

### ZONING AND LAND USE PLANNING

## Sign Law Does Not Bar Lechis, Court Rules

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The Supreme Court, Suffolk County, has ruled that a sign ordinance adopted by the Long Island town of Southampton did not apply to wooden or plastic strips known as lechis that are attached to telephone or utility poles used to create an eruv, or ceremonial demarcation of an area, for members of the area's Orthodox Jewish community. The court's ruling, in *East End Eruv Association v. Town of Southampton*,<sup>1</sup> appears to be the first in New York to interpret a municipal land use ordinance<sup>2</sup> in a case involving an eruv.<sup>3</sup>

### Background

An eruv, under Jewish law, is a virtually invisible unbroken demarcation or delineation of an area that may be established by the attachment of wooden or plastic strips, called lechis, to telephone or utility poles. Among other things, an eruv must be built on land owned by the public, it may not have a ceiling, it must be at least 40 inches high, and it must be accessible to the public 24 hours a day. An eruv allows an observant Jewish person on the Sabbath or Yom Kippur to carry or push



Eruv on telephone pole in the Village of Quogue, Town of Southampton

objects from his or her residence (i.e., private property) onto public property and from public property back to his or her residence, activities a person would be prohibited from otherwise doing, by creating the fiction of a communal "private" domain. Although its use is specifically for the Sabbath and Yom Kippur, an eruv is maintained throughout the year by observant Jews.<sup>4</sup>

The Southampton case arose from the efforts of the East End Eruv Asso-

ciation (the EEEA), a not-for-profit corporation formed for the purpose of coordinating efforts toward the promotion and construction of an eruv in communities of Suffolk County with a proposed boundary traveling through three municipalities—the town of Southampton and the villages of Westhampton Beach and Quogue—to form a continuous bounded area. To do so in Southampton, the EEEA applied for and, in 2010, entered into licensing agreements with the owners of the needed poles, Verizon New York, and the Long Island Power Authority (LIPA), to attach 28 lechis to 15 poles.

In late 2010, Verizon was advised by Southampton that the attachment of lechis to poles violated the town's sign ordinance and that issuing licenses for that could result in fines and other penalties. Consequently, Verizon and LIPA refused to issue licenses to the EEEA for the lechis.

The EEEA's counsel responded that lechis should not be considered signs under the town's sign ordinance as they did not convey a message, did not consist of "a letter, number, figure, emblem, picture, outline, character, spectacle, delineation, announcement, trademark, or logo," and were not in any way used for "the purpose of commercial identification." The EEEA's counsel further explained

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how the lechis served no business purpose and would present no aesthetic or public safety concerns, as the lechis would consist of 5/8-inch PVC strips, firmly affixed to certain telephone poles, painted to match the poles' color, and nearly impossible to detect.

The town's chief building inspector responded to the EEEA's counsel that a lechi was a sign as it displayed a message that observant Jews may "carry and push" objects within its bounds. Additionally, the inspector found that "[e]ven if an eruv could be viewed as not conveying a message, a lechi is an 'outline' and a 'delineation'... and also qualifies as an 'emblem' ... [which] 'symbolize doors,'" and, therefore, that a lechi qualified as a sign under the sign ordinance.

The EEEA formally submitted applications to the inspector for 28 sign permits to attach lechis to 15 utility poles, but its request was denied. After a public hearing to address whether lechis were signs under the town's sign ordinance, the town's zoning board of appeals (ZBA) held that "lechis constitute illegal signs" under the sign ordinance.

The EEEA went to court, arguing that lechis were not signs for purposes of the town's sign ordinance.<sup>5</sup>

### Suffolk County Court Decision

The Supreme Court ruled in favor of the EEEA, holding that lechis were not signs for purposes of the town's sign ordinance.

In its decision, the court explained that the town implemented the sign ordinance to "assure that all signs within the town of Southampton are compatible with its unique character, charm, environment, storied history and climate" and "to promote the public health, safety and welfare

through a comprehensive system of reasonable, effective, consistent, content-neutral, and nondiscriminatory sign standards and requirements."<sup>6</sup> It then examined whether a lechi fell within the ambit of the sign ordinance in that it displayed a message, symbol, etc., and determined that it did not.

The court focused on the word "display" and observed that lechis were not discernable to the community. After examining photographs with the proposed lechis attached to utility poles, the court found that the boundaries were "invisible" as the lechis were not discernable. "Neither drivers nor casual observers would be able to differentiate the

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poles which have lechis attached from the other poles," the court said. Therefore, the court ruled, lechis did not display a message or delineation and were not subject to the town's sign ordinance.

The inspector's interpretation of the sign ordinance, the court noted, was not entitled to the usual deference afforded to such interpretations because the question was one of pure legal interpretation of its terms. It then declared that the interpretation was "contrary to the language of the law, irrational and unreasonable" in that it did not comport with the sign ordinance's intent. Given that the ZBA's decision was based on the inspector's erroneous interpretation, the court decided, it had to be set aside. The court then ordered the ZBA to grant the EEEA's application.

### Conclusion

The Suffolk County Supreme Court's decision is the latest addition to a growing body of case law that restricts the power of local municipalities and public utilities regarding the creation of an eruv. Now, with the definitive decision in the Southampton case, opponents of an eruv have lost another basis—a local sign ordinance—for challenging the creation of an eruv in Southampton and, perhaps, throughout the rest of the state as well.

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1. No. 14-21124 (Sup. Ct. Suffolk Co. June 30, 2015).

2. In a related case, the Long Island village of Westhampton Beach conceded that a lechi was not a "sign" under its sign ordinance. *Verizon New York Inc. v. Village of Westhampton Beach*, No. 11-252 (AKT) (E.D.N.Y. June 16, 2014).

3. Other courts in New York, and in New Jersey, have issued decisions relating to an eruv on First Amendment grounds. See, e.g., *Tenafty Eruv Ass'n, Inc. v. Borough of Tenafty*, 309 F.3d 144 (3d Cir. 2002); *American Civil Liberties Union of N.J. v. City of Long Branch*, 670 F. Supp. 1293 (D. N.J. 1987); *Smith v. Community Board No. 14*, 128 Misc. 2d 944 (Sup. Ct. Queens Co. Special Term 1985), affirmed, 133 A.D.2d 79 (2d Dept. 1987).

4. See, *Smith*, supra n.3.

5. Chapter 330, Article XXII, of the Southampton Town Code governs signs, which are defined in Section 330-201 as:

Any material, device or structure displaying, or intending to display, one or more messages visually and used for the purpose of bringing such messages to the attention of the public, but excluding any lawful display of merchandise. The term "sign" shall also mean and include any display of one or more of the following:

A. Any letter, numeral, figure, emblem, picture, outline, character, spectacle, delineation, announcement, trademark, or logo; and

B. Colored bands, stripes, patterns, outlines or delineations displayed for the purpose of commercial identification.

6. Southampton Town Code §300-200.