UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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LEXJAC, LLC and RICHARD ENTEL,

Plaintiffs,

MEMORANDUM & ORDER
07-CV-4614 (JS)(ARL)

-against-

JULIANNE W. BECKERMAN, individually and as Mayor of the Incorporated Village of Muttontown, CARL JUUL-NIELSON, J. RANDOLPH BARTHOLOMEW, STEVEN FINE and PAT MILLER, individually and in their official capacities as MEMBERS OF THE BOARD OF TRUSTEES of the Incorporated Village of Muttontown, THE BOARD OF TRUSTEES OF THE INCORPORATED VILLAGE OF MUTTONTOWN, THE INCORPORATED VILLAGE OF MUTTONTOWN and BONNIE O'CONNELL.

Defendants.
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APPEARANCES:

For Plaintiffs: Laurel R. Kretzing, Esq.
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Seth Presser, Esq.
Jaspan, Schlesinger & Hoffman, LLP
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For Defendants: Steven G. Leventhal, Esq.
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SEYBERT, District Judge:

Pending before this Court is a motion to dismiss brought by Defendants Pat Miller, The Board of Trustees of the Incorporated Village of Muttontown, The Incorporated Village of Muttontown, Julianne W. Beckerman, Carl Juul-Nielson, J. Randolph Bartholomew, and Steven Fine (the "Village's motion"), a motion to dismiss

brought by Defendant Bonnie O'Connell ("O'Connell"), and two motions to dismiss brought by Plaintiffs to dismiss Defendants' counter-claims. Additionally, Defendant Bonnie O'Connell requests that the Court disqualify Plaintiffs' represented law firm, Jaspan, Schlesinger & Hoffman, LLP. For the reasons set for below, the Village's motion is GRANTED in part and DENIED in part, O'Connell's motion to dismiss is DENIED, and Plaintiffs' two motions to dismiss Defendants' counter-claims is GRANTED. The Court reserves decision on O'Connell's request for disqualification of Jaspan, Schlesinger & Hoffman, LLP.

BACKGROUND

The following facts are taken from the Complaint and are presumed to be true for the purpose of deciding the present motion.

The main dispute in this case involves a property dispute regarding a 1.1 acre parcel of land (the "Property") in the Village of Muttontown. The property concerned in this dispute is located adjacent to Plaintiffs' residential property.

Lexjac, LLC is a domestic limited liability company with its principal place of business in the Village of Muttontown, New York (the "Village") (Pls.' Complaint ("Comp.") ¶ 4.) Plaintiff Richard Entel ("Entel") is the sole member and owner of Lexjac and resides adjacent to the "Property" at the center of this dispute. (Id. ¶ 5.) Defendant Board of Trustees of the Village of Muttontown is the governing body of the Village (the "Board.")

(Id. ¶ 7.) Defendant Julianne W. Beckerman ("Beckerman") is the Mayor of the Village and a member of the Board. (Id. ¶ 8.) The other members of the Board include Defendants Carl Juul-Nielson ("Juul-Nielson"), J. Randolph Bartholomew ("Bartholomew"), Steven Fine ("Fine"), and Pat Miller ("Miller"). (Id. ¶¶ 9-12.) Defendant O'Connell is an individual residing in Muttontown who is the President of the Pond's Edge Civic Association. (Id. ¶ 13.)

In or around July of 1969, the Village Planning Board of the Village approved a subdivision plot, which provided for the creation of twenty-eight building lots on property owned by Foreal Homes, Inc ("Foreal"). (Id. ¶ 14). The approval by the Village Planning Board was conditioned on a requirement that the developer make an offer of dedication for a recreational area. (Id. ¶ 15). On October 13, 1969, the Village adopted the Village Comprehensive Master Plan, which provided that if the Village were to establish a park, the property acquired for the park should be approximately 25 acres and have access to a main road. (Id. ¶ 16.)

In 1972, Foreal made a written offer of dedication (the "Offer of Dedication") of the Property and executed a deed that was delivered to the Village (the "Foreal Deed"). (Id. ¶ 17). In or about August 7, 1992, the approved subdivision map was filed in the Office of the Nassau County Clerk. (Id. ¶ 18.) The Offer of Dedication was neither accepted nor rejected by the Village. Thereafter, the building lots, other than the disputed Property,

were sold and improved by single family dwellings as part of a development known as "Pond's Edge." (Id. ¶ 20.)

On March 12, 1979, Foreal applied to the Planning Board for permission to eliminate the restriction on development of the Property. (Id. ¶ 21.) The Planning Board denied Foreal's application. (Id. ¶ 22.) The Village continued to refuse to either accept or reject the Offer of Dedication. (Id. ¶ 23.) Thereafter, in 1983, Foreal attempted to revoke its Offer of Dedication, but the Village denied Foreal's attempted revocation. (Id. ¶¶ 24-25.) Although the Village refused to accept the Offer of Dedication, Foreal remained the record owner of the Property but failed to maintain and secure the Property. (Id. ¶¶ 27-30.) Plaintiff alleges that the Village's refusal to accept the Offer of Dedication was based on a Village policy to avoid the acquisition of parkland because of the costs and liability associated with parklands, and because the Property did not meet the Master Plan's requirement that parkland be 25 acres or more and have direct access to a principal road. (Id. ¶¶ 28, 29.)

Over the years, the Property remained undeveloped, and ultimately became an eye-sore and a place for trespassers to convene. (Id. ¶ 30.) On December 18, 2003 Foreal entered into a contract for the sale of the Property with Entel for a purchase price of $90,000.00 (Id. ¶ 31.) At the time of the purchase, the fair market value of the development rights of the Property was

$1.6 million; Entel's lower purchase price reflected the restrictions on development on the Property. (Id. ¶ 32.) Entel intended to incorporate the Property into the yard of his residence, which adjoined the Property. (Id.) On February 26, 2004, Foreal executed a deed to Lexjac as assignee of Entel, which was recorded in the office of the Nassau County Clerk on May 17, 2004. (Id. ¶¶ 33, 34.)

On October, 17, 2005 the Village Board of Trustees adopted a resolution (the "October 2005 Resolution and Declination") declining Foreal's Offer of Dedication made in 1972. (Id. ¶ 35.) The resolution provided that "any and all right, title and interest the Village of Muttontown may have to the parcel is hereby extinguished." (Id.) In exchange for the resolution, Lexjac agreed to plant and maintain screen planting and not further develop the Property. (Id. ¶ 35.) At the time of the October 2005 Resolution, Entel was a member of the Board; however, Entel recused himself from the vote. (Id.)

As a way to insure that the Property would be protected from further development, Plaintiffs sought to donate the development rights to the Property to the Village and to the North Shore Land Alliance, an organization dedicated to preserving open space on Long Island. (Id. ¶ 37.) On December 9, 2005 Lexjac delivered a Conservation Easement over the Property in favor of the Village to the Village Attorney. (Id. ¶ 38.) On December 12,

2005, with Entel again recusing himself, the Board adopted a resolution authorizing the Mayor to accept the Conservation Easement (the "December 2005 Resolution"). (Id. ¶ 39.) In reliance on the resolutions adopted by the Village, Entel planted the required screen plantings and properly maintained the Property at his own expense. (Id. ¶ 41.) Plaintiffs allege that the resolutions vested in Plaintiffs the exclusive right to the Property subject to the Conservation Easement issued to the Village and to be issued to the North Shore Land Alliance. (Id. ¶ 42.)

In 2006, Entel was a candidate for the Office of Mayor of the Village. (Id. ¶ 43.) The Mayor, whom Entel was running against, was actively supported by Defendant O'Connell, the President of the Pond's Edge Civic Association, who has long advocated for the Village to create a recreational park on the Property. (Id. ¶¶ 44-45.) In her attempts to secure approval for the creation of a park, O'Connell objected to the October 2005 Resolution, and at her behest, the Village required Plaintiffs to make certain landscaping improvements to the Property. (Id. ¶ 46.) Shortly after the Mayor was elected, Entel went to the office of the Mayor to speak to her about his plumbing investigation. During the conversation, the Mayor raised the issue of the Property, although it was unrelated to Plaintiffs's question regarding his plumbing inspection. The Mayor allegedly accused Entel of seeking to sell the Property for development, and informed Entel that

O'Connell had said that Entel had "stolen" the Property from the Village. (Id. ¶¶ 49, 50.) Thereafter, the Mayor and O'Connell publicly requested that the Village investigate the October 2005 Resolution declining the Offer of Dedication. (Id. ¶ 51.)

On July 10, 2007, as a result of the investigation, the Village adopted a resolution (July 2007 Resolution), without notice to Plaintiffs, which rescinded the October 2005 Resolution and accepted the original Offer of Dedication made by Foreal. (Id. ¶ 54.) Furthermore, the July 2007 Resolution directed that the Foreal Deed be recorded with the Nassau County Clerk, "conveying to and vesting in the Village all right, title and interest in the Property." (Id. ¶ 55.)

Plaintiffs commenced this suit pursuant to 42 U.S.C. § 1983, alleging violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. More specifically, Plaintiffs contend that the Village wrongfully and unlawfully rescinded the October 2005 Resolution that rejected the Offer of Dedication by adopting the July 2007 Resolution. Additionally, Plaintiffs contend that Defendants violated Plaintiffs First Amendment rights by seeking to prevent future political participation from Plaintiffs.

DISCUSSION

I. Standard Of Review

A. Legal Standard Under 12(b)(6)

On a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must satisfy a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007). The Complaint "must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, –- U.S. –-, 127 S. Ct. 1955, 167 L. Ed. 2d 1965 (2007. To be clear, on a motion to dismiss, the Court does not require "heightened fact pleading of specifics, but only enough facts to state a claim for relief that is plausible on its face." Id. at 1974.

In applying this standard, the district court must accept the factual allegations set forth in the Complaint as true and draw all reasonable inferences in favor of Plaintiff. See Cleveland v. Caplaw Enter., 448 F.3d 518, 521 (2d Cir. 2006); Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 100 (2d Cir. 2005).

In deciding a 12(b)(6) motion, the Court is confined to "the allegations contained within the four corners of the complaint." Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 71 (2d Cir. 1998.) Additionally, the Court may examine "any written

instrument attached to [the complaint] or any statements or documents incorporated in it by reference" as well as any document on which the complaint relies heavily. Chambers v. Time Warner, Inc., 282 F.3d 147, 152-153 (2d Cir. 2002). "Of course, it may also consider matters of which judicial notice may be taken under Fed. R. Evid. 201." Kramer v. Time Warner, Inc., 837 F.2d 767, 773 (2d Cir. 1991). Consideration of materials beyond those just enumerated requires conversion of the 12(b)(6) motion to dismiss to one for summary judgment under Rule 56. See id.

The Court declines to convert the 12(b) motion to a motion for summary judgment at this early stage, particularly in light of the fact that the parties have not yet engaged in discovery.

II. The Village's Motion To Dismiss

A. Substantive Due Process

Plaintiffs' substantive due process claim is premised on the argument that the adoption of the July 2007 Resolution, purportedly rescinding the October 2005 Resolution, deprived Plaintiff of a legitimate property interest in an arbitrary, capricious, and irrational manner.

To sustain a substantive due process claim, Plaintiffs must prove a legitimate property interest and that the government, in this case the Village, acted arbitrarily and irrationally to deprive Plaintiffs of that interest. Cine SK8, Inc. v. Town of

Henrietta, 507 F.3d 778, 784 (2d Cir. 2007). The Second Circuit employs a "'strict entitlement test' . . . to claims . . . involving a local government's revocation of a land-use benefit that the plaintiffs had previously been granted." Id. Further, in New York, a property owner must show that he has a "vested" right to an existing land-use benefit. See id. "[A] vested right can be acquired when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development." Id. (quoting Town of Orangetown v. Magee, 88 N.Y.2d 41, 47, 665 N.E.2d 1061, 643 N.Y.S.2d 21 (1996)).

The Village posits that the Complaint fails to prove that Plaintiffs had a legitimate property interest, because the property interest that Plaintiffs claim to have been deprived of was the result of an illegal contract entered into between Plaintiffs and the Village. The Village cites to Article 18 of the New York General Municipal Law ("GML"), and Plaintiff Entel's position on the Board of Trustees of the Village to support their position that the contract entered into between Plaintiffs and the Village in the October 2005 Resolution is void. Article 18 of the New York GML provides:

> [N]o municipal officer or employee shall have an interest in any contract with the municipality of which he is an officer or employee, when such officer or employee,

> individually or as a member of a board, has the power or duty to (a) negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder (b) audit bills or claims under the contract, or (c) appoint an officer or employee who has any of the powers of duties set forth above . . ..

N.Y. GEN. MUN. LAW § 801.

In support of its motion to dismiss, Defendants argue that Plaintiffs entered into a contract with the Village, Plaintiffs benefitted from the Declination of the Offer of Dedication because the value of the parcel of land at issue substantially increased and was appraised at $1.6 million, far less than Plaintiffs' purchase price. Lastly, Defendants argue that as a member of the Board of Trustees, Entel "had the power to negotiate, prepare, authorize and approve [the] contract with the Village," and that his disclosure of an interest in the property and recusal from discussions concerning the Declination do not cure the violation of the New York GML.

Plaintiffs contend that the October 2005 Resolution declining the Offer of Dedication was not a prohibited contract under GML § 801. Plaintiffs maintain that GML § 801 has a limited definition of contracts, and intends to prohibit only agreements "'between a municipality and a third party whereby consideration passes from the municipal corporation as a result of goods purchased by it or services rendered to it.'" Stettine v. County of Suffolk, 66 N.Y.2d 354, 358 (1985) (holding that GML § 801 did

not apply to a collective bargaining agreement between the County of Suffolk and the Suffolk County Chapter of the Civil Service Employees Association). Plaintiffs further contend that the October 2005 Declination and Resolution merely declined an offer of dedication on the condition that Plaintiffs leave the land undeveloped and agree to maintain the land. The October 2005 Declination and Resolution did not involve the sale of land because at that time, the Property was already owned by Lexjac. According to Plaintiffs, the dispute here involves a request from an exemption from a plat, and is governed by GML § 809, and does not involve a contract subject to § 801.

Moreover, Plaintiffs contend that the agreement was valid because Entel disclosed his interest in the property and recused himself from any discussions and of the vote regarding the resolution. In making this contention, Plaintiffs rely upon GML § 803 which states, in pertinent part: "Any municipal officer or employee who has, will have, or later acquires an interest in . . . any actual or proposed contract . . . or other agreement . . . with the municipality of which he or she is an officer or employee, shall publicly disclose the nature and extent of such interest in writing." N.Y. GEN. MUN LAW 803.

In order to determine whether Plaintiffs have a legitimate property interest that can sustain their substantive due process claim, it is necessary to determine whether the parties

entered into a valid contract. According to New York GML § 800(2) a contract is defined as "any claim, account or demand against or agreement with a municipality, express or implied . . . ." N.Y. GEN. MUN. LAW § 800(2). Here, the Court agrees that Plaintiffs did not enter into a "contract" with the Village. Plaintiffs' agreement with the Village originated with the Village's agreement with Foreal, the previous owner of the Property. The Village agreed to approve Foreal's subdivision plan only if Foreal made an offer of dedication. This agreement clearly fell within Section 809 of the General Municipal Code, which governs over "[e]very application, petition or request submitted for . . . approval of a plat." Foreal made an application for approval of his plat, which was granted subject to the offer of dedication.

Thereafter, Entel purchased the Property from Foreal, and took the Property subject to the Offer of Dedication. When Entel asked that the Village reject the Offer of Dedication, this was akin to asking for removal of a condition placed on the Village's previous approval of the property. In exchange, Entel promised to undertake certain responsibilities, such as maintaining the land and granting an easement to the Village and to the North Shore Alliance, a land conservation organization. The Court finds that Entel's agreement with the Village falls more closely under Section 809, and not 801.

Both parties acknowledge that Section 809 allows a

municipal officer or employee to disclose any interest he had in the land use application and recuse himself from any discussions or vote regarding the matter. Disclosure and recusal from discussions involving that member's personal interest has been deemed an appropriate action to cure conflicts of interest. See Tuxedo Conservation & Taxpayers Ass'n v. Town Bd. of Town of Tuxedo, 69 A.D.2d 320 (2d Dep't 1979); Office of the Attorney General, Informal Opinion No. 99-42, 1999 N.Y. AG LEXIS 47 (1999). The Court finds that Plaintiffs' recusal cured any possible conflict of interest.

In any case, the Court finds that even if there was a contract, the Village may not have acted promptly in rescinding it, and therefore might have waived their right to disaffirm the contract. See Landau v. Percacciolo, 66 A.D.2d 80, 89 (N.Y. App. Div. 2d Dep't 1978 (finding that the municipality "should not be permitted to disaffirm . . . if they did not act promptly.).

Defendants argue that they acted promptly, and disaffirmed the October 2005 Declination and Resolution as soon as possible after they discovered Entel's improper interest and involvement in the Board. Defendants argue that this situation is akin to Landau, where the state court held that the defendants acted promptly in rescinding a contract shortly after the municipality learned that one of the beneficiaries to the contract was a public official. However, Plaintiffs argue that the Village

was aware that Entel was a board member at the time of the October 2005 Resolution and Declination, yet they waited until July 2007 to object on the grounds of Entel's alleged conflict of interest. According to Plaintiffs, Defendants did not learn anything new as a result of their 2007 investigation, and were always in a position to disaffirm the contract. Taking Plaintiffs' allegations as true, as the Court must, the Court finds that Defendants were aware of Entel's alleged conflict at all relevant times, and therefore did not act promptly in rescinding the contract. See County of Washington v. Counties of Warren & Washington Indus. Dev. Agency, No. 93-CV-0086, 1997 U.S. Dist. LEXIS 3985, at *8, n. 26 (N.D.N.Y Mar. 31, 1997) ("The law is clear that a municipal contract should not be nullified based on a violation of the GML unless the relief is requested promptly.").

Defendants next argue that any contract between the Village and Plaintiffs was not supported by adequate consideration, and the transfer of municipal property for less than adequate consideration is an unconstitutional waste. Although the Court has already found that the agreement between Entel and the Village was not a contract, it nonetheless finds that, to the extent that the agreement could be considered to be a contract, Plaintiffs have sufficiently pled the existence of consideration.

Defendants maintain that the property was appraised at $1,600,000 and that it would be unconstitutional for the Village to

transfer this valuable property in exchange for Entel's promise to plant appropriate screens and maintain the land. Plaintiff responds that the land is worth $1,600,000 only if there were no restrictions on its use, and that figure does not represent the value given up by the Village in the offer of Dedication. The Offer of Dedication was made for park purposes, and not for the Village to sell the land for its unencumbered value. Plaintiffs further argue that they provided adequate consideration for the October 2005 Resolution and Declination by promising not to develop the Property and by agreeing to landscape and maintain the Property in accordance with the Village's specifications.

The Court finds that Plaintiffs' promises provided adequate consideration for the October 2005 Resolution and Declination. "Although political subdivisions are prohibited from conveying public property to private entities without adequate consideration (see NY Const, art. VIII, § 1), the consideration may take the form of public benefits or services rendered pursuant to a contract." Matter of La Barbera v. Town of Woodstock, 814 N.Y.S.2d 376, 379 (N.Y. App. Div. 3d Dep't 2006). The Court finds that Plaintiffs' promise to maintain and landscape the land, which Plaintiff alleges had become an eye-sore for the community, could be sufficient consideration, particularly in light of the fact that Plaintiff alleges that the Village did not want to spend the time, money, and resources in creating a park.

Here, the Court finds that Plaintiffs have alleged enough facts to overcome a motion to dismiss on their substantive due process claim. Plaintiffs allege that the Board declined the offer of dedication, and in reliance on this action, Plaintiffs expended considerable funds maintaining and landscaping the property. Plaintiffs may be able to prove that their actions in relying on the October 2005 Resolution and Declination were "so substantial" that the Village's action in rescinding the Offer of Declination resulted "in serious loss rendering the improvements essentially valueless." Town of Orangetown, 88 N.Y.2d at 48.

B. Procedural Due Process

In order to prevail on a § 1983 procedural due process claims, Plaintiffs must allege that they (1) possessed a protected liberty or property interest, and (2) that the Village deprived Plaintiffs of that interest without due process. See McMenemy v. City of Rochester, 241 F.3d 279, 2001 WL 208999, *6 (2d Cir. 2001) (citing Hynes v. Squillace, 143 F.3d 653, 658 (2d Cir.) (per curiam), cert. denied, 525 U.S. 907, 119 S. Ct. 246, 142 L. Ed. 2d 202 (1998)). A cognizable property interest is the backbone of any procedural due process claim.

The Village argues that (1) Plaintiffs did not have a cognizable property interest because the contract was void, (2) Plaintiffs failed to allege how further process would have led to a different determination by the Board of Trustee, and (3)

Plaintiffs had an adequate post-deprivation remedy by way of an Article 78 proceeding.

The Court has already found that Plaintiffs have sufficiently alleged the validity of the October 2005 Resolution and Declination, and therefore rejects the Village's argument that Plaintiffs have not shown a valid property interest. Additionally, the Court finds the Village's second argument unclear. Plaintiffs allege that they were deprived of a property interest without an opportunity for a hearing or other form of process to discuss the matter. Plaintiffs need not allege in their Complaint that further process would have resulted in a different determination in a claim for procedural due process claim.

Finally, the availability of an Article 78 post-deprivation procedure does not divest the Village of its requirement to provide pre-deprivation process. While post-deprivation hearings may satisfy due process where "the state conduct in question is random and unauthorized," when the "deprivation is pursuant to an established state procedure, the state can predict when it will occur and is in the position to provide a pre-deprivation hearing." Rivera-Powell v. N.Y. City Bd. of Elections, 470 F.3d 458, 465 (2d Cir. 2006) (internal citations omitted). "Under those circumstances, 'the availability of post-deprivation procedures will not, ipso facto, satisfy due process.'" Id. (quoting Hellenic Am. Neighborhood Action Comm. v.

City of New York, 101 F.3d 877, 880. n7).

While the "distinction between random and unauthorized conduct and established state procedures . . . is not clear-cut[,]" the Supreme Court has held that the "government actors' conduct cannot be considered random and unauthorized . . . if the state delegated to those actors 'the power and authority to effect the very deprivation complained of . . . [and] the concomitant duty to initiate the procedural safeguards set up by state law,' even if the act in question 'was not . . . sanctioned by state law.'" Id. at 465 (quoting Zinermon v. Burch, 494 U.S. 113, 138, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990)). Here, Plaintiff has not alleged a random act; rather, the Village has the power and authority to rescind and grant offers of dedication and other such land use rights. At this stage in the litigation, the Court cannot hold that Plaintiffs' procedural due process claim fails because Plaintiffs have an adequate post-deprivation process available to them.

C. Equal Protection

The Fourteenth Amendment's Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985); Latrieste Rest. v. Village of Port Chester, 188 F.3d 65, 69 (2d Cir. 1999). "While the Equal Protection Clause is most commonly

used to bring claims alleging discrimination based on membership in a protected class, where, as here, the plaintiff does not allege membership in such a class, he or she can still prevail in what is known as a "class of one" equal protection claim." Neilson v. D'Angelis, 409 F.3d 100, 104 (2d Cir. N.Y. 2005) (citing Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000)).

In a "class of one" equal protection claim, a plaintiff must show "the existence of persons in similar circumstances who received more favorable treatment than the plaintiff . . . to provide an inference that the plaintiff was intentionally singled out for reasons that so lack any reasonable nexus with a legitimate governmental policy that an improper purpose -- whether personal or otherwise -- is all but certain." Sloup v. Loeffler, No. 05-CV-1766, 2008 U.S. Dist. LEXIS 65545, at *50-51 (E.D.N.Y. Aug. 21, 2008) (quoting Neilson, 409 F.3d at 105.

The Village argues that Plaintiffs have not shown the existence of other similarly situated persons. Specifically, the Village argues that Plaintiffs "cannot point to any similar instance in which a Village Trustee derived a financial benefit from a prohibited contract with the Village, and in which, as a consequence, the Village released all of its right, title and interest in a parcel irrevocably dedicated as parkland." (Village Memo. p. 17.) However, this argument relies on the illegality of

the underlying agreement between Entel and the Village. The Court has already found that Plaintiffs have pleaded enough facts to state a cognizable agreement.

Plaintiffs' Complaint alleges that the Village has not acquired any park land or required any similarly situated property owners to make a dedication of property rights to the Village. The Court notes that the Complaint does not specify any entity who was in a position to dedicate property to the Village as a park, but was not required to do so, or an entity who made an offer, but had that offer rejected or not acted upon because of the Village's alleged custom of not developing park land. In any case, "[t]hough other Circuits have determined otherwise, this Circuit has recently proclaimed that there is no requirement that the Plaintiffs 'identify in [their] complaint actual instances' where others have been treated differently." Cathedral Church of the Intercessor v. Inc. Vill. of Malverne, 353 F. Supp. 2d 375, 383 (E.D.N.Y. 2005) (quoting DeMuria v. Hawkes, 328 F.3d 704, 707 (2d Cir. 2003) (holding that it was sufficient for plaintiffs to "summarily state that 'upon information and belief, the defendants imposed subjective, arbitrary, and unreasonable conditions and requirements upon the Church that it has never imposed on any other construction projects of similar or like size and scope.'"). Here, Plaintiffs have sufficiently alleged, for the purposes of a motion to dismiss, that the Village would not have required any similarly situated

property owners to make a dedication of property rights to the Village.

The Village next argues that it had a rational basis for accepting Foreal's Offer of Dedication, the public policy in favor of preserving open space. The Court agrees that preserving open space is a rational basis for accepting an offer of dedication. However, Courts in this Circuit have held that an equal protection claim survives a motion to dismiss if the complaint alleges that a defendant's actions were irrational, and the complaint provides sufficient allegations, which if taken to be true, would support this claim. See McCormick v. Town of Clifton Park, No. 05-CV-0694, 2006 U.S. Dist. LEXIS 32813, at *17 (N.D.N.Y. May 23, 2006) (plaintiffs' equal protection claim survived motion to dismiss where it alleged "the defendants acted with impermissible motive and animus in order to punish them for their business activities" and provided "allegations in support [of] such an inference, which must be accepted as true on a motion to dismiss."); Cathedral Church of the Intercessor v. Incorporated Vill. of Malverne, No. 02-CV-2989, 2006 U.S. Dist. LEXIS 12842, at *14 (E.D.N.Y. Mar. 6, 2006) (plaintiff's complaint, which stated that "the plaintiff ha[d] been intentionally treated differently from others similarly situated and that there [was] no rational basis for the difference in treatment" stated sufficient facts to overcome a motion to dismiss because of the possibility that defendants' proffered

rational basis was "illegitimate pretexts intended to shield the defendants' discriminatory intent.").

Plaintiffs' Complaint alleges that Defendants arbitrarily recorded Foreal's offer of dedication, whereas Defendants had a policy of not accepting park land from similarly situated entities. The Complaint further states that Defendants irrationally singled out Plaintiffs for its decision, notwithstanding the fact that Defendants identified suitable park land as land with 25 acres and access to a main road. At this stage, Plaintiffs' have sufficiently alleged that Defendants' actions were not rational, and therefore the equal protection claim is sufficient to withstand a motion to dismiss. See A&P v. Town of E. Hampton, 997 F. Supp. 340, 351 (E.D.N.Y. 1998) ("holding that plaintiff stated an equal protection claim where it alleged that "it stands in the same position as a would-be builder of an industrial building having a floor area in excess of 10,000 square feet, that the industrial user would not be barred from building such a structure, but that plaintiff would be barred, and that there is no rational basis for that difference in treatment.").

Defendants also argue that Plaintiffs have not shown that the Individual Defendants "harbored any animus towards plaintiffs." However, in an equal protection "class of one" claim, "Plaintiff[s] need not allege discriminatory animus and instead may merely allege that 'there is no rational basis for the difference in treatment.'"

Cathedral Church of the Intercessor v. Inc. Vill. of Malverne, 353 F. Supp. 2d 375, 383 (E.D.N.Y. 2005) (quoting Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000)). As above noted, Plaintiffs' Complaint sufficiently alleges that Defendants would not have required another entity to dedicate a parcel of land that is not located on a main road and is under twenty-five acres, and Defendants basis for singling out Plaintiffs' parcel is irrational. Although at the summary judgment stage, Defendants may be able to show that their actions were, in fact, rational, at this stage, Plaintiffs' pleadings are sufficient to survive a motion to dimiss.

D. First Amendment Retaliation Claim

To establish a First Amendment retaliation claim under § 1983, Plaintiffs must show that "(1) [their] conduct was protected by the First Amendment, and (2) such conduct prompted or substantially caused [Defendants'] action." Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 91 (2d Cir. 2002) (internal citations omitted). Defendants argue that Plaintiffs failed to set forth a valid First Amendment retaliation claim because Plaintiffs have not alleged an improper motive and Defendants had an independent justification for their actions, namely the illegality of Plaintiffs' underlying contract with the prior administration.

Plaintiffs argue that their Complaint sets forth

sufficient facts from which retaliatory motive by Mayor Beckerman can be inferred. In support of this argument, Plaintiff states that the Complaint is replete with references to the "bitterly-contested" mayoral election, and as such, it can be inferred that Beckerman acted to chill Plaintiffs' further political participation.

The Court finds that Plaintiffs' allegations with respect to Beckerman are sufficient to withstand a motion to dismiss. Plaintiffs allege that Beckerman decided to overturn the former Board's decision and record the Foreal deed in retaliation for Plaintiffs' political activities. From the facts alleged in the Complaint, it can be inferred that Beckerman retaliated against Plaintiffs for their political views and actions. See Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 40-42 (1st Cir. 1992) (acknowledging that a plaintiff could base a First Amendment claim on the grounds that the defendants denied plaintiff a permit in retaliation for the plaintiff's political views).

Plaintiff next argues that retaliatory motive can be imputed to the entire Board. In support of this argument, Plaintiffs cite to Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778, 785 (2d Cir. N.Y. 2007), where the Second Circuit held that in the context of a substantive due process claim, "it is possible that, even if a majority of the individuals that participate in the decision lack unconstitutional motives, the unconstitutional

intentions of a minority of those involved can taint the ultimate outcome." If Beckerman can be considered to be a minority of one who tainted the Board's ultimate outcome, then Plaintiffs' first amendment retaliation claim against the Board will survive. At this stage in the proceedings, Plaintiffs have alleged sufficient facts to overcome a motion to dismiss their first amendment retaliation claim against the Board.

III. Legislative Immunity

Defendants assert that the Individual Defendants are entitled to legislative immunity for their decision to adopt the July 2007 Resolution rescinding the prior resolutions. Plaintiffs counter that the Individual Defendants actions were not legislative in nature, and thus are not barred by absolute immunity.

"Local legislators, such as members of a town board, are absolutely immune from civil rights lawsuits provided that the actions for which they are being sued are 'legislative.'" Livant v. Clifton, 334 F. Supp. 2d 321, 326 (E.D.N.Y. 2004) (citing Harhay v. Town of Ellington Bd. of Ed., 323 F.3d 206, 210 (2d Cir. 2003)). "Under the Supreme Court's functional test for determining the applicability of absolute legislative immunity, 'whether immunity attaches turns not on the official's identity, or even on the official's motive or intent, but on the nature of the act in question.'" State Emples. Bargaining Agent Coalition v. Rowland, 494 F.3d 71, 82 (2d Cir. 2007) (quoting Almonte v. City of Long

Beach, 478 F.3d 100, 106 (2d Cir. 2007)). "More specifically, legislative immunity shields an official from liability if the act in question was undertaken in the sphere of legitimate legislative activity." Almonte, 478 F.3d at 106. (internal citations and quotations omitted).

The Court finds that the Individual Defendants' decision to vote on the resolution is entitled to absolute immunity. Plaintiffs cite to Harhay, 323 F.3d at 206, to support their argument that the Individual Defendants' actions were not legislative in nature. Harhay is distinguishable from this case. In Harhay, a town board of education voted against accepting the resignation of a teacher. The Second Circuit held that the board's decision to "table" the resignation was a "[d]iscretionary personnel decision[]" which, "even if undertaken by public officials who otherwise are entitled to immunity, do not give rise to immunity because such decisionmaking is no different in substance from that which is enjoyed by other actors." Id. at 210-211.

In contrast, the Board's decision to rescind the former resolutions and accept an offer of dedication is not the type of decision made by other actors. Rather, this decision was purely within the province of the local board members. A local board's decision to rescind its former action and accept an offer of dedication for park land is clearly a legislative act, entitling

the individual board members to absolute immunity. See Orange Lake Assocs. v. Kirkpatrick, 21 F.3d 1214, 1224 (2d Cir. N.Y. 1994) (legislative immunity attached to individual members of local town board for their adoption of a master plan and zoning law amendments); Livant v. Clifton, 334 F. Supp. 2d 321, 326 (E.D.N.Y. 2004) ("Here, the Board's actions in holding a hearing, voting, and approving a resolution which authorized the removal of a nuisance . . . are clearly legislative in nature."); Zdziebloski v. Town of E. Greenbush, 336 F. Supp. 2d 194, 203 (N.D.N.Y 2004) (individual board members entitled to legislative immunity for their actions in voting for a resolution that eliminated the plaintiff's job). Accordingly, the Board and its individual members, Beckerman, Juul-Nielson, Bartholomew, Fine, and Miller, are entitled to absolute immunity for their action in voting for the resolution rescinding the prior Board's October 17, 2005 contract.[1]

IV. Defendant O'Connell's Motion To Dismiss

O'Connell moves under Rule 12(c) to dismiss Plaintiffs' claims against her on the ground that Plaintiffs failed to allege that O'Connell conspired with the other Defendants to deprive Plaintiffs of their constitutional rights. Specifically, O'Connell argues that she was simply acting as a "responsible civic leader"

[1] Because the Court has found that the Individual Defendants are shielded from liability by absolute immunity, the Court declines to address Defendants' arguments that the Individual Defendants are also entitled to qualified immunity.

in requesting that the Village investigate the declination of the Offer of Dedication.

"To prove a § 1983 conspiracy, a plaintiff must show: (1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." Pangburn v. Culbertson, 200 F.3d 65, 72 (2d Cir. 1999).

At this stage in the proceedings, the Court finds that Plaintiff has alleged enough facts to sustain a Section 1983 conspiracy action against O'Connell. Plaintiffs allege that O'Connell made a "false allegation" that Entel had stolen the Property from the Village, and that O'Connell worked with Beckerman to request that the Village investigate the declination of the offer of dedication, notwithstanding the fact that O'Connell and Beckerman allegedly knew all the relevant facts and circumstances surrounding the declination. At this stage in the litigation, these allegations are sufficient to state a claim of conspiracy against O'Connell.

V. O'Connell's Motion To Disqualify Jaspan Schlesinger Hoffman LLP

O'Connell moves to disqualify Jaspan Schlesinger Hoffman LLP ("Jaspan") on the grounds that Chris J. Coschignano, Esq. ("Coschignano"), a partner with the firm, represented O'Connell in the past.

"Unless there is a risk of taint to a court proceeding, courts are quite hesitant to disqualify an attorney from representing his client in litigation." Med. Diagnostic Imaging, PLLC v. CareCore Nat'l, LLC, 542 F. Supp. 2d 296, 306 (S.D.N.Y. 2008). "Courts are reluctant to grant such motions because they are often tactically motivated, cause undue delay, add expense, and have 'an immediate adverse effect on the client by separating him from counsel of his choice. . . .'" Drag Racing Technologies, Inc. as D.R.T., Inc. v. Universal City Studios, Inc., 2003 WL 1948798, at * 2 (S.D.N.Y. 2003) (quoting Board of Education v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979)). However, "[w]here an actual or severe conflict is so strong that 'no rational defendant would knowingly and intelligently desire the conflicted lawyer's representation,' the court is obligated to disqualify the attorney." United States v. Schlesinger, 335 F. Supp. 2d 379, 382 (E.D.N.Y. 2004) (quoting United States v. Levy, 25 F.3d 146, 153 (2d Cir. 1994)).

The parties do not dispute that O'Connell never retained Coschignano. The question before the Court is whether O'Connell confided in Coschignano with the assumption that she was obtaining legal advice from her attorney. Although there is no "single, well-defined test for determining whether an attorney client relationship exists," most court have held that "an attorney-client relationship exists if the party divulging confidences and secrets

to an attorney believes that he is approaching the attorney in a professional capacity with the intent to secure legal advice." Fierro v. Gallucci, No. 06-CV-5189, 2007 U.S. Dist. LEXIS 89296, 18-17 (E.D.N.Y. Dec. 4, 2007).

O'Connell alleges that she consulted Coschignano for advice regarding the Property, and disclosed to Coschignano her concerns regarding Entel's use of the land. O'Connell asserts that she approached Coschignano on the matter because she was acquainted with him from Coschignano's work as Town Councilman, and because O'Connell and her husband had their wills prepared by Coschignano's wife, who formerly worked with Coschignano at his private law office.

Jaspan argues that disqualification is not warranted because Coschignano did not represent O'Connell in this matter, and the only attorney/client relationship that existed between Coschignano and O'Connell occured in March of 2004, when an attorney in Coschignano's office prepared O'Connell and her husband's will. Jaspan does not deny that O'Connell approached Coschignano to discuss certain concerns she had regarding Plaintiffs' property. However, Jaspan argues that O'Connell's conversations with Coschignano did not establish an attorney/client relationship because O'Connell did not approach Coschignano with the intent to retain him. Specifically, Jaspan argues that O'Connell knew of Coschignano's professional relationship with

Plaintiff Entel, and approached him because of that relationship and because of his position as Town Councilman, and that O'Connell never divulged confidential or privileged information. According to Jaspan, O'Connell considered her conversations with Coschignano to be a meeting with a local public official, and not as private consultations with her attorney.

However, O'Connell submits a number of documents in support of her motion for disqualification that casts doubt on Jaspan's argument that O'Connell did not confide in Coschignano. O'Connell submits the minutes from the Board of Directors of the Pond's Edge Civil Association's May 19, 2005 meeting, which state:

> Then Bonnie spoke with Peter McKenna, Village Attorney, explaining the history of the land within the community and how Entel's managed to buy it without anyone in the community being informed. McKenna said the community can make application [sic] to the town to make it a park, we have that right - We don't need an attorney. Though he recc. [sic] That perhaps we do . . . 5. Talk with a lawyer informally about what it would cost- Chris Cashignano [sic] - town councilman and attorney - Bonnie will call him.

(O'Connell Aff. Ex. A). The minutes from the June 5, 2005 meeting state:

> Then Bonnie met with Chris Coschignano, Oyster Bay Councilman . . . . He indicated that we could pursue it but it would be really hard and that entel [sic] could prob. Sue [sic], hold us up in court for years, and then said that anything else we wanted we could basically have, e.g. we can have him keep the fence - has to be an estate fence-where it is, . . . we get approval of landscaping plan at

> his cost - ask him to take down the lights, etc. - does he have right to access to Noel Lane? Cannot put the pool on that land-or any other kind of structure - no permit can ever be issued - To make it a park, town would have to condemn the land, buy it back from Entel - then declare it a park. But they could permanently designate as park land - not buildable - has to pass some legislation to make that happen. . . . Possibly June 20-21 for mtg with Cashignano [sic]. We should have a meeting with Coschignano.

(O'Connell Aff. Ex. B.)

Finally, O'Connell submits a letter she sent to Coschignano on August 15, 2005, in which O'Connell writes,

> It has been some time [sic] since we all met and I wanted to bring you up to date on what is happening as well as ask you a few more questions . . . . Lastly, if the village had the right to make this a park when Mr. Forte owned the land, why would they have to buy it back from Mr. Entel before making it a park? . . . . Thanks so much for your continued assistance in this.

(O'Connell Aff. Ex. D). The Court finds that the above documents raise a serious question as to whether O'Connell sought legal advice from Coschignano regarding the facts underlying this cause of action, and as to whether O'Connell believed that she was speaking in confidence because of a professional relationship.

However, the Court is reluctant to disqualify Jaspan without first granting the parties an opportunity to be heard on the issue. In the interest of upholding the ethical integrity of the trial process, the Court will hold a conference on this matter on October 10, 2008, at 10:00 a.m., whereupon it will revisit this

issue.

The Court has reviewed Defendants' remaining arguments regarding Coschignano's necessity as a trial witness, and finds them to be without merit. Rule 5-102 (c) of the New York Code of Professional Responsibility prohibits an attorney from acting as counsel on a case in which he may have to serve as a witness. Rule 5-102(c) states,

> "A lawyer shall not act, or accept employment that contemplates the lawyer's acting, as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client . . . .

A party seeking disqualification based on this rule must "demonstrate that the testimony of the attorney subject to disqualification is both necessary and substantially likely to be prejudicial to the interests of the movant at trial." Shabbir v. Pak. Int'l Airlines, 443 F. Supp. 2d 299, 308 (E.D.N.Y. 2005). However, "where it is unclear whether an attorney's testimony will, in fact, be necessary, the motion to disqualify should be dismissed in the absence of clear prejudice to the moving party. Id. Defendants argue that Coschignano is in the unique position to testify about the conservation easement that Entel allegedly gave to the Village, and to testify about O'Connell's motives and intentions with respect to the land. However, it is unclear at this juncture that testimony about the conservation easement is

necessary, and in any case, Entel can testify to this. Likewise, O'Connell herself, in addition to other members of the Pond Edge Civil Association, can testify as to O'Connell's intentions.

VI. Plaintiffs' Motion To Dismiss

Plaintiffs move to dismiss the counterclaim asserted by Beckerman, Juul-Nielson, Bartholomew, and Fine, and separately move to dismiss the counterclaim asserted by O'Connell. Because both sets of Defendants assert the exact same counterclaim, and Plaintiffs' motions to dismiss are also essentially identical, the Court will address Plaintiffs' two motions together.

Defendants Beckerman, Juul-Nielson, Bartholomew, Fine, and O'Connell allege that Plaintiffs' suit violates New York Civil Rights Law § 70-a, otherwise known as the "Anti-SLAPP" statute, because the suit was brought to harass and intimidate Defendants and is essentially a strategic lawsuit against public participation.

New York Civil Rights Law § 70-a allows a defendant in "an action involving public petition and participation," as defined in §76-a, to bring an action for damages, costs, and attorney's fees. §76-a defines "action involving public petition and participation" as any "an action . . . for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." Attorney's

fees and costs are only available "where it is shown that the suit was brought 'for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights[,]'" and even where a defendant has made such a showing, "the award of damages is within the sole discretion of the trial court." Friends of Rockland Shelter Animals, Inc. v. Mullen, 313 F. Supp. 2d 339, 344 (S.D.N.Y. 2004) (quoting § 70-a(1)(b)(c)).

Here, the Court finds that Defendants are not entitled to damages under the anti-SLAPP statute. At the outset, the Court questions whether anti-SLAPP damages are available to a defendant in a Section 1983 action.[2] In any case, Plaintiffs have supported their claims with cognizable legal theories, and have presented sufficient facts to show that their claims are not frivolous. Accordingly, the Court finds that anti-SLAPP damages are not warranted in this case, and therefore GRANTS Plaintiffs' motion to dismiss Defendants' counter-claim for anti-SLAPP damages. See Friends of Rockland Shelter Animals, Inc. v. Mullen, 313 F. Supp.

[2] See Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hempstead, 98 F. Supp. 2d 347, 361 (S.D.N.Y. 2000) (reflecting that it is unclear whether the anti-SLAPP statute applies to Section 1983 cases because to "use this legislation to protect state officials accused of violating constitutional rights through state action appears to stand the purpose of the legislation on its head.").

2d 339, 345 (S.D.N.Y. 2004) (declining to award damages where the plaintiff's claims were not frivolous).

CONCLUSION

For the reasons stated above, the Village's motion to dismiss is GRANTED in part and DENIED in part. The Village's motion to dismiss Plaintiffs' substantive due process, procedural due process claims, equal protections claims, and First Amendment retaliation claims is DENIED. The Village's motion to dismiss Plaintiffs' claims against the Individual Defendants because of legislative immunity is GRANTED. Finally, Defendant O'Connell's motion to dismiss is DENIED, and Plaintiffs' motions to dismiss Defendants' counter-claims is GRANTED.

The Court reserves its decision on the issue of whether Plaintiffs' counsel should be disqualified, and will hold a conference on this matter on October 10, 2008, at 10:00 a.m.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York
September 30, 2008