No. 21-1324

IN THE

# Supreme Court of the United States

JOHN ZARBA AND SUSAN LEMOIE-ZARBA,
PETITIONERS

*v.*

THE TOWN OF OAK BLUFFS ET AL.

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

## PETITION FOR WRIT OF CERTIORARI

SUSAN L. LEMOIE-ZARBA
*pro se*

JOHN ZARBA
*pro se*

*455 State Road*
*PMB 257*
*Vineyard Haven, MA 02568*
*suelz@comcast.net*
*(508) 400-3422*

CURRY & TAYLOR • (202) 350-9073

## QUESTION(S) PRESENTED

1. Should this Court resolve the long standing problem that Rule12(b)(6) motions should be dramatically modified due to the following; 1) the rule demand the exercise of uniquely subjective or normative judgements that allows a pro se civil right complaint to be denied fully with prejudice without a hearing or notice to amend; 2) the rule as it stands, allows an erroneous district court decision to be upheld through the appellate court without a hearing or leave to amend; 3) the rule as it stands, enables court decisions to be grounded on the moving party errors of fact and law, while disregarding the nonmoving party's findings of facts, all of which deny due process, contribute to wasteful and unnecessary litigation? *Tolan v. Cotton* 572 U.S. (2014)

2. Under *Monell v Department of Social Services*, 436 U.S. 658 (1978), a municipality may be held liable under 42 U.S.C Section 1983 only for its own unconstitutional acts except "In limited circumstances," such as when a municipality is on notice of a pattern or practice of unconstitutional acts.

In the decision below, the District Court concluded that The Town of Oak Bluffs could not be held liable for the Town Officials, Town Counsel and Boards widespread, continual egregious acts that caused violation of a resident's constitutional property rights.

THE QUESTION PRESENTED IS:

Should a municipality be protected from liability when it conspired over a 5-year period through a pattern or practice of unconstitutional acts against a private resident

by: Town Counsel; the Town Administrator; the Chief Assessor; the Building Inspector; the Water Department, the Zoning Board, and Selectmen, individual and collective acts that violated the resident's constitutional rights under 42 U.S.C. Section 1983, the 5th and 14th Amendments?

## PARTIES TO THE PROCEEDING

John Zarba; Susan Lemoie-Zarba, Petitioners

v.

The TOWN OF OAK BLUFFS; Thomas Perry, individually and as current Town of Oak Bluffs Building Inspector; Robert Whritenour, individually and as Town of Oak Bluffs Administrator; Andrea Rogers, individually and as member of the Zoning Board of Appeals of the Town of Oak Bluffs; Kris Chvatal, individually and as former Chairman of the Zoning Board of Appeals of the Town of Oak Bluffs; Peter Yoars, individually and as member of the Zoning Board of Appeals of the Town of Oak Bluffs; Michael Perry, individually and as Associate member of the Zoning Board of Appeals of the Town of Oak Bluffs; Llewellyn Rogers, individually and as Associate member of the Zoning Board of Appeals of the Town of Oak Bluffs; David Bailey, individually and as Town of Oak Bluffs Principal Assessor; Mark Barbadoro, individually and as former Town of Oak Bluffs Building Inspector; Ronald H. Rappaport, individually and as Town Counsel of the Town of Oak Bluffs; Michael A. Goldsmith, individually and as Town Counsel of the Town of Oak Bluffs; The Law Firm of Reynolds, Rappaport, Kaplan & Hackney, LLC, Town Counsel law firm to the Town of Oak Bluffs, Respondents

## STATEMENT OF RELATED CASES

None

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

**CASES**

**STATUTES**



**RULES**



**OTHER AUTHORITIES**

## PETITION FOR WRIT OF CERTIORARI

The Zarbas' respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

## OPINIONS BELOW

The decision by the First Circuit Court of Appeals affirming the District Court dismissal, App. 1-3, The unpublished decision of District Court for Massachusetts dismissal of the Complaint is reprinted at App. 4-16. The Decision by the First Circuit Court of Appeals denial for rehearing en banc, App. 17-18.

## JURISDICTION

The decision of the United States Court of Appeals for the First Circuit denied rehearing en banc on December 30, 2021; and this petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' decision under 28 U.S.C. § 1257(a).

## RELEVANT PROVISIONS INVOLVED

**Civil Rights Act–42 U.S.C. § 1983:**

> ...Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State ...subjects, or causes to be subjected, any citizen of the United States... shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

**United States Constitution, Amendment V:**

> "... nor shall private property be taken for public use without just compensation."

**United States Constitution, Amendment XIV:**

> ...No state shall make or enforce any law... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Massachusetts Tort Claim Act:**
Mass. Gen L. ch 258 § 2,4,10(c)

> public employees shall be liable for injury ... caused by negligent or wrongful act..."

**Fed. R. Civ. P. 12(b)(6):**

> ...[T]he following defenses may at the option of the pleader be made by motion:...(6) failure to state a claim upon which relief can be granted....

**Massachusetts State Building Code- 780 CMR State Board of Building Regulations and Standards:**

> ... adopted by the Board of Building Regulation and Standards

## INTRODUCTION

Our country was founded on a set of rules and laws intended to provide order and to keep its citizens free and safe. On the tiny Island of Martha's Vineyard for the past 5 years those rules and laws have been abused and ignored by town officials, town counsel and the boards. For decades Ronald Rapport has been town counsel for 5 of 6 towns on Martha's Vineyard. Over the past 5 years Rappaport orchestrated an elaborate scheme that included expending hundreds of thousands of tax dollars assisting one powerful town resident, a Magistrate of the Court, to gain an unrestricted easement across the Zarbas' private property.

On October 13, 2015 the Zarbas' were issued "by right" a building permit to construct a 750SF guest house. On March 9, 2016 Magistrate John C.O'Neil sued the Zarbas' in Land Court seeking an unlimited prescriptive easement over the Zarbas' private property. Prior to the Town being named party to this matter, Rappaport and the Magistrate shared 103 private emails discussing creating a zoning issue on the Zarbas' property. App. 25, 29, 39,52 The combination of influential Town Counsel, powerful Magistrate and the town tax money set the stage for 5 years of 'conscience shocking', unprecedented actions against the Zarbas'.

A multitude of people across various town departments including; Water Department, Town Assessor , Town Administrator, Building Department, Town Surveyor, Board of Appeals and the Selectmen supported Town Counsel elaborate concocted scheme to coerce the Zarbas' into giving up their property rights

to grant the Magistrate an unrestricted easement. App.20,21

This elaborate scheme included; March 2016 the town assessor manipulated the towns assessor map and placed the Magistrate public road on the Zarbas' private way, April 2016 denied water-hookup and DigSafe services, App.24 June 2016 the building inspector revoked the Zarbas' legally issued building permit, denied the final occupancy permit and ousted the Zarba family from the home with no probable cause, Sept 2016 town issued $300 day fine parking restriction, App.26 Nov 2016 town invalidated the Zarbas' deeded survey and issued a town order that includes removal of the house or be fined $300/day and ousted, Jan 2017 Board unanimously predetermined to deny the Zarbas' appeal, Feb 2017 Town Selectmen, Town Counsel and Magistrate supported an Agreement for Judgement document that grants the public and the Magistrate an unrestricted right to Zarbas' private property, App. 29, 30 March 2017 Town Counsel instructed the town to install a public street sign on the Zarbas' private way, App. 30 May 2019 the town ousted the Zarbas' for a second time, App. 31 and between 2016-2020 town continually mowed, plowed and heavily graded Zarbas' private property. App. 31

Why did the town officials, selectmen and board members join town Town Counsel malicious intentional actions against the Zarbas'? The answer is simple; because the defendants were motivated to punish the Zarbas' for protecting their property rights. App.20, 32 The Zarbas' granted the Magistrate a restricted easement but that was not good enough. The Magistrate wanted the Zarbas' private Way to become a public road. The Town joined the Magistrate in this endeavor. Magistrate clearly had control over the

towns illegal actions, his attorney states; "that if we wanted our town problems to go away and water running then we needed to grant his client an unrestricted easement."App 24

The record clearly demonstrates that Town Counsel were not engaged in "government functions" when they conspired with the Magistrate and shared 103 private emails in which they agreed on three things; 1) to commission a survey to find a nonexistent zoning violation on the Zarbas' property; 2) persuade the town officials that the nonexistent violation was real; 3) create an Agreement for Judgment document that grants the Zarbas' Way to the Magistrate and the public for unlimited use. App. 29, 39, 41, 52

This pattern of conduct taken together indeed "shocks the conscience" such the defendants, acting under color of state law violated the Zarbas' substantive and procedural due process rights guaranteed under Constitutional Section 1983, and caused an illegal taking under the Fifth Amendment through inverse condemnation.

This matter has nothing to do with a "boundary dispute" as the lower court suggests. This is a civil rights matter that includes violation of the Zarbas' property rights.

This matter includes the complete revocation of a building permit after construction was complete, fully approved, occupied, with no probable cause, when the Zarbas' interest was clearly sufficiently advanced to be a property interest protected by the fifth and fourteenth amendments. App. 20,25 The complaint demonstrates that the town's asserted positions were not calculated to advance any legitimate governmental interest. The sole motive was to create zoning problems on the Zarbas' property after the Zarbas' had

completed construction of their home in reliance on a duly issued building permit.

Six judges across two state court venues carefully reviewed the zoning evidence and on every issue found that the Zarbas' property is fully compliant. The Zarbas' were only provided zoning relief and not adequate post-deprivation remedies.

The district court was lead to believe that on June 27, 2016 the day that the Zarbas' guesthouse was complete, fully approved, and occupied, that Town Counsel had "in hand" evidence of a conflicting survey, a title report, and pending legal matter was promising to resolve the zoning question. This unsupported holding was the lower court's sole basis for entering a dismissal against the Zarbas'. The District Court simply got this pivotal piece of information wrong.

The Zarbas' presented sufficient evidence from which a jury could reasonably conclude that certain municipal 'policy maker' officials, Town Counsel and boards improperly interfered with the Zarbas' 'legitimate claim of entitlement' to the Final Occupancy Permit and that they did so for partisan political or personal reasons unrelated to the merits of the application for permits.

## STATEMENT

### A. Town Counsel, Town Officials and Boards violate the Zarbas' Constitutional Property Rights.

Because the district court dismissed Zarbas' claim on 12(b) (6) Motion, what follows are the "plaintiffs version of the facts." *Scott v Harris*, 550 U.S. 372, 378 (2007). "When opposing parties tell different stories, one of which is blatantly contradicted by the

record so that no reasonable jury could believe it, a court should not adopt that version of the facts ..."

In 2005, a 'Gilstad plan' was developed in the town and supported by Town Counsel, endorsed by the Planning Board and recorded in the Registry of Deeds. This Gilstad plan was utilized to construct a 3 home sub-division. The Zarbas' purchased the house and property located on lot #2 of the Gilstad Plan. Ten years later on October 13, 2015, Barbadoro the town's building inspector issued "by right" the Zarbas' a building permit based on the 2005 Gilstad plan. Barbadoro inspected and approved the Zarbas' construction on 13 occasions and continually told the Zarbas' to "keep on building". App 23

On March 9, 2016, the Zarbas' were named defendants in an prescriptive right action brought in Land Court by Magistrate O'Neil. Days after this legal matter began, the Magistrate influenced the town water department to stop water hook-up and Principal Assessor Bailey manipulated the Zarbas' assessor map. App. 24, 3, 41 Rappaport and Goldsmith acted outside the scope of their job with the Magistrate and shared 103 emails regarding creating zoning issues on the Zarbas' property. App.25, 29, 39, 52

The crux of the town's acts against the Zarbas' can be tied directly to Magistrate 2016 legal matter that Chief Justice of Land Court confirmed; "... this case involves plaintiffs' purported prescriptive easement to use the way, this case is not brought to determine fee ownership of the way..." "The defendants in this case were named by plaintiffs solely because they may have a fee interest or standing as an easement holder to contest the plaintiffs' claim of an easement by prescription, and not to determine beyond that the full ownership of the fee of the way..." App. 25 Armed

with this docketed decision, the Town Counsel purposely ignored the Chief Justice ruling and and knowingly misrepresented material facts to the Town Officials, Board, Selectmen and the lower court. Town Counsel mistruth was the driving force behind the violations of the Zarbas' constitutional property rights and the direct cause of the lower court's dismissal.

On May 7, 2016, Barbadoro states; "Sourati engineering provided a certified plot plan by a registered land surveyor that is the standard that is used for obtaining a building permit." "In Oak Bluffs as in most towns proof of the deed is not required to obtain a building permit" App.24

On June 13, 2016 the town of Oak Bluffs was named a defendant and 'potential abutter' in the Prescriptive Right Magistrate O'Neil matter. App. 24

On Friday, June 24, 2016, Zarbas' construction was complete. Barbadoro performed a final inspection and approved the property for a final occupancy permit and occupancy. The Zarba's family moved into the guest-house.App. 25 Barbadoro stated "...it is 4:05PM the office is now closed, come by Monday morning to pick up the final occupancy permit." On Monday, Barbadoro denied the Zarbas' permit. Barbadoro stated Rappaport called him and said Zarbas' property "may have a zoning issue". App. 32,33 Barbadoro revoked the town issued building permit, denied the final and temporary occupancy permit and ousted the Zarba family. App. 25

The lower court erroneous concluded; "Based on a review of Plaintiffs' title that had been undertaken as a part of the O'Neill Trust litigation in Land Court, Town Counsel Ronald Rappaport and Michael Goldsmith advised Barbadoro that the survey used by the Plaintiffs to obtain a building permit for their guest

house did not accurately portray the southern property line of the [Plaintiffs'] lot, and given this allegedly faulty survey," "the siting of the guest house might be unlawful.""In light of this advice and the pending Land Court litigation that promised to resolve the property line question..." There is no basis in the record, factual or otherwise, to support this decision. The record clearly states that there was no survey, no title report and no legal matter pending that promised to resolve property line questions. App.25

The town ousted the Zarbas' from their private property from June 24, 2016 through July 13, 2016 and on a second occasion on May 24, 2019 through June 27, 2019 these outings cost the Zarbas' a great loss of rental income. App.31, 34, 36 The lower court did not conclude the Zarbas' were ousted and rental income was lost. App.37, 38, 42, 57

On July 18, 2016 Town Counsel utilized tax dollars and commissioned Austin the town Surveyor to begin unnecessary survey work on the Zarbas' property. Austin confirmed under oath that the 2016 town plan was unfinished, not in a recordable form, and that Town Counsel advised him to ignore his ethical duty and to not contact the surveyor of record. App.26

On October 7, 2016, Austin produced a draft plan that disagreed with the recorded Gilstad 2005 Plan. Town Counsel inappropriately adopted this 2016 Austin plan and delivered copies of this survey throughout the town. A copy of this 2016 Austin Survey was placed onto the Zarbas' deed. App.27

On November 1, 2016, Town Counsel conspired with Barbadoro together they issued the Zarbas' a town Order which directed the Zarbas' to conform to the 2016 Austin survey and included fines of $300/day

and an ousting for every day the guest house stood. App. 27,35

The Zarbas' appealed the town Setback and Parking Orders to the town Board. Rappaport directed Chairman Chvatal to deny the Zarbas' appeals. Prior to the start of the meeting Chavatal instructed the board to deny the Zarbas' appeal. App. 28, 35,36 Chvatal stated; "The Zarbas' 2005 Gilstad survey of record was wrong and that the town's 2016 survey was correct..." The Board unanimously denied the Zarbas' appeals. App.28 The lower court disregarded the fact that the board meeting decisions were predetermined.

In January the Zarbas' granted the Magistrate a restricted prescriptive right. Weeks later the Town Counsel, the Selectmen and the Magistrate created and fully executed the Agreement for Judgment document states; "...it is the town's position that both the town and the public (including the Trust) have the right to use The Way ..." The lower court disregarded the Agreement for Judgment document. App. 29, 56,57

February 14, 2017 Goldsmith instructed the Selectmen to install a "Davis Avenue " street sign on the Zarbas' Private Way and support the Agreement for Judgment Document. App. 29, 30, 41

On March 17, 2017, the Zarbas' brought suit in state land court against the Board, Barbadoro and the town of Oak Bluffs for the Board setback and parking decisions. Chief Justice dismissed the town of Oak Bluffs and Barbadoro from the appeal, and entered a Protective Order as to town Officials, Town Counsel, and Board. The Order states; " the court will not allow examination of Board members of other decision-making officials concerning their deliberative processes...." App. 84

The lower erroneously states; "Additionally, it is well-settled that municipalities may not be held liable for violations of 42 U.S.C. § 1983 absent allegations of an unconstitutional municipal policy", "The First Amended Complaint does not allege the kind of "affirmative link necessary to sufficiently plead a supervisory liability claim, and/or a policy..."

The complaint clearly states; "Mark Barbadoro decision to deny the Zarbas' a Final Occupancy Permit is considered a single act that constitutes a "policy" where a "deliberate choice to follow a course of action is made from various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.'" "This decision to adopt a particular course of action, the denial of the final occupancy permit was directed by Mark Barbadoro who established government policy, therefore the municipality (The Town of Oak Bluffs) is equally responsible whether that action is to be taken only once or repeatedly." "Mark Barbadoro imposed a deliberate and arbitrary single decision as the municipality policymaker ...in retaliation because the Zarbas' defended their property rights against O'Neil trust." App. 21, 34

The complaint states the Zarbas'; "...suffered substantial economic loss... value of house diminished...physical and severe emotional distress, loss of the private and peaceful enjoyment...was subject to humiliation..." App. 37, 38

Specifically, what emerged in the State court proceedings was persuasive proof that the Zarbas' Way is private. On February 18, 2020 the Zarbas' requested the town to remove the public 'Davis Avenue' street sign and correct manipulated assessor maps. Town Counsel directed the Selectmen to deny

the appeal. In 2020 the Zarbas' were forced to market and sell their 12,726SF property at a diminished value with the faulty unfinished 2016 town survey on their deed, the public Davis Avenue street sign on the private Way, and the manipulated assessor maps. These town actions invited the public onto 2,400SF of the Zarbas' property which caused a taking of approximately 20% of the Zarbas' private property.

**B. The Decision Below**

A District Court granted dismissal of the Zarbas' complaint to the defendants 12(b)(6) Motion to Dismiss. The lower court harshly dismissed the Zarbas' pro se complaint with prejudice, and did so by failing to view the evidence in light most favorable to the Zarbas' with respect to the central facts of the case. The lower court failed to acknowledge key contradictory evidence offered by the Zarbas'. Zarbas' appealed the District Court decision to the First Circuit Court of Appeals; they did not correct the errors of fact or law and approved the District Court's ruling. Zarbas' petition for rehearing en banc, which the court denied.

The lower court granted 12(b)(6) motion by improperly crediting the evidence to the moving party and failed to acknowledge key contradictory evidence offered by the Zarbas'. If the Zarbas' alleged facts are considered in Zarbas' favor, a jury could readily find that the actions of the town violated Zarbas' clearly established Fifth and Fourteenth Amendment rights and denied substantive and procedural due process by means of Civil Rights Act 42 U.S.C. § 1983.

## REASON FOR GRANTING THE PETITION

### I. The Decision Allowing 12(b)(6) Motion Against Zarbas' Is Wrong

1. Two questions must be answered when a defendant asserts a 12(b)(6) motion against a pro se civil right complaint. The first, is the complaint must contain sufficient factual matter, accepted as true, to "state a claim for relief that it is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "...the Court must accept all factual allegations in the complaint as true and construe them in light most favorable to the plaintiff." *Conley v. Gibson* 355 U.S. 41 (1957) Holding that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entail him to relief"

The second question asks whether a pro se litigant should be held to a less stringent standard than formal pleadings drafted by lawyers. This court confirms; *Haines v. Kerner*, 404 U.S. 519(1972) "... under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers..." *Dioguardi v. Durning*, 139 F.2d 774 (CA2 1944). "Under the new rule of civil procedure, there is no pleading requirement of stating "facts sufficient to constitute a cause of action" but only that there be "a short and plain statement of the claim showing that the pleader is entitled to relief." The lower courts did not "accept as true" the Zarbas' complaint and hold the pro se complaint with 'less stringent standards'.

2. The lower Court's Erroneous Decision Warrants Review Certiorari is warranted notwithstanding the absence of a circuit conflict on the question presented. In *Tolan v. Cotton*, 572 U.S. (2014) Justice Alito, with whom Justice Scalia joins, concurring the judgment.

" ...granting of review in this case sets a precedent that, if followed in other cases, will very substantially alter the Court's practice." "There is no question that this case is important for the parties, but the same is true for a great many other cases that fall into the same category."

In this matter the facts lead to inescapable conclusion the court below credited the opinion of the party seeking 12(b)(6) motion and failed properly to acknowledge key evidence offered by the Zarbas' opposing that motion. The opinion below reflects a clear misapprehension of 12(b)(6) motion standard in light of this court's precedent.

Because the lower court demonstrated no familiarity with the case and the appeals court did nothing to demonstrate that it has diligently reviewed the record. The lower court failed to followed Rule 12(b)(6) of the F.R.C.P. to take all factual allegations [in the Complaint] as true and draw all reasonable inferences in favor of the plaintiff, therefore, the decision below did not acknowledge and credited the Zarbas' evidence with regard to; the 52 day ousting, denial water hook-up, Agreement for Judgment Document, Zarbas' vested protected property interest, 4 year denial of the final occupancy permit, board meeting was a fix with predetermined denial, inappropriately adopted unfinished town survey, and manipulated assessor maps. These are not the only set of facts that the first circuit should have considered.

These are the stated facts that were omitted in the dismissal.

The Zarbas' matter draws many parallels to the Tolan case. Both cases are centered around a Section 1983 action. Tolan at its heart is fundamentally a decision on summary-judgment principles. These very same principles can be applied to the rules of a 12(b)(6) Motion. Tolan was a unanimous opinion, in which every Justice of the U.S. The Supreme Court recognized the Fifth Circuit's failure "to adhere to fundamental summary judgment principles." In this matter it is troubling the amount of deference the lower courts gave to the Defendants. Rule of 12(b)(6), as it stands today, allows a district court judge the power to subjectively make decisions with regard to which facts they deem to be true. They are allowed to base these facts solely on the moving party opinion. This court is the correct vehicle to fix this defect in our legal system.

**II. The Lower Court Decision Is Unjust And Facts Of This Matter Are Unprecedented**

It is unprecedented for a property owner to be denied; water, revoked town issued building permit, ousted, denial of final occupancy permit after a house is complete, fully approved and occupied. It is extraordinary for a town to instruct a property owner months after final approval and occupancy to remove the house within 90 days or be fined $300/day and ousted, based solely on an inappropriately adopted unfinished non-adjudicated town survey alleging a 22 inch setback violation.

In this matter the lower court reached the opinion that Town Counsel, town Officials and Board did no wrong. The court relied solely on the opposition

documents that erased the timeline and told mistruth of the facts. The record concludes:

1.) The Zarba's had a clearly established property interest that was fully met the day that the Building permit was issued. The Zarbas' presented undisputed facts that they were the legal owners of the 14 South Street Oak Bluffs property. The Zarbas' were granted 'by right' a town issued building permit to construct a guest-house on their property. The guest-house was complete, fully approved and occupied therefore, the Zarba's had a clearly established right to the issuance of the final occupancy permit.

2.) Barbadoro the Building Inspector is the town's 'policy maker' and has final authority to issue permits, perform inspections and grant final occupancy permits. App. 21,33,34 Barbadoro 'knew or should have known' what he was doing was wrong because; a)issued the Zarbas' Building Permit based on the construction documents that included a professional license survey; b) stated that the Zarbas' "...provided a certified plot plan by a registered land surveyor that is the standard that is used for obtaining a building permit."stamped 'Reviewed for Code Compliant' onto the survey as required by state code; c) understands the only state and local code requirement for issuance of a building permit is a professional licensed survey, Section 107.2.5 Site Plan of 780 CMR State Board of Building Regulations and Standards;App. 33 d) State Reg Section 111states, "No building or structure shall be used or occupied...until the inspector of buildings... has issued a certificate of of occupancy..."; e) the guest-house was inspected and approved he stated; "it is 4:05PM the office is now closed, come by Monday morning to pick up the Final Occupancy Permit"; f) lacked the legal authority to revoke the Zarbas'

building permit, deny the final occupancy permit and oust the family.

Barbadoro's deliberate decision to deny the Zarbas' a Final Occupancy Permit was a single act that equals a 'policy' that violated the Zarbas' constitutional rights, and the town of Oak Bluffs is therefore held liable under Section 1983. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986)"If the decision to adopt a particular course of action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." Pp. 475 U.S. 477-481. "...the County Prosecutor was acting as the final decision maker for the county, and the county may therefore be held liable under Section 1983. Pp. 484-485. "Municipality liability under Section 1983 attached where—and only where— a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." Pp. 475 U.S. 481-484.

Town counsel, Rappaport and Goldsmith 'knew or should have known' what they were doing was wrong because; a) they are attorney's that are held to a high ethical standard; b) they lacked line authority to direct the Building Inspector to deny the Zarbas' final occupancy permit; c) they lacked the legal authority to direct the town professional licensed surveyor to ignore his ethical duty; d) they lacked legal authority to adjudicate a survey and inappropriately adopt unfinished survey; e)lacked the authority to direct Barbadoro tp issue town Order demanding the Zarbas' take their house down; f) inappropriate to direct the board to predetermine to deny the Zarbas' appeal based their contrived survey; g) inappropriate to direct

the selectmen to install a public street sign and approve the Agreement for Judgment; h) inappropriate to direct the selectmen to deny the Zarbas' 2020 appeal remove the street sign and correct assessor maps.

In *Owen v. City of Independence*, 445 U.S. 622 (1980). City Council passed resolution firing plaintiff without a pretermination hearing, *Newport v Fact Concerts, Inc.*, 453 U.S. 247 (1981) City Council canceled license permitting concert because of dispute over content of performance. In *Pembaur*, *Owen* and *Newport*, "If the decision to adopt that particular course of actions is properly made by that government's authorized decision makers, it surely represents an act of official government 'policy'..." "More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of 1983." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) "The touchstone of due process is protection of the individual against arbitrary action of government." *L.A. Ray Realty v. Town Council of Cumberland*, 698 A.2d 202, 211 (RI 1997) "A regulation that takes property violates the substantive due process clause if it is arbitrary, discriminatory, or irrelevant to a legislative policy." "Furthermore, as to substantive due process claims, the constitutional violation actionable under Section 1983 is complete when the wrongful action is taken." (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)). "Moreover, substantive due process prevents the use of government power for purposes of oppression, or abuse of governmental power that is shocking to the conscience, or legally irrational action that is not keyed

to a legitimate state interest." "[s]ubstantive due process is violated when 'the constitutional line has been crossed' by state actions that transgress 'some basic and fundamental principle.'"

In this case, as a matter of law, Barbadoro denial of the final occupancy permit without probable cause and without legal authority is "an act of oppression, or abuse of governmental power that is shocking to the conscience, or legally irrational action that is not keyed to a legitimate state interest." *Mathews v. Eldridge*, 424 U.S. 319 (1976). Elements of substantive due process claim if the government takes away somebody's liberty in an arbitrary or capricious manner, it is a violation of substantive due process. Clearly, a deliberate decision indifferent to the law by a government official sworn to uphold the law should constitute "an arbitrary exercise of powers of government" and "conscience shocking behavior" and thus violates the Due Process Clause.

3.) Due process requires a fair opportunity to be heard. The record clearly demonstrates that the Board meeting was a fix from the start. Rappaport, Goldsmith and Barbadoro without legal authority inappropriately adopted the unfinished town Survey. Town Counsel advised the Board to deny the Zarbas' appeal prior to the start of the meeting. The Board unanimously inappropriately adopted the 2016 Austin survey. Chavatal unilaterally denied the parking appeal without the benefit of a board vote. The Zoning board pre deprivation hearings were a sham in which the board rendered decisions that were preordained to deprive the Zarbas' of their constitutional protected property interest, which action, in the absence of an adequate post deprivation remedy, gave rise to the Zarbas' procedural due process claim. The State court

provided a protective order on Town Counsel, town Officials and the Board. Therefore, the local board and the state court system did not cure the defendant's intentional acts that deprived the Zarbas' their property rights. *L.A. Ray Realty et al. v. The Town Counsel of the Town of Cumberland et al.*, U.S. 96-2017 "In this case pre-deprivation hearings were possible and indeed were provided to plaintiffs. This pre-deprivation process was meaningless, however, because of the actions of town officials. Therefore, the animosity and actions of some town officials resulted in a procedural due process violation..." "... we hold that plaintiffs have been denied, respectively, their substantive and their procedural due process rights."

In this matter, the town is unable to provide the court an explanation of a "legitimate public purpose" for commissioning and inappropriately adopting a revised survey on the Zarbas' property. Barbadoro had a duty to deliver the Zarbas' final occupancy permit on June 24, 2016 without delay and without the hope that Town Counsel would someday find a zoning defect. Rappaport directly, wrongfully and without a legal basis interfered with the Zarbas' legitimate expectations of their protected substantive due process rights. These government actions were arbitrary, discriminatory and demonstrably irrelevant to a legislative policy. These actions caused the Zarbas' loss of a summer of rental income and extreme harm. *L.A.Ray Realty v. Town Council of Cumberland* U.S. 698 A 2d 202(R.I. 1997) No. 96-207, 213 "...we conclude that the town through its officials acted egregiously, as well as with animus, and without actual or legal basis, to deprive plaintiffs of substantive due process rights. Consequently, plaintiffs are entitled to damages under 42 U.S.C. § 1983..." , "It is our conclusion that plaintiffs

were deprived of their fundamental, constitutional protected property rights because of the "egregiously unacceptable" and "outrageous" actions of town officials."

4) The record demonstrates the Gilstad plan was supported by Town Counsel and the planning board and was the only deeded survey of record for the previous developer to develop a 3 home subdivision. App.23 Ten years later the Zarbas' were granted "by right" a permit to build a guest house utilizing the Gilstad plan. App.23 The previous builders and the Zarbas' were building residential structures in the same town using the same survey. Both applications are similar and should be treated equally. It is impossible to offer an example to the court any more "apples to apples" in comparison than one that utilized the exact same survey.

The Zarbas' plead that they were the only residents in the town to be denied water hook-up, parking privileges, survey of record invalidated, and 4 years denial of a final occupancy permit; these actions against them were "irrational and wholly arbitrary" and do not serve a legitimate public purpose or objective. *Villages of Willowbrook v. Olech*, 528 U.S. 562 (2000). The Zarbas' matter is "purposeful and intentional" discrimination. You cannot review this matter and ignore the different treatment with no rational basis. This matter gives rise to the equal protection claim. You can search the record and not find any conceivable rational basis for the treatment of the Zarbas'. The town had to have a rational basis for treating the Zarbas' differently from other people. This case allows one person who is not otherwise a member of a class can state an equal protection claim. The town singled out just the Zarbas' for some irrational action

they must be protected. In *Willowbrook* the matter was dismissed on 12(b)(6) motion and the government's objective and purpose is not legitimate. The Zarbas' matter had improper motive and no legitimate government purpose therefore, the Zarbas' can state an equal protection claim.

The Zarbas' had a fundamental right to protect their property from an unwanted unrestricted easement which this court has recognized as being protected by the constitution.

In this matter the Zarbas' can state a class of one claim because they can show there's no conceivable rational basis for treating the Zarbas' differently from others who are similarly situated.

5.)The Zarba's endured a 52 day ousting, Agreement for Judgment Document, 4 year denial final occupancy permit, permanent manipulated assessor maps, revocation town issued building permit, permanant installation of public street sign, water hook-up denial, parking restrictions, invalidated survey, permanent deed blemish, 4 year continue mow, plow and heavy grade private Way. Clearly these actions exceed the legal bounds, creating an extreme burdensome, therefore, a taking occurred that requires compensation.

> As Justice Thomas noted in his dissent from the denial of a certiorari for *Bridge Aina Le'a, LLC v Hawaii Land Use Commission* No 20-54, February 22, 2021; "Our current regulatory taking jurisprudence leaves much to be desired." A taking takes effect whenever it "goes to far", *Pennsylvania Coal Co.v. Mahon*, 260 U.S. 393, 415 (1922), or whenever there is a physical intrusion, *Loretto v. Teleprompter Manhattan*

*CATV Corp.*, 458 U.S. 419(1982), or leaves land "without economically beneficial or productive options for its use", *Lucas v. South Carolina Coastal Council*, 505 U.S1003, 1018(1992). "But such cases are exceedingly rare. See, e.g. Brown & Merridiam, On the the Twenty-Fifth Anniversary of *Lucas*: Making or Breaking the Taking Claim, 102 Iowa L.Rev 1847, 1849-1850(2017) (noting that in more than 1,700 cases over a 25-year period, there were only 27 successful taking claims under Lucas-a success rate of just 1.6%)." "As one might imagine, nobody-not States, not property owners, not courts, nor juries-has any idea how to apply this standardless standard." "And if there is no such thing as a regulatory taking, we should say so. And if there is, we should make clear when one occurs."

*United States v Dow*, 357 U.S. 17(1958) The 5th amendment does not require that the compensation be paid in advance or contemporaneously with the taking. When the government physically occupies property in connection with unauthorized projects or programs, action is a taking. *Lingle v. Chevron* 544 U.S. T 539 "Regulatory taking actions... are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain...the severity of the burden that government imposes upon private property rights." The complaint clearly states that the Zarba's were "ousted" on 2 occasions from their property and caused loss of rental income. The evidence presented by the Zarba's indicated that this action was "confiscatory measure" Under *Maher v. City of New*

*Orleans*, 516 F.2d 1051 (5th Cir 1975) 426 U.S. 905 "...if a regulatory undertaking is confiscatory in nature, it is a taking." Under *Chmielewski v. City St. Pete Beach* 16-16402 (11th Cir 2018)"... a physical taking occurred..where the City encouraged public occupation by placing beach access signs.." "...a physical taking occurred.."

To this day the town's public street sign is still standing, the assessor maps are still manipulated, and Agreement or Judgment Documents still stand. The Town invites the public onto the Zarba's private property 24/7 for 365 days a year. The Zarba's private Way became a public road without compensation. This is a Taking.

6.) The lower court granted the Board and Municipality officials qualified and Town Counsel absolute immunity. Each of the defendants had free will to say no to Town Counsel's illegal concocted scheme, however, none of them did. Clearly Rappaport and Goldsmith were not engaged in 'governmental functions' when; they exchanged 103 emails with the Magistrate prior to the town being named party to the case or when they instructed the surveyor to ignore his ethical duty, and conspired with the Magistrate to create the Agreement for Judgment document. None of these actions were in the town's interest. Immunities should be denied for the town Officials, Board and Town Counsel because they; "knew or should have known" of the constitutionally violative effect of his actions. *Harlow v. Fitzgerald* 457 U.S. 800, 102 S.Ct. 2727, 73 (1982). This court should allow "some measure of discovery... to determine exactly what a public-official defendant did "know" at the time of his actions."

As the law currently stands, building officials sued under 42 U.S.C. for violating citizen's rights are

entitled to qualified immunity if either (1) they did not violate any constitutional right, or (2) those rights were not "clearly established " at the time of the violation. *Pearson v. Callahan*, 555 U.S. 223, 232, (2009). Barbadoro violated the Zarba's 'clearly established constitutional right' the day that he revoked the building permit and denied the Final Occupancy Permit.

State officials entitled to absolute or qualified immunity is a danger for future municipality behavior locally and nationally. Primary purpose of 1983 apart from compensation, is that being deterrence. If this court does not correct municipality actions then the town will never know what is prohibited, then it is very unlikely that one could be deterred.

The Lower court granted immunity without discovery and or any deference to the Zarbas' complaint.

**III. Municipality Should Be Liable From The Pattern Or Practice Of Unconstitutional Acts**

Under *Monell v Department of Social Services*, 436 U.S. 658 (1978), a municipality may be held liable under 42 U.S.C Section 1983 only for its own unconstitutional acts when a municipality is on notice of a pattern or practice of unconstitutional acts.

Court stated in *Newport* that in a proper case under 42 U.S.C. Section 1983 punitive damages were available against the municipality and the individuals. The question now is what is a proper case? This court stated that a public official who knowingly and maliciously acts to deprive one of his civil rights is a proper subject for punitive damages. In *Carey v. Piphus* 435 U.S. 247 (1978) Standard for 1983 must

include: "actual malice" with intent. Not passive. Not recklessness. All 'knew or should have known' they were committing 'actual malice' with intent to cause harm.

This is an extraordinary matter in which the town of Oak Bluffs should be held liable for its pattern of unconstitutional acts. The actions against the Zarbas' were intentional with actual malice and took place over 5 years over many departments and actors. The town demonstrated a callous and reckless disregard of constitutional rights under color of law resulting in a financial injury that justified award under Section 1983. This is an extraordinary case. Zarbas' are the first residents to be denied water, parking, final occupancy permit, revoke issue permit, invalidate a survey of record.

None of the defendants examined the consequences or risk of their behavior. The town held the Zarba's property hostage for 5 years and revoked the temporary occupancy at times causing continued oustings. For 5 years the Zarba's family lived in a state of fear of the next action. Town officials made a decision with deliberate indifference, callous disregard, of what was known to them about the Zarbas' property. Rappaport and Goldsmith did not care what happened to the Zarba's. They witnessed the Zarbas' hiring expert witnesses, surveyors, prepare for parking summary judgment case, and a 3 day trial all over a contrived survey.

This is a standard common sense matter. It is just plain common sense that Town Counsel should not commission a survey, direct the results of the survey, adjudicate the survey, invalidate the survey of record, direct the building inspector to act on the survey, or direct the Board to adopt the survey. In doing so,

Town Counsel weaponized the inappropriately adopted survey in an attempt to coerce the Zarba's into giving up their property rights. The lower court granted Rappaport and Goldsmith absolute immunity; they will incur no damages and this pattern of bad behavior will continue.

In *Owen* and *Newport*, "If the decision to adopt that particular course of actions is properly made by that government's authorized decision makers, it surely represents an act of official government "policy"..." "More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of 1983." In *Newport* the lower court judge awarded punitive damages against the city, and against the individual councilmen in varying amounts. Five councilmen and the mayor all had varying punitive damages against them. Punitive damage award is necessary under 1983 for the deterrence which this Court has acknowledged to be a primary underlying premise of 1983. City must pay to deter this from happening again in the future.

In this matter a clear finding of the facts proves an absence of good faith and a proof of malice. Therefore, it was an error for the lower court to grant qualified immunity and absolute immunity the defendants without a complete understanding of the facts that they are all liable for the torturous acts against the Zarbas'. The Zarba's allegations of fact make clear that the *town itself* is the "moving force" behind this coherent municipal policies or practices that denied the Zarba's constitutionally protected property rights.

The town's unlawful scheme could not be carried out *in vacu;* the Zarba's complaint identifies those actors who took part in devising this policy of coercion and abuse of power. High officials in the town government involved in this process 'knew or should have known better' the town must be liable. Not one town official or board member said 'no' to the Town Counsel concocted scheme. Everyone had actual knowledge of what was going on. Starting right from the top town Administrator, Whritenour, who as town Administrator is responsible for the management of all town Departments including the Building Department, Assessor, Selectman, Board and town funding. Whritenour joined in on the town's scheme to pressure and cause harm to the Zarbas' for protecting their property rights. App. 40 Complaint states; "On September 28, 2107 Robert Whritenour told the Zarbas' that the partial 2016 town Austin Survey is the only town survey and that the Zarbas' 2005 Gilstad survey is no longer recognized by the town, the Zarbas' will never park on the rear of their property, and that the town will be taking the Zarbas' private Way through eminent domain." App.30

The town itself devised this coherent, concerted policy in bad faith for no public purpose in order to support the Magistrate in gaining an unrestricted easement. Therefore, the town should be liable for the Building Inspector, Town Counsel, Board, Selectmen, Water Dept, town Administrator, town Assessor extraordinary, purposeful, and continual acts of malice behavior towards the Zarbas'. *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1985) Many officials responsible for the policy including the Mayor responsible for the 'policy' that caused the retaliation for upholding the first amendment.

**IV. There Is No Question That This Case Is Important To The Parties, But The Same Is True For A Great Many Other Cases That Fall Into The Same Category**

Municipality employees across this country every day perform duties that impact residents. This case is an unprecedented matter in which 15 town officials across 7 departments for over 5 years joined into an illegal scheme that violated one resident constitutional property rights. This is the only court that can deter similar actions from occurring.

If this decision is allowed to stand, it causes serious consequences throughout the country. Any property owner, anywhere, at any time, can be instructed by a town building inspector with no probable cause, that their deeded survey is invalid, and they must take their house down or be fined daily and ousted.

The record clearly demonstrates that this level of abuse of power granted to Town Counsel should have never been tolerated. Currently on Martha's Vineyard, Rappaport and Goldsmith are Town Counsel in 5 out of 6 towns. This court is the only vehicle that can deter this behavior and ensure that another innocent resident will not be subject to losing their property rights and endure these tortious acts.

If this petition is denied it empowers the lower courts to fully dismiss pro se civil rights complaints on 12(b)(6) motion based solely on the opposition documents, and, also, allows municipalities, Town Counsel, and Boards to continue to violate innocent resident property rights without deterrence or consequences.

## CONCLUSION

We pray that this court grants the petition for writ of certiorari.

Respectfully submitted,

Susan Lemoie-Zarba
John Zarba
pro se
455 State Road, PMB 257
Vineyard Haven, MA 02568
508 400 3422
suelz@comcast.net