No. 02-7346

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HENRY DITTMER, JAMES ALLEN, MILTON ARONAUER, JAMES K. BARRY, JOHN BARRY, LORRAINE BARRY, ROY BENDER, LILLIAN EVERS, CHESTER BICZYOWKSI, OTTA BISCHOFF, KATHRYN BISCHOFF, LOIS BRASS, BRESKEL ASSOCIATES (withdrawn from case), MERCEDES BRODERICK, DEBRA BROWN, JERILYN BUCK, ERVINE BROWN, BUNKER HILL ESTATES, INC., JOHN BUTLER, CANDACE BUTLER, WILLIAM CLAVELIN, RALPH B. CLEMENTE, ROBERT COMUNALE, CLEMENTE COTE, EUGENIA COTE, IRENE CUNARD, ANNA MARIE CZARNECKI, CONCETTA D'ANGELO, JOSEPH DASILVA, EDITH DASILVA, RUDOLPH DAVIS, VITO DeGAETANO, JOHN DELIA, JAMES A. McLOUGHLIN, IDA DITTMER, RICHARD DITTMER, RICHARD C. DITTMER, HENRY R. DITTMER, RICHARD R. DITTMER, IDA HARDEKOPH, CATHERINE EASTLUND, LEONARD ERHARDT, FAY ERHARDT, ERNA BENJAMIN, R. FABRIZIO, CONNIE FALKENSTEIN, RALPH FARRAUTO, MICHELLE FARRAUTO, FRANKLIN FAYE, JOSEPHINE FEDERICI, MELVIN FELDMAN, JOSEPH FERRARI, ANGELINA FERRARI, THOMAS GAMBETTA, JOAN GATTI, ISABEL GENARI, GLADYS GHERARDI, EVAN GOLDSTEIN, ESTELLE GRABOWSKI, PATRICIA GREEN, EDRIS GREENIDGE, JOSEPH GRIFFITH, NANCY GRIVAS, MARVIN GUTIN, SUSAN GUTIN, ROBERT HAMEL, HAMPTON TERMITE, INC., ANTHONY HARRISON, JOHN HAUSS, MARIA HAUSS, DONALD MARKSTEIN, GLORIA HENDRIX, WILLIAM HENRICHSEN, JOEL HOFFMAN, BEATRICE HOFFMAN, PAUL HOLSCHUH, PAUL HOCK, ELFRIEDA HOCK, NATHANIEL HUGHES, SALVATORE INDOVINO, AUDREY POLLACK ISAACS, WILLIAM JACKOMIS, ROBERTA JACKOMIS, FRANZ KAMMEL,

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Plaintiffs-Appellants,

v.

COUNTY OF SUFFOLK, New York, TOWN OF BROOKHAVEN, New York, TOWN OF RIVERHEAD, New York, TOWN OF SOUTHAMPTON, New York, CENTRAL PINE BARENS JOINT PLANNING AND POLICY COMMISSION, ROBERT J. GAFFNEY, RAY E. COWEN, VINCENT CONNUSCIO, FELIX GRUCCI, and JAMES STARK**,**

Defendants-Appellees.

On Appeal From The United States District Court
Eastern District of New York
District Court Civil No. 96-2206 TCP/ARL
The Honorable Thomas C. Platt

BRIEF OF AMICI CURIAE ASSOCIATION OF TOWNS OF THE STATE OF NEW YORK, NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS, and NEW YORK STATE ASSOCIATION OF COUNTIES IN SUPPORT OF DEFENDANTS-APPELLEES

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INTEREST OF *AMICI CURIAE*

The Association of Towns of the State of New York was established in 1933 to help towns obtain greater economy and efficiency by providing training programs, research and information services, technical assistance, legal services, computer software programs, insurance programs, and a variety of publications. In addition, the Association monitors State legislation and advocates town concerns to the New York State Legislature. The membership of the Association consists of 97 percent of New York's 932 towns. The towns of Brookhaven, Riverhead, and Southampton are members of the Association and defendants in this litigation.

The New York State Conference of Mayors and Municipal Officials (NYCOM) is a not-for-profit voluntary membership association established in 1910. Its members include 57 of the State's 62 cities and 515 of the State's 558 villages. NYCOM is devoted to protecting and advocating the interests of cities and villages throughout the State.

The New York State Association of Counties (NYSAC) is a not-for-profit municipal corporation incorporated pursuant to the laws of the State of New York. NYSAC is the only statewide municipal association representing elected county executives, county supervisors, legislators, representatives, county attorneys, commissioners, and administrators from the 62 counties of the State

of New York, including the City of New York. NYSAC's activities involve essential governmental functions, and all of its activities, including the filing of this amicus brief, otherwise accrue to the benefit of those county governments in the State of New York.

Amici's members "have long engaged in the commendable task of land use planning." *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994). *Amici* thus bring a vital perspective to this case and have a compelling interest in the continued uniformity in the law regarding claims challenging protections for natural resources and other vital public interests. The preservation of the Pine Barrens Protection Act is important not only for the local governments directly impacted by the Act, but also for other municipalities in New York State that may seek similar State legislation to preserve unique natural resources in their communities.

All parties have consented to the filing of this brief.

INTRODUCTION

The New York State legislature enacted the Pine Barrens Protection Act ("the Act") in 1993 to protect the pine barrens ecosystem and its significant natural resources. *See* N.Y. Envtl. Conserv. Law (ECL) §§ 57-0119(1); 57-0121(2) (consol. 2001). As the District Court observed, the Act's stated goals are: 1) to protect the largest drinking water source in New York State; 2) to

preserve the ecologically unique and fragile Pine Barrens ecosystem; 3) to protect "unique natural agricultural, historical, cultural and recreational resources"; 4) to manage growth and promote environmentally-sensitive development; 5) to provide for forest fire management, including the use of controlled burns; 6) to limit urban sprawl; and 7) to preserve and protect surface waters in the Pine Barrens. *See Dittmer v. County of Suffolk*, 188 F. Supp. 2d 286, 289 (E.D.N.Y. 2002); ECL § 57-0105.

To implement the Act, the legislature created the Pine Barrens Commission, composed mainly of local officials, and charged it with preparing a Comprehensive Land Use Plan ("the Plan") for the region. *See* ECL § 57-0119(6)(a). Landowners wishing to develop property in the area designated by the Act as the Core Preservation Area must apply to the Commission for a permit; however, development for agricultural or horticultural purposes may proceed as of right, *see* ECL § 57-0107(13)(f)(v), as may certain residential developments on subdivisions approved by June 1, 1993, *see* ECL § 57-0107(13)(f)(ix), and certain single family homes on designated roadside parcels. *See* ECL § 57-0107(13)(f)(x). The Commission oversees a transferable development rights program aimed at redirecting development outside the Core Preservation Area, *see* ECL § 57-0119(6)(j), and it has the authority to grant building permits for affected owners who can demonstrate hardship. *See* ECL

§§ 57-0123(3); 57-0121(10). A landowner who is dissatisfied with a Commission determination can seek judicial review. *See* ECL § 57-0135. If a court concludes that a Commission determination works a taking, the Commission is empowered to set aside its determination or acquire the property by eminent domain. *Id.*

The Appellants ("the Landowners") comprise some 167 similarly situated owners of property in the Core Preservation Area. They allege that the Act and the Plan deprive them of "'protectible [sic] property rights without due process of law [and] the equal protection of law.'" *Dittmer*, 188 F. Supp. 2d at 289-90 (quoting Second Am. Compl. ¶ 17). As this Court recognized, however, "plaintiffs have yet to invoke any administrative process under the Act." *Dittmer v. County of Suffolk,* 146 F.3d 113, 117 (2d Cir. 1998).

Instead, the Landowners now appear before this Court attempting to press a menagerie of meritless constitutional claims. One of these—their bill of attainder claim—was neither alleged in any of their three complaints nor considered at the District Court level. What is more, the Landowners throughout their brief continually attempt to resuscitate a takings claim that does not appear in their most recent complaint and the District Court found to be abandoned. *See Dittmer,* 146 F.3d at 115 n.3 (noting that "the [takings] claim is

not apparent in the amended complaint"). The only issues remaining in this case are their facial equal protection and substantive due process claims.

Amici's submission will treat these issues summarily so as not to duplicate the filing of Appellees (the "Government"). The primary purpose of this brief is to impress upon the Court the serious negative consequences of such frivolous lawsuits on the planning and zoning function of municipalities in the Pine Barrens region and throughout New York State.

We urge the Court to reiterate as clearly as possible that federal courts are neither superlegislatures nor zoning boards of appeal and should entertain challenges to land use controls only when they genuinely infringe on constitutionally protected interests. If the "commendable task of land use planning," is to go on at all, *Dolan*, 512 U.S. at 396, district courts must separate the wheat from the chaff and spare municipalities the burdens of costly and fruitless litigation.

Section I of this brief focuses on the historical deference owed to the legislature in land use cases. Section II reviews the Landowners' claims in turn, and Section III addresses the chilling effect of unnecessary land use litigation on the planning efforts of state and local governments.

ARGUMENT

I. FEDERAL COURTS SHOULD AFFORD APPROPRIATE DEFERENCE TO STATE AND LOCAL GOVERNMENT DECISIONMAKERS ON LAND USE AND ZONING ISSUES.

Time and again, this Court has affirmed "the general proscription that 'federal courts should not become zoning boards of appeal to review nonconstitutional land[-]use determinations by the [C]ircuit's many local legislative and administrative agencies.'" *Harlen Assocs. v. Village of Mineola*, 273 F.3d 494, 502 (2d Cir. 2001) (rejecting due process and equal protection challenges as mere policy disagreements with the zoning board's decision) (quoting *Zahra v. Town of Southold*, 48 F.3d 674, 679-80 (2d Cir. 1995)); *accord Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 17 (2d Cir. 1999) (rejecting due process and equal protection challenges); *Crowley v. Courville*, 76 F.3d 47, 52 (2d Cir. 1996) (same); *Sullivan v. Town of Salem*, 805 F.2d 81, 82 (2d Cir. 1986) (same).

Indeed, federal appellate courts have long acknowledged their limited role in land use disputes. "The Courts of Appeals were not created to be 'the Grand Mufti of local zoning boards,' *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989), nor do they 'sit as [] super zoning board[s] or [] zoning board[s] of appeals.'" *Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) (quoting *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985)); *accord Shelton v. City of College Station,* 780 F.2d 475, 475 (5th Cir.

1986) (en banc) ("[R]eview of municipal zoning is within the domain of the states, the business of their own legislatures, agencies, and judiciaries, and should seldom be the concern of federal courts."). In *Sullivan v. Town of Salem*, this Court noted the reason why:

> Federal judges lack the knowledge of and sensitivity to local conditions necessary to a proper balancing of the complex factors that enter into local zoning decisions. Even were we blessed with the requisite knowledge and sensitivity, due regard for the constitutional role of the federal courts in our dual judicial system would permit us to exercise jurisdiction in zoning matters only when local zoning decisions infringe national interests protected by statute or the constitution.

Sullivan, 805 F.2d at 82.

To do otherwise would hearken back to "the long-discredited era of *Lochner*-style judicial activism," *Chateaugay Corp. v. Shalala*, 53 F.3d 478, 487 (2d Cir. 1995) (rejecting takings claims), in which courts stringently analyzed the relationship between a challenged law and its stated objectives. *See Lochner v. New York*, 198 U.S. 45, 61-62 (1905) (striking down a New York law restricting work hours in bakeries despite evidence that working conditions for bakers posed serious health risks).

Landowners face a particularly high burden where, as here, their substantive due process and equal protection challenges are facial. In a facial attack to a statute, the challenger must show that "no set of circumstances exists under which the Act would be valid." *DeMichele v. Greenburgh Cent. Sch.*

Dist. No. 7., 167 F.3d 784, 789 (2d Cir. 1999); *Kittay v. Giuliani*, 112 F. Supp. 2d 342, 353-54 (S.D.N.Y. 2000) (dismissing facial equal protection and substantive due process challenges to land use regulations intended to protect watershed areas).

II. THE DISTRICT COURT PROPERLY REJECTED ALL OF THE LANDOWNERS' CONSTITUTIONAL CLAIMS.

A. The Landowners' Substantive Due Process Claim Must Fail Because the Act Is Rationally Related to Several Important Government Interests.

In order to prevail on a substantive due process theory, the Landowners must show that the statute in question lacked a rational basis. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (holding that a statute may be found wanting if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."); *Orange Lake Assocs., Inc. v. Kirkpatrick*, 21 F.3d 1214, 1225 (2d Cir. 1994) (quoting *Euclid*); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 102 (2d Cir. 1992) ("In the zoning context, a government decision regulating a landowner's use of his property offends substantive due process if the government action is arbitrary or irrational.").

Under a rational basis standard, "a statute will be sustained if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose." *Exxon Corp. v. Eagerton*, 462 U.S.

176, 196 (1983). Moreover, where the legislative judgment is at least debatable, the decision of the legislature must be upheld against a substantive due process challenge if "any state of facts either known or which could reasonably be assumed affords support for it." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (A statute must be sustained "if any state of facts reasonably may be conceived to justify it."); *Brady v. Town of Colchester*, 863 F.2d 205, 216 (2d Cir. 1988) (same).

The Landowners did not plead and cannot possibly show that the Act lacks a rational relationship to a legitimate government interest. Indeed, the Act addresses governing interests of the first magnitude. As the U.S. Environmental Protection Agency has recognized, the Long Island Pine Barrens sit atop an aquifer that supplies the "sole or principle drinking water supply" for 2.5 million people and is "vulnerable to contamination." *See* 43 Fed. Reg. 26611-12 (June 21, 1978). There can be no doubt that as a matter of law protection of drinking water supplies is a paramount government interest. As the Third Circuit has made clear, "because pure water is a precondition for human health, regulating the water supply is a basic and legitimate governmental activity." *Stern v. Halligan,* 158 F.3d 729, 732 (3d Cir. 1998).

The protection of open space and the preservation of ecosystems are likewise universally recognized as legitimate governmental objectives and

provide more than a rational basis for the Act. *See Agins v. Tiburon*, 447 U.S. 255, 261 (1980) (holding that open space plans and zoning regulations intended to protect against "the ill effects of urbanization . . . have long been recognized as legitimate."); *South County Sand & Gravel Co. v. Town of South Kingstown*, 160 F.3d 834, 836 (1st Cir. 1998) ("There is no dispute that" preventing the loss of "natural resources including wildlife habitat, groundwater quality and scenic value" are "legitimate municipal goals."); *Orange Lake*, 21 F.3d at 1227 ("[T]he limitation of future development around Orange Lake, an environmentally critical area according to the town's planning consultants, is a perfectly legitimate goal.").

The Landowners argue (Br. 34) that the Core Preservation Area of the Pine Barrens Act does not regulate all areas that might impact the aquifer, but it is not the role of a federal court "to speculate whether the evils proposed to be ameliorated by the law could have been better regulated in some other fashion." *Beattie v. New York*, 123 F.3d 707, 712 (2d Cir. 1997) (citing *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 378 (1973)). The Supreme Court has stated clearly that "the effectiveness of existing laws in dealing with a problem identified by Congress is ordinarily a matter committed to legislative judgment." *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 283 (1981). It is enough that the legislature "considered the effectiveness

of existing legislation and concluded that additional measures were necessary." *Id*. The Landowners would have this Court rule that a legislature may not regulate incrementally, a holding that would call into question the constitutionality of virtually every state or federal environmental protection.[1]

Because the Act is unquestionably related to several legitimate government interests, the Landowners' substantive due process claim must fail.

B. The Landowners' Equal Protection Claim Must Fail Because the Act Has a Rational Basis and Neither Impinges on Fundamental Rights Nor Employs Suspect Classifications.

Legislation that neither impinges upon a fundamental right guaranteed by the Constitution nor employs a suspect classification such as race, nationality, alienage, or gender does not violate the Equal Protection Clause unless the

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[1] As the District Court, *see Dittmer,* No. 96-CV-2206, slip op. at 12-14 (July 7, 1999), and the Government's brief (Br. at 54-56) indicate, the Landowners have also failed to plead and establish a property interest, which is a prerequisite for a substantive due process claim. *See Board of Regents v. Roth,* 408 U.S. 564, 577 (1972) (holding that to claim a property interest under the Fourteenth Amendment, a plaintiff "clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."); *RRI Realty Corp. v. Inc. Village of Southhampton*, 870 F.2d 911, 915-18 (2d Cir. 1989). A cognizable property interest exists "only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured." *RRI Realty*, 870 F.2d at 918. Neither the Second Amended Complaint nor the Landowners' brief before this Court even addresses how prior zoning classifications applied to their property. As a matter of law, the Landowners have failed to demonstrate a property interest sufficient to support a due process claim.

statute lacks a rational basis. *See, e.g., Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-96 (1983); *Vance v. Bradley,* 440 U.S. 93, 96-97 (1978) (applying rational basis standard to equal protection challenges); *Minnesota v. Clover Leaf Creamery Co*., 449 U.S. 456, 461-63 (1981) (same); *Euclid,* 272 U.S. at 395 (same); *Orange Lake*, 21 F.3d at 1225-27 (same). In the area of equal protection, a state or municipality "does not offend the Constitution simply because the correction of a particular evil creates classifications that result in some inequality, so long as the classifications have a rational basis." *See Beattie v. New York*, 123 F.3d at 711-12 (citing *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970)).

The Landowners assert that the Act violates equal protection because it impermissibly treats similarly situated landowners differently. Specifically, they claim that town officials conspired to exempt certain federal lands—the Calverton Property—from the Core Preservation Area, and that this exemption treats similarly situated properties differently without a rational basis.

As an initial matter, the landowners' undeveloped properties are not similarly situated. The Calverton Property houses a United States Department of Defense Weapons Industrial Reserve Plant that bears little resemblance to the Landowners' properties. *See Dittmer*, 188 F. Supp. 2d at 290. Indeed, the

developed portions of the plant include jet runways, fuel storage facilities, airplane hangars, and maintenance facilities. *See id.*

Moreover, the legislature distinguished between the developed and undeveloped portions of the plant in the Act. Portions of the plant that contain significant open space are in fact located within the Core Preservation Area.

The Landowners are left to argue only that the precise lines of the Core Preservation Area might have been drawn differently. This is not enough. As the Supreme Court said in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), "every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function." *Id.* at 8.

Accordingly, the District Court rightly rejected the Landowners' equal protection claim.

C. The Landowners' Takings Claim Must Fail Both As a Matter of Law and Because No Such Claim Remains in This Case.

Throughout their brief, the Landowners attempt to resuscitate a takings claim that the parties themselves agreed was abandoned and the District Court properly found to be abandoned. *See Dittmer v. County of Suffolk,* No. 96-CV-2206, slip op. at 7 (E.D.N.Y. July 7, 1999) (citing Pl.'s Mem. in Opp. at 24; Defs.' Mem. in Supp. at 17). As the District Court noted, this agreement "no doubt . . . results at least in part" from the holding in *W.J.F. Realty v. State of*

New York, 672 N.Y.S.2d 1007 (N.Y. App. Div. 1998) in which the Supreme Court for Suffolk County rejected the landowners' regulatory takings claims because "'[the Act's provisions] satisfy due process requirements and the need for tangible compensation subject to judicial review.'" *Dittmer,* at * 7-8 (July 7, 1999) (quoting *W.J.F. Realty,* 672 N.Y.S.2d at 1011). As a result of the abandonment, the Landowners' most recent complaint does not contain a takings claim, and thus no takings claims remain in this case.

Even if such claims were before the court, the Landowners have no basis for asserting a facial taking. The Landowners cannot demonstrate that "no set of circumstances exists under which the Act would be valid." *DeMichele*, 167 F.3d at 789. Indeed, there are a host of such circumstances. The Landowners offered no evidence whatsoever in the District Court that they have been denied economically viable use of their land. *Amici* understand that few, if any, of the Landowners have even sought permits for development. Nor have they attempted to seek compensation through the means provided in the statute. Because they cannot show a facial taking under either the categorical rule of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), or the multi-factor test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the Landowners' takings claims must fail.

D. The Landowners' Bill of Attainder Claim Is Frivolous and Not Properly Before the Court.

Inexplicably, the Landowners now assert that the Act is an unconstitutional bill of attainder (Br. 7-13), even though this claim was not alleged in their three complaints and was thus never reviewed by the District Court. The Landowners cannot raise this issue for the first time on appeal. "[A] federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *United States v. Slade*, 980 F.2d 27, 30 (1st Cir. 1992) ("It is a bedrock rule that when a party has not presented an argument to the district court, she may not unveil it in the court of appeals."); *Sage Prods., Inc. v. Devon Indus. Inc.*, 126 F.3d 1420, 1426 (Fed. Cir. 1997) ("[A]ppellate courts do not consider a party's new theories, lodged first on appeal. . . . In short, this Court does not 'review' that which was not presented to the district court.").[2]

[2] The Second Circuit has described this general rule as "prudential" and retains the discretion to consider issues not decided in the lower court. *See Booking v. General Star Mgmt. Co.*, 254 F.3d 414, 418 (2d Cir. 2001) ("It follows therefore that we have discretion to consider issues that were raised, briefed, and argued in the District Court, but that were not reached there."). *Booking* is plainly distinguishable. For one, the choice-of-law question raised on appeal in that case was "a purely legal issue" that, if left unaddressed, would "likely lead to a substantial injustice." *Id.* at 419. Such is not the case here. Moreover, *Booking* does not contemplate a situation where, as here, the Landowners did not even hint at the issue in their three complaints, much less brief and argue it in the District Court.

Even if this Court could entertain this claim, the Landowners' bill of attainder argument is an incomprehensible misreading of the law. A bill of attainder is essentially a criminal law that "legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977). The Pine Barrens Protection Act, by contrast, is an environmental and zoning law that creates a comprehensive planning regime intended to manage growth and protect an important natural area for current and future generations. It simply defies credulity that a law enacted to protect open space, fragile ecosystems, and drinking water, as discussed above, might in any way be considered a bill of attainder.

The Landowners' reliance on *Consolidated Edison v. Pataki,* 292 F.3d 338 (2d. Cir. 2002), a unique case that pressed the boundaries of bill of attainder theories, *see id.* at 348, is completely misguided. In *Consolidated Edison*, the court invalidated legislation that singled out the company by name, assigned blame to the company for maintenance issues that caused a power outage at the Indian Point 2 nuclear power plant, and assessed a financial penalty. *See id.* Here, the Landowners' entire argument is premised on the notion that there exists in the Act no "non-punitive legislative purpose." The Landowners thus ignore controlling Supreme Court and Second Circuit precedent that

indisputably approve the stated goals of the Act. *See, e.g., Belle Terre*, 416 U.S. at 9; *Euclid*, 272 U.S. 365 (1926); *Stern*, 158 F.3d at 732; *Orange Lake*, 21 F.3d at 1227.

III. FRIVOLOUS LITIGATION CHILLS STATE AND LOCAL LAND USE PLANNING EFFORTS.

This is a case that should never have come this far or taken this long to resolve. The Government's brief explains in great detail the amount of effort expended on this case (and others) since the Landowners began their crusade against the Act. (Br. 7 n.3, 20-33).[3] *Amici* reference this procedural history to illustrate the considerable time and expense inherent in defending against a lawsuit that the trial judge acknowledged at the outset was dubious at best. *See Dittmer,* No. 96-CV-2206, slip op. at 16-17 (E.D.N.Y. July 7, 1999) (characterizing the equal protection claim as "barely" cognizable and expressing doubt as to "whether plaintiffs will be able to produce proof sufficient to

[3] Indeed, this is just another in a series of challenges brought by these and other landowners. In state court, landowners unsuccessfully alleged a *per se* physical taking, a permanent regulatory taking, a temporary regulatory taking of property without compensation under the New York State Constitution, a violation of federal and state constitutional due process, and a violation of equal protection under 42 U.S.C. § 1983, among other claims. *See W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007 (1998). For other landowner challenges to the Act and the work of the Commission, see *Toussie v. Central Pine Barrens Joint Planning and Policy Comm'n*, 700 N.Y.S.2d 358 (Suffolk County, 1999); *Olsen v. New York State Dep't of Envtl. Conservation*, Index No. 01-3600 (Albany County, May 7, 2002); and *Gherardi v. State of New York,* No. 01-CV-1066 (N.D.N.Y.) (pending).

withstand summary judgment"). The ever-changing nature of claims in the Landowners' three complaints and their wide-ranging discovery request—which magistrate Judge Lindsay described as "breathtaking in scope" and imposing burdens "beyond undue"—only underscore the point. *See* Government Br. 31.

This appeal adds further unnecessary delay and expense by ignoring established precedent and calling into question the constitutionality of workaday planning techniques. The Landowners argue (Br. 19) that "[t]he failure of the statute to include a 'Plan', what is intended to be the methodology for accomplishing stated legislative ends and goals, renders the statute in that respect a nullity." Yet it is commonplace and proper for legislatures to charge commissions with the responsibility of establishing land use plans. For example, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002), the Court rejected constitutional challenges to a moratorium designed to allow a planning agency time to develop a regional land use plan as required by the agency's governing compact. *See id*. at 1470-72. The Landowners' bill of attainder (Br. at 7-13) and ex post facto (Br. 21-22) arguments are, to put it charitably, beyond the pale. The Landowners' physical-invasion argument (Br. 27)—which cryptically alleges "a 'Teapot Dome' form of entry" and compares the government officials at issue to

Nazi "storm troopers forcibly entering upon the property"—is too frivolous and demeaning to warrant further response.

As shown below, frivolous and meritless lawsuits can seriously impact municipal budgets. Unfortunately, such cases are becoming increasingly common, and may be seriously impeding the ability of state and local governments to conduct land use planning in the public interest.

A. Municipal Litigation Costs Are Increasing As a Result of Frivolous Land Use Lawsuits.

Municipal litigation costs have soared in recent years according to a survey of the membership of the International Municipal Lawyers Association (IMLA) (formerly the National Institute of Municipal Law Officers). More than half of the jurisdictions surveyed reported litigation cost increases of 10 percent or more during the study period; 19.3 percent reported increases of 30 percent; and for 6.6 percent of respondents, the rate of increased costs was more than 50 percent. *See* Susan A. Macmanus, *The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms*, 44 Syracuse L. Rev. 833, 834 (1993) (citation omitted).[4]

[4] Respondents were also asked: "To what extent have litigation costs (including damages and awards) affected your local government's budget this past year?" One-fifth (20.3 percent) said litigation costs had "a lot" of impact, while another

Empirical research suggests that the "'explosion in the non-traditional use of civil rights statutes—most important, section 1983 of the Civil Rights Act of 1971—to include cases involving such areas as zoning and land development'" is a "driving factor" in increased public litigation costs. Macmanus, 44 Syracuse L. Rev. at 836-37 (citation omitted). Among the reasons proferred in the IMLA survey for increased municipal litigation costs, 48.2 percent cited an increase in frivolous cases. *See id.* at 838. Asked about the subject matter of cases "contributing most to their rising litigation costs over the past three years," 48.2 percent of the respondents cited land use and zoning cases. *Id*. at 839-40.

Although landowners frequently try to portray themselves as the hapless victims of big government planning efforts, the reality is different. Each of the nation's top four real estate developers boasts annual revenues of more than $1 billion. *See* S. Rep. No. 105-242, at 45 (1998) (The Private Property Rights Implementation Act of 1998) (minority views), *available at* http://www.communityrights.org/SR105-242.pdf. In comparison, most small cities and towns in America generate less than $10 million in revenue. *See id.* Indeed, 90 percent of municipalities maintain populations of less than 10,000 people. *See id.* Many of these communities cannot afford even one full-time

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two-thirds (66.3 percent) responded "some" impact. *See* Macmanus, 44 Syracuse L. Rev. at 836.

municipal lawyer, and are terribly ill-equipped to defend against the litigation efforts of the well-financed development industry and the so-called property rights movement. *See id.*

B. Higher Litigation Costs Chill Legitimate Planning and Zoning Efforts.

Fear of litigation costs has a chilling effect on municipal planning, especially in smaller towns and counties. Most communities simply do not have the time, money, or staff to defend every land use regulation through the process of discovery, pretrial motions, trial, and appeal. Even when local governments regulate appropriately, litigation costs can soar as the need to defend against meritless suits increases. Indeed, this might very well be the intent of such suits.

In the First Amendment arena, much has been made of the chilling effect of so-called S.L.A.P.P. suits—Strategic Lawsuits Against Public Participation.[5]

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[5] One commentator defines a SLAPP suit as a "meritless action filed by a plaintiff whose primary goal is not to win the case but rather to silence or intimidate citizens or public officials who have participated in proceedings regarding public policy or public decision making." Jennifer E. Sills, Comment, *SLAPPS (Strategic Lawsuits Against Public Participation): How Can the Legal System Eliminate Their Appeal?,* 25 Conn. L. Rev. 547, 548-49 (1993). On the issue of chilling public participation, see Alice Glover and Marcus Jimison, *SLAPP Suits: A First Amendment Issue and Beyond*, 21 N.C. Cent. L. J. 122, 122 (1995) ("SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expense of a defense. The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism.").

In the land use context, one might argue, a S.L.A.M. suit—Strategic Lawsuit Against Municipalities—can be just as effective in chilling legitimate government planning efforts. Oftentimes, such cases are pursued for the sole purpose of driving up the costs of regulation. As one commentator noted, in such instances "the offensive use of a lawsuit merely becomes a negotiating tool." Alice Glover and Marcus Jimison, *SLAPP Suits: A First Amendment Issue and Beyond*, 21 N.C. Cent. L. J. 122, 133 (1995); *see also Northside Sanitary Landfill, Inc., v. City of Indianapolis*, 902 F.2d 521, 523 (7th Cir. 1990) (describing "a common tactic of multiplying litigation in order to buy time—and perhaps to make matters so costly for its adversaries that they will cave in").[6]

If local governments cannot count on the courts to dispose of frivolous constitutional claims swiftly, many municipalities might choose to settle winnable cases or allow development to proceed despite the public interest against it. *See* Macmanus, 44 Syracuse L. Rev. at 838.[7] Indeed, 81.4 percent of

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[6] In pursuing federal legislation to open up federal courts to innumerable new challenges to land use controls, developers were quite blunt about their intent to use federal lawsuits to put a "hammer to the head" of state and local officials. *See* National Journal's CongressDaily AM (March 14, 2000).

[7] Many commentators have noted the strong incentive for governments to settle even frivolous claims in order to avoid legal fees and a public controversy. *See, e.g.,* David S. Mendel, *Determining Ripeness of Substantive Due Process Claims Brought by Landowners Against Local Governments*, 95 Mich. L. Rev. 492, 494 n.9 (1996); Susan A. Macmanus, *The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment*

IMLA survey respondents "acknowledge they settle at least some of their 'winnable' cases just to save money." *Id*. at 842.

As numerous surveys of local officials have shown, fear of lawsuits might even prevent municipalities from enacting environmental and land use legislation in the first place. For example, following a fact pattern based on *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), the National Association of County Planning Directors asked 300 members whether they would regulate to close a local gravel mine that had significant environmental impact. Forty-eight percent of respondents said they would adopt the regulation if the only possible remedy were invalidation. By contrast, only eight percent said they would adopt the regulation if a court could order money damages as relief. *See* Craig J. Doran, Comment, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles and Nollan v. Callifornia Coastal Commission: The Big Chill*, 52 Alb. L. Rev. 325, 359 (1987).

A survey by William & Mary Law professor Lynda Butler turned up similar findings. The proliferation of constitutional land use litigation and continued debate over compensation principles, she writes,

> have made legislators and administrators . . . hesitant to adopt new regulatory programs. . . . As one official explained, lawmakers who foresaw an increased risk of litigation would be more likely to

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Mechanisms, 44 Syracuse L. Rev. 833, 834 (1993). *See also* S. Rep. No. 105-242, at 45.

> weaken the regulatory programs that they adopted by, for example, including broader grandfather clauses; yet the weaker the program, the less effective it becomes.

Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 Wm. & Mary L. Rev. 823, 830-31 (1990).

Likewise, a California Research Bureau study found that cities which have been sued for takings are twice as likely to report having changed their regulatory behavior as those that have not been sued. *See* Daniel Pollak, *Have the U.S. Supreme Court's 5th Amendment Takings Decisions Changed Land Use Planning in California?* 27 (California Research Bureau, 2000). The report concluded that "takings objections, litigation threats, and even lawsuits have become a common aspect of land use planning discussions." *Id*. at 75.

Amici do not seek to deny a forum to landowners who have legitimate constitutional grievances. As Justice Holmes famously noted, a regulation can go "too far." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922). In reviewing such claims, however, federal courts must take care not to create an environment in which towns might, in order to avoid budget-busting litigation, be compelled to set aside their environmental, public health, and safety standards. Indeed, in a recent case involving another precious natural resource, Lake Tahoe, the U.S. Supreme Court warned against unduly expansive constitutional theories that would undermine comprehensive planning efforts,

thereby fostering "ill-conceived growth" that threatens ecologically sensitive land. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1488 (2002). Courts must guard against the use of strategic—often meritless—lawsuits to intimidate community planners.

We urge this Court to spare municipalities from costly and fruitless litigation and send a strong message that federal courts will not tolerate meritless claims against critical planning efforts like the Pine Barrens Protection Act. The Act is intended to preserve and protect a unique natural resource for residents now and in perpetuity. The Landowners' frivolous constitutional claims are mere fig leaves for what are essentially philosophical differences with the state legislature. Such arguments have no legal merit, and this Court should not countenance them.

CONCLUSION

The District Court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

Pursuant to Rule 29 and Rule 32(a)(7)(B) and (C) of the Federal Rules of Appellate Procedure, I certify that the foregoing Brief of *Amici Curiae* Association of Towns of the State of New York, New York State Conference of Mayors and Municipal Officials, and New York State Association of Counties is proportionally spaced, has a typeface of 14 point Times New Roman, and as indicated by our document preparation software contains a total of 5,912 words, including footnotes, but excluding the cover, table of contents, table of authorities, this certification, and the certificate of service.

Dated: August 14, 2002

JASON C. RYLANDER

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of *Amici Curiae* Association of Towns of the State of New York, New York State Conference of Mayors and Municipal Officials, and New York State Association of Counties were served via first class mail, postage prepaid, this 14th day of August 2002, on the following:

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Pursuant to Rule 25(d)(2) of the Federal Rules of Appellate Procedure, I certify that the foregoing brief is being mailed to the clerk of the court by first class mail, postage prepaid on this 14th day of August 2002.

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