APPENDIX

INDEX TO APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the of he United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of April, two thousand twenty-five.

Patricia J. Curto,

Plaintiff - Appellant,

v. ORDER

Erie County Water Authority, Docket No: 24-29
Earl L. Jann, Jr.,

Defendants - Appellees.

Appellant, Patricia J. Curto, filed a petition for panel rehearing , or in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

Appendix A

FOR THE COURT:

/s/Catherine O'Hagan Wolfe, Clerk

MANDATE ISSUED ON 04/10/2025

24-29-cv
Curto v. Erie county Water Authority

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILLED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of January, two thousand twenty-five.

Present:

DEBRA ANN LIVINGSTON,
Chief Judge
DENNIS JACOBS,
GUIDO CALABRESI,
Circuit Judges.

Appendix B

PATRICIA J. CURTO,

Plaintiff-Appellant,

v. 24-29-cv

ERIE COUNTY WATER AUTHORITY,
EARL. JANN, Jr.,

Defendants-Appellees.

For Plaintiff-Appellant:	Patricia J. Curto, pro se, West Seneca, NY.
For Defendants-Appellees:	James D. Macri, Goldberg Segalla LLP, Buffalo, NY.

DATE ISSUED ON 04/10/2025

Appeals from a judgment of the United States District Court for the Western District of New York (Sinatra, J.).

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

In 2017, the Erie County Water Authority ("ECWA") shut off Patricia Curto's water service because she refused for over two years to allow an ECWA employee to replace her water meter. Proceeding pro se, Curto sued ECWA alleging, inter alia, procedural due process violations, an unconstitutional taking, and trespass. The district court granted ECWA's motion for summary judgment in full. Curto appealed. We assume the parties familiarity with the remaining facts, procedural history and issues on appeal to which we refer only as necessary to explain our decision to **AFFIRM.**[1]

We review a grant of summary judgment de novo, "resolv[ing] all ambiguities and draw[ing] all inferences against the moving party." *Garcia v. Hartford Police Dep't,* F.3d 120, 126-27 (2d Cir. 2013) (per curiam). "Summary judgment is proper

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1 The district court previously dismissed some of Curto's other claims and rendered other rulings on motions throughout the pendency of the case. Although Curto mentions and even disputes some of these disputes in her brief, we agree with ECWA that she has not adequately developed her arguments on those issues, which are therefore forfeited. *See Palin v. New York Times Co.,*113F.4th 245, 279 (2d Cir. 2004) (issues" unaccompanied by some effort at developed argumentation" are forfeited); *Gerstenbluth v. Credit Suisse Sec,(USA) LLC,* 728 F.3d 139, 142 n.4(2d Cir. 2013)(pro se party forfeits issues raised only "in passing").

Only when, construing the evidence in the light most favorable to the non-movant, 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law'" *Doinger v. Niehoff*, 642 F.3d 334, 344 (2d Cir. 2011)(quoting Fed.R.Civ.P.56(a)).

I. Procedural Due Process Claim

We agree with the district court that summary judgment is appropriate on Curto's procedural due process claim. "It is well established that many state-created privileges...'are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Gudema v. Nassau City.*, 163 F.3d 717, 724 (2d Cir. 1998) (*Bell v. Burson*, 402 U.S. 535. 530 (1971)). To prevail on a procedural due process claim, Curto must demonstrate: "(1) that the Defendants deprived [her] of a cognizable interest in life, liberty, or property; (2) without affording [her] constitutionally sufficient process." *Proctor v. Leclaire*, 846 F.3d 597, 608 (2d Cir. 2017) (internal quotation marks omitted). Because the validity of Curto's property interest is undisputed, the primary *issue* is whether she received constitutionally sufficient process.

The Supreme Court has held in the utility disconnection context that due process requires notice and at least "some administrative procedure for entertaining customer complaints prior to termination...to afford reasonable assurance against erroneous or arbitrary withholding of essential services." *Memphis Light, Gas & Water Div, v. Craft*, 436 U.S. 1, 18 (1978). But this requirement need not be onerous. "The opportunity for informal consultation with designated personnel

empowered to correct a mistaken determination constitutes a 'due process hearing' in appropriate circumstances," Id, at 16n.17.

The district court determined, and we agree, that Curto received proper notice and an opportunity to be heard prior to the termination of her water service. The summary judgment record shows that ECWA mailed Curto eight letters requesting she schedule a time to install a new water meter - six of which warned her that her water service would be discontinued if she refused to schedule the replacement. ECWA placed an additional final notice on Curto's door indicating that she needed to call ECWA within 10 days or else her water would be shut off. The notices all provided the contact number for ECWA customer service which Curto could call to discuss the need for the replacement and schedule a time for the repair. Though Curto claims she did not receive all the letters, "[in] the context of a wide variety of proceedings that threaten to deprive individuals of their property interests, the Supreme Court has consistently held that mailed notice satisfies the requirements of due process." *Akey v. Clinton Cnty.*, 375 F.3d 231,235 (2d Cir. 2004) (quoting *Weigner v. City of New York*, 852 F,2d 646, 649 (2d Cir. 1988)). In the context of this record, the district court did not err in concluding that summary judgment was appropriate on Curto's procedural due process claims.

II. Takings Claim

The district court correctly granted summary judgment on Curto's taking claim. "The law recognizes two species of takings: physical taking

and regulatory takings." *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 374 (2d Cir. 2006). Physical takings "occur when the government physically take possession of an interest in property for some public purpose." *Id.* Nothing was taken from Ms. Curto for a public purpose, so she has no physical takings claim.

Regulatory takings occur when a "a state regulation goes too far and in essence effects a taking." *Id.* (internal quotation marks and citation omitted). Regulatory takings may be either categorical or non-categorical. *Yahoe-Sierra Pres. Council, Inc. v Tahoe Reg'l Planning Agency,* 535 U.S. 302, 330 (2002). A categorical taking involves a government regulation that leaves "no productive or economically beneficial use of the land." *Id.* There has been no categorical taking as Curto retains many of the economic benefits of ownership.

" Anything less than a complete elimination of value, or total loss," may be a non-categorical regulatory taking and is analyzed under the framework established in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104(1978). *Tahoe-Sierra,* 535 U.S. at 331. To determine if a non- categorical taking occurred, we must weigh "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action." *Buffalo Teachers,* 464 F.3d at 375. We agree with the district court that there has not been a non-categorical taking, principally because the impact from the termination of Curto's water service is temporary and within her control to remedy.

ECWA has maintained—including throughout this litigation—that it will restore Curto's water service if she permits an ECWA employee to replace her water meter. Accordingly, the district court did not err in granting ECWA summary judgment on Curto's takings claim.

III. Trespass

In New York, a claim for civil trespass requires showing an "intentional entry onto the land of another without justification or permission" or "a refusal to leave after permission has been granted but thereafter withdrawn." *Nat'l Fuel Gas Distribution Corp. v. PUSH Buffalo,* 104 A.D.3d 1307, 1309 (4thDept 2013)(internal quotation marks and citation omitted). We agree with the district court that Curto consented to ECWA's entry onto her property for service-related reasons when she signed up for water service. *See* Erie Cnty. Water Auth. Tariff 2.39 ("The customer shall grant identified ECWA employees or agents...access to the premises at reasonable times for purposes of installing, reading, inspecting or repairing meters."); N.Y. Pub Auth. Law 1054(13) ("[ECWA] shall have power: [t]o enter any land, waterways and premises for the purpose of ...examination."). And Curto does not allege that she withdrew permission and then ECWA employees refused to leave. Based on the summary judgment record, the district court did not err in concluding the entries onto Curto's property did not constitute trespass.

* * *

We have considered Curto's remaining arguments and concluded they are without merit. For the foregoing reasons, the judgment of the

maintenance services at the property....

> Viewing the notice as a whole, it can be said to convey some information...but a reader would likely be left with more questions than answers. The notice does not indicate what kind of service is being performed, what obligations such service imposes on the homeowner, or, most importantly, why the failure to call a number results in the termination of service, and what remedies the homeowner has to challenge the proposed service of the potential termination.
>
> Thus, it could be reasonably argued that the Water Authority left a threat of termination on Curto's doorstep and provided little little context by which Curto could assess what was happening and why....Under the circumstances, the court cannot fault Curto, a layperson, for her interpretation of the notice. She believed the notice related to someone 'applying for' water service, and, because she already had water service, the notice not relate to her."

R&R [47] at 17-19.

Although Judge Feldman cautioned that his recommendation was "necessarily tentative" and was "without prejudice to either side developing facts and marshalling additional legal authority in support of summary judgment" (id. at 21-22), the evidence submitted since then does not entitle the

ECWA to summary judgment dismissing this claim.

Ms Curto argues that "[a]ssuming arguendo there was prior to 3/1/2017 requets, they would have been replaced by the 3/1/2017 'notice'." Curto Affidavit [121] at 33. She points out that the notice "did NOT inform me of a need to service my property and affirmatively excluded a need to service ECWA property...and stated the one and only reason was an APPLICATIO for water service (by a new customer). The APPLICATION cited was not submitted by me (my spplication was submitted and approved over a decade before). No where on the notice does Patricia J Curto appear. The notice does not indicate that I must call the Authority . The person that the notice indicated must all is the person who submitted the application. I was previously informed by the ECWA (during a phone conversation) that they could not talk to me about another customer/account." Id. at 31-32.

For purposes of this motion, I must credit Ms Curto's assertions. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [her] favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,255 (1986). My view of her likelihood of success is irrelevant to that determination. *See* American International Group, Inc. v. London American International Corp., 664 F.2d 348, 351 (2d Cir. 1981)("summary judgment is improper when the court merely believes that the opposing party is unlikely to prevail on the merits after trial"). Therefore, I recommend that the motion be denied as to this claim.

B. Trespass

As recognized by Judge Freldman, Ms. Curto's Amended Complaint [30] is limited to alleged trespasses that occurred on March 2 and 21, 2017, and during the week of September 16, 2018. R&R[47] at 27 (*citing* Amended Complaint[30], ¶¶4,7). Therefore, to the extent that she points to an unspecified number of additional alleged trespasses by ECWA employees that occurred "overweeks/months/years...to determine [if her] service continued to be terminated at the curb box" (Curto Affidavit [132] at 5), those entries are not at issue in this case.[2]

The ECWA argues that the three entries onto Ms Curto's property were privilege - *i.e.*, with her contractual consent and authorized by law. ECWA's Memorandum of Law [113-4] at 22-25. Judge Feldman explained that "an entry pursuant to a priviledge must be 'for the purpose for which the privilege is given' and only to the extent 'reasonably necessary...to perform the duty or exercise the authority". R&R [47] at 28 (*quoting* Restatement (Second) of Torts 211 cmts.c, f(1965)).

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2 Curto raises several other issues in response to the ECWA's motion that also are not at issue in this case, including alleged overbilling by the ECWA (Curto Affidavit [121] at 6, 25), and the ECWA's failure to follow its own COVID protocol for restoration of water service. Id. at 6; Curto's Sur-reply Affidavit [132] at 10.

By initiating service in 2006 with the ECWA, Ms. Curto agreed to be bound by the terms of its Tariff, which states that "[t[he customer shall grant identified {ECWA] employees...access to the premises at reasonable times for purpose of installing, reading, inspecting, or repairing meters". [113-3],2.39.3 *See also* ECWA's Application for Water Service dated April 20, 2006 [113-11]. The New York Authorities Law also gives the ECWA the right "enter on any lands...and premise for the purpose of...examinations".New York Public Authpries law 1054(13).

1. March 2, 2017

According to Otoka's Declaration [113-5], he first entered Ms. Curto's property on March 2, 2017, "in an attempt to speak with [Curto] about changing her water meter". Id., ¶6. When Ms. Curto failed to answer the front door, he headed to the "ARB box", an electronic reader port on the exterior of the home, and took a meter reading before placing the notice on the front door and "immediately" leaving the property. Id., ¶¶8-11; D'Amico Affidavit [113-7], ¶23. At least some

3 The ECWA's motion relies on the Tariff that became effective January 1, 2018, after the March 2017 entries onto Curto's property. However, in reply, the ECWA submitted the Tariffs in effect when she initiated service [126-5] and when her water services was terminated [126-6]. Both contained identical provisions. *See* [126-5], 2.40;[126-6], 239.

portion of this is placed into doubt by the ECWA's own records, which indicate that the meter was read a day earlier, Meter & Service Order [113-23] at 2.[4]

Ms. Curto also offers a different version of events. She states that Otoka removed a barricade at the end of her driveway to gain entry to her property and proceeded past "No Trespassing" signs. Curto Affidavit {121] at 14, response to Claim in ¶8. According to Ms. Curto, "[a]fter walking the width of my front lawn (from east to west), [Otoka] turned around and walked back to the driveway, down the driveway moved the barrack [*sic*], exited the property, and walked to my neighbor who was in his driveway and spoke to him about my account (violating my privacy), he reentered my property and drove off in his vehicle". Id. at 15, response to Claim in ¶10. *See also* Curto form...then proceeded to walk across the lawn to within 5-6 feet of meter reading port on side of house, urinate in the bushes, walk across the property and left the property to talk to the neighbor...and then entered my private posted property again a second time...before leaving").

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4 The notice Otoka left on Curto's door was also dated March 1, 2017 ([113-23] at 3), but Otoka states that he prepared it on that date, *See* Otoka Declaration [113-5], ¶3.

Ms Curto agrees that Otoka to the side of the house where the ARB is located, but states that she "did not observe him reading it". Id. She also disputes that he "immediately" left her property after placing the notice on her door knob. Id. At oral arguments, Ms Curto acknowledged that she was not home at the time, but later watched a surveillance video that captured these events. That video has not been produced either to the ECWA in discovery or to the court in connection with the motion.

Nothing in the record rebuts the fact that Otoka entered Ms. Curto's property in an attempt to change her meter, which would render the enter privileged for that purpose. However, Ms Curto disputes that Otoka was identified as an ECWA employee. *See* Curto Affidavit [121] at 14, response to Claim in ¶8 ("I did not know who he was (could not see his vehicle nor any type of identification on him"; Tariff effective January 1, 2017 [126-6] at 2.39 ("[t]he customer shall grant *identified* [ECWA] employees...access to the premises" (emphasis added)).

Giving Ms. Curto the benefit of every favorable inference, there is a triable issue of fact as to whether Otoka acted beyond the scope of that privilege by remaining on her property after unsuccessfully attempting to speak to her about replacing the meter. While Otoka purports to have stayed on the property to read Ms. Curto's meter, the ECWA's own records show that the meter reading occurred a day earlier. *See* Meter & Service Order [113-24] at 2

2. March 21, 2017

According to Otoka , he returned on March 21, 2017 "to try and obtain [Ms. Curto's] consent to change the water meter or otherwise terminate the water service". Otoka Declaration [113-5], ¶ 12. When his knocks on the front door went unanswered, he took another meter reading from the ARB box on the exterior of Ms. Curto's residence and terminated the water service. Id., ¶¶14-16. At some point, while Otoka was there, a neighbor inquired about what he was doing and they spoke. Id., ¶17. A Meter & Service Order dated March 21, 2017 corroborates that Curto's meter was read that day. [113-24] at 2.

Ms. Curto disputes whether Otoka knocked on her door, read the meter, or spoke to her neighbor. *See* Curto Affidavit [121] at 16, responses to Claims ¶¶14-17. Instead, she states that "[h]e exited his vehicle, entered my property mid lawn, used a metal detector, upon finding the shut off valve, terminated service and left/drove away". Id. At response to Claim ¶14.[5] At oral argument, she stated she was home at this time and videotaped these events. However, that video has not been produced in discovery or to the court.

Crediting Ms. Curto's version of events (as I must for purposes of this motion), Otoka's entry onto her property was limited to locating the shut

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5 As the ECWA notes, this diverges from the description of the entry alleged by Ms Curto in her Amended Complaint. ECWA's Reply memorandum of Law [126] at 18.

off valve and terminating service. However, the Tariff provision that the ECWA relies upon grants access "for purposes of installing, reading, inspecting, or repairing meters" (Tariff effective January 1, 2017 [126-6], 2.39), and Public the Authorities Law only permits entries on to property for the purpose of conducting "examinations" New York Public Authorities Law 1054(13). The termination of water service to a property is none of those things.

The ECWA also points to the Public Authorities Law, which affords it the ability to "do all things necessary or convenient to carry out the powers expressly given in this title". NY Public Authorities Law 1054(18). It contends that "[i]nspecting, servicing, upgrading, and/or maintaining components of the water supply system is certainly a necessary act to carry out its power to develop and maintain the system". ECWA's Memorandum of Law [113-4] at 24. Again, termination of water service is not one of those things. Therefore, the ECWA has not established its entitlement to summary judgment.

3. **Week of September 16, 2018**

Both parties appear to agree that ECWA's entry onto her property occurred on September 18, 2018. Steven D'Amico, the ECWA's Business Office Manager, states that "on September 18, 2018, an employee of the Authority, entered onto [Ms. Curto's] property for the purpose of inspecting its equipment and determining whether the water service had been illegally turned back on". D'Amico Affidavit [113-7], ¶64; ECWA's Statement of

Material Facts ([13-1], ¶¶94,97). D'Amico Affidavit states that the unidentified employee's entry "was limited to...going to the curb box shut off valve located near the street at the front of the property" to "confirm that water service to the property remained shut off". Id., ¶65.

Ms. Curto paints a different picture. She states that the purpose of the September 18, 2018 entry "was to determine if [the] house was vacant. The ECWA employee walked past several 'POSTED [sic] NO TRESPASSING' signs, move[d] my driveway barrack [sic], walked to the blue painted cover of the shut off value but did not remove the cover and check to see [the] value was closed, he walked to the side of my house past the location where Mr. Otoka had torn off the external port meter reader...then turned around again walking past location of where Mr. Otoka had torn off the external port meter reader and across the front of my house to the front porch step and finally exited the property". Curto Affidavit [132] at 3.

The ECWA argues that since Ms. Curto does not live at the property, she "provides no basis to establish her personal knowledge of what occurred at her property on September 18, 2017". ECWA's Reply Memorandum of Law [126] at 19. The same can be said of D'Amico, who lacked personal knowledge of what the unidentified ECWA employee did on her property. In any event, giving Ms. Curto every favorable inference on this motion (as I must), I will assume that, similar to the March 2017 entries, she either observed these events in real time or at a later date via a surveillance video.

Based on D'Amico's lack of personal

knowledge, his Affidavit fails to meet the ECWA's burden of establishing that no trespass occurred on March 18, 2018, but even if it did satisfy the ECWA's burden, Ms. Curto's version of events, whereby the ECWA's entry onto her property went well beyond an inspection of the curb box shut off valve to confirm that water service remained terminated, is sufficient to raise a triable issue of fact as to whether a trespass occurred.

C. Takings

The court has not previously "found there was a taking", as Ms. Curto argues (Sur-Reply Memorandum of Law [132] at 24), but rather only that a takings claim has been sufficiently alleged. *See* Vega v. Hempstead Union Free School District, 801 F.3d 72, 87 (2d Cir. 2015)("[o]n a motion to dismiss, the question is not whether a plaintiff is likely to prevail, but whether...plaintiffs alleged enough to 'nudge[] their claims across the line from conceivable to plausible'", *quoting* Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 570 (2007)).

"The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, prohibit's the government from taking private property for public use without just compensation." Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001). "the law recognizes two species of takings; physical takings and regulatory takings." Buffalo Teachers Federation v. Tobe, 464 F.3d 362, 374 (2d Cir. 2006). I will address both.[6]

1. Physical Takings

Physical takings "occur when the government physically takes possession of an

interest in property for some public purpose". Buffalo Teachers Federation. 464 F.3d at 374. A *See status*, I will consider her belated opposition. "taking is fairly obvious in physical takings cases: for example, the government might occupy or take over a leasehold interest for its own purposes...or the government might take over a part of a rooftop of an apartment building so that cable access may be brought to residences within". Id.

The ECWA argues that since nothing was taken from Ms. Curto for a public use or purpose, this claim fails. ECWA's Memorandum of Law [113-4] at 17. I agree, and recommend that this portion of the claim be dismissed. However, I disagree with the ECWA (*see* id.) that this is also fatal to Ms. Curto's regulatory takings claim. *See* Tahoe-Sierra Preservation Council, Inc Tahoe

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6 Since Ms. Curto failed to initially respond to the ECWA's arguments seeking dismissal of her takings cause of action, it argues that that portion of it's motion should be granted as unopposed. ECWA's Reply Memorandum of Law[126] at 16. In her sur-reply, she appears to attribute her nonfeasance to the fact she did not receive a complete set of motion papers. *See* Sur-Reply Memorandum of Law [132] at 16; Sur-Reply Affidavit [132] at 12. Yet, in her sur-reply she responds to the taking argument and cites to the pages of the ECWA's Memorandum of Law addressing that argument (*see* Curto's Sur-reply Memorandum of Law [132] at 24-25), suggesting that her copy of the motion was *not* missing the takings sections she appears to contend. In any event, given Ms. Curto's *pro se* status, I will consider her belated opposition. *See* Jackson v Federal Express, 766 F.3d 189, 197-98 (2d Cir. 2014)("[w]ehere a partial response to a motion is made" by a *pro se* litigant, "the district court should examine every claim or defense with a view to determining whether summary judgment is legally and factually appropriate").

Regional Planning Agency, 535 U.S. 302, 303 (2002) ("neither a physical appropriation nor public use has ever been a necessary component of a "regulatory taking""); Muhammad v. City of Moreno Valley Code Enforcement, 2*5 (2002 WL 837421, *5 (C.D. Cal. 2022) (same).

2. Regulatory Takings

"The gravamen of a regulatory taking claim is that the state regulation goes too far and in essence 'effects a taking.'" Buffalo Teachers Federation, 464 F.3d at 374. Regulatory takings fall into two categories: categorical and non-categorical. *See* Sherman v. Town of Chester, 752 F.3d 554,564 (2d Cir. 2014). A categorical taking occurs in "the extraordinary circumstance when *no* productive or economically beneficial use of lands is permitted." Tahoe-Sierra Preservation Council, Inc., 535 U.S. at 330 (emphasis in original). This not such a circumstance. *See* South Nassau Building Corp. v. Town Board of Town of Hempstead, 2022 WL 3446317, *10 (E.D.N.Y. 2022) (finding it to not be a categorical taking where "the property can still be sold to be used as a residence").

Therefore, I will analyze Ms. Curto's claim as a non-categorical taking, which results from "[a]nything less than a complete elimination of value, or a total loss". Tahoe-Sierra Preservation Council, Inc., 535 U.S. at 330. *See also* Lebanon 464 F.3d at 375, Valley Auto Racing Corp. v. Cuomo, 478 F.Supp.3d 389, 400 (N.D.N.Y. 2020) ('[i]f a regulation results in less than a complete elimination of value, it is...a non-categorical taking"). To determine whether a Non-categorical

regulatory taking has occurred, three factors are weighed: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." Murr v. Wisconsin. _U.S._, 198 L.Ed.2d 497, 137S.Ct. 1933,1943 (2017).

Ms. Curto, who bears a "heavy burden" to establish a regulatory taking, Buffalo Teachers Federation, 464 F.3d at 375,argues that ECWA's illegal termination of her water service has limited her ability to utilize the property for its intended purpose - residential occupancy. Curto's Sur-Reply Memorandum of Law [132] at 25. However, for reasons set forth by ECWA ([113-4] at 18-22), none of the factors weigh in favor of finding a regulatory taking has occurred.

Any economic impact from the termination of Ms. Curto's water service was temporary and within her control to remedy. *See* Buffalo Teachers Federation, 464 F.3d at 375 ("the severity of the economic impact of the [wage] freeze...[is] relatively small", where it is "temporary and operates only during a controlled period"); Remauro v. Adams, 2022 WL 1525482.*6 (E.D.N.Y.)(since "the condemnation...is temporary...applying only until 'such time as [Plaintiffs] have an [e]ngineering report completed detailing all deficiencies at the [Apartment Building] and required repairs to bring the structure[] into compliance with the NY State Building Code"). Melody Gil, an ECWA employee, states that she told Ms. Curto on March 22, 2017, the day following the termination of her water service, that her water could be "immediately" restored following

a "5 minute[]" meter change, but she refused. Gil Affidavit [113-6]. ¶¶10-13.

While Ms. Curto disputed what Gil told her (*see* Curto Affidavit [121] at 23, responses to Claims ¶¶10-11, she does not deny that she refused to have meter changed. Id. at response to Claim ¶12 . At the April 21, 2022 oral argument [107] the ECWA reiterated its willingness to reinstate Ms. Curto's water service if she permitted it to change her meter, but she again refused.

The second factor, whose purpose is "to limit recover to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime", also weighs against Ms. Curto. Allen v. Cuomo, 100 F.3d 253,262 (2d Cir. 1996). *See also* Meriden Trust & Safe Deposit Co. v. F.D.I.C., 62 F.3d 449, 454 (2d Cir. 1995) (" a paradigmatic regulatory taking occurs when a change in the law results in the immediate impairment of property rights, leaving the property owner no options to avoid the loss"). While the ECWA's Tariff has been amended regularly since Curto initiated service, she points to no amendment to the ECWA's Tariff that resulted in the termination of her water service. *See* Martin v Town of Simsbury, 505 F.Supp.3d 116, 132 (D. Conn. 2020), aff'd 2022 WL 244084 (2d Cir. 2022) ("there was no change in the law that resulted in the impairment of Plaintiff's property rights. Rather, it appears that Plaintiff is simply frustrated by the Defendants' application of existing regulations to his property when refusing to grant him a variance or approve is permit application")

Instead, Ms. Curto argues that the termination of her service ran afoul of the Tariff which allowed water service to be terminated for "only one reason, non-payment". Curto's Sur-Reply Memorandum of Law [132] at 25. That is simply not so. *See* Tariff's effective January 1, 2006[126-5], 2.33(F) and January 1, 2017 [126-6], 2.32(F) ("[w]ater service may be discontinued by the [ECWA]....[f]or refusal of reasonable access to the property for the purpose of...replacing...meter").[7]

With regard to the third and final factor, "the character of the governmental action", 'a taking may more readily be fond when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Penn Central Transportation Co. v. City of New York, I recommend that her takings claim be dismissed.

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7 Ms. Curto also disputes whether a meter change was necessary. *See, e.g.* Curto Affidavit [121] at 23, response to Claims ¶¶10,11 ("there is no evidence that the meter needed to be changed"). However, the Tariff gave the ECWA the unfettered "right to remove and test any meters at any time and to substitute another meter in its place". Tariff effective January 1, 2006 [126-5], 6.09.

D. Damages

With respect to Ms. Curto's trespass claims, the ECWA suggest that "if the Court disagrees that the Authority was authorized to enter Plaintiff's property, then it should only award Plaintiff nominal damages in the amount of $1. ECWA's Memorandum of Law [113-4] at 26. However, since it has not yet determined whether the ECWA *did* trespass on Curto's property (Ms. Curto herself has not moved fir summary judgment on her claims), an award of damages - nominal or otherwise - would be premature.

"[C]ourts normally decide only questions presented by the parties", United States v Sineneng-Smith, __U.S.__, 140 S.Ct. 1575, 1579(2020) which is all that I have done. That being said, I feel compelled to offer a few additional comments for the parties' benefit. This action has been pending for over four years. Ms. Curto has always had the ability to have her water service restored by allowing the ECWA to replace he water meter. For her own reasons, she has refused the ECWA'S offers to do so. If she is expecting a large recovery in the event that she prevails on her remaining claims, I suggest that she think again.

While she relies on Section 2.40 of the Tariff (Curto's Sur-Reply Affidavit [132] at 10, it states that "[i]f a customer refuses access to the premises on three...consecutive occasions, *the [ECWA] may require the customer to purchase a remote read meter"*([126-5], 2.40 (emphasis added)). Nowhere does it restrict the ECWA's discretion to undertake a meter replacement.

CONCLUSION

For these reasons, I recommend that the ECWA's motion for summary judgment [113] be granted to the extent that it seeks dismissal of Ms. Curto's takings claim, but otherwise be denied . Unless otherwise ordered by Judge Sinatra, any objects to this Report and Recommendation must be filed with the clerk of this court by December 1, 2022. Any requests for extension of this deadline must be made to Judge Sinatra. A party who "fails to object timely...waives any right to further judicial review of [this] decision". Wesolek v. Canadair Ltd., 838 F.2d 55,58 (2d Cir. 1988); Thomas v. Arn 474 U.S. 140,155 (1985).

Moreover, the district judge will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which could have been, but were not, presented to the magistrate judge in the first instance. Patterson-Leitch Co. v. Massachusetts Municipal Wholesale Electric Co., 840 F.2d 985, 990-991 (Ist Cir. 1988).

The parties are reminded that, pursuant to Rule 72(b) and (c) of this Court's Local Rules of Civil Procedure, written objections shall "specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis each objection...supported by legal authority", and must include a "written statement either certifying that objected do not raise new legal/factual arguments o identifying the new arguments and explaining why they were not raised to the Magistrate Judge". Failure to comply with these provisions may result in the district judge's refusal to consider the objects.

Dated: November 14, 2022

/s/ Jeremiah J. McCarthy
JEREMIAH J. MCCARTHY
United States Magistrate Judge