Appendix

Table of Contents

United States Court of Appeals
For the First Circuit

No. 22-1446

MATTHEW HANEY,
as Trustee of the Gooseberry Island Trust,

Plaintiff, Appellant,

v.

TOWN OF MASHPEE; MASHPEE ZONING BOARD OF APPEALS; JONATHAN FURBUSH; WILLIAM A. BLAISEDELL; SCOTT GOLDSTEIN; NORMAN J. GOULD; BRADFORD H. PITTSLEY; SHARON SANGELEER, as they are members of the Zoning Board of Appeals of the Town of Mashpee,

Defendants, Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Judith G. Dein, U.S. Magistrate Judge]

Before

Barron, Chief Judge,
Howard and Montecalvo, Circuit Judges.

Paul Revere, III, for appellant.

Joseph A. Padolsky, with whom Louison, Costello, Condon & Pfaff, LLP was on brief, for appellees.

June 6, 2023

MONTECALVO, Circuit Judge. Matthew Haney ("Haney"), as the Trustee of the Gooseberry Island Trust ("Trust"), brought a complaint against the Town of Mashpee ("Town") and its Zoning Board of Appeals ("Board") alleging an unconstitutional taking of property. The district court dismissed the complaint without prejudice for want of jurisdiction on ripeness grounds. This appeal raises two issues: (1) whether the government has reached a "final" decision on the Trust's request for variances and (2) whether requiring the Trust to submit further applications to the Town would be futile. Because Haney waived one of his arguments relative to the first issue and because his other arguments are meritless, we affirm the dismissal without prejudice.

I. Background

As this case comes to us on a motion to dismiss, "we draw the relevant facts from the complaint." *Rivera v. Kress Stores of P.R., Inc.*, 30 F.4th 98, 100 (1st Cir. 2022). We also consider and rely on "documents incorporated by reference in the complaint . . . as well as matters appropriate for judicial notice." *Lass v. Bank of America, N.A.*, 695 F.3d 129, 134 (1st Cir. 2012).

The Trust is the owner of Gooseberry Island, a four-acre island in Popponesset Bay, Mashpee, Massachusetts. Gooseberry Island lies offshore from the end of Punkhorn Point Road in Mashpee. The Trust also claims ownership in the land at the end of Punkhorn Point Road.[1] Gooseberry Island is

[1] The Trust's alleged ownership in the land at the end of Punkhorn Point Road emanates from SN Trust. In October 2014, the Town filed a complaint in the Massachusetts Land Court

separated from the mainland by a channel that ranges from forty to eighty feet between mean low and high tides. At low tide, the channel is less than two feet deep, and Gooseberry Island can be accessed by wading across the channel. Prior to the Trust's current ownership of Gooseberry Island, it was used primarily as a camp for hunting and fishing.

A. 2013 Variance Applications

Beginning in 2013, the Trust sought to construct a single-family residence on Gooseberry Island; this endeavor was subject to the Town's zoning bylaws. Per the zoning bylaws, Gooseberry Island is located in an R-3 residential zone and — as is relevant to the instant appeal — any residence constructed by the Trust would be required to have at least 150 feet of frontage on a street and an unobstructed paved access roadway within 150 feet. Gooseberry Island is entirely surrounded by water and thus does not have any frontage on a street and is located more than 150 feet away from a paved roadway.

To enable construction of a single-family residence on Gooseberry Island, the Trust applied for variances from the Board on August 29, 2013, seeking relief from the frontage and roadway access

---

challenging SN Trust's right, title, or interest to the land ("Title Dispute Action"). The Land Court entered judgment in favor of SN Trust and affirmed its ownership to the land. The Town has appealed the Land Court's decision. Because the distinction between SN Trust's ownership of the land at the end of Punkhorn Point Road versus Gooseberry Island Trust's ownership of Gooseberry Island is immaterial for purposes of the instant appeal, for ease of discussion, our reference to "the Trust" encompasses both the SN Trust and/or the Gooseberry Island Trust.

requirements ("2013 Variance Applications"). The Board denied the 2013 Variance Applications (the "2013 Variance Decisions"). The 2013 Variance Decisions detailed that some Board members expressed concerns about access to Gooseberry Island in the event of an emergency, and that the Board ultimately determined granting the relief sought "would not advance the Town's interest in maintaining the public safety . . . [and] would in fact derogate from the underline [sic] purpose and intent of the Zoning By-laws." The 2013 Variance Decisions did not indicate whether they were made with or without prejudice.

B. Bridge Proposals

In an apparent effort to address the Board's concerns with emergency access to Gooseberry Island and public safety, on March 14, 2014, the Trust filed a Notice of Intent with the Mashpee Conservation Commission ("MCC"). The Notice of Intent proposed to construct a timber bridge to span between the end of Punkhorn Point Road and Gooseberry Island. The proposed timber bridge would provide vehicular and pedestrian access to Gooseberry Island.

Throughout the course of public hearings on the Trust's Notice of Intent, the Mashpee Wampanoag Tribe ("Tribe") opposed the timber bridge. The Tribe held a shellfish grant from the Town "valid through 2027 and occup[ying] the entirety of the tidal creek between the Mashpee mainland at Punkhorn Point Road and Gooseberry Island." The Tribe maintained that construction of the timber bridge would result in significant environmental impact to the shellfish beds and permanent loss of shellfish habitat.

The MCC rejected the Notice of Intent without prejudice, and, on February 11, 2015, it denied the proposed timber bridge construction under the Massachusetts Wetland Protection Act, Mass. Gen. Laws ch. 131, § 40, and the Mashpee Wetlands Protection Bylaw. The Trust promptly filed a request for superseding review with the Massachusetts Department of Environmental Protection ("DEP"). DEP similarly denied the proposed timber bridge, finding that "the installation of sixteen 14-inch diameter piles within [the] salt marsh would destroy 17.1 square feet of salt marsh and that the shading impacts from the bridge decking would have an adverse effect on the productivity of the salt marsh." The Trust appealed DEP's superseding denial of the timber bridge to the Office of Appeals and Dispute Resolution.

The Trust requested an adjudicatory hearing before the Office of Appeals and Dispute Resolution and in the interim conferred with DEP about replacing the proposed timber bridge with a steel bridge. The steel bridge purportedly would remove the pilings from the salt marsh area and allow better light penetration. DEP appeared to support the construction of a steel bridge, advising the Trust that the revised design complied with applicable regulations and was entitled to approval under the Wetlands Protection Act. DEP viewed the design changes as permissible pursuant to the Plan Change Policy.[2]

---

[2] Under the Plan Change Policy, insubstantial changes to a Notice of Intent may be reviewed by DEP as a part of the appeal review, but substantial changes require a party to file a new Notice of Intent.

The Office of Appeals and Dispute Resolution held an evidentiary hearing on the Trust's appeal on December 7, 2015, and DEP thereafter filed a post-hearing memorandum stating its support for the Trust's "request for a Final Order of Conditions" and that the Trust's appeal should be granted. The MCC opposed DEP's request and argued that its review of the steel-bridge design "improperly circumvented the Plan Change Policy requirement of [thorough] local review."

The Office of Appeals and Dispute Resolution issued a final decision — which was adopted by the Commissioner of DEP on June 22, 2017 — finding that the steel-bridge proposal could not be considered under the Plan Change Policy because "the steel bridge is substantially different than the timber bridge and increases wetlands impacts to Salt Marsh and Land Containing Shellfish." Accordingly, the Office of Appeals and Dispute Resolution and DEP concluded that they could not review the steel-bridge proposal as a part of the timber-bridge appeal and that the Trust instead was required to file a new Notice of Intent with the MCC. The Trust then appealed that decision all the way to the Massachusetts Appeals Court, which ultimately affirmed the Office of Appeals and Dispute Resolution's decision (the "DEP Appeal"). *Haney v. Dep't of Env't Prot.*, 173 N.E.3d 55 (Mass. App. Ct. 2021) (unpublished table decision).

C. 2018 Variance Applications

On November 9, 2018, the Trust once more applied to the Board for variances to enable construction of a single-family residence and again sought relief from the frontage and access

requirements of the zoning bylaws ("2018 Variance Applications"). In an effort to address the perceived reason behind the Board's denial of the 2013 Variance Applications, the Trust provided the Board with a "2014 plan depict[ing] a bridge and Gooseberry Island." The single-lane bridge would span between the end of Punkhorn Point Road and Gooseberry Island. The Trust stated that the bridge would provide pedestrian and vehicular access to Gooseberry Island, including access by emergency vehicles.

The Board published written decisions unanimously denying the 2018 Variance Applications ("2018 Variance Decisions"). These written decisions are the only evidence in the record of the Board's reasons for denying the 2018 Variance Applications. The 2018 Variance Decisions detail what transpired at the December 12, 2018 public hearing on the 2018 Variance Applications and reveal that part of the Board's discussion focused on whether "the bridge needs to be approved prior to building on the lot." The Trust's attorney acknowledged that the bridge had been through the DEP hearing process and was denied, but that the decision was under appeal.

In response to a Board member's concern that the Board did not have the authority to review and approve a bridge, the Trust's attorney suggested that the Board could grant the 2018 Variance Applications but condition the approval upon a bridge being built. At least one Board member expressed discomfort "with conditioning anything for these variance requests."

The Board closed the public comment session and unanimously voted to deny the 2018 Variance Applications. The 2018 Variance Decisions state that

"[t]he Board, upon review of the testimony and evidence, determined that the proposed [v]ariance[s] would not advance the Town's interest in maintaining the public safety . . . [and] would in fact derogate from the underline [sic] purpose and intent of the Zoning By-laws." The 2018 Variance Decisions did not indicate whether they were made with or without prejudice.

D. The Present Action

On April 29, 2021, Haney commenced the present action against the Town and the Board, seeking a declaratory judgment that the defendants' actions constituted uncompensated taking of property.[3] The complaint asserted two counts against the defendants: (1) violation of the Fifth Amendment of the U.S. Constitution due to an unconstitutional taking and (2) violation of the Massachusetts Constitution due to inverse condemnation. The defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The defendants argued that Haney's claims were not ripe

---

[3] The Trust appealed the denial of the 2013 Variance Applications and then the denial of the 2018 Variance Applications to the Massachusetts Superior Court pursuant to Mass. Gen. Laws ch. 40A, § 17, which permits judicial review of the Board's decisions. According to the record on appeal, the parties requested that the Superior Court stay the zoning appeals until the Title Dispute Action and the DEP Appeal were fully resolved. However, on April 19, 2023, the Trust filed a motion with the Superior Court "to reschedule the date for the pre-trial conference" and, as a supporting basis for its request, relied on the instant federal action because, it contends, "[a] final decision in the federal appellate proceeding may obviate the need for th[e Superior Court] proceeding and result in voluntary dismissal of this matter."

for adjudication because the Trust never applied to build a steel bridge.

The district court granted the defendants' motion to dismiss the complaint. The district court concluded that that the claims were not ripe for review because "[t]he facts as alleged in the complaint fail to establish that there has been a final government decision on the Trust's steel[-]bridge proposal." Specifically, the district court found that the Trust never followed through with filing a new Notice of Intent with the MCC for construction of a steel bridge, even though "DEP expressed support for this proposal." The district court reasoned that because the Trust never "filed any application seeking a variance based on the steel[-]bridge proposal" and because pursuing the steel-bridge proposal would not be futile, the litigation was not ripe. Haney timely appealed the district court's dismissal of the complaint.

II. Discussion

On appeal, Haney argues that the district court erred by dismissing the complaint as unripe. "We review *de novo* the dismissal of a takings claim on ripeness grounds." *García-Rubiera v. Calderón*, 570 F.3d 443, 451 (1st Cir. 2009).[4] "The Takings Clause of

[4] Haney sought a declaratory judgment "as to the constitutionality and legality of [the Town's] actions." "[A]ppellate review of discretionary decisions not to grant declaratory relief is generally for abuse of discretion." *Verizon New England, Inc. v. Int'l Brotherhood of Elec. Workers, Local No. 2322*, 651 F.3d 176, 187 (1st Cir. 2011). Here, however, *de novo* review is appropriate because the district court did not deny the request for declaratory relief, but rather found it lacked jurisdiction to entertain the request in the first instance. *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, 919 F.3d 638, 644 n.3 (1st Cir. 2019).

the Fifth Amendment, which applies to the states through the Fourteenth Amendment, prohibits the taking of private property for public use without just compensation." *Franklin Mem'l Hosp. v. Harvey*, 575 F.3d 121, 125 (1st Cir. 2009). Because Haney asserts that the defendants' actions unconstitutionally regulate how he may use Gooseberry Island, we focus our inquiry under the law of regulatory takings. *See id.* (explaining that the Takings Clause guards not only against physical takings but also against "certain uncompensated regulatory interferences with a property owner's interest in his property").

"A regulatory taking transpires when some significant restriction is placed upon an owner's use of [its] property for which justice and fairness require that compensation be given." *Phillip Morris, Inc. v. Reilly*, 312 F.3d 24, 33 (1st Cir. 2002) (cleaned up). Haney bears the burden of proving that the regulatory takings claim is ripe before a federal court has jurisdiction over the claim. *Downing/Salt Pond Partners v. R.I. & Providence Plantations*, 643 F.3d 16, 20 (1st Cir. 2011).

A. Finality

"When a plaintiff alleges a regulatory taking in violation of the Fifth Amendment, a federal court should not consider the claim before the government has reached a 'final' decision." *Pakdel v. City & Cnty. of San Francisco*, 141 S. Ct. 2226, 2228 (2021) (per curiam) (quoting *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 737 (1997)). This finality requirement "is relatively modest[:] [a]ll a plaintiff must show is that there is no question about how the regulations at issue apply to the particular land in question." *Id.* at 2230 (cleaned up). To do so, "a developer must at least

resort to the procedure for obtaining variances and obtain a conclusive determination by the [Board] whether it would allow the proposed development in order to ripen its takings claim." *Suitum*, 520 U.S. at 737 (cleaned up).

Haney argues that his claims are ripe for review because the Trust twice applied to the Board for variances and, each time, its requests were denied. He advances three arguments as to why the Board's 2018 Variance Decisions constitute a final decision: (1) the Trust could not get other approvals for construction of the bridge without those variances first being granted; (2) in making its decision on the 2018 Variance Applications the Board should not have considered whether a bridge permit was — or would be — issued by the MCC; and (3) the plain language of the 2018 Variance Decisions shows that the Board reached a final decision. We quickly dispose of the first two contentions.

Under the State Wetlands Protection Act, DEP's regulations, and Mashpee's local wetlands ordinance, any notice of intent seeking a permit to build a bridge would need to be accompanied by permits, variances, and approvals required "*with respect to the proposed activity*." *See* Mass. Gen. Laws ch. 131, § 40 (emphasis added); 310 Mass. Code Regs. § 10.05(4)(e). The relevant proposed activity for the notice of intent is construction of a bridge to span from the end of Punkhorn Point Road to Gooseberry Island. Variances for the construction of a single-family residence on Gooseberry Island are not, for purposes of the filing of a notice of intent, related to construction of the bridge. Accordingly, the assertion that the Trust could not obtain approval for construction of the bridge without

the Board first granting it variances for relief from frontage and roadway access requirements is mistaken.

Haney's second argument is similarly unavailing. Pursuant to the Town's zoning bylaws and the Zoning Act, the Board is vested with the authority "[t]o hear and decide petitions for variances." Mass. Gen. Laws ch. 40A, § 14. Despite any contention to the contrary, the Board did not inappropriately consider or determine any matters outside its jurisdiction. The issue of whether the MCC would issue a permit for construction of the bridge was raised by the Trust's own attorney when he invited the Board to "act on [the] request for relief, and condition[] it upon the bridge being built." Indeed, the Board is statutorily authorized to "impose conditions, safeguards and limitations" on the grant of a variance. Mass. Gen. Laws ch. 40A, § 10. Relative to this power, the Board received evidence about construction of a bridge that fell under the jurisdiction of the MCC in the first instance. However, the Board never determined whether that permit should or should not issue. Accordingly, the Board did not exceed its jurisdiction or consider evidence it should not have.

We now turn to Haney's final argument — that the plain language of the 2018 Variance Decisions show that the Board reached a final decision. He contends that the district court misconstrued the 2018 Variance Decisions because the Board never explicitly found that its decision to deny the variances were premised on the Trust's failure to have an approved steel bridge in place.

The district court concluded that "[t]he facts as alleged in the complaint fail to establish that there

has been a final government decision on the Trust's steel[-]bridge proposal" and, therefore, the Trust's claim was not ripe. On appeal, Haney challenges this finding because he maintains that the 2018 Variance Applications were denied because the Board found that the granting of the variances would derogate from the underlying purpose and intent of the zoning bylaws, *not* because the Trust did not have an approved steel bridge in place.

In support of this contention, Haney draws a distinction between "the statements of individual [B]oard members with the operative decision." He maintains that the questions or concerns expressed by the Board members during the hearing regarding the absence of an approved steel bridge cannot inform our understanding of the reason for denying the variances.[5] Rather, Haney argues, the 2018 Variance Decisions delineate that the Board denied the 2018 Variance Applications because it found that granting them would derogate from the underlying purpose and intent of the zoning bylaws. Haney suggests that reading the 2018 Variance Decisions in this manner reveals that the Board reached a final decision.

The sole reason offered by Haney as to why the 2018 Variance Decisions should be read in the manner he suggests is § 15 of the Zoning Act, which states that

---

[5] It does not escape our attention that in a January 2019 motion to consolidate the state court appeals of the 2013 Variance Decisions and the 2018 Variance Decisions, the Trust described the procedural history of the 2018 Variance Decisions as follows:

> "After holding a hearing on the application, the Board denied the request for variances. The [Board] declined to issue variances, in part, *based upon conditional outcomes in other forums*." (Emphasis added.)

the Board "shall cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question . . . and setting forth clearly the reason for its decision and of its official actions[.]" Past quoting this section of the Zoning Act, the argument as to what should be construed as the Board's "reason for its decision" is entirely undeveloped. Haney offers no authority as to why the discussion and statements of the Board members detailed in the 2018 Variance Decisions do not constitute the reasons for its decision.

We thus see no support for the contention that we must disregard the statements made by the Board members as recorded in the 2018 Variance Decisions, at least when such statements are plausibly related to the concluding explanation given by the Board for denying the variances. That argument is underdeveloped, it is waived, and we are not in a position to evaluate it. Indeed, it is well-settled that "[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). We thus decline to adopt Haney's position regarding how the 2018 Variance Decisions should be interpreted under Massachusetts law based on the limited argument he has offered in support of that position.

Similarly, Haney offers no argument as to why the denial of the 2018 Variance Applications should be interpreted as with prejudice. The text of the 2018 Variance Decisions fails to specify whether the denials were with or without prejudice, and Haney does not provide us with any authority or guidance as to why

we should read the decisions as being final and with prejudice.

In sum, Haney's claim that the plain language of the 2018 Variance Decisions shows that the Board reached a final decision on the requested relief is waived pursuant to "the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Id.*

B. Futility

Haney next argues that the district court erred in finding that applying for a steel-bridge permit would not be futile. We have recognized "that there is a narrow 'futility exception' to the final decision requirement for takings claims which, on rare occasion, may excuse the submission of an application for a variance or other administrative relief." *Gilbert v. City of Cambridge*, 932 F.2d 51, 60 (1st Cir. 1991) (quoting *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990)). If the prospect of an adverse decision is certain (or nearly so) "federal ripeness rules do not require the submission of further and futile applications." *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001).

This futility exception — which has been part of our caselaw for three decades — was recently endorsed by the Supreme Court in *Pakdel*. 141 S. Ct. at 2230. In addressing the state-forum finality requirement, the Court held that a landowner only needs to show "that there is no question about how the regulations at issue apply to the particular land in question." *Id.* (cleaned up). The finality requirement is therefore met once it is clear to the federal courts

that the initial decisionmaker has reached a "definitive position on the issue." *Id.* at 2230 (quoting *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985)).

Through *Pakdel*, our caselaw's futility exception is now simply part and parcel of the finality requirement. Here, Haney argues that the finality requirement is met because the Trust should not be required to submit "applications for a bridge permit when the denial of any application for a variance from the [Board] is a certainty." Haney alleges that the Trust submitted the 2018 Variance Applications without a bridge approval in place because it "did not want to waste resources permitting and/or building a bridge if the Town would not even issue a building permit due to zoning concerns." This allegation casts doubt on Haney's argument that the Board would most certainly deny any variances. Instead, it makes clear that the Trust strategically chose to seek relief from the Board without the bridge approval in place in an effort to save resources.

Moreover, as discussed above, the Board made it clear when considering the 2018 Variance Applications that it was concerned with the lack of emergency vehicular access to Gooseberry Island and felt "uncomfortable with conditioning" the variances on a bridge that the Trust had not yet obtained approval for. The Board has never represented that it would deny any and all variance applications — even if the Trust presented applications accompanied by an approved steel-bridge plan.[6]

---

[6] Haney makes various allegations about the Town's delegation of power to the Tribe, including that the Town will not make any

Given this, we cannot conclude that the Board has "committed to a position" with respect to the variances. *See Pakdel*, 141 S. Ct. at 2230. The Trust still has the option to pursue approval of the steel-bridge proposal and then present the Board with variance applications. *See id.* (holding the finality requirement met where there was no question about the government's position and such position inflicted a concrete injury on the plaintiff). Submission of those applications would further clarify "the extent of development permitted by the" Town's zoning bylaws. *Palazzolo*, 533 U.S. at 624. Accordingly, Haney has not demonstrated compliance with the finality requirement.

III. Conclusion

Haney must first obtain the government's conclusive and definitive position on the application of the Town's zoning bylaws to Gooseberry Island before proceeding in federal court. *See Pakdel*, 141 S. Ct. at 2230. Having failed to do so, and for all the reasons

---

decisions favorable to the Trust's construction of a bridge and/or development of Gooseberry Island without the Tribe's assent. This argument does not advance the ball for Haney. The record reveals that the Tribe is primarily concerned with the effect construction of a bridge would have on the shellfish beds. The Tribe "oppose[d]" granting the 2018 Variance Applications because "[t]he bridge would interfere with their aquaculture project."

However, as the Board members recognized, construction of a bridge required approval from the MCC, and the Trust failed to apply for or secure a decision regarding the steel-bridge proposal. Moreover, the "initial decisionmaker" for variances for construction of a single-family home on Gooseberry Island is the Board, and they have not reached a definitive position. *See Pakdel*, 141 S. Ct. at 2229–30.

stated above, the judgment of the district court is affirmed.

Filed May 6, 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MATTHEW HANEY, Plaintiff, v. TOWN OF MASHPEE et al, Defendants.	CIVIL ACTION NO. 21-10718-JGD

ORDER OF DISMISSAL

DEIN, U.S.M.J.

In accordance with the Court's Memorandum of Decision and Order dated March 22, 2022, allowing the defendants' motion to dismiss, and the Court's Memorandum of Decision and Order dated April 25, 2022, denying the plaintiff's motion for reconsideration, it is hereby ORDERED that the above-entitled action be and hereby is dismissed.

ROBERT M. FARRELL,
CLERK OF COURT

/s/ Katherine Thomson
By: Deputy Clerk

DATED: May 6, 2022

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MATTHEW HANEY, as Trustee of the Gooseberry Island Trust, Plaintiff, v. TOWN OF MASHPEE, and JONATHAN FURBUSH, WILLIAM BLAISEDELL, SCOTT GOLDSTEIN, NORMAN GOULD, BRADFORD PITTSLEY, and SHARON SANGELEER, as they are members and are collectively the ZONING BOARD OF APPEALS OF THE TOWN OF MASHPEE, Defendants.	CIVIL ACTION NO. 21-10718-JGD

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

March 22, 2022

DEIN, U.S.M.J.

I. INTRODUCTION

Plaintiff Matthew Haney ("Haney"), as Trustee of the Gooseberry Island Trust ("Trust"), has brought this action against the Town of Mashpee ("Mashpee" or the "Town") and the members of its Zoning Board of Appeals ("ZBA") pursuant to 42 U.S.C. § 1983 alleging an unconstitutional regulatory taking of

private property under the Fifth Amendment of the United States Constitution (Count I), and asking this court to exercise its supplemental jurisdiction over a claim of inverse condemnation under Article X of the Massachusetts Constitution and state common law (Count II). This is the latest in a series of administrative and court proceedings initiated by Haney relating to his attempt to construct a home on Gooseberry Island.

This matter is presently before the court on "Defendants' Motion to Dismiss Plaintiff's Complaint" (Docket No. 8), by which the defendants are seeking dismissal of the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. The critical issue raised by the motion is whether Haney's claims are sufficiently ripe for this court to exercise jurisdiction. For the reasons detailed herein, the allegations of the complaint establish that no "final" decision has been reached on Haney's applications, and that the government has not "reached a conclusive position." *Pakdel v. City & Cty. of San Francisco, Cal.*, 141 S. Ct. 2226, 2228, 2231, 210 L. Ed. 2d 617 (2021) (per curiam). Consequently, Haney's claims are not ripe for adjudication and the motion to dismiss is ALLOWED.

II. STATEMENT OF FACTS

Scope of the Record

Motions to dismiss under Rule 12(b)(6) test the sufficiency of the pleadings. Thus, when confronted with a motion to dismiss, the court accepts as true all well-pleaded facts and draws all reasonable inferences in favor of the plaintiff. *Cooperman v. Individual, Inc.*, 171 F.3d 43, 46 (1st Cir. 1999). Dismissal is only appropriate if the complaint, so viewed, fails to allege

"a plausible entitlement to relief." *Rodriguez-Ortiz v. Margo Caribe, Inc.*, 490 F.3d 92, 95 (1st Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559, 127 S. Ct. 1955, 1967, 167 L. Ed. 2d 929 (2007)).

"The plausibility inquiry necessitates a two-step pavane." *Garcia-Catalan v. United States*, 734 F.3d 100, 103 (1st Cir. 2013). "First, the court must distinguish 'the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited).'" *Id.* (quoting *Morales-Cruz v. Univ. of P.R.*, 676 F.3d 220, 224 (1st Cir. 2012)). "Second, the court must determine whether the factual allegations are sufficient to support 'the reasonable inference that the defendant is liable for the misconduct alleged.'" *Garcia-Catalan*, 734 F.3d at 103 (quoting *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011)) (additional citation omitted). This second step requires the reviewing court to "draw on its judicial experience and common sense." *Garcia-Catalan*, 734 F.3d at 103 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)). "If the factual allegations in the complaint are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture, the complaint is open to dismissal." *Morales-Cruz*, 676 F.3d at 224 (quoting *SEC v. Tambone*, 597 F.3d 436, 442 (1st Cir. 2010)). Finally, while the court's inquiry is focused on the sufficiency of the allegations of the complaint, courts may consider official public records, documents central to plaintiff's claims, and documents sufficiently referred to in the complaint without converting the inquiry to one of summary judgement. *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993).

Applying these principles, the relevant facts are as follows.

Background

The property at the center of the dispute, Gooseberry Island, is an island spanning approximately four acres in Popponesset Bay offshore from the end of Punkhorn Point Road in Mashpee (the "Island" or "Subject Property"). (Compl. (Docket No. 1) ¶¶ 2, 8, 24). In 1955, Niles Nelson purchased the Island from Fields Point Manufacturing Company as an investment. (*Id.* ¶ 10). The Subject Property stayed in the Nelson family until 2011, at which point Robert Nelson Jr., Niles' grandson, conveyed title to Robert Emmeluth, as trustee of the Gooseberry Island Trust, for $1,315,000. (*Id.* ¶¶ 13–18). Haney, the plaintiff in the instant case, later succeeded Emmeluth as trustee. (*Id.* ¶ 20). The Subject Property had primarily been used as a camp for hunting and fishing prior to its conveyance to the Trust. (*Id.* ¶ 22). The only structure on the Island is the remnants of the foundation of a cottage. (*Id.* ¶ 23).

The Island is separated from the mainland by a narrow channel that fluctuates between forty and eighty feet wide depending on the high-water mark. (*Id.* ¶ 25). The channel's depth is less than two feet at mean low water. (*Id.* ¶ 26). Haney claims he has rights in the property at the end of Punkhorn Point Road through a separate trust, the SN Trust, allowing him to travel along this private road, across the property at the end, then to the water, and across the water of Popponesset Bay to the Subject Property. (*Id.* ¶ 27).[1]

---

[1] Haney claims ownership rights in the property at the end of Punkhorn Point Road through the SN Trust. Mashpee filed a

In 1908, the Board of Harbor and Land Commissioners Court had issued a license to construct a bridge from the mainland at the end of Punkhorn Point Road to the Island. (*Id.* ¶ 31). As detailed herein, no bridge has been built, and at the time Haney acquired the Subject Property, and today, the Island is accessed by wading across the channel. (*Id.* ¶ 28).

In 1960, a Mashpee Special Town Meeting placed Gooseberry Island within the R-150 Residence zone. (*Id.* ¶ 46). By 1985, after several amendments to the Mashpee zoning bylaws, the owner of Gooseberry Island needed a variance to build a house on the property unless the owner constructed a bridge and a road to provide frontage. (*Id.* ¶¶ 48–55). In 1998, Mashpee classified Gooseberry Island as "Lands of Conservation and Recreation Interest" in the Town's Local Comprehensive Plan, and in 2008, it was classified as "Private Land of Conservation Interest" in the Town's Open Space, Conservation and Recreation Plan. (*Id.* ¶¶ 56–57). The zoning restrictions and classifications were in effect at the time Haney acquired the Subject Property in 2011.

The Mashpee Wampanoag Tribe

On May 23, 2007, the Mashpee Wampanoag Tribe ("Tribe") gained federal recognition and subsequently

---

complaint in Land Court in 2014 challenging SN Trust's title to this land. (Compl. ¶ 86). The Land Court entered judgment in SN Trust's favor on October 10, 2019, and the Town has appealed. (*Id.* ¶¶ 86–88, 148–50). Since the distinction between the SN Trust and Gooseberry Island Trust is not relevant to the issues before the court, unless the circumstance requires otherwise, the reference to the "Trust" refers to the SN Trust and Gooseberry Island Trust either singularly or collectively.

entered into negotiations with the Town of Mashpee for the execution of an intergovernmental agreement ("IGA") between the Town and the Tribe. (*Id.* ¶¶ 58–59). During the special town meeting in which the Mashpee Board of Selectmen approved an article to enter into an agreement with the Tribe, a separate article was offered to

> see if the Town will vote to authorize the Board of Selectmen to convey, grant and/or release to the Mashpee Wampanoag Tribe of Massachusetts (the "Tribe") the Town's title, rights, or interest it (sic) and to the following described parcels of real property, to file such petitions with the Massachusetts General Court as may be necessary to effect this conveyance, grant or release, and to execute any and all instruments necessary to convey, grant and for release the Town's title, interest or rights, upon such terms and conditions as the Board of Selectmen shall deem to be in the interest of the Town; provided, that the Town and the Tribe shall have first executed an Inter-Governmental Agreement specifically providing the terms of disposition of the subject title, rights and/or interests: . . . . ***Parcel Seven: The parcel containing 4.6 acres, more or less, identified on Assessors Map 106, located off of Punkhorn Point and Gooseberry Island, currently utilized as a Wampanoag Aquaculture/Shellfish Farm site*** . . . Parcels Seven and Eight are Wampanoag Shellfish Farms located in Popponesset Bay which, have, for several years been cultivated, maintained and harvested by the Tribe

> pursuant to licenses and permits granted by the Town. The Town has agreed in the Intergovernmental Agreement to convey to the Tribe any right, title or interest of the Town in these two parcels for continued aquaculture/ shellfish farm use and/or to support steps necessary for these parcels to be taken into trust for this purpose.

(*Id.* ¶¶ 60–62 (emphasis in original)).

Parcel Seven, as described in the article, includes the state-owned waters that surround Gooseberry Island. (*Id.* ¶ 63). Upon consideration of the article, Mashpee's town counsel acknowledged that the Town had "no legal right or ability to interfere with any rights or interests of private property owners or the Commonwealth in these areas," and Parcel Seven was subsequently removed from the article, which ultimately passed. (*Id.* ¶¶ 64–65). Mashpee and the Tribe formally entered into the IGA on April 22, 2018. (*Id.* ¶ 66). The IGA includes language that pledges Mashpee to "support all necessary steps to have [Parcel Seven] acquired in trust for the Tribe." (*Id.* ¶ 67).

2013 Variance Applications and Initial Bridge Denial

On or about August 29, 2013, the Trust applied for three variances to Mashpee's zoning bylaws: (1) Section 174-12 – frontage on a street, (2) Section 174-31 – 150 Feet of frontage on a street, and (3) Section 174-32 – unobstructed paved access roadway. (*Id.* ¶ 72). After holding a hearing, the ZBA voted 4 to 1 to deny the variances. (*Id.* ¶ 73). In three written decisions, the ZBA explained that public

safety concerns vis-à-vis the lack of a bridge between the Island and mainland compelled its decision to deny the variances. (*Id.* ¶ 74).[2]

To ameliorate the ZBA's public safety concerns, Haney, through Vaccaro Environmental Consulting, filed a notice of intent ("NOI") with the Mashpee Conservation Commission ("Commission") on behalf of both the SN Trust and the Gooseberry Island Trust. (*Id.* ¶ 75; *see* note 1, *supra*). The NOI proposed to construct a timber bridge and driveway to provide vehicle access to the Island. (*Id.* ¶¶ 75, 100). The Tribe opposed the bridge and other development on Gooseberry Island because it believed that it would negatively impact the Tribe's shellfish grant. (*Id.* ¶¶ 77, 95). The Tribe also took the position that any approvals for the bridge would violate the IGA. (*Id.* ¶ 96). According to the complaint, on "information and belief," the Mashpee Board of Selectmen, based on the Tribe's opposition to the timber bridge, and allegedly improperly acting in executive session, authorized the town counsel to oppose the proposal before the Commission, which he did. (*Id.* ¶¶ 82–85, 89–91).

The hearing on the NOI was continued several times, culminating in a final hearing on January 8, 2015. (*Id.* ¶¶ 78, 89, 92, 94–95). In addition to the Tribe's opposition to the bridge, at the hearing Mashpee's independent consultant noted that the proposal would not comply with the state Wetlands Protection Act ("WPA"), Mass. Gen. Laws ch. 131,

---

[2] As detailed *infra*, this decision was appealed to the Barnstable Superior Court and was subsequently consolidated with another appeal. (Def. Mem. (Docket No. 9) Ex. 7).

§ 40. (*Id.* ¶¶ 95–97).[3] On January 22, 2015, the Commission rejected the proposal without prejudice, and on February 11, 2015, it issued an Order of Conditions denying the proposed timber bridge under both the WPA and the Mashpee Wetlands Protection Bylaws. (*Id.* ¶ 100).

Review of the Initial Bridge Proposal

Following the Commission's denial, the Trust filed a request for superseding review with the Massachusetts Department of Environmental Protection ("DEP") on February 12, 2015. (*Id.* ¶ 103). The DEP subsequently issued a superseding order of conditions denying the Trusts' proposal on the grounds that the "installation of sixteen 14-inch diameter piles within salt marsh would destroy 17.1 square feet of salt marsh and that the shading impacts from the bridge decking would have an adverse effect on the productivity of the salt marsh." (*Id.* ¶ 104). In response, the Trust, on July 14, 2015, requested that the DEP issue a variance from the WPA and also appealed the superseding order of conditions by requesting an adjudicatory hearing with the Office of Appeals and Dispute Resolution ("OADR"), in accordance with 310 Mass. Code Regs. 10.05(7)(j)(2). (*Id.* ¶ 105).

Prior to the OADR adjudicatory hearing, the Trust proposed replacing the disputed timber bridge with a steel bridge, which would eliminate both the piling and light issues presented by the initial proposal. (*Id.* ¶ 106). After the DEP advised that the

[3] According to the complaint, this advice was in error and the bridge was exempt from the WPA due to the licenses issued in the early 1900's. (Compl. ¶ 98).

proposed changes would address the initial reasons for denial, since the steel bridge would have no piles in the salt marsh and would allow more light to penetrate the salt marsh, the Trust revised the proposal accordingly. (*Id.* ¶¶ 107–08). After an evidentiary hearing on December 7, 2015, the DEP filed a post-hearing memorandum stating that the DEP "now supports the [Trust's] request for a Final Order of Conditions and submits that the Presiding Officer should grant the [Trust's] appeal." (*Id.* ¶ 110). However, the Commission filed its own post-hearing memorandum stating that "the [Trust's] newly-filed Plan has improperly circumvented the Plan Change Policy requirement of [thorough] local review and should be remanded to the Commission." (*Id.* ¶ 111).

On June 6, 2017, the OADR issued a Recommended Final Decision holding that the Trust's new proposal could not be reviewed under the DEP's plan change policy because the steel bridge alternative was "substantially different from their originally proposed timber bridge" and must be submitted to the Commission under a new NOI. (*Id.* ¶¶ 112–13). This decision was adopted by the DEP's Commissioner on June 22, 2017 (the "DEP's Final Decision"). (*Id.* ¶ 114).

The Trusts appealed the DEP's Final Decision by filing a complaint seeking judicial review pursuant to the Massachusetts Administrative Procedure Act, Mass. Gen. Laws ch. 30A, § 14, on July 21, 2017. (*Id.* ¶ 116). On August 2, 2019, judgment entered in Barnstable Superior Court affirming the DEP's Final Decision. (*Id.* ¶ 130). The Trust then appealed to the Massachusetts Appeals Court ("MAC"). (*Id.* ¶ 131). The MAC affirmed the Superior Court's decision on

August 10, 2021, upholding the ruling that evaluation of the steel bridge proposal had to be completed by the Commission in the first instance because the steel bridge was "substantially different from the plan acted upon by the [c]onservation [c]ommission." *Haney v. Dep't of Envtl. Prot.*, No. 19-P-1395, 2021 WL 3502072, at *2 (Mass. App. Ct. Aug. 10, 2021).

2018 Application for Variance and Settlement Discussions

On November 9, 2018, Haney, on behalf of the Trust, filed three new applications for variances from the Mashpee zoning bylaws for the construction of a single-family home: (1) Section 174-12 – variance from frontage on a street, (2) Section 174-32 – variance from frontage for fire department access, and (3) Section 174-31 – variance from 150-foot length of frontage. (Compl. ¶ 132). Haney claims to have made these filings to avoid "wast[ing] resources permitting and/or building a bridge if the Town would not even issue a building permit due to zoning concerns." (*Id.* ¶ 133). No variance was filed relating to the steel bridge proposal. The ZBA held a hearing on the matter on December 12, 2018. (*Id.* ¶¶ 138–39). Despite the absence of a wetlands permit, which the Trust concededly needed, Haney's new application proposed to construct a single-lane bridge that would provide pedestrian and vehicle access to Gooseberry Island. (*Id.* ¶ 137; Def. Mem. Ex. 7, at 4). At the hearing, the Tribe's natural resources director claimed that granting the variance would violate the IGA. (Compl. ¶ 140). After a full hearing, the ZBA voted again to deny the variances. (*Id.* ¶ 143). The ZBA issued written decisions explaining that the denial was based on the conclusion that the proposed variance would

not advance the Town's interest in maintaining the public safety and would, in fact, derogate from the underlying purpose and intent of the zoning bylaws. (*Id.* ¶ 144).

On January 8, 2019, the Trusts appealed the ZBA denials to the state court pursuant to Mass. Gen. Laws ch. 40A, § 17. (Def. Mem. (Docket No. 9) at 9, Ex. 6). Haney later moved to consolidate that appeal with the appeal of the ZBA's denial of the initial 2013 variance requests. (Def. Mem. Ex. 7; *see* note 2, *supra*). The record before this court is that those appeals are currently pending.

Haney alleges that he has reached out to Mashpee and the relevant boards to settle the variance appeals. (Compl. ¶ 151). He also alleges that Mashpee's town counsel, Patrick Costello ("Costello"), has represented to him that "any proposed settlement must be acceptable to the [Tribe]" and that "it is essential that the Tribe be on board with the construction of a bridge as a preliminary matter" for purposes of a settlement. (*Id.* ¶¶ 152–54). In early July 2020, Haney offered Mashpee a proposed universal settlement agreement in which he would be permitted to construct a residence only upon approval of the bridge, but Mashpee, through Costello, denied that offer, noting "the trial court and DEP appeal dispositions favorable to the Town rendered to date." (*Id.* ¶¶ 157–59). The Mashpee Board of Selectmen later formally considered passing an article to purchase Gooseberry Island, but the article was indefinitely postponed in October 2020. (*Id.* ¶¶ 160, 163–66). The following month, the Commission voted to endorse the acquisition of the Subject Property by eminent domain. (*Id.* ¶ 167).

In January 2021, the Mashpee Conservation Department submitted an application to the Mashpee Community Preservation Committee seeking funding to purchase Gooseberry Island for conservation land and open space. (*Id.* ¶ 169). The Community Preservation Committee subsequently voted to acquire an appraisal of Gooseberry Island. (*Id.* ¶ 173). It is the plaintiff's contention that it would now be futile to apply for a permit for a bridge because "(i) the Town of Mashpee will not issue any permit allowing development; and (ii) there is no process to obtain a permit from the Tribe." (*Id.* ¶ 178).

Additional facts will be provided below as appropriate.

III. ANALYSIS

A. Regulatory Takings Generally

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. am. V. A property owner may bring a Fifth Amendment claim under 42 U.S.C. § 1983 to seek compensation for a government violation of the Takings Clause. *Knick v. Twp. of Scott, Penn.*, 139 S. Ct. 2162, 2177, 2014 L. Ed. 2d 558 (2019). When governmental regulations deprive a property owner of all economically beneficial uses of their property, that owner has suffered a compensable taking. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 2895, 120 L. Ed. 2d 798 (1992). "Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic

effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S. Ct. 2448, 2457, 150 L. Ed. 2d 592 (2001) (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978)). "The question of what constitutes a 'taking' for purposes of the Fifth Amendment" in the absence of a complete deprivation of all economically beneficial uses "has proved to be a problem of considerable difficulty." *Penn Cent.*, 438 U.S. at 123, 98 S. Ct. at 2659. While the defendants argue that the facts alleged in the complaint do not rise to the level of a constitutional deprivation, this issue does not need to be resolved at this time. (*See* Def. Mem. at 25–28). As detailed below, the Trust's claims are not ripe for adjudication.

The Supreme Court recently held that it is no longer a requirement that a plaintiff seek compensation in state court before bringing a Takings Clause claim in federal court. *Knick*, 139 S. Ct. at 2177–79 (repudiating *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194, 105 S. Ct. 3108, 3120, 87 L. Ed. 2d 126 (1985)). *See also Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516, 102 S. Ct. 2557, 2568, 73 L. Ed. 2d 172 (1982) (plaintiffs suing under § 1983 are not required to have exhausted state administrative remedies). Nevertheless, it is still the case that "[w]hen a plaintiff alleges a regulatory taking in violation of the Fifth Amendment, a federal court should not consider the claim before the government has reached a 'final' decision." *Pakdel*, 141 S. Ct. at 2228. That is because "until the government makes up

its mind, a court will be hard pressed to determine whether the plaintiff has suffered a constitutional violation." *Id.* While "[t]he finality requirement is relatively modest" a plaintiff must show that "there is no question about how the regulations at issue apply to the particular land in question." *Id.* at 2230 (internal quotation and punctuation omitted). The facts as alleged in the complaint fail to establish that there has been a final government decision on the Trust's steel bridge proposal.

B. No "Final" Decision Has Been Made By The Town

For a regulatory takings claim under § 1983 to be "ripe" for adjudication, there must be "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 348, 106 S. Ct. 2561, 2566, 91 L. Ed. 2d 285 (1986). Thus, the landowner must have followed "reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law." *Palazzolo*, 522 U.S. at 620–21, 121 S. Ct. at 2459. Put simply, a reviewing court "cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald*, 477 U.S. at 348, 106 S. Ct. at 2566.[4]

---

[4] State takings claims under Article X of the Massachusetts Constitution are evaluated coextensively with the federal takings analysis. *Commonwealth v. Blair*, 805 N.E.2d 1011, 1016, 60 Mass. App. Ct. 741, 748 (2004).

As detailed above, in response to the denial of the 2013 requests for variances, the Trust proposed a steel bridge to address the concerns that the previously proposed wooden bridge would cause harm to the salt marsh. (Compl. ¶¶ 106–08). The DEP expressed support for this proposal. (*Id.* ¶ 110). However, the Commission determined that the proposal required a new NOI, as it was substantially different than the earlier proposal. (*Id.* ¶ 111). The need for a new proposal was confirmed by the OADR, and then by the Superior Court and the MAC. (*Id.* ¶¶ 112–13, 130; *Haney*, 2021 WL 3502072, at **2, 5). Nevertheless, the Trust has not filed any application seeking a variance based on the steel bridge proposal. Therefore, the present litigation is not ripe. Haney has not given the agencies the opportunity "to exercise their full discretion in considering development plans for the property[.]" *Palazzolo*, 533 U.S. at 620–21, 121 S. Ct. at 2459.

Pursuing The Steel Bridge Proposal Is Not Futile

A regulatory takings claim may proceed despite a plaintiff eschewing the relevant permitting processes when engaging in the permitting process would be "futile," such as "where special circumstances exist such that a permit application is not a 'viable option,'" or "the granting authority has dug in its heels and made it transparently clear that the permit, application or no, will not be forthcoming[.]" *Gilbert v. City of Cambridge*, 932 F.2d 51, 60–61 (1st Cir. 1991). The allegations of the complaint do not support a conclusion that further efforts to obtain regulatory approval would be futile.

As alleged in the complaint, the Trust filed a new application for zoning variances with the ZBA in 2018 in an attempt to determine if the ZBA would deny a variance for a single-family home regardless whether there was an approved bridge. (*See* Compl. ¶¶ 132–37). Since the ZBA denied the variances, it is Haney's position that there was a regulatory taking and that he has been prevented from developing the Subject Property "for a home or any other economically viable, developmental use." (*Id.* ¶¶ 141, 147). However, a review of the referenced ZBA December 20, 2018 decision makes it clear that the members believed that the application to the ZBA was premature, and that a final decision on the merits was not being made. (Def. Mem. Ex. 6 (Docket No. 9-6)). Thus, the members were concerned that the litigation regarding title to property was still pending, as was the litigation concerning whether the steel bridge could be considered on the merits without a new NOI. (*Id.* at 11). The sentiment was expressed that it was "wasteful and unnecessary" to submit new applications while the issues raised by the pending litigation remained unresolved. (*Id.*). Of concern was that there was "no clear ownership to the title to the land on the mainland, and . . . no clarity from Conservation to allow the bridge to be built." (*Id.* at 10). Similarly, a ZBA member expressed the opinion that "[h]e could not approve something that was not approved by other departments." (*Id.* at 9). Without belaboring the point, there is no clear statement from the ZBA that there can never be a variance granted for the Subject Property, or that it would be futile for the Trust to seek a variance at the appropriate time. *See Pakdel*, 141 S. Ct. at 2231 ("[A] plaintiff's failure to properly pursue administrative procedures may

render a claim unripe *if* avenues still remain for the government to clarify or change its decision." (emphasis in original)).

The Trust further argues that additional approval attempts are futile given the Tribe's opposition to a bridge, and its belief that the Town will never approve a bridge without the agreement of the Tribe because it would allegedly violate the IGA. (Pl. Mem. (Docket No. 18) at 4; Compl. ¶¶ 75–85, 151–59). However, the allegations of the complaint go no further than noting that there was opposition to the bridge proposal. There is no indication of a formal vote or binding position prohibiting the Town from issuing the variances despite the Tribe's opposition. Nor is there any reference to any opinion of counsel that a bridge would violate the IGA. In the absence of factual allegations that "the government is committed to a position" the decision is not final for takings clause purposes. *Pakdel*, 141 S. Ct. at 2230.[5]

IV. CONCLUSION

For all the reasons detailed herein, "Defendants' Motion to Dismiss Plaintiff's Complaint" (Docket No. 8) is ALLOWED. The complaint is dismissed without prejudice.

/s/ Judith Gail Dein
Judith Gail Dein
United States Magistrate Judge

[5] In light of the conclusion that the issues raised by the complaint are not ripe, this court will not reach the additional arguments raised by the defendants in support of their motion to dismiss.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MATTHEW HANEY, as Trustee of the Gooseberry Island Trust, Plaintiff, v. TOWN OF MASHPEE, and JONATHAN FURBUSH, WILLIAM BLAISEDELL, SCOTT GOLDSTEIN, NORMAN GOULD, BRADFORD PITTSLEY, and SHARON SANGELEER, as they are members and are collectively the ZONING BOARD OF APPEALS OF THE TOWN OF MASHPEE, Defendants.	CIVIL ACTION NO. 21-10718-JGD

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR RECONSIDERATION

April 25, 2022

DEIN, U.S.M.J.

Plaintiff Matthew Haney ("Haney"), as Trustee of the Gooseberry Island Trust ("Trust"), has brought this action against the Town of Mashpee ("Mashpee" or the "Town") and the members of its Zoning Board of Appeals ("ZBA") pursuant to 42 U.S.C. § 1983 alleging an unconstitutional regulatory taking of

private property under the Fifth Amendment of the United States Constitution (Count I), and asking this court to exercise its supplemental jurisdiction over a claim of inverse condemnation under Article X of the Massachusetts Constitution and state common law (Count II). This is the latest in a series of administrative and court proceedings initiated by Haney relating to his attempt to construct a home on Gooseberry Island.

On March 22, 2022, this court issued its "Memorandum of Decision and Order on Defendants' Motion to Dismiss" dismissing the complaint without prejudice. (Docket No. 24). This matter is presently before the court on Haney's "Motion for Reconsider[a]tion" by which the plaintiff has asked this court to reconsider its decision because the court allegedly (1) erred in finding that Haney did not submit a steel bridge proposal to the ZBA; (2) misread the decision of the ZBA on the 2018 variances applications; (3) failed to read the allegations of the Complaint in a manner favorable to the plaintiff; and (4) incorrectly concluded that Haney's claims were not ripe for adjudication. (Docket No. 25). After careful review of the plaintiff's "Memorandum in Support of Motion for Reconsider[a]tion" (Docket No. 25-1) and the defendants' opposition thereto ("Opp.") (Docket No. 26), the Motion for Reconsideration is DENIED.

In order to succeed on a motion for reconsideration, "'the movant must demonstrate either that newly discovered evidence (not previously available) has come to light or that the rendering court committed a manifest error of law.'" *Mulero-Abreu v. Puerto Rico Police Dep't*, 675 F.3d 88, 94–95 (1st Cir. 2012) (quoting *Palmer v. Champion Mortg.*, 465 F.3d

24, 30 (1st Cir. 2006)). "[A] motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law, but is not appropriate as a vehicle to reargue an issue previously addressed by the court when the motion merely advances new arguments or supporting facts which were available at the time of the original motion." *Platten v. HGBermuda Exempted Ltd.*, 437 F.3d 118, 139 (1st Cir. 2006) (internal punctuation and quotation omitted). Haney's motion fails to meet this standard for reconsideration.

For the reasons detailed more fully in this court's Memorandum of Decision and Order of March 22, 2022, and the defendant's Opposition to the motion for reconsideration, this court sees no reason to modify its interpretation of the facts as found in the record or its rulings of law.

The Motion for Reconsideration (Docket No. 25) is DENIED.

/s/ Judith Gail Dein
Judith Gail Dein
United States Magistrate Judge

Filed April 29, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Matthew Haney, as Trustee of the Gooseberry Island Trust Plaintiff v. Town of Mashpee, and Jonathan Furbush, William A. Blaisedell, Scott Goldstein, Norman J. Gould, Bradford H. Pittsley, and Sharon Sangeleer, as they are members and are collectively the Zoning Board of Appeals of the Town of Mashpee Defendants	Civil Action No.

COMPLAINT

Introduction

This complaint involves an approximately four acre island in Mashpee, Massachusetts owned by the Plaintiff and asserts a claim that the Defendants' actions have resulted in a regulatory taking of said island in violation of the Fifth Amendment to the Constitution of the United States of America, and Article X, of the Massachusetts Declaration of Rights by refusing to issue permits to allow construction of a single family home on said island. Plaintiffs bring their federal claims pursuant to 42 U.S.C. § 1983.

Jurisdiction and Venue

1. This action arises under 42 U.S.C. § 1983 in relation to Defendants' deprivation of Plaintiffs' constitutional rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and, therefore, this Court has federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343, and to award attorneys' fees and costs under 42 U.S.C. § 1988. This Court has pendent jurisdiction over Plaintiff's state law claims.

2. The United States District Court for the District of Massachusetts is the appropriate venue for this action pursuant to 28 U.S.C. §§ 1391(b)(1) and (2) because it concerns property located in the Town of Mashpee, Massachusetts, within the jurisdiction of the District of Massachusetts and is the district in which Defendants either maintain offices or do substantial official government work in, exercise their authority in their official capacities, and it is the district in which substantially all of the events giving rise to the claims occurred.

Parties

3. Plaintiff Matthew Haney, trustee of the Gooseberry Island Trust ("Gooseberry") is an individual with a mailing address of P.O. Box 1416, Brookline, Massachusetts 02446.

4. The Defendant Town of Mashpee is a duly constituted municipal body with an address of 16 Great Neck Road North, Mashpee, Massachusetts 02649.

5. The Defendants Jonathan Furbush, William A. Blaisedell, Scott Goldstein, Norman J. Gould, Bradford H. Pittsley, and Sharon Sangeleer, are the duly appointed members and are collectively

the Mashpee Zoning Board of Appeals ("ZBA") and have an address of 16 Great Neck Road North, Mashpee, Massachusetts 02649.

6. Each Defendant is a person within the meaning of 42 U.S.C. § 1983.

7. The acts of Defendants set forth below were performed under color of law.

Factual Allegations

Title History of the Property

8. At all times material to this suit, Gooseberry, or members of the Nelson family in their individual capacity (Plaintiffs or Owners) owned real property consisting of an island in Popponesset Bay in Mashpee, Barnstable County, Massachusetts (the "Subject Property"), more particularly described in Land Court Plan 25209A.

9. A true and correct copy of Land Court Plan 25209A is attached as Exhibit One to this complaint.

10. Niles Sture Nelson ("Sture") purchased the Subject Property, a 4-acre island commonly known as "Gooseberry Island," from Fields Point Manufacturing Corporation pursuant to a quitclaim deed, dated September 22, 1955.

11. A true and correct copy of the deed is attached as Exhibit Two.

12. Sture purchased the Subject Property for an investment.

13. In 1981 Sture conveyed title to his son Robert J. Nelson and his wife, Betsy A. Nelson.

14. A true and correct the deed is attached as Exhibit Three.

15. In 1992 Robert J. Nelson and Betsy A. Nelson conveyed title to the Subject Property to their son, Robert J. Nelson, Jr.

16. A true and correct the deed is attached as Exhibit Four.

17. Upon Robert J. Nelson, Jr.'s retirement he planned to construct a single family home on the Subject Property.

18. In 2011 Robert J. Nelson, Jr. conveyed title to the Subject Property to the Robert D. Emmeluth as trustee of the Gooseberry Island Trust for $1,315,000.00.

19. A true and correct copy of the documents of transfer are attached as Exhibit Five.

20. Matthew Haney succeeded Robert D. Emmeluth as trustee.

21. A true and correct copy of the documents of transfer are attached as Exhibit Six.

22. Although currently vacant, the Subject Property was used by Plaintiff's predecessors in title as a camp for hunting and fishing.

23. Remnants of the foundation of a cottage are shown on the Land Court Plan 25209-A (attached as Exhibit One), and are still present on the Property.

Access to the Property and Nearby Islands

24. The Property is comprised of 4± acres of land located in Popponesset Bay offshore from the end of

Punkhorn Point Road formally known as the road to Gooseberry Island.

25. The Subject Property is separated from the mainland by a narrow channel that is approximately 40 feet wide at mean low water and 80 feet wide at mean high water.

26. The channel has a depth of less than two feet at mean low water.

27. As further discussed below, the Plaintiff has rights in the property at the end of Punkhorn Point Road allowing the Plaintiff to travel along Punkhorn Point Road, a private road, across the property at the end, then to the water, and across the waters of Popponesset Bay to the Subject Property.

28. The Subject Property is currently accessed by wading across the channel.

29. Pursuant to Chapter 134 of the Acts of 1908, the Massachusetts General Court authorized Plaintiff's predecessor in title, Theodore H. Tyndale, his associates and assigns to construct a bridge from the mainland at the end of Punkhorn Point Road to the Subject Property ("1908 Act").

30. A true and correct copy of the 1908 Act is attached as Exhibit Seven to this complaint.

31. Pursuant to the 1908 Act, the Board of Harbor and Land Commissioners Court issued a license to Theodore H. Tyndale to construct a bridge from the mainland at the end of Punkhorn Point Road to the Subject Property ("1909 License").

32. A true and correct copy of the license approved in 1909 License is attached as Exhibit Eight to this complaint.

33. A true and correct copy of the plan approved in 1909 License is attached as Exhibit Nine to this complaint

34. The 1908 Act and the 1909 License also authorized the construction of a bridge from the mainland to Popponesset Island in Popponesset Bay.

35. This bridge to Popponesset Island was constructed pursuant to the Act and, at this time, over 70 homes have been constructed on the approximately 45 acres of land that constitutes Popponesset Island (*i.e.*, about one house for each 0.64 acres of total land).

36. Popponesset Island is located in the R3 District which requires a minimum lot size of 40,000 square feet (*i.e.*, 0.91 acres).

37. Popponesset Island has an elongated shape with a single road down the center which travels essentially north to south.

38. As such the overwhelming majority of home lots on the Popponesset Island have frontage on this narrow road on one side and Popponesset Bay on the opposite with adjacent home lots on each side to the north and south.

39. Notwithstanding that almost every lot is deficient in size and located on an island that can only be accessed via a small bridge connecting to a single road, the Defendant ZBA has approved numerous special permits and variances allowing the construction and expansion of single family houses on Popponesset Island.

40. Notwithstanding that the lots are deficient in size and located on an island that can only be accessed via a small bridge, the Town through its building

department has issued numerous permits allowing the construction and expansion of single family houses on Popponesset Island.

41. Notwithstanding that almost every lot on Popponesset Island is located within or immediately adjacent to protected wetlands and the island has shellfish grants located in Popponesset Bay in its immediate vicinity, the Town of Mashpee through its Conservation Commission has issued numerous authorizations to allowing the construction and expansion of single family houses including associated septic systems on Popponesset Island.

Mashpee's Town Meeting and the Subject Property

42. The October 18, 1954, Mashpee Town meeting included Article 12 which provided:

> To see if the Town will vote to take by eminent domain, purchase, gift or in any other manner, for purposes of a public park, recreational grounds or for any other public purposes, a certain parcel of marsh and upland, with all the trees, shrubbery and structures thereon, if any, commonly known as Gooseberry Island

43. The Mashpee Advisory Commission withheld approval and the vote did not pass at the October, 1954, town meeting.

44. The March 7, 1955, Mashpee Town meeting included Article 64 which provided:

> To see if the Town will vote to take by eminent domain, purchase, gift or in any other manner, for purposes of a public park,

> recreational grounds or any other public purpose, a certain parcel of Marsh and upland, with all the trees, shrubbery and structures thereon, if any, commonly known as Gooseberry Island

45. The Mashpee Advisory Commission withheld approval and the vote did not pass at the March, 1955, town meeting.

46. On October 25, 1960, Mashpee Special Town Meeting adopted a zoning bylaw and placed the Property within the R-150 Residence.

47. After the adoption of the zoning by-law the Owner had a right to construct at least six houses on the Subject Property.

48. The March 7, 1966, Mashpee Annual Town meeting voted to amended the zoning by-law to require "minimum frontage of one hundred twenty-five (125) feet.... provided that one (1) one-family dwelling and its accessory buildings may be erected on any lot which at the time this by-law was adopted, is separately owned."

49. After the amendment of the zoning by-law, the Owner had a right to construct one house on the Subject Property unless the Owner constructed a bridge and a road to provide frontage.

50. The 1970 Mashpee Town meeting voted to amended the zoning by-law to require: "No building shall be erected except on a lot fronting on a street and there shall be not more than one principal building on any lot."

51. After the amendment of the zoning by-law and since the Subject Property is an island and has no

frontage, the Owner needed a variance from the zoning bylaw to build a house on the Subject Property unless the Owner constructed a bridge and a road.

52. The May 1978 Mashpee Town meeting voted to add a grandfather provision to the zoning bylaw by adding Section 5.5 which provides: "Any lot shown on a plan and lawfully in existence in compliance with the provisions of the Subdivision Control Law (MGL Chapter 41), as of January 1, 1977 may thereafter be built upon."

53. After the enactment of this section, the Owner had a right to construct one house on the Subject Property.

54. The 1985 Mashpee Town meeting voted to amended the zoning by-law to remove the protection that Section 5.5 provided.

55. After the amendment of the zoning by-law, the Owner needed a variance to build a house on the Subject Property unless the Owner constructed a bridge and a road to provide frontage.

56. The Town of Mashpee 1998 Local Comprehensive Plan classified the Subject Property as Lands of Conservation and Recreation Interest.

57. In 2008 the Town of Mashpee classified the Subject Property as a Private Land of Conservation Interest in the Town's Open Space, Conservation and Recreation Plan.

The Defendant Town's Agreement with the Mashpee Wampanoag Tribe Regarding Lands Adjacent to the Subject Property

58. On May 23, 2007, the Mashpee Wampanoag Tribe ("Tribe") obtained federal recognition.

59. Subsequently, the Defendant Town of Mashpee entered into negotiations for the execution of an intergovernmental agreement with the Tribe governing the relationship between the Town and the Tribe.

60. Article 1 of the April 7, 2008, Town of Mashpee Special Town Meeting was a request to "authorize[] the board of selectmen to enter into an Inter-Governmental Agreement with the Mashpee Wampanoag Tribe upon such terms and condition as the Selectmen deem advisable and in the best interest of the Town, or take any other action relating thereto."

61. Article 1 passed.

62. Article 2 of the April 7, 2008, Town of Mashpee Special Town Meeting was a request to:

> "see if the Town will vote to authorize the Board of Selectmen to convey, grant and/or release to the Mashpee Wampanoag Tribe of Massachusetts (the "Tribe") the Town's title, rights, or interest it and to the following described parcels of real property, to file such petitions with the Massachusetts General Court as may be necessary to effect this conveyance, grant or release, and to execute any and all instruments necessary to convey, grant and for release the Town's title, interest or rights, upon such terms and conditions as the Board of Selectmen shall deem to be in the interest of the Town; provided, that the Town and the Tribe shall have first executed an Inter-Governmental Agreement specifically providing the terms of disposition of the subject title, rights and/or interests:....

> ***Parcel Seven: The parcel containing 4.6 acres, more or less, identified on Assessors Map 106, located off of Punkhorn Point and Gooseberry Island, currently utilized as a Wampanoag Aquaculture/Shellfish Farm site***... Parcels Seven and Eight are Wampanoag Shellfish Farms located in Popponesset Bay which, have, for several years been cultivated, maintained and harvested by the Tribe pursuant to licenses and permits granted by the Town. The Town has agreed in the Intergovernmental Agreement to convey to the Tribe any right, title or interest of the Town in these two parcels for continued aquaculture/ shellfish farm use and/or to support steps necessary for these parcels to be taken into trust for this purpose"

63. Parcel Seven is the water that surrounds Gooseberry Island/Subject Property and is owned by the Commonwealth of Massachusetts.

64. On March 18, 2008, Town Counsel emailed the Mashpee town manager stating:

> I have researched the statutes and case law on point, and ALL that the Town has the authority to do (pursuant to G.L. c.130, ss 52, 57, et seq.) is issue "grants" or licenses to individuals authorizing them to conduct shellfish farming or other authorized aquaculture activities at specified tideland/ low water areas. We have no legal or equitable title or interest in any of these areas, thus, we can't convey any title or interest to the Tribe. ***We also have no legal right or ability to***

> ***interfere with any rights or interests of private property owners or the Commonwealth in these areas***, thus, no action of the Town could affect any such private/ state rights. Finally, since the right to issue the grants/ licenses is vested in the Town by General Law, we have no right or legal ability to transfer or assign that right to any other entity. Special legislation by the General Court will be required to effect any such transfer of rights.

65. At the April 8, 2008, Town Meeting, the Town passed Article 2, but Parcel Seven was removed from the list of parcels.

66. On or about April 22, 2018, the Defendant Town of Mashpee signed an intergovernmental agreement ("IGA") with the Tribe.

67. Notwithstanding the failure to include Parcel 7 in Article 2, the Town pledged in the intergovernmental agreement to "support all necessary steps to have [Parcel 7] acquired in trust for the Tribe."

Actions of the Defendant Zoning Board of Appeals and to Prevent Development of Gooseberry Island

68. Gooseberry Island/Subject Property is located in a heavily developed waterfront residential area of the Town of Mashpee and nearly all available upland waterfront lots which are a fraction of the size of Gooseberry Island are developed with single family homes.

69. The Defendant ZBA is a board established by the Town which pursuant to M.G.L. ch. 40A, 10 and

Section 174-95 of the Mashpee Zoning Bylaw has the authority to grant site specific variances to the terms of the Mashpee Zoning Bylaw.

70. Since adoption of the zoning bylaw in the town of Mashpee, the Defendants have granted hundreds of variances from the zoning by-law.

71. Plaintiff has been unable to find a situation whereas a municipally has refused to allow a house on an island with a similar amount of upland regardless of whether an access bridge has been constructed excepting circumstances where the Town or another entity purchased a restriction on the development of the island.

72. On or about August 29, 2013, the Plaintiff filed an application for variances with the ZBA of the following provisions of the Mashpee Zoning Bylaw to enable construction of a one single-family dwelling on the Subject Property: (i) Section 174-12-frontage on a street; (ii) Section 174-31 – 150 feet of frontage on a street; and (iii) Section 174-32- unobstructed paved access roadway.

73. On October 9, 2013, the Defendant ZBA held a public hearing on the Trust's application and voted 4 to 1 to deny it.

74. The Defendant ZBA filed three separate written decisions with the Town Clerk denying each of the three variances that the Plaintiffs request citing concerns with public safety as no bridge had been proposed.

Actions of the Mashpee Conservation Commission and the Board of Selectman to Prevent Development of Gooseberry Island

75. On March 14, 2014 to address the Defendant's concerns with public safety and the provision of emergency services, Plaintiff had Vaccaro Environmental Consulting file a Notice of Intent (NOI) application with the Mashpee Conservation Commission ("Commission"), a board established by the Defendant Town, on behalf of the Plaintiff and the SN Trust which are the owners of the land on Gooseberry Island/Subject Property and at the east end of Punkhorn Point Road in Mashpee proposing to construct a modern bridge and driveway in order to provide vehicle access to the island in approximately the same location as that approved in the 1908 Act and 1909 License.

76. After multiple continuances for various reasons, the matter was scheduled for a substantive hearing on August 28, 2014 at 6:00 p.m.

77. On August 25, 2014, the Tribe sent a letter to the Mashpee Town Manager Town of Mashpee and Patrick Costello Town Counsel stating:

> Pursuant to Section 1.a of the IGA, the Town agreed to convey the Town's interest, if any, in the "Punkhorn Point Site" consisting of 4.6 acres surrounding Gooseberry Island, as depicted on Exhibit B and the accompanying map, and described as the "Mashpee Wampanoag Tribal Council Shellfish Aquaculture Areas." See Page 16 and 17 of the IGA. In the alternative, should the Town not hold fee title to the site, the Town agreed that

> it "shall support all necessary steps to have those Parcels acquired in trust for the Tribe including any local approvals or state legislation." See Section 1.b of the IGA."..... "In accordance with the provisions of the IGA, the Tribe hereby respectfully requests that the Town—by and through the Town Manager, Town Attorney and Board of Selectman—aid and support the Tribe in its opposition to the proposed bridge and any other development on Gooseberry Island that would negatively impact the Tribe's shellfish grant. Further, the Tribe urges the Town to take the necessary steps to convey the "Mashpee Wampanoag Tribal Council Shellfish Aquaculture Areas" to the Tribe or, in the alternative, support the Tribe in its efforts to acquire the area as tribal lands.

78. On August 28, 2014, the Commission opened the continued hearing and Plaintiff requested additional continuance to October 9, 2014 to allow time for requested soil borings and structural analysis of proposed bridge.

79. At the meeting, the Mashpee Conservation Agent stated that Town Counsel will attend the October 9th meeting and then a motion was made and passed to continue the hearing to October 9, 2014.

80. On September 22, 2014, the Mashpee Board of Selectmen meeting was attended in person by Patrick Costello, the Town Counsel, and a motion was made to enter into Executive Session at this time for the purpose of discussing the disposition of real property, potential litigation regarding real property

and the matter of the trust agreement which was passed unanimously.

81. The September 22, 2014, Mashpee Board of Selectmen meeting agenda does not state that the "trust agreement" and/or the Tribe's request, and/or Gooseberry Island was going to be addressed in executive session.

82. On information and belief, during the Selectmen's executive session the August 25, 2014, Tribe's request under the IGA was discussed and the selectman authorized Town Counsel to aid and support the Tribe in its opposition to the proposed bridge and authorized Town Counsel to file a Massachusetts Land Court action against Matthew Haney as trustee of the SN Trust claiming that the Town owned the SN Trust's property at the end of Punkhorn Point Road which property Plaintiff has rights in based upon the SN Trust's ownership.

83. The actions violated the Open Meeting Law, G.L. c. 30A, §§ 18–25.

84. Selectmen Andrew Gottlieb was present during the discussion.

85. On information and belief in response to the Tribe's request and authorization from the Mashpee Board of Selectman, Patrick Costello informed the Mashpee Wampanoag Tribe that the town will work with them in opposing the bridge application before the Conservation Commission.

86. On October 3, 2014, the Town of Mashpee filed a Complaint in Land Court against the SN Trust challenging the SN Trust's title to the land at the end of Punkhorn Point Road (the "Land Court Action").

87. The Town's claim had little or no basis in fact.

88. Specifically, on October 10, 2019, the Land Court entered judgment that the SN Trust owned the land at the end of Punkhorn Point Road and, in doing so, noted that the Town submitted no credible evidence or any testimony in support of its claim stating that the Town:

> did not offer any source deeds into evidence to show a foundation for [its] claim . . . . It did not offer a testimony from any witnesses on that topic or, for that matter, on any other [and] relied solely on (1) a 1954 deed from George and Gladys Schneider to the Town (with no underlying source deeds or other evidence to show a foundation tying that deed back [to the 1888 division of lands in Mashpee), and (2) a 1957 Plan . . . which the Town created based upon the Schneider deed but which, in fact, is inconsistent with it. I find neither reliable. (footnotes omitted)

89. On October 9, 2014 The Mashpee Conservation Commission opened the continued hearing and Patrick Costello Town Counsel was present and opposed Plaintiffs application.

90. Attorney Costello's opposition was extraordinary as he is tasked as legal counsel to the Commission and argued against an application for which the Commission is acting in a quasi-adjudicatory capacity.

91. During the October 9, 2014 Mashpee Conservation Commission hearing, Patrick Costello Town Counsel never mention he was there in response

to the Tribe's request for the Town to oppose the bridge or on behalf of the Board of Selectman to support the Tribe's opposition.

92. The hearing was continued to November 13, 2014, to allow the Town's Conservation Agent to submit responses to a request for proposals.

93. On November 13, 2014, the Mashpee Conservation Commission opened the continued hearing and, following a discussion, moved to hire the BSC Group as the consultant to review Plaintiff's proposal.

94. The hearing was further continued to January 8, 2015.

95. At the January 8, 2015, the Tribe argued that the bridge would harm the area of a shellfish propagation license issued to the Tribe by the Town (but for which the Tribe is not using for shellfish propagation), and for which the Town has agreed to support a claim by the Tribe to place such land into trust by the Tribe.

96. On information and belief, the Tribe has informed the Town that any approvals granted to Plaintiff for the bridge would violate the IGA. *See also* Paragraph 77, *supra*, and Paragraph 140, *infra*.

97. BSC, the supposedly independent consultant hired by the Commission with funds provided by Plaintiff, also argued that the proposed bridge did not comply with the performance standards of the state Wetlands Protection Act.

98. The independent consultant did not inform the Commission that the bridge was exempt from the

Wetlands Protection Act due to the 1908 Act and the 1909 License.

99. On January 8, 2015, the Commission closed the public hearing on the application.

100. On January 22, 2015, and based primarily on the Mashpee Conservation agent's recommendations, the Mashpee Conservation Commission voted to deny the Plaintiff's application without prejudice and, on or about February 11, 2015, the Commission issued an Order of Conditions denying the proposed timber bridge under both the Wetlands Protection Act, M.G.L. c. 131, § 40 and the Mashpee Wetlands Protection Bylaw.

101. The denial order of conditions was not drafted solely by the Commission or its agent, but was drafted, in part, by assistant town counsel, Kathleen Connolly.

102. The Commission's decision was not issued within twenty-one days of the close of the public hearing as required by the state Wetlands Protection Act, M.G.L. c. 131, § 40.

103. On or about February 12, 2015, the Trusts filed a request for superseding review with the Massachusetts Department of Environmental Protection ("DEP") pursuant 310 CMR 10.05(7)(b).

104. On or about June 30, 2015, the DEP issued a superseding order of conditions denying the proposed timber bridge on the grounds that the installation of sixteen 14-inch diameter piles within salt marsh would destroy 17.1 square feet of salt marsh and that the shading impacts from the bridge decking would have an adverse effect on the productivity of the salt marsh.

105. On or about July 14, 2015, the Trusts requested that the DEP issue a variance from the Wetland Protection Act, and also appealed the DEP's denial superseding order of conditions by requesting an adjudicatory hearing with the Office of Appeals and Dispute Resolution ("OADR") pursuant to 310 CMR 10.05(7)(j)(2).

106. Prior to the adjudicatory hearing, the Trusts conferred with the DEP about replacing the proposed timber bridge with a steel bridge which would span the salt marsh, remove the pilings from the disputed land containing shellfish and which would have better light penetration.

107. The DEP advised that it would view such changes as permissible under the DEP's "Plan Change Policy" (Wetlands Program Policy 91-1: Plan Changes) and that such changes would address the two reasons for denial because the steel bridge would have no piles in the salt marsh and would allow more light to penetrate to the salt marsh.

108. The Trusts revised their proposed plans accordingly and the DEP advised that it viewed the revised design as complying with the applicable Wetlands Regulations and entitled to approval under the Wetlands Protection Act.

109. On or about December 7, 2015, the OADR held a one-day evidentiary hearing on the matter.

110. On January 25, 2016, DEP filed a post-hearing memorandum of law stating: "iv. Conclusion: Based on the foregoing the Department now supports the Petitioners' request for a Final Order of Conditions and submits that the Presiding Officer should grant the Petitioners' appeal."

111. On January 25, 2016, the Commission filed a Post Hearing Memorandum of Law which provided: "VI. Conclusion: For the aforementioned reasons, the Department should find for the Respondents and issue a Ruling that the decision of the Commission was timely filed and therefore it is controlling and Petitioner's newly-filed Plan has improperly circumvented the Plan Change Policy requirement of through local review and should be remanded to the Commission."

112. On or about June 6, 2017, the OADR issued a Recommended Final Decision.

113. The Recommended Final Decision held, inter alia: (a) that the Commission's decision was not issued in a timely manner and, consequently, the Trusts were entitled to proceed with the adjudicatory appeal; and (b) that the Trusts' revised project -- the steel bridge — could not be reviewed under the Plan Change Policy because the Trusts' proposed steel bridge alternative was "substantially different from their originally proposed timber bridge . . . . As a result, the Petitioner's Revised Project Plan cannot be reviewed and approved in this appeal, but must be submitted to the MCC (Mashpee Conservation Commission) for review pursuant to a new [notice of intent]..."

114. On or about June 22, 2017, the Commissioner of the DEP, Martin Suuberg, adopted the Recommended Final Decision and issued a Final Decision.

115. The decision that the Commission failed to act within 21 days of the closing of the public hearing effectively prohibited the Town from applying the

Mashpee Wetlands Protection Bylaw to the Plaintiff's project unless Plaintiff was forced to file a new notice of intent before the Commission.

116. The Plaintiff who was aggrieved by the Final Decision, which would have required the Plaintiff to return to file a new notice of intent before the Commission, appealed by filing a Complaint with the Barnstable Superior Court seeking judicial review under the Administrative Procedure Act, G.L. c. 30A, § 14, , on or about July 21, 2017.

Town's Admission of No Valid Claim in the Land Court And Attempts at Settlement

117. Nearly contemporaneously, on or about June 15, 2017, the Land Court directed the parties to identify the locations of the land that they sought to claim title to at the end of Punkhorn Point Road in a joint sketch.

118. In response, the parties submitted a document which became "Ex. C" to the Land Court as a stipulation.

119. In Exhibit C, the Town placed the northern limit of its claims far to the south the end of Punkhorn Point Road and the claims of the other parties, with no overlap demonstrating that the Town knew that it had no viable claim of title to the land at the end of Punkhorn Point Road.

120. On July 19, 2017, the SN Trust asked that the Town to settle the Land Court litigation against the SN Trust as the Town and the trust's claims did not overlap.

121. Assistant Town Counsel Kathleen Connolly emailed:

> As we discussed, the Town of Mashpee is willing to enter into settlement discussions with SN Trust and the residents of Punkhorn Point Road who are plaintiffs in one of the consolidated cases. The Town is not interested in entering into a settlement with SN Trust alone, but rather would consider a global settlement of the issues in these two cases."

122. On April 18, 2018 the Mashpee Board of Selectmen sent a letter to Cedric Cromwell, chairman of the Mashpee Wampanoag Tribal Council, stating:

> With respect to the Town's commitments under the IGA, we already have fulfilled certain key obligations, including: . . . 4) supporting all local approvals and state legislation, as necessary and requested by the Tribe, to have the Punkhorn Point and the Popponesset Bay aquaculture sites acquired in trust, since the Town lacks fee title to those parcels."

123. The letter was drafted by Town Counsel.

124. At the August 27, 2018 The Mashpee Board of Selectman meeting Selectman Gottlieb made a motion to for the Town to place an article on the Fall Town Meeting agenda to take Gooseberry Island by eminent domain as the Town's actions had rendered the island "unbuildable."

125. The motion did not pass.

The Superior Court DEP Litigation

126. The DEP responded to the Complaint in Superior Court by filing the Administrative Record in 2018.

127. On or about August 31, 2018 the Plaintiffs served a Motion for Judgment on the Pleadings.

128. The Defendant Town through the Commission responded with an Opposition and Cross-Motions for Judgment on the Pleadings.

129. On May 14, 2019, the Superior Court held a hearing on the Motions and took the matter under advisement.

130. On July 29, 2019, the Court issued a Memorandum and Order denying the Plaintiffs' Motion and allowing the Defendants' Cross-Motions and, on August 2, 2019, Judgment was entered affirming the DEP's Final Decision.

131. The Plaintiff was aggrieved by the Judgment of the Superior Court and filed a Notice of Appeal on August 28, 2019, and the appeal is currently pending in the Massachusetts Appeals Court.

Application for Zoning Variance

132. On November 9, 2018, Plaintiff filed a three applications for a zoning variances to allow construction of a single family home on the Subject Property: (i) variance from requirement for frontage on a street, Mashpee Code Sec. 174-12, (ii) variance from frontage for fire department access, Mashpee Code Sec. 174-32, and (iii) variance from 150 foot length of frontage requirement, Mashpee Code Sec. 174-31.

133. The Plaintiff made the filings as he did not want to waste resources permitting and/or building a bridge if the Town would not even issue a building permit due to zoning concerns.

134. That is the issuance of variance is generally discretionary and no person is entitled to a variance.

135. Thus, it made little sense to expend efforts to obtain a permit for a bridge if the ZBA would deny a variance for a single family home accessed via a bridge.

136. The applicable provisions of the state zoning act as to variances provide

> [A zoning board of appeals] shall have the power . . . to grant upon appeal or upon petition with respect to ***particular land*** or structures a variance from the terms of the applicable zoning ordinance or by-law where such permit granting authority specifically finds that owing to circumstances ***relating to the soil conditions, shape, or topography of such land*** or structures and ***especially affecting such land or structures but not affecting generally the zoning district in which it is located***, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law. . . .

G.L. ch. 40A, Sec. 10.

137. Therefore, to address the 2013 variance denials, the application proposed to construct a single-lane bridge that will span the channel and provide pedestrian and vehicle access to the Island, including access by the Town's emergency response vehicles and explained how the island met the criteria for granting a variance as because of "circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law."

138. Prior to opening the public hearing on December 12, 2018, the ZBA in violation of Open Meeting Law, G.L. c. 30A, §§ 18–25 entered executive session with assistant Town Attorney, Kate Connolly, to discuss the application.

139. The ZBA then opened the public hearing on the Plaintiff's application and then had assistant Town Attorney Kate Connolly speak in opposition to Plaintiffs variance request.

140. At the hearing, George "Chuckie" Green director natural resources Tribe told the ZBA that granting the variance would violate the 2008 IGA.

141. At the hearing, the Plaintiff asserted that, if the ZBA does not approve the variance, their action will constitute a regulatory taking.

142. In response, the Chairman of the ZBA requested the opinion of Assistant Town Attorney, Kate Connolly, as to whether the denial of a variance would constitute a regulatory taking and she advised the ZBA that such action would not constitute a regulatory taking.

143. At the close of the hearing, the Defendant ZBA voted 5 to 0 to deny the application for a variance.

144. On December 20, 2018, the ZBA filed three separate written decisions with the Town Clerk denying the Plaintiffs petition on the basis that basis that the proposed variance would not advance the Town's interest in maintaining the public safety and, further, grant of a variance would in fact derogate from the underline purpose and intent of the Zoning By-laws.

145. The denial was not based upon Massachusetts' common law nuisance principles or any other longstanding common law background principle of state law.

146. Without the issuance of the variances, the Plaintiff cannot develop the Subject Property for a home or any other economically viable, developmental use.

147. Plaintiff cannot legally use the Subject Property for campsites or for uses traditionally accessory to a residence because the Town of Mashpee bylaws prohibit all such alternative uses on the Plaintiffs property and the Town refuses to grant a variance from the bylaw.

Decision in the Land Court Action

148. On October 10, 2019, the Land Court ruled in SN trust favor against any claims by the Town of Mashpee and any other party to the land at the end of Punkhorn Point Road and issued judgment that the land belonged to the SN Trust.

149. In reaching its decision, the Land Court explained that the Town utterly failed to present any evidence to support its claim stating as follows:

> The Town of Mashpee's position is more ambiguous. Because this is a case whose central issue is location — where on the ground, as best can be determined, the parties' respective parcels actually are — the court directed the parties to identify the locations they sought in a joint sketch. Ex. C was the parties' response to that order, and was taken by the court as a stipulation. In that sketch, the Town put the northern limit of its claims far to the south of the other parties' claims, with no overlap. In its post-trial submission, however, the Town went beyond that limit to claim ownership of marshland further north, all the way to Punkhorn Point Road and in front of the road, which does create overlap in that area . . . due to the Town's failure to prove record title, traceable back to the original Mingo marsh setoffs, in any part of that area, I cannot find that the Town is the record owner of either of those set-offs, either . . . the Town did nothing more than make that statement. It offered no evidence at trial of any acts of possession, I saw none at the view, and the Town gave no

> citation or indication of what it meant by "generally accepted standards in the Commonwealth of Massachusetts..." or what it did to meet those alleged standards. Its claim of adverse possession thus fails.

150. Notwithstanding its failure to submit any evidence to support its claim, the Town of Mashpee has appealed the Land Court decision.

Town's Delegation of Its Municipal Authority to Wampanoag Tribe

151. At various times, the Plaintiff has sought to settle its dispute with the Town of Mashpee and its respective boards regarding construction of a bridge and a single family home.

152. The Defendant Town of Mashpee and its respective boards have consistently stated that it will not settle any claim of the Plaintiff without the approval of the Tribe.

153. By way of example, on February 7, 2020, Patrick Costello emailed Plaintiff's counsel:

> with respect to the pending Gooseberry Island zoning appeals and the various pending matters relative to construction of the bridge from Punkhorn Point to the Island, any proposed settlement must be acceptable to the Mashpee Wampanoag Tribe. As we discussed yesterday, there are certain Town/Tribe legal obligations and understandings pursuant to our Intergovernmental Agreement and otherwise that would absolutely preclude the Town from agreeing to any terms and conditions relative to construction of a bridge at this location without the consent of the

> Tribe. I understand that the zoning appeals do not involve the Tribe as a party, but since any stipulated resolution thereof would be predicated upon the construction of a bridge for access purposes we would want to assure the Tribe's assent to the proposed bridge in advance. You noted that, thus far, efforts to obtain Tribe approval of a bridge to the Island have been unsuccessful. While the other stated intentions of your client with respect to its development and use of the Island may well provide a basis for fruitful settlement discussions, it is essential that the Tribe be on board with the construction of a bridge as a preliminary matter. I would be happy to further discuss this point with you, however, please note that this is a "nonnegotiable" prerequisite of the Town for any settlement negotiations regarding these appeals.

154. In a February 28, 2020 email from Patrick Costello to plaintiff's counsel, Mr. Costello stated "as previously noted, there are certain hard limits: the Tribe's concurrence with proposals for Gooseberry Is. development is essential."

155. On March 31, 2020 Patrick Costello, Town Counsel, called Plaintiff's Counsel regarding a proposed Agreement for Judgment provided by Plaintiff and Costello stated *inter alia* -- the Town is not going to agree to anything regarding the bridge unless the Tribe assents to it.

156. In various communication in June and July, 2020, the Plaintiff explained to Town Counsel Patrick Costello that: (i) the Town and its respective boards had an independent duty under state law to make a

decision on an application regardless of the IGA, (ii) the ZBA and the Conservation Commission were not parties to the IGA; and (iii) it was wholly inappropriate for the Town and ZBA to delegate its decision making powers to a third party.

157. In early July, 2020, the Plaintiff specifically offer to settle the appeal of the zoning variance denials by entering into an Agreement for Judgment that a house could only be constructed on the island if and when a bridge was approved.

158. On July 13, 2020, the Mashpee Board of Selectman went into Executive Session to for the purpose of: "Strategy Discussion Relative to Pending Litigation Regarding Gooseberry Island: Matthew Haney, Trustee of Gooseberry Island Trust and SN Trust vs. Zoning Board of Appeals and Town of Mashpee: Barnstable Superior Court CA 91972CV00012."

159. On July 17, 2020, Patrick Costello Town Counsel emailed the following to Plaintiff:

> Please be advised that I have discussed with the Board of Selectmen and Town Manager your proposed Agreement for Judgment in the above-referenced zoning appeal, our recent conversations relative to a "universal" settlement of the multiple pending Gooseberry Island development litigation matters, as well as your recent statements of intent to pursue further litigation against the Town and Town officers in the event that these matters are not resolved forthwith. Upon review of your proposed Agreement for Judgment in the ZBA appeal and

> consideration of the status of the other pending Gooseberry Island litigation matters, including the trial court and DEP appeal dispositions favorable to the Town rendered to date, be advised that the Town has rejected your settlement proposal.

Renewed Attempt to Take the Island by Eminent Domain

160. On August 24, 2020, the Mashpee Board of Selectman voted to add an article on the October Town Meeting warrant to authorize the Town of Mashpee to purchase Gooseberry Island/Subject Property and authorize the Town Manager to enter into Negotiations with the owner for said purchase.

161. The only statements in opposition were by a selectman who felt that the Town did not need to pay for the Subject Property on the basis that the ZBA actions made the property unbuildable.

162. On August 25, 2020, the Plaintiff informed the Mashpee Town Manager that the Plaintiff was not interested in selling the Subject Property for nominal consideration.

163. On September 24, 2020, the Mashpee Board of Selectman formally placed an article on the Town Meeting warrant as Article 20 to purchase or obtain by eminent domain the Subject Property.

164. At that same meeting, the Mashpee Board of Selectman voted to support the passage of Article 20 at Town Meeting.

165. On September 17, 2020 The Finance Committee did not recommend approval of Article 20 by a vote of 5–0

166. On October 19, 2020, the Mashpee Town Meeting voted to indefinitely postpone a vote on Article 20.

167. On November 12, 2020, the Chairman of the Mashpee Conservation Commission criticized the Commission for failing to endorse Article 20 before the October 2020 Town Meeting and the Commission then voted to endorse the acquisition of the Subject Property by eminent domain.

168. As such, the Commission, which has been actively preventing the Plaintiff from developing the Subject Property to reduce its value, has endorsed buying the island immediately.

169. On or about January 2021, the Mashpee Conservation Department submitted an application to the Mashpee Community Preservation Committee "seeking Community Preservation Act funding to purchase Subject Property for the purposes of preserving the island as conservation land/open space."

170. On January 14, 2021, Mashpee Community Preservation Committee met to discuses the funding request of the Mashpee Conservation Department.

171. Notwithstanding that the meeting was a public hearing, Plaintiff was prevented by the Mashpee Community Preservation Committee from fully testifying regarding the funding request.

172. The committee chair was Selectman Andrew Gottleib.

173. The Committee voted 5–3–1 to authorize the Committee to acquire an appraisal of Subject Property

Exhaustion of Administrative Remedies

174. The Defendant Town of Mashpee and its respective boards have stated that no variances will be issued by the ZBA for the Subject Property regardless of whether a bridge is constructed or not.

175. The Defendant Town of Mashpee has stated that the Tribe has authority to decide whether a permit for a bridge will ever be issued to develop the Subject Property because Town of Mashpee will not issue any permits without the approval of the Tribe.

176. There is no administrative or other legal process to place a permit application before the Tribe for a decision on the construction of a bridge.

177. The Town of Mashpee has initiated litigation against the Plaintiff claiming rights to land but wholly failed to present any evidence to support that claim.

178. Accordingly, it would be futile for the Plaintiff to apply for a permit because: (i) the Town of Mashpee will not issue any permit allowing development; and (ii) there is no process to obtain a permit from the Tribe.

179. As such, Plaintiff has exhausted of its administrative remedies.

Declaratory Relief Allegations

180. The Plaintiff has the right to be free from a taking of their private property without just compensation under the Fifth Amendment to the United States Constitution, and Article X, of the Massachusetts Declaration of Rights.

181. Defendants are charged with enforcing state and local laws that have been employed to harm and

take the Plaintiffs private property without compensation.

182. Defendant has a legal obligation under state and federal law to provide compensation once it takes private property

183. There is a justiciable controversy in this case as to whether the Defendants' denial of a variances to develop the Subject Property for a home requires just compensation under Article X, of the Massachusetts Declaration of Rights and/or the Fifth Amendment to the United States Constitution.

184. There is a justiciable controversy in this case as to whether the Defendants' delegation of its decision making authorities to the Mashpee Wampanoag Tribe requires just compensation under Article X, of the Massachusetts Declaration of Rights and/or the Fifth Amendment to the United States Constitution.

185. There is a justiciable controversy in this case as to whether the Defendants' filing and continue baseless litigation claiming ownership of land requires just compensation under Article X, of the Massachusetts Declaration of Rights and/or the Fifth Amendment to the United States Constitution.

186. A declaratory judgment regarding Defendants' foregoing actions will clarify and establish the legal relations between Plaintiff and Defendants and whether such actions require just compensation.

187. A declaratory judgment as to the constitutionality and legality of Defendants' actions will provide the parties relief from the uncertainty and insecurity giving rise to this controversy.

COUNT I

Unconstitutional Taking of Private Property Under the Fifth Amendment to the United States Constitution

188. Plaintiff repeats the allegations in paragraphs 1 through 187 set forth above and further allege as follows.

189. The Fifth Amendment to the United States Constitution prohibits the government from taking private property without just compensation.

190. The Fourteenth Amendment to the United States Constitution makes the Fifth Amendment to the United States Constitution applicable to state and municipal action.

191. The Fifth Amendment's requirement of just compensation is self-executing and, through the Fourteenth Amendment, provides property owners with a self-executing right to damages for a taking carried out by a state or municipal entity.

192. A regulatory taking occurs when the state denies a property owner of all economically beneficial use of land, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), or deprives it of significant economic value. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

193. The acts of the Defendants alleged in this Complaint have deprived the Plaintiff of all economically beneficial use of land, or deprived the Plaintiff of significant economic value of the Subject Property.

194. The acts of the Defendants alleged in this Complaint result in the Plaintiff being unable do

anything with the Subject Property except to picnic on it or walk on it or view it.

195. Alternatively, if residual value remains, acts of the Defendants alleged in this Complaint deprives the Subject Property of at least 99% of its prior value as a residentially developable water front lot.

196. In light of the surrounding neighborhood and nearby Popponesset Island, which includes developed waterfront lots on a fraction of the size of Subject Property, Plaintiff had distinct and reasonable expectations that they could build a single family home on the Subject Property.

197. Given that homes exist on islands throughout the commonwealth of similar size and location without objection from the state and without harm to the public, the Plaintiffs had a reasonable and distinct expectation that they could build a home on the Subject Property.

198. The primary reasonable use expectation for the Subject Property is as a residentially developed waterfront parcel.

199. The acts of the Defendants alleged in this Complaint has the practical effect of ousting the Plaintiff from the Subject property, leaving it to the Town as part of its conservation lands.

200. The Defendants did not provide, offer, or guarantee compensation to the Plaintiff at any time, and nothing in the town bylaws secures compensation for persons in the Plaintiffs' position.

201. The acts of the Defendants alleged in this Complaint are an uncompensated taking of the Plaintiff's Property for public benefit.

202. The Plaintiff has exhausted all applicable and relevant administrative procedures.

203. This Complaint seeks damages, in the form of monetary compensation, for the taking of the Subject Property.

204. Defendants' actions were taken under color of law and constitute the policy of the Town of Mashpee.

COUNT II

Inverse Condemnation under the Massachusetts Constitution and State Laws

205. Plaintiff repeats the allegations in paragraphs 1 through 204 set forth above and further allege as follows.

206. Article X of the Massachusetts Constitution provides as follows:

> no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, ... And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

207. The Massachusetts Supreme Judicial Court has held that a regulatory taking claim may be brought against a municipality and it boards based upon Article X of the Massachusetts Constitution allowing a Plaintiff to state a cause of action to recover damages when the state or a political subdivision takes private property through regulation and in the absence of eminent domain proceedings.

208. Under Article X of the Massachusetts Constitution, a property owner may establish that a compensable taking has occurred, resulting in a valid state law inverse condemnation claim, by showing that the government has substantially impaired its right to possess, use, enjoy, or dispose of land.

209. Property rights may be deemed to be substantially impaired when a government act substantially reduces the value of the subject property or substantially intrudes on other property rights.

210. The acts of the Defendants alleged in this Complaint have substantially impairs the use, enjoyment, and value of the Subject Property.

211. The acts of the Defendants alleged in this Complaint result in an uncompensated taking of the Subject Property for public benefit.

212. The Defendants have not instituted formal condemnation or eminent domain proceedings against the Subject Property.

213. The actions of the Defendants are not based upon common law principles such as the common law of nuisance.

214. The Plaintiffs are entitled to recover compensation from the Defendants under Article X of the Massachusetts Constitution and state common law.

215. The Plaintiffs have exhausted all applicable and relevant administrative procedures.

216. The federal court should assert supplemental jurisdiction over this claim because it has "original jurisdiction" under Count I, and this claim is "so related to claims in the action within such original

jurisdiction that they form part of the same case or controversy" under Article III of the United States Constitution. *See* 28 U.S.C. 1367

WHEREFORE, the Plaintiff requests that this Court:

A. Declare that the Defendants' acts result in an unconstitutional taking of the Plaintiffs' Property under both the Massachusetts and United States Constitutions;

B. Provide just compensation for a taking of the Subject Property under the Fifth Amendment in the amount of $5,500,000;

C. Assess damages for a taking of the Subject Property under Massachusetts law in the amount of $5,500,000;

D. Award the Plaintiff its attorney's fees and costs in this matter as allowed under state and federal law and specifically under 42 U.S.C. § 1988; and

E. Enter such other orders as it deems meet and just.

/s/ Paul Revere, III
Paul Revere, III
(BBO #636200)
Law Offices of Paul Revere, III
226 River View Lane
Centerville, Massachusetts 02601
revereiii@aol.com
(508) 237-1620

Dated: April 29, 2021