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2020

The Law of The Eruv

Michael Lewyn



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A quiet office would be the best place to discern and discuss the likely risks. Then suggest that the client landowner take some basic precautions. Insist that the pipeline owner pay for signage and post to indicate subsurface risk areas. If the pipeline's safety shutoff is miles away from your site, meet with the local fire chief and have a standard operating procedure with the gas pipeline control center. Post a placard in your building's maintenance shop to warn workers (perhaps bilingually) that no digging is permitted near the area which you describe as pipeline risk zones. Tell local business association meetings of the need for awareness of the risks "underfoot." And urge your state chambers of commerce to host discussions about pipeline safety measures, to get the word out widely, so that state gas regulators pay more attention to safe practices.

Put this on your list for this year, a thoughtful dialogue without the sirens and "whooshing" sound of methane gas rushing out of the site where the backhoe met the pipeline. If you're surprised and your client's site is "toast," it's too late.

Zoning and Land Use Planning

Michael Lewyn*

The Law of the Eruv

Under traditional Jewish law, Jews may not carry outside during the Jewish Sabbath¹ (which runs from sundown Friday to nightfall on Saturday).² An exception to this rule exists where Jews have created an artificial boundary known as an eruv.³ The construction of an eruv often requires a Jewish community to place wires on utility poles to demarcate the eruv's boundaries.⁴ To build such an eruv, a Jewish community must usually have municipal permission.⁵ Occasionally, municipalities have refused to grant permission for the steps required for an eruv. The purpose of this Article is to discuss eruv-related case law, focusing on whether (1) the First Amendment requires municipalities to grant such

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I would like to thank Rabbi Jason Herman of Hudson Yards Synagogue in New York, NY for his helpful comments.

¹See *Bikur Cholim, Inc. v. Village of Suffern*, 664 F. Supp. 2d 267, 280 (S.D. N.Y. 2009) (Jewish law typically prohibits "carrying objects in public areas").

²See *Zacharowicz v. Nassau Health Care Corp.*, 2005 WL 1530263, *2 (E.D. N.Y. 2005), decision aff'd, 177 Fed. Appx. 152 (2d Cir. 2006).

³See *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209, 34 Env'tl. L. Rep. 20079 (3d Cir. 2004) (eruv "a ceremonial demarcation of an area within which . . . Jews may push or carry objects on the Sabbath").

⁴See *American Civil Liberties Union of New Jersey v. City of Long Branch*, 670 F. Supp. 1293, 1294 (D.N.J. 1987). An eruv may also be created from natural barriers. See *Smith v. Community Bd. No. 14*, 128 Misc.2d 944, 945, 491 N.Y.S.2d 584, 585 (Sup 1985) (eruv "created from natural barriers or from wires strung across poles").

⁵See *Lorin Geitner, Eruv and Establishment*, 52 Orange County Lawyer 26, 27 (2010) (for eruv to be effective "local government must officially recognize this area as an eruv, and, in return for valuable consideration, lease it to the local Jewish community").

permission; (2) the Religious Land Use and Institutionalized Persons Act (RLUIPA) requires such permission; and (3) whether the Establishment Clause of the First Amendment limits such permission.

I. Introduction to the Eruv

The Bible states: "On six days work may be done, but on the seventh day you shall have a Sabbath of complete rest."⁶ The Mishnah, a 2nd-century code of Jewish law,⁷ interprets this rule to mean that 39 types of labor are prohibited on the Sabbath day; one of these labors is carrying from one domain to another⁸ for example, from a private domain (such as a house or apartment) to a public street and vice versa.⁹

The Mishnah also refers to an artificial private domain known as a *eruv*.¹⁰ The Hebrew word "*eruv*" means "to mix or join together" and the *eruv* combines multiple private

⁶The Bible, Exodus 35:2, at <https://www.sefaria.org/Exodus.35.2?lang=bi&aliyot=0>.

⁷See J. David Jacobs, Privileges for the Use of Deadly Force Against a Residence-Intruder: A Comparison of Jewish Law and the United States Common Law, 63 Temp. L. Rev. 31, 34 n. 26 (1990) (describing Mishnah in more detail).

⁸See Mishnah Shabbat 7:2 (listing "carrying from one domain to another" as one of primary labors forbidden on Sabbath), at <https://www.sefaria.org/Mishnah-Shabbat.7?lang=bi>. See also OU Staff, *The 39 Categories of Sabbath Work Prohibited by Law*, at <https://www.ou.org/holidays/shabbat/the-thirty-nine-categories-of-sabbath-work-prohibited-by-law/> (explaining in detail why carrying forbidden); Adam Mintz, *Halakhah in America: The History of City Eruvin, 1894-1962*, at 21-22, 25, 31 at <http://www.rabbimintz.com/wp-content/uploads/Mintz-Dissertation-Final.pdf> (noting that rule also supported by other scriptural references, including the statement of Exodus 16:29 that "let no man leave his place on the seventh day," prophet Jeremiah's condemnation of "carrying burdens when you enter the gates of Jerusalem on the Sabbath Day" and Nehemiah's condemnation of "bringing heaps of grain [and other goods] . . . into Jerusalem on the Sabbath"; adding that Dead Sea Scrolls contain similar prohibition).

⁹See Shira J. Schlaff, Using an Eruv to Untangle the Boundaries of the Supreme Court's Religion-Clause Jurisprudence, 5 U. Pa. J. Const. L. 831, 831-32 (2003).

¹⁰See Mishnah Eruvin 5:6. Cf. Mintz, *supra* note 8, at 32, citing Babylonian Talmud, Eruvin 21b (hereinafter "Talmud") (Talmudic legend

domains into one, thus allowing carrying in those domains.¹¹ The Talmud, a seventh-century commentary on the Mishnah,¹² makes it clear that even on the Sabbath, Jews may carry within the *eruv*.¹³ In the days of the Mishnah and Talmud, *eruv*in were created around courtyards.¹⁴ Jewish law allowed households living in the same courtyard to create an *eruv*, turning the courtyard into a private domain analogous to a house.¹⁵ The Talmud also allowed the creation of an *eruv* around a city,¹⁶ and by the Middle Ages urban *eruv*s were common.¹⁷ The first American *eruv* was proposed

states that King Solomon legislated this idea). Cf. *infra* note 12 (describing Talmud).

¹¹Conversation with Rabbi Jason Herman (Nov. 11, 2019); Zachary Heiden, Fences and Neighbors, 17 Law & Literature 225, 231 (2005) ("The Hebrew word *eruv* means 'to mix or join together,' and an *eruv* serves to integrate areas, such as the home and the synagogue, where carrying is permitted.") (emphasis in original).

¹²See David Flatto, The King and I: The Separation of Powers in Early Hebraic Political Theory, 20 Yale J.L. & Human. 61, 67 (2008) (Talmud "redacted in the sixth and seventh centuries . . . presents a running commentary on the Mishnah" and addresses a variety of other issues); Mintz, *supra* note 8, at 82 (Talmud eventually became "authoritative code of the Jewish people").

¹³See Talmud, Shabbat 6a ("if they placed an *eiruv* . . . they are all permitted to carry objects [on Sabbath]") at <https://www.sefaria.org/Shabbat.6a?lang=en>. Cf. Mintz, *supra* note 8, at 35-41 (explaining technical details of Talmudic rules).

¹⁴See Zachary Paul Levine, *It's A Thin Line: The Eruv and Jewish Community in New York and Beyond* 3, 6 in *It's A Thin Line: Eruv from Talmudic to Modern Culture* (Adam Mintz ed., 2014) (earliest *eruv* "was a means for enclosing the shared courtyards between two or three houses").

¹⁵See Schlaff, *supra* note 9, at 832; Levine, *supra* note 14, at 6 (In Roman Palestine, houses usually "built around courtyards that functioned as shared public spaces for activities such as eating, working and sleeping" and *eruv* allowed Jews to carry articles between houses).

¹⁶See Mintz, *supra* note 8, at 40 (citation omitted), 75 (describing Talmud-era examples); The Mishnah mentions the concept of an *eruv* around a city, but is ambiguous as to how frequently such an *eruv* is permitted. *Id.* at 71-72.

¹⁷*Id.* at 118 (in medieval Spain, "*eruv*in were built in all the major cities").

in St. Louis in the 1890s.¹⁸ But until the 1960s, the only American eruvim were in St. Louis and Manhattan.¹⁹ Today, there are hundreds of eruvs in the United States,²⁰ including 80 in the New York City metropolitan area alone.²¹

Because a home has walls and a doorway, an eruv must also have boundaries analogous to doorways.²² The ideal eruv would be bounded by solid walls,²³ and bodies of water, railroad tracks or freeways may also create an eruv boundary.²⁴ Where this is not possible, the area within the eruv must be artificially enclosed.²⁵ Observant Jews may create such boundaries with wires such as overhead cable lines and poles, typically belonging to utility companies.²⁶ Under Jewish law, the cable lines must pass over the top of the

¹⁸ See Samuel Arbesman, *Why America's Religious Jews May Not Be Able to Move Back Downtown*, Citylab, August 8, 2012, at <https://www.citylab.com/equity/2012/08/why-americas-religious-jews-may-not-be-able-move-back-downtown/2870/> (It is not clear when this eruv was actually built. See Yosef Gavriel Bechhofer, *The Contemporary Eruv* 31 (3d ed. 2013) (St. Louis eruv not built); Mintz, *supra* note 8, at 176 (St. Louis eruv "first documented eruv in North America") (emphasis in original).

¹⁹ See Levine, *supra* note 14, at 33 ("Until the late 1960s, there were only three eruvim in North America: St. Louis, Toronto and Manhattan"); Mintz, *supra* note 8, at 229 (New York eruv established in 1905).

²⁰ See Eruv.org, *Eruv Directory*, at <http://www.eruv.org/eruv-directory/> (listing 223 eruvs).

²¹ See Levine, *supra* note 14, at 34.

²² See Heiden, *supra* note 11, at 232 (to rabbis who developed relevant Jewish law, "essential defining feature of a home is that it has walls . . . a home made up with walls also must have a door").

²³ See Rabbi Herschel Schachter, *Eruvin: The Streets, The Strings And The Shabbat* 47, 47 in *It's A Thin Line: Eruv from Talmudic to Modern Culture* (Adam Mintz ed., 2014) ("In its ideal form, the borders of the eruvs would be solid walls"); Levine, *supra* note 14, at 15 (in European walled cities, walls were the eruv).

²⁴ See Heiden, *supra* note 11, at 232 (wires may be used "where creek beds or freeway sound walls do not already establish a usable boundary"); Levine, *supra* note 14, at 20–21, 30–31 (railroad tracks and seawalls have been boundaries for New York City eruvim). *But cf.* Bechhofer, *supra* note 18, at 87–92 (natural walls not always valid boundaries).

²⁵ See Schlaff, *supra* note 9 at 832.

²⁶ See Bechhofer, *supra* note 18, at 67; Levine, *supra* note 14, at 34 (eruvim "usually made out of string or wire attached to utility poles").

poles.²⁷ Frequently, Jews achieve this goal by attaching rods or strips known as lechis to the utility poles.²⁸ These pieces are practically invisible except to observant Jews who are looking closely for them, because they look almost identical to utility wires.²⁹ Every week, Jews must check the eruv's boundaries to make sure that it is intact for the Sabbath—that is, that the eruv's wires and lechis have not been broken.³⁰

The eruv must be at least 40 inches high, roofless and continuous.³¹ In addition, courtyard residents may not create an eruv without requesting permission from non-Jewish residents and depositing a symbolic amount of food in a Jewish resident's house.³² A secular official with jurisdiction over the eruv must issue a ceremonial proclamation leasing the eruv territory to the Jewish community, thus converting that land into a private domain for purposes of Jewish law.³³ Thus, government effectively has veto power over the creation of an eruv.

According to Jewish law, the prohibition against carrying includes pushing objects, so in the absence of an eruv, one generally may not push a baby carriage or wheelchair outside on the Sabbath.³⁴ It follows that without an eruv, mothers of younger children and the wheelchair-bound are

²⁷ See Bechhofer, *supra* note 18, at 68.

²⁸ See Alexandra Lang Susman, *Strings Attached: An Analysis of the Eruv under the Religion Clauses of the First Amendment and the Religious Land Use and Institutionalized Persons Act*, 9 U. Md. L.J. Race Relig. Gender & Class 93, 94–95 (2009) (lechis often black rubber strips); Bechhofer, *supra* note 18, at 70 (lechi may be a barrel, but a "routine approach [is to bolt] 'plank, a rod, or tubing, to utility poles' as lechi).

²⁹ *Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 152 (3d Cir. 2002).

³⁰ See Susman, *supra* note 28, at 99.

³¹ *Id.* at 94.

³² See Schlaff, *supra* note 9, at 832; Mintz, *supra* note 8, at 51.

³³ See Susman, *supra* note 28, at 95.

³⁴ See Schlaff, *supra* note 9, at 832.

virtually trapped in their homes.³⁵ As a result, an eruv is a significant amenity for an observant Jewish community.³⁶

The small number of eruv-related cases suggests that most cities with an eruv have allowed them without any controversy. However, a few communities have been exceptions to this general rule. Opposition to the eruv is sometimes based on an abstract concern about accommodating religion, and sometimes based on a desire to exclude Orthodox Jews (the primary beneficiaries of an eruv).³⁷

³⁵ Cf. *Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 152 (3d Cir. 2002) (without an eruv, observant Jews "who have small children or are disabled typically cannot attend synagogue on the Sabbath").

³⁶ See Correspondent, *Jews Unite Behind Orthodox to Support Area's 1st Eruv*, *The Jewish News of Northern California*, June 23, 2000, at <https://www.jweekly.com/2000/06/23/jews-unite-behind-orthodox-to-support-t-area-s-1st-eruv/> ("Orthodox presence involved in the high-tech world . . . that won't live here [Palo Alto, California] due to the lack of an eruv"). Most eruv-related commentary refers to the needs of Orthodox Jews. See, e.g., Heiden, *supra* note 11, at 232. (referring to eruv as "associated with Orthodox Jewish practice.") But in fact, Conservative Jews also take advantage of eruv. See Congregation Beth Shalom, *Enlarging the Jewberhood: The Richmond Eruv*, at <https://www.bethsholomsf.org/cbs-blog/enlarging-the-jewberhood-the-richmond-eruv> (post on Conservative congregation's web page endorsing extension of eruv to cover congregation); Alan Jay Gerber, *Jewish Unity and the Eruv*, *Jewish Press*, Nov. 5, 2014, at <https://www.jewishpress.com/indepth/opinions/jewish-unity-and-the-eruv/2014/11/05/> (stating that "Conservative Judaism in fact mandates an eruv for all its adherents" and citing treatise by Conservative rabbi) (emphasis in original). By contrast, Reform Jews generally do not. See Charlotte Elisheva Fonrobert, *Installations of Jewish Law in Public Urban Space: An American Eruv Controversy*, 90 *Chi-Kent L. Rev.* 63, 73 (2015) (Reform rabbis have rejected eruv as "legal fiction").

³⁷ See Susman, *supra* note 28, at 101–02 (describing opposition); 109 (claiming that eruv violates Establishment Clause). Cf. Sylvia Barack Fishman, *Sociological Contexts and Complications of Eruv Construction in American Jewish Communities* 121, 123–25, in *It's A Thin Line: Eruv from Talmudic to Modern Culture* (Adam Mintz ed., 2014) (secular voters sometimes desire to exclude Orthodox Jews because Orthodox Jews send children to religious schools and thus are less likely to support high property taxes for public schools; also, secular Jews fear being condemned by Orthodox Jews for failure to observe traditional Jewish laws).

II. The Eruv and Free Exercise

The First Amendment provides that government may not restrict the free exercise of religion.³⁸ The most extensive case involving the Free Exercise Clause is the 2002 case of *Tenaflly Eruv Association v. Borough of Tenaflly* (Tenaflly).³⁹ The Tenaflly litigation began when two observant Jews met with a town's mayor to discuss the creation of an eruv.⁴⁰ The mayor agreed to bring the matter to the attention of the city council.⁴¹ The council did not vote on the issue, so the eruv's supporters obtained a proclamation from a county executive.⁴² After this proclamation, the plaintiffs completed the eruv by affixing lechis to the utility poles of the local telephone company, with the assistance of the local cable television franchise.⁴³ Shortly thereafter, the town council learned that there was an ordinance prohibiting placing signs or other matter upon utility poles, and voted to force the cable company to remove the lechis from the utility poles.⁴⁴ In response, the plaintiffs filed suit, alleging that the council's decision violated the First Amendment.⁴⁵ The district court refused to grant plaintiffs' motion for a preliminary injunction, holding that the plaintiffs were not reasonably likely to succeed.⁴⁶ The Third Circuit reversed, uphold-

³⁸ U.S. Const. Amend. I.

³⁹ *Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly*, 309 F.3d 144 (3d Cir. 2002).

⁴⁰ *Id.* at 152.

⁴¹ *Id.*

⁴² *Id.* at 153.

⁴³ *Id.* at 153.

⁴⁴ *Id.* at 154.

⁴⁵ *Id.* The plaintiffs also alleged a violation of the Fair Housing Act. *Id.* at 156. The Fair Housing Act allows relief when a municipality makes housing unavailable. See 42 U.S.C.A. § 3604(a) (it is a violation of Act to "make unavailable or deny" housing). The district court rejected this claim because the eruv is not housing. See *Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 156 (3d Cir. 2002) (citation omitted). The plaintiffs did not raise this claim on appeal. Because the district court's view seems obviously correct to me, and because no other case has addressed the issue, I have not addressed the Fair Housing Act in this article.

⁴⁶ *Id.* at 155.

ing the plaintiffs' claim based on the Free Exercise Clause of the First Amendment.⁴⁷

The court began by noting that if "a law is 'neutral' and 'generally applicable,' and burdens religious conduct only incidentally, the Free Exercise Clause offers no protection."⁴⁸ On the other hand, if a law is not neutral (that is, if it discriminates against religiously motivated conduct) then "strict scrutiny"⁴⁹ applies—which means that the law violates the Free Exercise Clause "unless it is narrowly tailored to advance a compelling governmental interest."⁵⁰

In Tenafly, the law at issue was the ordinance providing that no person shall place "any sign or advertisement, or other matter upon any pole . . . in any public street or public place"⁵¹ without municipal authorization. The court noted that the ordinance, on its face, was neutral.⁵² The court accordingly reasoned that if the city had enforced the ordinance uniformly, the plaintiffs' First Amendment claim would have failed.⁵³

However, the city in fact did not enforce its no-sign ordinance uniformly. Instead, the city had "tacitly or expressly granted exemptions from the ordinance's unyielding language for various secular and religious . . .

⁴⁷The plaintiffs also raised a claim under the Freedom of Speech clause of the First Amendment. See U.S. Const. Amend. I (allowing "no law . . . abridging the freedom of speech"). The court rejected this claim because the eruv was not sufficiently expressive to constitute speech. See *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 158–65 (3d Cir. 2002). No other case has addressed a free speech claim related to an eruv, and the court's analysis seems sufficiently persuasive to not be worth further discussion.

⁴⁸*Id.* at 165, citing *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876, 52 Fair Empl. Prac. Cas. (BNA) 855, 53 Empl. Prac. Dec. (CCH) P 39826, Unempl. Ins. Rep. (CCH) P 21933 (1990), overturned due to legislative action, 42 U.S.C.A. § 2000bb (Nov. 16, 1993).

⁴⁹*Id.*

⁵⁰*Id.*, citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

⁵¹*Id.* at 151 (citation omitted).

⁵²*Id.* at 167.

⁵³*Id.*

purposes."⁵⁴ The city had allowed "house numbers and lost animal signs . . . holiday displays, church directional signs, and orange ribbons"⁵⁵ on its utility poles. Moreover, many of these signs were even more obvious to onlookers than the lechis required for an eruv.⁵⁶

The court went on to discuss the city's justifications for its discriminatory conduct. The city argued that they could reasonably discriminate against lechis because they were designed to be permanent; the court rejected this argument because the city allowed house numbers to be nailed to utility poles, and those numbers were also permanent.⁵⁷ The city also argued that other cases involving discriminatory conduct were distinguishable because the plaintiffs sought to place lechis on public property, and thus sought a benefit from government.⁵⁸ The court rejected this argument because the nondiscrimination principle of prior cases applies not only when a city prohibits religious conduct, "but also when government denies religious adherents access to publicly available money or property."⁵⁹ The city further claimed that strict scrutiny should not apply because the denial of the eruv did not substantially burden plaintiffs.⁶⁰ The court rejected this argument because the "substantial burden" concept did not apply where, as in *Tenafly*, government discriminated against religious conduct.⁶¹

Because the city's application of its ordinance singled out

⁵⁴*Id.*

⁵⁵*Id.*

⁵⁶*Id.* ("even observant Jews are often unable to distinguish them [lechis] from ordinary utility poles.").

⁵⁷*Id.*

⁵⁸*Id.* at 169–70.

⁵⁹*Id.* at 169 (citations omitted).

⁶⁰*Id.* at 170.

⁶¹*Id.* The city also made the similar argument that the eruv was optional for Jews. *Id.* at 171. *Cf. Levine, supra* note 14, at 30–31 (some Orthodox rabbis have opposed eruv as unnecessary leniency, both on technical grounds and because Jews used to carrying inside eruv might come to carry on the Sabbath in places outside an eruv). The court found that this assertion, even if true, was irrelevant, because the Free Exercise clause is not limited to compulsory religious practices. See *Tenafly*, 309 F.3d at 171.

religious conduct for discriminatory treatment, the court held that strict scrutiny was required which meant, as noted above, that the city's decision was invalid unless it was narrowly tailored to a compelling interest. The city argued that under strict scrutiny, its interest in rejecting the eruv was compelling, because, *inter alia*,⁶² the eruv is permanent, and the city had a "compelling interest in preventing permanent fixtures on its utility poles."⁶³ The court rejected this argument because for many years, the city had allowed its residents to nail equally permanent house numbers to utility poles.⁶⁴ So even if the city's interest was compelling, its discriminatory treatment of the eruv was not narrowly tailored to promote that interest. The court accordingly held that the plaintiffs had shown a reasonable probability that the plaintiffs would prevail on their Free Exercise claim, and granted a preliminary injunction.⁶⁵ The parties then settled the lawsuit by allowing the construction of the eruv.⁶⁶

By contrast, the case of *East End Eruv Association v. Village of Westhampton Beach*⁶⁷ (East End) rejected a Free Exercise claim. In that case, the plaintiffs sought to build an eruv through three separate municipalities (Southampton, Quogue and Westhampton Beach).⁶⁸ The plaintiffs' first step was to enter into an agreement with a telephone company⁶⁹

⁶²The city also claimed that compliance with the Establishment Clause of the First Amendment constituted a compelling state interest that justified its decision. *Id.* at 173–74. The court's discussion of this issue will be addressed *infra*, in my discussion of Establishment Clause issues related to eruvim.

⁶³*Id.* at 172.

⁶⁴*Id.*

⁶⁵*Id.* at 178–79.

⁶⁶See Deena Yellin, *Eruv lawsuit in Tenafly provides a cautionary tale*, northjersey.com, July 30, 2017, at <https://www.northjersey.com/story/news/2017/07/30/tenaflys-eruv-lawsuit-provides-cautionary-tale/507868001/>.

⁶⁷*East End Eruv Association, Inc. v. Village of Westhampton Beach*, 828 F. Supp. 2d 526 (E.D. N.Y. 2011).

⁶⁸*Id.* at 529–30; Fonrobert, *supra* note 33, at 68–69 (describing plaintiffs and licensing scheme).

⁶⁹*East End Eruv Association, Inc. v. Village of Westhampton Beach*, 828 F. Supp. 2d 526, 531 (E.D. N.Y. 2011) (describing agreement with

and an electric power company⁷⁰ to attach lechis to the utility's poles. The town attorney of Southampton contacted the telephone company, informing it that the lechis constituted a sign within the meaning of a local ordinance prohibiting signs on telephone and utility poles.⁷¹ Similarly, Westhampton Beach and Quogue officials informed the utilities that the eruv could not be installed without municipal permission.⁷² After these threats, the two utilities refused to allow the installation of lechis.⁷³

The plaintiffs then filed suit, requesting a preliminary injunction.⁷⁴ The court rejected the plaintiffs' First Amendment claim, holding, *inter alia*,⁷⁵ that the plaintiffs had not shown a likelihood of success on the merits of the claim.⁷⁶ The court cited *Tenafly* to support the proposition that neutral policies are generally valid,⁷⁷ and found that Southampton's anti-sign policy was neutral.⁷⁸ In particular, the court noted that there was no evidence that Southampton

Verizon); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 153 (3d Cir. 2002) (describing Verizon as "local telephone company").

⁷⁰*East End Eruv Association, Inc. v. Village of Westhampton Beach*, 828 F. Supp. 2d 526, 531–32 (E.D. N.Y. 2011) (describing agreements with LIPA); *PSEG Long Island LLC v. Town of North Hempstead*, 158 F. Supp. 3d 149, 152 (E.D. N.Y. 2016) (LIPA, also known as Long Island Lighting Company, provides electric power).

⁷¹*East End Eruv Association, Inc. v. Village of Westhampton Beach*, 828 F. Supp. 2d 526, 532, 534 (E.D. N.Y. 2011) (describing ordinance), (describing correspondence).

⁷²*Id.* at 535 (village board of Westhampton Beach informed Verizon official that it "understands Verizon's position to be that it will not execute the proposed [eruv] agreement . . . unless and until the Village approves"; Quogue mayor informed utilities of "the need for village approval for the attachment"). However, neither Westhampton nor Quogue Beach took other official action in opposition to the eruv. *Id.* at 535–36.

⁷³*Id.* at 531.

⁷⁴*Id.* at 536.

⁷⁵The court also held that the action was not ripe for judicial review because the plaintiffs had not asked the city for a decision. *Id.* at 537–38.

⁷⁶*Id.* at 538.

⁷⁷*Id.* at 539, citing *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002).

⁷⁸*East End Eruv Association, Inc. v. Village of Westhampton Beach*, 828 F. Supp. 2d 526, 539–40 (E.D. N.Y. 2011).

“tacitly or expressly allowed exceptions, whether for religious or secular purposes”⁷⁹ to its sign ordinance. Although the plaintiffs had found six signs on Southampton’s utility poles, the court found that this fact did not show selective enforcement, because most of the signs were removed quickly.⁸⁰ The only signs that were not removed were placed at heights where they could not be removed by the city without special equipment.⁸¹ Because there was no evidence of selective enforcement, the court held that Tenaflly was distinguishable and that plaintiffs’ Free Exercise claim was likely to fail.⁸² The court also dismissed the claims against Westhampton Beach and Quogue without prejudice, because those claims were intertwined with the claims against Southampton.⁸³ However, an eruv was ultimately built, after a state court decided that Southampton’s sign ordinance as written did not prohibit the lechi.⁸⁴

Read together, Tenaflly and East End stand for the following proposition: where a city rejects an eruv based on a sign ordinance that is consistently enforced, it does not violate the First Amendment but where the city allows some people but not others to place signs on utility poles, it must allow the eruv.

⁷⁹*Id.* at 540.

⁸⁰*Id.* (noting that “in only two of the six locations did signs remain for any appreciable length of time”).

⁸¹*Id.*

⁸²*Id.*

⁸³*Id.* at 541.

⁸⁴See Stewart Ain, *An Eruv Will Come to Southampton*, New York Jewish Week, Sept. 10, 2015, at <https://jewishweek.timesofisrael.com/an-eruv-will-come-to-southampton/> (city settled after unfavorable decision by state trial court; Westhampton also settled litigation by allowing eruv); Matt A.V. Chaban, *Hamptons Town Nears a Deal on a Jewish Ritual Boundary*, New York Times, May 29, 2016, at <https://www.nytimes.com/2016/05/30/nyregion/hamptons-town-nears-a-deal-on-a-jewish-ritual-boundary.html> (Quogue later settled on similar terms).

III. The Eruv and RLUIPA

RLUIPA provides, in relevant part, that government may not “impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person . . . [unless the regulation] (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.”⁸⁵ The law defines a “land use regulation” is a law that limits “use or development of land . . . if the claimant has an ownership, leasehold, easement, servitude or other property interest in the regulated land or an contract or option to acquire such an interest.”⁸⁶

The East End court held that RLUIPA was inapplicable to the eruv, because the plaintiffs had no property interest in the utility poles at issue.⁸⁷ Although the plaintiffs had a license from the utilities to affix their signs to the poles, this license was not an interest because the utilities did not own the land the poles were on; instead, the utilities themselves merely had a license to erect poles.⁸⁸

⁸⁵42 U.S.C.A. § 2000cc(a)(1).

⁸⁶42 U.S.C.A. § 2000cc-5(5).

⁸⁷East End Eruv Association, Inc. v. Village of Westhampton Beach, 828 F.Supp. 2d 526, 540–41 (E.D. N.Y. 2011).

⁸⁸*Id.* at 541 (citation omitted). Sussman argues that RLUIPA is relevant because an eruv involves use of land, and “requires the use of public property and a government proclamation.” Sussman, *supra* note 28, at 128. But as the East End court pointed out, even issues related to the use of public land are not covered by RLUIPA if the plaintiffs had no interest in the land at issue. See *supra* notes 86–87 and accompanying text.

IV. The Establishment Clause and the Eruv

The First Amendment also prohibits any law "respecting any establishment of religion."⁸⁹ Several cases have upheld pro-eruv municipal policies, and not one has held that an eruv violated the Establishment Clause. The first case to address whether an eruv violates the Establishment Clause was the 1985 case of *Smith v. Community Board No. 14*.⁹⁰ In *Smith*, a resident of the Belle Harbor neighborhood in Queens⁹¹ sued a pro-eruv group and an agency of New York City in a New York state court,⁹² asserting that the eruv violated the Establishment Clause. The court applied the Supreme Court case of *Lemon v. Kurtzman*,⁹³ which "established three guiding principles to determine whether particular governmental action violates the establishment clause: whether the conduct has a secular purpose even if that secular purpose is not primary, whether its principal effect either advances or inhibits religion, and whether there is excessive governmental entanglement with religion."⁹⁴

As to the first Lemon prong, the court held that the eruv had a secular purpose because the pro-eruv group improved fences along a neighborhood beach in order to facilitate eruv

⁸⁹U.S. Const. Amend. I.

⁹⁰*Smith v. Community Bd. No. 14*, 128 Misc. 2d 944, 491 N.Y.S.2d 584 (Sup 1985).

⁹¹*Id.* at 586, *Smith v. Community Bd. No. 14*, 128 Misc. 2d 944, 491 N.Y.S.2d 584 (Sup 1985) (plaintiff had standing "as a resident of Belle Harbor").

⁹²*Id.* at 584-85 (describing claims), *Smith v. Community Bd. No. 14*, 128 Misc. 2d 944, 491 N.Y.S.2d 584 (Sup 1985). The municipal defendant was a community board, which is a neighborhood-based organization that makes recommendations about land use decisions to New York City's council. See Valletta, *Siting Public Facilities On a Fair Share Basis in New York City*, 25 Urb. Law. 1, 3 n. 10 (1993) (describing community boards; New York City divided into 59 community districts, each of which has a community board that makes recommendations about land use-related actions).

⁹³*Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).

⁹⁴*Smith v. Community Bd. No. 14*, 128 Misc. 2d 944, 491 N.Y.S.2d 584, 586 (Sup 1985), citing *Lemon*, 403 U.S. at 602, 612-13.

construction.⁹⁵ The court further held that the city did not advance religion because even though the eruv accommodated Judaism, the city had in the past accommodated religious beliefs of other New Yorkers.⁹⁶ Finally, the court found no excessive entanglement, for two reasons. First, the city treated the pro-eruv group no differently than it treated secular groups; just as the city has historically allowed secular groups to hang commercial signs from poles, it allowed the pro-eruv group to string wire from poles.⁹⁷ Second, the city did not financially assist the eruv.⁹⁸ Thus, the court found that all three prongs of the Lemon test favored the defendants. Because the eruv in *Smith* was supported by a secular purpose that might not be present in other cases (the pro-eruv group's improvement of the fence) *Smith* is of limited precedential value.

Two years later, a federal court addressed the eruv issue for the first time in *American Civil Liberties Union of New Jersey v. City of Long Branch*.⁹⁹ In that case, the plaintiffs (the ACLU and a private individual) alleged that the city's approval of an eruv violated the Establishment Clause, because the creation of an eruv placed religious symbols on public property.¹⁰⁰

The court applied the Lemon test, holding that the eruv satisfied a secular purpose because it "allows a large group of citizens access to public properties."¹⁰¹ The court explained that the eruv allows observant Jews to push a baby carriage on public streets, and to more conveniently go to a park or

⁹⁵*Id.* at 587, *Smith v. Community Bd. No. 14*, 128 Misc. 2d 944, 491 N.Y.S.2d 584 (Sup 1985). In particular, the group increased the height of the fences to 40 inches, because under Jewish law an eruv must be at least 40 inches high. *Id.* at 585, *Smith v. Community Bd. No. 14*, 128 Misc. 2d 944, 491 N.Y.S.2d 584 (Sup 1985).

⁹⁶*Id.* at 587, *Smith v. Community Bd. No. 14*, 128 Misc. 2d 944, 491 N.Y.S.2d 584 (Sup 1985).

⁹⁷*Id.*

⁹⁸*Id.*

⁹⁹*American Civil Liberties Union of New Jersey v. City of Long Branch*, 670 F. Supp. 1293 (D.N.J. 1987).

¹⁰⁰*Id.* at 1294.

¹⁰¹*Id.* at 1295.

visit friends.¹⁰² In other words, the eruv “allows observant Jews to engage in secular activities on the Sabbath”¹⁰³ and thus has a secular purpose.

The court also held that the eruv did not advance religion for three reasons. First, the eruv merely provided Jews with equal access to public streets, and thus was analogous to other permissible government activities such as fixing sidewalks outside churches, providing utilities to religious gatherings, providing police to direct traffic into synagogue parking lots, and authorizing additional street lights near churches.¹⁰⁴ Second, even though the eruv did accommodate observant Jews’ desire to use land for religious purposes, this was no different from “houses of worship on public land at an airport to enable travelers and airport employees to practice their religions.”¹⁰⁵ Third, because the eruv was virtually invisible, it did not subject non-Jews to religious symbols¹⁰⁶ and thus “sends no religious message to the rest of the community.”¹⁰⁷

Finally, the court held that the eruv did not excessively entangle government and religion, because the government spent no funds on the eruv and did not aid the eruv except by allowing it.¹⁰⁸ Moreover, the government was not responsible for the eruv’s day-to-day maintenance.¹⁰⁹

¹⁰² *Id.* Even without an eruv, observant Jews can do the latter two activities on the Sabbath; however, the inability to carry infant children or carry keys makes the latter activities less convenient.

¹⁰³ *Id.*

¹⁰⁴ *Id.* Sussman points out that some of these activities are not similar to the eruv because they benefit the general public as well as worshippers. For example, a “better sidewalk aids all people walking on it” and “directing traffic outside a busy religious building aids . . . those who are simply driving by.” Sussman, *supra* note 28, at 111. However, provision of public utilities to a religious gathering (another valid example cited by the court) only benefits those present at the gathering.

¹⁰⁵ *American Civil Liberties Union of New Jersey v. City of Long Branch*, 670 F. Supp. 1293, 1296 (D.N.J. 1987).

¹⁰⁶ *Id.* at 1295.

¹⁰⁷ *Id.* at 1296.

¹⁰⁸ *Id.* at 1297. Sussman argues that the one-time proclamation allowing an eruv entangles religion and the government by “declaring and defining what Orthodox Jewish law requires of its adherents.” Sussman,

In *Tenaflly*, a federal appellate court applied Establishment Clause doctrine in a different legal context. As noted above, the *Tenaflly* court held that because a city’s opposition to the eruv discriminated against religious land use, the city violated the Free Exercise Clause unless they could show a compelling state interest justifying its conduct.¹¹⁰ The city argued, however, that its interest in avoiding an Establishment Clause controversy justified such discrimination.¹¹¹

The *Tenaflly* court declined to apply the *Lemon* test, writing that in several cases involving private use of public resources, the Supreme Court has developed the “endorsement test.”¹¹² This test collapses the *Lemon* prongs into one question: “would a reasonable, informed observer, *i.e.*, one familiar with the history and context of private individuals’ access to the public money or property at issue, perceive the challenged government action as endorsing religion?”¹¹³

Applying this test, the court found that the eruv was not an endorsement of religion, for two reasons. First, the court pointed out that eruv was essentially private conduct: the eruv was installed by private individuals and maintained by private funds.¹¹⁴ Second, allowing the lechis to remain in place “would represent neutral rather than preferential treatment of religiously motivated conduct”¹¹⁵ while refusing

supra note 28, at 115. But such statements merely point out what some adherents believe, and thus do not entangle the public sector in a religious dispute.

¹⁰⁹ See *American Civil Liberties Union of New Jersey v. City of Long Branch*, 670 F. Supp. 1293, 1297 (D.N.J. 1987). The plaintiffs also claimed that the eruv violated the New Jersey version of the Establishment Clause. The court rejected this argument, because New Jersey law on this issue was identical to federal constitutional law. *Id.*

¹¹⁰ See *supra* note 50 and accompanying text.

¹¹¹ See *Tenaflly Eruv Ass’n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 173 (3d Cir. 2002).

¹¹² *Id.* at 174.

¹¹³ *Id.* (emphasis in original) (citations omitted).

¹¹⁴ *Id.* at 177.

¹¹⁵ *Id.*

to allow an eruv would cause a reasonable observer to perceive hostility towards observant Jews.¹¹⁶

In the most recent relevant case, *Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton Beach*,¹¹⁷ an organization and two individuals challenged the licensing agreements that led to the East End litigation.¹¹⁸ Unlike the *Tenafly* court, the *Jewish People* court held that the three-part *Lemon* test “still governs cases alleging violations of the Establishment Clause.”¹¹⁹

The court found that all three elements of *Lemon* favored rejection of the plaintiffs’ claim. As to the “secular purpose” element of the *Lemon* test, the court held that even if the eruv itself lacked a secular purpose, a utility’s decision to allow lechis on its utility poles constituted “[n]eutral accommodation of religious practice [which] qualifies as a secular purpose under *Lemon*.”¹²⁰ The court treated the second “advancing religion” element of *Lemon* as identical to the “endorsement” test enunciated in *Tenafly*.¹²¹ As to this element, the court stated without significant explanation that no reasonable person would treat the lechis as an endorsement of religion.¹²² And the court found that the “entangle-

¹¹⁶*Id.* But see *Sussman*, *supra* note 28, at 117 (suggesting that proclamation required for eruv might be “a sign of government endorsement” for the eruv).

¹¹⁷*Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton Beach*, 778 F.3d 390 (2d Cir. 2015).

¹¹⁸*Id.* at 393 (describing agreements); *supra* notes 67–88 and accompanying text (discussing East End case).

¹¹⁹*Id.* at 395 (citation omitted).

¹²⁰*Id.* (citation omitted) (emphasis omitted). But see *contra* *Sussman*, *supra* note 28, at 111 (eruv has no secular purpose because it separates “a designated area in order to satisfy the religious needs of a particular group of citizens”).

¹²¹See *Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton Beach*, 778 F.3d 390, 396 (2d Cir. 2015) (“In religious display cases, *Lemon*’s second consideration collapses into the question of whether a reasonable observer . . . would perceive a message of governmental endorsement or sponsorship of religion”) (citation omitted) (emphasis omitted).

¹²²*Id.*

ment” element of *Lemon* was not met, because private persons would install, finance and maintain the eruv.¹²³

¹²³*Id.* at 396.

V. Conclusion

Because every single relevant case has rejected eruv-related Establishment Clause claims, it seems clear that a municipality that permits an eruv does not violate the Establishment Clause of the First Amendment. On the other hand, a municipality that refuses to do so does not violate the Free Exercise Clause unless it has treated analogous secular land uses more favorably- for example, by prohibiting lechis on poles while allowing secular signs or signs installed to promote other religions. Thus, municipalities have some discretion to permit or deny the installation of an eruv.