

No. 21-1324

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IN THE  
Supreme Court of the United States

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JOHN ZARBA AND SUSAN LEMOIE-ZARBA  
PETITIONERS

v.

THE TOWN OF OAK BLUFFS ET. AL,  
RESPONDENTS

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*PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT*

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**PETITION FOR REHEARING**

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Dated: July 5, 2022

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1.

## INTRODUCTION

Pursuant to Rule 44.2 of this Court, Petitioners John Zarba and Susan Lemoie-Zarba, respectfully petitions for a rehearing of the denial of a writ of certiorari in this case. The petitioners request granting certiorari, vacate judgement, and remand to the lower court for reconsideration. (GVR)

This matter is “review worthy” because these issues are really of statewide and national significance. Property rights are clearly embedded into our constitution and our founding fathers intended property to be protected.

This request is in light of the recent Massachusetts Supreme Court regulatory taking and error of fact finding matter *FBT Everett Realty, LLC v. Massachusetts Gaming Commission* No. SJC - 13196 Mass decided on May 23, 2022.

## REASONS FOR REHEARING

Petitions for rehearing are an order denying certiorari are generally granted in two instances: if a petitioner can demonstrate “intervening circumstances of a substantial or controlling effect”; or if a petitioner raises “other substantial grounds not previously presented.” R 44.2. Petitioners present both categories: first, the intervening circumstance in the recent Massachusetts Supreme Court *FBT Everett Realty, LLC v. Massachusetts Gaming Commission* SJC decision which involves a finding of a ‘regulatory taking’ and ‘error of fact finding’, second, the petitioner can demonstrate other substantial grounds not previously presented by presenting alleged facts that the moving parties intentional misinformation was relied upon by the lower court, resulting in a wrong decision in the dismissal of the 12(b)(6) motion.

### **I. The Court Should Grant Rehearing In Light Of Recent Massachusetts Supreme Court ‘Regulatory Taking’ Decision”**

This petition is requested in light of the ruling decided on May 23, 2022 *FBT Everett Realty, LLC v. Massachusetts Gaming Commission* SJC - 13196 this reversal of the lower courts order states; “The regulatory taking inquiry is a fact-intensive evaluation that should consider multiple factors...” and “The motion judge here limited his analysis to the investment-backed expectation factor. This was error, as he also should have considered...economic impact and the highly unusual character of the government action here....” *Penn Cent. Trans Co. v. New York*, 438 U.S. 104, 123-128 (1978).

In *FBT*, the court set out to determine whether a government restriction on an owner’s use of property has effected a compensable taking, where the restriction involves neither a physical invasion nor a complete deprivation of economically viable use. This court has required a fact-intensive inquiry “designed to allow ‘careful examination and weighing of all the relevant circumstances.’” *Tahoe-Sierra Preservation Council, Inc. v Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002). In *FBT*, the court found that the motion judge relied on just a single factor without considering the other two factors identified in *Penn Central*, namely the economic impact and the character of the government action. This was error.

This Zarbas’ matter draws many parallels to *FBT*. The two cases are centered around a ‘taking’ matter that are governed by the Fifth Amendment and Article 10 of the Massachusetts Declaration of Rights. (1780): “...each individual of the society has a right to be protected by it in the enjoyment of life, liberty and property...” “... no part of the property of any individual can, with justice, be taken from him, or applied to public uses...” “And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation...”

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In both matters, the lower court's erroneous decisions were incorrect because there were 'errors of fact finding', limited existing record, improperly weighed record evidence, and a complete disregard of the highly unusual and extraordinary character of the government's actions that resulted in a regulatory taking.

In the Zarbas' matter, the lower court did not consider the facts in the complaint that alleged a physical and regulatory taking occurred.

Physical Taking

In *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419, 426-437 (1982) a physical taking comes about when there is a permanent intrusion even on a very small piece of the property.

The complaint clearly states that a permanent taking has occurred because the town erected a permanent public street sign on the private Way, permanently manipulated the town assessor maps by adding a public street onto the private Way, executed the Agreement for Judgement Document that states "it is the Town's position that both the Town and the public (including the use by the Trust) have the right to use The Way..." App. 81-82a. These actions certainly bring rise to a permanent taking. The town took the Zarbas' private Way 24/7 for 365 days a year and granted it to the public. The Zarbas' lost physical control over a portion of their property (The Way) and could no longer keep intruders from entering. In *Penn* "embracing the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel."

The town refused to remove these 3 blemishes on the Zarbas' property even after the Land Court judge concluded that the Zarbas' Way is private.

Regulatory Taking

In addition to the physical invasion, the town placed unreasonable and unnecessary restrictions on the Zarbas' property, which substantially rendered the property useless for a period of time. The town denied

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water hook-up for months, initiated a 4 year denial of a final occupancy permit, caused a 52 day ousting, held predetermined board meetings where the town inappropriately adopted an unnecessary, unfinished, non-adjudicated contrived survey, restricted parking, all while continuing to mow, plow and grade the Way.

Three factors under *Penn* are considered to evaluate whether a regulatory taking has occurred. The Zarbas' complaint states:

(1) Economic Impact: Towns irrational regulation caused by the town denied an occupancy permit on two occasions, causing a 52 day ousting that resulted in the family moving in and out of the guest house 4 times and the loss of 2 summers of rental income. "...ousted the Zarba's from their guest house..." "The Zarba's rely on seasonal rental income" App. 25a, 31a and 57a

The complaint states on 9 occasions; "As a direct result of the acts of the defendants, ...the defendants deprived them of their property rights, they suffered substantial economic loss which includes, loss profits from sale not made, debt interest which would have been retired if sale has gone forward, significant attorney fees, court fees, loss of household income, loss rental income, value of property diminished or destroyed, physically and severe emotional distress, loss of privacy and peaceful enjoyment of their property, was subject to humiliation and other damages." App. 36, 59a.

(2) Reasonable Investment-Backed Expectations: For 13 years, the Zarbas' relied on seasonal rental income. App 57a The Zarbas' constructed the guest house with the intent of adding additional rental income. The 5 year extraordinary delay of the delivery of the final occupancy permit, parking restrictions and denied water hook-up caused Ms. Zarba to leave her job to work full time as pro se litigant protecting these property rights.

The towns actions caused extreme emotional and financial strain on the Zarbas' family. These financial losses were so great that they resulted in the Zarba's

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need to sell the property. The property was marketed and sold at a diminished value with 4 permanent blemishes attached to the property: the town's faulty survey on the deed, public street sign on the Way, the Agreement for Judgement still standing, and the manipulated assessor map. Cert.11.

The lower court wrongly concluded that the Zarbas' "failed to state a claim upon which relief can be granted." The lower court disregarded the loss of two seasons' rental income, diminished the home's selling price, forced the subsequent purchase of a new home without a second dwelling, resulting in the loss of future rental income. App. 36, 59a

The complaint states, "The defendants behavior towards the Zarba's is considered an extraordinary delay in the delivery of the final occupancy permit and the restriction placed on the parking. Resulting in the Zarba's being denied the "economically viable" use of their property." App. 55a

(3) Character of the Government Action: The character of the regulatory action here is highly unusual and the evidence presented is overwhelming. For five years, 15 town officials in 7 departments join town counsels concocted scheme to create zoning issues on the Zarbas' property. Six judges in two venues carefully reviewed every issue and concluded that the Zarbas' property is fully conforming and the Zarbas' Way is private.

The town did not possess the legal authority to:

- deny water hook-up
- deny final occupancy permit for four years
- oust the family for 52 days
- install a public street sign
- manipulate assessor maps
- adopt unnecessary contrived town survey
- predetermine the results of the board meeting
- restrict parking on property
- formally mandate the removal of the guest house

"If a regulation goes too far, it will be recognized as a taking." *Pennsylvania Coal Co. v Mahon* 260 U.S. 393, 415 (1922)

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The character of the government action is an important factor because the guiding aim of the regulatory taking inquiry is to “identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property.” *Lingle v. Chevron USA Inc.*, 544 U.S. at 539 (2005) for which compensation is required.

The allegations demonstrate that the town’s character was grossly inappropriate because none of their actions were exercised for protecting ‘public health, public safety and public morals’. Instead, the government directly appropriated the Zarbas’ private property to the public for which compensation is required. *Lingle*, 544 U.S. at 539.

This recent *FBT* Supreme Court ruling should cast doubt on the judgment in this matter. In *FBT*, the judgment of the lower court has been called into question by the Massachusetts Supreme Court. Due to the recent reversal in *FBT*, we ask this court to reconsider the Zarbas’ matter to Grant/Vacate/and Remand this case to the lower court to apply this *FBT* Supreme Court’s ‘fact finding’ and ‘regulatory’ precedence.

**II. The Court Should Grant/Vacate/Remand This Matter Due To The Intentional Misinformation (Defrauding the Court)**

Litigants have a duty of full disclosure and honesty with the court. In this matter, the lower court obtained a judgement through fraudulent conduct. Town counsel, board and town officials intentionally deceived the court and the lower court relied on the misrepresentation of facts. Therefore, the wrong decision was made and the Zarbas’ suffered damages resulting from the lower court’s reliance on these intentional false facts.

**1. Town Survey**

Town Counsel Doc #91 on 2/28/20 page 2, fraudulently states; “A survey the town prepared for

the easement litigation showed the Zarbas' fully constructed guest house violated zoning setback requirements." page 9 "After a survey prepared in connection with the Zarbas' dispute with the O'Neil Trust ." page 10 "... there was no fraud in the development of the town's survey, and the enforcement warnings and decisions of the ZBA were based on a good-faith belief in the validity to a survey..."

#### Courts Reliance on Misrepresentation

The record demonstrates that the day the Zarbas' guest house was complete, fully approved and occupied, there was no Town survey, no title report and no court matter required it. However, the lower court relied on this intentionally misleading information and rendered an opinion that states the Zarbas' survey was 'faulty' and 'a court matter was determining ownership.'

App.5a

#### Correction

Chief Justice of Land Court ruled that the O'Neil Prescriptive Right matter did not include matters of ownership and did not require the town perform any title or survey work on the Zarba's Way. App. 74a

The town surveyor confirmed under oath that the town survey was incomplete, not in a recordable form and it was his ethical duty as a professional Land Surveyor to contact the surveyor of record to discuss this 22 inch boundary dispute. Town surveyor confirmed that Town Counsel advised him to ignore his ethical duty and to not contact the surveyor of record.

App.26a

Town counsel intentionally and inappropriately declared that the survey they commissioned was a requirement in the O'Neil prescriptive right matter, that the survey was not built on fraud, and that they possess the authority to adjudicate the survey and direct the Building Inspector and the Board to adopt it. These unsupported holdings were the courts' basis for entering a dismissal against the Zarbas'.

#### 2. Agreement for Judgement

Towns Doc #87 on 02/28/21 page 6-7, fraudulently states; "...the Land Court Agreement for Judgment are nothing more than a collateral attack to unwind the holding and legal effect of the Agreement for Judgement entered and approved by the Land Court. This court lacks jurisdiction to rule upon such claims under the Rooker-Feldman doctrine."

Courts Reliance on Misrepresentation

The lower court disregarded the Agreement for Judgement document that was identified on 13 occasions in the Complaint.

Correction

Chief Justice of Land Court never 'entered and approved' that Agreement. Chief Justice Order states; "That Agreement for Judgement has not been submitted to the court for its endorsement or approval ..." "Accordingly, that Agreement for Judgement does not in any manner constitute a judgment of this court..." App.30

The Agreement for Judgement is a concrete piece of evidence that is proof of a conspiracy and an illegal taking. App. 80a-84a

3. 52 Day Ousting and Loss 2 Seasons Rental Income

Town Counsel Doc #91 on 2/28/20 page 3 fraudulently states; "The plaintiffs do not and could not allege that they ever stopped occupying their guesthouse..." Town Doc # 87 on 02/28/20 page 16 "... Plaintiffs fail to allege they ever actually vacated the premises or are prohibited from renting the premises, which the Town asserts never happened."

Court Reliance on Misrepresentation

The lower court disregarded the 52 day ousting and loss of rental income.

Correction

The Zarbas' abided by the MA State Building Code which states; "No building or structure shall be used or occupied ...until the building official has issued a certificate of occupancy ...". The Zarbas' conformed to the state law by moving in and out of the guest house

when the occupancy permits were denied. App. 25a and 57a

#### **4. Policymaker**

Town Doc # 87 on 02/28/20 page 23 fraudulently states; "Nowhere in the Complaint do the Plaintiffs even allege the existence of a municipal custom or policy which caused the allegedly unconstitutional denial of civil rights"

#### **Court reliance on Misrepresentation**

The lower court wrongly concluded "...Complaint does not allege ...a policy or custom of the [Town] which led to the alleged constitutional violations." App. 9a  
Correction

Complaint states; "Mark Barbadoro imposed a deliberate and arbitrary single decision as the municipality policymaker ..." "Mr. Barbadoro denied Ms. Zarba a Final Occupancy Permit the day that it was due." "the denial of the final occupancy permit was directed by Mark Barbadoro who establish government policy..." App 21a

#### **5. Property Interest**

Town, board and town counsel disregard the Zarbas' property interest.

#### **Court reliance on the misrepresentation**

Court never considered the Zarbas' property interest.  
Correction

The Zarbas' were issued 'by right' a building permit, they acted on it, the town building inspector performed the final inspection and approved the dwelling for permit and occupancy. App. 23,25 Just 48 hours later, town counsel (without probable cause) interfered and caused a 4 year denial of that permit. If the Zarbas' property does not have a constitutional protected right to issuance of the permit then what property does?

How can a legally permitted structure suddenly be considered illegal? Our constitution outlawed this behavior. *Yocum v. Power*, 398 Pa. 223, 157 A 2d 268 (1960). "When the Church acquired the building permit it became vested with an interest that cannot be lightly set aside." "...opponents sought to illegalize what had

been done under existing law." "As nothing can be more unjust in criminal law than an ex post facto law, so nothing is more frowned on in civil law than a procedure which has the effect of making illegal what the law has already recognized as legal."

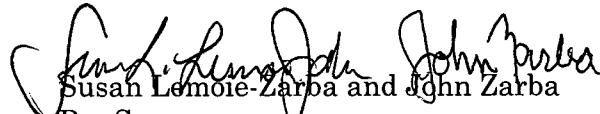
In this matter, the facts lead to the inescapable conclusion the court below credited the opinion of the party seeking 12(b)(6) motion. The opinion below reflects a clear misinterpretation of 12(b)(6) motion standard in light of this court precedent. *Tolan v. Cotton*, 572 U.S. (2014).

In light of the *FBT* ruling that found a 'regulatory taking' and 'error of fact finding' and the newly presented intentional misinformation that the lower court relied upon that resulted in a wrong decision. If this petition is granted a GVR, then there is a reasonable probability that the First Circuit would conclude the Zarbas' property interest was fully met, a taking has occurred, and the complaint "stated a claim upon which relief can be granted". *Lawrence v. Chater*, 516, U.S. 163 (1996). "...recent development that the court below is unlikely to have considered,...a GVR is potentially appropriate."

#### CONCLUSION

We pray that this court allow a rehearing, granting certiorari, vacate judgement, and remand to the lower court for reconsideration. (GVR)

Respectfully submitted,

  
Susan Lemire-Zarba and John Zarba

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July 5, 2022

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**CERTIFICATE OF A PARTY"  
UNREPRESENTED BY COUNSEL"**

I hereby certify that this petition for rehearing  
is presented in good faith and not for delay, and  
that it is restricted to the grounds specified in  
Supreme Court Rule 44.2.

  
Susan Lemoie-Zarba  
Pro Se