STATE OF NEW YORK SUPREME COURT
MONROE COUNTY

SUSAN FERRARI ROWLEY,
GREGORY STOKOE and
WILLIAM MC GUIRE,

Plaintiffs,

Vs.

TOWN OF WHEATLAND and
MONROE COUNTY,

Defendants.

MEMORANDUM OF LAW
IN OPPOSITION TO
WHEATLAND MOTION
TO DISMISS
Index No. 2010-3999
(Ark, J.)

Plaintiff submits this Memorandum of law in opposition to the Town of Wheatland's motion to dismiss.

POINT ONE
THIS COURT HAS JURISDICTION OVER THE TOWN LAW 268(2) CLAIM

Plaintiffs sue to stop Monroe County and the Town of Wheatland from converting an open meadow into soccer fields for tournament and league play in violation of the Town of Wheatland Zoning Ordinance. The Town of Wheatland does not contest that three of its taxpayers made a written request that it correct or abate the zoning violation, or that it refused to do so. Rather, the Town claims that the taxpayers cannot proceed under Town Law 268(2) because it (incorrectly) determined that no zoning violation exists. This argument lacks merit.

Town Law 268(2) authorizes three taxpayers to commence a lawsuit to enjoin zoning violations if the Town fails or refuses to do so. Here, it is undisputed that:

- plaintiff Susan Ferrari Rowley made a written requests that the Town of Wheatland restrain, correct or abate the violations of Town of Wheatland Zoning Law by letters dated March 3 and 4, 2010 (Verified complaint, paragraphs 26 and 27 and Exhibit "C");
- The Town of Wheatland determined that the facts and circumstances herein did not violate the Town of Wheatland Zoning Code. Verified complaint paragraph 28 and Exhibit "D"; and
- The Town of Wheatland has failed and refused to restrain, correct or abate the aforementioned violations of Town of Wheatland Zoning Law (Verified complaint, paragraph 29).

Consequently, plaintiffs may commence a lawsuit to enjoin the zoning violation pursuant to Town Law section 268(2). Moreover, the Town of Wheatland is actively developing the soccer fields for Monroe County pursuant to an Inter-Municipal Agreement. See Affirmation of Mindy L. Zoghlin sworn to May 19, 2010 paragraphs 3 and 4 and Exhibits "A" and "B". Plaintiffs seek to enjoin the Town's conduct in site development, not to compel it to enforce its zoning laws.

The Town argues that plaintiffs cannot invoke Town Law section 268(2) because the it determined that no violation exists; and, given that determination, could not itself commence an action under Town Law section 268(2). This strained and self-serving argument is not supported by the statute or case law.

The Town cites *Phair v. Sand Lake Corp.*, 56 AD 3rd 449 (2nd Dept. 2008); *Marlowe v. Elmwood Inc.*, 12 AD 3rd 742 (3rd Dept. 2004), leave dismissed, 4 NY 3rd 881 (2005) and *Forget v. Raymer*, 65 AD2d 953 (4th Dept. 1978) in support of the claim that "the right of action conferred upon resident taxpayers is no greater than the right of action possessed by the Town of it chose to institute a proceeding." Town overstates the holding in each of those cases.

In *Phair*, the Second Department found that taxpayers were entitled to maintain an action under Town Law section 268(2) because the Town's criminal prosecution of a zoning violation was not an "appropriate action or proceeding" to prevent, restrain or enjoin a zoning violation. Here there is no criminal prosecution.

In *Marlowe*, the use which plaintiffs complained of began in 1965, plaintiffs made written complaints to the town in 1991 and 1992 and then commenced a lawsuit against the Town under Town Law section 268(2) in 2000 (see *Marlowe v. Elmwood, Inc.*, 34 AD3d 970 (3rd Dept. 2006)). In the first appeal the Court dismissed the claims under Town Law section 268(2) because there was no "official lassitude or nonfeasance in the enforcement of zoning laws" but let the nuisance claim survive. *Marlowe v. Elmwood, Inc.*, 12 AD3d 742 (3rd Dept. 2004). In a later appeal the Third Department dismissed the nuisance claim for *laches*. *Marlowe v. Elmwood, Inc.*, 34 AD3d 970 (3rd Dept. 2006). *Marlowe* stands for the proposition that a plaintiff cannot wait twenty-six years to complaint about an objectionable use, and then wait another eight

or nine years to commence to lawsuit to enjoin it. Here, in contrast, plaintiffs have acted quickly to preserve their rights.

In *Forget* the ZBA determined that defendant's use of land was a pre-existing nonconforming use. One of the plaintiffs was a party to two actions to challenge the alleged zoning violation: She was (1) a petitioner in an Article 78 proceeding to challenge the ZBA's determination upholding the building inspector's determination that no zoning violation existed and (2) one of the three taxpayers in a suit under Town Law section 268(2). The Fourth Department let the Article 78 proceeding continue, and dismissed the action under Town Law section 268(2) because the Town could not question the validity of the ZBA's determination, so plaintiff could not step into the Town's shoes to enforce the alleged violation.

Forget is inapplicable to the case at bar because there has been no appeal to and decision by the ZBA upholding the building inspector's decision.

The Town's reliance on *Manuli v. Hilderbrandt*, 144 AD2d 789 (3rd Dept. 1988) is based on a misapprehension of plaintiffs' claim. Plaintiffs named the Town as a party because the Town is actively developing the soccer fields for the County pursuant to an Inter-Municipal Agreement. Affirmation of Mindy L. Zoghlin sworn to May 19, 2010 paragraphs 3 and 4 and Exhibits "A" and "B". Plaintiffs do not seek an order compelling the Town to enforce its Zoning Ordinance.

The pertinent legal authority on this issue is in *Little Joseph Realty v. Town of Babylon*, 41 NY2d 738 (1977) and its progeny. In *Little Joseph*,

plaintiff sued a municipality under Town Law section 268(2) and the common law of private nuisance. The Town bought land and leased it to a private party for an asphalt plant and sand excavation lot. The trial court dismissed the complaint and the appellate court reversed. The Court of Appeals both affirmed the appellate court decision and stated that it would have granted plaintiff an unconditional injunction if plaintiff had asked for one. In so holding, the Court explained that the Courts need not stand by and allow municipalities to permit unlawful uses of land subject to their jurisdiction:

> "When it has been established that a defendant violates a valid zoning ordinance there is no need for judicial accommodation of the defendant's use to that of plaintiff. For a court to do so would be for it to usurp the legislative function." 41 NY2d at 745.

In *Lesron Junior Inc. v. Feinberg,* 13 AD2d 90 (1st Dept. 1961) plaintiff sued to enjoin construction of a building that he believed violated the town's zoning code. The town had already issued a building permit for the construction and plaintiff did not appeal the permit to the ZBA. The Court unequivocally stated that "the fact that there is an outstanding and unrevoked building permit is immaterial and constitutes no defense to the action for injunctive relief where the structure in fact violates the law." 13 AD2d at 95. *See also Marcus v. Village of Mamaroneck,* 283 NY 325 (1940) (Holding that "no building permit by an administrative official could condone, or afford immunity for, a violation of law" at 330); *South Woodbury Taxpayers Association v. American Institute of Physics,* 104 Misc.2d 254 (S.C., Nassau Co, 1980) ("A private person's action to enjoin a zoning violation may obtain an injunction to

prevent its continuance even where defendant has proceeded pursuant to a building permit and the permit is attacked for illegality" at 161).

An action for injunctive relief is available even if plaintiff fails to appeal the building inspector's determination in an Article 78 proceeding. *Leising v. Town of Clarence*, 144 AD2d 969 (4th Dept. 1988) (holding that plaintiff may commence an action to enjoin continuing violations of a zoning ordinance ever if he failed to timely appeal that decision to the ZBA).

Consequently, an erroneous determination that the County's conduct complied with the Zoning Ordinance does not bar plaintiffs' claims under Town Law 268(2).

POINT II
THE EXHAUSTION DOCTRINE DOES NOT APPLY

The Town argues that plaintiffs lack standing because they failed to exhaust administrative remedies by appealing the Building Inspector's decision to the ZBA. This argument is wrong.

Plaintiffs' failure to appeal to the ZBA is not fatal to its action for injunctive relief because the ZBA cannot provide "adequate and complete relief" to them in the form of an injunction. *Haddan v. Salzman*, 188 AD2d 515 (2d Dept. 1992) (holding that the trial court improperly dismissed a complaint to enjoin a zoning violation for failure to exhaust administrative remedies).

Failure to exhaust administrative remedies does not bar a claim for equitable relief unless the administrative remedy is "plain and adequate and as certain, prompt, compete and efficient to attain the ends of justice and its

prompt administration as the remedy in equity." *Lesron Jr. Inc. v. Feinberg,* 13 AD2d 90 (1st Dept. 1961). In determining whether an action for injunctive relief is barred by failure to exhaust administrative remedies, it must be

> "borne in mind that an administrative officer or board generally has but very limited powers; and that a party, maintaining a proceeding before such officer or board, is not generally enabled to obtain at his or its hands the broad and complete relief providable by a court. And, if an administrative remedy would afford plaintiff substantially less than adequate relief for a clear wrong, the failure to exhaust the same should not be regarded as bar to the obtaining of complete relief in a court of equity." *Lesron Jr. Inc. v. Feinberg,* 13 AD2d at 93-94.

In *Lesron Junior Inc. v. Feinberg,* 13 AD2d 90 (1st Dept. 1961) plaintiff sued to enjoin construction of a building that he believed violated the town's zoning code. The town had already issued a building permit for the construction and plaintiff did not appeal the permit to the ZBA. The Court stated that plaintiff's action for injunctive relief was not barred by its failure to appeal the building inspector's determination to the ZBA because the ZBA could not provide plaintiff with full and complete relief. Is so holding, the Court noted that:

1. The remedies that could result from a ZBA determination were incapable of providing plaintiff with the relief it sought. The ZBA's power was limited to approving the building permit; revoking the building permit; or granting a variance. None of those remedies would aid plaintiffs.

2. If plaintiff appealed the building inspector's determination to the ZBA and received an unfavorable decision on appeal, plaintiff would be faced with the necessity of an Article 78 proceeding to challenge it. This would result in unnecessary, time-consuming and expensive litigation.

3. Only the Supreme Court had the power to grant the injunctive relief sought by plaintiff.

13 AD2d at 94-95.

Based upon this analysis, the Court concluded that "If plaintiffs are entitled to bar the construction of the proposed structure, this action constitutes the proper and simple method of affording them relief. It is settled beyond doubt that an action for injunctive relief is the appropriate remedy for an aggrieved property owner who seeks to bar the erection of a structure on adjoining or nearby premises in violation of express zoning regulations [citations omitted]" 13 AD2d at 95.

In *Marcus v. Village of Mamaroneck*, 283 NY 325 (1940) the Court of Appeals did not require plaintiffs to seek a ZBA determination before commencing an action to enjoin building alterations that violated the Zoning Ordinance. Similarly, in *Weitzen v. 130 East 65th Street Sponsor Corp.*, 86 AD2d 511 at 511 (1st Dept. 1982), the Court explicitly stated that the "contention that injunctive relief may not issue because plaintiff failed to exhaust administrative remedies by seeking review of the building inspector's determination before the ZBA is without merit as such remedy would not provide under the circumstances herein adequate and complete relief." See also *Queens County Business Alliance, Inc. v. New York Racing Association, Inc.*, 98 AD2d 743 (2d Dept. 1983) (converting an Article 78 proceeding to an action to enjoin zoning violations or nuisance and holding that "aggrieved parties may bring a plenary action for an injunction against the property owners who are violating the zoning ordinance"); *Pansa v. Sirkin*, 27 AD2d 636 (4th Dept. 1966);

Fried v. Fox, 49 AD3d 877 (2d Dept. 1975); *Bingham v. Town of Burlington*, 116 AD2d 900 (3rd Dept. 1986).

For these reasons, plaintiffs' action is not barred for failure to exhaust administrative remedies.

POINT III
PLAINTIFFS ESTABLISHED THAT THE TOWN FAILED OR REFUSED TO ENFORCE THE ZONING CODE

The Town cites *Marlowe* and *Forget* for the proposition that there is no "failure or refusal" to enforce the Zoning Code as required by Town Law section 268(2) where the Town incorrectly determines that no zoning violation exists.

This is another way of arguing that plaintiffs' claims under Town Law 268(2) are barred by the Town's (incorrect) determination that no zoning violation exists and fails for the same reason. When it has been established that a defendant violates a valid zoning ordinance there is no need for judicial accommodation of the defendant's use to that of plaintiff. For a court to do so would be for it to usurp the legislative function. *Little Joseph Realty v. Town of Babylon*, 41 NY2d at 745 (1977). See also *Marcus v. Village of Mamaroneck*, 283 NY 325 (1940); *Lesron Junior Inc. v. Feinberg*, 13 AD2d 90 (1st Dept. 1961); *South Woodbury Taxpayers Association v. American Institute of Physics*, 104 Misc.2d 254 (S.C., Nassau Co, 1980).

Here plaintiffs clearly asked the Town to enjoin the improper conduct and the Town refused to do so. Verified complaint, paragraphs 26 and 26 and

Exhibit "C". This establishes that the Town failed or refused to enforce the Zoning Ordinance.

POINT IV
THIS ACTION IS NOT BARRED BECAUSE ENFORCEMENT BY THE TOWN MAY BE DISCRETIONARY

The Town argues that plaintiffs cannot proceed under Town Law 268(2) because it could not proceed in an Article 78 proceeding in the nature of mandamus. This argument lacks merit. The New York State legislature has provided plaintiffs with a specific statutory remedy to enjoin a zoning violation under Town Law 268. Town Law 268(2); Little *Joseph Realty v. Town of Babylon*, 41 NY2d at 790 (1977); *Manuli v. Hildenbrandt*, 144 AD2d 789 at 790 (3rd Dept. 1988). The Court of Appeals has long held that injured New Yorkers may sue to enjoin zoning violations if the municipality does not: "The provision that an official of the village shall enforce the zoning ordinance does not prevent a private property owner who suffers special damage from maintaining an action for redress." *Marcus v. Mamaroneck*, 283 NY 325 at 333 (1940).

Moreover, the validity of the relief sought herein is the very reason why there is no cause of action to compel the municipality to act in an Article 78 mandamus proceeding. When a use violates a valid zoning ordinance, it must be enjoined unconditionally. *Little Joseph Realty v. Town of Babylon*, 41 NY2d at 745 (1977). The drastic remedy of mandamus is not available to compel a municipality to enforce a zoning law because aggrieved parties may bring a plenary action for an injunction against the property owners who are violating

the zoning ordinance. *Pansa v. Sirkin,* 27 AD2d 636 (4th Dept. 1966); *Fried v. Fox,* 49 AD3d 877 (2d Dept. 1975); *Bingham v. Town of Burlington,* 116 AD2d 900 (3rd Dept. 1986); *Queens County Business Alliance, Inc. v. New York Racing Association, Inc.*, 98 AD2d 743 (2d Dept. 1983) (converting an Article 78 proceeding to an action to enjoin zoning violations or nuisance).

The Town's reliance on *Church of the Chosen v. City of Elmira,* 18 AD3d 978 (3rd Dept. 2005); *Matter of Dyne v. Village of Johnson City,* 261 AD2d 783 (3rd Dept. 1999) and *Matter of Young v. Town of Huntington,* 121 AD2d 641 (2d Dept. 1986) is misplaced because each of those cases involve Article 78 proceedings in the nature of mandamus, not actions under Town Law 268(2) or the common law of public nuisance.

Moreover, *Manuli v. Hildebrandt,* 144 AD2d 789 (3rd Dept. 1988) supports plaintiffs' position herein because the Court recognized that petitioners would have a valid claim under Town Law 268(2) even though there was no claim under Article 78: "The absence of a judicial remedy [under Article 78] would not prevent plaintiffs from pursuing legal remedies directly against [the property owner] to abate a harmful violation of applicable zoning laws (*see, Town Law section 268(2); Little Joseph Realty v. Town of Babylon,* 41 NY2d 738.)" 144 AD2d at 790.

Finally, the Town of Wheatland is actively assisting Monroe County with the soccer field development pursuant to an Inter-Municipal Agreement. See Affirmation of Mindy L. Zoghlin sworn to May 19, 2010 paragraphs 3 and 4 and

Exhibits "A" and "B". Plaintiffs seek to enjoin the Town's conduct in site development, not to compel it to enforce its zoning laws.

For these reasons, the lack of mandamus relief under Article 78 does not prevent plaintiffs from proceeding under Town Law section 268(2) or the common law of public nuisance.

POINT V
THERE IS NO NEED TO FILE A NOTICE OF CLAIM UNDER GML 50-E

The Town argues that plaintiffs' nuisance claim must be dismissed for failure to file and serve a written Notice of Claim under General Municipal Law section 50-e and 50-i. This argument lacks merit. The notice of claim provisions of GML 50-i do not apply to actions seeking only injunctive relief. *Francola v. City of Utica*, 77 AD2d 161 (4th Dept. 1980); *Malcuria v. Town of Seneca*, 66 AD2d 421 (4th Dept. 1979); Mazo *v. Town of Shawgangunk*, 60 AD2d 734 (3rd Dept., 1977). Here plaintiffs seek only injunctive relief, so there is no need to file a Notice of claim under the GML.

POINT VI
PLAINTIFFS HAVE STANDING

The Town argues that plaintiffs lack standing to commence an action under Town Law 268(2). This argument lacks merit.

To maintain a private action to enjoin a zoning violation, a plaintiff must establish that he has standing. *Zupa v. Paradise Point Association, Inc.*, 22 A.D.3d 843 (2d Dept. 2005). In order to establish standing, a plaintiff must demonstrate that he may suffer an "injury in fact" from the challenged action; and (2) that "the interest asserted is arguably within the zone of interest to be

protected by the statute" in question. *Dairylea Corp., Inc. v. Walkley*, 387 N.Y.2d 6 (1975). Standing exists when a party challenging an administrative act can show that such action will have a harmful effect and that the resulting harm is different from that suffered by the public at large. *Society of Plastics Industry v. County of Suffolk*, 77 N.Y.2d 761 (1991). However, "...standing principles, which are in the end matters of policy, should not be heavy-handed, and in zoning litigation in particular, it is desirable that land use disputes be resolved on their own merits rather than by preclusive, restrictive standing rules." *Zupa* at 843-844; *Matter of Parisella v. Town of Fishkill*, 209 A.D.2d 850, 851 (3d Dept. 1994); *Matter of Massiello v. town Board of Lake George*, 257 A.D.2d 962 (3d Dept. 1999); *Matter of Rosch v. Town of Milton Zoning Board of Appeals*, 272 A.D.2d 761 (3d Dept. 2000). Moreover, on a motion to dismiss a complaint, the allegations contained in the complaint are deemed to be true (*Matter of Massiello v. town Board of Lake George*, 257 A.D.2d 962 (3d Dept. 1999)); and the facts contained in the complaint must be considered in their most favorable light (*Matter of Parisella v. Town of Fishkill*, 209 A.D.2d 850, 851 (3d Dept. 1994)).

Plaintiffs Have Established Injury in Fact

Injury in fact is the first prong of the standing test. Plaintiffs need not establish definitive proof of actual harm in order to establish standing, but need only demonstrate that there may be an adverse effect. *Tuxedo Conservation & Taxpayers Association v. Town Board of the Town of Tuxedo*, 96 Misc. 2d 1, 4 (Sup.Ct. Orange County 1978), *aff'd* 69 A.D.2d 320 (2d Dept.

1979); *Har Enterprises v. Town of Brookhaven*, 74 N.Y.2d 524 (1989). An allegation of close proximity alone may give rise to an inference of injury enabling a nearby owner to challenge an administrative land use determination without proof of actual injury. *Sun-Bright Car Wash v. Board of Zoning and Appeals of Town of North Hempstead*, 69 N.Y.2d 406, 414 (1987).

The court in *Matter of Committee to Preserve Brighton Beach and Manhattan Beach, Inc. v. Planning Commission of the City of New York*, 259 A.D.2d 26 (1st Dept. 1999) stated that, "an allegation of close proximity alone may give rise to an inference of injury enabling a nearby party to challenge an administrative determination without proof of actual." In so holding, the court recalled the promising words of the New York Court of Appeals in *Sun-Bright Car Wash v. Board of Zoning and Appeals of Town of North Hempstead*, 69 N.Y.2d 406, 409 (1987): "standing principles, which are in the end matters of policy, should not be so heavy-handed ... it is desirable that land use disputes be resolved on their own merits rather than by preclusive, restrictive standing rules." *Brighton Beach* at 33. For the reasons set forth below, each individual plaintiff has standing to bring this proceeding.

Here, plaintiff Susan Ferrari Rowley is a taxpayer in the Town of Wheatland who lives at 197 Stewart Road. Her property is adjacent to the southern boundary of the Park. Verified Complaint paragraph 5. Likewise, plaintiff Gregory Stokoe is a taxpayer in the Town of Wheatland who lives at 9835 Union Street. His property is surrounded on three sides by the Park and is located less than one hundred (100) feet from the site of the proposed soccer

field development. Verified Complaint paragraph 6. Plaintiff William McGuire is a taxpayer in the Town of Wheatland who lives at 9787 Union Street. His property is adjacent to the eastern boundary of the Park. Verified Complaint paragraph 7. Each of the plaintiffs is in close proximity with the proposed soccer field development.

Each of the plaintiffs has established that they will suffer direct harm that is different from that of the public at large. The entrance to the Park is by way of a Town road. The addition of automobile traffic will significantly increase the volume of traffic on Stewart Road and Union Street, which intersects with Stewart Road and provides the sole vehicular access to the Park. Plaintiffs' close proximity and frequency of use of these roads will be impacted and the increased traffic congestion will be burdensome and considerably noisy. Furthermore, plaintiffs regularly use the Park trails. League and tournament play will result in increased congestion at the entranceway and within the parking lot. This will limit plaintiffs' ability to access the Park and enjoy the recreational opportunities there.

Plaintiff Gregory Stokoe has already suffered an injury in fact from activities related to the proposed soccer filed development. Before grading for the proposed development began the Stokoe home was secluded from the Park by small and medium size trees and brush. Affidavit of Gregory Stokoe sworn to May 19, 2010, para. 4. He frequently used an outdoor patio that was isolated from the Park for cooking and relaxing. The trees and brush have been removed and Mr. Stokoe now has a direct line of sight from his property to the

proposed soccer field development. Id. at para. 5-6. There no longer is a visual or noise barrier between the Stokoe property and the proposed development. Id. at para. 7.

A plaintiff's aesthetic or quality of life injuries have consistently been recognized by the courts as a basis for standing. *Matter of Committee to Preserve Brighton Beach and Manhattan Beach v. Planning Commission of the City of New York*, 259 A.D.2d 26 (1st Dept. 1999); *Matter of Duke & Benedict v. Town of Southeast*, 253 A.D.2d 877 (2d Dept. 1998) (owner of nearby property who alleges actual or potential noneconomic harm from projects risks harm that is different from the public at large); *Matter of Committee to Preserve Brighton Beach and Manhattan Beach v. Council of City of New York*, 214 A.D.2d 335, 336 (1st Dept. 1995), *lv denied* 87 N.Y.2d 802 (standing derived from proximity of petitioners' residences adjacent to the project which will impact on their sightlines, availability of light and potential flow of sea air); *Matter of Steele v. Town of Salem Planning Board*, 200 A.D.2d 870, 872 (3d Dept. 1994), *lv denied* 83 N.Y.2d 757 (requisite showing of standing made by allegations that petitioner lives in immediate vicinity of the project and that it affects his scenic view).

The development of soccer fields will diminish plaintiffs' aesthetic enjoyment of the Park. Approximately three and one half (3.5) acres of formerly undisturbed land hosting a variety of domestic wildlife as well as trees and vegetation has been removed and replaced with graded dirt. Similarly, plaintiffs' enjoyment of the Park will be diminished by crowds, noise and

littering. Mr. Stokoe's privacy already has been invaded by the removal of trees and brush at the border between his home and the Park. These allegations establish that plaintiffs will suffer an injury in fact which is different from that of the public at large.

Plaintiffs' Injuries Are Within the Zone of Interested to Be Protected by the Zoning Code

Plaintiffs have alleged violations which are within the zone of interest to be protected by the Town ordinance. The Park is zoned in an AR-2 ("Agricultural Residential") district. The purpose of the AR-2 Agricultural Rural District is to:

> "encourage a proper environment to foster normal agricultural operations and a rural, low-density, residential land use; to preserve viable land for agriculture; to assure compatible types and densities of rural development where public sewers and/or water service do not exist and are not envisioned; and to protect groundwater quality to the greatest extent possible by controlling development over established aquifers. It is intended to be rural in character with rolling open countryside, fields, woods and sparse development predominantly outside the higher-density business and residential areas." Wheatland Town Code section 130-7(B)(1).

The zoning regulation is designed to maintain the agricultural and residential nature of the surrounding area with limited exceptions. Introducing commercial activities into the area will negatively impact the neighboring landowners' enjoyment of this rural, low-density residential land use. It is the very harm the zoning regulation aims to prevent.

The Park's only means of ingress and egress is a narrow entrance perpendicular to Union Street. Union Street is a two-lane Town road with no

shoulder or sidewalks. Affidavit of Susan Ferrari Rowley sworn to May 19, 2010, para. 8 (the "Rowley Affidavit.") Increased traffic volumes, including school buses and automobiles driven by family, friends and other spectators would generate high density commercial activity in this low density rural environment. Rowley Affidavit, para. 18. The Park is surrounded on all sides by residential homes including those of plaintiffs. Id. at para. 7. There are no other commercial activities within two miles of the Park. Id. at para. 12. Like plaintiffs, those in the surrounding area trust their routine way of life will not be suddenly disrupted by irregular high density commercial activities foreign to this district. For all of these reasons, plaintiffs have established injury in fact within the zone of interest and therefore have established standing.

CONCLUSION

The Town of Wheatland's motion to dismiss must be denied.

Dated: Rochester, New York
May 19, 2010

BANSBACH ZOGHLIN P.C.
Mindy L. Zoghlin, Esq., of Counsel
Attorneys for Plaintiff
Office and Post Office Address
31 Erie Canal Drive, Suite A
Rochester, New York 14626
Tel: (585) 227-2610

TO: FIX SPINDELMAN BROVITZ AND GOLDMAN P.C.
Rueben Ortenberg, Esq., of Counsel
Attorneys for Defendant Town of Wheatland
295 Woodcliff Drive
Fairport, New York 14450

Sean T. Hanna, Esq., of Counsel
Attorneys for Defendant Monroe County
39 West Main Street, Room 307
Rochester, New York 14614
Tel: (585) 753-1407