings Conducted by the Board of Review Did Not Hinder The Project and Constituted Protected Speech

Due to the size and physical constraints of the Hunts Place site, Conifer faced significant technical challenges in terms of ensuring that its proposed building satisfied the fire safety standards prescribed by the N.Y.S. Uniform Code. In 2013, the Town Building Inspector reviewed Conifer's preliminary design plans and concluded that Conifer would need at least eight (8) variances from provisions of the Uniform Code.[16] (JA 1227). Under New York law, however, a building inspector has no authority to grant such variances, and Conifer was required to seek variance relief from the New York State Department of State, Division of Building Standards and Codes (the "Board of Review"). By statute, the Board of Review is an independent New York State agency empowered to hold public hearings and grant variances from otherwise applicable provisions of the Uniform Code. *See generally* N.Y. Executive Law §§ 374, 381; 19 NYCRR § 1205.4.

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[16] As adopted in September 2013, the Special Permit expressly identified the variances that Conifer would need from the Uniform Code and conditioned the issuance of a building permit upon their issuance from the Board of Review. (JA 1227). Under New York State law, towns are expressly authorized by statute to attach conditions to their special use permits. *See* Town Law § 274-b(4). The Town Board has never modified or expanded this (or any other) condition in the Special Permit. (JA 1219-1230, 2285). Conifer never challenged any of the Special Permit's conditions as arbitrary, capricious or contrary to law. *See, e.g., Rendely v. Town of Huntington*, 44 A.D.3d 864, 843 N.Y.S.2d 668 (2d Dep't 2007).

The Town Building Inspector participated in the public hearings conducted by the Board of Review by expressing his professional opinion (based upon over 50 years of experience in the field) that Conifer's fire safety plans were inadequate insofar as ensuring the safety of first responders and future residents, and that variance relief should not be granted. (JA 1685-1696, 1835-1842).[17] One of the more significant deficiencies in Conifer's plans was the inability to provide a code-compliant "aerial access" staging area where firefighters could safely deploy and operate a ladder truck to reach the upper floors of the building. In fact, three of the eight variances that Conifer initially sought from the Board of Review related to this single issue. Conifer proposed designating the adjacent exit ramp for the Saw Mill River Parkway, and the Quaker Street (Route 120) bridge overpass, as aerial access locations. However, the Saw Mill River Parkway ramp is too narrow (at approximately 22 feet) and too close to Conifer's proposed building (with only approximately 5 feet of separation) to meet the provisions of the Uniform Code. (JA 1689-1690, 1836). The elevation and location of the Quaker Street bridge relative to the Hunts Place site makes it wholly unworkable for aerial access. (JA 1939-1840).

[17] The Building Inspector was the only Town official who appeared at the Board of Review's public hearings. On December 10, 2013, Robert Greenstein (then, the supervisor-elect) appeared before the Board of Review in his private capacity as a Town resident, as his first term of office had not yet begun. (JA 1697).

The Building Inspector also addressed the code implications arising from placing a residential building with window openings only 15 feet from an active railroad track. (JA 1183, 2253). The proximity of the Metro North railroad tracks required Conifer to seek a substantial variance (23%, not including the building's garage windows) in the number of allowable window openings under the Uniform Code. (JA 2023). The Building Inspector advised the Board of Review that in his opinion, granting such a substantial variance was inadvisable.

The Board of Review agreed with the Building Inspector that Conifer's initial application failed to establish an entitlement to variance relief. On July 2, 2014, the Board of Review announced at a public hearing that it was denying 7 of the 8 variances that Conifer had requested. (JA 1879-1901). At its hearing, the Board of Review observed that Conifer's "unique site plan drives most of the variance requests" for the project, "including lot line openings, unrated lot line walls and [fire] access roads." (JA 1896). By Decision dated November 29, 2014 (the "November 2014 Decision"), the Board of Review set forth its findings of fact and conclusions. (JA 2145-2167).

As a threshold matter, the Board of Review's November 2014 Decision determined that each fire code variance identified in the Special Permit as necessary for the project was, in fact, a variance that Conifer was required to obtain from the Uniform Code, and not a pretext for impeding the project. (JA 2125-2154). Thus,

the Board of Review confirmed that the Building Inspector had correctly interpreted the applicable provisions of the Uniform Code, and that his safety concerns were well-founded.

The November 2014 Decision also expressed concern for the safety of first responders who someday might be called upon to fight a fire at Chappaqua Station from aerial access staging areas on the Saw Mill River Parkway exit ramp and Quaker Street Bridge. (JA 2160-2161). The Board of Review concluded that neither area provided safe access to Conifer's proposed four-story building for firefighting purposes. With respect to the exit ramp, the Board of Review's November 29, 2014 Decision found that its physical constraints and heavy traffic volume would expose first responders to significant danger. (JA 2161-2162).

Conifer did not challenge any of the Board of Review's findings pursuant to CPLR Article 78. Instead, after several months, Conifer returned to the Board of Review with a new and modified variance application. Due to the nature of the modifications made by Conifer, its new application asserted that only 4 variances were needed from the Uniform Code.

At a public hearing conducted on January 22, 2015, the Board of Review voted to approve the variances Conifer had requested, subject to a number of conditions. (JA 1432-1452). Notably, the Board of Review's motion to grant 3 of the 4 variances that related to aerial access carried by less than a unanimous vote. (JA 1444,1451).

By Decision dated April 27, 2015, the Board of Review set forth its findings and determination, and the conditions under which it was granting variance relief. (JA 2020-2037). Significantly, the Board of Review's Decision will require Conifer to widen and improve the Saw Mill River Parkway exit ramp in order to provide adequate access for aerial fire apparatus. (JA 1217-1218). Other safety improvements newly required by the Board of Review included the addition of exterior window sprinklers on the side of the building facing the Metro North Railroad tracks; smoke venting equipment in stairwells; a fire escape ladder on an exterior deck of the building; and a flat access path on the building's roof to allow better access for firefighters. (JA 2033-2036).

The lower court's conclusion that the Building Inspector's testimony before the Board of Review "hindered" the Chappaqua Station project is impossible to reconcile with the record of the Board of Review's proceedings and determinations. The Building Inspector offered his professional opinions and expertise on the subject of whether Conifer's proposed residential apartment building would provide adequate fire safety protection for its future residents and first responders. The Board of Review shared his opinions, affirmed his determinations, and ultimately required Conifer to implement substantial additional design changes to its building and site plan as a condition to receiving variance relief. Such testimony cannot be reasonably

characterized as having created a hindrance for the developer, particularly in light of the fire safety improvements which it helped elicit from Conifer.

The lower court's ruling is also inconsistent with the Supreme Court's recent admonition that federal housing goals should not trump local governmental imperatives, "such as ensuring compliance with health and safety codes." *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, __ U.S. __, 135 S. Ct. 2507, 2524 (2015). Federal case law also recognizes the right of municipal actors to petition under the First Amendment. *See Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills*, 701 F.Supp.2d 568, 599 (S.D.N.Y. 2010). Here again, the Opinion and Order afforded no deference to the right and obligation of a local municipality to express legitimate concerns, advocate for a position different than the one taken by the Government and Monitor, and protect its citizenry.

In sum, the Town submits that the lower court erred when it concluded that the Town hindered the Chappaqua Station project through the Building Inspector's testimony before the Board of Review.

C. The Single, Stray Comment Made By The Building Inspector in March 2015 Did Not Hinder The Project

At a meeting with Conifer on March 26, 2015, the Town Building Inspector expressed frustration with the developer's representatives who were pressing him for an expedited review of Conifer's building permit application. At that time, Conifer's

building permit application was incomplete, and the Town's development staff had a number of relatively large projects under review, including a proposed 25,000 square foot religious sanctuary and a proposed 134,000 square foot expansion of a palliative care facility for children with chronic and severe medical conditions. (JA 2287, n. 2). In the lower court, the Government and Monitor seized upon the Building Inspector's comment as "proof" of the Town's intention to hinder the Chappaqua Station project. Yet, the record establishes that Conifer's building permit application did not "go to the bottom of the pile." To the contrary, it went to the front of the line.

When Conifer finally tendered the requisite building permit application fee to the Town approximately 3 months later on July 2, 2015,[18] the Town's development staff, including the Building Inspector, began their reviews immediately. (JA 2288). The Town authorized key staff to work overtime on Conifer's building permit application so that its review would not be delayed by the need to keep processing other pending applications. (JA 2287, n. 2). By August 6, 2015, Town staff had provided Conifer with its first review memorandum, and by September 22, 2015, the Town had finished its review of Conifer's building permit application and provided

[18] On April 2, 2015, despite having repeatedly advised Town staff that it intended to tender the requisite building permit application fee, Conifer belatedly requested a partial fee waiver from the Town Board. (JA 2109-2111). The Town Board granted Conifer's request, in part, on May 26, 2015. (JA 2111).

the developer with a complete set of comments. (JA 2288-2289).[19] Thereafter, on December 29, 2015, the Building Inspector issued a building permit for the project that allowed Conifer to begin site work on the Hunts Place site. (JA 2268).[20]

As of this writing, Conifer continues to work towards obtaining necessary permits and approvals from regulatory agencies, such as the New York State Department of Transportation. The Town submits that the Building Inspector's single, stray comment on March 26, 2015 cannot reasonably support a finding that the Town hindered the Chappaqua Station project.

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[19] Chappaqua Station is a relatively complex project in terms of its size, site work and construction staging requirements. (JA 2288-2280, 2309-2396, 2664). *See also* JA 2654-2655 ("[T]he Chappaqua Station development is among the most complex construction projects I have ever encountered"). Conifer's building permit application included over 118 pages of construction plans. (JA 1363). The Town's review of the project was efficient and well-coordinated among the various stakeholders. (JA 2282, 2654-2658, 2708-2710). *See also* JA 2961-2067 ("The process for acquiring all approvals for this project has been reasonable given the complexity of this project and the involvement of numerous governmental stakeholders"). There is no evidence in the record to the contrary.

[20] In a letter dated November 25, 2015, Conifer thanked the Building Inspector for "recognizing the complexity of our undertaking" and his "willingness to accommodate the phasing of the work." (JA 2426).

V. CONCLUSION

The Town respectfully submits that the Opinion and Order entered below should be reversed insofar as the lower court held that Town officials "hindered" the Chappaqua Station project.

Dated: White Plains, New York
October 7, 2016

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This brief complies with the type-volume limitation set forth in Fed. R. App. P. 29(d) and Fed. R. App. P. 32(B)(i) because it contains 5,613 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface 14-point Garamond font and 13-point font for footnotes, using Microsoft Word.

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