APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 24-2033-cv

PHILIP G. POTTER,

Plaintiff-Appellant,

v.

INCORPORATED VILLAGE OF OCEAN BEACH, VILLAGE BUILDING DEPARTMENT, VILLAGE BOARD OF TRUSTEES, MAYOR OF THE VILLAGE OF OCEAN BEACH, VILLAGE BOARD OF ZONING APPEALS, GERARD S. DRISCOLL, Village Building Inspector, in his official and individual capacities, THEODORE MINSKI, Village Building Inspector, in his official and individual capacities, NICHOLAS WEISS, Village Building Inspector, in his official and individual capacities, LOUIS SANTORA, Village Building Inspector, in his official and individual capacities, ROBERT FUCHS, Village Prosecutor, in his official and individual capacities, KENNETH GRAY, Village Hearing Officer, in his official and individual capacities,

Defendants-Appellees.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Brown, *J.*).

SUMMARY ORDER

April 10, 2025

PRESENT: DEBRA ANN LIVINGSTON, *Chief Judge,* GERARD LYNCH, BETH ROBINSON, *Circuit Judges.*

FOR PLAINTIFF-APPELLANT: MICHAEL STANTON, Kosakoff & Cataldo LLP, Melville, NY.

FOR DEFENDANTS-APPELLEES: THEODORE GORALSKI, (Deanna Panico, on the brief), Bee Ready Fishbein Hatter & Donovan LLP, Mineola, NY.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Plaintiff-Appellant Philip G. Potter appeals from a July 9, 2024 judgment of the district court (Brown, *J.*), dismissing his claims under 42 U.S.C. § 1983 against the Incorporated Village of Ocean Beach ("the Village") and various Village officials. Potter's amended complaint alleges procedural due process, substantive due process, and *Monell* liability claims relating to (1) the revocation of the certificate of occupancy ("CO") for his seasonal residence in the Village; (2) criminal citations issued to Potter in 2012 for purported violations of local building codes; (3) the denial of Potter's applications for rental permits in 2016, 2017, and 2018; and (4) the Village's purported refusal to conduct a hearing, ordered by a state court in parallel Article 78 proceedings, on the revocation of Potter's CO. On appeal, Potter principally argues that the district court incorrectly dismissed his claims as barred by the statute of limitations due to its erroneous conclusion that the Village revoked his CO in 2011. We assume the parties' familiarity with the remaining underlying facts and the procedural

history of the case, which we reference only as necessary to explain our decision to affirm.

I. Standard of Review

"We review *de novo* a grant of a motion to dismiss pursuant to Rule 12(b)(6), accepting the complaint's factual allegations as true and drawing all reasonable inferences in the plaintiff's favor." *Pettaway v. Nat'l Recovery Sols., LLC*, 955 F.3d 299, 304 (2d Cir. 2020) (quoting *Brown Media Corp. v. K&L Gates, LLP*, 854 F.3d 150, 156–57 (2d Cir. 2017)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). "[O]n a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), the court may also rely upon 'documents attached to the complaint as exhibits[ ] and documents incorporated by reference in the complaint,'" *Halebian v. Berv*, 644 F.3d 122, 130 n.7 (2d Cir. 2011) (quoting *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010)), and "consider matters of which judicial notice may be taken," *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008) (quoting *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991)).

"Generally, '[t]he lapse of a limitations period is an affirmative defense that a defendant must plead and prove.'" *Whiteside v. Hover-Davis, Inc.*, 995 F.3d 315, 319 (2d Cir. 2021) (quoting *Staehr*, 547 F.3d at 425); *see also* Fed. R. Civ. P. 8(c)(1). But we have allowed "a defendant [to] raise an affirmative defense in a pre-answer Rule 12(b)(6) motion if the defense appears on the face of the complaint." *Whiteside*, 995 F.3d at 319 (quoting *Staehr*, 547 F.3d at 425). "Dismissal under Rule 12(b)(6) is therefore appropriate only if 'it is clear from the face of the

complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law.'" *Michael Grecco Prods., Inc. v. RADesign, Inc.*, 112 F.4th 144, 150 (2d Cir. 2024) (quoting *Sewell v. Bernardin*, 795 F.3d 337, 339 (2d Cir. 2015)).

II. Statute of Limitations

"[T]he applicable limitations period" for § 1983 actions "is found in the 'general or residual [state] statute [of limitations] for personal injury actions,'" which in New York is three years. *Pearl v. City of Long Beach*, 296 F.3d 76, 79 (2d Cir. 2002) (quoting *Owens v. Okure*, 488 U.S. 235, 249–50 (1989)); *see also* N.Y. C.P.L.R. § 214(5) (McKinney 1990). But while "courts look to state law for the length of the limitations period, the time at which a § 1983 claim accrues 'is a question of federal law,' 'conforming in general to common-law tort principles.'" *McDonough v. Smith*, 588 U.S. 109, 115 (2019) (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)). The Supreme Court has explained that under federal law, "it is the standard rule that [accrual occurs] when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." *Wallace*, 549 U.S. at 388 (internal quotations marks and citations omitted). And this Court has held that "[a] federal claim generally accrues 'once the plaintiff knows or has reason to know of the injury which is the basis of his action.'" *DeSuze v. Ammon*, 990 F.3d 264, 270 (2d Cir. 2021) (quoting *Veal v. Geraci*, 23 F.3d 722, 724 (2d Cir. 1994)). We further explained that a plaintiff's knowledge of his injury is sufficient to trigger accrual when he knows "enough of the critical facts of injury and causation to protect himself by seeking legal advice." *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998) (quoting *Guccione v. United States*, 670 F.Supp. 527, 536 (S.D.N.Y. 1987)).

Potter pleaded in his amended complaint that the Village violated his substantive and procedural due process rights by issuing criminal citations premised on an assertion that Potter knowingly violated the Village building code, even though the purported code violations related to conditions "covered under the permanent Certificate of Occupancy." App'x 224. The complaint states that these criminal citations were issued in "early 2012." *Id.* Potter also brought claims based on the Village's denial of his rental permit applications in "2016, 2017, and 2018," alleging these actions deprived him of "potentially lucrative rental income from the property" without due process. *Id.* at 228, 232–33. Because Potter filed this case on August 29, 2023, claims that accrued prior to August 29, 2020 are time barred. Given the dates accompanying Potter's allegations, it is clear on the face of the complaint that claims stemming from the Village's issuance of criminal citations against him in 2012 and its denial of his applications for rental permits in 2016, 2017, and 2018 are outside of the relevant statute of limitations. We therefore affirm the district court's dismissal of these claims.

Potter's claims relating to the Village's revocation of his CO present a more difficult question. Ultimately, however, we conclude that these claims also accrued outside of the relevant limitations period and are therefore time-barred. While the Village Building Inspector sent Potter a letter in July 2011 informing him that his CO had been revoked, Potter alleges that the Village later appointed a hearing officer to conduct a hearing on the proposed revocation of his CO ("the revocation hearing"), indicating that the Building Inspector's determination was subject to a review process before it became final. That hearing officer ultimately found that Potter's CO was erroneously issued and recommended that the Village Board of Trustees

revoke it, but the Board never voted to adopt that proposal, instead tabling it indefinitely in 2015. While these facts indicate that the Village Board had not taken a final position on the revocation of Potter's CO in 2015, Potter pleaded in his complaint that in the ten years since the Board tabled the proposal, the Village has proceeded as though he does not have a valid CO, denying his rental permit applications in 2016, 2017, and 2018 "based upon . . . its position that the premises lack a valid certificate of occupancy." App'x 215. And Potter went on to allege the Village "den[ied] [him] potentially lucrative rental income from the property, all due to the purported absence of a valid certificate of occupancy." *Id.* at 228.

Potter's complaint therefore pleads multiple times that he understood that the Village's repeated denials of his rental permit applications from 2016 to 2018 stemmed from its determination that he lacked a valid CO. By the third year of these denials, it seems clear that Potter "ha[d] reason to know of the injury which is the basis of his action"—that the Village had taken the position that the revocation of Potter's CO was final, despite the Village Board's purported indefinite tabling of the revocation.[1]

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[1] We note that claims "in the land-use context are not ripe until [the] landowner receives a final, definitive decision" from the local authority charged with administering the relevant regulations. *Ateres Bais Yaakov Acad. of Rockland v. Town of Clarkstown*, 88 F.4th 344, 350 (2d Cir. 2023); *see also Zito v. Town of Babylon*, 534 F. App'x 25, 28 (2d Cir. 2013) (summary order) ("This Court applies *Williamson*'s 'final decision' requirement to both substantive and procedural due process claims in the land-use context" (citing *Doughtery v. Town of North Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88–89 (2d Cir. 2002) and *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 96–97 (2d Cir. 1992)). But "[t]he finality requirement is relatively modest," and only "*de facto* finality" is required. *Pakdel v. City & Cnty. of San Francisco*, 594 U.S. 474, 478–79 (2021). Because the Village

DeSuze, 990 F.3d at 270 (quoting *Veal*, 23 F.3d at 724). And Potter's decision to bring a declaratory action in state court in 2019 to defend the validity of the 2010 CO further supports that he was aware that the Village had taken this position and that he knew "enough of the critical facts of injury and causation to protect himself by seeking legal advice" prior to the start of the limitations period here.[2] *Kronisch*, 150 F.3d at 121 (quoting *Guccione*, 670 F.Supp. at 536). Thus, while Potter's claims for substantive and procedural due process violations based on the Village's revocation of the 2010 CO did not accrue when the Village Building Inspector voided his certificate in 2011, Potter did become sufficiently aware that the Village had taken a final position on the revocation of his CO to have brought this claim by at least 2020, rendering his claims based on the Village's revocation of his CO time barred.[3]

"demonstrated its 'arriv[al] at a definitive position on the issue that inflict[ed] an actual, concrete injury'" on the plaintiff at least five years prior to the initiation of this suit, we conclude his claims became ripe for review at that time. *Village Green at Sayville, LLC v. Town of Islip*, 43 F.4th 287, 298 (2d Cir. 2022) (quoting *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985)).

[2] Potter did not argue that the ripeness determination made in the state court proceedings bars relitigation of that issue here. New York law applies to determine the preclusive effect of a state court proceeding in a federal § 1983 suit. *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir. 1999) (citing 28 U.S.C. § 1738). And New York courts disfavor raising issue preclusion sua sponte. *See Impellizzeri v. Campagni*, 194 N.Y.S.3d 637, 640 (N.Y. App. Div. 2023) (holding that because the defendant did not raise "collateral estoppel . . . the court erred in raising that issue sua sponte," given that the parties "had no opportunity to address the issue"). We therefore do not address the applicability of that doctrine here.

[3] We also reject Potter's request to find this claim timely under the continuing violation doctrine or under the doctrine of equitable

* * *

We have considered Potter's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

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estoppel. First, the continuing violation doctrine does not apply to "discrete unlawful acts, even where those discrete acts are part of a 'serial violation[ ],' but to claims that by their nature accrue only after the plaintiff has been subjected to some threshold amount of mistreatment." *Gonzalez v. Hasty*, 802 F.3d 212, 220 (2d Cir. 2015) (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114–15 (2002)). Because the Village's denials of rental permit applications premised on the absence of a valid CO are each discrete unlawful acts indicating that the Village had reached a final decision, we conclude that the continuing violation doctrine does not apply. Second, equitable estoppel applies only in those cases "where the plaintiff knew of the existence of his cause of action but the defendant's conduct caused him to delay in bringing his lawsuit." *Ellul v. Congregation of Christian Bros.*, 774 F.3d 791, 802 (2d Cir. 2014) (quoting *Cerbone v. Int'l Ladies' Garment Workers' Union*, 768 F.2d 45, 49–50 (2d Cir. 1985)). But here Potter did bring a lawsuit in 2019 after the Village denied his rental permits based on the absence of a valid CO, so equitable estoppel does not apply either. Finally, we note that Potter did not raise arguments in his opening brief contesting the district court's ruling regarding the Village's failure to hold the state-court ordered hearing on the revocation of Potter's CO. We therefore consider these arguments forfeited. *See JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. DE C.V.*, 412 F.3d 418, 428 (2d Cir. 2005).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CIVIL ACTION NO. 23-6456 (GRB)(ARL)

PHILIP G. POTTER,

Plaintiff,

v.

INCORPORATED VILLAGE OF OCEAN BEACH, *et al.*

Defendants.

MEMORANDUM OF DECISION AND ORDER

GARY R. BROWN, United States District Judge:

> **Sisyphean (adj) -** *Of or relating to Sisyphus, in Greek mythology a king of Corinth who was condemned in Hades endlessly to roll a heavy stone up a hill only for it to roll down again as he reached the top; resembling Sisyphus or that of Sisyphus; spec. (of labour, a task, etc.) resembling the fruitless toil of Sisyphus; endless, laborious, and ineffective.*
>
> - Oxford English Dictionary[1]

The allegations in this action, charging purported constitutional violations against the defendant Village of Ocean Beach (the "Village") and several of its officials, comprise a tale that is nothing short of Sisyphean. The

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[1] *Sisyphean*, Oxford English Dictionary, https://www.oed.com/dictionary/sisyphean_adj (last visited July 9, 2024).

amended complaint painstakingly recounts the story of the Village's issuance and subsequent revocation of a Certificate of Occupancy, institution and dismissal of criminal proceedings related thereto, convention of a revocation hearing, rejection of rental permits based upon the absence of a Certificate of Occupancy and plaintiff's successful prosecution of a declaratory judgment action in state court. Unfortunately for plaintiff, however, this story, like the tale of Sisyphus, is an ancient one, and falls well outside the statute of limitations. Thus, the matter must be dismissed.

Procedural History

Growing out of the 2011 revocation of the subject Certificate of Occupancy by defendants, this action was commenced in this Court in August 2023 by the filing of a complaint. Docket Entry ("DE") 1. Defendants moved for a pre-motion conference in connection with an anticipated Rule 12 motion, and the parties filed letter briefs and presented arguments on January 3, 2024. DE 13. After argument, the Court deemed the motion made, and recognizing "a fundamental statute of limitations problem," the absence of allegations to support a continuing violation theory, and looming ripeness issues, dismissed the complaint, granting leave to refile within 60 days. DE 14 at 7, 15.

Plaintiff filed an amended complaint. DE 15. Defendants moved to dismiss for failure to state a claim, which has now been fully briefed. DE 19. This opinion follows.

Factual Background

The allegations of the amended complaint, assumed true for the purpose of this motion (though the conduct of the Village, as established through publicly accessible documents, is at times truly difficult to believe), include the following:

Plaintiff, a New York City resident, acquired a seasonal residence on Fire Island within the confines of the Village in 2009. DE 15 ¶¶22, 31. After obtaining a permit, he demolished the existing structure and commenced construction of a two-story wood structure that same year. *Id.* ¶¶32, 33. In July 2010, the Village issued a Permanent Certificate of Occupancy for the new residence. *Id.* ¶40.

From there, the story takes a troubling turn. The complaint alleges that in 2011, well after the issuance of the Certificate of Occupancy, the Village, at times acting through its Building Inspector:

- Falsely indicated that a final survey had not been provided until July 2011,
- Stated that the survey revealed violations of the Village's building code and required the removal of a deck,
- Altered the original Certificate of Occupancy maintained in its files by adding a handwritten "X" through the word permanent and adding the words "Void as of July 15, 2011," and
- Issued a letter indicating that the Village had revoked the Certificate of Occupancy and noted additional violations.

Id. ¶¶44-51. Then, in 2012, the Village "doubled down," issuing eight criminal informations, a criminal summons and a bench warrant for plaintiff returnable before its Village Justice Court for zoning and building violations. *Id.* ¶¶55-60. Faced with a motion to dismiss the charges, the Village prosecutor stated he could not, in good faith oppose that motion because "[t]he Village of Ocean Beach did issue a Certificate of Occupancy"; in 2014, Village Justice William Wexler dismissed the criminal charges, finding

that the plaintiff "had a C of O." *Id.* ¶¶62, 63 (emphasis removed).

In June 2014, the Village commenced a "revocation hearing" concerning the subject Certificate of Occupancy, yielding a recommendation by a hearing officer that the certificate be revoked for noncompliant zoning. *Id.* ¶¶65-70. In 2015, that matter was "tabled subject to recall" by the Village's Board of Trustees. *Id.* ¶¶71-72. In 2016, 2017 and 2018, the Village denied plaintiff rental permits based upon purported zoning issues, thus denying him "potentially lucrative rental income from the property." *Id.* ¶77. These allegations all occurred well outside the relevant limitations period.

In 2019, plaintiff brought a declaratory judgment action in state court challenging the failure to issue a Certificate of Occupancy and arguing that the Village had validated the CO issued on July 2, 2010. DE 15-14 at 2. Notably, according to a decision issued in that matter, plaintiff argued, at that time, that defendants "failed to act in this matter for over five years." *Id.* In 2020, the state court dismissed the action based upon plaintiff's failure to comply with the notice of claim requirement. *Id.* A second such action, filed the following year, was dismissed in 2021 as premature based upon "the Village Board having not made a decision as to the revocation of the petitioners' CO at this time." DE 15-15 at 3. The state court remanded the decision to the Village Board for a further determination. *Id.*

Following the dismissal of plaintiff's initial complaint in this action, plaintiff caused to be conducted a Certificate of Occupancy search, the report from which is annexed to the amended complaint. *See* DE 15-16. According to the allegations of the amended complaint, in response to the 2024 Certificate of Occupancy search, "the Village, on or

about January 25, 2024, revoked the Certificate of Occupancy." DE 15 ¶88. Yet the report, annexed to the amended complaint, does not so indicate. Rather, the report contains an email from the current building inspector that states as follows:

> Though it appears there were several [temporary certificates of occupancy] issued and than [sic] a [permanent certificate of occupancy] issued from the multiple page document previously attached; this is a moot issue since the attached CO revocation letter dated July 15, 2011, revokes any CO that may have been issued.

DE 15-16 at 4; *see also* DE 15 ¶89 (repeating this text verbatim).

Based upon these allegations, plaintiff purports to set forth causes of action predicated upon violations of procedural and substantive due process in violation of 42 U.S.C. § 1983, municipal liability under *Monell,* and civil conspiracy to violate constitutional rights under 42 U.S.C. § 1985.

Standard of Review

The oft-repeated and well-understood standard of review for a motion to dismiss under Fed. R. Civ. P. 12(b)(6) has changed little from the first decade of this century when the Supreme Court issued its decisions in *Iqbal* and *Twombly*. My learned colleague Judge Louis Scarcella recently set forth a nuanced reiteration of the standard, which follows:

> A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8(a)(2) "does not require detailed factual allegations, but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937. A defendant may move to dismiss a complaint under

Rule 12(b)(6) for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* To meet this standard, a plaintiff must allege sufficient facts to show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* The allegations "must be enough to raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955.

In ruling on a Rule 12(b)(6) motion, "the duty of a court is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *DiFolco v. MSNBC Cable LLC*, 622 F.3d 104, 113 (2d Cir. 2010) (internal citation and quotation marks omitted). Where a plaintiff has not "nudged [its] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955. "Applying this plausibility standard is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *McCall v. Chesapeake Energy Corp.*, 817 F. Supp. 2d 307, 312 (S.D.N.Y. 2011) (quoting *Iqbal,* 556 U.S. at 679, 129 S.Ct. 1937). Although all well-pleaded factual allegations in the complaint are assumed true for purposes of a motion to dismiss, *see Koch*, 699 F.3d at 145, this principle is "inapplicable to legal conclusions," and "[t]hreadbare recitals

> of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937. The Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986).

In re Molina, 657 B.R. 172, 181 (Bankr. E.D.N.Y. 2023). In short, assuming the allegations of the complaint to be true and drawing inferences in favor of the plaintiff, the factual matter asserted must contain claims that are facially plausible.

Discussion

With respect to § 1983 claims, this Court must apply the state statute of limitations for personal injury actions, which is three years under New York C.P.L.R. § 214(5). *Kane v. Mount Pleasant Cent. Sch. Dist.*, 80 F.4th 101, 107 (2d Cir. 2023) (citation omitted). To be actionable, the matters complained of must have accrued within three years prior to the filing of this action. With respect to the 2011 revocation of the Certificate of Occupancy, the seemingly ill-considered criminal charges in 2012 and the denial of rental permits in 2016 through 2018, all of these actions occurred well outside the limitations period. Though federal law provides that a claim does not accrue in absence of notice, none of the allegations suggest that the plaintiff was unaware of any of the defendants' actions for any appreciable period of time; indeed, the litigative record suggests precisely the opposite.

Thus, the only theories requiring analysis are the due process claims arising from the alleged failure of defendants to act following the 2021 state court remand to the Village to conduct a hearing as to the propriety of the revocation of the Certificate of Occupancy. To press such a claim, however, the plaintiff must allege an entitlement to

right claimed. As a general matter, "federal courts should not become zoning boards of appeal to review nonconstitutional land-use determinations by the Circuit's many local legislative and administrative agencies." *Zahra v. Town of Southold*, 48 F.3d 674, 679–80 (2d Cir. 1995) (citation and internal marks omitted). As the Second Circuit explained:

> When an unsuccessful applicant for a governmental permit claims that an official or regulatory body has violated due process, the framework for evaluating the claim is the well-developed property interest analysis, which has its origins in the Supreme Court's decision in *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). The focus of this analysis is on the nature of the applicant's interest in the approval being sought, specifically whether the applicant has a clear entitlement to the approval sought from the government official or administrative body. *See, e.g., RRI Realty Corp. v. Incorporated Village of Southampton,* 870 F.2d 911 (2d Cir.) (analyzing whether applicant possessed property interest in building permit), cert. denied, 493 U.S. 893, 110 S.Ct. 240, 107 L.Ed.2d 191 (1989); *Sullivan v. Town of Salem*, 805 F.2d 81, 84–85 (2d Cir.1986) (analyzing whether applicant possessed property interest in certificate of occupancy); *Yale Auto Parts v. Johnson*, 758 F.2d 54, 58–60 (2d Cir.1985) (analyzing whether applicant possessed property interest in permit to use property as automobile junkyard).
>
> In *Yale Auto Parts*, 758 F.2d at 59, we stated that a "legitimate claim of entitlement" exists where, "absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted." This test focuses on the amount of discretion committed to the issuing authority, not the

> estimated probability that the authority would act favorably in a particular case. *See RRI Realty*, 870 F.2d at 918. As we observed in *RRI Realty,* "[t]he 'strong likelihood' aspect of *Yale Auto Parts* comes into play only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured; an entitlement does not arise simply because it is likely that broad discretion will be favorably exercised." *Id.* Put another way, "[t]he fact that the permit could have been denied on non-arbitrary grounds defeats the federal due process claim." *Id.*

Walz v. Town of Smithtown, 46 F.3d 162, 167–68 (2d Cir. 1995).

Here, the Court is not faced with a question of, for example, the propriety of the filing of criminal charges against plaintiff (about which there has already been a significant judicial finding); rather, the issue turns on the discretion afforded the Village in the matter remanded to it in the 2021 state court decision. That discretion is described in the state court order: the matter was not remanded with directions for a particular outcome. Rather, the state court left the Village with substantial discretion in making a determination, holding only that "the matter is remitted for a public hearing before the Village Board . . . on the revocation of the CO at issue." DE 15-15 at 3.

That leaves plaintiff solely with a complaint of the failure of the Village to hold the directed hearing since the state court remand in 2021. Importantly:

> The mere existence of *procedures* for obtaining a permit or certificate do not, in and of themselves, create constitutional "property interests." Were we to hold otherwise, aggrieved property owners would be empowered to bring constitutional challenges at virtually every stage of the building process in municipalities. We

> expressly decline to announce a rule that would obligate federal courts to consider endless numbers of alleged "property interests" arising not from the benefits themselves, but as extensions of existing or sought property interests.

Zahra, 48 F.3d at 681. Thus, the alleged failure of the Village to hold the hearing as directed cannot provide the basis for a due process claim. And undoubtedly plaintiff has alternative avenues to enforce his rights through the state court system.

Conclusion

As the amended complaint contains solely claims that are barred by the statute of limitations or are otherwise unactionable, the motion to dismiss is GRANTED. The Clerk shall close the case.

SO ORDERED.

Dated: July 9, 2024
Central Islip, New York

/s/ Gary R. Brown
GARY R. BROWN
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 24-2033-cv

PHILIP G. POTTER,

Plaintiff-Appellant,

v.

INCORPORATED VILLAGE OF OCEAN BEACH, VILLAGE BUILDING DEPARTMENT, VILLAGE BOARD OF TRUSTEES, MAYOR OF THE VILLAGE OF OCEAN BEACH, VILLAGE BOARD OF ZONING APPEALS, GERARD S. DRISCOLL, Village Building Inspector, in his official and individual capacities, THEODORE MINSKI, Village Building Inspector, in his official and individual capacities, NICHOLAS WEISS, Village Building Inspector, in his official and individual capacities, LOUIS SANTORA, Village Building Inspector, in his official and individual capacities, ROBERT FUCHS, Village Prosecutor, in his official and individual capacities, KENNETH GRAY, Village Hearing Officer, in his official and individual capacities,

Defendants-Appellees.

ORDER

May 13, 2025

PRESENT: DEBRA ANN LIVINGSTON, *Chief Judge,* GERARD LYNCH, BETH ROBINSON, *Circuit Judges.*

Appellant Philip G. Potter having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.