UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONGREGATION RABBINICAL COLLEGE OF TARTIKOV, INC., et al.,

Plaintiffs,

-v-

VILLAGE OF POMONA, et al.,

Defendants.

Case No. 07-CV-6304 (KMK)

ORDER

KENNETH M. KARAS, District Judge:

Plaintiffs bring challenges to certain zoning and environmental ordinances enacted by Defendant Village of Pomona (the "Village"), alleging they are unlawful under the First and Fourteenth Amendments of the United States Constitution, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*, the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq.*, New York Civil Rights Law § 40–c(1) and (2), §§ 3, 8, 9 and 11 of the New York State Constitution, and New York common law. Specifically, Plaintiffs challenge the enactment and enforcement of portions of the Village of Pomona, New York Code ("Village Code") §§ 130–4 (defining educational institutions and dormitories) ("Accreditation Law"), 130–10(F)(12) (limiting the size of dormitories) (together with the definition of "dormitory" in § 130–4, the "Dormitory Law"), and 126 (establishing wetlands protections) ("Wetlands Law") (together, the "Challenged Laws"). Plaintiffs moved for summary judgment on several of Defendants' claims and affirmative defenses, and for sanctions due to the spoliation of evidence. Defendants cross-moved for summary judgment on all of Plaintiffs' claims, and for certain evidence to be stricken from the record. For the reasons discussed in its Opinion and

Order dated September 29, 2015 (the "Opinion"), the Court granted in part and denied in part the Parties' motions. Plaintiffs and Defendants have moved for clarification and re-consideration (respectively, "Plaintiffs' Motion" and "Defendants' Motion"). For the reasons explained in this Order, Plaintiffs' Motion and Defendants' Motion are denied.

I. Discussion

A. Standard of Review

"Motions for reconsideration are governed by Federal Rule of Civil Procedure 59(e) and Local Civil Rule 6.3, which are meant to ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." *Pla v. Renaissance Equity Holdings LLC*, No. 12-CV-5268, 2013 WL 3185560, at *1 (S.D.N.Y. June 24, 2013) (internal quotation marks omitted). "The standard for granting a motion for reconsideration under Local Rule 6.3 is strict, so as to avoid repetitive arguments on issues that have been considered fully by the [c]ourt." *Sampson v. Robinson*, Nos. 07-CV-5867, 07-CV-6890, 2008 WL 4779079, at *1 (S.D.N.Y. Oct. 31, 2008) (internal quotation marks omitted). Furthermore, "[a] motion for reconsideration is not an opportunity for a losing party to advance new arguments to supplant those that failed in the prior briefing of the issue." *In re Refco Capital Mkts., Ltd. Brokerage Customer Sec. Litig.*, Nos. 06-CV-643, 07-CV-8686, 07-CV-8688, 2008 WL 4962985, at *1 (S.D.N.Y. Nov. 20, 2008), *aff'd sub nom. Capital Mgmt. Select Fund Ltd. v. Bennett*, 680 F.3d 214 (2d Cir. 2012). "Rather, to be entitled to reconsideration, a movant must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion, which, had they been considered might reasonably have altered the result reached by the court." *Id.* (internal quotation marks omitted); *see also Pla*, 2013 WL 3185560, at *1 ("Such a motion is appropriate where the

moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." (internal quotation marks omitted)). In other words, "[r]econsideration is appropriate only where there is an intervening change of controlling law, newly available evidence, or the need to correct a clear error or prevent manifest injustice." *In re Refco*, 2008 WL 4962985, at *1 (internal quotation marks omitted).

B. Analysis

1. Defendants' Motion

a. Factual Disputes

Defendants assert that several facts characterized in the Opinion as undisputed are, in fact, disputed. (*See* Defs.' Mem. of Law in Supp. of Mot. for Clarification And/Or Reconsideration ("Defs.' Mem.") 2–4 (Dkt. No. 224).) As such, Defendants seek "clarification" of several of these facts. (*See id.*) For example, Defendants take issue with the statement in the Opinion that the 100-acre tract intended by the Congregation Rabbinical College of Tartikov (the "Congregation") to be the site of a rabbinical college (the "Subject Property") "is the only property that the Congregation owns . . . and appears to be the only parcel suitable for Plaintiffs' proposed rabbinical college under Village Law . . . ." (*Id.* at 3 (quoting Opinion 11 (Dkt. No. 207)).) Defendants claim that they disputed this assertion by Plaintiffs. (*See id.* (citing Defs.' Response Pursuant to Local Rule 56.1(b) to Pls.' Statement of Material Facts ("Defs.' Counter 56.1") ¶ 616 (Dkt. No. 175)).) In support of this claim, Defendants cite to two portions of the deposition of Doris Ulman. (*See* Defs.' Counter 56.1 ¶ 616 (citing Decl. of Paul Savad in Supp. of Pls.' Mot. for Summ. J. ("Savad Decl.") Ex. 12, at 117 (Dkt. No. 155); Savad Decl. Ex. 13, at 287).) In the first cited portion, Ms. Ulman was asked what "facts" supported "the Village and

the Village Board's belief in denying the allegations in Paragraph 127 [of the Second Amended Complaint]." (Savad Decl. Ex. 12, at 117.) She responded that she did not "believe the building was 100,000 square feet," deemed there was "no synagogue," and did not "believe" that the property "was less than 10 acres." (*Id.*)

That small portion of Ms. Ulman's deposition testimony, however, does not address the particular factual claim made by Plaintiffs—namely, that the Subject Property was the only parcel of land suitable for the proposed rabbinical college under the Village Code. (*See* Pls.' Rule 56.1 Statement of Material Facts in Supp. of Pls.' Mot. for Summ. J. ("Pls.' 56.1") ¶ 616 (Dkt. No. 139).) Indeed, paragraph 127 of the Second Amended Complaint alleges that in December 1999, Yeshiva of Spring Valley made an informal presentation to the Village Planning Board regarding its plans to build a 100,000 square-foot private primary school and a synagogue, and then later to build a 20,000–30,000 square foot pre-school. (Second Am. Compl. ¶ 127 (Dkt. No. 28).) This cited deposition testimony thus does not address Plaintiffs' claim about the suitability of the Subject Property to host a rabbinical college; rather, it deals with a proposal in 1999 to construct a different set structures.[1]

[1] Even if Ms. Ulman's testimony was relevant to the point, it would not be sufficient to dispute Plaintiffs' factual claim about the unique suitability of the Subject Property for construction of the rabbinical college, as this testimony only discussed her belief about some of the property measurements. In the absence of any foundation for that belief, the testimony is insufficient to dispute Defendants' claim. *See Baity v. Kralik*, 51 F. Supp. 3d 414, 419–20 (S.D.N.Y. 2014) (disregarding "statements not based on [the] [p]laintiff's personal knowledge and conclusory statements that are nothing more than speculation"); *S.E.C. v. Espuelas*, 905 F. Supp. 2d 507, 519 (S.D.N.Y. 2012) (disregarding a deponent's testimony "as to his belief" as "inadmissible and unreliable" where the plaintiff "failed to establish what, if any, foundation [the deponent] had for that belief"); *Morisseau v. DLA Piper*, 532 F. Supp. 2d 595, 617 (S.D.N.Y. 2008) (noting that "statements of personal belief and speculation" are inadmissible), *aff'd*, 355 F. App'x 487 (2d Cir. 2009).

The second portion of Ms. Ulman's deposition testimony cited by Defendants cannot be located in the record. What Defendants cite to is page 287 of her testimony, which is identified as the second day of her deposition. (*See* Defs.' Counter 56.1 ¶ 616.) However, there is no page 287, (*see generally* Savad Decl. Ex. 13), and the Court could find nothing relevant in her testimony at other pages, for example, page *1*87. Thus, there is no need for further clarification from the Court on this point.

The second fact that Defendants claim was falsely labeled as undisputed is that the proposed rabbinical college would involve "somewhere between 50 and 250 units of housing, which will be apartments that have 3 or 4 bedrooms ranging in size from 1800–2000 square feet." (*See* Defs.' Mem. 3 (quoting Opinion 6).) According to Defendants, the Court erroneously neglected to note that these were "initial" projections and that Plaintiffs have indicated that they expect the rabbinical college to grow substantially in later phases. (*See id.*) However, in merely citing what Plaintiffs represented about their current plan to develop the Subject Property, the Court never suggested, or even hinted, that it was beyond dispute that the scope of the rabbinical college's development could evolve over time. Indeed, the Court noted that there were disputes about whether there were any concrete construction plans to build the rabbinical college or even how seriously it had been planned. (*See* Opinion 142.) Accordingly, there is no need to correct or clarify this statement.

For this same reason, Defendants' concern about the Court's statement that Defendants learned of the Congregation's plans to build a rabbinical college on the Subject Property is overblown. (*See* Defs.' Mem. 3 (citing Opinion 13).) In the Opinion, the Court agreed with Defendants that Plaintiffs have not offered any specific development plans that provide the details of the proposed rabbinical college. (*See* Opinion 142.) Nonetheless, the record is clear

that Defendants became aware in late 2005 or 2006 that Plaintiffs planned to construct *a* rabbinical college on the Subject Property. (*See* Defs.' Local Rule 56.1(a) Statement in Supp. of their Mot. for Summ. J. ("Defs.' 56.1") ¶¶ 19–20 (Dkt. No. 142).)

Next is Defendants' claim that the Court erred when it noted that "Preserve Ramapo, a political action group in the region leaked tentative plans for the Congregation's proposed rabbinical college to the public." (*See* Defs.' Mem. 4 (quoting Opinion 14).) Defendants contend that the more correct way of putting it is that Preserve Ramapo published the plans on its website following a leak. (*See id.* (citing Defs.' 56.1 ¶ 135).) The difference may be semantic only, and hardly material to the outcome of the motions. Indeed, Defendants' Rule 56.1 Statement on this point read: "On January 9, 2007, plans for the proposed rabbinical college were leaked to the public and disseminated by a political action group, Preserve Ramapo, via its website and email distribution list." (Defs.' 56.1 ¶ 135.) Plaintiffs did not object to this statement, (*see* Pls.' Opp'n to Defs.' Local Rule 56.1 Statement of Facts ("Pls.' Counter 56.1") ¶ 135 (Dkt. No. 176)), so the Court finds there is no dispute about it.

Finally, Defendants note that the Court identified the wrong Sanderson when discussing opposition to a proposed middle school to be constructed near the Village. (*See* Defs.' Mem. 4 (citing Opinion 16).) It is true that Leslie Sanderson, and not Nicholas Sanderson, opposed the development of the middle school on property other than the Subject Property. (*See* Pls.' 56.1 ¶ 375.) This discrepancy, however, is immaterial to the Court's determination that Plaintiff has presented sufficient evidence against all Defendants, including Nicholas Sanderson, to deny Defendants' summary judgment motion.

b. Community Character

Defendants also move for reconsideration on the basis that the Court improperly determined that community character is not a compelling interest sufficient to survive strict scrutiny of the Challenged Laws. (*See* Defs.' Mem. 4–6.) As Defendants contend, the Court, citing several decisions, noted that "community character" is not a compelling interest. (*See id.* at 4 (citing Opinion 90).) According to Defendants, the Court reached this erroneous conclusion because it confused "community character" with visual aesthetics. (*See id.* at 5 (citing Opinion 90–91).) In Defendants' view, "community character" is synonymous with "maintaining the integrity of a zoning scheme, managing population growth, ensuring the safety of residential neighborhoods, maintaining conditions favorable to raising children, allocating government resources, environmental issues and maintaining the nature of a neighborhood." (*Id.* (citations omitted).)

In support of the general claim that "community character" is a compelling interest, Defendants cite only the Seventh Circuit's decision in *Eagle Cove Camp & Conference Center, Inc. v. Town of Woodboro*, 734 F.3d 673 (7th Cir. 2013). (*See id.* at 4–5.)[2] In that case, the plaintiff-property owner challenged land use regulations that it claimed unlawfully barred it from operating a year-round Bible camp in a residentially-zoned area of the defendant town. *Eagle Cove*, 734 F.3d at 676. In rejecting the plaintiff's RLUIPA and Free Exercise claims, the court noted that "[i]t [was] not the land use regulations that create[d] a substantial burden, but rather [the plaintiff's] insistence that the expensive, year-round Bible camp be placed on the subject property." *Id.* at 681. In other words, unlike in this case, the plaintiff had a number of locations

[2] Defendants also cite a variety of state cases for the non-controversial proposition that municipal officials exercise a wide array of land use powers. (*See* Defs.' Mem. 5.) Of course, those powers may not be exercised in a way that contravenes the Constitution or RLUIPA.

on which it could build its Bible camp. *Cf. id.* Also unlike in this case, the court in *Eagle Cove* highlighted that the zoning regulations under attack by the plaintiff had been promulgated *before* the plaintiff "expressed any interest in constructing a Bible camp." *Id.* Thus, the plaintiff's claim of unreasonable delay in executing any re-zoning was deemed unfounded, as the town had consistently made clear its refusal to allow any property use akin to a Bible camp. *Id.* at 681–82. The court went on to note, without citing any supporting authority or including any accompanying analysis, that the municipal defendants had a "compelling interest in preserving the rural and rustic character of the [t]own as well as the single-family development around [the area]." *Id.* at 682.

As discussed in the Opinion, to the extent Plaintiffs cited sufficient facts to support their claim that the Challenged Laws discriminated against Plaintiffs and/or imposed a substantial burden on Plaintiffs' rights under RLUIPA and the Free Exercise Clause, the Challenged Laws would be invalid unless they survived strict scrutiny. (*See* Opinion 90.) This required Defendants to establish that the Challenged Laws were narrowly tailored to further a compelling interest. *See Westchester Day School v. Vill. of Mamaroneck*, 504 F.3d 338, 353 (2d Cir. 2007). As the Supreme Court has warned, "strict scrutiny leaves few survivors." *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 455 (2002). Furthermore, the Supreme Court has emphasized that a compelling interest is one of the "highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (internal quotation marks omitted); *see also Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and not otherwise served can overbalance legitimate claims to the free exercise of religion."); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) ("[O]nly the gravest abuses,

endangering paramount interest, give occasion for permissible limitation." (internal quotation marks omitted)).

In the face of these demanding principles, Defendants' reliance on the one line in *Eagle Cove* is far from sufficient to establish that the Court committed clear error in rejecting Defendants' version of "community character" as a compelling interest sufficient to survive strict scrutiny. Putting aside the non-binding import of that decision, the Court notes there are numerous other courts that have held that "community character" is not a compelling interest. *See, e.g.*, *Rocky Mountain Christian Church v. Bd. Of Cty. Comm'rs*, 612 F. Supp. 2d 1163, 1175 (D. Colo. 2009) (holding that "[i]n the context of a strict scrutiny analysis," interests such as "the character of the neighborhood" and "incompatibility with the county's comprehensive plan . . . have been found not to be compelling") (collecting cases); *XXL of Ohio, Inc. v. City of Broadview Heights*, 341 F. Supp. 2d 765, 789–90 (N.D. Ohio 2004) (noting that no court has found "neighborhood character" to be "a compelling governmental interest sufficient to withstand strict scrutiny") (collecting cases).

Similarly unpersuasive is Defendants' claim that the Court conflated "community character" with "community aesthetics." (*See* Defs.' Mem. 4–5.) The Court did no such thing. Moreover, even conceding that "community character" differs from, and/or encompasses more than, "community aesthetics," the Court notes that Defendants themselves offer no one definition of "community character" and cite no authority delineating the boundaries of what is meant by "community character."[3] Moreover, the Court notes that Defendants cite not a single case

[3] "[Z]oning has become more complex and refined, and municipalities and planners have considered more factors and provide for more amenities. Reflecting this trend, 'community character' has come to be understood in another, broader, sense as a city's or neighborhood's overall ambience." *The Legitimate Objectives of Zoning*, 91 Harv. L. Rev. 1443, 1451 (1978) (footnotes omitted).

providing a definition of "community character" that incorporates the elements outlined by Defendants, let alone any decision from the Supreme Court or the Second Circuit holding that such "community character" is a compelling interest sufficient to survive strict scrutiny. Thus, while the preservation of "community character" may provide the legal authority for municipalities to promulgate zoning ordinances, this interest does not, as a matter of law, immunize any ordinances adopted in the general name of "community character" from constitutional scrutiny. *See Schad v. Town of Mount Ephraim*, 452 U.S. 61, 68 (1981) ("The power of local governments to zone and control land use is undoubtedly broad[,] and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. But the zoning power is not infinite and unchallengeable; it 'must be exercised within constitutional limits.'" (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring in judgment))).

In the end, courts have not adopted a uniform definition of "community character," or explained precisely when preservation of such constitutes a compelling interest so that zoning regulations that discriminate against groups or otherwise violate fundamental liberties survive strict scrutiny.[4] Moreover, courts have regularly rejected the types of interests that could be included in the rubric of "community character" as surviving strict scrutiny. *See. e.g.*, *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 94–95 (1977) (finding that a town ordinance prohibiting the posting of "For Sale" and "Sold" signs violated the First Amendment, even

[4] Indeed, the amorphous nature of "community character" leaves open the argument that this alleged interest could be "a pretext for racial discrimination; more subtly, a community's self-definition may be influenced by social or economic stereotypes . . . ." *The Legitimate Objectives of Zoning*, at 1452. And, "[b]ecause creating a certain character is such a vague, ill-defined objective, it can be used to justify zoning measure that are directed at locally unpopular groups or individuals . . . ." *Id.*

though the town claimed the ordinance furthered the interest of promoting racially integrated neighborhoods); *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995) (rejecting traffic safety and aesthetics as compelling interests); *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1570 (11th Cir. 1993) (holding that traffic safety was not a compelling interest sufficient to justify content-based speech regulation); *United Farmworkers of Fla. Housing Project v. City of Delray Beach*, 493 F.2d 799, 808 (5th Cir. 1974) (rejecting consistency with master plan as a compelling interest); *Mount St. Scholastica, Inc. v. City of Atchison*, 482 F. Supp. 2d 1281, 1295 (D. Kan. 2007) (noting that no court has found "historic preservation" of a neighborhood "to be a compelling government interest"); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1228 (C.D. Cal. 2002) (holding that neighborhood "blight" is a substantial, but not a compelling, government interest). Therefore, the Court denies Defendants' Motion on this ground.[5]

2. Plaintiffs' Motion

a. Substantial Burden

Plaintiffs contend that the Court erred when it suggested that their religious practices must be "essential" to be covered by RLUIPA and the Free Exercise Clause. (*See* Pls.' Mem. of

[5] It also bears noting that Defendants must do more than identify a general compelling interest in surviving strict scrutiny. In other words, Defendants must "must show a compelling interest in imposing the burden on religious exercise in the particular case at hand, not a compelling interest in general." *Westchester Day School*, 504 F.3d at 353. And, Defendants are required to demonstrate that the Challenged Laws are the least restrictive means of furthering any asserted compelling interests. *Id.* Here, Defendants have not explained, for example, why the Accreditation and Dormitory Laws are the least restrictive means of furthering the asserted interests in "maintaining conditions favorable to raising children," or "ensuring the safety of residential neighborhoods," which, as noted above, Defendants claim are part of what they have defined as "community character." (*See* Defs.' Mem. 5.) Thus, even if these were compelling interests, Defendants have not placed beyond dispute whether and how these interests are specifically furthered by the Challenged Laws.

Law in Supp. of Mot. for Reconsideration ("Pls.' Mem.") 2 (Dkt. No. 221) (citing Opinion 120).) While the Court understands Plaintiffs' desire for clarification, the Court did not apply the wrong standard in deciding that factual disputes prevented the Court from granting Plaintiffs' summary judgment motion. To begin, in denying Defendants' summary judgment motion, the Court held that Plaintiffs had offered sufficient evidence that the Challenged Laws could be construed to completely bar the construction of the rabbinical college sought by Plaintiffs, and that the Challenged Laws were passed with a discriminatory purpose. (*See* Opinion 117–18.) Accordingly, the Court concluded that Plaintiffs had established material facts that could support a claim that the Challenged Laws substantially burden their exercise of religion. (*See id.* at 118.)

In also denying Plaintiffs' summary judgment motion, however, the Court focused on Plaintiffs' failure to define the contours of what the rabbinical college would include by way of curriculum and architectural make-up. (*See id.* at 121; *see also id.* at 119.) That failure, in the Court's view, placed in dispute whether the Challenged Laws in fact substantially burden Plaintiffs' exercise of religion. (*See id.* at 121.) While the Court understands that Plaintiffs do not need to establish the *necessity* of a particular act in the exercise of religion to make out a RLUIPA or Free Exercise claim, *see* 42 U.S.C. § 2000cc-5(7)(A), the Opinion explained that Plaintiffs must at least explain what religious acts they think are being substantially burdened by the Challenged Laws, (*see* Opinion 119–20). Put simply, not all acts or conduct by a religious organization amount to an exercise of religion. *See Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 274 (3d Cir. 2007) (holding that there is no free exercise right to locate a religious premises in a particular location); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 654 (10th Cir. 2006) (holding that the inability of a church to run a daycare center in a particular location did not constitute "more than an incidental burden on

religious conduct"). And, because Plaintiffs did not offer any specifics about the construction of the rabbinical college, let alone the curriculum it would offer, Plaintiffs had not put the question of substantial burden beyond dispute. (*See* Opinion 123.)

b. Preston Green

Next, Plaintiffs contend that the Court should have granted their summary judgment motion as to the Accreditation Law because the Court improperly identified Preston Green as Plaintiffs' expert when he was, in fact, Defendants' expert. (*See* Pls.' Mem. 4.) It is true that the Court mistakenly identified whose expert Mr. Green was, but that typographical error does not alter the import of the expert opinion as it related to his conclusion that a rabbinical college could, with certain curriculum and admissions requirements, be accredited by the Association of Advanced Rabbinical and Talmudic Schools ("AARTS"). (*See* Opinion 122 (citing Aff. of Amanda E. Gordon ("Gordon Aff.") Ex. 15, at 18 (Dkt. No. 150)).) And, given the Court's conclusion, discussed above and in the Opinion, about Plaintiffs' vague plans regarding the curriculum for the rabbinical college, the Court will not alter its conclusion that the question of accreditation for a rabbinical college is a disputed fact.

Plaintiffs also object to the portion of Mr. Green's opinion that suggested that a rabbinical college could obtain a conditional use variance if it made certain changes to its curriculum and admissions requirements. (*See* Pls.' Mem. 4–5.) In particular, Plaintiffs claim that this conclusion was hearsay as it was based on statements from Ms. Ulman. (*See* Pls.' Mem. 4.) Plaintiffs further claim that the Court held that Plaintiffs cannot obtain a variance for their use. (*See id.* at 5 n.3 (citing Opinion 89).) However, the portion of the Opinion cited by Plaintiffs only noted that "there is enough evidence to suggest that whether Plaintiffs can successfully obtain a change in the Challenged Laws, or variance from them, is a question of fact

subject to a resolution by a fact-finder." (Opinion 89–90.) That this point was disputed made summary judgment for either side inappropriate. The Court, therefore, denies Plaintiffs' Motion on this claim.

c. Barbara Beall

Plaintiffs quarrel with the Court's decision to exclude certain portions of Barbara Beall's Declaration. (*See* Pls.' Mem. 6–7.) In particular, the Court determined that Ms. Beall's statement that "automotive repair schools [and] driving schools . . . can be accredited by various accrediting bodies," (Decl. of Barbara B. Beall ("Beall Decl.") ¶ 231 (Dkt. No. 153)), was "past her area of expertise in her declaration," (Opinion 57). According to Plaintiffs, this statement was not Ms. Beall's opinion, but was based on information provided to her by the Board of Cooperative Educational Services ("BOCES"). (*See* Pls.' Mem. 6 (citing Beall Decl. ¶ 231).)[6] As such, Plaintiffs claim that Ms. Beall was entitled to rely on that statement in reaching her expert opinion that "regardless [of whether automotive repair schools or driving schools can be accredited], accreditation is not relevant to the potential for impacts to wetlands." (*See id.* at 7 (alteration in original) (quoting Beall Decl. ¶ 231).) Furthermore, Plaintiffs request clarification that their experts can rely on the fact that automotive repair and driving schools can be accredited in support of their expert opinions. (*See id.*)

The Court, of course, understands that an expert may base her opinion on hearsay information. *See* Fed. R. Evid. 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they

[6] The Court notes that it is not clear from paragraph 231 what the source was of Ms. Beall's statement regarding accreditation of automotive or driving schools.

need not be admissible for the opinion to be admitted."). But, that does not make the hearsay information admissible. *See Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 438 (E.D.N.Y. 2013) ("Although an expert may rely upon inadmissible hearsay, the expert 'must form his [or her] own opinions by applying his [or her] extensive experience and a reliable methodology to the inadmissible materials. Otherwise, the expert is simply repeating hearsay evidence without applying any expertise whatsoever, a practice that allows the [party] to circumvent the rules prohibiting hearsay.'" (third alteration in original) (quoting *United States v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008))). However, to the extent Plaintiffs wish to offer evidence at trial that automotive repair and driving schools can be accredited, (*see* Pls.' Mem. 7), they are free to do so. In the meantime, the Court sees no reason to alter its conclusion about the limits of Ms. Beall's expertise.

II. Conclusion

For the foregoing reasons, Plaintiffs' Motion and Defendants' Motion are denied. The Clerk of the Court is respectfully directed to terminate the pending Motions. (*See* Dkt. Nos. 220, 223.)

SO ORDERED.
Dated: May 25, 2016
White Plains, New York

KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE