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COURT OF APPEALS

STATE OF NEW YORK

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TOWN OF OYSTER BAY,

Appellant,

-against-

No. 163

KIRKLAND,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
September 6, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Sharona Shapiro  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 163, Town of Oyster  
2 Bay.

3 Counselor, you want any rebuttal time?

4 MR. GIAIMO: Yes, Your Honor, I would like  
5 two minutes.

6 CHIEF JUDGE LIPPMAN: Two minutes? Okay.  
7 Go ahead.

8 MR. GIAIMO: Good afternoon. May it please  
9 the court. My name is Joseph Giaimo. I am the  
10 special counsel to the Town of Oyster Bay.

11 In probably the most profound  
12 Constitutional issue before this court, one that has  
13 never been addressed, in this particular case - - - I  
14 know it's a hot bench so I don't have to go into the  
15 facts again. One of the things that should be  
16 brought out, however, is that the complaint in this  
17 action, the complaint by the DHR - - - not our  
18 complaint, not the Town's complaint - - - the DHR  
19 complaint, which the Town moved to void, does not say  
20 anything about racial discrimination on the part of  
21 the Town. The Town is - - - this claim - - -

22 CHIEF JUDGE LIPPMAN: It asks you to end  
23 your preferences, doesn't it?

24 MR. GIAIMO: It deals with the preference.  
25 But what's the - - -

1 CHIEF JUDGE LIPPMAN: But why isn't that a  
2 legitimate - - -

3 MR. GIAIMO: Be - - -

4 CHIEF JUDGE LIPPMAN: - - - issue for them  
5 to raise?

6 MR. GIAIMO: Well, because the law is clear  
7 in this state that a preference - - - and it's in my  
8 - - - if you look at addendum A and B in the briefs,  
9 the State of New York has approved preferences. And  
10 - - -

11 CHIEF JUDGE LIPPMAN: Preferences that  
12 discriminate?

13 MR. GIAIMO: No, not a preference that  
14 discriminates, absolutely not, and that is the sine  
15 qua non.

16 CHIEF JUDGE LIPPMAN: Yes? So?

17 MR. GIAIMO: We are dealing with an  
18 accident. One and a half percent of the population -  
19 - - of the residents of the Town of Oyster Bay are  
20 black. There's an additional twelve percent black  
21 countywide. Okay. There's seventeen percent - - -

22 JUDGE CIPARICK: But why perpetuate that?  
23 Why perpetuate that with preferences for this new  
24 housing - - - this new affordable housing?

25 MR. GIAIMO: Because we're entitled to

1 grant a preference to a resident. Let me - - - this  
2 is the bottom line. What does the DHR want? Does  
3 the D - - -

4 CHIEF JUDGE LIPPMAN: They want you to end  
5 the preferences. What could be wrong with that? Why  
6 - - - if this accident that's produced this skewed  
7 situation with the population is ended in terms of  
8 not perpetuated by continuing preferences, why isn't  
9 that within their bailiwick to ask you to do?

10 MR. GIAIMO: Your Honor, there'd be 87.6  
11 percent nonblack - - - nonresident - - - nonblack  
12 residents.

13 JUDGE PIGOTT: Mr. Giaimo, I - - -

14 MR. GIAIMO: You're still going to have an  
15 87.6 - - - an 86.6 difference.

16 JUDGE PIGOTT: Is that - - -

17 MR. GIAIMO: So what difference would that  
18 make? In other words, if I may, stop the preference.  
19 Now what? Now is the Town - - - now is DHR going to  
20 say something, oh, wait a minute, there's still a  
21 disparity here and we think you should change it.

22 CHIEF JUDGE LIPPMAN: No, what they seem to  
23 be saying is don't perpetuate a situation which you  
24 describe as an accident, but whatever it is, that in  
25 order to cure this situation, let it be open to

1 everybody. And why is that a problem?

2 MR. GIAIMO: The Supreme Court of the  
3 United States has spoken on this over and over in  
4 Parents - - -

5 CHIEF JUDGE LIPPMAN: In what way have they  
6 spoken to your situation?

7 MR. GIAIMO: The Supreme Court of the  
8 United States in Parents - - - in that case, there  
9 was a claim that there should be fifteen to fifty  
10 percent spread between black and white, averaging out  
11 to thirty-four percent, and therefore, there should  
12 be thirty-four percent black students.

13 JUDGE CIPARICK: They're not asking for any  
14 specific numbers, though; they haven't suggested any  
15 quotas.

16 MR. GIAIMO: But what are they suggesting?

17 JUDGE READ: Well, there hasn't been any  
18 kind of administrative hearing here yet either.  
19 There's really no factual record.

20 MR. GIAIMO: There is nothing - - -

21 JUDGE SMITH: Well, they - - -

22 MR. GIAIMO: There are no facts. This was  
23 summary judgment.

24 JUDGE GRAFFEO: I think there's a different  
25 threshold issue here that at least I see. I guess

1 I'm viewing this differently because I thought the  
2 issue was whether DHR has the ability to commence  
3 this investigation, and if so, to let it go through  
4 the administrative process and then we'd have a  
5 record of what the statistical or any other evidence  
6 is that you both want to put in - - -

7 MR. GIAIMO: There's no alle - - -

8 JUDGE GRAFFEO: - - - and then the courts  
9 could review it.

10 MR. GIAIMO: There is no allegation that  
11 the Town - - - the Town just had its zoning  
12 ordinance.

13 JUDGE PIGOTT: No, you're missing - - - I  
14 think you're - - -

15 JUDGE GRAFFEO: Isn't this premature, what  
16 you're doing?

17 MR. GIAIMO: No, no, there's nothing to - -  
18 - what will be gained out of a factual hearing? What  
19 facts?

20 JUDGE SMITH: Isn't it a fact that the Town  
21 has not yet accused you of doing anything - - - I'm  
22 sorry, the - - -

23 MR. GIAIMO: They have not.

24 JUDGE SMITH: - - - DHR hasn't accused you  
25 of doing anything wrong?

1 MR. GIAIMO: That's correct.

2 JUDGE SMITH: So why not wait until they do  
3 it?

4 MR. GIAIMO: What - - -

5 JUDGE SMITH: Maybe they'll find in your  
6 favor and go away.

7 JUDGE READ: Well, isn't that why we - - -

8 MR. GIAIMO: How - - - what fact is there?

9 JUDGE READ: - - - that's why we have the  
10 doctrine - - -

11 MR. GIAIMO: The only - - -

12 JUDGE READ: That's why we have the  
13 doctrine of exhaustion of administrative remedies.

14 MR. GIAIMO: Exhaustion - - - this - - - we  
15 are here based upon the court of appeals - - -

16 CHIEF JUDGE LIPPMAN: No, no, but the  
17 question is whether you need to exhaust, whether  
18 there needs to be a record, and then if you're right  
19 and the Town is totally innocent of anything,  
20 wouldn't that come out on the record and maybe  
21 they'll say you're right and it - - - there'll be no  
22 charges against you - - -

23 MR. GIAIMO: There's nothing - - -

24 CHIEF JUDGE LIPPMAN: - - - ultimately.

25 MR. GIAIMO: There's nothing to come out.

1 They're attacking solely on a basis of the fact that  
2 it's 1. - - -

3 JUDGE SMITH: They haven't attacked yet.  
4 They - - -

5 MR. GIAIMO: They have, too. They filed a  
6 complaint against the - - -

7 JUDGE SMITH: Their staff filed a complaint  
8 before their hearing officer.

9 MR. GIAIMO: Wait, what happens when you go  
10 to an administrative hearing? What is there to look  
11 at?

12 JUDGE PIGOTT: Wait, wait, wait. Can - - -  
13 you're almost agreeing and disagreeing in the same  
14 thing. I thought you were saying, DHR, you just  
15 don't walk into this town, file a complaint and then  
16 make us go in front of one of your hearing officers  
17 where your hearing officers, the next thing you - - -  
18 or, she is going to do is say, now, how can we settle  
19 this, because they're not going to go to a liability  
20 hearing immediately. And they're going to say, if  
21 you pay us 50,000 dollars and change your zoning  
22 ordinances, we'll go away. And I thought what you  
23 were up here to say is we don't want to do that  
24 because they don't have the authority to do what  
25 they're saying they're doing in that complaint.



1                   MR. GIAIMO: That is right. That is what  
2 I'm arguing. They do not have the authority to file  
3 a complaint based upon numbers.

4                   JUDGE PIGOTT: So you don't - - - well - -  
5 - well, what I think you want to say is, we don't  
6 have to go through an administrative hearing because  
7 they don't have the authority to hold one, and the  
8 reason they don't is they can't sue a town on their  
9 zoning ordinance.

10                  MR. GIAIMO: Well, you've articulated  
11 better than I have, Judge. That is correct. That is  
12 absolutely cor - - - you know, it's a case of the DHR  
13 - - - first of all, the DHR says - - - the DHR says  
14 it has never had such a case. You'll see it in the  
15 record.

16                  CHIEF JUDGE LIPPMAN: Why is the process  
17 that they're laying out one that you shouldn't be  
18 following in the normal course and see what happens?

19                  MR. GIAIMO: What - - - for what - - - it's  
20 a town record - - - we don't even participate in  
21 that.

22                  CHIEF JUDGE LIPPMAN: Well, how can we say  
23 at this point whatever the complaint was that led  
24 them to begin this process was wrong, the Town is  
25 right, there's no issue.

1 MR. GIAIMO: The Town - - -

2 CHIEF JUDGE LIPPMAN: Your issue is that  
3 they don't have the authority to come in and do what?

4 MR. GIAIMO: To come in, to file a  
5 complaint, to investigate based upon numbers. And  
6 that's all they're doing. If we follow Supreme Court  
7 of the United States precedent, the numbers game  
8 should be over. We are no longer in that kind of a  
9 society. All of the cases say that. We - - - the  
10 DHR - - -

11 JUDGE GRAFFEO: So the threshold issue is  
12 whether DHR can initiate its own complaint against  
13 the Town.

14 MR. GIAIMO: If it's - - -

15 JUDGE GRAFFEO: Right?

16 MR. GIAIMO: If it's based on some facts,  
17 but this is not based on facts. They come in and - -  
18 - in the complaint they say nothing about the Town at  
19 all. They accuse the builders, the developers. They  
20 don't say anything about a second cause of action  
21 refers to the Town.

22 JUDGE GRAFFEO: How can a judicial forum  
23 determine if there's facts or not facts until there's  
24 a record?

25 MR. GIAIMO: There's nothing to determine.

1 It's a question of the zoning resolution, and the  
2 facts are there. It's 1.6, 13.6, that's the fact.  
3 You can't change that. What is a hearing going to  
4 do?

5 CHIEF JUDGE LIPPMAN: Well, can they - - -

6 MR. GIAIMO: We'll be right back up here.

7 CHIEF JUDGE LIPPMAN: Can they find out  
8 whether the zoning regulations cause those numbers or  
9 that situation in the town?

10 MR. GIAIMO: No. No, they can't do that  
11 based upon numbers. They can't find - - - what they  
12 cannot, if you follow the Constitutional - - -

13 JUDGE SMITH: Suppose, theoretically - - -  
14 I understand there's no evidence of this, but that's  
15 the point. Suppose at the hearing they developed a  
16 record that when these ordinances were passed, the  
17 reason - - - that it was passed as a result of people  
18 complaining about too many minorities moving into the  
19 town. Wouldn't that be a problem?

20 MR. GIAIMO: No, I don't - - - that's pure  
21 fiction.

22 JUDGE SMITH: Well, maybe it is, but don't  
23 you have to have a record to find out what's fiction  
24 - - -

25 MR. GIAIMO: I'm here - - -

1 JUDGE SMITH: - - - and what's fact?

2 MR. GIAIMO: I'm not here on that basis.

3 I'm here because the only allegation against the Town  
4 is that the numbers create a disparate impact upon  
5 blacks, and solely blacks, according to Commissioner  
6 Kirkland. That's the only issue before this court is  
7 the zon - - - this is not - - - by the way, if they  
8 made a facial attack, which they did not do - - - if  
9 they made a facial attack upon the zoning, I might  
10 have another question before you. But all this is is  
11 a claim - - -

12 CHIEF JUDGE LIPPMAN: But it's not - - -

13 MR. GIAIMO: - - - where we want to look -  
14 - -

15 CHIEF JUDGE LIPPMAN: But counselor, it's  
16 not in a vacuum, right? You do have these zones that  
17 give preferences to residents, right?

18 MR. GIAIMO: But this is not exclusionary  
19 zoning. This is not like any of the other cases  
20 where the Supreme Court says, well, it's  
21 exclusionary, you're keeping out. But that's not  
22 happened here. These were senior citizens and first  
23 generation buyer zoning resolutions to keep residents  
24 in the town.

25 CHIEF JUDGE LIPPMAN: Yeah, but they could

1 have an effect that causes - - -

2 MR. GIAIMO: A disparate effect?

3 CHIEF JUDGE LIPPMAN: Say again?

4 MR. GIAIMO: A disparate effect?

5 CHIEF JUDGE LIPPMAN: Yeah.

6 MR. GIAIMO: But those days - - - I say  
7 that's not the law anymore.

8 CHIEF JUDGE LIPPMAN: Okay, you'll have  
9 rebuttal - - -

10 MR. GIAIMO: That's not - - -

11 CHIEF JUDGE LIPPMAN: - - - and we'll let  
12 you say more. Let's hear from your adversary.

13 JUDGE CIPARICK: What are you seeking to do  
14 here?

15 CHIEF JUDGE LIPPMAN: And what are you  
16 charging them with?

17 MR. SWIRSKY: Okay. Let me - - -

18 CHIEF JUDGE LIPPMAN: If anything, at this  
19 point. Go ahead.

20 MR. SWIRSKY: Yes. Let me just say that  
21 this - - - the allegations of the complaint, and I  
22 just want to clar - - -

23 JUDGE CIPARICK: Your complaint, you're  
24 talking about or the complaint in this matter?

25 MR. SWIRSKY: I'm talking about the

1 Division-initiated complaint.

2 JUDGE CIPARICK: The Division's complaint,  
3 okay.

4 MR. SWIRSKY: The allegations are based  
5 upon a theory of adverse impact, a theory - - -

6 CHIEF JUDGE LIPPMAN: Of the zoning  
7 regulations?

8 MR. SWIRSKY: Right.

9 JUDGE PIGOTT: Is there a town, village,  
10 city or any other subdivision of the state that you  
11 can't go sue tomorrow on exactly the same claim?

12 MR. SWIRSKY: I'm sorry, I didn't - - -

13 JUDGE PIGOTT: Is there a state, town,  
14 village or any other subdivision of the government  
15 that you can't sue tomorrow on this very same claim?

16 MR. SWIRSKY: Can't sue - - - I didn't hear  
17 - - - didn't seek - - - I'm sorry. You said one word  
18 - - -

19 JUDGE PIGOTT: You can sue every city - - -

20 MR. SWIRSKY: Yes.

21 JUDGE PIGOTT: - - - saying, you know,  
22 you've got senior citizen housing in here. You can  
23 sue every town, saying that you've got playgrounds  
24 that violate the ADR. You can sue the governor,  
25 saying that he's not hiring sufficient numbers of

1 people, right?

2 MR. SWIRSKY: Right.

3 JUDGE PIGOTT: And when you do that, when  
4 you sue the governor and then he has to show up in  
5 front of one of your hearing officers and explain,  
6 and you say, well, look, we can settle this if you  
7 just hire a few more republicans or democrats,  
8 depending on who the governor is, and you then settle  
9 the claim, everything goes away.

10 And I think the point is that you - - - the  
11 argument, I think, although Mr. Giaimo seems to  
12 disagree with me, is whether or not you have the  
13 authority to just wander around and sue everybody  
14 that you think is in any way doing this. And it  
15 seems to me that when a person complains to you that  
16 something is happening, you can investigate it. You  
17 do have the right on your own to bring actions, but  
18 you seem to think, and maybe you're right, that you  
19 can sue anyone, anytime, on any theory, for whatever  
20 reason, and end up - - - and these people then end up  
21 in an administrative hearing of substantial expense  
22 and time that then is going to - - - could  
23 conceivably hurt that respondent.

24 MR. SWIRSKY: Well, Your Honor, this is  
25 based upon evidence that the Town passed a zoning

1 resolution that set up this residency preference.

2 JUDGE PIGOTT: They have senior citizen  
3 towers in Buffalo.

4 MR. SWIRSKY: Right.

5 JUDGE PIGOTT: They have senior citizen  
6 towers in New York City. Are you going to sue 'em?

7 MR. SWIRSKY: Well, I'm not sure whether or  
8 not there are residency preferences for every senior  
9 citizen develop - - -

10 JUDGE PIGOTT: Can you sue them?

11 MR. SWIRSKY: Can you sue them?

12 JUDGE PIGOTT: Yeah, can you go sue the  
13 city of New York saying we don't like the fact that  
14 you've got these senior citizen towers?

15 MR. SWIRSKY: Well, no, because - - -

16 JUDGE PIGOTT: Why not?

17 MR. SWIRSKY: - - - the law exempts housing  
18 developments for people over fifty-five. But with  
19 respect to - - -

20 JUDGE PIGOTT: Does that include zoning  
21 developments?

22 MR. SWIRSKY: Well, if you're talking about  
23 age, specifically - - -

24 JUDGE PIGOTT: No, I'm trying to figure out  
25 what can stop you? I just don't see any control on



1           what you can do and when. Do you recognize any  
2           limitation on who and when you can sue and why?

3                   MR. SWIRSKY: Yes, the law is very specific  
4           that a party can be liable if it discriminates with  
5           respect to housing, and adverse impact is a theory  
6           that this court, in the Kilian case thirty-nine years  
7           ago, upheld. In that particular case, the Division  
8           on its own complained, identified a practice, namely  
9           a company's filling positions through referrals and  
10          not advertising for workers, and the fact that the  
11          company had no black employees, whereas the  
12          surrounding area was 10.7 percent black. And this  
13          court upheld the Division's order after hearing on  
14          that.

15                   JUDGE PIGOTT: I get that, and I can  
16          understand why companies can be brought to bear with  
17          respect to that. I'm missing it on government. I'm  
18          just wondering why, if a government is doing  
19          something - - - I mean there - - - I thought. Maybe  
20          they're not bigger than you. I mean, the elected  
21          officials in the town are doing what they're doing,  
22          and you're saying that SDHR can at any time challenge  
23          what the town is doing and sue them for it.

24                   MR. SWIRSKY: Well, Your Honor - - -

25                   JUDGE GRAFFEO: Is there a statute or - - -

1 I mean, what's the legal basis that allows you to  
2 initiate your own complaint as opposed to some other  
3 resident of this town filing a complaint?

4 MR. SWIRSKY: Well, the Division does have  
5 the power to initiate its own complaint, and - - -

6 JUDGE GRAFFEO: And where do we find that  
7 power, if you want to look - - -

8 MR. SWIRSKY: In Executive Law 296 - - -  
9 295(6)(b), it says the Division may make a complaint  
10 on its own motion. And Kilian Manufacturing was a  
11 case, in fact, based upon a Division-initiated  
12 complaint.

13 CHIEF JUDGE LIPPMAN: Are you doing it - - -  
14 - your adversary alleges you're doing it just on  
15 statistical numbers.

16 MR. SWIRSKY: No.

17 CHIEF JUDGE LIPPMAN: Is that what's  
18 happening?

19 MR. SWIRSKY: No. We're doing it also on  
20 an identified practice, namely the zoning residency  
21 preference. So you have a practice identified and a  
22 statistical predicate.

23 But I do want to stress - - -

24 JUDGE SMITH: And you say that's all you  
25 need?

1                   MR. SWIRSKY: Well, I think, Your Honor,  
2                   this goes to the fact that this matter is in its  
3                   preliminary stages. We don't even have an  
4                   investigatory - - -

5                   JUDGE SMITH: Well, I mean, I guess what  
6                   I'm going to say is if it's all you need, then why  
7                   should he have to exhaust administrative remedies?  
8                   Those are admitted facts.

9                   MR. SWIRSKY: Because we do not have yet a  
10                  completed investigation that looks more in depth into  
11                  the allegations.

12                  JUDGE SMITH: Well, what sort of thing  
13                  would you be looking for?

14                  MR. SWIRSKY: Well, I think there are  
15                  certainly issues that I'm sure have been raised  
16                  concerning who the applicants were, for instance,  
17                  these housing developments, where they lived - - -

18                  JUDGE PIGOTT: Which - - -

19                  MR. SWIRSKY: - - - whether or not there is  
20                  in fact an adverse impact. We have not yet made a  
21                  determination - - -

22                  JUDGE PIGOTT: Mr. Swirsky, well, then what  
23                  inspired this? I mean, why do you go pick on Oyster  
24                  - - -

25                  JUDGE READ: Oyster Bay.

1 JUDGE PIGOTT: - - - Oyster Bay?

2 MR. SWIRSKY: Well - - -

3 JUDGE PIGOTT: Can you go after Grand  
4 Island? That's where I live. I'm just kind of  
5 curious.

6 MR. SWIRSKY: Well - - -

7 JUDGE PIGOTT: I mean, doesn't somebody  
8 have to incite this or do you just sit in your office  
9 - - - not you personally, obviously - - -

10 MR. SWIRSKY: Right.

11 JUDGE PIGOTT: - - - or somebody sit in  
12 their office and throw a dartboard and say let's pick  
13 on some town in Herkimer County?

14 MR. SWIRSKY: Well, if the Town feels that  
15 it has a meritorious defense, it can - - -

16 JUDGE PIGOTT: No, I know - - - I get that.

17 MR. SWIRSKY: Right.

18 JUDGE PIGOTT: But you've already filed a  
19 complaint, right?

20 MR. SWIRSKY: Right. All right - - -

21 JUDGE PIGOTT: And you've already made  
22 accusations.

23 MR. SWIRSKY: Right.

24 JUDGE PIGOTT: But today you're saying  
25 well, we've got to look into it to see whether or not

1 we've got a case.

2 MR. SWIRSKY: Okay. Well, this goes really  
3 to the dual role, if you will, that our agency plays.  
4 We have prosecutorial units that filed this  
5 complaint, and we have a neutral system of  
6 investigation, and if the matter should go to that  
7 stage, an administrative law judge.

8 CHIEF JUDGE LIPPMAN: What was the answer  
9 to your other question? How did this come about?

10 MR. SWIRSKY: How did the complaint come  
11 about?

12 CHIEF JUDGE LIPPMAN: Yeah. Did people  
13 complain to you? Is that it?

14 MR. SWIRSKY: The answer is I am not  
15 completely sure. The record does not reflect - - -  
16 have any pre - - - any investigatory report that  
17 preceded the complaint.

18 CHIEF JUDGE LIPPMAN: But logic would tell  
19 you that this came to your attention, maybe someone  
20 said, hey, these zones perpetuate some kind of - - -

21 MR. SWIRSKY: Something came to the  
22 attention of the deputy commissioner in charge of - -  
23 -

24 JUDGE CIPARICK: It could have been a  
25 newspaper article or it could have been something

1           like that? A newspaper article, maybe? A newspaper  
2           - - -

3                     MR. SWIRSKY: Paper article? I don't - - -

4                     JUDGE CIPARICK: A newspaper article.

5                     MR. SWIRSKY: I don't know for sure, but  
6           something came to the attention of the deputy  
7           commissioner in charge of - - -

8                     JUDGE PIGOTT: Why don't you make something  
9           up? What would inspire a complaint? Judge Ciparick  
10          says a newspaper article can do it.

11                    MR. SWIRSKY: Well, the deputy commissioner  
12          thought that there were some facts that gave rise to  
13          an allegation of discrimination based upon the zoning  
14          practices. The complaint does have attached to it  
15          many studies and newspaper articles from which the  
16          deputy commissioner derived his allegations.

17                    CHIEF JUDGE LIPPMAN: Is this an unusual  
18          proceeding, counsel, or is this typical for your  
19          agency?

20                    MR. SWIRSKY: We've had a number of  
21          Division-initiated complaints over the years.

22                    JUDGE PIGOTT: Didn't you say this is your  
23          first one against the government?

24                    MR. SWIRSKY: I'm sorry?

25                    JUDGE PIGOTT: This is your first one

1           against the government?

2                   MR. SWIRSKY: We've had - - - had a number  
3 of them over the years.

4                   CHIEF JUDGE LIPPMAN: Against the  
5 government, the judge is asking.

6                   MR. SWIRSKY: Against the Town - - - well,  
7 certainly we've had complaints - - -

8                   JUDGE CIPARICK: Well, not Oyster Bay,  
9 necessarily, but any town - - -

10                   CHIEF JUDGE LIPPMAN: No, but any  
11 governmental - - -

12                   JUDGE CIPARICK: - - - any municipality,  
13 any - - -

14                   MR. SWIRSKY: Well - - -

15                   JUDGE CIPARICK: - - - political  
16 subdivision.

17                   MR. SWIRSKY: - - - governmental-entities  
18 are respondents all the time, and - - -

19                   CHIEF JUDGE LIPPMAN: Counselor, I'm asking  
20 is this common?

21                   MR. SWIRSKY: - - - for any discrimination  
22 case.

23                   CHIEF JUDGE LIPPMAN: Towns, cities,  
24 villages - - -

25                   MR. SWIRSKY: Absolutely.

1 CHIEF JUDGE LIPPMAN: - - - is it common?

2 JUDGE SMITH: Division-initiated

3 complaints, not complaints from - - -

4 MR. SWIRSKY: Division-initiated

5 complaints? Yeah, I can recall one involving the

6 County of Nassau some years ago, respecting a policy

7 the - - - an employment policy the county had.

8 JUDGE PIGOTT: But I get employment too,

9 because it's pretty clear. It just is remarkable to

10 me - - - I mean, can you - - - maybe I'm wrong, but I

11 mean, can you sue the Town of Oyster Bay and say you

12 don't have enough women on your town board?

13 MR. SWIRSKY: Well, this is not that kind

14 of a case. This deals with - - -

15 JUDGE PIGOTT: I understand that. I'm just

16 wondering where your jurisdiction ends. And this

17 one, Mr. Giaimo's argument aside, I thought was

18 whether or not he has to - - - whether you - - -

19 whether he has to exhaust - - - whether he's got to

20 go through your procedure before he can challenge

21 your right to hold it in the first place. Now, he

22 looks at his case a little differently than I do.

23 But isn't that an issue?

24 MR. SWIRSKY: Well, here we're talking

25 about a specific housing policy that, as alleged, has



1 an adverse impact. Now, there does not have to be,  
2 as this court said in the Kilian case thirty-nine  
3 years ago, a specific subjective intent to  
4 discriminate. There has - - -

5 JUDGE GRAFFEO: Is this public housing?

6 MR. SWIRSKY: I'm sorry?

7 JUDGE GRAFFEO: Is this public housing or  
8 private, affordable housing? I know there's a  
9 developer involved, but is there any public funds  
10 coming into this development?

11 MR. SWIRSKY: Well, named in this complaint  
12 are developers who have taken advantage of that  
13 zoning - - -

14 JUDGE PIGOTT: You're not - - - that's, I  
15 guess, kind of the point here. You're not arguing  
16 anything other than they have a zoning ordinance.

17 MR. SWIRSKY: Right.

18 JUDGE PIGOTT: And you say the zoning  
19 ordinance favors either older or younger, I've  
20 forgotten now, and you want to make this government  
21 change their zoning.

22 MR. SWIRSKY: Well, we're asking the Town -  
23 if the complaint is sustained, we're asking the Town  
24 to drop its preferences. So, in effect, yes, we're  
25 asking that a zoning ordinance not be enforced.

1 JUDGE GRAFFEO: Is it both of these that  
2 you're investigating or just the next generation?

3 MR. SWIRSKY: We're investigating all the  
4 parties.

5 JUDGE GRAFFEO: The Golden Age and - - -

6 MR. SWIRSKY: Right.

7 JUDGE GRAFFEO: - - - The Next Generation?

8 MR. SWIRSKY: Both programs, yes.

9 JUDGE PIGOTT: Before - - -

10 JUDGE GRAFFEO: If - - -

11 JUDGE PIGOTT: Before you go, the city of  
12 Niagara Falls just instituted a new program where  
13 they're going to give subsidies to students that  
14 promise to live in the city. They've got a problem  
15 with that, don't they, because obviously the students  
16 are young.

17 MR. SWIRSKY: Well, I can't really - - -  
18 can't really speculate on that.

19 JUDGE PIGOTT: But if you wanted to, you  
20 could sue the city of Niagara Falls and make them  
21 change their city ordinance to say you can't prefer  
22 students.

23 MR. SWIRSKY: I think that really depends  
24 on a lot of other factors. I can say - - -

25 JUDGE PIGOTT: But not jurisdiction?

1 MR. SWIRSKY: But not jurisdiction.

2 JUDGE PIGOTT: You can do it?

3 MR. SWIRSKY: No, I do not think that the  
4 Division lacks jurisdiction. The town could  
5 certainly be seen as an aider and abettor of the  
6 discriminatory practice. But again, these are fact-  
7 driven - - -

8 JUDGE PIGOTT: Can you throw out a zoning  
9 ordinance that's agricultural because it's not  
10 letting other people move in?

11 MR. SWIRSKY: Again, I really, with all due  
12 respect, don't want to get into what I see as  
13 speculation.

14 JUDGE SMITH: But again, you would say  
15 whatever problems there are with that, they're not  
16 jurisdictional?

17 MR. SWIRSKY: Right. Let's put it this  
18 way. These are mixed questions of fact and law at  
19 best. And this court has held that, in the Schultz  
20 case from 1995, that a Constitutional claim that's  
21 incidental or that may require the resolution of  
22 factual issues reviewable at the administrative level  
23 should be addressed to the administrative body. As  
24 you, Judge Smith, put it before to the Oyster Bay  
25 counsel, if they follow through the investigation

1 they may be done with the matter. The Division may  
2 decide that Oyster Bay is not a proper party.

3 CHIEF JUDGE LIPPMAN: Okay, counselor.

4 Judge Graffeo, do you have a final question  
5 you wanted?

6 No.

7 Okay, thanks, counsel.

8 MR. SWIRSKY: Okay, thank you.

9 CHIEF JUDGE LIPPMAN: We'll get rebuttal  
10 now.

11 MR. GIAIMO: Thank you. The first thing  
12 I'd like to do is quote the spokesman for the DHR.  
13 It's in the record at page 34 on the record and it  
14 says, "The complaint is the Division's first against  
15 an affordable housing program on Long Island, and  
16 such actions are unusual elsewhere in the state."  
17 It's the first and only action.

18 It also said - - - their spokesman said,  
19 and it's in the record, that we don't have a  
20 complainant yet, we're going to look for one. That's  
21 exactly what he says, and that's in the record.

22 In the Kilian case, upon which the DHR  
23 relies, if you'll look at page 17 of the brief, my  
24 brief, the Court said it does not follow from today's  
25 decision that it will be open to the Division in any

1 community in which there is a significant minority  
2 population on a statistical predicate only. To  
3 question an employer on whose payroll there is to be  
4 found no minority. - - -

5 CHIEF JUDGE LIPPMAN: What about the  
6 statistical predicate plus the - - -

7 MR. GIAIMO: There's got - - -

8 CHIEF JUDGE LIPPMAN: - - - the zoning,  
9 though?

10 MR. GIAIMO: There's got to be something  
11 else.

12 CHIEF JUDGE LIPPMAN: Say again?

13 MR. GIAIMO: There's got to be something  
14 else.

15 CHIEF JUDGE LIPPMAN: Why?

16 MR. GIAIMO: Because you cannot base an - -  
17 - and this court said it, you can't base - - - in  
18 that case the employer wasn't hiring a sufficient  
19 number of blacks in proportion to the population, and  
20 the Court said it's okay, but they found other stuff.  
21 They didn't like the employer's hiring practices but  
22 they made the reservation. You can't do it on a  
23 statistical basis only; you've got to have something  
24 else. Now, there's nothing that let - - -

25 CHIEF JUDGE LIPPMAN: Could you do it if

1           there's a newspaper article, that was raised before,  
2           that says that the town of Oyster bay discriminates  
3           against any particular - - - against black people - -  
4           -

5                       MR. GIAIMO:   No.

6                       CHIEF JUDGE LIPPMAN:  - - - by these - - -  
7           this zoning which give preferences to residents or  
8           younger people or whatever it is, and they see that  
9           and they look at it and they say, hm, that's  
10          interesting, we better take a look at that and see if  
11          it's the case and have a hearing where this is all  
12          sort of hammered out as to what the - - - can they do  
13          that?

14                      MR. GIAIMO:  No.  Do you know what they can  
15          do?  If this court - - -

16                      CHIEF JUDGE LIPPMAN:  It's unconstitutional  
17          for them to do that?

18                      MR. GIAIMO:  Yeah, I think so.  Just  
19          because they read an article - - - well, there wasn't  
20          an article in this case but let's - - -

21                      CHIEF JUDGE LIPPMAN:  Let's say they  
22          whatever, it's some kind of public issue.  Maybe  
23          there was a town meeting and residents complained  
24          that - - - or outsiders complained that you're  
25          discriminating or the preferences cause a

1 perpetuation of a discriminatory situation. Can they  
2 come in and take a look at it and, you know, have a  
3 hearing?

4 MR. GIAIMO: My answer is no. In my brief  
5 - - - in my first brief, I refer to the great New  
6 York Mets.

7 CHIEF JUDGE LIPPMAN: Great is a particular  
8 descriptive word in this case - - -

9 MR. GIAIMO: Yeah.

10 CHIEF JUDGE LIPPMAN: - - - but go ahead.

11 MR. GIAIMO: There is not one black  
12 ballplayer on the Mets. Does that give the DHR the  
13 right to come in and claim employment discrimination?  
14 And the New York Knicks, by last count, have - - -

15 JUDGE SMITH: But isn't the usual rule that  
16 the litigant can come into court and claim anything  
17 it wants? Then a court looks at it and decides  
18 whether it's a good case or not. You're trying to  
19 say they can't even write the - - - before they even  
20 sue you you're trying to enjoin them from suing you.

21 MR. GIAIMO: That's correct. They can't go  
22 in - - - they can't go and claim that the New York  
23 Knicks should have more white ballplayers just  
24 because there's only two on the team.

25 JUDGE SMITH: You're saying - - -

1 MR. GIAIMO: They can't do that.

2 JUDGE SMITH: Isn't there a difference  
3 between saying they can't win the lawsuit and they  
4 can't bring it?

5 MR. GIAIMO: No, that is not the  
6 difference. They are not imbued with the authority  
7 to just do what they want.

8 JUDGE PIGOTT: Well, one of the  
9 distinctions could be - - - I'm not suggesting this,  
10 but if someone were cut by the Mets and they were  
11 African-American and they filed a claim with SDHR  
12 saying I can play a better second base than the  
13 person they kept and they're guilty of  
14 discrimination, would you agree that they then could  
15 - - -

16 MR. GIAIMO: That's fine.

17 JUDGE PIGOTT: - - - pursue that? What - -  
18 -

19 MR. GIAIMO: That's fine.

20 JUDGE PIGOTT: What I think you're saying  
21 is that the SDHR can't just look at the box score and  
22 say we're going to start a lawsuit against the Mets  
23 because - - -

24 MR. GIAIMO: Precisely, and that's what  
25 happened here.



1

CHIEF JUDGE LIPPMAN: Okay, counselor.

2

MR. GIAIMO: Thank you.

3

CHIEF JUDGE LIPPMAN: Thank you both.

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Town of Oyster Bay v. Kirkland, No. 163 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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Date: September 13, 2012