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# [***Dosiak v. Town of Brookhaven***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RKY-MF31-JJK6-S41S-00000-00&context=)

United States District Court for the Eastern District of New York

November 27, 2017, Decided; November 27, 2017, Filed

Civil Action No. 16-6658

**Reporter**

2017 U.S. Dist. LEXIS 217221 \*

JOHN WILLIAM DOSIAK III, BENNETT DOSIAK, BENNETT A. DOSIAK, LISA DOSIAK and EDDA DOSIAK, Plaintiffs, -against- TOWN OF BROOKHAVEN, Defendant.

**Core Terms**

abstention, allegations, Orders, court action, barns, proceedings, quotation, temporary restraining order, preliminary injunction, marks, Farm, state court, motion to dismiss, stop work, Plaintiffs', show cause, constructing, rights, cause of action, materials, municipal, parties, due process, violations, plausibly, requires, issuing, cases, constitutional right, concrete

**Counsel:** **[\*1]**For Plaintiffs: Frederick P. Stern, PC, Islip, NY, By: Frederick P. Stern, Esq., Richard I. Scheyer, Esq.

For Defendant: Rosenberg Calica & Birney LLP, Garden City, New York, By: Robert M. Calica, Esq., Judah Serfaty, Esq.

**Judges:** Denis R. Hurley, United States District Judge.

**Opinion by:** Denis R. Hurley

**Opinion**

**MEMORANDUM & ORDER**

**HURLEY, Senior District Judge:**

Plaintiffs John William Dosiak III ("JWD"), Bennett Dosiak ("BD"), Bennett A. Dosiak ("BAD"), Lisa Dosiak ("LD") and Edda Dosiak ("ED") (collectively "Plaintiffs" or "Dosiaks") commenced this action pursuant to *28 U.S.C. § 1983* alleging defendant Town of Brookhaven ("Brookhaven" or "Town") violated their constitutional rights. Presently before the Court is Brookhaven's motion to dismiss pursuant to [*Fed. R. Civ. P. 12(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) and [*(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=). For the reasons set forth below, the motion is granted.

**BACKGROUND**

The following allegations are taken from the Complaint.

Plaintiffs own approximately 200 acres of farmland in Manorville ("the Farm"). The Farm consists of, among other lots, parcels identified as Lots 7 (owned by JWD, BD, and BAD), 13.4 (owned by LD and JWD), 2 (owned by JWD and ED), and 6 (owned by JWD and BD). Portions of the Farm are leased to third parties, although a substantial part is cultivated as farmland.**[\*2]** (Comp. ¶¶ 9-14.)

In January 2016, lot 6 (which is vacant land) was leased to JD Trucking Material, Inc. (JD Material"); almost immediately thereafter the Town began to harass JD Material by issuing tickets and stop work orders based on allegation that JD Material was operating a solid waste facility. In April 2016, JD Materials relocated to Lot 7, which is zoned agricultural, but the Town continued to harass JD Material. (Comp. ¶¶ 15-18.)

In February 2016, the Dosiaks filed an application to build two barns on Lot 13.4, which is part of the Farm used as farmland; the plans were approved in February 2016 and a building permit issued in March 2016. The barns were to be constructed along an "earth road" which provides access to Lot 13.4 from Wading River Road, located approximately 750 feet away. In April 2016 prefabricated materials for the barns were delivered to Lot 13.4 along with "enough recycled concrete aggregate ('RCA') to pave a portion of the 'earth road' and put a base down for the foundation on which the two barn structures were to be constructed." (Comp. ¶¶ 19-22.)

Code Violations

On April 19, 2016 "a representative of the Town, Sr. Investigator Brian Tohill," issued two appearance**[\*3]** tickets alleging violations of sections 45-10F (prohibiting private disposal areas) and 85-405A (Residence 2 District permitted uses) of the Town Code. "[N]o supplemental information has been provided by the Town to any of the Plaintiffs to explain the allegations upon which these alleged violations are based." (Compl. ¶¶ 23-25.) "Of the five[[1]](#footnote-0)1 violations which have been issued against Plaintiffs, none of them have resulted in a conviction nor has either [sic] the Town been ready to proceed to prosecute on any of these charges." (*Id.* ¶ 38.)

The Supreme Court Action

On April 26, 2016 the Town commenced an action in the Supreme Court, Suffolk County ("the Supreme Court Action"), "alleging violations of [the above referenced] and other Code sections all based upon the erroneous claims that these portions of the Dosiak Farm are being used as a 'solid waste management facility.'" It is alleged that the operations being conducted by JD Material do not rise to the level of a "solid waste management facility under either the Code" or "the Environmental Code Law § 27-0704(4)." (Compl. ¶¶ 26-27.) "As part of its scheme to further harass JD Material,"[[2]](#footnote-1)2 an Order to Show Cause was filed by the Town seeking a preliminary injunction**[\*4]** enjoining and restraining JWD, BD and JD Material, their agents, and persons acting in concert with them from:

a. Importing, dumping and spreading any further fill material, recycled concrete aggregate ("RCA"), construction and demolition debris ("C&D"), and any other imported earth, dirt, fill, gravel, and material to the additional farm property owned by B. Dosiak, and operated by J. Dosiak and B. Dosiak located at the Northeast and Northwest corners of Wading River Road and the Long Island Expressway known as "Dosiak Gardens", and as more fully described in the attached submissions (the "North Dosiak Farm") which is located in the Pine Barrens Core Preservation Arca;

b. Maintaining a non-permitted and illegal Solid Waste facility on the North Dosiak Farm and from further "dumping" and spreading of solid waste at such properties; and

c. Granting a mandatory injunction requiring defendants to remove thousands of cubic yards of unidentified imported solid waste, RCA, C&D material, imported dirt, earth and other imported materials from such North Dosiak Farm" and other relief.

(*Id.* ¶ 28.) The Supreme Court, "without a hearing," granted a temporary restraining order "'pending the hearing**[\*5]** of this motion and further Order of this Court' enjoining and restraining 'any further importation to, or spreading on the aforesaid properties any further fill material, RCA, earth, dirt and other material.'" (*Id.* ¶ 29.) The temporary restraining order prevents the construction of the barns for which the Town had issued the permit referenced above as the spreading of RCA for substrate is required for the concrete base of the barns, which barns are necessary for the continued operation of the Farm. (Id. ¶¶ 30, 31.)

The Town brought an application by Order to Show Cause on May 5, 2016 to modify/enlarge the temporary restraining order to include Lot 7. On the return date, "Plaintiffs" appeared and requested a hearing on the request for a preliminary injunction and the continued imposition of the temporary restraining order. They were advised to provide notice to the Town that the hearing would be held the following day. When they appeared the following day, they were advised that no hearing would be held and that a decision would be rendered at some future date. As of the filing of the complaint, no decision has been rendered "despite the passage of more than seven months since the**[\*6]** original temporary restraining order was issued." (Comp. ¶¶ 33-36.)

Causes of Action

Plaintiffs' first cause of action alleges a violation of the *equal protection clause of the Fourteenth Amendment*. The following additional allegations are asserted in support thereof. They are being treated differently from "residents of the Town who have been issued building permits and have not had their construction projects interfered with" and "the other property owners who operate on the neighboring lands." Further "none of the other residents of the Town have been subjected to repeated harassment by the Town and/or its agents" or "been issued Stop Work Orders while they are in full compliance with the lawfully issued building permits." Finally, the Town "singled the Plaintiffs out for enforcement proceedings which are pending and/or under investigation" as a result of "personal animus toward non party JD Material and the Plaintiffs herein" and "for the sole purpose of preventing Plaintiffs from acquiring any use in their property, causing extreme economic hardship to Plaintiff [sic]." (Compl. ¶¶ 42-46, 49-51.)

The second cause of action asserts a violation of the *Fourteenth Amendment's Due Process Clause*. According to the Complaint, Defendant "acting as a matter of official Town or State**[\*7]** policy" deprived "Plaintiffs of their property without an opportunity to be heard" by unilaterally issuing the Stop Work Orders;" by "issu[ing] Stop Work Orders and criminal charges [although] there has never been a trial adjudicating any of the Plaintiffs," and by not setting forth "any credible or substantial evidence that any violations have been committed," and have "damaged Plaintiffs' reputations in the community where they live and conduct their business." (Compl. ¶¶ 62-67.)

The third cause of action alleges a violation of "Plaintiff's [sic] Civil Rights Pursuant to *Section 1983*" with "[t]he full composite of Defendant's conduct includ[ing] but . . . not limited to issuing violations, issuing stop work orders, obtaining a temporary restraining order which prevents Plaintiffs from constructing the structures authorized by a validly issued building permit and, thereby, essentially confiscating Plaintiff's [sic] properties, all of which markedly treat Plaintiffs differently than other residents in the immediate area who conduct similar operations."(Compl. ¶ 78.)

The fifth[[3]](#footnote-2)3 cause of action alleges that the "full composite of Defendant's conduct has so slandered, encumbered, and debilitated Plaintiffs'**[\*8]** property rendering it a taking" violating the *Fifth Amendment*.

The sixth cause of action asserts a violation of substantive due process in that the Town "undermined the Plaintiffs use of the real property and prevented their lawful use all without a hearing or opportunity to be heard" and "has no evidence that the Plaintiffs were operating, or knew of the operation of, a 'solid waste management facility' in violation of any lawfully issued certificate of occupancy of the real properties which the Town has restrained." (Compl. ¶¶ 87-88.)

The seventh and final cause of action asserts a violation of Plaintiffs' right to petition the Courts for redress in that as a result of the state court action and restraining order the Town "has actually seized and confiscated their property" and are "punishing Plaintiffs for exercising their Constitutionally protected rights to obtain permits, to petition the Court, and to have Hearings on administrative Stop Work Orders," which actions have deprived Plaintiffs of the use of their property "before there has been any official determination or adjudication by any Court of law." (Compl. ¶¶91-93.)

Additional Materials Submitted by Defendant

Attached to the Town's motion**[\*9]** are the following materials: (1) the (original) Order to Show Cause with temporary restraining order issued on April 26, 2016 in the Supreme Court Action and the papers on which it was based (Eaderesto Declar. at Ex. B); (2) the Order to Show Cause issued in May 2016 in the Supreme Court Action (seeking modification/enlargement of the temporary restraining order issued on April 26, 2016) and the papers on which it was based (*id.* at Ex. C); (3) a transcript of hearing held on May 4, 2016 in the Supreme Court Action (*id.* at Ex. D) ; (4) an affidavit of counsel for JWD, BD and JD Materials, dated June 9, 2016, submitted "in opposition to the Pending Orders to Show Cause" and "to request an immediate hearing regarding the granting of a permanent injunction to the Town" (*id.* at Ex. E); (5) a reply affirmation of counsel for the Town, dated June 13, 2016, submitted in further support of the "two pending motions for preliminary injunctions" in the Supreme Court Action (*id.* at Ex. F); (6) an order of the Appellate Division, Second Department, dated October 25, 2016, denying a motion by the defendants in the Supreme Court action for "leave to appeal from the two orders to show cause" issued**[\*10]** in the Supreme Court Action and denying "as academic" that portion of their application to stay enforcement of the temporary restraining orders contained in the orders to show cause, pending hearing and determination of the appeals (*id.* at Ex. G); (7) a decision, dated December 22, 2016, issued in the Supreme Court Action granting the Town's application for a preliminary injunction (*id.* at Ex. H)[[4]](#footnote-3)4 ; (8) sections of the Brookhaven Town Code (*id.* at Ex. I). Reference to the contents of these documents will be made as appropriate.

**DISCUSSION**

**I. Legal Standards**

**A.** [***Rule 12(b)(1)***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) **Motion**

A case may properly be dismissed for lack of subject matter jurisdiction pursuant to [*Rule 12(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) "when the district court lacks the statutory or constitutional power to adjudicate it." [*Makarova v. United States, 201 F.3d 110, 113 (2d Cir.2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YB1-XMB0-0038-X2H4-00000-00&context=). "In contrast to the standard for a motion to dismiss for failure to state a claim under [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), a 'plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists.'" [*MacPherson v. State St. Bank & Trust Co., 452 F. Supp. 2d 133, 136 (E.D.N.Y. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4KY8-W430-TVW3-P2VK-00000-00&context=) (quoting [*Reserve Solutions Inc. v. Vernaglia, 438 F. Supp. 2d 280, 286 (S.D.N.Y. 2006))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4K7N-N090-TVW3-P2D6-00000-00&context=), *aff'd*, [*273 F. App'x 61 (2d Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4S8B-6JJ0-TXFX-4216-00000-00&context=); *accord* [*Tomaino v. United States, 2010 U.S. Dist. LEXIS 24980, 2010 WL 1005896, at \*1 (E.D.N.Y. Mar. 16, 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y1S-FPF0-YB0N-V0CC-00000-00&context=). "In resolving a motion to dismiss for lack of subject matter jurisdiction, the Court may consider affidavits and other materials beyond the pleadings to resolve jurisdictional questions." [*Cunningham v. Bank of New York Mellon, N.A., 2015 U.S. Dist. LEXIS 88717, 2015 WL 4101839, \* 1 (E.D.N.Y. July 8, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GD2-9DM1-F04F-0149-00000-00&context=) (citing [*Morrison v. Nat'l Australia Bank, Ltd., 547 F.3d 167, 170 (2d Cir. 2008))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4TRX-NCJ0-TX4N-G02T-00000-00&context=). A motion**[\*11]** to dismiss based on the *Rooker-Feldman*[[5]](#footnote-4)5 doctrine addresses subject matter jurisdiction and therefore is considered pursuant to [*Fed. R. Civ. P. 12(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=). *See* [*Redmond v. Bank of New York Mellon, Corp., 697 Fed. App'x 23, 24 (2d Cir. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PCM-8NR1-F04K-J06V-00000-00&context=) (citing [*Vossbrinck v. Accredited Home Lenders, Inc., 773 F.3d 423, 426 (2d Cir. 2014))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5DST-RCD1-F04K-J0VR-00000-00&context=); [*MacPherson v. Town of Southampton, 738 F. Supp.2d 353 (E.D.N.Y. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:50YV-58M1-652J-D01V-00000-00&context=). Similarly, a motion to dismiss based the abstention doctrine is considered pursuant to [*Fed. R. Civ. P. 12(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) . [*U.S. v. Blake, 942 F. Supp. 2d 285, 292 (E.D.N.Y. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:587Y-47P1-F04F-0054-00000-00&context=); [*City of New York v. Milhelm Attea & Bros., Inc., 550 F. Supp.2d 332 (E.D.N.Y. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SDG-J8B0-TXFR-J34R-00000-00&context=).

**B.** [***Rule 12(b)(6)***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) **Motion**

In deciding a motion to dismiss under [*Federal Rule of Civil Procedure 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), a court should "draw all reasonable inferences in Plaintiff['s] favor, assume all well-pleaded factual allegations to be true, and determine whether they plausibly give rise to an entitlement to relief." [*Faber v. Metro. Life Ins. Co., 648 F.3d 98, 104 (2d Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:82WF-XNN1-652R-01GJ-00000-00&context=) (internal quotation marks omitted). The plausibility standard is guided by two principles. [*Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=) (citing [*Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=); *accord* [*Harris v. Mills, 572 F.3d 66, 71-72 (2d Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4WR2-9J90-TXFX-42SX-00000-00&context=).

First, the principle that a court must accept all allegations as true is inapplicable to legal conclusions. Thus, "threadbare recitals of the elements of a cause of action supported by mere conclusory statements, do not suffice." [*Iqbal, 556 U.S. at 678*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=). Although "legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." [*Id. at 679*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=). A plaintiff must provide facts sufficient to allow each named defendant to have a fair understanding of what the plaintiff is complaining about and to know whether there is a legal basis for recovery. *See* [*Twombly, 550 U.S. at 555*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=).

Second, only complaints that state a "plausible**[\*12]** claim for relief" can survive a motion to dismiss. [*Iqbal, 556 U.S. at 679*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but asks for more than a sheer possibility that defendant acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line' between possibility and plausibility of 'entitlement to relief.'" [*Id. at 678*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=) (quoting [*Twombly, 550 U.S. at 556-57*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=)) (internal citations omitted); *see* [*In re Elevator* ***Antitrust*** *Litig., 502 F.3d 47, 50 (2d Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PKD-BY80-TXFX-423H-00000-00&context=). Determining whether a complaint plausibly states a claim for relief is "a context specific task that requires the reviewing court to draw on its judicial experience and common sense." [*Iqbal, 556 U.S. at 679*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=); *accord* [*Harris, 572 F.3d at 72*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4WR2-9J90-TXFX-42SX-00000-00&context=).

In making its determination, 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)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T8W-50S0-0038-X45P-00000-00&context=). However, this has been interpreted to include any document attached to the complaint, any statements or documents incorporated in the complaint by reference, any document on which the complaint heavily relies, and anything of which judicial notice may be taken.**[\*13]** *See* [*Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:456H-9WR0-0038-X4H7-00000-00&context=) (citations omitted); [*Kramer v. Time Warner Inc., 937 F.2d 767, 773 (2d Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BSX0-008H-V3DD-00000-00&context=).

**II. Summary of Defendant's Contentions**

Defendant raises the following arguments in support of its motion to dismiss (1) "[b]ecause the entire complaint attempts to challenge and collaterally attack the TROs, it must be dismissed for lack of subject matter jurisdiction pursuant to the *Rooker/Feldman* doctrine;" (2) the Court should abstain from hearing this action pursuant to the *Younger* and/or *Colorado River* abstention doctrines; (3) the complaint fails to state a *Monell* claim; and (4) each of Plaintiffs' claims otherwise fail to state a claim.

**III. The *Rooker-Feldman* Doctrine**

The Supreme Court decisions in [*Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-38J0-003B-H14G-00000-00&context=), and [*District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5340-003B-S092-00000-00&context=), taken together, establish the principle that federal district courts lack jurisdiction over suits that are, in substance, appeals from state-court judgments. *See* [*Hoblock v. Albany Cnty. Bd. of Elections, 422 F.3d 77, 84 (2d Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H17-DXP0-0038-X3RC-00000-00&context=). The Supreme Court has explained that *Rooker—Feldman* "is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting the district court review and rejection of those judgments." [*Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FTW-X5G0-004B-Y01N-00000-00&context=).

In this Circuit, courts must make four**[\*14]** determinations before applying the doctrine. *See* [*Hoblock, 422 F.3d at 84*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H17-DXP0-0038-X3RC-00000-00&context=). First, the federal court plaintiff must have lost in state court. Second, the plaintiff must complain of injuries caused by a state-court judgment. Third, the plaintiff must invite district court review and rejection of that judgment. Fourth, the state-court judgment must have been "rendered before the district court proceedings commenced." [*Id. at 85*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H17-DXP0-0038-X3RC-00000-00&context=). The first and fourth requirements are procedural, whereas the second and third are substantive. *Id.* If all four requirements are met, federal subject matter jurisdiction is barred by *Rooker—Feldman*.

With respect to the first factor, Plaintiffs contend that *Rooker-Feldman* does not apply because "[w]hile the State Court orders were issued in favor of the Town and against some of the Plaintiffs herein, those Orders do not encompass Lot 13.4 . . . ." (Pls.' Mem. at 10.) Similarly, they argue that the fourth factor cannot be met as "there is no Order affecting Lot 13.4." (*Id.* at p. 11.) However, as Defendant aptly points out:

The State Court Action specifically concerns illegal activities on Lot 13.4 and the other Lots "[u]nder the guise and pretext of constructing only lawful barn structures," of which Lot 13.4**[\*15]** is repeatedly and specifically identified in the Town's Complaint and simultaneously filed Order to Show Cause application therein as being the 24 acre lot whose mailing address is 191 South Street, Manorville, NY. *See* [Eaderesto Declar. at ] Exhibit B, First Order to Show Cause and TRO, with Town's Complaint attached, PDF pp. 22, 28, 71, 36-37, 69, & Exhibit H, Preliminary Injunction Order, PDF pp. 261, 263. Moreover, Plaintiffs' own Complaint herein specifically admits that the Town's State Court Action concerns all four of the Lots, including specifically Lot 13.4 and that the first "temporary restraining order prevents the construction of the lawfully permitted barns" , , , and has "halted" that construction (Compl. ¶¶ 23-26, 30).

Def.'s Reply at 4-5 (footnote omitted).

While the applicability of the Orders to Lot 13.4 appears satisfied, that some of the plaintiffs herein are not named as a party to the Supreme Court Action precludes satisfaction of the first prong as to those plaintiffs (i.e., BAD, LD, and ED). The Supreme Court has emphasized that the *Rooker-Feldman* is a "narrow" doctrine and has cautioned against "erroneously conflating [it with] preclusion law." [*Lance v. Dennis, 546 U.S. 459, 464, 466, 126 S. Ct. 1198, 163 L. Ed. 2d 1059 (2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4J9V-C8Y0-004B-Y02X-00000-00&context=). It "does not**[\*16]** bar actions by nonparties to the earlier state-court judgment simply, because, for purposes of preclusion law, they could be considered in privity with a party to the judgment." *Id.*; *accord* [*Worthy-Pugh v. Deutsche Bank Nat'l Tr. Co., 2016 U.S. Dist. LEXIS 19081, 2016 WL 2944535, \* 6 (D. Conn. Jan. 29, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J3M-24S1-F04C-W0H3-00000-00&context=), *aff'd*, [*664 Fed. App'x 20 (2d Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KYT-H3X1-F04K-J00W-00000-00&context=) (*Rooker-Feldman* does not require dismissal of claims of federal plaintiff who was "married co-habitant" with the state court debtor and co-plaintiff, even though "their legal interest in the funds is identical and they are in privity.") While the *Lance* Court left open the possibility that there are limited circumstances in which the doctrine may be applied against a party not named in the state proceeding, this case does not appear to fall within the single example given of such a circumstance, i.e. "[w]here an estate takes a de facto appeal in a district court of an earlier state decision involving the decedent." *Id.* at n.2. As the first element has not been satisfied as to plaintiffs BAD, LD, and ED, the motion to dismiss pursuant to *Rooker-Feldman* is denied as to them. The Court will proceed to address the remaining elements as to plaintiffs JWD and BD.

Plaintiffs do not dispute that the second element has been met. *See* Pls.' Opp. Mem at 10 ("Here, while Plaintiffs complain of injuries**[\*17]** caused by the State Court TRO . . . "). Indeed, as the complaint specifically alleges that the Order issued in the Supreme Court Action "prevents the construction of the lawfully permitted barns . . . effectively halting any further construction of the barns" (Compl. ¶ 30), the second element has been met.

Plaintiff maintains, however, that the third element has not been met citing the "Wherefore Clause" of their complaint in which they seek "ordering the Defendant to remove the administrative Stop Work Orders and allow Plaintiff [sic] to continue to construct the barns which are the validly issued building permit" and "enjoining Defendant from taking any action against the Plaintiffs without a determination by the Court as to guilt or innocence of any of the allegations made." (Pls.' Opp. Mem at 10.) The Court is underwhelmed by this argument. Notwithstanding clever pleading, Plaintiffs seek to have this Court allow them to continue to construct the barns and thus are challenging the Orders of the court in the Supreme Court Action which they allege prevents that construction. Their complaint specifically claims that the "temporary restraining order prevents the construction of the lawfully permitted**[\*18]** barns . . . as the barns require a concrete base and without the spreading of the RCA on the property as a substrate, the concrete base cannot be installed, effectively halting any further construction of the barns." Further, the affidavit submitted by the Town in support of the first Order to Show Cause states that "[u]nder the guise and pretext of constructing only lawful barn structures ostensibly incidental to farming and for which only limited and incidental leveling is permitted, defendants have instead imported ten of thousands of cubic yards of fill, recycled concrete aggregate, and material containing currently unknown contaminants to create unlawful grades and roadways (without approved grading, drainage, or site plans) causing runoff of contaminants onto adjoining operating farms, and contaminating crops and groundwater, all in violation of applicable Town Codes and Environmental Conservation Law prohibitions." (Eaderesto Declar. Ex. B at ¶ 7 (DE 11-2 at p. 26).) The lifting of the stop work orders would not permit construction of the barns, because their construction would continue to be subject to the Orders in the Supreme Court Action. Thus, the relief sought invites**[\*19]** review and rejection of the preliminary injunction Order entered in the Supreme Court Action. *See, e.g.,* [*Salten v. United States, 2014 U.S. Dist. LEXIS 156134, 2014 WL 5682804, \*4 (E.D.N.Y. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5DHP-V841-F04F-0288-00000-00&context=) (citing cases).

There is no dispute that the Orders in the Supreme Court Action were entered before the commencement of the instant action and therefore the fourth factor has been met.

Defendant's motion to dismiss on the basis of [*Rooker*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-38J0-003B-H14G-00000-00&context=)*-*[*Feldman*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5340-003B-S092-00000-00&context=) is granted as to plaintiffs JWD and BD.

**IV. Abstention**

"Abstention from the exercise of federal jurisdiction is the exception, not the rule." [*Colorado River, 424 U.S. 800, 813, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9YH0-003B-S3H5-00000-00&context=). The Second Circuit has characterized the abstention doctrine as "compris[ing] a few extraordinary and narrow exceptions to a federal court's duty to exercise its jurisdiction." [*Woodford v. Community Action Agency of Green County, Inc., 239 F.3d 517, 522 (2d Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CM-SY00-0038-X2ST-00000-00&context=) (internal quotation marks omitted).

**A. *Younger* Abstention**

The Supreme Court has recognized that in certain instance "the prospect of undue interference with state proceedings counsels against federal relief." [*Sprint Commc'ns, Inc. v. Jacobs, U.S.    , 571 U.S. 69, 134 S. Ct. 584, 588, 187 L. Ed. 2d 505 (2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5B1D-3BH1-F04K-F54X-00000-00&context=). "[*Younger [v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)]*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DRF0-003B-S48T-00000-00&context=) exemplifies one class of cases in which federal-court abstention is required . . . . Circumstances fitting with the *Younger* doctrine . . . include . . . state criminal prosecutions, civil enforcement proceedings, and civil proceedings involving certain orders that**[\*20]** are uniquely in furtherance of the state court's ability to perform their judicial functions." *Id.* (internal quotation marks omitted). To the extent Plaintiffs claims involve the ongoing criminal proceedings, [*Younger*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DRF0-003B-S48T-00000-00&context=) abstention is warranted. [*Washington v. County of Rockland, 373 F.3d 310, 318 (2d Cir.2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CPP-32X0-0038-X47B-00000-00&context=) (Sotomayor, J.) ("Under *Younger*, federal courts, in the interest of comity, must abstain from enjoining pending state court criminal prosecutions and allow state courts to resolve pending matters within their jurisdiction.") Further, Plaintiffs' claim here clearly implicate both civil enforcement proceedings and New York State's interest in enforcing the orders and judgments of its courts. Nor does the bad faith exception to Younger apply. As the Second Circuit recently stated:

A court may refuse to abstain when "a prosecution or proceeding has been brought to retaliate for or to deter constitutionally protected conduct, or where a prosecution or proceeding is otherwise brought in bad faith or for the purpose to harass." [*Cullen v. Fliegner, 18 F.3d 96, 103-04 (2d Cir. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-81H0-003B-P449-00000-00&context=). But '[a] state proceeding that is legitimate in its purposes, but unconstitutional in its execution—even when the violations of constitutional rights are egregious—will not warrant the application of the bad faith exception."**[\*21]** *Diamond "D"* [[*Constr. Corp. v. McGowan,] 282 F.3d 191, 199 [(2d Cir. 2002)]*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4582-RHS0-0038-X044-00000-00&context=). The plaintiff must therefore show subjective bad faith on the part of the defendants. [*Id. at 199-200*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4582-RHS0-0038-X044-00000-00&context=). The plaintiff must demonstrate that the party bringing the state action has "no reasonable expectation of obtaining a favorable outcome." [*Id. at 199*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4582-RHS0-0038-X044-00000-00&context=) (quoting [*Cullen, 18 F.3d at 103*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-81H0-003B-P449-00000-00&context=).)

[*Schorr v. DoPico, 686 Fed. App'x 34, 36 (2d Cir. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N82-J9T1-F04K-J07T-00000-00&context=). Given that Defendant was able to successfully obtain a Temporary Restraining Order and Preliminary Injunction, Plaintiffs cannot demonstrate that the Town has no reasonable expectation of obtaining a favorable outcome.

[*Younger*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DRF0-003B-S48T-00000-00&context=) abstention is therefore appropriate. To the extent Plaintiffs seek injunctive relief, their claims are dismissed; the claims for monetary relief are stayed. *See* [*Quackenbush v. Allstate Ins., 517 U.S. 706, 730-31, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996.)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RPN-MB70-003B-R05N-00000-00&context=)

**B. *Colorado River* Abstention**[[6]](#footnote-5)6

Alternatively, for the following reason, *Colorado River* abstention is also appropriate. In *Colorado River* the Supreme Court announced that "while the [general] rule is that the pendency of an action in the state court is no bar to proceedings concerning the matter in the Federal court having jurisdiction" a court may abstain in order to conserve federal judicial resources where resolution of the state matter may result in "comprehensive disposition of the litigation." [*Colorado River, 424 U.S. at 817*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9YH0-003B-S3H5-00000-00&context=); *see* [*Woodford, 239 F.3d at 522*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CM-SY00-0038-X2ST-00000-00&context=).

The *Colorado River* abstention**[\*22]** analysis begins with a determination of whether the concurrent proceedings are parallel; parallelism is a "necessary prerequisite." [*Smulley v. Mutual of Omaha Bank, 634 Fed. App'x 335, 337 (2d Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J5G-JBX1-F04K-J0NT-00000-00&context=) (citing [*Dittmer v. County of Suffolk, 146 F.3d 113, 118 (2d Cir. 1998))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SVY-KRM0-0038-X1WN-00000-00&context=). If the proceeding are parallel, then the following six factors should be considered:

(1) whether the controversy involves a res over which one of the courts has assumed jurisdiction; (2) whether the federal forum is less convenient than the other for the parties; (3) whether staying or dismissing the federal action will avoid piecemeal litigation; (4) the order in which the actions were filed; (5) whether federal law provides the rule of decision; and (6) whether the state procedures are adequate to protect the plaintiff's federal rights.

[*Woodford, 239 F.3d at 522*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42CM-SY00-0038-X2ST-00000-00&context=) (internal citations omitted). "No one factor is necessarily determinative . . . . Only the clearest of justifications will warrant dismissal." [*Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 15-16, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-54V0-003B-S0RY-00000-00&context=) (quoting [*Colorado River, 424 U.S. at 818-19*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9YH0-003B-S3H5-00000-00&context=)) (emphasis in *Moses H. Cone* omitted). "Where a *Colorado River* factor is facially neutral, that is a basis for retaining jurisdiction, not for yielding it." [*Niagara Mohawk Power Corp v. Hudson River-Black River* ***Regulating*** *Dist., 673 F.3d 84, 101 (2d Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5549-2M51-F04K-J0J8-00000-00&context=) (internal quotation marks omitted).

"Actions are 'parallel when substantially the same parties are contemporaneously litigating the same issue in another forum.'" [*Smulley, 634 Fed. App'x 335, 337 (2d Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J5G-JBX1-F04K-J0NT-00000-00&context=) (quoting [*Niagara Mohawk, 673 F.3d at 100*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5549-2M51-F04K-J0J8-00000-00&context=)); *see* [*Dittmer v. County of Suffolk, 146 F.3d 113, 118, 2d Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SVY-KRM0-0038-X1WN-00000-00&context=) ("Suits are**[\*23]** parallel when substantially the same parties are contemporaneously litigating substantially the same issue in another forum") (internal quotation marks omitted); [*Blake, 942 F. Supp. 2d at 293*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:587Y-47P1-F04F-0054-00000-00&context=) ("Cases are considered parallel when the main issue in the case is the subject of already pending litigation.") (internal quotation marks omitted). "Perfect symmetry of parties and issues is not required." [*United States v. Blake, 942 F. Supp. 2d 285, 297 (E.D.N.Y. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:587Y-47P1-F04F-0054-00000-00&context=) (citations omitted). Abstention may be appropriate "notwithstanding the nonidentity of the parties" in cases where interests are "congruent." [*Canaday v. Koch, 608 F. Supp. 1460, 1475 (S.D.N.Y.)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-FMY0-0039-R39G-00000-00&context=), *aff'd*, [*768 F.2d 501 (2d Cir. 1985)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FR80-0039-P1S2-00000-00&context=).

This action is parallel with the State Court Action and the code enforcement proceedings as all revolve around the same core issues and involve "substantially" the same parties. That some of the plaintiffs herein are not a named party to the matters pending in the state courts does not preclude the actions beings parallel given the congruency of their interests with those plaintiffs named in those proceedings.

Having determined that the two actions are parallel, the Court will address the six-part balancing test.

Jurisdiction over the res may be "dispositive" in a *Colorado River* analysis. *See* [*FDIC v. Four Star Holding Co., 178 F.3d 97, 102 (2d Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WJD-G0V0-0038-X30T-00000-00&context=) (citing [*40235 Washington St. Corp. v. Lusardi, 976 F.2d 587, 589 (9th Cir. 1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0RX0-008H-V0KS-00000-00&context=) (per curiam) (holding that in an action concerning the disposition of**[\*24]** property, "the first prong of the Colorado River abstention test is dispositive ... [and] the forum first assuming custody of the property at issue has exclusive jurisdiction to proceed")). Although neither the various state court proceedings or this action are proceedings "in rem" they do all involve the use of the same property - the Dosiak Farm and therefore the first factor favors abstention.

The state court proceedings are pending in Suffolk County, which is just as convenient to the parties as this Court. Thus, this factor is neutral and favors retention of federal jurisdiction. *See* [*Village of Westfield, NY. v. Welch's, 170 F.3d 116, 122 (2d Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3VWW-1600-0038-X1JR-00000-00&context=).

Avoidance of piecemeal litigation is of paramount importance in a *Colorado River* analysis. *See* [*Moses H. Cone, 460 U.S. at 16*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-54V0-003B-S0RY-00000-00&context=) (stating that "the most important factor in our decision to approve the dismissal [in *Colorado River* ] was the clear federal policy . . . of avoidance of piecemeal adjudication. ") (internal quotation marks and brackets omitted); [*Arkwright—Boston Mfrs. Mut. Ins. Co. v. City of New York, 762 F.2d 205, 211 (2d Cir. 1985)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HD20-0039-P0K9-00000-00&context=) (noting that in the case before it, "the danger of piecemeal litigation is the paramount consideration"). This factor strongly favors abstention inasmuch as the state proceeding and this action revolve around the core issue of whether illegal materials are being stored**[\*25]** and/or processed on the Farm.

The Supreme Court Action was commenced prior to the filing of the instant action. The relative commencement dates are not determinative; rather, the relative progress of the cases each in forum are to be considered. [*Arkwright-Boston, 762 F.2d at 211*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HD20-0039-P0K9-00000-00&context=) (citing [*Moses Cone, 460 U.S. at 21-22*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-54V0-003B-S0RY-00000-00&context=)). As the Supreme Court Action had already resulted in the issuance of a temporary restraining order and a preliminary injunction, its progress favors abstention.

The Complaint contains only federal law claims. The presence of federal claims normally weighs against abstention but only slightly where the claims are not within the exclusive jurisdiction of the federal courts. *See generally* [*Niagara Mohawk, 673 F.3d at 99*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5549-2M51-F04K-J0J8-00000-00&context=) ("[T]he presence of a federal basis of jurisdiction may raise the level of justification needed for abstention . . . .") (internal quotation marks omitted). Here, however, the federal claims will require the Court to apply and interpret Brookhaven Code provisions and DEC environmental ***regulations***. Thus abstention is favored. *See* [*General Reins. Corp. v. Ciba-Geigy Corp., 853 F.2d 78, 82 (2d Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YRS0-001B-K4MP-00000-00&context=) (abstention favored "where the bulk of the litigation would necessarily revolve around the state-law . . . rights of . . . parties." (internal quotation marks omitted)).

The last factor is whether "the parallel state-court litigation**[\*26]** will be an adequate vehicle for the complete and prompt resolution of the issues between the parties." [*Moses H. Cone, 460 U.S. at 28*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-54V0-003B-S0RY-00000-00&context=). To the extent Plaintiffs successfully defeat the State Court Action and the enforcement proceedings, they will have received relief that parallels the injunctive relief sought in this action. To the extent Plaintiffs seek damages, they may assert counterclaims in the State Court action for their recovery. Thus, this factor supports abstention.

Upon consideration of the [*Colorado River*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9YH0-003B-S3H5-00000-00&context=) factors, the Court concludes that this case falls within the "exceptional circumstances" warranting abstention and thus a stay of any claims which may remain after resolution of Defendant's [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion. It is to that portion of Defendant's motion that the Court now turns.

**V. Failure to State a Claim**

**A**. ***Monell***

In order to bring a *§ 1983* claim against a municipal defendant, a plaintiff must establish both a violation of his constitutional rights and that the violation was motivated by a municipal custom or policy. *See* [*Monell v. N.Y. City Dep't of Soc. Servs., 436 U.S. 658, 690-91, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8SP0-003B-S1RH-00000-00&context=); *see* [*Coon v. Town of Springfield, Vt., 404 F.3d 683, 686 (2d Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FY5-K5P0-0038-X3KB-00000-00&context=) ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury**[\*27]** that the government as an entity is responsible under *§ 1983*."); [*Patterson v. Cnty. of Oneida, 375 F.3d 206, 226 (2d Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CVY-GPM0-0038-X12K-00000-00&context=); *see also* [*Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0K50-003B-G21W-00000-00&context=) (noting that "the mere invocation of the 'pattern' or 'plan' will not suffice") (citations omitted); [*Middleton v. City of New York, 2006 U.S. Dist. Lexis 44320 (E.D.N.Y. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4K9C-86N0-TVW3-P1RC-00000-00&context=) (allegations of a isolated incident of police misconduct will not suffice). A municipality cannot be held liable under *Section 1983* on a respondeat superior theory. [*Monell, 436 U.S. at 691*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8SP0-003B-S1RH-00000-00&context=).

"To show a policy, custom, or practice, a plaintiff need not identify an express rule or ***regulation***." [*Patterson, 375 F.3d at 226*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CVY-GPM0-0038-X12K-00000-00&context=). "Rather, the existence of a municipal policy or custom may be plead in any of four ways. A plaintiff may allege "(1) the existence of a formal policy which is officially endorsed by the municipality; (2) actions taken or decisions made by municipal officials with final decision making authority, which caused the alleged violation of plaintiff's civil rights; (3) a practice so persistent and widespread that it constitutes a custom of which constructive knowledge can be implied on the part of policymaking officials; or (4) a failure by policy makers to properly train or supervise their subordinates, amounting to deliberate indifference to the rights of those who come in contact with municipal employees." [*Calicchio v. Sachem Central Sch. Dist., 2015 U.S. Dist. LEXIS 139001, 2015 WL 5944269, \*10 (E.D.N.Y. Oct. 13, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5H4P-S7B1-F04F-0011-00000-00&context=) (citing [*Giscombe v. New York City Dept. of Educ., 2013 U.S. Dist. LEXIS 27941, 2013 WL 829127, \* 7 (S.D.N.Y. Feb. 28, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57VS-BCV1-F04F-02W5-00000-00&context=); *accord* [*Bektic-Marrero v. Goldberg, 850 F. Supp. 2d 418, 430 (S.D.N.Y.2012))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:554N-6P51-JCNC-804D-00000-00&context=); [*Zambrano—*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:549G-CPM1-F04F-0014-00000-00&context=)[*Lamhaouhi v. New York City Bd. of Educ., 866 F. Supp. 2d 147, 175 (E.D.N.Y.2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:549G-CPM1-F04F-0014-00000-00&context=).

The Supreme Court has long**[\*28]** recognized that "[i]f the decision to adopt [a] particular course of action is properly made by [a] government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood." [*Pembaur v. City of Cincinnati, 475 U.S. 469, 481, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7PB0-0039-N51X-00000-00&context=). "Municipal liability attaches only where the decision-maker possesses final authority to establish municipal policy with respect to the action ordered. . . . Authority to make municipal policy may be granted directly by legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law." [*Id. at 481-83*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7PB0-0039-N51X-00000-00&context=) (citations and footnotes omitted). In other words, "municipal liability under *§ 1983* attaches where - and only where - a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." [*Id. at 483-84*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7PB0-0039-N51X-00000-00&context=) (citing [*Oklahoma City v. Tuttle, 471 U.S. 808, 823, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BDP0-0039-N50K-00000-00&context=) ("'policy' generally implies a course of action consciously chosen from among various alternatives.")).

The complaint does not include any allegations to plausibly suggest *Monell* liability based on the existence of a formal**[\*29]** policy or a widespread practice. *See, e.g.,* [*Vail v. City of New York, 68 F. Supp.3d 412, 431 (S.D.N.Y. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5DRJ-SS01-F04F-03PW-00000-00&context=). ("A municipal policy may be pronounced or tacit and reflected in either action or inaction, but either way Plaintiff must allege it with factual specificity, rather than by bare and conclusory statements.) (internal quotation marks omitted). Indeed, the complaint contains only a detailed account of plaintiffs' own experiences. *Cf.* [*Schnauder v. Gibens, 679 Fed. App'x 8 (2d Cir. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MVB-C011-F04K-J00H-00000-00&context=) (no de facto policy alleged where "apart from a detailed recounting of his own experiences, [plaintiff's] complaint contains only general conclusory allegations that there was a policy . . . .") (internal quotation marks omitted); [*Iacovangelo v. Correctional Med. Care, Inc.,624 Fed. App'x 10, 14 (2d Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GXH-5T31-F04K-J01S-00000-00&context=) (widespread practice not pled where other than the plaintiff, the pleading provides only one additional example of a similar incident).

With respect to the code violations and stop work orders, the complaint is devoid of any reference to a failure by the Town to properly train or supervise the members of either the Building or Code Department, no less contain allegations suggesting that the lack of training or supervision amounted to deliberate indifference to the rights of those who come in contact with municipal employees. Similarly absent are allegations in the Complaint of actions**[\*30]** taken or decisions made by municipal officials with final decision making authority over policy which caused the alleged violation of Plaintiffs' civil rights stemming from the issuance of appearance tickets for code violations and stop work orders. Indeed, Plaintiffs seem to concede as much in their opposition memorandum where they concede that they "are unable to determine what officials at the Town made the decision to deprive them of their constitutional rights . . . ." Pls.' Opp. Mem. at 17.

The assertion in their Memorandum that "senior officials in the Building Department were not only aware of, but were personally involved in, carrying out the dictates of the Town" *id.*, does not cure this defect. Even if a statement in a memorandum of law could cure a defective pleading, which it does not, *see* [*Taormina v. Thrifty Car Rental, 2016 U.S. Dist. LEXIS 176673, 2016 WL 7392214, \*8 (S.D.N.Y. Dec. 21, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MFG-XF41-F04F-027R-00000-00&context=), this does not plausibly suggest that senior officials in the Building Department were the final municipal policy makers with regard to the matters alleged. *See* [*Boonmalert v. City of New York, 2017 U.S. Dist. LEXIS 56409, 2017 WL 1378274, \* 7 (S.D.N.Y. Apr. 12, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N9H-B901-F04F-04G6-00000-00&context=) (citing [*Hurdle v. Bd. of Educ. of City of N.Y., 113 Fed. App'x 423, 427 (2d Cir. 2004))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DN4-FRC0-0038-X4FJ-00000-00&context=). In fact, it suggests just the opposite.

However, given the allegations in the complaint with respect to the Supreme Court Action, a *Monell* claim has been sufficiently pled. The Supreme Court Action was instituted in**[\*31]** the name of the Town, with the Town Attorney herself submitting an affidavit in support of the application for relief, and thus it may reasonably be inferred that the Town Board authorized its initiation. Defendant's argument that no *Monell* claim is stated because it was not the driving force behind the alleged injury is premature at this juncture.

The motion to dismiss on the ground that a *Monell* claim has not been stated is denied.

**B. The Equal Protection Claim**

The mandate of the *Fourteenth Amendment's Equal Protection Clause* is essentially to prohibit the government from treating similarly situated individuals differently. *See* [*City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9Y50-0039-N48B-00000-00&context=). The *Equal Protection Clause* is typically invoked to bring law suits claiming discrimination based on membership in a protected class. Where, as here, there is no inherently suspect class is at issue a plaintiff may assert an equal protection claim under a class-of-one theory or a selective enforcement theory. [*Bizzarro v. Miranda, 394 F.3d 82, 86, 89 (2d Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4F6G-C3C0-0038-X37F-00000-00&context=).

A class-of-one claim arises when a plaintiff claims that he was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." [*Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YMV-9SF0-004C-200D-00000-00&context=).

[T]o succeed on a class-of-one claim, a plaintiff must establish that: (i) no rational person could regard the circumstances**[\*32]** of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake.

[*Analytical Diagnostic Labs, Inc. v. Kusel, 626 F.3d 135, 140 (2d Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:515C-YBY1-652R-0000-00000-00&context=) (internal quotations omitted).

A class-of-one plaintiff is "required to identify comparators that are 'prima facie identical' in order 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 . . . is all but certain.'" [*Renato Pistolesi, Alltow, Inc. v. Calabrese, 666 Fed. App'x 55, 58, n.2 (2d Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M96-DXK1-F04K-J06D-00000-00&context=) (quoting [*Neilson v. D'Angelis, 409 F.3d 100, 105 (2d Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4G84-9RM0-0038-X1H7-00000-00&context=), *overruled on other grounds by* [*Appel v. Spiridon, 531 F.3d 138 (2d Cir. 2008))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SWT-P190-TX4N-G0M2-00000-00&context=); *cf.* [*Ruston, 610 F.3d at 59*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YWN-8DN1-652R-000C-00000-00&context=) (Class of one claims require "an extremely high degree of similarity between [plaintiffs] and the persons to whom they compare themselves.").

A selective enforcement claim requires that a plaintiff plead that "(1) [he was] 'treated differently from other similarly situated' [entities] and (2) this 'differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent**[\*33]** to injure a person.'" [*Butler v. City of Batavia, 323 Fed. App'x 21, 22 (2d Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W13-CXW0-TXFX-42JM-00000-00&context=) (quoting [*Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778, 790 (2d Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R35-WKV0-TXFX-434R-00000-00&context=)). Like a class of one claim, a selective enforcement claim must allege the existence of similarly situated comparators. *See* [*id.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W13-CXW0-TXFX-42JM-00000-00&context=)

Here, the complaint fails in that it does not identify comparators that are prima facie identical and thus the Court cannot say that it is "all but certain" that the Town's actions were based on an improper purpose. The complaint only generally refers to other property owners or tenants that were issued building permits. As defendants succinctly state:

It identifies no other property owners who themselves or their tenant maintained a stockpile of alleged "clean fill" or RCA and were treated differently. It identifies no comparators whose tenants was charged with illegally "operation a 'solid waste management facility.'" It identifies no other property owner who constructed or were allegedly preparing to construct a "road" without permits or who maintained a stockpile of used concrete based materials (the claimed RCA) for that alleged purpose at the same time their tenant was being prosecuted for operating a solid waste management facility by stockpiling used concrete and other unpermitted materials.

Def.'s Reply Mem.**[\*34]** at 17-18 (citing Compl. ¶¶ 15, 16, 22). The failure to identify even one comparator is fatal to the Equal Protection claim. *See* [*Clark v. Kitt, 2014 U.S. Dist. LEXIS 113494, 2014 WL 4054284, \*14 (S.D.N.Y. Aug.15, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CX9-04T1-F04F-00GD-00000-00&context=). Further, the conclusory allegation that "the sole reason for Plaintiffs being singled out for punishment is personal animus toward non party JD Material and the Plaintiffs herein" (*see* Compl. ¶49) does not save the selective enforcement claim as conclusory allegations are not entitled to the assumption of truth. [*Iqbal, 556 U.S. at 678*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=).

The motion to dismiss the equal protection claim is granted.[[7]](#footnote-6)7

**C. Procedural Due Process**

The *Due Process Clause* does not protect against all deprivations of constitutionally protected interests, rather it protects "only against deprivations without due process of law." [*Parratt v. Taylor, 451 U.S. 527, 537, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6J80-003B-S169-00000-00&context=) (internal quotation marks omitted), *overruled in part on other grounds* by [*Daniels v. Williams, 474 U.S. 327, 330-331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8KW0-0039-N11N-00000-00&context=). "[I]t is necessary to ask what process the State has provided, and whether it was constitutionally adequate" in determining whether a constitutional violation has occurred. [*Zinermon v. Burch, 494 U.S. 113, 126, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7TR0-003B-4188-00000-00&context=).

"[I]n evaluating what process satisfies the *Due Process Clause* the Supreme Court has distinguished between (a) claims based on established state procedures and (b) claims based on random, unauthorized acts by state employees." [*Rivera-Powell v. New York City Bd. of Elections, 470 F.3d 458 (2d Cir. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4MHB-1K20-0038-X0JD-00000-00&context=) (internal quotation marks omitted). A**[\*35]** state will satisfy procedural due process requirements if it provides a meaningful post-deprivation remedy when the state conduct in question is "random and unauthorized." *Hellenic American Neighborhood Action Committee v. City of New York* ("*HANAC*"), [*101 F.3d 877, 880 (2d Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YJT0-006F-M2B0-00000-00&context=); *see* [*Hudson v. Palmer, 468 U.S. 517, 533, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-38T0-003B-S2X7-00000-00&context=). If, however, "the deprivation is pursuant to established state procedure, the state can predict when it will occur and is in the position to provide a pre-deprivation hearing," [*Rivera-Powell, 470 F.3d at 465*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4MHB-1K20-0038-X0JD-00000-00&context=) (citing [*HANAC, 101 F.3d at 880*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YJT0-006F-M2B0-00000-00&context=); [*Parratt, 451 U.S. at 541*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6J80-003B-S169-00000-00&context=))) and therefore "'the availability of post-deprivation procedures will not, *ipso facto*, satisfy due process.'" *Id.* (quoting [*HANAC, 101 F.3d at 880*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YJT0-006F-M2B0-00000-00&context=)).

In support of their procedural due process claim Plaintiffs argue:

The Town was granted the TROs and the preliminary injunction in violation of [*CPLR § 6301*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-08C1-6RDJ-8513-00000-00&context=)which requires that "a temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss, or damage will result unless the defendant is restrained before the hearing can be had. Here, in contrast, Plaintiffs received no hearing before the Town essentially revoked their building permit.

(Pls.' Mem. in Opp. at 25.) Firstly, Plaintiffs do not cite to any authority that the "hearing" requirement in the**[\*36]** CPLR requires a full blown evidentiary hearing, as opposed to an opportunity to be heard. But assuming such a requirement does exist, given the allegations that the TRO precludes Plaintiffs from constructing the barns, it was the court, not the Town, that failed to provide such a hearing and a remedy for such an omission exists in the form of an Article 78 proceeding which provides relief in the form previously obtained by, inter alia, a writ of mandamus. *See* [*N.Y. CPLR § 7801*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-08C1-6RDJ-854G-00000-00&context=).[[8]](#footnote-7)8 As the Town notes there is no claim that it "did not give Plaintiffs notice of its civil enforcement lawsuit or of its Order to Show Cause applications, or that Plaintiffs did not receive actual complaint and application papers. . . . [T]he Plaintiffs appeared and submitted opposition to both applications, as the State Court observed in its Order granting both Preliminary Injunction Motions." (Def.'s Mem. at 20.)

The motion to dismiss the procedural due process claim for failure to state a claim is granted.

**D. Substantive Due Process**

"Substantive due process rights safeguard persons against the government's exercise of power without any reasonable justification in the service of a legitimate governmental objective." [*Southerland v. City of New York, 680 F.3d 127, 151 (2d Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55MS-XG01-F04K-J0B1-00000-00&context=). To state**[\*37]** a claim for violation of this right, allegations must plausibly allege that the plaintiff "was deprived of a fundamental constitutional right," [*Walker v. City of Waterbury, 361 Fed. App'x 163, 165 (2d Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XJ4-RBF0-YB0V-D039-00000-00&context=) (citing [*Local 342 v. Town Bd. of Huntington, 31 F.3d 1191, 1196 (2d Cir. 1994))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3YN0-003B-P4PC-00000-00&context=), by government conduct so egregious it as " to shock the contemporary conscience," [*County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SSS-S7J0-004C-0001-00000-00&context=); *accord* [*Rochon v. California, 342 U.S. 165, 172 (1952)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JJM0-003B-S2RF-00000-00&context=); [*Ruston v. Town Bd. for Town of Skaneateles, 610 F.3d 55, 58 n.2 (2d Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YWN-8DN1-652R-000C-00000-00&context=). Conduct that is merely "incorrect or ill-advised" does not meet this standard. *See* [*Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir. 1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-76F0-003B-P01N-00000-00&context=). It must be "conscience shocking." [*Cox v. Warwick Valley Cent. Sch. Dist., 654 F.3d 267, 275 (2d Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:8301-JWF1-652R-01HS-00000-00&context=) (internal quotation marks omitted). Substantive due process "does not forbid governmental actions that might fairly be deemed arbitrary or capricious and for that reason correctable in a state court lawsuit." [*Corbley v. County of Suffolk, 45 F. Supp. 3d 276, 282 (E.D.N.Y. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D6J-N131-F04F-03VG-00000-00&context=) (citing [*Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir. 1999))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W01-H390-0038-X3NS-00000-00&context=).

Here, the action of the Town in issuing the stop work order, commencing criminal and civil enforcement proceeding and bringing the State Court Action and seeking preliminary relief cannot be viewed as an "exercise of power without any reasonable justification in the service of a legitimate governmental objective" given the assertions in those proceedings of the potential damage to the environment. Additionally, that the Town is pursuing relief through the judicial process, both civil and criminal, even if its motivation is arbitrary and capricious, is not conscience shocking. Moreover, unlike the cases upon**[\*38]** which Plainitffs rely, *e.g.,*[*Soundview Assocs. v. Town of Riverhead, 725 F. Supp. 2d 320, 338 (E.D.N.Y. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YY4-03D1-652J-D028-00000-00&context=) (substantive due process claim stated where plaintiff alleged that defendant arbitrarily extinguished its right to build a health spa in order to approve the application of another); [*Garlasco v. Stuart, 602 F. Supp.2d 396 (D. Conn. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VVY-0690-TXFP-F27T-00000-00&context=) (substantive due process claim stated by allegations that the defendant blocked plaintiff's property access with boulders, stones, dirt, and snow in an attempt to compel him to sell the property); [*Collier v. Town of Harvard, 1997 U.S. Dist. LEXIS 23582, 1997 WL 33781338, at 5 (D. Mass. Mar. 28, 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XP6-4V50-0038-Y18H-00000-00&context=) (substantive due process claim premised on assertion that the defendants attempted to extort an easement for the personal benefit of a member of the town's planning board), here there are no specific factual allegations to support an improper motive.

The motion to dismiss the substantive due process claim is granted.

**E. *First Amendment* Right to Petition Claim**

Plaintiffs' claim that Defendant "violated the Plaintiffs right to petition the government when they refused to schedule a hearing on the preliminary injunction in the State Court as required by [*N.Y.C.P.L.R. § 6301*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-08C1-6RDJ-8513-00000-00&context=). By doing so, the Plaintiffs were unable to assert their rights affectively [sic] in that action prior to the issuance of the preliminary injunction in violation of the *First Amendment*." (Pls.' Mem. in Opp. at 31.) As the Court has previously stated, they cite no**[\*39]** authority for the proposition that a full blown evidentiary hearing is required as opposed to an opportunity to be heard (which they received when they submitted their opposition papers) and even if such a hearing is required, the scheduling of such a hearing is an obligation of the court, not the Town.

The *First Amendment* Right to Petition claim is dismissed.

**F. The *Fifth Amendment* Taking Claim**

A *Fifth Amendment* taking claim is subject to the two-step ripeness test announced in [*Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186-97, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B0C0-0039-N4CM-00000-00&context=). That test requires a plaintiff (1) to have received a final decision regarding the application of an ordinance or ***regulation*** to its property and (2) to have sought just compensation for the alleged taking before proceeding to federal court. [*Id.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B0C0-0039-N4CM-00000-00&context=)*; see* [*Murphy v. New Milford Zoning Comm'n, 402 F.3d 342 (2d Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FSX-4630-0038-X26B-00000-00&context=). Given the on-going nature of the proceedings in the New York courts, the first prong has not been met. Accordingly, the taking claim is not ripe and therefore dismissed.

**CONCLUSION**

For the foregoing reasons, Defendant's motion to dismiss is granted.[[9]](#footnote-8)9 The Clerk of Court is directed to enter judgment accordingly and to close this case.

Dated: Central Islip, New York

November 27, 2017

/s/ Denis R. Hurley

Denis R. Hurley

United States District Judge

**End of Document**

1. 1The Court notes that paragraph 23 of the Complaint references the issuance of only two code violation while paragraph 38 refers to 5. [↑](#footnote-ref-0)
2. 2Plaintiffs have disavowed bringing any cause of action on behalf of JD Material. (*See* Pls.' Mem. in Opp. at 14.) [↑](#footnote-ref-1)
3. 3The fourth cause of action seeks attorneys' fees pursuant to ***42 U.S.C. § 1988***. [↑](#footnote-ref-2)
4. 4The Court takes judicial notice of the fact that the Plaintiffs herein filed a notice of appeal from the preliminary injunction order entered in the Supreme Court Action. See https://iapps.courts.state.ny.us/webcivil/FCASeFiledDocsDetail?county\_code=8IyhIV\_PLUS\_9PSFtX87g2d6u9g%3D%3D&txtIndexNo=zLfoWrwmKSNHzu6930SM6A%3D%3D&showMenu =no&isPreRji=N&civilCase=sJ0Mi7c36cj1xUdrTyKV9w%3D%3D at Document 20. [↑](#footnote-ref-3)
5. 5The doctrine evolved from the Supreme Court decisions in [*Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-38J0-003B-H14G-00000-00&context=) and [*District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5340-003B-S092-00000-00&context=). [↑](#footnote-ref-4)
6. 6The Court notes that Plaintiffs' Memorandum in Opposition does not address whether *Colorado River* abstention is appropriate. [↑](#footnote-ref-5)
7. 7The dismissal includes not only the first cause of action, which is labeled as a violation of equal protection, but the third cause of action as well. The third cause of action is labeled "violation of Plaintiff's [sic] rights pursuant to ***Section 1983 of Title 42 of the U.S. Code***" but does not specify the constitutional rights that was allegedly violated. ***Section 1983*** is the enforcement mechanism for violations of constitutional rights by persons acting under color of state law and does not itself establish any rights. Given the allegations contained with respect to this "claim" it appears that Plaintiffs are reasserting an equal protection claim. *See, e.g.*, ¶ 78 (Alleging that the "full composite of Defendant's conduct" "markedly treat Plaintiffs differently than other residents in the immediate area who conduct similar operations.") [↑](#footnote-ref-6)
8. 8The Second Circuit has held that the availably of a post-deprivation hearing under Article 78 of the C.P.L.R. satisfies the requirements of due process. *See* [*Locurto v. Safir, 264 F.3d 154, 175 (2d Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43VK-5XR0-0038-X078-00000-00&context=) ("An Article 78 proceeding therefore constitutes a wholly adequate post-deprivation hearing for due process purposes."); [*Giglio v. Dunn, 732 F.2d 1133, 1135 (2d Cir. 1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-X6B0-003B-G0R3-00000-00&context=) ("Where a pre-deprivation hearing is impractical and a post-deprivation hearing is meaningful, the State satisfies its constitutional obligations by providing the latter.... Where, as here, Article 78 gave the employee a meaningful opportunity to challenge the voluntariness of his resignation, he was not deprived of due process simply because he failed to avail himself of the opportunity.").

   It is unclear whether Plaintiffs are asserting a procedural due process claim with respect to the alleged delays in the criminal proceeding and/or the initial issuance of the stop work order. In any event, the availability of an Article 78 proceeding satisfies the dictates of procedural due process in both cases. [↑](#footnote-ref-7)
9. 9Plaintiffs' request for leave to amend their complaint in the concluding paragraph of their memoranda is denied as they do not provide the Court with any elucidation of the proposed amendment. *See* Pls.' Opp. Mem. at 32. Moreover, to the extent that the Court has determined that this action is subject to *Rooker-Feldman* and that abstention is appropriate, such an amendment would be futile. [↑](#footnote-ref-8)