UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 9:16-cv-80195-MARRA

GERALD GAGLIARDI and
KATHLEEN MacDOUGAL,

Plaintiffs,

vs.

CITY OF BOCA RATON,

Defendant,

and

CHABAD OF EAST BOCA, INC.
and TJCV LAND TRUST,

Intervenors.
_____/

INTERVENORS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS

Intervenors submit this reply in support of their motion to dismiss Plaintiffs' complaint.

SUMMARY OF THE ARGUMENT

Plaintiffs offer no factual allegations to plausibly suggest the City did anything other than (1) adopt a zoning ordinance that treats secular and religious assemblies on equal terms, and (2) apply its zoning code in a non-discriminatory manner to a religious applicant. Not satisfied with the decisions the City made, Plaintiffs attempt to transform the zoning controversy into a series of constitutional claims. These claims are meritless and should be dismissed.

The Establishment Clause requires neither the exclusion of religious assemblies from zoning districts in which secular assemblies are permitted nor the denial of zoning allowances to religious applicants that the zoning code authorizes for all applicants. Plaintiffs' contrary argument – that ending discriminatory treatment represents an impermissible "government benefit" to religion – contradicts applicable constitutional and statutory law and fails to state a claim. Florida's No-Aid Provision similarly does not mandate discriminatory zoning and is not

even implicated where, as here, no public funds support a sectarian entity.

Plaintiffs also fail to state a claim under the Equal Protection Clause because Plaintiffs do not allege that they are part of a similarly situated group that sought, but were denied, the same treatment as Chabad. In other words, Plaintiffs do not even allege an instance of discrimination. Plaintiffs fail to state a claim under the Due Process Clause because they do not identify a protected interest of which they were deprived or any procedural deficiencies in the City's conduct. Plaintiffs' failure to allege that they sought relief in the state courts is enough by itself to doom their procedural-due-process claim.

Not only do these claims fail on the merits, but Plaintiffs still have not established standing to maintain this suit. Plaintiffs can point to no personal injury caused by the purported establishment, equal-protection, and due-process violations. Plaintiffs' assertion of taxpayer standing to challenge all actions by salaried public employees is breathtaking in scope – but clearly foreclosed by the case law. Moreover, Plaintiffs' attempt to invoke the "continuing violation doctrine" to avoid the applicable statute of limitations contradicts controlling precedent.

ARGUMENT

I. PLAINTIFFS LACK STANDING.

A. Plaintiffs Have Not Sufficiently Alleged They Suffered a Personal Injury.

Plaintiffs' response fails to identify a personal injury that would justify standing here. Plaintiffs concede that they must "allege specific, concrete facts" establishing both harm and redressability. *Warth v. Seldin*, 422 U.S. 490, 508 (1975). Yet Plaintiffs identify no such facts. Plaintiffs object that Chabad has benefitted from the City's decision to end its discriminatory zoning policy, but that does not establish an injury to Plaintiffs. Plaintiffs further assert they have standing because they suffered "direct contact" with "offensive conduct." Pls.' Br. 5. But the only

"direct contact" they identify was *not* "be[ing] permitted to participate in hearings." *Id.* That is, the only "contact" they identify was the *absence* of contact. Plaintiffs cite no authority to support this unusual single-sentence argument; it is, therefore, waived. *Donahay v. Palm Beach Tours & Transp., Inc.*, No. 06-61279, 2007 WL 1119206, at *2 (S.D. Fla. Apr. 16, 2007) ("[A] 'skeletal argument' unsupported by relevant authority or reasoning is viewed as a mere assertion which does not sufficiently raise the issue so as to merit the court's attention."). In any event, the mere "psychological consequence … produced by observation of conduct with which one disagrees" is "not an injury sufficient to confer standing." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). All Plaintiffs have shown is that they live in a zoning district that previously allowed only secular "places of public assembly" and now allows equivalent religious assemblies as well. That others may now assemble for religious purposes does not establish that Plaintiffs have suffered harm.

Moreover, Plaintiffs' insistence that they were not permitted to participate in hearings related to the zoning ordinance or property development is belied by Plaintiffs' own complaint. The complaint acknowledges that the City held public hearings on these subjects, Compl. ¶¶ 96-97, 105-07, and Plaintiffs have not alleged that they were prevented from participating in those hearings. Plaintiffs write ominously of "secret meetings," but nowhere do Plaintiffs show they had a right to participate in such meetings or that the Establishment Clause requires all governmental meetings with religious entities to be public.[1] There were open public hearings that considered the zoning ordinance and application, and Plaintiffs' only apparent injury is that they disagree with the decisions of the zoning board and the City taken at those hearings. That does

1. There is, however, an Establishment Clause requirement that religious groups not be subject to discriminatory treatment, which is what Plaintiffs' apparent, no-private-meetings-with-religious-groups rule would require. *Larson v. Valente*, 456 U.S. 228, 247 (1982).

not establish standing for their constitutional claims, and "federal courts do not sit as zoning boards of review." *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1389 (11th Cir. 1993).

B. Plaintiffs Lack Taxpayer Standing.

Plaintiffs acknowledge that taxpayer standing is available only if they can "demonstrate that tax expenditures were used for the offensive practice in violation of the Establishment Clause." Pls.' Br. 4. But, Plaintiffs do not even contend that taxpayer funds are being spent on religious activities. Instead, Plaintiffs rely on the unprecedented proposition that because tax dollars financed the salaries of the city council members, zoning officials, and other public employees who evaluated and approved Ordinance No. 5040 and Intervenors' site plan, Plaintiffs can invoke their taxpayer status to challenge those activities under the Establishment Clause.

Plaintiffs cite no authority for the sweeping contention that taxpayers have standing to challenge any activity conducted by public employees. As Intervenors noted in their opening brief, courts have rejected that argument. *See, e.g., Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 74 (2d Cir. 2001). To qualify for municipal taxpayer standing, a plaintiff must "identify a 'measurable appropriation or loss of revenue' attributable to the challenged activities." *Id.* at 73; *see, also, Doremus v. Board of Ed. of Borough of Hawthorne*, 342 U.S. 429, 433 (1952) (denying standing where plaintiff did not allege that the challenged "activity is supported by any separate tax or paid for from any particular appropriation"). Plaintiffs identify no such appropriation – because none was made; city expenditures did not change at all. Plaintiffs rely on *Marsh v. Chambers*, 463 U.S. 783 (1983), and suggest that it is indistinguishable from this case. Pls.' Br. 5. Yet *Marsh* is obviously distinguishable because in that case the state legislature appropriated taxpayer funds to finance a chaplaincy. *See, Marsh*, 463 U.S. at 794 (noting "compensation of the chaplain from public funds"); *Id.* at 786 n. 4 (noting that "taxes are used to fund the chaplaincy"). Unlike

Plaintiffs here, the plaintiffs in *Marsh* could identify a measurable appropriation of public funds to religious activities that justified taxpayer standing.

II. CLAIMS ARISING FROM ORDINANCE NO. 5040 ARE TIME BARRED.

Plaintiffs concede – as they must – that their claims based on the enactment of Ordinance No. 5040 were brought outside the applicable four-year statute of limitations. To avoid dismissal, Plaintiffs invoke the "continuing violation doctrine" that "when [a defendant's] conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period." Pls.' Br. 7 (citing *Tearpock-Martini v. Borough of Shickshinny*, 756 F.3d 232 (3d Cir. 2014)). The suggestion appears to be that the approval of Intervenors' site plan in 2015 was the "last act" evidencing a "continuing practice" that began with the adoption of Ordinance No. 5040 by the City Council in 2008. But these separate acts do not form a continuing practice. Plaintiffs allege that the adoption of Ordinance No. 5040 was itself a "*complete* and express violation of the prohibition of advancing, endorsing or promoting of religion as set forth in the First Amendment," Compl. ¶ 31 (emphasis added), as well as a "complete and express violation of the equal protection rights of Plaintiffs," *Id.* ¶ 62, and a "complete and express violation of the due process rights of Plaintiffs," *Id.* ¶ 94. In other words, Plaintiffs contend that the passage of Ordinance No. 5040 violated their rights and gave rise to their constitutional claims. Plaintiffs do not contend that there was no constitutional violation until the approval of the site plan in 2015. According to Plaintiffs' own allegations, the "facts supportive of the cause of action" were apparent in 2008, so the statute of limitations began to run at that time. *Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d 1208, 1222 (11th Cir. 2001).[2]

2. *See, also, Florida Transp. Serv., Inc. v. Miami-Dade Cnty.*, 757 F. Supp. 2d 1260, 1270 (S.D. Fla. 2010) ("[T]he [continuing violation] doctrine does not apply where each alleged constitutional violation is an independent discrete act."), *aff'd*, 703 F.3d 1230 (11th Cir. 2012).

Plaintiffs do not qualify for the continuing violation doctrine if they merely "complain of the present consequence" of a previous violation. *Knight v. Columbus, Ga.*, 19 F.3d 579, 581 (11th Cir. 1994) (internal quotation marks omitted). Accordingly, the mere fact that the passage of Ordinance No. 5040 in 2008 *allowed* the site plan to be approved in 2015 does not transform those two acts into a "continuing practice" that excuses Plaintiffs from complying with the statute of limitations. The very case on which Plaintiffs rely, *Tearpock-Martini*, emphasizes this distinction. While "[m]any allegedly unconstitutional state actions set in motion a lasting consequence," if a court were "to elide the distinction between *affirmative acts* and *effects*," it would "extend indefinitely the date of accrual for all constitutional claims predicated upon … zoning decisions, and any other manner of state action carrying long-term repercussions." *Tearpock-Martini*, 756 F.3d at 237. Yet – unfortunately for Plaintiffs – constitutional claims challenging zoning decisions are not subject to indefinite tolling.[3] In this case, the approval of the site plan was, at most, a consequence of the earlier adoption of the zoning ordinance. According to Plaintiffs' own allegations, each act was a discrete constitutional violation. Under these circumstances, the continuing violation doctrine does not excuse Plaintiffs from complying with the statute of limitations, and their challenge to Ordinance No. 5040 must be dismissed.

III. PLAINTIFFS FAIL TO STATE A CLAIM ON THE MERITS.

A. Plaintiffs Fail to State a First Amendment Claim (Counts I and IV).

Plaintiffs' response brief fails to acknowledge the valid secular purpose of Ordinance No. 5040 – ending unlawful discrimination against religious practitioners. Plaintiffs make no effort to defend the prior unconstitutional zoning policy they seek to restore. If this Court were faced with

3. *See, e.g.*, *Foley v. Orange Cnty.*, No. 6:12-CV-269, 2012 WL 6021459, at *4 (M.D. Fla. Dec. 4, 2012) ("[T]he facts necessary to support a claim … were apparent or should have been apparent no later than the board of zoning adjustment hearing.").

a challenge to that policy, it would need to invalidate it as unlawful. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231 (11th Cir. 2004). Plaintiffs offer no reason for this Court to *impose* that policy or to prevent the City from correcting it. Instead, Plaintiffs tendentiously characterize the removal of the discriminatory policy as a "benefit" conferred on religious groups by the City. Plaintiffs also rely heavily on their conclusory allegations about "secret meetings" to suggest that the City acted with a religious purpose. That is insufficient to state a valid constitutional claim.

First, Ordinance No. 5040 plainly has a valid secular purpose: "to establish a consistent treatment for places of worship and places of public assembly." Ex. 1 to Intervenors' Opening Br., at 1. On its face, the ordinance is neutral between religion and irreligion because places of both secular and religious assembly are permitted in B-1 zoning districts. It is also neutral among religions because it permits any religious group to maintain a place of worship in those areas where secular assemblies are allowed. Such a neutral zoning policy is not only permissible but legally mandated. RLUIPA requires municipalities to allow "religious assemblies" in zoning districts where "secular assemblies" are permitted. *Midrash Sephardi*, 366 F.3d at 1231 (citing 42 U.S.C. § 2000cc(b)(1)). The Free Exercise Clause prohibits a municipality from denying religious practitioners rights enjoyed by others. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993); *see, also, Midrash Sephardi*, 366 F.3d at 1231-32 (noting that sections (b)(1) and (b)(2) of RLUIPA "enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable"). Plaintiffs cannot argue that the City acted with an impermissible purpose when it conformed its zoning regulations to legal and constitutional requirements.

Plaintiffs effectively concede that Ordinance No. 5040 had a permissible, secular purpose. In their brief, Plaintiffs argue that Ordinance No. 5014 – which would have allowed places of worship in certain residential districts – represented a "permissible change in zoning." Pls.' Br. 10. Plaintiffs offer no explanation for their apparent position that allowing places of worship in residential areas would be permissible, but allowing places of worship in commercial areas – as Ordinance No. 5040 did – is unconstitutional. Plaintiffs even write that a purpose to "add religious uses" where "other 'places of public assembly' were permitted to operate" would have justified Ordinance No. 5014. *Id.* Yet that is the purpose behind Ordinance No. 5040, and Plaintiffs offer no reason why it is permissible in one zoning area but not another. In fact, that admittedly secular purpose could have been accomplished only through Ordinance No. 5040, which authorized places of worship in those areas where places of secular assembly were allowed – thereby establishing equal treatment of religious and secular assemblies.

Plaintiffs' contention that establishing such equal treatment represents a "benefit" to religious practitioners is mistaken. Pls.' Br. 9. A party has not received a government benefit when the government simply refrains from imposing discriminatory burdens on that party.

Second, Plaintiffs' mysterious intimations of "secret meetings" between the City and Chabad do not suffice to establish an impermissible purpose. Plaintiffs must offer some factual content to substantiate their claims and cannot rely on the bare conclusory assertion that there was some clandestine governmental conspiracy to promote Jewish organizations to the exclusion of everyone else. That is "a legal conclusion couched as a factual allegation" which courts "are not bound to accept as true" for "the purposes of a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see, also, Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) ("[T]erms like 'conspiracy,' or even 'agreement,' are border-line [allegations for purposes of Rule 12(b)(6)]: they

might well be sufficient in conjunction with a more specific allegation ... but a court is not required to accept such terms as a sufficient basis for a complaint.").

Third, Plaintiffs contend that the ordinance and site plan approval amount to an excessive entanglement with religion. Yet "building and zoning regulations … are examples of necessary and permissible contacts" under the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). As the Supreme Court has said, "routine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no 'detailed monitoring and close administrative contact' between secular and religious bodies does not of itself violate the nonentanglement command." *Hernandez v. CIR*, 490 U.S. 680, 696-97 (1989) (internal citations omitted). None of those features of an excessive entanglement are present here. The City has no ongoing relationship with Chabad past the approval of the site plan. Contrary to Plaintiffs' assertion, nothing about the ordinance or the site plan calls for the "imposition of civil authority in matters of 'church policy and administration.'" Pls.' Br. 12. By making places of worship a permitted use, the ordinance actually avoids the possibility of civil inquiries into church administration that could arise in the conditional use permitting process.

Fourth, with respect to Count IV, Plaintiffs again argue – without authority – that "the use of City staff and facilities" constitutes "indirect" aid under the No-Aid Provision of the Florida Constitution. Pls.' Br. 15. Yet, both Florida courts and the Eleventh Circuit have held that that the No-Aid Provision is not implicated unless the religious institution receives public funds. *See*, *Atheists of Florida v. City of Lakeland*, 713 F.3d 577, 596 (11th Cir. 2013) ("[T]he no-aid provision is violated when public funds are used 'to advance religion.'"). The Eleventh Circuit has held, for example, that a municipality's expenditure of resources to arrange for religious invocational speakers did not violate the No-Aid Provision because such a practice does not result in "any

pecuniary benefit, either direct or indirect, conferred by [the municipality] upon such groups." *Id.* The Florida Supreme Court has repeatedly upheld public support for religious institutions that does not involve the transfer of public funds. *See*, Intervenors' Opening Br. 16-17. If Plaintiffs' position were correct, those cases would have been decided differently – and public services to religious institutions generally would be called into question.

B. Plaintiffs Fail to State an Equal Protection Claim (Count II).

Plaintiffs argue that they have stated an equal protection claim based on allegations that "no other *religious group* has received such favorable treatment from the City as Chabad has in this circumstance." Pls.' Br. 15. Yet Plaintiffs have not alleged that any other religious group has sought such treatment and been denied – let alone that Plaintiffs themselves are members of that group. In other words, Plaintiffs have offered no allegations that they were discriminated against and so cannot state an equal-protection claim. "Failing to persuade authorities that someone else should be denied a permit does not give rise to an equal protection violation." *Hi Pockets, Inc. v. Music Conservatory of Westchester, Inc.*, 192 F. Supp. 2d 143, 158 (S.D.N.Y. 2002).

C. Plaintiffs Fail to State a Procedural Due Process Claim (Count III).

Plaintiffs still have not identified a constitutionally protected liberty or property interest that has been deprived. Plaintiffs assert they lacked an "opportunity to be heard," but Plaintiffs nowhere identify a process they were due – beyond the public hearings the City admittedly conducted, Compl. ¶¶ 96-97, 105-07 – and were denied. Plaintiffs assert that the City "failed to comply with its own procedures with respect to this application adequately," Pls.' Br. 18, but Plaintiffs nowhere identify those purported procedural failings or explain how those failings

deprived Plaintiffs of a protected interest.[4] Moreover, the "failure to plead that [Plaintiffs] attempted to obtain relief from Florida courts but that they somehow violated [their] procedural due process dooms [Plaintiffs'] procedural-due-process claim." *Hudson v. City of Riviera Beach*, 982 F. Supp. 2d 1318, 1334 (S.D. Fla. 2013). That claim must be dismissed.

CONCLUSION

The Court should dismiss Plaintiffs' complaint.

Dated: April 25, 2016

WEISS, HANDLER & CORNWELL, P.A.
One Boca Place, Suite 218-A
2255 Glades Road
Boca Raton, FL 33431
Telephone: (561) 997-9995
Facsimile: (561) 997-5280

By: /s/ *Henry B. Handler*
HENRY HANDLER
Florida Bar No. 259284
hbh@whcfla.com
filings@whcfla.com
jn@whcfla.com

Jay P. Lekfowitz, P.C.
Steven J. Menashi
Elliot C. Harvey Schatmeier
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
212-446-4800

Lawrence C. Marshall
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654
312-862-2000

Attorneys for Chabad of East Boca, Inc. and TJCV Land Trust

4. As Intervenors have explained, the City's actions with respect to the application were authorized by Boca Raton, Florida, Code of Ordinances § 28-780 and § 23-190(k). Plaintiffs do not even address these provisions.

Lori H. Windham
Daniel H. Blomberg
The Becket Fund for Religious Liberty
1200 New Hampshire Avenue NW, Suite 700
Washington, DC 20036
202-955-0095

Attorneys for Chabad of East Boca, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Intervenors' Reply Memorandum of Law in Further Support of Their Motion to Dismiss was served by electronic filing on April 25, 2016, on all counsel or parties of record on the service list.

SERVICE LIST

Marci A. Hamilton
36 Timber Knoll Drive
Washington Crossing, PA 18977
hamilton.marci@gmail.com

- and -

Arthur C. Koski
Law Offices of Arthur C. Koski
101 North Federal Highway, Suite 602
Boca Raton, FL 33432
akoski@koskilaw.com

Attorneys for Plaintiffs

Diana Grub Frieser
Office of the City Attorney
City of Boca Raton
201 West Palmetto Park Road
Boca Raton, FL 33432
dgfrieser@myboca.us

Attorney for Defendant
City of Boca Raton

WEISS, HANDLER & CORNWELL, P.A.
One Boca Place, Suite 218-A
2255 Glades Road
Boca Raton, FL 33431
Telephone: (561) 997-9995
Facsimile: (561) 997-5280

By: */s/ Henry B. Handler*
HENRY HANDLER
Florida Bar No. 259284
hbh@whcfla.com
filings@whcfla.com
jn@whcfla.com

Jay P. Lekfowitz, P.C.
Steven J. Menashi
Elliot C. Harvey Schatmeier
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
212-446-4800

Lawrence C. Marshall
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654
312-862-2000

Attorneys for Chabad of East Boca, Inc. and TJCV Land Trust

Lori H. Windham
Daniel H. Blomberg
The Becket Fund for Religious Liberty
1200 New Hampshire Avenue NW, Suite 700
Washington, DC 20036
202-955-0095

Attorneys for Chabad of East Boca, Inc.