State of New York
Office of the Attorney General

Letitia James
Attorney General

Division of Regional Affairs

April 19, 2024

Via Email and Regular Mail

Dan Hogue, Jr.
Town of Forestburgh
Town Supervisor
332 King Road
Forestburgh, NY 12777
Forestburghsupervisor@gmail.com

Re: Local Law 3 of 2023: A Local Law Repealing and Replacing Town of Forestburgh Chapter 180 Relating to Zoning Code and Regulations.[1]

Dear Town Supervisor Hogue,

The New York State Office of the Attorney General has received reports that Forestburgh's recent rezoning ordinance, Local Law 3 of 2023, discriminates against Jewish New Yorkers. Based on our review of Local Law 3 and its adoption, the Office of the Attorney General has concerns about the ordinance's lawfulness. Local Law 3 appears to violate state and federal law by discriminating against religious uses. And the adoption of Local Law 3 raises concerns about Forestburgh's compliance with the Open Meetings Law.

Overview of Severe Minimum Requirements for Places of Worship in Local Law 3

Local Law 3 requires religious uses to meet lot area and setoff minimums that far exceed those for comparable secular uses.

In all three business districts, places of worship now have a minimum lot size of five acres—larger than any secular use except "office parks." This 5-acre minimum is more than

[1] This letter is not intended to be legal advice, or a full accounting of your legal duties and obligations.

twice the 1.5-acre minimum for comparable uses such as "theater," "funeral home," and "restaurant, brewery, brew pub, tavern."[2] It is also a substantial increase over the 2.25 minimum acreage previously required of places of worship in both business and residential zones. The chart below compares the minimum lot area required for places of worship and secular uses:

Use[3]	Minimum Lot Area
Place of Worship	**5 acres**
Recreation, Indoor Commercial	*4 acres*
Public Garage	*3 acres*
Warehouse	*3 acres*
Bed & Breakfast	*2.3 acres*
Day Care Center	*2.3 acres*
Hotel/Motel	*2.3 acres*
Theater	*1.5 acres*
Retail Store	*1.5 acres*
Funeral Home	*1.5 acres*
Restaurant, Brewery, Brew Pub, Tavern, Wine Tasting Room, Cidery	*1.5 acres*

In residential districts, places of worship have larger minimum setback requirements than comparable secular uses. Local Law 3 mandates side- and rear-yard requirements for places of worship that are double or even quadruple those of secular buildings. For example, the following structures share the same minimum lot area and width requirements, yet the setback requirements differ significantly between religious and secular uses:

Use[4]	Side Yard	Rear Yard
Place of Worship (Both Residential Recreation and Residential Conservation Districts)	**200**	**200**
Clubhouses for social organizations (Residential Recreation District)	*100*	*100*
Clubhouses for social organizations (Residential Conservation District)	*50*	*150*
Library/Museum (Both Residential Recreation and Residential Conservation Districts)	*50*	*100*
Schools and colleges (Both Residential Recreation and Residential Conservation Districts)	*50*	*100*

[2] In both B1 and B2 districts, the only districts where Office Parks are permitted, Office Parks share the five-acre minimum lot size requirement but require a minimum side yard and rear yard size of 100 units each, while places of worship in those same districts require a minimum side yard and rear yard size double that - 200 units each.
[3] *See* Town of Forestburgh Local Law #3 of 2023, Town of Forestburgh Zoning Code, Use Tables (filed November 16, 2023), available at https://forestburgh.net/wp-content/uploads/2023/12/Local-Law-3-of-2023-Zoning-Code-Amendments.pdf.
[4] *Id*.

The Town of Forestburgh has failed to provide any explanation for the onerous restrictions imposed on places of worship. On its face, the zoning code does not justify the disparate requirements for religious and secular uses. And the public record for the passage of Local Law 3 offers no rationale for those discrepancies.

State and Federal Prohibitions against Restrictions on Religious Uses

1. *Local Law 3 improperly places more onerous requirements on religious uses than comparable secular uses.*

Under federal law, no government may impose or implement a land use regulation that "treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[5] And New York law prohibits imposing zoning conditions on religious uses that are not imposed on other uses.[6]

Local Law 3 contravenes these standards in two ways. First, in business districts, places of worship have a five-acre minimum lot size, larger than any use other than "office parks." Comparable secular uses, such as "theater" and "funeral home" have a significantly smaller lot size requirement of 1.5 acres. Second, even where comparable secular uses are subjected to the same 5-acre minimum, those uses have significantly smaller setoff requirements than religious uses. The side and rear yard requirements imposed on places of worship in residential districts are double or even quadruple the size of those imposed on secular uses such as libraries, museums, and social clubhouses.

2. *Forestburgh's zoning code cannot have the effect of eliminating religious uses.*

If Local Law 3 operates to exclude places of worship entirely, it runs afoul of state zoning and federal laws. Federal law prohibits any government from imposing or implementing a land use regulation that "totally excludes religious assemblies from a jurisdiction" or "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."[7] This law is specifically intended to "prevent municipalities from broadly limiting where religious entities can locate."[8] New York law also provides that zoning codes may only impose conditions on religious uses that do not "by their cost, magnitude or volume, operate indirectly to exclude such uses altogether."[9] A "wholesale exclusion" of religious uses from any district, residential or

[5] 42 U.S.C. § 2000cc(b)(1).
[6] *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 595–96 (1986) (the "controlling consideration in reviewing the request of a school or church for permission to expand into a residential area must always be the over-all impact on the public's welfare" and a "special permit may be required and reasonable conditions directly related to the public's health, safety and welfare may be imposed to the same extent that they may be imposed on noneducational applicants").
[7] 42 U.S.C. § 2000cc(b)(3).
[8] *Cent. UTA of Monsey v. Vill. of Airmont, New York*, No. 18-CV-11103 (VB), 2020 WL 377706, at *18 (S.D.N.Y. Jan. 23, 2020) (quoting *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 915 F. Supp. 2d 574, 637 (S.D.N.Y. 2013), *aff'd sub nom. Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona, NY,* 945 F.3d 83 (2d Cir. 2019)).
[9] *Cornell Univ.*, 68 N.Y.2d at 596.

commercial, is unconstitutional on its face.[10] Such exclusion "serves no end that is reasonably related to the morals, health, welfare and safety of the community."[11]

If any district lacks available five-acre lots Local Law 3 would unlawfully eliminate religious uses from that district.

3. *Local Law 3 places onerous restrictions on religious uses without a public policy justification.*

Under New York law, religious uses "presumptively serve the public's welfare and morals,"[12] and restrictive burdens placed on religious uses are "difficult to justify."[13] Federal law requires that any "substantial burden" on a religious use federal law be the "least restrictive means of furthering [a] compelling governmental interest."[14] A zoning scheme imposes a substantial burden when it places "conditions on the use of the property, such as limitations on the size of the facilities to be used by the religious institution."[15]

Local Law 3 places a substantial burden on religious uses by limiting them to the largest minimum lot required under the zoning code in business districts, and imposing much larger setback requirements than comparable secular uses across all districts.[16] Courts have previously found even smaller setback requirements to constitute impermissible burdens. For example, an ordinance requiring religious uses in residential areas be set back at least 100 feet "offend[ed] against the requirement that efforts to accommodate religious uses be made" as "[t]here could well be situations in which no detriment to any aspect of public safety or welfare would result from a setback of less than 100 feet."[17]

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[10] *Albany Preparatory Charter Sch. v. City of Albany*, 31 A.D.3d 870, 871 (3rd Dept. 2006) (finding that "a wholesale exclusion of educational uses from the commercial districts in question are unconstitutional on their face" when the "general principles" regarding entities given special treatment in zoning codes "apply with equal force to areas zoned commercial as well as those zoned residential").

[11] *Cornell Univ.*, 68 N.Y.2d at 594 (referring to residential districts).

[12] *Matter of Apostolic Holiness Church v. Zoning Bd. of Appeals of Town of Babylon*, 220 A.D.2d 740, 743 (2nd Dept. 1995); *see also Westchester Day School v. Village of Mamaroneck*, 417 F.Supp.2d 477, 562 (S.D.N.Y. 2006), *aff'd*, 504 F.3d 338 (2d Cir. 2007) (religious uses of land are "presumed to have a beneficial effect on the community") (citation omitted).

[13] 2 Salkin, N.Y. Zoning Law & Prac. § 11:33, Religious uses [4th ed.].

[14] Religious Land Use and Incarcerated Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc(a)(1). While "RLUIPA does not protect buildings or structures per se," it protects their use for the purpose of religious exercise." *Fortress Bible Church v. Feiner,* 734 F. Supp. 2d 409, 499 (S.D.N.Y. 2010), *aff'd,* 694 F.3d 208 (2d Cir. 2012).

[15] *Cent. UTA of Monsey,* 2020 WL 377706 at *15 (quoting *Congregation Rabbinical Coll. of Tartikov, Inc.*, 915 F. Supp. 2d at 631–32).

[16] A substantial burden violation of RLUIPA must meet one of three jurisdictional prerequisites, one of which is that it is imposed in the implementation of a land use regulation in which the government makes individualized assessments. *See* 42 U.S.C. § 2000cc(a)(2). Here, special use permits–mandated for places of worship across all zoned districts under Local Law 3–meet this requirement as they necessarily "depend on individualized assessments." *Fortress Bible Church*, 734 F. Supp. 2d at 499.

[17] *Jewish Reconstructionist Synagogue of N. Shore, Inc. v. Inc. Vill. of Roslyn Harbor*, 38 N.Y.2d 283, 286 (1975); *see also Westchester Reform Temple v. Brown*, 29 A.D.2d 677, 677 (2nd Dept. 1968), *aff'd*, 22 N.Y.2d 488 (1968) (the Planning Commission's requirement that a proposed expansion of a temple provide a 130-foot front yard set back and a 40-foot side yard was applied in a manner "so arbitrary and unreasonable" as to result in an invasion of property rights and an interference with the free exercise of religious worship)

To rebut the presumption that these restrictions are impermissible, Forestburgh had the obligation to show "an actual negative impact on the public health, safety and welfare sufficient to support restriction on the breadth and scope of the proposed religious use."[18]

But Local Law 3 provides no justification or explanation for the onerous restrictions on religious uses. The zoning code itself is simply silent on the question. Nor can a justification be divined from its legislative history. Local Law 3 was apparently developed in closed-door executive sessions with no public minutes. Without a record, it is impossible to know what the deciding factors were in imposing the prohibitive size requirements on religious uses in the new zoning code.

Compliance with Open Meetings Law

Based on our review of publicly available minutes from the Town's meetings[19], the OAG has specific concerns regarding the Town's compliance with its duties and obligations under the Open Meetings Law, N.Y. Pub. Off. Law § 100 *et seq*. The Open Meetings Law requires, among other things, that "any proposed resolution, law, rule, regulation, policy, or any amendment thereto" scheduled to be the subject of discussion be made available to the public at least twenty-four (24) hours before the meeting during which the matter will be discussed.[20] In enacting the Open Meetings Law, the NYS legislature sought to ensure that "public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."[21] Indeed, "[t]he Open Meetings Law was intended, as its very name suggests, to open the decision-making process of elected officials to the public while simultaneously striking a balance in protecting the ability of government to carry out its functions and responsibilities…".[22]

Meetings subject to Open Meetings Law include "the gathering or meeting of a public body for the purpose of transacting public business, whenever a quorum is present, whether or not a vote of members of the public body is taken."[23] The court in *Orange County Publications* examined the true intent of the word "meeting" within the Open Meetings Law, stating:

> …the word "meeting" is defined as "the formal convening of a public body for the purpose of officially transacting public business." This definition contains several words of limitation such

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[18] *McGann v. Inc. Vill. of Old Westbury*, 186 Misc. 2d 661, 662 (Nassau Cty. Sup. Ct. 2000).. Under RLUIPA, Forestburgh had the analogous obligation to show that the requirements were the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc(a)(1).

[19] The meetings referenced to herein include, but are not limited to, Town Board meetings, Planning Board meetings and special meetings associated with the creation of the TOF Comprehensive Plan.

[20] Open Meetings Law § 103(e).

[21] *Matter of McCrory v Village of Mamaroneck Bd. of Trustees*, 181 A.D.3d 67, 70 (N.Y. App. Div. 2d Dep't. 2020).

[22] *Id*.

[23] *Orange County Publications, Div. Of Ottaway Newspapers, Inc. v. Council of Newburgh*, 60 A.D.2d 409, 414-419, 401 N.Y.S.2d 84, 88-91, 1978 N.Y. App. Div. LEXIS 9687 (NY App. Div. 2d Dep't), aff'd, 45 N.Y.2d 947, 411 N.Y.S.2d 564, 383 N.E.2d 1157, 1978 N.Y. LEXIS 2337 (N.Y. 1978); see also OML-AO-3110; Open Meetings Law § 102.

> as "public body", "formal convening" and "officially transacting public business". Special Term construed these terms to mean that one of the minimum criteria for a meeting would include the intent to adopt, then and there, measures dealing with the official business of the governmental unit. Unfortunately this narrow view has been used by public bodies as a means of circumventing the Open Meetings Law. Certain practices have been adopted whereby public bodies meet as a body in closed "work sessions", "agenda sessions", "conferences", "organizational meetings", and the like, during which public business is discussed, but without the taking of any action. Thus, the deliberative process which is at the core of the Open Meetings Law is not available for public scrutiny…[24]

In other words, work sessions, agenda meetings or any other gathering, by quorum, on notice, where public business is not only voted upon but also discussed—regardless of how it is labeled—falls "within the tenor and spirit of the Open Meetings Law and should be open to the public."[25]

With respect to executive sessions, § 105 requires: (i) a majority vote—taken in an open meeting—in order to enter into executive session; (ii) disclosure of the general area(s) or subject matter to be considered in executive session; and (iii) explicit documentation, within the meeting minutes, of the subject area to be considered during an executive session.[26] Plainly stated, the reason(s) for entering into executive session must be recorded in the minutes of the public meeting, and these reasons(s) must correlate with the established reasons listed under the statute.[27]

It is important to note that "[t]o validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity, *the*

[24] *Orange County Publications*, 60 A.D.2d at 414-416 (…the word "formal" was "inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body or matters pending before a public body.").

[25] *Orange County Publications*, 60 A.D.2d at 416-417 ("In further support of the fact that the Open Meetings Law was intended to apply to all discussions by a public body of matters pending before it, we need only look to the provisions made for executive sessions... [c]ommon sense alone dictates that the provisions for executive sessions are meaningless, or at best superfluous, if a public body can hold a 'work session' without paying heed to the Open Meetings Law.").

[26] Open Meetings Law § 105.

[27] *Matter of Ballard v. New York Safety Track, LLC*, 126 A.D.3d 1073, 1076 (N.Y. App. Div. 3d Dep't. 2015) (the [public] body must identify the subject matter to be discussed with some degree of particularity) (internal citations omitted); Open Meetings Law § 103(a); § 105(1) ("…a public body may conduct an executive session for the below enumerated purposes only."); Open Meetings Law § 106(1)(" Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."); *see also* OML-AO-4889 ("a public body may not conduct an executive session to discuss the subject of its choice").

pending, proposed or current litigation to be discussed during the executive session."[28] Put another way, it is firmly established that boilerplate language indicating that "pending litigation" will be discussed—without also naming the actual litigation to be discussed—does not comply with the Open Meetings Law. Additionally, when entering executive session for the purpose of engaging in "discussions regarding proposed, pending or current litigation," the attorney-client privilege does not extend when additional or outside parties are also present at such meetings.[29]

Minutes "shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action."[30] In other words, the Town must create and preserve a publicly available record of the reason(s) a public body enters into executive session, as well as a publicly available record of any action(s) voted upon in executive session that would qualify as a "final determination."[31] Minutes from such executive sessions must be made publicly available within one week of the date of the executive session.[32] The NYS Department of State Committee on Open Government has advised that, with respect to meeting minutes and documentation of actions taken by a public body, the most important tenet is accuracy.[33]

We encourage the Town to carefully review its obligations under the Open Meetings Law to ensure an open and accurate decision-making process between the Town and the public as required under New York law.[34]

[28] *Daily Gazette Co. v. Town Bd., Cobleskill*, 111 Misc. 2d 303, 304-305, 444 N.Y.S.2d 44, 46, 1981 N.Y.Misc. LEXIS 3263 (N.Y. Sup. Ct. 1981)(emphasis within the original opinion); see also OML-AO-4616; Open Meetings Law § 105.

[29] *Matter of Ballard*, 126 A.D.3d at 1076-77.

[30] Open Meetings Law § 106.

[31] *Id*.

[32] Open Meetings Law § 106(3).

[33] OML-AO-4889.

[34] *Matter of Windsor Owners Corp. v City Council of City of N.Y.*, 878 N.Y.S.2d 545, 23 Misc. 3d 490, 241 NYLJ 14, 2009 N.Y. Misc. LEXIS 88 (N.Y. Sup. Ct. 2009) (OML is to be "liberally construed" in accordance with its purposes… A court has the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of the Open Meetings Law void, in whole or in part. "Good cause" factors include insufficient notice, unreasonable starting times, improper convening of executive sessions, and improper exclusion of members of the public) (internal citations omitted).

Conclusion

We request that you promptly review Local Law 3 make any amendments needed to comport with state and federal law. We further ask that you provide our office with any proposed amendments resulting from your review before their enactment.

Sincerely,

Jill F. Faber
Chief Deputy Attorney General for Regional Affairs

cc: Forestburgh Planning Board Attorney
David Afzali, Esq.
Harris Beach PLLC
677 Broadway, Suite 1101
Albany, NY 12207