

**Application of East End Eruv Association
to place lechis on certain utility poles in public
rights of way for the purpose of
establishing an eruv in part of the
Village of Quogue**

Decision of the Board of Trustees

Introduction

The East End Eruv Association (“EEEE” or “Applicant”), through its counsel, Weil Gotshal & Manges LLP, filed an application with the Board of Trustees dated January 16, 2012 to allow the placement by the EEEA of lechis on certain utility poles located in public rights of way for the purpose of establishing an eruv in part of the Village of Quogue. The application was supplemented by a letter dated February 9, 2012 from Robert Sugarman of Weil Gotshal to Peter Sartorius, Mayor of the Village. At a regular meeting of the Board of Trustees held on March 19, 2012, Mr. Sugarman made a presentation to the Board of Trustees. A number of citizens also expressed their views concerning the application. One of the speakers, Arnold Sheiffer, president of an organization named Jewish People for the Betterment of Westhampton Beach, also submitted a written statement to the Board of Trustees opposing the application.¹

The purpose of an eruv is set forth in the application. Very briefly, as described by the EEEA, it is to establish an area that is an extension of the home in order to allow Jews having certain religious beliefs to carry and push objects on Shabbat and Yom Kippur when traveling between their homes and the synagogue and other people’s homes. In the absence of an eruv, according to their religious beliefs, carrying and pushing on those days are prohibited. Mr. Sugarman stated at the hearing that approximately five families in Quogue hold these beliefs and would be benefited by the eruv.

Among the steps required to create an eruv is the placement of lechis on utility poles located in the public rights of way. The lechis are described and depicted in the application. They are 5/8-inch deep, half-round strips of PVC that can be painted any color to blend with the surroundings. They are 10-15 feet in length and placed vertically on the utility poles and topped with a white cap. The application specifies 48 utility poles in the Village where lechis will be placed, mostly on two sides of the pole. The utility poles involved are located principally on Montauk Highway, Scrub Oak Road, Old Depot Road and Old Country Road. According to Mr. Sugarman and the application, the poles were selected by

¹ Subsequent to the meeting, Mr. Sugarman submitted a letter dated April 26, 2012, with which he enclosed an open letter of the Suffolk Board of Rabbis, and Jonathan Sinnreich, counsel for the Jewish People for the Betterment of Westhampton Beach, Inc., submitted a letter dated May 4, 2012 enclosing a document of the Central Conference of American Rabbis entitled Contemporary American Reform Responsa, 178. Eruv. We have reviewed both submissions and do not take a position on this dispute over religious belief.

rabbinical authority in conjunction with Verizon and LIPA as the owners of the poles following the conduct of “pole walks.”

The lechis do not by themselves depict the boundaries of the eruv. The eruv boundaries are established by certain natural boundaries and pre-existing objects such as utility wires. According to Mr. Sugarman, the entity seeking to establish the eruv selects the area in which it seeks to do so, and rabbinical authority then advises as to the necessary placement of lechis and the use of natural boundaries and pre-existing objects to establish the perimeter. The eruv that the EEEA seeks to establish is set forth on a map furnished by the EEEA on December 6, 2011 and encompasses parts of Quogue, the Town of Southampton (Quogue) and the Village of Westhampton Beach, and the placement of the lechis in Quogue is done on that basis. The EEEA is proceeding separately as to Westhampton Beach and the Town of Southampton.

This application raises several issues.

The Village has previously asserted that permission of the Board of Trustees to place items in the public rights of way is required by provisions of the Quogue Village Code and the New York Village Law. The EEEA contends, however, that these provisions do not mandate Board of Trustee permission and do not prohibit the placement of the lechis. In the alternative, the Applicant seeks permission from the Board of Trustees for the placement of the lechis.

In addition, the EEEA cites both Religion Clauses of the First Amendment of the United States Constitution, asserting both that the Establishment Clause does not prohibit the placement of lechis on the utility poles and that, as a result, the Free Exercise Clause compels the grant by the Board of Trustees of the application.

Relevant Law

The following laws are involved in the Board’s decision.

Quogue Village Code provisions:

§ 158-1. Encroachments and projections not allowed.

No encroachment or projection upon, into or over any public road or street in the Village of Quogue shall be made or maintained.

§ 158-2. Definitions.

As used in this article, the following terms shall have the meanings indicated:

ENCROACHMENT

Any private use of any portion of a public right-of-way through any structure or device, whether upon, above or under said right-of-way; but nothing herein contained shall be construed to apply to any vehicle or any easement now legally owned by any public service corporation. The term "encroachment" also includes any private use of any portion of a public right-of-way for the display and sale of any products, goods, wares or merchandise.

PROJECTION

Any part of any building, structure or device erected upon private property or attached to any structure or device erected upon private property.

PUBLIC ROAD OR STREET

The area between the extreme lines of any public right-of-way in this Village, including any state or county road or highways as well as a Village road or street.

New York Village Law Provisions:

Section 6-602, which provides that the streets and public grounds of a village:

“are under the exclusive control and supervision of the board of trustees”

Section 4-412(3)(6), which grants the board of trustees the power to:

“grant rights and franchises or permission to use the streets ... [and] public places or any part thereof or the space above or under them ... for any specific purpose upon such terms and conditions as it may deem proper and as may be permitted by law.”

Discussion

The placement of lechis as requested in the application is undeniably a “private use;” a lechi is a “device” within any normal construction of that term; and the lechis will be located “upon [or] above ... the right-of-way.” A lechi is therefore plainly an “encroachment” within the meaning of Section 158-2. The fact that the lechis are, in the Applicant’s view, small or that they blend in aesthetically is immaterial to the analysis. Furthermore, pursuant to Sections 6-602 and 4-412(3)(6) of New York Village Law, the right of a private party to place an encroachment on or over a public right of way in the Village of Quogue depends upon that party obtaining permission from the Board of Trustees.

The Village of Quogue closely monitors the rights of way on its approximately 30 miles of public roads. Signs and objects placed in the right of way are regularly removed by the Village’s Code Enforcement Officer and police. Items placed on utility poles or otherwise in the right of way that have often been removed include, among other things, real estate open house signs, yard sale signs, political campaign posters, business advertising, parade, festival and other event announcement posters, house numbers and reflectors. At the hearing on March 19th, one resident in fact spoke about reflectors being removed from a utility pole in front of her house. The Board of Trustees believes that to protect the safety of our residents, to maintain the beauty and quality of life in the Village, and to avoid constitutional violations

and liability, rights of way should be kept clear. The EEEA asserts that the appearance of lechis on the utility poles is no worse than the telecommunications, electrical and cable television devices that are present. While we certainly cannot reasonably defend the *appearance* of those items, the lechis represent more than functioning, unattractive pieces of hardware. The placement of lechis is requested by the Applicant to be for an indefinite and unlimited period of time and is one of a number of steps to establish and maintain an eruv—part of the “totality,” as Mr. Sugarman stated at the hearing. They would communicate to an audience the presence of an eruv. That audience is partly Jews whose religious beliefs prevent them from carrying and pushing outside the home on Shabbat and Yom Kippur in the absence of an eruv, but it is also broader than that. The audience is also any other reasonably well-informed person aware of the nature of an eruv and the means of establishing one. In Quogue and its vicinity, we believe that the number of those reasonably well-informed persons is substantial in view of the well-publicized nature of this application and the related litigation brought against the Village and others by the EEEA and its co-plaintiffs and, in a separate but related case, by Verizon and LIPA. We despair of identifying any principled distinction between both the device and the message imparted by the lechis and many other types of signs and other things that imaginative people have sought and could seek to place in our rights of way. We do not wish to be in a position of having to make distinctions without a clear basis for doing so or to expose the Village to claims of discriminatory treatment, expensive litigation and potential liability for allowing one type of device and message and not another.² On that basis denial of the application is appropriate.

That conclusion does not wholly put to rest the application, however, because the EEEA asserts that the approval of the application would not violate the Establishment Clause of the First Amendment and therefore that the Free Exercise Clause mandates that the application be granted. While we are fully cognizant that the Board of Trustees is not the last word on matters of Constitutional interpretation, we are sworn to uphold the Constitution. Three cases have been cited by the EEEA as authority for the proposition that grant by a municipality of permission to establish an eruv does not violate the Establishment Clause. No case has been cited as holding that the Free Exercise Clause *requires* that an application to establish an eruv be granted.

Two of the three cases cited by the Applicant held that an eruv was permissible, not mandatory. Smith v. Community Board No. 14, 128 Misc. 2d 944, 949 (N.Y. Sup. Ct. 1985), aff'd, 133 A.D. 2d 79 (2d Dept. 1987), upheld against an Establishment Clause challenge the grant of permission for creation of an eruv in part of Queens. ACLU v. City of Long Branch, 670 F. Supp 1293, 1296-97 (D. N.J. 1987), upheld the actions taken by the City of Long Branch, New Jersey, in allowing the establishment of an eruv. Both the Smith and the City of Long Branch cases were decided under an analysis which is probably no longer valid under more recent United States Supreme Court cases. In any event, we find them to be result-

² If the Village of Quogue were to permit the lechis, which can be understood as symbolic speech because they signal to rabbis and persons holding certain religious beliefs where, in accordance with their religious beliefs, they can engage in certain practices on Shabbat and Yom Kippur and to other persons that a religious boundary, or eruv, has been erected, it would be in danger of creating a public forum that would require it to accept other forms of speech on the public rights of way. See Pleasant Grove City v. Summum, 555 U.S. 460, 469-70 (2009); Good News Club v. Milford Cent. Sch. Dist., 533 U.S. 98, 107-08 (2001).

driven and unpersuasive particularly insofar as they both found a valid secular purpose for the eruv and determined that the governmental actions did not promote any particular religion. Furthermore, unlike in many other large jurisdictions such as New York City and Washington D.C. that have supported an eruv, we believe that in Quogue, which has a well-informed citizenry on this matter, the grant of permission to place lechis on utility poles in a public right of way would be regarded as an endorsement of a particular religion. Thus, the grant of this application would very likely constitute a violation of the Establishment Clause.

The third, and most recent, decision relied upon by EEEA, Tenaflly Eruv Association v. Borough of Tenaflly, 309 F.3d 144, 167-68 (3rd Cir. 2002), is not applicable to Quogue. The Third Circuit held that lechis to signify an eruv could not be removed because the Borough of Tenaflly had permitted other objects and religious symbols, such as holiday displays, church directional signs, house numbers, lost-animal signs and ribbons, to remain on its utility poles. This decision turned on a finding of selective and discriminatory enforcement of a local ordinance against the proponents of the eruv, as the government permitted some types of things, including religious symbols, but not lechis. This situation does not exist in the Village of Quogue. Apart from public utility facilities (electric, telephone and cable) necessary to service its homes and businesses, the Village of Quogue does not permit others to place signs or other objects on utility poles, and when such things have been introduced, they have been removed.

Even if an Establishment Clause or other Constitutional violation would not arise, however, it does not follow that the application must be granted by the Board of Trustees in order to be consistent with the First Amendment of the Constitution. Chapter 158 of our Village Code is a neutral law of general application and wholly consistent with the pertinent provisions of the New York Village Law. See Employment Div. v. Smith, 494 U.S. 872, 879 (1990) (noting that the Court has “consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability’”); see also, Universal Church v. Geltzer, 463 F.3d 218, 228 (2nd Cir. 2006) (stating that a principle that is neutral and generally applicable “does not violate the Free Exercise clause” regardless of the burden it may place on a religious practice).

Having considered the EEEA’s application and consulted with counsel, we find that grant of the application is not mandated by law, and for the reasons set forth above, we hereby deny it.

THIS DECISION APPROVED unanimously by the Board of Trustees of the Village of Quogue on May 18, 2012.