BUCK FOSTON'S NEW BRUNSWICK, LLC et al v. CAHILL et al

2013 | Cited 0 times | D. New Jersey | September 27, 2013

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY _____

: , : LLC, LAWRENCE D. BLATTERFEIN, : : REALTY, LLC, : : Civil Action No. 11-03731(FLW)(TJB) Plaintiffs, : : OPINION v. :

: JAMES M. CAHILL, INDIVIDUALLY and : as Mayor of the City of New Brunswick, : New Jersey, ROBERT RECINE, : Individually and as President of the New : Brunswick City Council, KEVIN P. EGAN, : Individually and as a member of the New : Brunswick City Council, and CITY OF : NEW BRUNSWICK, New Jersey, : : Defendants. : _____ :

WOLFSON, United States District Judge:

Before the Court is a Motion for Summary Judgment by Defendants James M. Cahill , Robert Recine , Kevin P. Egan , and the City of New Brunswick, New Jersey , to dismiss the Federal and New Jersey State constitutional claims of Plaintiffs, s New Brunswick LLC , Lawrence D. (collectively, liability company, was formed by Mr. Blatterfein to own and operate a restaurant and sports bar

to be in the City of New Brunswick.

alleged delay in the review and then denial of application for a liquor license transfer: (1) were in retaliation for Plaintiffs exercise of commercial speech protected by the First Amendment in naming their proposed restaurant ; (2) deprived Plaintiffs of the equal protection of law under the Fourteenth Amendment by treating the application differently than those of other similarly situated bars/restaurants; and (3) violated the corresponding provisions of the New Jersey State Constitution (Article I, Paragraph 6, and Article I, Paragraph 1, respectively).

Defendants have moved for summary judgment on all of P claims pursuant to Federal Rule of Civil Procedure 56, arguing that (1) Plaintiffs fail to state a cognizable claim for violation of First Amendment rights because they produce no evidence of a causal link between by Defendants; (2) Plaintiffs fail to state a cognizable claim for violation of equal protection rights because they produce no evidence of similarly situated entities; and (3) the parallel state constitutional claims should be

dismissed In addition, Defendants move to dismiss all claims brought by Blatterfein, individually, for lack of standing.

For the reasons that follow, this Court finds that (i) Mr. Blatterfein has standing; (ii) , and thus, it will be dismissed as a plaintiff; (iii) all claims against Defendant Egan are dismissed; (iv) summary judgment is granted in favor of Defendants Cahill, Recine, and City of New Brunswick as to arising from the conduct of the New Brunswick Police Department in allegedly delaying the

liquor license transfer application; and (v) the Motion for Summary

Judgment by Defendants Cahill, Recine, and City of New Brunswick is denied as to First Amendment retaliation claim arising from the denial of

application.

I. Factual Background

The following facts are undisputed, unless otherwise noted:

Sometime in the spring of 2009, Mr. Blatterfein restaurant at the intersection of Routes 1 and 18 in New Brunswick, New Jersey (the

n as a potential location for a new restaurant and sports bar to be named . [Statement of Material Facts, ¶ 7]. In the fall of 2010, at a Rutgers football game, Mr. Blatterfein first discussed the idea of opening a bar/restaurant on the Ben with Councilman Recine, the President of the New Brunswick City Council. [Transcript of Recine, T9:6-11]. During that conversation, Mr. Blatterfein indicated that he desired to change the layout of the Ben roperty to include fewer tables so as to accommodate a dance floor. Councilman to the floor plan and . [Transcript of Blatterfein, T44:1-18 Facts, ¶ 24].

Moving forward with his development plan, Mr. Blatterfein entered into a contract with [Contract for Sale of Real Estate dated January 31, 2011, hereinafter].

Prior to the closing of the Real Estate Contract , jointly,

obtained a guaranteed Small Business Administration loan from Provident Bank in the amount of $2,634,800. [Provident Bank Loan Commitment dated January 13, 2011, hereinafter]. The loan was

costs, and the purchase of a liquor license. Most importantly for the present action, the Real Estate Contract with JLS was made contingent upon Plaintiffs obtaining the loan from Provident Bank within 45 days of the execution of the contract. [Real Estate Contract, ¶¶ 5, 6, 22(a)]. The loan from Provident Bank was, in turn, made contingent upon Plaintiffs obtaining a liquor license transfer

approved by the City, as explained below. [Loan Commitment, 3; Letter from Schiller & Pittenger, P.C. to Clarkin dated March 29, 2011, at 4].

In order to operate a bar within the City of New Brunswick, Plaintiffs were required to obtain a liquor license. Only a finite number of licenses are authorized, and at the time Mr. New Brunswick licenses had already been issued to other businesses. For the project to move forward, Mr. Blatterfein had to locate a liquor license owner willing to sell its license, and to file an application with the City to approve -to- and of the place at which the license could be used -to- . Under the City of New Brunswick government, the City Council is responsible for deciding liquor license transfer applications by

majority vote. [Recine Dep., T24:8-10]. Mr. Blatterfein located a willing liquor license seller, Sapporo, another New Brunswick area business, and contracted to purchase its license for $160,000, with $16,000 to be paid as a down payment. [Agreement to Sell Alcoholic Beverage License dated January 8, 2011].

On April 5, 2011, ownership of the Sapporo liquor license location to the Benni. [Blatterfein Dep., T39:14-16; Clarkin Letter dated April 5,

2011, Re: Plenary Retail Distribution License]. Also during the first week of April, 2011, Mr. attorney the Mayor of New Brunswick. During that conversation, Mayor Cahill expressed his approval of be put to productive use. In the same conversation,

indicated that he found the name offensive because of the play on letters. [Transcript of Clarkin,

T16:2-8, herein].

On April 20, 2011, Mr. Blatterfein personally met with Mayor Cahill to discuss the Buck Mayor Cahill again voiced his displeasure, informing Mr. [Transcript of Cahill, T85:9-14,]. The Mayor believed that the name was inappropriate for the venue, indicating that the play on letters was a cheap stunt. [Cahill Dep., T79:10-16; Blatterfein Dep. T72:6-11, 16-17]. By Mr. was devoted to discussion of the disapproval of the Blatterfein Dep., T72:6-11, 16-17]. Mr. Blatterfein

left the meeting believing that Mayor Cahill opposed the project based solely upon its name.

On May 25, 2011, Glenn Patterson, s Director of Planning, Community and Economic Development, prepared a memorandum addressed to Mayor Cahill, identifying

e aware of The Application, as filed on April 5, 2011, requested an increase

om 185 to 393 persons [May 25, 2011, at 2]. This increase areas around tables with open spaces for

standing only. [Proposed Renovation to Existing

Building by James P. Kissane, Architect]. Patterson indicated that the changed floor plan did not create a violation of zoning standards, and that he had asked Mr. updated floor plan to assess whether there were any other changes that might result in a violation

of city ordinances. [May 25 Memorandum]. Two weeks later, Kenneth Krug, the City official responsible for ensuring that liquor license applicants facilities complied with the New Jersey Uniform Construction Code, reviewed the same floor plan discussed by Mr. Patterson in the May 25 Memorandum. Mr. Krug agreed to accept a reduced maximum occupancy of 352 persons. Mr. Krug believed that this

reduced level of occupancy was not only compliant with City ordinances, but safe for the public. [Transcript of Krug, T6:20-25, 12:14-22, 16:13-21, approval,

By June 9, 2011, necessary to submit its liquor license transfer application to the City Council, except for that of the New Brunswick Police Department. [: Certification of Zoning Compliance and Recommendations of Application Status] (The Application received zoning approval on June 9, construction approval on May 24, fire approval on June 9, and legal approval on June 2). On June 15, 2011, Councilman Recine called Mayor Cahill to discuss the Buck

project. During the conversation, Councilman Recine requested to meet with the Mayor to discuss the matter further. [Recine Dep., T70:19-25, 71:1-2].

Mayor Cahill, Councilman Recine, and Mr. Patterson met on June 16, 2011, [Cahill Dep., T113:1-10, 117:9-13]. It is undisputed that no similar meeting between Defendants Cahill and Recine has ever occurred in conjunction with a liquor license transfer application. [Cahill Dep., T117:16- 21]. In his deposition, Mr. Patterson stated that the purpose of June 16 meeting was to discuss concerns related to the Application. [Patterson Dep., 25:19-23]. Mayor Cahill and Cou scuss the Buck Application, with the Mayor further clarifying after the fact that the Application was indeed the only thing discussed at the meeting. [Recine Dep., T54:20-23; Cahill Dep., T117:9- 13].

Later that same day, Mr. Patterson prepared a second, 5-page memorandum addressed to Mayor Cahill and Councilman Recine. The memorandum discussed, inter alia, the legal Memorandum, hereinafter]. Specifically, of the relevant sections,

roughly three pages are concerned with zoning and the liquor licensing process generally, and one page addresses municipal ordinances restricting business signage and United States Supreme Court case law on government restriction of commercial speech. Id. In drafting the memorandum, Mr. Patterson emphasized certain sentences in each of the sections by underlining them and placing them in bold. In the section discussing commercial speech, Mr. Patterson [a]ny governmental

restraint must advance a substantial public interest

and must not be more extensive than necessary to serve that interest unless speech regulations target false, misleading or coercive advertising, or require disclosure of information that will help avoid misleading advertising, strict First Amendment scrutiny should apply Id. (emphasis in original). In his deposition, Mr. Patterson testified that he included the discussion of signage and commercial speech Transcript of Patterson,

T65:24-25, 66:1-22]. It is undisputed that no similar memoranda have ever been produced in conjunction with a liquor license transfer application in New Brunswick. [Patterson Dep., T53:25, 54:1-25, 55:1-9].

yor Cahill spoke including one or two in Buck project, was discussed. [Patterson Dep., T24:4-11, 24:15-25, 25:1-4].

By late June, 2011, the Police Department had not yet concluded its background check of Mr. Blatterfein, recommendation. Both were necessary before the Application could be considered by the City

Council. Mr. Blatterfein found the delay in the background check particularly troubling, because he was already a liquor license holder in the City of New Brunswick, having previously passed d check, and had received reapproval for his other New Brunswick , [Amended Complaint, ¶ 3; Clarkin Declaration, ¶ 9]. On June 29, 2011, Plaintiff, filed the present lawsuit, including only In their initial pleadings, Plaintiffs did not allege any conduct by the City

Council, because the Council had not yet acted, and the Application was not yet complete for its review. It was not until July 14, 2011, that Tax Certificate to the New Brunswick Police Department, rendering its Application otherwise complete. [DeBonis Letter dated August 2, 2011].

Although absent from the record, it is undisputed that Defendant City of New Brunswick indicated that Plaintiffs Application would be put on the agenda for the August 17 City Council meeting on August 12, 2011. [accord Amended Complaint, ¶ 56]. Police Chief Anthony Caputo, on behalf of the New Brunswick Police Department, in a letter dated August 16, 2011, recommended approval of requested person-to- person transfer, but denial of the place-to-place transfer, citing as his reasons (1) the proposed increase in occupancy over that of the perated at the Property, and (2) the configuration of the interior layout. [Recine Dep., T15:20-16:10; Police Applicant Status dated August 16, 2011]. 1

In other words, the Police Department approved transferring the liquor license from its current owners to Buck , but recommended against allowing the license to be used at the Bennigan s Property. Although it is disputed whether Plaintiffs were unable to publish the required public

notices for their application to be heard at the August 17 meeting, or simply failed to do so, in either case, no notice was timely filed, and the City Council did not hear pplication

1 While Chief Caputo approved and signed the final recommendation, the investigative work and the initial formulation of the recommendation were conducted by Detective DeBonis. Accordingly, it was Det. DeBonis who determined that there were occupancy and layout concerns and cautioned against granting the Application; Det. DeBonis also delivered the

in August. Instead, the public hearing for the Application was rescheduled for the next City Council meeting in September.

pplication was finally considered by the New Brunswick City Council on September 7, 2011. Three members of the Council were present and considered the Application. Detective DeBonis testified that the higher occupancy load for the Bennigan s Property proposed would increase traffic in the area of the Property and cause a public safety issue. [Council Meeting Hearing Transcript, September 7, 2011, at T27-29, hereinafter adversely affect the quality of life in the area and traffic . were based, at least in part, on an accident and traffic study he had conducted on the area around

Id. At the same meeting, Plaintiffs submitted for th the letter of approval of Kenneth Krug, a licensed fire protection and electrical subcode official for the City, in charge of reviewing proposed development projects for compliance with the New Jersey Uniform Construction Code. Krug electrical safety ordinances. [Krug Dep., T6:20-25, 11:7-13].

, high- Richard C. Dube, Letter Re: NJDOT Letter of No Interest dated

September 1, 2011]. Plaintiffs also submitted a letter by two professional traffic engineers from

John R. Harter, Atlantic Traffic Letter, Letter to Clarkin dated September 7, 2011]. 2

At the close of the meeting, Councilmen -to-person transfer of the Sapporo liquor license to Mr. Blatterfein and his business

partner, but voted to deny the place-to-place transfer. Both councilmen cited their concerns about proposed changes to the internal layout of the building and the increased traffic in the area resulting from the higher occupancy as their reasons for denying the place-to-place transfer. [Recine Dep., T43:2-4, 46:1-9; Transcript of Egan, T9:4-12, 7:10-23, hereinafter]. 3 The only other councilperson in attendance voted to approve both the person-to-person and the place-to-place transfers. [Council Meeting Hearing Tr., T57:18]. was denied by a 2-1 vote.

Plaintiffs allege that [Amended

Complaint, ¶ 39]. They further allege that in the period during which the background check process was delayed, excuse to deny Plaintiffs [Amended Complaint, ¶ 40]. Plaintiffs further allege

Cahill 2 did not read either the letter [Recine Dep., T86:20-23, 89:4-8]. There is no evidence in the Record whether either of the other council members present read or did not read the letters. It is undisputed, however, that Recine was aware of all three letters. Mr. Clarkin spoke at the Council Meeting laying out all of the T14:24- 26:9]. 3 It is undisputed that Councilman Recine never before publicly voiced concerns about traffic in the area. [Recine Dep., T24:4].

had predetermined and agreed to vote in favor of the person-to-person transfer, but to vote against the place-to-place transfer, and to cite traffic and occupancy concerns as their reasons for so voting. Thus, Plaintiffs contend that these defendants conspired to create a pretextual explanation to conceal their true motive for denying the Application, which was to preclude a restaurant the City of New Brunswick. [Id.].

II. Procedural History

liquor license transfer application was still pending, Plaintiffs filed their original Complaint against Defendants Cahill and City of New Brunswick, alleging unconstitutional delay in the processing Application. On August 2, 2011, Plaintiffs filed a motion for a temporary restraining order and/or preliminary injunction against the City of New Brunswick to compel the completion of the background check procedure. Before the disposition of the motion, the New Brunswick Police Department completed its background check and the New Brunswick City Council voted to deny Plaintiff , this Court entered

and opened fact discovery. On December 13, 2011, Plaintiffs filed an Amended Complaint against all Defendants, alleging denial of equal protection under the law and retaliation for the exercise of First Amendment rights Application. Defendants filed an Answer to the Amended Complaint on January 23, 2012. Discovery on all issues

concluded on January 11, 2013. Subsequently, Defendants filed the present Motion for Summary Judgment on all claims.

III. Local Rule 56.1

As a preliminary matter, should be denied based on the absence of a separate Rule 56.1 statement. New Jersey Local Civil Rule 56.1(a), as amended in 2008, requires that on a motion for summary judgment, both the moving and non-moving parties furnish a separate statement identifying what each side deems to be the material facts. These statements assist the Court in determining whether a genuine dispute exists. As noted in the separate document represents a change from the practice under the former version of the rule [and] . . . is viewed by the Court as a vital procedural step, since it

constitutes and is relied upon as a critical admission of the ifies that the assertions in each statement must be set out in separately numbered paragraphs, and each fact alleged must be supported by a specific citation to an affidavit. N.J. Loc. Civ. Rule 56.1 cmt.

The consequences of a movant's noncompliance with Rule 56.1(a) can be severe [a] motion for summary judgment unaccompanied by a statement of material facts not in dispute Civ. R. 56.1(a). See also Kee v. Camden County, 2007 U.S. Dist. LEXIS 23637 (D.N.J. 2007) (Simandle, Jr.); Langan Eng'g & Envtl. Servs. v. Greenwich Ins. Co., 2008 U.S. Dist. LEXIS 99341 (D.N.J. 2008) (Greenaway, J.). A court may, however, excuse the failure to submit a Rule 56.1 statement where there is no evidence of bad faith. See, e.g., Shirden

v. Cordero, 509 F. Supp. 2d 461, 463 64 n .1 (D.N.J. 2007) (Martini, J.) compliance with the Local Civil Rules has made it difficult and time-consuming for the Court to

determine whether a genuine issue of material fact exists. Nonetheless, the Court, having found no evidence of bad

Here, while in support of the Motion for Summary J otherwise substantially complies with the requirements of Rule 56.1. The Statement of Facts is presented in numbered paragraphs and includes appropriate citations to the record. There is no indication that Defendants failure to separately submit a document titled tatement of Material Facts, stemmed from an impermissible purpose or otherwise was done in bad faith. The substantially

submission does not strictly comply with every requirement of Rule 56.1, it is nevertheless within the discretion of this C otion. I find that such a result is in the interests of justice.

IV. Standard of Review

A. Jurisdictional Challenge Standard Fed. R. Civ. P. 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) permits a party to bring a motion to dismiss for want of standing. See Ballentine v. United States, 486 F.3d 806, 810 (3d Cir. 2007). At the summary judgment stage of a proceeding elements of standing, and each element must be supported in the same way as any other matter

FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 838 (3d Cir. 1996) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). Plaintiffs must therefore demonstrate jurisdiction in accordance with the summary judgment standard enunciated below.

B. Summary Judgment Standard

the facts in the light most favorable to the non-moving party, the moving party is entitled to

Pearson v. Component Tech. Corp., 247 F.3d 471, 482 n. 1 (3d Cir. 2001) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)); accord Fed. R. Civ. P. 56(c). Kaucher v. County of Bucks, 455 F.3d 418, 423 (3d Cir. 2006). For an issue to for the non- Id.; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A

dispute is not Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

Initially, the moving party has the burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp., 477 U.S. at 323. Once the moving party has met this burden, the non-moving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial. Id.; Maidenbaum v. Bally's Park Place, Inc., 870 F. Supp. 1254, 1258 (D.N.J. 1994). Thus, to withstand a properly supported motion for summary judgment, the non- moving party must identify specific facts and affirmative evidence that contradict those offered by the moving party. Anderson, 477 U.S. at 256 -

mere allegations, general denials or . . . vague statements. . . Trap Rock Indus., Inc. v. Local 825, In , 982 F.2d 884, 890 (3d Cir. 1992) (quoting Quiroga v. Hasbro, Inc., 934 F.2d 497, 500 (3d Cir. 1991)). Moreover, the non-moving party must present Woloszyn v. County of Lawrence, 396 F.3d 314, 319 (3d Cir. 2005). Indeed, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322.

V. Jurisdiction

-or-controversy Allen v. Wright, 468 U.S. 737, 750, (1984) (quoting Vander Jagt , 699 F.2d 1166, 1178 79 mootness, the political- See Toll

Brothers, Inc. v. Township of Readington, 555 F.3d 131, 137 (3d Cir. 2009) (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006)). To satisfy the requirements of the justiciability doctrine of standing, a plaintiff must demonstrate that (1) he or she has suffered an nj actions of the defendant, and (3) the injury will likely be redressed by a favorable decision. Svc. Employ v. Municipality of Mt. Lebanon, 446 F.3d 419, 422 (3d Cir. 2006).

Generally, courts must separately address a plaintiff's standing as to each claim asserted in the complaint. See Municipality of Mt. Lebanon, 446 F.3d at 422. Where, however, claims challenge the same conduct and allege the same injuries, a claim-by-claim discussion is unnecessary. Toll Brothers, 555 F.3d at 139 n. 5. Plaintiffs' First Amendment and Equal Protection claims challenge the same conduct (the allegedly unconstitutional delay and denial of the liquor license transfer application)

and, therefore, will be discussed state law constitutional claims, brought before the Court under its supplemental jurisdiction pursuant to 42 U.S.C. § 1367, also challenge the same conduct and allege the same injuries. They will be considered if The Court will now proceed to address the standing of each Plaintiff in turn.

claims based upon the denial of its liquor license transfer application. Instead, Defendants standing, contending that,

A. Lawrence D. Blatterfein

1. Injury

The Third Circuit has held that the injury-in-fact requirement is often determinative of whether a plaintiff has standing to sue. Toll Brothers, 555 F.3d at 139. Injury, in the standing Id. (citations

omitted). In a recent case addressing this important requirement, the Circuit Court reaffirmed -in fact requirement], while not precisely defined, are very New Jersey, 13-1713, 2013 WL 5184139 (3d Cir. Sep. 17, 2013) (citing Bowman v. Wilson, 672 F.2d 1145, 1151 (3d Cir. 1982)). ich may exist if the has . . . a personal stake in the outcome of [the] litigatio Id. (quoting The Pitt News v. Fisher, 215 F.3d 354, 360 (3d Cir. 2000)). In this case, Mr. Blatterfein has introduced evidence showing that he has the requisite personal stake in the outcome. He was the signatory on the real Application, and he expended significant funds Moreover, the Supreme Court has explicitly held that a

developer, having entered into a contract to purchase a parcel of land made contingent upon the disposition of an application then pending before a municipal government, has standing to bring suit to recover damages arising from the cancelation of the land purchase contract after the Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 261-62 s reasoning in Arlington Heights. See Toll Brothers, 555 F.3d at 139 40. Bearing in mind the low threshold for injury reaffirmed by the Court in , I find the reasoning in Arlington Heights, as relied upon by the Third Circuit in Toll Brothers, controlling in this case.

The developer in Arlington Heights entered into two contracts with the owner of a property. The first was a 99 year lease of the property, which went into effect immediately. The second was a land purchase contract, which would only close if the developer convinced the

local zoning board to re-zone the property to permit construction of an apartment building. The zoning board refused to re-zone the property e the land was therefore canceled, and the developer brought suit challenging the board's decision on equal protection grounds. The Supreme Court, in addressing the developer's standing, ruled that the developer sufficiently alleged injury-in-fact:

[I]t is inaccurate to say that [the developer] suffers no economic injury from a refusal to rezone,

despite the contingency provisions in its contract. [The developer] has expended thousands of dollars on the plans for Lincoln Green and on the studies submitted to the Village in support of the petition for rezoning. Unless rezoning is granted, many of these plans and studies will be worthless even if [the developer] finds another site at an equally attractive price. Arlington Heights, 429 U.S. at 262. Because the and exhibited a substantial expenditure of financial resources, in undue speculation as a predicate for finding that the plaintiff ha[d] the requisite personal stake

in the co Id. at 261. See discussion in Coastal Outdoor Adver. Grp., LLC v. Twp. of Union, N.J., 676 F. Supp. 2d 337, 346-47 (D.N.J. 2009) aff'd sub nom. Coastal Outdoor Adver. Grp., L.L.C. v. Twp. of Union, N.J., 402 F. App'x 690 (3d Cir. 2010).

While it is true that Mr. Blatterfein, in his personal capacity, was not the liquor license transfer applicant, Plaintiffs have and that he spent significant funds on the

project prior to the Application, amply demonstrating his requisite personal stake in the controversy. Mr. Blatterfein the proposed site restaurant on Route 18 for $1,500,000, [Real Estate

Contract]; was a co-borrower, , on a $2,634,800 loan from Provident Bank to finance the project, [Loan Commitment]; and (3) was the sole buyer/owner of

the $160,000 Sapporo liquor license which was the subject of the transfer application. [Agreement to Sell Alcoholic Beverage License]. Ben roperty

project, and his agreement to secure financing was conditioned upon the approval of or license transfer application, [Loan Commitment, 3; Letter from Schiller & Pittenger, P.C. to Clarkin dated March 29, 2011]. 4

On May 17, 2011, Mr. Blatterfein paid an additional $30,000 to extend the closing date of the land purchase contract to June 30, delivered two more $30,000 checks to the seller of the Ben roperty as the application

It is also undisputed that Mr. Blatterfein expended funds (i) to have property in preparation for the renovation of the parking lot, (ii) to commission architects to draw

up new floor plans for submission to the City, and (iii) to have Phase 1 and Phase 2 environmental testing conducted on the property in preparation for the renovation. [Clarkin Letter, April 5, 2011 Re: Plenary Retail Distribution License]. injuries arising from money he spent in connection with contingent land contracts and property

specific land studies are sufficiently similar to those of the developer in Arlington Heights to warrant a similar finding of injury-in-fact. 5

4 award of the liquor licen , the license had lost most of its value to Mr. Blatterfein, because his only other bar in New Brunswick already had a liquor license. Mr. Blatterfein voluntarily canceled the contract after the denial. [Letter from James F. Clarkin III to Lawrence B. Sachs dated September 12, 2011]. 5 The New Jersey case of Senna v. City of Wildwood, 23 N.J. Tax 275 (App. Div. 2006), cited in is inapplicable to this case. That case

2. Traceability

-in-fact prong focuses on whether the plaintiff suffered harm, then the traceability prong focuses on who Toll Brothers, 555 F.3d at 142 (emphasis in original). The key question is caused the Id. (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). Id. (citing Pub. Interest Research Group of N.J., Inc. v.

Powell Duffryn Terminals Inc., 913 F.2d 64, 72 (3d Cir.1990)).

Here, similar to the purchase option in Arlington Heights, Mr. the Bennigan s Property was made contingent upon securing favorable action by the governing

body of a municipality. [Real Estate Contract; Boenning Letter dated September 9, 2011]. Because the New Brunswick City Council denied application, never closed, and the environmental impact studies, engineering plans, and architectural layouts that Mr. Blatterfein had commissioned were rendered useless. Thus, Mr. reasonably traceable to the action of Defendants.

dealt with the requirement of proper legal representation by counsel of an LLC, where the lone shareholder attempted to proceed pro se Id. It has no bearing on the standing in this case.

3. Redressability

Toll Brothers, 555 F.3d at 142 (quoting Dynalantic Corp. v. Dep't of Def., 115 F.3d 1012, 1017 (D.C. Cir. redressability inquiry. Id. (citing Lujan, 504 U.S. at 560 61). As long as a plaintiff establishes a

plaintiff's claim may proceed. Id. (citations omitted).

Mr. Blatterfein, personally, seeks compensatory damages resulting from the delay and denial of the liquor license transfer application. The Supreme Court has long held compensatory damages to be an appropriate remedy in civil rights actions:

[W]hatever the constitutional basis for § 1983 liability, such damages must always be designed to compensate injuries caused by the [constitutional] deprivation. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 309-10 (1986) (citations omitted) (emphasis in original). Accordingly, a favorable decision in this case will redress Mr. Thus, Mr. Blatterfein has standing to bring the

present suit.

B

on the same grounds raised against Mr. Blatterfein. omplaint as Blatterfein. [Blatterfein Dep., T39:1-5]. Because Mr. Blatterfein paid personally for the Sapporo

contract extensions, and the preparatory studies on the Property,

the o ealty is the loss of the opportunity to ow Property. [, 5]. The record shows that Mr. Blatterfein planned to

purchase contract, but reveals no contract or other instrument obligating Mr. Blatterfein to effect the transfer, or otherwise

financial stake nor a legally enforceable future interest in the Prop is unlike that of the contingent contract signatory in Arlington Heights, or Mr. Blatterfein. loss of a potential, future transfer of real property, unaccompanied by other evidence of -in-fact for Article III standing purposes. Because the C Realty has suffered no injury-in-fact, no further standing analysis is required and Plaintiff

VI. First Amendment Retaliation Claim

length, I pause to clarify the nature of the claim being made. Plaintiffs assert two instances of alleged retaliation by Defendants as a result either directed o

a required departmental recommendation. Second, Plaintiffs contend that Mayor Cahill either directed or conspired with Councilmen Recine and Egan to deny the Application when it was called up for a vote. Neither Plaintiffs nor Defendants apply the legal standard for § 1983 conspiracy in their briefing of this matter. See Startzell v. City of Philadelphia, 2007 WL 172400 (E.D. Pa. Jan. 18, 2007) at *17, Pa., 533 F.3d 183 (3d Cir. 2008) spiracy in violation of § 1983, a plaintiff must allege (1) the existence of a conspiracy involving state action; and (2) a [deprivation] of civil rights in . 6

Nevertheless, this Court finds that, when viewed together, the many allegations of retaliation included in the Amended Complaint state a claim for conspiracy under § 1983 for both the delay and denial of the Application. See, e.g., Amended Complaint, ¶ explanation for their votes); Amended Complaint, ¶ hatched an intentional and

Having so found, the difficulty then arises that, in their filings on this Motion, neither Plaintiffs nor Defendants structure their arguments and factual support at the summary judgment stage according to the § 1983 conspiracy framework. Instead, both concentrate on the three-part

6 more persons to do a criminal act, or to do a lawful act by unlawful means, or for an unlawful purpose by making specific factual allegations of combination, agreement, or understanding among all or between any of the defendants to plot, plan, or conspire to carry out the alleged Startzell, 2007 WL 172400 at *17 (citations omitted). Central to this showing Id. Because circumstantial evidence may r there is a conspiracy is typically a jury question if there is a possibility to infer from the circumstances that the alleged conspirators had a meeting of the Id. (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 (1970) ( ).

standard for civil rights retaliation claims. To establish the elements of a retaliation claim predicated on the First Amendment under 42 U.S.C. § 1983, Plaintiffs person of ordinary firmness from exercising his or her rights, and (3) that there was a causal

connection between the protected act Lauren W. ex rel. Jean W. v. DeFlaminis, 480 F.3d 259, 267 (3d Cir. 2007). frequently disputed, and is indeed the only one of the three elements disputed in the case now

before the Court. 7

As explained, infra, the evidence introduced by Plaintiffs to show causation under the three-part retaliation test is the same evidence supporting under a conspiracy theory of liability. By the very nature of the evidence introduced by

Plaintiffs, if the record will not support a finding of causation, it also will not support the existence of a conspiracy.

A. Retaliation By Delay of the Background Check and Recommendation

allegedly intentional delays of the New Brunswick Police Department simply by showing that as public officer or agent is not responsible for the misfeasances or position wrongs, or for the

nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons 7 naming of his prospect

sufficient to deter a person of ordinary firmness from exercising his First Amendment rights. , 9].

Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) (quoting Robertson v. Sichel, 127 U.S. 507, 515-516 (1888)). Because vicarious liability is inapplicable to § 1983 suits, to state a First Amendment retaliation claim Government-official defendant, through the official's own individual actions, has violated the

Id. The Third Circuit has long subscribed to this standard, as made clear in Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1998):

A defendant in a civil rights action must have personal involvement in the alleged wrongs.... [P]ersonal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity. Defendant Cahill, this court is constrained to note that this is not a motion to dismiss, where

factual allegations are taken as true; but rather, this is a motion for summary judgment, and Plaintiffs have offered no evidence to raise a genuine issue of material fact that Mayor Cahill influenced the Police Department Application. While Plaintiffs have his friendship with the Director of the Police Department, and his approval, as Mayor, of the

hiring of individual police officers, this showing falls short. [Cahill Dep., T69:15-25, 70:1-7, 68:17-25, 69:1-3]. Plaintiffs have not proffered any evidence, whether by records of electronic communication, writings, or in-person meetings between Mayor Cahill and Detective DeBonis, or any other member of the New Bru Mayor and Police Department. This Court notes that direct evidence is generally not forthcoming

in cases of alleged collusion among government officials in meetings closed to the public, but Plaintiffs here have not introduced any circumstantial evidence giving rise to an inference of improper influence over the Police Department by Mayor Cahill. The Plaintiffs have not proffered, for example, entries from showing meetings scheduled between the Mayor and Detective DeBonis, agendas from regularly scheduled meetings with the Police Department where liquor licenses were slated to be discussed, any email exchanges, or even phone records for the relevant time period.

These same gaps in the record illustrate that Plaintiffs have also failed to show a factual allegations that there was a mutual understanding among the conspirators to take actions directed any kind between two. Startzell, 2007 WL 172400 at *17. The Court also notes that the absence

of any evidence in the record concerning any conspiracy involving the Mayor, City Council, and Police Department, remains after the close of discovery. It is not for lack of opportunity to investigate, therefore, that Plaintiffs fail in making their required showing of either influence or agreement.

In discussing summary judgment in First Amendment retaliation cases, the Third Circuit has explained:

Although we have often noted that the first prong of the First Amendment retaliation test presents questions of law for the court while the second and third prongs present questions of fact for the jury, e.g., Curinga v. City of Clairton, 357 F.3d 305, 310 (3d Cir.2004) (citing Baldassare, 250 F.3d at 195), only genuine questions of fact should be determined by the jury. For example, in Ambrose v. Township of Robinson, Pa., 303 F.3d 488, 496 (3d Cir.2002), we held that judgment as a matter of law

under Rule 50(b) should have been granted to the defendant where the plaintiff failed to present sufficient

evidence that his protected activity was a substantial factor in his suspension. The same principle applies in the summary judgment context under Rule 56. E.g., Watters v. City of Philadelphia, 55 F.3d 886, 892 (3d Cir.1995) (noting District Court concluded that plaintiff made sufficient showing that speech was substantial factor motivating termination to submit question to jury). Hill v. City of Scranton, 411 F.3d 118, 127 (3d Cir. 2005). While evidence may be sufficient to show that it was within job description to supervise the New Brunswick Police Department, nonetheless Plaintiffs have failed to show that, in the weeks and months ly directed possessed and acquiesced in the delay of

same time, the absence of direct or circumstantial evidence showing communications about the

decision in Hill along with the substantial discovery already conducted in this case, this Court

grants summary judgment in favor of Defendant Cahill on Retaliation claim against him on the basis of the conduct of the Police Department. The Court

Defendants Recine and Egan, because Plaintiffs have not alleged, and the record contains no evidence to support, any connection between Councilmen Recine and Egan and the New

Brunswick Police Department. Because there is no underlying liability for any of the City officials, there is also no municipal liability on this basis for the City of New Brunswick. 8

B. Retaliation By Denial of the Application

supra, made analysis -part test for causation in retaliation cases unnecessary, Plaintiffs have introduced substantial evidence in support of their denial of the liquor license application claim, requiring closer review. To establish causation, the Third Circuit has explained that a 1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of DeFlaminis, 480 F.3d at 267. The Circuit has also provided a catch- either foregoing 8

Plaintiffs have not named Det. DeBonis or any other officer of the New Brunswick Police Department as defendants in this action. Nevertheless, at least once in the Amended Complaint, Plaintiffs argue that the Police Department may have acted to delay the Application because of infra, however, the Supreme Court has long held that there is no vicarious municipal liability in § 1983 cases. Kriss v. Fayette Cnty. Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 403 (1997)).

Plaintiffs have not introduced any evidence suggesting that the actions of Det. DeBonis or any other police officer involved in the liquor license transfer review process were motivated to delay Plaintif s or that there was a pattern or practice within the police department of delaying the applications of

businesses with disfavored names such that the practice could be imputed to the municipality as its official policy. Without some showing by Plaintiffs permitting a trier of fact to infer that the Police no municipal liability for the City of New Brunswick.

Id. (citing Farrel v. Planters Lifesavers Co., 206 F.3d 271, 281 (3d Cir. 2000)).

Regarding the first theory, w that such an inference could be

drawn where two days passed between the protected activity and the alleged retaliation, see Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989), but not where 19 months had elapsed, see Krouse, 126 F.3d [494,] . . . 503 [(3d Cir. 1997)] Estate of Smith v. Marasco, 318 F.3d 497, 512-13 (3d Cir. 2003). Id. (quoting Marra v. Phila. Hous. Auth., 497 F.3d 286,

302 (3d Cir. 2007).

The third, catchall standard of causation, as most often applied by courts in this Circuit, th Shehee v. City of Wilmington

was motivated solely by anti-speech animus, or even that the illegal animus was the dominant or Id. (quoting Suppan v. Dadonna, 203

F.3d 228, 236 (3d Cir. 2000). As will be explained, infra this third theory of causation.

Given that the actions of the New Brunswick Police Department are not properly attributable to Mayor Cahill, as explained, supra, remaining claim of retaliatory

conduct by the elected officials of New Brunswick is the pplication by the City Council. is not unusually suggestive of causation

have occurred within the same period. N.J.A.C. 13:2.7-7(d). A denial within the 60 day period and roughly five months after the alleged act of protected speech is not unusually suggestive of a retaliatory motive. DeFlaminis, 480 F.3d because the district ruled on the request within the period in which it was legally required to do so).

Plaintiffs similarly fail to show a pattern of antagonism by Defendants Cahill and Recine during the period between the filing and the adverse vote. Plaintiffs have not shown any interactions between Plaintiffs and either Mayor Cahill or Councilman Recine after the April meeting between Mr. Blatterfein and Mayor Cahill. 9

repeated interactions of plaintiff and defendant. See Marra, 497

F.3d 286 (pattern of antagonism evidenced by series of escalating incidents between defendant omputer and exclusion from work meetings); Woodson v. Scott Paper Co., 109 F.3d 913 (3d Cir. 1997) (pattern of antagonism evidenced by gradual deterioration of relationship between plaintiff and defendant through series of discrete interactions culminating in alleged act of retaliation).

9 be viewed as antagonistic, but that meeting, standing alone, does not reflect a pattern of antagonism.

Turning to the catch-all theory, reviewing the record as a whole, the Court finds that Plaintiffs have raised a triable issue of material fact as to whether Councilman Recine, against whom there is no direct evidence of unconstitutional animus, was nonetheless influenced by or conspired with Mayor Cahill, against whom there is such evidence. While, it is undisputed that Plaintiffs have no personal knowledge of any improper influence by Mayor Cahill over the City Council vote, nor have Plaintiffs identified any witnesses purporting to possess such knowledge, [Blatterfein Dep., T106:7-10], the Court notes that in cases alleging unconstitutional influence and conspiratorial behavior by elected officials, an inference of improper influence must often, and may here, rest solely upon evidence of , the timing of such conduct, and indications of some retaliatory motive by one of the actors. See Montone v. City of Jersey City, 709 F.3d 181, 202 (3d Cir. 2013) (quoting Stephens v. Kerrigan, 122 F.3d 171, 181 (3d Cir.

reason [for the employment action], either circumstantially or directly, or by adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or substantial . Because Plaintiffs exclusively of circumstantial evidence of an unlawful agreement between, and cover-up by Defendants, evidence sufficient to show causation under DeFlaminis will also be sufficient to show conspiracy under Startzell.

As a preliminary matter, Defendants, in both their Motion and Response to the Statement of Facts, place great emphasis on the contention that Mr. Blatterfein could have obtained a liquor license transfer for the Benni wit

which they argue negates the premise that the denial of the Application was based on the name in violation of the First Amendment. Specifically, Defendants argue:

the site instead of the doubled occupancy Plaintiff sought, and Plaintiff turned it down.

lone piece of evidence in support of this claim is a single statement in the deposition transcript of Mr. Blatterfein. 10

Significantly, Defendants have not provided any evidence of where the alleged offer was made to Mr. Blatterfein, when it was made, or by whom. The absence of any evidence by way of deposition testimony from Defendants, declarations, or documents confirming that such an offer was indeed

made by any of the City officials is particularly striking and revealing. Plaintiffs, on the other hand, have introduced evidence to chal , offering the deposition

the liquor license transfer application for Mr. Blatterfein, including negotiations with the City, and Mr. Clarkin strenuously denies ever having received such an offer. [Clarkin Dep., 26:11-16]. Defendants have not even provided the complete portions of the transcript surrounding Mr. t, making it even more difficult for the Court to discern his full meaning.

10 In his deposition, Mr. Blatterfein although you were offered to keep the same occupancy and internal configuration, and you would have a liquor licensed [sic] granted to you to be able to operate under the name Buck Foston [sic], you decided to decline that; i Blatterfein Dep., T125:15-20]. s in the record. [Id. at 126:3-5]. Nevertheless, Id. at 126:7]. After advice of traffic engineering, and under the advice of five of the City officials who were charged with giving me that occupant [Id. at 126 :9-17].

Ultimately, this Court finds that the record on this issue is unclear at best, and certainly not adequate to find that Defendants have shown no issue of material fact. There is a paucity of Property at a reduced occupancy using the name record showed that the offer was made, there would remain a disputed issue of material fact as to

th particularly that the purchase

price and financing agreement contemplated a sports bar serving up to 352 patrons, not 185. Thus, Defendants could have predicted that an offer by the City for a significantly reduced occupancy would have to be rejected by Plaintiffs as an illusory offer because it would be financially unsustainable, and could not therefore, as Defendants argue, negate

Putting aside the alleged delays by the Police Department background check or recommendation, the Plaintiffs rely on the following factual account to support their claims against Mayor Cahill and Councilman Recine. with Mayor Cahill and

being na s discussed. At the request of Councilman Recine,

on June 16, 2011, Mayor Cahill, Councilman Recine, and Mr. Patterson met to discuss the Buck project. This meeting, called for the sole purpose of discussing a liquor license transfer application, was, according to the recollections of those present, the first of its kind in New Brunswick. Directly after the meeting, also on June 16, Mr. Patterson wrote a five-page memorandum, including a one page discussion of municipal ordinances governing signage and the Supreme Court case law governing regulations of commercial speech. Mr. Patterson included meeting.

Council, Councilman Recine voted to deny the place-to-place transfer that was necessary for

s bar. He claimed that concerns with alterations to the internal layout of the building and increases in traffic resulting from the increased occupancy motivated his decision. While this decision was consistent with the recommendation of New Brunswick Police Det. DeBonis, delivered in testimony before the Council, Councilman directly counter to all the other evidence submitted to the Council, including: (i) the recommendations of other City officials tasked with the responsibility to make findings based upon the layout and safety, (ii) the determination of the New Jersey Department of Transportation, which found no concerns regarding the anticipated increase in traffic, and (iii) the expert opinion of a professional transportation engineering firm. Detective DeBonis was not a traffic expert and he relationship between occupancy and traffic. [Transcript of DeBonis, T35:8-20, hereinafter

]. Case 3:11-cv-03731-FLW-TJB Document 51 Filed 09/27/13 Page 35 of 57 PageID: 1050 have been required at all. [DeBonis Dep., T102:18-25, 103:1-5]. Indeed, the Police Department usual non-involvement in reviewing occupancy changes is consistent with the guidance provided by the Alcoholic Beverage Control Handbook for Municipal Issuing Authorities. The Handbook does not mention occupancy or traffic concerns, and advises municipalities to investigate the criminal history and financial condition of applicants. Councilman Recine was almost certainly aware that traffic concerns generally lay outside the scope of license transfer proceedings, because he was advised as much in the June 16 Memorandum from Director Patterson, addressed to him and prepared immediately after a meeting at which he was present. [June 16 Memorandum, 2]. 11

Based upon these undisputed facts, Plaintiffs contend that Defendant Cahill caused the City Council to deny Councilman Recine to have him vote

to deny the application. [Amended Complaint, ¶ 73].

To determine whether a constitutionally permissible explanation is merely a pretext to conceal an unconstitutional motive, the Third Circuit has applied case law from the employment Phillips v. Borough of Keyport, 107 F.3d Pretext may be shown by exposing such weaknesses, implausibilities, for its action that a reasonable factfinder could rationally fi 11

The Court is mindful of the extensive New Jersey state case law cited by Defendants in support of the proposition that the New Brunswick City Council is entitled to broad discretion in the granting of liquor license transfers. Therefore, the Court highlights the absence of traffic this absence in the June 16 Memorandum, not to suggest that the City Council lacked the power to deny a transfer on the basis of a variety of concerns, but only to note that to do so in light of the other surrounding circumstances contributes to the inference of discriminatory motive requiring jury determination.

Marra, 497 F.3d at 306 (change in original) (quotations omitted). the trier of fact can reasonably infer from the falsity of the explanation that the [official] is

dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty Id. Moreover, such inferences may properly be drawn on this motion from the undisputed facts and are sufficient to raise a material issue o First Amendment retaliation claim. 12

The timing of the June 16 meeting and the follow-up memorandum, including the discussion of the First Amendment concerns with the proposed name, when coupled with Councilman Rec , which was against the weight of the credible evidence presented to the Council, are suggestive of an improper motive. This suggestion of improper motive is further bolstered by the additional facts that the incidence of such meetings and memoranda concerning liquor license transfers are unprecedented in New Brunswick, and the lone recommendation against the Application came from a Police Department addressing traffic issues outside of its purview. 13

Defendants attempted to show that no issue of material fact existed concerning

12 The Court does not here decide the question of pretext i ts have Blatterfein months before the Application was filed that he was against changing the layout of Council Meeting that his opposition to Property because he lived on the same street. [Council Meeting Tr., T26:10-25, 27:1-4]. At the summary judgment stage, this Court, accordingly, only decides that in light of the evidence introduced by Plaintiffs and Defendants, a genuine issue of material fact exists to be decided by the jury. 13 Indeed, although administrative remedies were not exhausted, see note 16 infra, I question, Control had been pursued.

allegedly non-discriminatory explanation for his Council vote: concern over traffic and layout. But for this explanation to survive Plain challenge, the trier of fact must believe that Councilman Recine either did not consult or gave no

Department of Transportation, and a private traffic engineering firm, and chose instead to follow

his own intuition and the recommendation of a police detective, who was not an expert in traffic engineering and not normally consulted about occupancy changes. No reasonable trier of fact must so conclude. It is for the jury to determine whether, in light of the facts and circumstances, determinations were pretextual. 14

Moreover, whichever account the trier of fact choses to believe, as the sole witnesses to many of the central events in both credibility of Mayor Cahill, Councilman Recine, and Director Patterson will likely decide the disposition of this claim. Such credibility determinations must be left for the jury. Burton v. Teleflex Inc., 707 F.3d 417, 428-29 (3d Cir. 2013); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (internal citations omitted) (Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether

14 Indeed, the facts of this case are fundamentally different from those in which the courts of this Circuit have granted summary judgment. In those cases plaintiffs have usually failed to show Ambrose v. Twp. of Robinson, substantial motivating factor in a decision, the decision makers must be aware of the protected See Reilly v. City of Atlantic City, 532 F.3d 216 (3d Cir. 2008) (upholding District involvement in conspiracy to retaliate against that conduct); Marra, 497 F.3d 286 (upholding of awareness, causation, and pretext, requiring jury determinations of credibility).

he is ruling on a motion for summary judgment, or for a directed verdict); Marino v. Industrial Crating Co. .

DeFlaminis:

A court must be diligent in enforcing these causation requirements because otherwise a public actor cognizant of the possibility that litigation might be filed against him, particularly in his individual capacity, could be chilled from taking action that he deemed appropriate and, in fact, was appropriate. Consequently, a putative plaintiff by engaging in protected activity might be able to insulate himself from actions adverse to him that a public actor should take. The point we make is not theoretical as we do not doubt that public actors are well aware that persons disappointed with official decisions and actions frequently bring litigation against the actors responsible for the decisions or actions in their individual capacities, and the actors surely would want to avoid such unpleasant events. . . . Courts by their decisions should not encourage such activity and, by enforcing the requirement that a plaintiff show causation in a retaliation case, can avoid doing so as they will protect the public actor from unjustified litigation for his appropriate conduct. In this regard we recognize that often public actors such as those in this case must make a large number of decisions in charged atmospheres thereby inviting litigation against themselves in which plaintiffs ask the courts to second guess the actors' decisions. DeFlaminis, 480 F.3d at 267-68. While it is not the place of the Court to second guess the decisions of elected officials, at the summary judgment stage, the Court is also not permitted to make credibility determinations or weigh the evidence before it to resolve factual disputes.

Here, there is no dispute that Defendants were aware speech, and, as discussed supra, determinations of credibility reserved to the jury will play a central role in deciding the dispositive issue of causation based on the June 16 meeting, memorandum, September 7 vote, and surrounding circumstances. Viewing the evidence that can be gleaned from the record as a whole, there is a genuine issue of material fact as to the influence of Mayor Cahill over Councilman Recine, or the existence of an agreement between them, that is

Accordingly, the Court denies

asserted against Defendants Cahill and Recine.

C. Councilman Egan

On the other hand, the retaliation claim against Councilman Egan is devoid of any evidence in the record. In their Amended Complaint, Plaintiffs contend that and Egan (at the request and/or in coordination with Mayor Cahill and/or the City) had

-to-person transfer and against the place-to- place transfer and to offer a pretextual reason for doing so. [Amended Complaint, ¶ 67]. Unlike the evidence proffered alleging retaliatory conduct by Mayor Cahill and Councilman Recine, there is no evidence that Councilman Egan ever spoke to Mayor Cahill, [Egan Dep., T17:5-15], or Councilman Recine, [Id. at T17:16-19], ab to the City Council vote. Councilman Egan was not present at the June meeting between Councilman [Recine Dep., T70:23-24], and he did not review either of the memoranda oduced by Director Patterson. [Egan Dep., T17:24-18:2]. In his deposition, the councilman denied involvement in, or even communication about, any of the meetings, telephone calls, or written exchanges surrounding the . Plaintiffs have not offered any evidence to rebut this account. Bare assertions alone are insufficient to survive a motion for summary judgment. Accordingly, the retaliation claim against defendant Egan is dismissed.

D. City of New Brunswick

The Supreme Court has long held that there is no vicarious municipal liability in § 1983 cases. r § 1983 [must] Kriss v. Fayette Cnty., Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 403 (1997)). 15

[A]n unconstitutional policy c[an] be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government Brennan v. Norton, 350 F.3d 399, 428 (3d Cir. 2003) (quoting City of St. Louis v. Praprotnik, 485 U.S. at 123). The Third Circuit has observed pronouncement of this theory of liability in Pembaur v. City of Cincinnati:

[I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body - whether or not that body had taken similar action in the past or intended to do so in the future - because even a single decision by such a body unquestionably constitutes an act of official government policy. 475 U.S. 469, 480 (1986) (citations omitted) (reproduced in Brennan v. Norton, 350 F.3d 399, 428 (3d Cir. 2003)). The first step in this to determine whether Plaintiffs have identified a suitable final municipal policymaker.

15 Plaint advertising of an indecent or obscene na other incidents in which allegedly obscene advertising was suppressed, constituting a general

city policy. [Amended Complaint, ¶ 72].

Plaintiffs have asserted that Mayor Cahill is the relevant policymaker where liquor license transfers are concerned.

[Amended Complaint, ¶ 71]. It is, however, indisputable that the City Council, not the Mayor, has final decision making authority over such applications. N.J.S.A. 33:1- . Mayor Cahill is not a voting member of the City on to grant or deny a license. Nor are there any other higher officials within the municipality capable of reviewing the City on license applications. 16

For municipal liability purposes, therefore, the relevant policymaker is the New Brunswick City Council.

The Third Circuit found similarly in the case of Walsifer v. Borough of Belmar, 262 F. App'x 421 (3d Cir. 2008). In that case, plaintiff sought to establish municipal liability for the political affiliation, and recommended that someone other than Walsifer be promoted in

retaliation for his expressions of political belief. The court found that the Borough Council was the final authority to establish municipal policy with regard to promotions in the police department, and, accordingly, in the absence of any official discriminatory policy, the Borough

16 For municipal liability purposes the relevant inquiry is identifying the final decision maker within the municipality. It is undisputed that Plaintiffs failed to exhaust administrative remedies after the denial of their Application; an appeal to the State Division of Alcoholic Beverage Control was available and went unpursued. N.J.A.C. 13:2.7-7(d); [Blatterfein Dep., T87:11-14]. w been extended more than once, was canceled, leaving Plaintiffs unable to open a bar/restaurant at

have been fruitless, because Plaintiff would not own the property to which the license would have been transferred.

itself could only be held liable for the actions of the Council. Id. at 424. Similarly, here, having determined that the City Council is the relevant policymaker for municipal liability purposes, the Court must next ascertain he Application is attributable to the City Council as a whole.

To approve or deny a liquor license transfer in New Brunswick, a majority of the City may by their actions subject the government to § LaVerdure v. County of

Montgomery, 324 F.3d 123, 125 (3d Cir. 2003). The Third Circuit has interpreted this standard to mean that, in the case of a multi-member body, the majority, rather than any individual member is the final policymaker for municipal liability purposes. Id. In a recent unreported decision, the Third Circuit refined its holding in LaVerdure, explaining that the single vote of a councilman motivated by retaliatory animus did not give rise to a cause of action under the First Amendment when the final vote was five councilmen adverse to plaintiff and one in favor. Because changing the biased vote

would not have a ourt determined that the one Adopting the reasoning of the Second Circuit in an earlier case, the Third Circuit opined:

[I]f a majority of defendants prove that their individual votes against the plaintiff would as a group cannot be held liable, and no individual defendant, even one whose proof falls short, can be so held because causation is absent. . . . [E]ven if some defendants based their decision solely on impermissible grounds, a finding that a majority of defendants acted adversely to plaintiff on legitimate grounds is sufficient for all to escape liability. Watson v. Borough of Susquehanna, 2013 WL 3803893 (3d. Cir. Jul. 9, 2013) at *2 (emphasis added) unlawfully motivated vote. Case 3:11-cv-03731-FLW-TJB Document 51 Filed 09/27/13 Page 43 of 57 PageID: 1058 rights Id. (emphasis added). This reasoning is consistent with the c LaVerdure, where the three member municipal board had voted unanimously against plaintiff, so the tainting of any one vote by retaliatory animus would not undermine the legitimacy of the surviving, untainted two-vote majority.

Here, the situation is different than in LaVerdure, because, while I have found that there is no evidence of discriminatory animus motivating the negative vote of Councilman Egan, the remaining member of the Council voted in favor of Plaintiffs. Therefore, vote, one of the two in the majority adverse to Plaintiffs, . Stated differently, taking the votes of the unbiased council members as fixed, Councilman Recine, acting alone, could have brought about the denial of the Application, Amendment rights. The logic of LaVerdure and Watson governs this case. A policymaker can action adverse to plaintiff. Compare LaVerdure, 324 F.3d at 125 (where the policymaker is the

lone biased vote in a unanimous majority, there is no municipal liability, because the single vote did not cause the municipal action).

Since Councilman Recine was a member of a two-vote majority adverse to Plaintiffs, his vote was capable of setting municipal policy under the single act theory because, acting alone, he could commit the municipality to an official action. Accordingly, because Plaintiffs have introduced genuine issues of material fact as to their First Amendment Retaliation claim against Councilman Recine and Mayor Cahill, the City of New Brunswick cannot be dismissed from the action until the jury has decided the issue of retaliatory animus. Stated differently, a Case 3:11-cv-03731-FLW-TJB Document 51 Filed 09/27/13 Page 44 of 57 PageID: 1059 imputed to the City Council, which, under Brennan v. Norton, is the final policymaker for First Amendment purposes. City of New Brunswick is, therefore, denied.

VII. Fourteenth Amendment Equal Protection Claim

on on claim is granted as to all defendants because (A) the delay and denial claims are First Amendment retaliation cause of action against Councilman Egan, (B) the delay claim lacks

an adequate basis in the record to establish liability for all other Defendants, and (C) Plaintiffs have

failed to produce evidence of similarly situated entities in their denial of the application claim against all other Defendants.

A. Claim Against Egan

As a preliminary matter, to state a valid claim under the Equal Protection Clause a plaintiff must do more than merely rephrase his or her First Amendment retaliation claim. Oras v. City of Jersey City, 3 Thomas v. Independence Twp. or generic retaliation claim . . . simply As to Councilman Egan, where, as here, Plaintiffs Hill v. City of

Scranton, 411 F.3d 118, 125-26 (3d Cir. 2005). The Third Circuit has explained the logic of this measure at length:

burden the exercise of First Amendment rights by a class of persons under the equal protection guarantee, because the substantive guarantees of the Amendment serve as the Nowak, 3 Treatise on Constitutional Law: Substance and Procedure § 18.40, at 796 (3d ed.1999). If a law passes muster under the First Amendment it is also likely to be upheld under the Equal Protection clause. Id. Likewise, if a law violates First Amendment rights there is no need to resort to the Equal Protection clause to redress the constitutional violation. Id.; see also Sherbert v. Verner, 374 U.S. 398, 410 (1963) (no need to examine equal protection claim based on denial of unemployment benefits to individuals whose religious principles prohibit Saturday work where Court held same practice unconstitutional under free exercise clause). Hill v. City of Scranton, 411 F.3d 118, 125-26 (3d Cir. 2005). The analysis in Hill applies iscriminatory enforcement of a facially valid law is also unconstitutional under the eq Id.; See Yick Wo v. Hopkins, 118 U.S. 356, 373 74 (1886); Holder v. City of Allentown, 987 F.2d 188, 197 (3d Cir. 1993) (applying Yick Wo to a claim of discriminatory enforcement of a residency ordinance). Accordingly, the disposition of Pla claim against Councilman Egan will mirror that of retaliation claim. As no evidence has been introduced to support either claim against Councilman Egan, judgment is entered for Councilman Egan on laim as well.

B. Delay Claim against Cahill, Recine, and City of New Brunswick

1. Mayor Cahill and Councilman Recine

arising from the alleged delay of the Application fails for the same reasons stated in the discussion of the First Amendment, supra. Because there is no evidence, either direct or circumstantial, tending to show that Mayor Cahill either directed or acquie

this basis. As to Councilman Recine, Plaintiffs have not alleged any involvement with the Police Department, and certainly have not introduced any evidence showing such involvement. He too, therefore, incurs no liability for the alleged delay.

2. City of New Brunswick

Unlike the dearth of evidence concerning any connection between the named individual defendants and the Police Department, Plaintiffs have offered evidence of delaying actions by officers of the Police Department, itself a subdivision of the City of New Brunswick. 17

Both the Alcoholic Beverage Control Manual and the June 16 Memorandum drafted by Director Patterson suggest that occupancy and traffic concerns are not within the scope of background check and recommendation process. [June 16 Memorandum]. Nevertheless, Det.

[Council Meeting Tr., T27:14-25, 28:4-15]. Plaintiffs have also shown that on at least two occasions, the Police Department rendered its recommendation on a license transfer prior to the background check and processed a recommendation in fewer than 100 days. [NN: Police Departmen xhibit TT: Tax Clearance Certificated dated April 13, 2005]. Nevertheless, the

17 The United States Supreme Court determined that municipal corporations are subject to liability under the Civil Rights Act in of City of New York, 436 U.S. 658, 685 (1978). Municipal police departments, by contrast, have no separate subject to § 1983. n. 3 (3d Cir. 2005).

giving its recommendation to the Council, and took 155 days to render its final, and adverse, recommendation on the project. 18

evidence at least raises the specter of an equal protection claim, under a theory of selective enforcement, against Det. DeBonis, Police Chief Caputo, and perhaps other unnamed officers involved in the handling of l Dog Breeders Advisory Council, Inc. v. Wolff, 752 F. Supp. 2d 575, 595 (E.D. Pa. 2010) (internal citations with others similarly situated, was selectively treated; and (2) the selective treatment was

motivated by an intent to discriminate on the basis of impermissible considerations, such as . . . . Even presuming, without deciding, that Plaintiffs have shown that they were treated differently than similarly situated entities in the processing of their Application by officers of the Police Department, 19

the problem remains for Plaintiffs that neither Det. DeBonis, Chief Caputo, nor any other officers are named defendants in this action. As explained above, there is no vicarious liability for municipalities under § 1983. See Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 403 (1997). Accordingly, even a potential showing of discriminatory treatment by police officers is insufficient to show discriminatory treatment by the City of New Brunswick. To implicate the Police Department,

18 Defendants argue that Plaintiff has cherry-picked the fastest Police Department reviews of liquor license transfer applications in City history, but offer no specific counterexamples to support this

contention. 19 The Court does not reach the issue whether Plaintiff has identified similarly situated parties for Department, because the City is not otherwise liable for the actions of any individual police officers. See discussion, infra.

and by extension the City, Plaintiffs must show that either a policy or custom of the City motivated the conduct of the individual officers. For example, this could have been done by showing a pattern of delay by the Police Department in processing applications with arguably that Chief Caputo or Mayor Cahill, as a final policymaker for the See Watson v. Abington Twp., 478 F.3d 144, 155-56 (3d Cir. 2007). 20

After full discovery, Plaintiffs have not produced the evidence necessary to show a discriminatory policy or custom, and the City of New Brunswick cannot, accordingly, be held liable under § 1983 for the actions of Det. DeBonis or its other police officers.

C. Absence of Similarly Situated Entities for Denial Claim

Whereas the officers of the municipality, which, due to the absence of vicarious liability in § 1983 cases,

could not expose Mayor Cahill, Councilman Recine, or the City to liability on the facts in the record, the denial of the Application was allegedly brought about by the direct action of a

no issue of vicarious liability. Nevertheless, rotection claim against Mayor

20 custom. Under Monell, possess[ing Bielevicz, 915 F.2d at 850 (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir.1990) . . . . A plaintiff may establish a custom, on the authorized by law, is so well- Id. (citing Andrews, 895 F.2d at 1480). In other words, custom may be established by proving knowledge of, and acquiescence to, a practice. Fletcher v. O'Donnell, 867 F.2d 791, 793- Watson, 478 F.3d at 155-56.

Cahill, Councilman Recine, and the City of New Brunswick arising from the denial of the Application fails because the record contains insufficient evidence of similarly situated entities.

evaluating a claim that a law or government action violates the Equal Protection Clause is to

Donatelli v. Mitchell, 2 F.3d 508, 513 (3d Cir. 1993) (citation omitted). Protection challenge when a plaintiff alleges that he or she has been singled out for unfair

al and wholly arbitrary. claim under [the class of one] theory, a plaintiff must allege that (1) the defendant treated him

differently from others similarly situated, (2) the defendant did so intentionally, and (3) there was Hill v. Borough of Kutztown, 455 F.3d 225, 239 (3d Cir. 2006) (interpreting Village of Willowbrook v. Olech, 528 U.S. 562 (2000)).

This standard, however, only applies in cases in which plaintiff alleges conduct not motivated Eichenlaub v. Township of Indiana, 385 F.3d 274, 286 (3d Cir. 2004). According to Plaintiffs, or license transfer was motivated by, and designed to burden, Amendment right to name their restaurant [Amended Complaint, 23 n. 5].

Because the First Amendment protects such commercial speech, subject to a higher level of scrutiny. Regardless of the level of scrutiny that this Court employs,

however, claim fails because the Record contains insufficient evidence of similarly situated entities, which is the next step in the equal protection analysis under any standard. For example, the first inquiry a court must make in an equal protection challenge to a zoning

ordinance is to examine whether the complaining party is similarly situated to other uses that are either permitted as of right, or by special permit, in a certain zone. If, and only if, the entities are similarly situated, then the city must justify its different treatment of the two, perhaps by citing to the different impact that such entities may have on the asserted goal of the zoning plan. Congregation Kol Ami v. Abington Twp., 309 F.3d 120, 137 (3d Cir. 2002). The facts in the present case are sufficiently similar to those of Congregation Kol Ami, to extend the logic applied in the zoning context to the licensing context.

Persons are similarly situated under the Equal Protection Clause when they are alike in Startzell v. City of Philadelphia, Pennsylvania, 533 F.3d 183, 203 (3d Cir. 2008) (internal quotations omitted). Plaintiffs assert that for Fourteenth Amendment purposes, the relevant category of similarly situated liquor license applicants are those who also exercised their First Amendment right to speech in choosing to name their restaurants. According to Plaintiffs then, all businesses applying for liquor licenses in the City of New Brunswick are similarly because, by the very nature of a license application, every applicant must have a name. This Court disagrees.

Plaintiffs have not established that those entities, whose owners also exercised their Startzell standard.

that other entities are of the same general category as plaintiff (e.g. employees, property owners) and engaged in the one similar incidence of conduct (e.g. applying for a permit, canceling a lease). See Abrams v. Port Auth. Trans-Hudson Corp., 445 Fed. Appx. 537 (3d Cir. 2011) (plaintiff failed to show other employees subject to employment

actions where no evidence was introduced that those employees also physical condition/disability);

Rucci v. Cranberry Tp., Pa., 130 Fed. Appx. 572 (3d Cir. 2005) (plaintiff failed to show other property owners subject to street access regulation were similarly situated where other landowners were not shown to have also subdivided their properties in the same manner as plaintiff); Adams Parking Garage, Inc. v. City of Scranton, 33 Fed. Appx. 28 (3d Cir. 2002) (plaintiff failed to show another leaseholder subject to termination was similarly situated where the other leaseho . I need not rely on this general trend in precedents alone, because, as explained below, the Third Circuit has provided more specific guidance as to what kinds of additional characteristics must be shown by equal protection plaintiffs.

The Third Circuit going forward is that enunciated in the case most heavily relied upon by Plaintiffs in support of their claim, Congregation Kol Ami. There, the Third Circuit reversed and remanded the District cause the District Court had not adequately determined that entities named in the complaint. In reaching its decision, the Circuit Court instructed that

the surrounding community, but whether the other entities are similar Congregation Kol Ami, 309 F.3d at 139; Id. at 142.

development project were a major point of contention between the parties in Congregation Kol

Ami. The Third Circuit found it appropriate and necessary for the District Court to consider the

number of people visiting the plaintif and frequency of their comings and goings. Id. at 139, 142. While Plaintiffs here have produced hypothetical impact on the area

provide any like information about the allegedly they have rested their equal protection claim solely on a showing of differing treatment (e.g.

ficates), giving short shrift to the antecedent question of similarly situated entities. [on Brief, 19-23].

standard at the time of Kol Ami, this Court also finds instructive the discussion of more recent

Fourteenth Amendment equal protection law post-Startzell. For Example, in Warren v. Fisher, the District Court found that a Plaintiff had failed to identify similarly situated parties when it nor any fact 2013 WL 1164492 (D.N.J. Mar. 19, 2013) at *9. The court in Warren

the Third Circuit case of Perano v. Township of Tilden, 423 Fed. Appx. 234 (3d Cir. 2011). In that case, the Third Circuit affirmed the dismissal of the equal protection claim of a developer seeking to expand his mobile home park who failed to allege specific facts showing the othe . Id. at 238. The decision in Perano, although at the stage of a motion to dismiss rather than summary judgment, is consistent with the factors enunciated in Congregation Kol Ami. Without evidence as to impact, purpose, scope, and

intensity of use no finder of fact can determine if a plaintiff and other entities named in a complaint are similarly situated.

Plaintiffs situated entities fare no better than the plaintiffs in Warren and Perano. The record shows that Plaintiffs here sought to expand the bar and While in operation, a maximum occupancy of 185 [DeBonis Dep., T34:22-25]. Plaintiffs sought to change the layout

of the building to create three bars and increase the occupancy to 352 persons. [Proposed Renovation to Existing Building by James P. Kissane, Architect]. This expansion was cited by Defendants as the reason for denial of a liquor license. [Recine Dep., T43:2-4, 46:1-9; Egan Dep., T9:4-12, 7:10-23]. 21

In identifying similarly situated parties, it is insufficient for Plaintiffs to introduce, wholesale, examples of named businesses that also applied for licenses. 22

The relevant category of businesses must include applicants who presented expansion plans including increased occupancy, alteration to internal layout, or other change affecting the impact, purpose, scope, and/or intensity of the project.

See Congregation Kol Ami, supra. Plaintiffs do not do so and, accordingly, fail to show the existence of similarly situated parties. Their equal protection claim is dismissed.

21 text to cover up their unconstitutional motive to suppress speech. The court does not reach this argument in the based upon the absence from the record of similarly situated applicants.

22 Plaintiffs contributed information to the record showing how long it took for the other submitted their tax certificate. [See -HH]. This showing is insufficient and not relevant to the denial claim.

VIII. New Jersey State Constitutional Claims

A. First Amendment Retaliation

The Supreme Court of New Jersey has held that the analysis of Article I, paragraph 6 claims is functionally identical to federal First Amendment analysis. 23

As such, the disposition of retaliation claim mirrors that of . Motion is granted with respect to Councilman Egan, but denied as to all other defendants

consistent with the First Amendment analysis, supra.

B. Equal Protection

does not appear in the New Jersey Constitution, it fourteenth amendment, seeks to protect against injustice and against the unequal treatment of

those who should be treated alike. , 189 N.J. 140, 164 (2007) (internal citations and quotations omitted). Article I, Paragraph 1 provides:

23 Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the li N.J. Const. art. I, ¶ 6. Because we ordinarily interpret our State Constitution's free speech clause to be no more restrictive than the federal free speech clause, Shelton College v. State Bd. of Educ., 48 N.J. 501, 518, 226 A. [w]e rely on federal constitutional principles in interpreting the free speech clause Karins v. City of Atlantic City, 152 N.J. 532, 547, 706 A.2d 706 (1998); see Bell v. Township of Stafford, 110 N.J. 384, 393, 541 A.2d 692 1988) (stating that constitutional approach taken by United States Supreme Court when examining commercial speech conforms t Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 264-65 (1998).

All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

[N.J. Const. art. I, ¶ 1]. The New Jersey Supreme Court has interpreted this provision to require a three-part test to evaluate challenged statutes and state actions. New Jersey courts decide such challenges by weighing three factors: (1) the nature of the right asserted; (2) the extent to which the statute intrudes upon that right; and (3) the public need for the intrusion. Sojourner A., supra, 177 N.J. at 333, 828 A.2d 306. While the New Jersey test is not identical to that under the Federal Constitution, he considerations guiding our equal protection analysis under the New Jersey Constitution are implicit in the three tier approach applied by the Barone v. Dept. of Human Servs., 107 N.J. 355, 526 (N.J. 1987), and , 189 N.J. at 165; accord Brown v. City of Newark, 113 N.J. 565, 552 (N.J. 1989).

r the interests of the

public in liquor license transfers to suggest that the analysis under the federal constitution, supra,

claim, therefore, is also dismissed.

Conclusion

For in part and denied in part. Judgment is entered for Defendant Egan, dismissing all claims against him. Judgment is entered for Defendants Cahill, Recine, and City of New Brunswick

retaliation claims arising from the conduct of the New Brunswick Police Department in delaying th federal First Amendment and state Article I, paragraph 6, retaliation claims against Defendants Cahill, Recine, and City of New Brunswick arising from the denial of pplication.

Dated: _____9/27/2013____ /s/ Freda L. Wolfson .

The Honorable Freda L. Wolfson United States District Judge