STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

AMHERST PIZZA & ALE HOUSE, INC.,
BOTTOMS UP V, LLC d/b/a BOTTOMS UP,
CAMPFIRE GRILL II, INC,
DA BADA, INC. d/b/a BADABING BAR AND GRILL,
DDF RESTAURANTS, INC. d/b/a **DECISION**
DUFF'S FAMOUS WINGS,
DON BENOIT d/b/a PRESCOTT'S PROVISIONS, **INDEX NO. 816373-2020**
DVS PROPERTIES, LLC,
GALLERY EVENTS, LLC d/b/a VENU,
ICE HOUSE PUB, LLC, d/b/a ICE HOUSE PUB,
JOHN DOE CORP.,
KFEATHER5, LLC d/b/a DUFF'S FAMOUS WINGS,
KMT MANAGEMENT, INC. d/b/a BUFFALO BREW PUB,
LADY BIRDS RESTAURANTS, LLC d/b/a THE BAYOU,
LYONS, BIGGANE, INC. d/b/a
THE BYRD HOUSE RESTAURANT,
MAMBRINO KING WINE-COFFEE BAR LLC,
MARY SANTARINI d/b/a LONDA'S DINER,
MCCANS, INC. d/b/a MOONEY'S SPORTS BAR & GRILL,
MKC RESTAURANTS, LLC d/b/a NEAT,
OVERPASS PUB, LLC d/b/a OVERPASS PUB,
PHAROHS GC, INC.,
RAPHAEL'S CORP. d/b/a RAPHAEL'S,
SANTORA'S PHASE II, LLC,
SANTORA'S PIZZA PUB AND GRILL, INC.,
SCOTT A. JARGIELLO d/b/a CAMPFIRE GRILL,
SHOWNY, LLC d/b/a SCULPTURE HOSPITALITY OF WNY,
SMITH BUDUSON, INC. d/b/a ROBBIE'S BAR AND GRILL,
TACO COCINE ELLICOTT, LLC d/b/a DEEP SOUTH TACO,
TACO COCINE HERTEL, LLC d/b/a DEEP SOUTH TACO,
TANTALUS, LLC, d/b/a THE YELLING GOAT RESTAURANT,
TBF ENTERPRISES, INC.,
TETON SKY CORP. d/b/a TETON KITCHEN and
TETON KITCHEN ELMWOOD,
THE DEFIELDS CORPORATION d/b/a
THE FIRE HOUSE SPORTS BAR & GRILL,
THE HOWLING ROOSTER, LLC,
WNY BEER CLUB, LLC d/b/a RUSTY NICKEL BREWING CO.,
WNY RESTAURANT SYSTEM d/b/a DUFF'S FAMOUS WINGS,
99 BRICK OVEN BAR AND GRILLE, LLC,
5786 TRANSIT RD, INC. d/b/a FIELDSTONE COUNTRY INN, and
8444 TRANSIT RD, LLC d/b/a TAVERN AT WINDSOR PARK,

Petitioners,

vs.

**ANDREW M. CUOMO, in his official capacity as the Governor of the State of New York,
NEW YORK STATE SENATE,
NEW YORK STATE ASSEMBLY,
NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT
d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,
NEW YORK STATE DEPARTMENT OF HEALTH,
NEW YORK STATE LIQUOR AUTHORITY,
MARK C. POLONCARZ, in his official capacity as the County Executive for the County of Erie, and
ERIE COUNTY DEPARTMENT OF HEALTH,**

Respondents.

**HON. HENRY J. NOWAK, J.S.C.
Justice Presiding**

Petitioners are owners and operators of bars and restaurants in Western New York. They are currently prohibited from offering indoor dining to their customers pursuant to a determination by respondent New York State Department of Health (DOH) that portions of Erie County are designated in an "Orange Zone" under Governor Cuomo's Cluster Action Initiative, designed to combat increasing COVID-19 infection throughout the State.

Petitioners have commenced this proceeding pursuant to article 78 of the CPLR in which they move for both a preliminary injunction and a permanent injunction permitting them to reopen their indoor dining operations with appropriate social distancing, as set forth in the Interim Guidance for Food Services During the Covid-19 Public Health Emergency (Interim COVID-19 Guidance), issued by the DOH on November 9, 2020. Petitioners seek to prohibit respondents from enforcing Executive Order No. 202.68, which instituted the Cluster Action

Initiative, claiming that respondents' actions in banning all indoor dining pursuant to that Executive Order are arbitrary and capricious. Petitioners also seek a declaration that Executive Law § 29-a is unconstitutional as a violation of the separation of powers doctrine; that respondents have violated § 29-a; and that respondents have violated petitioners' rights under the Takings Clause, the Equal Protection clause, and that petitioners have been deprived of substantive due process and procedural due process. The court has considered the documents filed and numbered 1-147 in the New York State Courts Electronic Filing (NYSCEF) system, as well as oral argument by counsel for the parties on January 8, 2020 on the issue of whether the court should issue a preliminary injunction.

The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property until the court can conduct a hearing on the merits of permanent injunction (*see* CPLR 6301; *AJMRT, LLC v Kern*, 154 AD3d 1288, 1290 [4th Dept 2017]; *Bd. of Managers of Britton Condominium v C.H.P.Y. Realty Assoc.*, 101 AD3d 917, 919 [2d Dept 2012]). "In order to prevail on a motion for a preliminary injunction, the moving party has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury in the absence of injunctive relief, and (3) a balance of equities in its favor" (*Eastman Kodak Co. v Carmosino*, 77 AD3d 1434, 1435 [4th Dept 2010]). Where "the denial of a preliminary injunction would disturb the status quo and render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be reduced" (*N. Fork Preserve, Inc. v Kaplan*, 31 AD3d 403, 406 [2d Dept 2006]).

The global COVID-19 pandemic has ravaged the world at whirlwind speed. The State of New York, along with the rest of the world, continues to confront and struggle with the greatest

public health crisis in living memory. New York recorded its first cases of COVID-19 on March 1, 2020. By April 20, 2020, over 251,690 individuals had tested positive for COVID-19, and over 15,000 people had died from COVID-19 in New York State. These events placed significant strain on New York State's healthcare system. As the virus spread, New York faced a shortage of hospital beds, ventilators, and personal protective equipment.

I. New York's Initial Response and the Amendment of Executive Law 29-a

The Governor may declare a disaster emergency by executive order when he "finds that a disaster has occurred or may be imminent for which local governments are unable to respond adequately" (Executive Law § 28 [1]). When the Governor has declared a state disaster emergency, Executive Law § 29-a (1) expressly authorizes him to temporarily suspend any "statute, local law, ordinance, orders, rules, or regulations, or parts thereof, of any agency . . . if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster."

On March 3, 2020, the New York Legislature amended Section 29-a to give the Governor the authority to not only suspend existing laws, rules, and regulations, but also to issue any directives via executive order, during a state disaster emergency declared in specifically enumerated circumstances, including, but not limited to, epidemics and outbreaks of infectious diseases (L 2020, ch. 3, § 2). Petitioners contend that Executive Law § 29-a is unconstitutional in that it is a delegation of legislative authority to the executive and thereby violates the separation of powers doctrine (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 821-822 [2003]). "The constitutional principle of separation of powers, 'implied by the separate grants of power to each of the coordinate branches of government', requires that the

Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies" (*Bourquin v Cuomo*, 85 NY2d 781, 784 [1995] [citations omitted]). Nevertheless, "[d]espite this functional separation, th[e] Court [of Appeals] has always understood that the duties and powers of the legislative and executive branches cannot be neatly divided into isolated pockets" (*id.*). Moreover, the Court of Appeals has long "recognized that some overlap between the three separate branches does not violate the constitutional principle of separation of powers [and that] 'common sense and the necessities of government do not require or permit a captious, doctrinaire and inelastic classification of governmental functions' " (*Clark v Cuomo*, 66 NY2d 185, 189 [1985]).

In the context of regulations issued by a state agency, it is well settled that "the basic policy decisions underlying the regulations have been made and articulated by the Legislature. . . . The choice of the appropriate means for achieving these ends, including the adoption of regulations, is well within the authority delegated to the agency for the purpose of administering the statute" (*Matter of New York State Health Facilities Assn. v Axelrod*, 77 NY2d 340, 348 [1991]). Petitioners' effort to distinguish the power of the Governor from a government agency is without merit inasmuch as agencies are typically a part of the executive branch and there is no legal authority holding that delegating rule making power to the Governor, as opposed to an agency, is prohibited by the New York State Constitution.

As noted by respondents, Executive Law § 29-a grants significant, but not unlimited power to the Governor in dealing with the unprecedented health crisis caused by COVID-19. Any review of this statue must necessarily be viewed in the context of the COVID-19 pandemic and the state's efforts to quell this deadly virus (*see Jacobson v Massachusetts*, 197 US 11

[1905]). "According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety" (*id*. at 25). "Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect' " (*South Bay United Pentecostal Church v. Newsom*, 590 U S __, 140 S Ct 1613 [2020], quoting *Jacobson*, 197 US at 38).

By its terms, the statute will expire on April 29, 2021 and "no suspension or directive shall be made for a period in excess of thirty days" (Executive Law § 29-a [2] [a]). While a suspension or directive can be extended for another thirty days, this necessarily require a fresh assessment as to whether the extension is warranted. The Legislature ensured that directives issued pursuant to Executive Law § 29-a "must be necessary to cope with the disaster" and that "no suspension or directive shall be made which is not in the interest of the health or welfare of the public and which is not reasonably necessary to aid the disaster effort" (§ 29-a [2] [a]). A further significant check on the executive's authority is the provision that "[t]he legislature may terminate by concurrent resolution executive orders issued under this section at any time" (§ 29-a [4]). Based on the foregoing, this court rejects petitioners' contention that Executive Law § 29-a is unconstitutional.

II. Governor Cuomo's Executive Orders

On March 7, 2020, Governor Cuomo declared a state disaster emergency in New York because of the COVID-19 pandemic (Executive Order 202). He also issued Executive Order 202.3, which prohibited all on-premises consumption of food and beverages at bars and restaurants in the State as of March 16, 2020. After COVID-19 infections began to decrease

statewide over the next six weeks, Governor Cuomo announced an approach to reopen industries and businesses in New York in phases, based upon a data-driven, regional analysis. On June 11, 2020, Governor Cuomo announced that phase three would begin on June 12, 2020 in several regions of New York, which allowed bars and restaurants to resume offering indoor dining, with reduced capacity and restrictions as to the use of masks and social distancing.

On October 6, 2020, Governor Cuomo announced the new Cluster Action Initiative with the issuance of Executive Order 202.68, which provided in pertinent part:

> "The Department of Health shall determine areas in the State that require enhanced public health restrictions based upon cluster-based cases of COVID-19 at a level that compromises the State's containment of the virus. Certain activities shall be restricted and any permitted activities, in all three zones below, shall be conducted in strict adherence to Department of Health guidance."

The Governor described a cluster as a high density of cases, "COVID-19 hot spots," with infections spreading from the cluster in concentric circles. The intention of the Cluster Action Initiative is to create an aggressive and targeted approach to contain and control the spread of the virus from the immediate area where the cluster of cases is located, as well as the area around the cluster. Once clusters are identified, the DOH is to divide the clusters and the areas around them into three categories with successively higher restrictions to control the clusters, stop the spread, and take precautionary action in the outlying communities. The Red Zone is the cluster itself, the Orange Zone is a "moderate severity warning area," and the Yellow Zone is "precautionary" zone (Executive Order 202.68).

The Cluster Action Initiative was initially applied to six areas in Brooklyn, Queens, and Broome, Orange and Rockland Counties. All but one area included a centralized red zone where the DOH identified a COVID-19 hot spot. This court finds that in principle, the Cluster Action

Initiative is an ingenious strategy, certainly "in the interest of the health or welfare of the public" and "reasonably necessary to aid the disaster effort" (Executive Law § 29-a [2] [a]). In practice, however, it is entirely dependent on proper identification of clusters, through contact tracing or other means.

On October 17, 2020, Governor Cuomo announced a new "Micro-Cluster" strategy that refined the focus of the Cluster Action Initiative. "Instead of analyzing data by region, county, or even just ZIP, the micro-cluster strategy will use granular data based on the Cluster Action Initiative" (Executive Summary of the New York Micro-Cluster Strategy, NYSCEF Doc. No. 80, p. 2). A press release announcing the Micro-Cluster strategy described it to be "predicated on three principles: refined detection, specific and calibrated mitigation, and focused enforcement" (NYSCEF Doc. No. 79, p. 2). It further provided that:

> "Using New York State's approach to track cases by address with the help of nation-leading levels of testing, the State will identify outbreaks and implement mitigation measures tailored to the precise areas where outbreaks occur. The State will implement rules and restrictions directly targeted to areas with the highest concentration of COVID cases, known as red zones, and put in place less severe restrictions in surrounding communities, known as orange and yellow zones that serve as a buffer to ensure the virus does not spread beyond the central focus area.
> . . .
> Governor Cuomo continued, 'We now have more sophistication because we've been at it for seven months. So rather than looking at COVID-19 data on the state level, regional level, county level or even neighborhood level, we are now going to analyze it on the block by block level. The micro-cluster strategy is not just to calibrate the state or the region, but to calibrate just those specific geographic areas. Target it and target your strategy down to that level of activity' " (*id*.).

The Executive Summary of the Micro-Cluster strategy describes how the DOH would define calibrated geographic boundaries of Micro-Cluster zones (NYSCEF Doc. No. 80, pp. 3-5). The DOH would utilize daily data monitoring and consider testing, hospitalizations, and

geographical considerations (*id*. at p. 3). Also, the DOH would analyze demographic information of people testing positive for the virus, contact tracing and whether outbreaks occurred at congregate facilities (*id*. at p. 3-4). To correctly designate a particular zone,

> "ZIP codes and other geopolitical or other common geographic subdivisions such as county, census tracts, or contiguous neighborhoods will be identified where clusters may be occurring. Geocoded case location data will be used to examine the location of cases within the flagged zip code and within surrounding zip codes/geographic areas to determine concentration of cases" (*id*. at p. 4).

"The purpose of an Orange Buffer Zone is to 1) restrict activity to prevent further spread from Red Zone area [and] 2) provide a defined geographic area where metrics can be monitored daily to ensure COVID is not spreading beyond the Red Zone" (*id*. at p. 4). It is "put in place primarily in densely populated urban areas as a tight buffer zone around a Red Zone micro-cluster" or "is implemented independently as a focus area" based on specified metrics (*id*.). The specified metrics listed in the summary place Erie County in a "Tier 1" geographic area, where the only distinction between the three zones concerns the "7-day rolling average positivity" for ten days (*id*. at p. 5). If that figure is above 2.5 %, the area qualifies as Yellow Zone; if above 3 %, the area qualifies as an Orange Zone; and if above 4 %, the area qualifies as Red Zone (*id*.).

Dr. Debra S. Blog, Director of the Division of Epidemiology for the DOH, explained that "[t]he micro-cluster strategy relies on flexibility and allows for a rapid response to a specific location and target the mitigation measures to a hot spot, minimizing disruption to surrounding areas" (NYSCEF Doc. No. 45, ¶ 76). It is designed to provide greater specificity than the broader Cluster Action Initiative, and thus requires more precise identification of high-density areas of COVID-19 infection.

III. Application of the Micro-Cluster Strategy to Portions of Erie County

On November 6, 2020, portions of Erie County were placed in a Yellow Zone. Respondents have not demonstrated criteria relied upon to make that designation. No Red Zones were designated as clusters of COVID-19 infection within the Yellow Zone. The record includes that the daily positivity rates in Erie County on November 1 and 2, 2020 were 2.2 % and 3.4 % respectively, but respondents have not shown the "7-day rolling average positivity" for any period of ten days, nor any of the criteria set by the Micro-Cluster strategy to establish the defined geographic area.

Nonetheless, the Yellow Zone designation still permitted petitioners to offer indoor dining under various restrictions, including a 4 person maximum per table. On November 9, 2020, the DOH issued the Interim COVID-19 Guidance, which applies to all restaurants and food services establishments. The Interim COVID-19 Guidance specifically refers to Yellow Zones designated in Erie, Monroe and Onondaga Counties and provides that as of November 11, 2020, "in addition to any other mitigation measures required, any restaurant or tavern must close by 12 midnight (12:00 am local time), and all service must cease at such time. The establishment cannot reopen or resume service until 5:00 am" (NYSCEF Doc. No. 83, p.1)

The Interim COVID-19 Guidance sets standards in three distinct categories: people, places, and processes. The standards pertain to physical distancing, gatherings in enclosed spaces, workplace activity, movement and commerce, kitchen areas, protective equipment hygiene, cleaning and disinfection, phased reopening, communications plans, screening and testing, and tracing and tracking. Under the Interim COVID-19 Guidance, restaurant operators must develop and conspicuously post completed safety plans on site for employees. To facilitate

this process, the DOH made available a business reopening safety plan template to guide business owners and operators in developing plans to protect against the spread of COVID-19. Petitioners contend that they have carefully followed the Interim COVID-19 Guidance and prior protocols to prevent the spread of the COVID-19 virus, and that no COVID-19 cases have been traced to their businesses while operating when Erie County was designated as a Yellow Zone.

On November 18, 2020, the majority of Erie County was designated as an Orange Zone, with a prohibition on indoor dining. Again, respondents did not identify any clusters requiring Red Zone Status within the designated area. The only basis given to make that designation is a hearsay, conclusory reference to the "forward.ny.gov/micro-cluster-strategy" web site, which states that on November 18, 2020, "parts of the Erie Yellow Precautionary Zone meet the metrics to transition to an Orange Warning Zone. The previous Yellow Zone is expanded to include new parts of Erie County seeing upticks in new cases, positivity, and hospital admissions." The distinction between the target metrics for Yellow and Orange Zones at that time were subtle – for a Yellow Zone, there needed to be a 7-day rolling average positivity for ten days above 2.5 %, but if that figure exceeded 3 %, the area then qualifies as an Orange Zone. One could envision a scenario where the 7-day rolling average positivity for ten days in a specified area rose and fell above and below the 3 % figure on a daily basis.

For petitioners, the effect of this change in designation was dramatic. As a result of the prohibition of all indoor dining in the new Orange Zone, thousands of employees have been laid off and petitioners have suffered financial losses to the point where their bars and restaurants will need to close.

On December 10, 2020, Governor Cuomo announced new metrics by which micro-cluster focus zones will be determined to help control COVID-19 spread and protect hospital capacity (NYSCEF Doc. No. 45, ¶ 78). The metrics required for a Red Zone changed significantly – "A red zone will be implemented when a region, after the cancellation of elective procedures and a 50 percent increase in hospital capacity, is 21 days away from reaching 90 percent hospital capacity on the current 7-day growth rate" (*id*.). An Orange Zone retained its requirement of "a 4 percent positivity rate (7-day average) over the last 10 days," but a second criterium was added: "a region that has reached 85 percent hospital capacity" (*id*.). Respondents have not demonstrated that the Orange Zone portions of Erie County have reached 85 % hospital capacity, nor have they shown alternative criteria, that the DOH "determines the region's rate of hospital admissions is unacceptably high and a zone designation is appropriate to control the rate of growth" (*id*.)

IV. Respondents' Alleged Violations of Law

A. The Takings Clause

Petitioners contend that as a result of the current ban on indoor dining in the Orange Zone, their property has been taken in violation of the Fifth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment. The Takings Clause "provides that private property shall not 'be taken for public use, without just compensation.' As its text makes plain, the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power' . . . In other words, it 'is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking' " (*Lingle v. Chevron U.S.A.*

Inc., 544 US 528, 536-537 [2005]). Petitioners' property has not been seized or taken for public use. "A second type of taking, known as a 'regulatory' taking, can arise where 'government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs.' . . . Regulatory takings are based on the principle that 'while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking' " (*Ganci v New York City Transit Authority*, 420 F Supp 2d 190, 195 [SDNY 2005]; *see Pennsylvania Coal Co. v Mahon*, 260 US 393, 415 [1922]).

There are two types of regulatory takings, categorical and non-categorical. A categorical taking can only occur "when a regulation deprives an owner of 'all economically beneficial uses' of" his or her property (*Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 US 302, 330 [2002]). Given that petitioners are not being denied the ability to engage in some business activity, the ban on indoor dining would not constitute a categorical taking. Determining whether there has been a non-categorical taking involves a specific and intense inquiry. The United States Supreme Court has "identified three factors which have 'particular significance': (1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action' " (*Connolly v Pension Ben. Guar. Corp*., 475 US 211, 224-225 [1986]). Such analysis cannot be conducted collectively as to all of the petitioners as a whole. Instead, each petitioner would have to present detailed evidence and analysis to establish a non-categorical taking.

More to the point, however, "the remedy for a Takings Clause violation is only damages, as the Clause 'does not proscribe the taking of property; it proscribes taking without just

compensation' " (*Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 US 702, 741 [2010] [Kennedy, J., concurring]). As a result, petitioners have not demonstrated the likelihood of success on the Takings Clause cause of action and even if they had, the appropriate remedy would be money damages, not an injunction (*see Auracle Homes, LLC v Lamont*, __ F.Supp.3d __, 2020 WL 4558682 *13 [D Conn 2020]).

B. The Equal Protection Clause

Petitioners assert that respondents have violated their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. "[T]he Equal Protection Clause bars the government from selective adverse treatment of individuals compared with other similarly situated individuals if 'such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person' " (*Bizzarro v Miranda*, 394 F3d 82 [2d Cir 2005]). It is clear that bars and restaurants are not a protected class. As a result, in order to adequately assert that there is a valid Equal Protection claim, petitioners "must plausibly allege that [they have] been intentionally treated differently from others similarly situated and no rational basis exists for that different treatment" (*Progressive Credit Union v City of New York*, 889 F.3d 40, 49 [2d Cir 2018]). Given that all bars and restaurants in the Orange Zone are treated the same, petitioners would have to demonstrate that there is no rational basis for being treated differently than bars and restaurants in other parts of Western New York or New York State. On this claim, petitioners have not shown a likelihood of success on the merits.

C. Substantive Due Process

Petitioners contend that respondents have violated their substantive due process rights under the Fourteenth Amendment to the United States Constitution.

> "To succeed on a substantive due process claim, a plaintiff must ultimately demonstrate government action that is 'arbitrary, conscience-shocking, or oppressive in a constitutional sense.' *Kaluczky v. City of White Plains*, 57 F3d 202, 211 (2d Cir 1995); *Cine SK8, Inc. v Town of Henrietta*, 507 F3d 778, 784 (2d Cir 2007) (finding that a plaintiff must show that 'defendants infringed on [his] property right in an arbitrary or irrational manner'). In this regard, only the most egregious executive action is considered 'arbitrary in the constitutional sense.' *Collins v. City of Harker Heights*, 503 US 115, 129 (1992). Notably, government action that is simply 'incorrect or ill-advised' does not fall within the protection of the substantive due process clause. *See Lowrance v Achtyl*, 20 F3d 529, 537 (2d Cir 1994)." (*Bimber's Delwood, Inc. v James*, __ F Supp 3d __, 2020 WL 6158612 *14 [WDNY 2020]).

Petitioners have not demonstrated that the respondents' actions are so egregious that it could be deemed arbitrary in the constitutional sense and have thus not shown a likelihood of success on their substantive due process claim.

D. Procedural Due Process

In addition, petitioners contend that respondents have violated their rights to procedural due process under the Fourteenth Amendment to the United States Constitution. It is well settled that "[t]he fundamental requirement of the Due Process Clause is that an individual be given the opportunity to be heard at 'a meaningful time and in a meaningful manner' " (*Patterson v City of Utica*, 370 F3d 322, 336 [2d Cir 2004]). "Official action that is legislative in nature is not subject to the notice and hearing requirements of the due process clause [citation omitted]. These constitutional due process requirements apply only where the official action is 'designed to adjudicate disputed facts in particular cases' " (*Interport Pilots Agency, Inc. v Sammis*, 14 F3d

133, 142 [2d Cir 1994], quoting *United States v Florida East Coast Ry. Co.*, 410 US 224, 245 [1973]). Thus, petitioners have not established a likelihood of success on their procedural due process cause of action.

E. CPLR Article 78

Upon reviewing administrative action under CPLR Article 78, courts must uphold the administrative exercise of discretion unless it has no rational basis or is arbitrary and capricious (*Krug v City of Buffalo*, 34 NY3d 1094, 1096 [2019]; *Lemma v Nassau County Police Officer Indem. Bd.*, 31 NY3d 523, 528 [2018]). "The arbitrary or capricious test 'relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact' " (*Pell v Bd. of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974 [internal citation omitted]).

Petitioners submitted the affirmation of Dr. Qanta A. Ahmed, a triple fellowship trained, board certified academic pulmonologist actively licensed to practice in the State of New York. Dr. Ahmed opined that the interaction of people at commercial establishments where COV1D-I9 protocols are being followed, including indoor dining, is not contributing to the spread of this disease. Despite Dr. Ahmed's affidavit, respondents have demonstrated enhanced risks related to indoor dining. COVID-19 transmission can occur through direct, indirect, or close contact with infected people through respiratory secretions of droplets or aerosols, which are expelled when an infected people talk, laugh, cough or sneeze. Indoor dining is unique in comparison to other regulated activities during the pandemic because patrons are not able to wear masks while eating and drinking.

There is no dispute that COVID-19 positivity rates have continued to rise in Western New York. Curiously, the most significant rise documented in the record occurred after the Orange Zone designation was made. Erie County's daily positivity rate reached 9.4 % on November 30, 2020, and the Western New York Region's 7-day rolling average positivity rate as of January 3, 2021 was 8.4 %, with the daily positive rate for January 3, 2021 at 10.2 %.

Such figures greatly exceed metrics previously set for Red Zone designation, much less Orange Zone designation. However, the DOH clearly is not relying upon such data for their designations, as much of the Western Region has no designation at all and portions of Erie County remain in the Yellow Zone. A lack of reliance on broad based regional data was further demonstrated at oral argument, when counsel for the parties discussed inconsistent designations statewide. Nonetheless, the Micro-Cluster Strategy eschews sole reliance on broad-based regional data; zones are to be designated after consideration of contact tracing, analysis of congregate facilities and "epidemiological factors, ZIP codes and other geopolitical or other common geographic subdivisions such as county, census tracts, or contiguous neighborhoods" (NYSCEF Doc. No. 80, pp. 3-4).

Petitioners rely heavily on information provided by Governor Cuomo at a December 11, 2020 press conference, showing that only 1.43 % of COVID-19 cases are traceable to restaurants and bars. The Governor referred to the information as "probably the most informative data." Respondents have shown that the contact tracing data relied upon by Governor Cuomo only accounted for approximately 20% of the total COVID-19 positive test results from September to November 2020, and an even smaller percentage of all positive test results maintained by the DOH. Furthermore, contact tracing data has been shown to be limited in a number of other ways.

Nora K. Yates, Director of the Center for Community Health at the DOH detailed numerous barriers to contact tracing, including privacy concerns, mistrust, apprehension, the unmet need for more information and support, fear of stigmatization, and mode-specific challenges, such as not having the appropriate devices, the ability to download an app and logistical challenges. While limitations with contract tracing casts doubt on the statistic relied upon by petitioners, it also undermines and inhibits the DOH's ability to properly designate specific areas under Micro-Cluster-strategy, which is premised upon the State's ability to identify areas of infection on a block by block basis.[1]

Considering the record presented, this court cannot find evidence that the State had a rational basis to designate portions of Erie County as an Orange Zone on November 18, 2020. On this issue, the court find a likelihood of success on the merits. The court also finds irreparable injury to petitioners in the absence of injunctive relief, and a balance of equities in their favor (*see Eastman Kodak Co. v Carmosino*, 77 AD3d 1434, 1435 [4th Dept 2010]). The loss of goodwill that corresponds with a viable business is not readily quantifiable and constitutes irreparable harm warranting the grant of preliminary injunctive relief. Petitioners have also demonstrated that the Orange Zone designation has caused loss of revenue, unemployment, potential foreclosure and hardship upon Erie County residents.

[1] Furthermore, the most often cited statistic used to designate Red, Orange and Yellow Zones – the daily positive rate in a specified area, is calculated using the number of people tested as the denominator. With robust contact tracing, great numbers of potentially infected individuals are notified of possible contact with an infected person. If those people lack accompanying COVID-19 symptoms but are tested based only on the possible contact, a small percentage would be expected to test positive. On the other hand, with limited contact tracing, most people would not request to be tested until they develop potential COVID-19 symptoms, leading to a higher daily positive rate in the area.

The original petition was filed on December 24, 2020. On December 28, 2020, the court informally heard arguments regarding whether the court had authority to grant a temporary restraining order (TRO). After determining that the court did not have authority to grant a TRO, a briefing schedule was set and oral argument on the application for a preliminary injunction was scheduled for January 8, 2021 at 3:30 p.m. Petitioners e-filed additional papers in support of the petition on December 28, 2020. The proposed order to show cause was revised to remove the TRO and it was signed and entered on December 29, 2020. Respondents filed their opposing papers on January 6, 2021 and petitioners replied to that opposition on January 8, 2021.

Petitioners also filed an amended petition with supporting affidavits on January 8, 2021 that added additional petitioners to this proceeding. At oral argument, the respondents objected to the amended petition asserting that it was done without authority. This court must therefore address whether the relief granted herein applies only to the petitioners named in the original petition or if it also applies to the additional petitioners named in the amended petition.

In making that determination, the court has considered two factors. First, the original petition and the amended petition both contain a party identified as John Doe Corp., described as "an individual (or group of) licensed bar(s) and/or restaurant(s) operating in Erie County, New York, who are fearful of retribution by and from Respondents should their identities be disclosed publicly, but who is (are) otherwise qualified to act as a Petitioner in this proceeding." Respondents have not so far objected to the party identified as John Doe Corp. Second, respondents opposed the relief sought by all petitioners on identical grounds and have not

asserted that one petitioner was any more or less deserving of the relief sought in the petition, with one exception.[2]

For these reasons, a preliminary injunction is hereby granted. With the one noted exception, the court concludes that all parties named in the amended petition filed on January 8, 2021 (NYSCEF Doc. No. 109) are hereby permitted to operate under the prior Yellow Zone restrictions and pursuant to the DOH's Interim COVID-19 Guidance (NYSCEF Doc. No. 2). The respondents have not, however, waived their right to move to dismiss all or part of the amended petition and have also not waived their right to oppose the relief sought by one or more of the petitioners individually based on any different facts or distinctions between or among petitioners that may be relevant. There will be a conference on January 19, 2020 at 3:30 pm, when we will also schedule a hearing on petitioners' request for a permanent injunction.

Submit order.

Dated: January 13, 2021

Henry J. Nowak, J.S.C.

[2] The court agrees with respondents that Smith Buduson, Inc., d/b/a Robbie's Bar and Grill, a restaurant located in Greece, New York, outside of Erie County is not a proper party to this proceeding in that it is not located in the Erie County Orange Zone and the county officials where that business is located are not parties to this proceeding.